No.

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

PETITION FOR A WRIT OF CERTIORARI

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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.

RULE 29.6 STATEMENT

Petitioner First National Bank of Wahoo has no parent company. No publicly held company owns 10% or more of Wahoo.

Petitioner Mutual First Federal Credit Union has no parent company. No publicly held company owns 10% or more of Mutual First.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners First National Bank of Wahoo and Mutual First Federal Credit Union respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in these consolidated cases.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-11a) is reported at 725 F.3d 819. The memorandum opinions of the district court granting petitioners' motions to dismiss in *Charvat* v. *First National Bank of Wahoo* (App., *infra*, 27a) and *Charvat* v. *Mutual First Federal Credit Union* (App., *infra*, 33a) are unreported.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331. The judgment of the court of appeals was entered on August 2, 2013. On October 23, Justice Alito extended the time for filing a petition for a writ of certiorari until November 30, which was a Saturday, making the petition due on December 2, 2013, under Supreme Court Rule 30.1. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2 of the U.S. Constitution provides that "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under * * * the Laws of the United States * * *."

The pertinent provisions of the Electronic Fund Transfer Act, 15 U.S.C. § 1693 *et seq.*, are reproduced at App., *infra*, 34a-37a.

STATEMENT

This Court granted certiorari in *First American Financial Corp.* v. *Edwards*, No. 10-708, to consider whether the injury-in-fact requirement for Article III standing is satisfied when the only harm alleged is a technical violation of a federal statute—in that case, the Real Estate Settlement Procedures Act of 1974. But the Court dismissed the writ of certiorari as improvidently granted, and so did not decide that important and recurring question. See *First Am. Fin. Corp.* v. *Edwards*, 132 S. Ct. 2536, 2537 (2012) (per curiam). This case presents the same question in the context of another federal statute—the Electronic Fund Transfer Act.

That question, which goes to the heart of both the legislative and the judicial powers, arises under numerous federal laws. And the lower courts disagree about how it should be answered. Without guidance from this Court, the extent and limits of federal jurisdiction will continue to vary circuit by circuit, court by court, and case by case.

The Court should grant the petition to clarify the fundamental requirements for Article III jurisdiction.

A. The Statutory Scheme.

The Electronic Fund Transfer Act regulates electronic-funds transfers, including transactions made on automated teller machines. It authorizes private suits for violations and provides for the award of actual and statutory damages plus attorneys' fees and costs. See 15 U.S.C. § 1693m.

Statutory damages in an individual EFTA action are "not less than $100 nor greater than $1,000." *Id.*

§ 1693m(a)(2)(A). "[I]n any class action or series of class actions arising out of the same failure to comply by the same person," there is no per-claimant minimum recovery, and the total statutory damages can be as much as "the lesser of $500,000 or 1 per centum of the net worth of the defendant." *Id.* § 1693m(a)(2)(B).

Most ATM operators charge a transaction fee to a consumer who obtains cash from an ATM when the operator "is not the financial institution that holds the account" of that consumer (15 U.S.C. § 1693b(d)(3)(D)(i)). From November 1999 until December 2012, the EFTA required ATM operators that charged such fees to provide two forms of notice of the amount of the fees: (i) a physical sign—usually in the form of 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).

The statute provided that "[n]o fee may be imposed * * * unless" the consumer receives the required notice and "elects to continue in the manner necessary to effect the transaction after receiving such notice." *Id.* § 1693b(3)(C). In other words, an individual who wishes to make a withdrawal from an ATM must be told about any transaction fee and must affirmatively acknowledge and accept that fee by hitting a key before any cash may be dispensed.

The EFTA authorized recovery of statutory damages based solely on the absence of a physical sticker notice on the ATM—even if the plaintiff had provided the required electronic acknowledgment. Congress amended the EFTA in December 2012 to eliminate this duplicative requirement of on-machine notice

while still ensuring that consumers had "on-screen" notice of any ATM fees before incurring them. See Pub. L. No. 112-216, 126 Stat. 1590 (Dec. 20, 2012) (codified as amended at 15 U.S.C. § 1693b(d)(3)(B) (2013)). As one Senator remarked, the sticker "requirement was outdated and * * * put our local institutions at risk for frivolous lawsuits." 158 Cong. Rec. S7751-01 (Dec. 11, 2012) (statement of Sen. Tom Udall).

B. Factual Background.

These putative class actions were filed before the December 2012 amendment to the EFTA. Petitioners, defendants in these actions, are two local Nebraska institutions: First National Bank of Wahoo and Mutual First Federal Credit Union. Respondent Jarek Charvat is the sole named plaintiff in each action.

Charvat originally alleged that he made two withdrawals from ATMs operated by Wahoo and one from an ATM operated by Mutual First, that he was charged a $2 fee for each transaction, and that the on-machine fee notices (*i.e.*, the stickers) were missing from the ATMs in violation of the EFTA. A few weeks after Mutual First filed its answer, Charvat went to two more of Mutual First's ATMs over the space of three days, made a withdrawal from each, and then amended his complaint to allege additional missing-sticker violations for those machines (see C.A. App. SA10). Charvat sought to represent classes of all customers who were charged fees at any of the five ATMs over a twelve-month period. See C.A. App. JA27, SA12-13.

It is undisputed that Charvat received on-screen notifications before any fee was charged and that he

affirmatively consented to the fees. See App., *infra*, 2a-3a; see also *id.* at 41a (photo of Wahoo's on-screen notice).

He alleges that his statutory rights and the rights of all other users of the five ATMs were violated because, although they received actual notice of and agreed to the $2 fees, they did not also receive the information about those fees in the form of a sticker on the machines' exterior. See C.A. App. JA29-31, SA15-16.

Charvat has not alleged any actual damages for the claimed violations; he seeks only statutory damages for the putative class, along with attorneys' fees and costs. See C.A. App. JA31, SA16.

C. The District Court's Rulings.

After Wahoo moved to dismiss Charvat's claims, the district court stayed the action pending this Court's consideration of *First American*. The district court explained that "[i]n both *First American* and here, the question [is] whether a violation of a statute, without an alleged injury in fact, is in itself sufficient to create standing under Article III." App., *infra*, 23a.

After this Court dismissed the writ in *First American* as improvidently granted, the district court here issued orders in both cases to show cause why the actions should not be dismissed for lack of standing, and ultimately dismissed the cases on that basis. See App., *infra*, 25a-27a (*Wahoo*); *id.* at 28a-33a (*Mutual First*); see also *id.* at 12a-24a (stay order in *Wahoo*, incorporated by reference into order to show cause).

The district court noted that some courts in other ATM-sticker cases had "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—regardless of whether the plaintiff had actual knowledge of the fee through the on-screen notice and affirmatively accepted it." App., *infra*, 16a; accord *id.* at 30a-31a. The district court rejected that view, however, holding instead that there can be no Article III standing when the plaintiff had actual knowledge of an ATM fee, voluntarily and affirmatively agreed to pay it, and sustained no actual damages from the absence of a sticker notice.

The district court concluded that there is no standing when, as here, the only injury being alleged is an "injury in *law*," because Article III requires that "[a] plaintiff must allege an injury in *fact* that was caused by the lack of an exterior fee notice on the ATM." App., *infra*, 31a-32a (citing *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 772 (2000)); accord *id.* at 16a-17a. The district court therefore dismissed on the ground that "Charvat has not alleged an injury in fact caused by [the banks'] violation of the [on-machine] notice requirements, [so] he lacks standing to bring this action." *Id.* at 32a; accord *id.* at 17a.

D. The Court of Appeals' Decision.

On appeal, Charvat argued for the first time that, in the Eighth Circuit's words, he had suffered "an economic injury in the form of an illegal $2.00 fee" that was "independent" of the "informational injury due to [the banks'] failure to provide the statutorily required notice" in sticker form. App., *infra*, 5a. The banks responded that Charvat had expressly

waived any claim of injury from the $2 fees when he declared: "'The injury to Plaintiff Charvat and the putative class * * * is not the $2.00 fee, but the failure to provide information in the manner prescribed by Congress.'" *Ibid.* (citation omitted).

The court of appeals "assum[ed], without deciding, that Charvat did waive the claim that the $2.00 fee constituted an injury in fact," but nonetheless reversed the dismissals, holding that the "informational injury that he allegedly sustained" was sufficient to establish Article III standing. *Id.* at 6a.

The court of appeals recognized that, "[b]ecause injury in fact is a constitutional requirement, Congress may not grant standing to an individual who would not otherwise have standing." *Id.* at 4a. But the court held that because "[t]he EFTA authorizes individual and class action suits for violations of the EFTA" (*id.* at 5a), it "create[s] legal rights via statute, the invasion of which can create standing to sue" (*id.* at 4a). The court thus accepted Charvat's argument that he had suffered a cognizable "informational injury" by not receiving on-machine notice of the $2 transaction fees, even though the on-screen notices had provided him with actual knowledge of those fees and he had knowingly, voluntarily, and affirmatively agreed to pay the fees before he incurred them. *Id.* at 6a-7a.

REASONS FOR GRANTING THE PETITION

This case presents the same important and recurring question of Article III standing that this Court agreed to consider but did not resolve in *First American*. As both the district court and the Eighth Circuit recognized, this case is about whether Article III's injury-in-fact requirement—the "irreducible

constitutional minimum" for standing (*Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992))—is satisfied by a mere injury-in-law that does not result in any actual harm to the plaintiff.

The court of appeals put it starkly: "The district court concluded that because Charvat failed to allege some injury beyond the failure to receive an 'on machine' notice, he had not suffered a cognizable injury in fact. We disagree." App., *infra*, 6a-7a. Charvat's claim that he did not receive the fee information through the physical sticker required by Congress was sufficient to confer Article III standing, the court of appeals held, *even though Charvat had received that same information—and acknowledged it—before the fees were imposed*, and therefore he could not allege any "additional economic or other injury." *Ibid*.

Charvat may argue that the issue presented by this case is unlikely to recur because Congress has repealed the provision of the EFTA under which he brought his actions. But the question presented here—whether Congress may confer Article III standing by providing for statutory damages or other recovery in the absence of any actual, concrete injury—is not tied to the particular underlying statute and arises under numerous federal laws.

The conflicting rulings in the lower courts, and the substantial uncertainty for litigants that they engender, would warrant this Court's review under any circumstance. But—as the Court's grant of review in *First American* recognized—the case for review is even more powerful because of the importance of the issue presented. What is at stake here is a fundamental question about the extent of the federal courts' Article III jurisdiction: May Congress confer on private parties the ability to enforce

any federal statute, regardless of whether the alleged violations have harmed those parties in any concrete way? The Court should grant review to make clear that the federal courts may decide only genuine cases and controversies.

A. The Question Whether An Injury-In-Law Confers Article III Standing Arises Frequently Under A Variety Of Federal Statutes.

Whether a technical statutory violation that inflicts no economic or other harm on a private plaintiff can satisfy Article III's injury-in-fact requirement is a question that arises again and again, under numerous federal statutes—typically as a consequence of statutory-damages provisions that are functionally (and in many instances actually) identical to the one at issue here. For example:

- The Truth in Lending Act, which imposes requirements on financial institutions that extend credit to consumers (see 15 U.S.C. §§ 1631-1632) and provides for awards of actual and statutory damages (see 15 U.S.C. § 1640(a)(2)(B)).[1]
- The Fair Debt Collection Practices Act, which prohibits using certain "means to collect or attempt to collect any debt" (15 U.S.C. § 1692f) and imposes liability for actual and statutory damages (see *id.* § 1692k(a)(2)(B)).[2]

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[1] See, *e.g.*, *DeMando* v. *Morris*, 206 F.3d 1300, 1303 (9th Cir. 2000).

[2] See, *e.g.*, *Robey* v. *Shapiro Marianos & Cejda, L.L.C.*, 434 F.3d 1208, 1212 (10th Cir. 2006).

- The Fair Credit Reporting Act, which addresses the accuracy of credit reports (see 15 U.S.C. § 1681e(b)) and authorizes private plaintiffs to seek actual or statutory damages for willful violations (see 15 U.S.C. §§ 1681n–*o*).[3]
- The Fair and Accurate Credit Transactions Act, which requires that merchants partially redact credit-card information from customers' receipts (15 U.S.C. § 1681c(g)(1)) and authorizes statutory damages for willful violations (see *id.*§ 1681n(a)(1)(A)).[4]
- The Telephone Consumer Protection Act, which regulates telephone solicitations and provides for statutory damages. See 47 U.S.C. § 227(b).[5]

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[3] See, *e.g.*, *Beaudry* v. *TeleCheck Servs., Inc.*, 579 F.3d 702, 705 (6th Cir. 2009).

[4] See, *e.g.*, *Hammer* v. *JP's Sw. Foods, L.L.C.*, 739 F. Supp. 2d 1155, 1161-1162 (W.D. Mo. 2010); *Hedlund* v. *Hooters of Houston*, No. 08-cv-45, 2008 WL 2065852, at *3 (N.D. Tex. May 13, 2008); *Ramirez* v. *Midwest Airlines, Inc.*, 537 F. Supp. 2d 1161, 1166-1167 (D. Kan. 2008); *Miller* v. *Sunoco, Inc.*, No. 07-cv-1456, 2008 WL 623806, at *1-3 (E.D. Pa. Mar. 4, 2008); *Ramirez* v. *MGM Mirage, Inc.*, 524 F. Supp. 2d 1226, 1229-1231 (D. Nev. 2007); *Korman* v. *Walking Co.*, 503 F. Supp. 2d 755, 759 (E.D. Pa. 2007).

[5] See, *e.g.*, *Palm Beach Golf Ctr.–Boca, Inc.* v. *Sarris*, __ F. Supp. 2d __, 2013 WL 5972173, at *11-12 (S.D. Fla. Oct. 22, 2013); *Manno* v. *Healthcare Revenue Recovery Grp., LLC*, 289 F.R.D. 674, 682 (S.D. Fla. 2013); *Smith* v. *Microsoft Corp.*, No. 11-cv-1958, 2012 WL 2975712, at *3-4 (S.D. Cal. July 20, 2012); *US Fax Law Ctr., Inc.* v. *iHire, Inc.*, 362 F. Supp. 2d 1248, 1252-1253 (D. Colo. 2005).

- The Employee Retirement Income Security Act, which imposes fiduciary duties on sponsors of retirement plans, including a duty to act in accordance with plan terms that are consistent with ERISA's requirements (see 29 U.S.C. § 1104(a)(1)(D)), and authorizes plan participants to bring civil actions against plan fiduciaries for breaches of those duties (see *id.* § 1132(a)(2)).[6]
- The Real Estate Settlement Procedures Act, which prohibits kickbacks in certain mortgage-loan transactions. See 12 U.S.C. § 2607.[7]
- The Lanham Act, which prohibits false advertising and authorizes civil actions for violations. See 15 U.S.C. § 1125.[8]
- The Fair Housing Act, which forbids discriminatory advertising for apartments (see 42 U.S.C. § 3604(c)) and creates a private right of action to challenge discriminatory housing practices in federal court (see *id.* § 3613(a)(1)(A)).[9]

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[6] See, *e.g.*, *David* v. *Alphin*, 704 F.3d 327, 338-39 (4th Cir. 2013); *Kendall* v. *Employees Ret. Plan of Avon Prods.*, 561 F.3d 112, 121 (2d Cir. 2009).

[7] See, *e.g.*, *Alston* v. *Countrywide Fin. Corp.*, 585 F.3d 753, 763 (3d Cir. 2009); *Carter* v. *Welles-Bowen Realty, Inc.*, 553 F.3d 979, 989 (6th Cir. 2009).

[8] See, *e.g.*, *Joint Stock Soc'y* v. *UDV N. Am., Inc.*, 266 F.3d 164, 176 (3d Cir. 2001).

[9] See, *e.g.*, *Fair Hous. Council* v. *Main Line Times*, 141 F.3d 439, 443-44 (3d Cir. 1998); *Wilson* v. *Glenwood Intermountain Props., Inc.*, 98 F.3d 590, 593-94 (10th Cir. 1996).

- The Americans with Disabilities Act, which prohibits discrimination on the basis of disability in public accommodations (see 42 U.S.C. § 12182(a)) and authorizes suits by private persons to enjoin such discrimination (see *id.* § 12188).[10]

The rule that the Eighth Circuit adopted in this case would afford plaintiffs Article III standing whenever they bring private actions under any of these statutes—regardless of whether they can claim actual harm—so long as they allege a bare violation of the statute at issue. This Court's guidance is therefore critical to ensure that the lower courts are acting within the scope of their constitutional authority.

B. The Courts Of Appeals Disagree Profoundly Over Whether An Injury-In-Law Satisfies Article III's Injury-In-Fact Requirement.

There is broad disagreement among the courts of appeals over whether Congress may confer Article III standing simply by creating a cause of action authorizing statutory damages or other recovery.

The Eighth Circuit's rule, exemplified by the holding below, is that Congress's provision for statutory damages creates an injury-in-fact for purposes of Article III. The lower court supported its ruling here by reference to its earlier decision in *Dryden* v. *Lou Budke's Arrow Finance Co.*, 630 F.2d 641 (8th Cir. 1980), which involved a claim under the Truth in Lending Act.

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[10] See, *e.g.*, *Doe* v. *National Bd. of Med. Exam'rs*, 199 F.3d 146, 153 (3d Cir. 1999).

Dryden held that plaintiffs "need not show that they sustained actual damages stemming from the TILA violations proved before they may recover the statutory damages the Act also provides for." *Id.* at 647. All that a plaintiff must show, the Eighth Circuit held, is that "the disclosure provisions * * * were violated in connection with" a transaction that the plaintiff entered into; it did not matter even that "the transaction was abandoned by both parties and [the plaintiff]'s money was returned." *Ibid.*

The Sixth and Ninth Circuits share that view. *See Edwards* v. *First Am. Corp.*, 610 F.3d 514 (9th Cir. 2010) (no need to show actual injury in RESPA action), *cert. granted*, 131 S. Ct. 3022 (2011), *petition dismissed as improvidently granted*, 132 S. Ct. 2536 (2012); *Beaudry* v. *TeleCheck Servs., Inc.*, 579 F.3d 702, 707 (6th Cir. 2009) (holding that there was Article III standing to sue over defendant's FCRA violations in preparing plaintiff's credit report where plaintiff alleged only a violation of "individual right not to have unlawful practices occur" and did not allege any actual harm resulting from violation); *Carter* v. *Welles-Bowen Realty, Inc.*, 553 F.3d 979, 989 (6th Cir. 2009) (RESPA action).

But at least three other courts of appeals have reached the opposite conclusion about Article III's injury-in-fact requirement.

The Fourth Circuit, for example, has flatly rejected the argument that the mere "deprivation of [a] statutory right * * * is sufficient to constitute an injury-in-fact for Article III standing." *David* v. *Alphin*, 704 F.3d 327, 338-39 (4th Cir. 2013) (ERISA action). The court straightforwardly declared that "this theory of Article III standing is a non-starter as it con-

flates statutory standing with constitutional standing." *Id.*

Similarly, the Second Circuit has squarely rejected the argument that "either an alleged breach of fiduciary duty to comply with ERISA, or a deprivation of [the plaintiff's] entitlement to that fiduciary duty, in and of themselves constitutes an injury-in-fact sufficient for constitutional standing." *Kendall* v. *Employees Ret. Plan of Avon Prods.*, 561 F.3d 112, 121 (2d Cir. 2009). The court explained that although "plan fiduciaries have a statutory duty to comply with ERISA," a plaintiff cannot maintain a claim for breach of that duty without also "alleg[ing] some injury or deprivation of a specific right that arose from a violation of th[e] duty." *Ibid.*

The Third Circuit has likewise declared in no uncertain terms that, "[a]lthough Congress can expand standing by enacting a law enabling someone to sue on what was already a de facto injury to that person, it cannot confer standing by statute alone." *Doe* v. *National Bd. of Med. Exam'rs*, 199 F.3d 146, 153 (3d Cir. 1999) (Becker, C.J., joined by Scirica and Alito, JJ.) (citing *Lujan*, 504 U.S. at 578). The court explained that "[t]he proper analysis of standing focuses on whether the plaintiff suffered an actual injury, not on whether a statute was violated." *Ibid.* Thus, the court held that the plaintiff in that case could not establish standing merely by alleging a right under the ADA to be free from discrimination, because that would "incorrectly equate[] a violation of a statute with an injury sufficient to confer standing"; the plaintiff was required to show some individualized harm flowing from the discrimination. *Ibid.*

On the same logic, the Third Circuit reasoned that plaintiffs lack Article III standing to sue over

discriminatory advertising that violates the Fair Housing Act if they fail to allege that the advertising deterred them from seeking to rent a home, because "a violation of the Act does not automatically confer standing on any plaintiff, even one who holds the status of a private attorney general." *Fair Hous. Council* v. *Main Line Times*, 141 F.3d 439, 443-44 (3d Cir. 1998).

Further underscoring that there can be no standing for claims over statutory violations that are "unrelated to [the plaintiffs'] asserted rights," the Third Circuit also held that Article III standing is lacking in suits for false advertising under the Lanham Act unless the plaintiffs allege that they were actually harmed by the challenged conduct. See *Joint Stock Soc'y* v. *UDV N. Am., Inc.*, 266 F.3d 164, 176 (3d Cir. 2001) (Alito, J.) (holding that plaintiffs "failed to create a genuine issue that they have suffered an injury in fact" over defendants' use of the trade name Smirnoff "for the simple reason that [they] never marketed any vodka in the United States").

Yet the Third Circuit held in *Alston* v. *Countrywide Financial Corp.*, 585 F.3d 753, 763 (3d Cir. 2009), that "[a] plaintiff need not demonstrate that he or she suffered actual monetary damages" to have Article III standing to sue under the RESPA; the allegation of a bare statutory violation in the processing of the plaintiff's real-estate transaction is enough. The *Alston* panel came to that conclusion with no apparent awareness, and certainly no acknowledgment, of any of the Third Circuit's prior rulings to the contrary.

In short, there is broad-based and long-standing disagreement in the lower courts over whether Article III places limitations on Congress's ability to cre-

ate constitutional standing. Without guidance from this Court, that disagreement will only continue to grow.[11]

C. The Eighth Circuit's Decision Is Inconsistent With This Court's Standing Jurisprudence.

This Court's review is warranted for a second, independent reason: The decision below resolved the critical question of Article III standing in a manner that conflicts with this Court's precedents.

1. It is well established that "the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 497 (2009). To be sure, as the decision below noted, this Court has said that "[t]he actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates stand-

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[11] We note, too, that at least eight other ATM-sticker cases are currently pending in the lower courts; each necessarily implicates the question of Article III standing. See *Kinder* v. *Dearborn Fed. Sav. Bank*, No. 13-2282 (6th Cir.) (notice of appeal filed Sept. 23, 2013); *Mabary* v. *HomeTown Bank, N.A.*, No. 13-20211 (5th Cir.) (notice of appeal filed Apr. 17, 2013; oral argument scheduled for Jan. 6, 2014); *Harter* v. *Beach Oil Co.*, No. 10-cv-968, 2013 WL 6051028 (M.D. Tenn. Nov. 15, 2013); *Christy* v. *Heritage Bank*, No. 10-cv-874 (M.D. Tenn. Nov. 8, 2013); *Gonzalez* v. *Investors Bank*, No. 12-cv-4084, 2013 WL 5730528 (D.N.J. Oct. 21, 2013); *Pike* v. *Nick's English Hut, Inc.*, No. 11-cv-1304 (S.D. Ind. Oct. 8, 2013); *Hooks* v. *Landmark Indus., Inc.*, No. 12-cv-173, 2013 WL 3937029 (S.D. Tex. July 30, 2013); *Archbold* v. *Landry's Gaming, Inc.*, No. 13-cv-714 (D. Nev. May 24, 2013). Without this Court's guidance, therefore, ATM-sticker litigation in the federal courts will continue even though there is good reason to think that there is no standing for such actions.

ing." App., *infra*, 4a (quoting *Warth* v. *Seldin*, 422 U.S. 490, 500 (1975)). But that does not mean that Congress can manufacture Article III standing when the asserted injury otherwise does not satisfy Article III's injury-in-fact requirement.

The "'[s]tatutory broadening of the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury.'" *Lujan*, 504 U.S. at 578 (quoting *Sierra Club* v. *Morton*, 405 U.S. 727, 738 (1972)) (brackets omitted). If there is an actual, palpable injury—i.e., one that could qualify as an "injury in fact" under Article III—but no remedy at law, Congress may create a remedy. See *ibid.* In other words, Congress may "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." *Ibid.*; see also Hart & Wechsler's The Federal Courts and the Federal System 144 (Richard H. Fallon Jr. et al. eds., 6th ed. 2009).

But Congress may not create the necessary underlying injury by fiat. See *Lujan*, 504 U.S. at 578; see also, *e.g.*, *Doe*, 199 F.3d at 153 (explaining *Lujan*'s holding that, "[a]lthough Congress can expand standing by enacting a law enabling someone to sue on what was already a de facto injury to that person, it cannot confer standing by statute alone").

This "outer limit to the power of Congress to confer rights of action is a direct and necessary consequence of the case and controversy limitations found in Article III." *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment). Accordingly, "[i]t is settled that Congress cannot erase Article III's standing requirements by statuto-

rily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines* v. *Byrd*, 521 U.S. 811, 820 n.3 (1997).

The decision below—like so many of those described above—departs from these firmly established constitutional principles. The Eighth Circuit held that Charvat alleged an injury sufficient to satisfy Article III's mandate by complaining that, when he completed transactions on petitioners' ATMs, he "personally experience[d]"—i.e., was exposed to—the alleged EFTA violation of the missing stickers. App., *infra*, 9a.

Endorsing that approach would render the case-or-controversy requirement of Article III an empty formality. If the Eighth Circuit were correct, then any time that Congress wishes to expand the jurisdiction of the federal courts, all that it need do is authorize statutory damages for violation of any federal requirement. Doing so would automatically create a cognizable injury for anyone who happens to "experience[]" any violation.

Article III does not open the federal courts to all manner of lawsuits by self-appointed private attorneys general who lack an injury as the concept has traditionally been understood. As this Court put it in *Lujan*, in the absence of a "concrete, *de facto* injur[y]," 504 U.S. at 578, Congress cannot confer standing on a plaintiff.

2. The Eighth Circuit purported to find support for Charvat's informational-injury theory in *Federal Election Commission* v. *Akins*, 524 U.S. 11 (1998). There, this Court held that a private plaintiff had standing to sue over the FEC's refusal to require a

political committee to make public disclosures of its members, contributors, and expenditures.

The court of appeals' reliance on *Akins* was misplaced. Far from creating a universal right to sue for "informational injuries" without actual harm, *Akins* addressed a *sui generis* circumstance in which the plaintiffs were being denied information that Congress has required the government to make public in order to enable voters "to evaluate candidates for public office"—a deprivation that the Court determined was "directly related to voting, the most basic of political rights." *Id.* at 21, 24-25.

Whatever the reach of that determination involving the exercise of the right to vote, it is irrelevant here. *Charvat received the information that Congress wanted him to have, at the time that Congress wanted him to have it.* He received on-screen notices at petitioners' ATMs, knew before engaging in the withdrawal transactions that he would be charged $2, and decided to go ahead with the transactions and pay the fees.

The only "injury" that Charvat can allege is that he did not receive duplicative notice-by-sticker of the $2 fees that he learned about by other means and then accepted. The absence of that second notice did not affect his choices—which is why he does not and cannot claim that he was actually harmed.

* * *

By concluding that Congress can create an injury-in-law sufficient to invoke the jurisdiction of a federal court regardless of whether Article III's injury-in-fact requirement is otherwise satisfied, the Eighth Circuit's ruling and the many similar decisions under other federal laws open the federal

courts to large numbers of lawsuits that do not satisfy Article III. Review by this Court is warranted to curtail that ongoing misuse of the federal courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 2013

APPENDICES

APPENDIX A

United States Court of Appeals
For the Eighth Circuit

No. 12-2790

Jarek Charvat, Individually and on behalf of
all others similarly situated

Plaintiff-Appellant

v.

Mutual First Federal Credit Union

Defendant-Appellee

No. 12-2797

Jarek Charvat, Individually and on behalf of
all others similarly situated

Plaintiff-Appellant

v.

First National Bank of Wahoo

Defendant-Appellee

United States of America
Amicus on Behalf of *Appellant*

Appeal from United States District Court
For the District of Nebraska - Omaha

Submitted: May 14, 2013
Filed: August 2, 2013

Before RILEY, Chief Judge, MELLOY and SHEPHERD, Circuit Judges.

SHEPHERD, Circuit Judge.

Jarek Charvat brought putative class actions against two Nebraska banks, Mutual First Federal Credit Union ("Mutual First") and First National Bank of Wahoo ("First National") (collectively, "Appellees"), alleging violation of the Electronic Fund Transfer Act ("EFTA"). *See* 15 U.S.C. § 1693. The district court dismissed both of Charvat's suits for lack of standing, and he now appeals. We reverse.

I.

In early 2012, Charvat made several withdrawals from Appellees' ATMs. A total of three transactions occurred, one at Mutual First in Omaha and two at First National in Wahoo, Nebraska. At the time Charvat completed the transactions, the EFTA required ATM operators to provide two forms of notice, one "on or at" the ATM ("on machine" notice) and another on-screen during the transaction, if operators charged a transaction fee. *See* § 1693b(d)(3)(B)(i)-(ii), *amended by* Act of Dec. 20, 2012, Pub. L. No. 112-216, 126 Stat. 1590 (removing the "on machine" notice requirement). A transaction fee was not allowed without the prescribed notice, and consumers could recover various damages under the EFTA for violations. *See* § 1693m(a) (actual damages, statutory damages, costs, and fees). Char-

vat received an on-screen notice of a transaction fee at each ATM, which he accepted, and for each transaction Charvat was charged a $2.00 fee. However, Charvat alleges that neither of Appellees' ATMs had "on machine" notice.

Charvat brought separate putative class action suits against Appellees, alleging violation of the EFTA. Both First Mutual and First National moved to dismiss, arguing the district court lacked subject matter jurisdiction because Charvat did not have standing to bring his claims. The district court granted Appellees' motions to dismiss, concluding that Charvat had not alleged an injury in fact but only an "injury in law." The district court held that an EFTA plaintiff "must allege an injury in fact that was caused by the lack of an exterior fee notice on the ATM," and determined that Charvat had not done so. *Charvat v. First Nat'l Bank of Wahoo*, No. 8:12CV97, 2012 WL 2016184, at *3 (D. Neb. June 4, 2012) (emphasis omitted); *see also* Order to Show Cause 4, No. 8:12CV11, ECF No. 22 (reaching same conclusion in suit against Mutual First). Charvat filed timely appeals in both cases, which are now consolidated for appeal.

II.

We review the district court's dismissal of Charvat's complaints de novo, "accepting as true the factual allegations contained in the complaint and granting [Charvat] the benefit of all reasonable inferences that can be drawn from those allegations." *See Gomez v. Wells Fargo Bank, N.A.*, 676 F.3d 655, 660 (8th Cir. 2012). The sole issue here is whether Charvat has standing to bring his EFTA claims against Appellees. "[T]he 'irreducible constitutional minimum of standing' requires a showing of 'injury

in fact' to the plaintiff that is 'fairly traceable to the challenged action of the defendant,' and 'likely [to] be redressed by a favorable decision.'" *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 591 (8th Cir. 2009) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). Although the district court primarily focused on the injury in fact element, Appellees also attack traceability. We address these two elements in turn.

A.

The injury in fact element requires a plaintiff to allege "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560. Because injury in fact is a constitutional requirement, Congress may not grant standing to an individual who would not otherwise have standing. *See Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997). Congress may, however, create legal rights via statute, the invasion of which can create standing to sue. *See Warth v. Seldin*, 422 U.S. 490, 500 (1975) ("The actual or threatened injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing . . . ." (quotation omitted)).

The EFTA, the statute at issue here, was passed to establish a "basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund and remittance transfer systems."[1]

[1] Under the EFTA, "electronic fund transfer" essentially means any transfer of funds initiated through a computer terminal or telephone, where a financial institution is authorized to debit or credit an account. *See* 15 U.S.C. § 1693a(7). This includes point-

15 U.S.C. § 1693(b). The "primary objective" of the EFTA is "the provision of individual consumer rights." *Id.* One of the consumer rights provided under the EFTA is the right to notice of fees linked to ATM transactions. *See* § 1693b(d). No ATM fee may be charged unless the consumer receives the prescribed notice and elects to continue the transaction. § 1693b(d)(3)(C). As noted above, when Charvat conducted his ATM transactions, the EFTA required notice of fees both on the ATM and also on the screen. *See* § 1693b(d)(3)(B)(i)-(ii), *amended by* Act of Dec. 20, 2012, Pub. L. No. 112-216, 126 Stat. 1590. The EFTA authorizes individual and class action suits for violations of the EFTA, with recovery of actual damages, statutory damages, costs, and attorney's fees. *See* § 1693m(a).

On appeal, Charvat argues he suffered two independent, equally cognizable injuries: an economic injury in the form of an illegal $2.00 fee and an informational injury due to Appellees' failure to provide the statutorily required notice. As an initial matter, Appellees argue Charvat waived any claim that the $2.00 fee constituted an injury in fact. Appellees argue Charvat repeatedly filed documents in the district court stating that the $2.00 fee was not the injury. *See, e.g.*, Pl.'s Resp. to Def.'s Mot. to Dismiss 1, No. 8:12-CV-00097, ECF No. 11 ("The injury to Plaintiff Charvat and the putative class in this matter is not the $2.00 fee, but the failure to provide information in the manner prescribed by Congress."). Charvat responds that his statements to the district court merely meant the $2.00 fee *standing alone* was not his injury, but rather that his injury was the

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of-sale transfers (i.e., debit card transactions), ATM transactions, direct deposits, and telephonic transfers. *Id.*

combination of the $2.00 fee and the failure to provide both forms of notice. Charvat also argues that claiming the $2.00 fee as his injury is merely a new argument on appeal, and not a new issue, since the broader issue of standing was clearly before the district court. *See Hintz v. JPMorgan Chase Bank, N.A.*, 686 F.3d 505, 508 (8th Cir. 2012) ("Appellants' contention that the order was not on the merits raises only a new argument, not a new issue, and thus is not barred from review.").

Notably, the district court did not address the $2.00 fee as an injury in fact, but only addressed the informational injury in its orders dismissing Charvat's claims. *See Charvat*, 2012 WL 2016184, at *2 ("The issue then is whether [First National's] failure to give a notice to which Charvat was statutorily entitled in itself constitutes an injury in fact to Charvat."); *id.* at *3 ("Here, Charvat alleges only a statutory violation of the EFTA because [First National] failed to provide an exterior fee notice on its ATM."); *see also* Order to Show Cause 4, No. 8:12CV11, ECF No. 22 (using identical language in suit against Mutual First). Nor did the district court discuss whether it found that Charvat waived the $2.00 fee as his injury in fact. Thus, we have no lower court decision to review regarding the $2.00 fee as an injury, either on the merits or in regard to an alleged waiver.

However, assuming, without deciding, that Charvat did waive the claim that the $2.00 fee constituted an injury in fact, we conclude Charvat still had standing to pursue his claims against Appellees based on the informational injury that he allegedly sustained. The district court concluded that because Charvat failed to allege some injury beyond the failure to receive an "on machine" notice, he had not suf-

fered a cognizable injury in fact. We disagree. Decisions by this Court and the Supreme Court indicate that an informational injury alone is sufficient to confer standing, even without an additional economic or other injury.

The district court's rejection of Charvat's informational injury claim was based largely on the determination that a statutory violation, standing alone, was not a sufficient injury in fact. But Charvat identifies a variety of instances where the denial of a statutory right to receive information is sufficient to establish standing. For example, the Supreme Court "has previously held that a plaintiff suffers an "injury in fact" when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute." *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 21 (1998). Our Court, as well, has held that plaintiffs need not show actual damages, beyond a statutory violation, in order to recover statutory damages. *See Dryden v. Lou Budke's Arrow Fin. Co.*, 630 F.2d 641, 647 (8th Cir. 1980) ("[Truth in Lending Act] plaintiffs, otherwise entitled to recover, need not show that they sustained actual damages stemming from the TILA violations proved before they may recover the statutory damages the Act also provides for.") Once Charvat alleged a violation of the notice provisions of the EFTA in connection with his ATM transactions, he had standing to claim damages. *See id.* ("If [borrower] proved that the disclosure provisions of [TILA] and Regulation Z were violated in connection with the January 26 transaction, [lender] is liable for statutory damages.") Thus, the district court erred by requiring Charvat to demonstrate an

injury beyond Appellees' failure to provide the prescribed "on machine" notice.[2]

The district court also held that "[t]he [EFTA's] authorization of statutory damages is unrelated to injury." *Charvat*, 2012 WL 2016184, at *3 (emphasis omitted). We disagree. 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. *Cf. Dryden*, 630 F.2d at 647 ("[S]tatutory damages are explicitly a bonus to the successful . . . plaintiff, designed to encourage private enforcement of the Act, and a penalty against the defendant, designed to deter future violations."). This distinguishes the statutory damages here from the qui tam damages at issue in *Vermont Agency of Natural Resources v. United States*, 529 U.S. 765, 772 (2000), cited by the district court in support of its conclusion that Charvat's damages were unrelated to his injury. In a qui tam case such as *Vermont Agency*, the relator is explicitly seeking to vindicate violation of the rights of the government. *See id.* at 772-74 (suggesting, in suit to remedy state agency's submission of false claims to EPA, that qui tam relator's interest in suit was unrelated to injury to the government, but finding sufficient injury to confer standing by considering relator partial assignee of govern-

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[2] We note also that the vast majority of lower courts to consider this question have found that plaintiffs like Charvat do have standing to bring similar EFTA claims. *See, e.g.*, *Alicea v. Citizens Bank of Penn.*, No. Civ. 12-1750, 2013 WL 1891348, at *2 & n.3 (W.D. Pa. May 6, 2013) (finding violation of EFTA notice provision constitutes injury in fact, and collecting cases).

ment's damages claim). Here, in contrast, the statutory damages are given to a consumer who personally experiences a statutory violation, and not to a third party who simply notices the injury of another. Accordingly, we find Charvat's claim of statutory damages is sufficiently related to his injury to confer standing.

We agree with Appellees and the district court that Article III precludes a plaintiff from asserting a claim for an abstract statutory violation. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009) ("It would exceed Article III's limitations if, at the behest of Congress and in the absence of any showing of concrete injury, we were to entertain citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws." (internal marks omitted)). And if, hypothetically, Charvat simply heard from an acquaintance that Appellees did not provide "on machine" notice—but never himself visited their ATMs, never initiated a transaction, and was never charged a transaction fee—then Charvat may well lack standing to bring an EFTA suit. But based on the complaints filed in these cases, Charvat has not merely asserted "the public's nonconcrete interest" in the administration of the EFTA. Instead, Charvat alleges a violation of his own interest: Appellees did not provide him with the required "on machine" notice, and subsequently charged him a prohibited fee following an ATM transaction that he initiated and completed. Thus, we conclude that Charvat has alleged an action that injured him "'in a concrete and personal way,'" *see id.* (quoting *Lujan*, 504 U.S. at 581 (Kennedy, J., concurring in part and concurring in judgment)), and has satisfied the injury in fact requirement of standing.

B.

Appellees also argue that Charvat's alleged injuries are not fairly traceable to their conduct because their failure to provide "on machine" notice was not the sole cause of his alleged injuries. "Traceability requires proof of causation, showing the injury resulted from the actions of the defendant 'and not . . . [from] the independent action of some third party not before the court.'" *See Oti Kaga, Inc. v. S. D. Hous. Dev. Auth.*, 342 F.3d 871, 878 (8th Cir. 2003) (quoting *Lujan*, 504 U.S. at 560). Appellees argue that Charvat, by accepting the $2.00 transaction fee after receiving an on-screen notice of the fee, broke any causal link between Appellees and his alleged injury.

Appellees' argument, however, is not supported by our case law. "'Not every infirmity in the causal chain deprives a plaintiff of standing.'" *ABF Freight Sys., Inc. v. Int'l Bhd. of Teamsters*, 645 F.3d 954, 961 (8th Cir. 2011) (quoting *St. Pierre v. Dyer*, 208 F.3d 394, 402 (2d Cir. 2000)). Indeed, in *ABF Freight*, the appellees argued that the appellants' injury flowed from their own action, namely the rejection of collective bargaining amendments adopted by a competitor. *Id.* However, we rejected this argument, finding that "[h]ad [appellees] not allegedly breached . . . [appellants] would not have been forced to choose between options that were unattractive . . . ." *Id.* The same logic applies here. If Appellees had not violated the EFTA's notice requirement, Charvat would not have been forced to choose between engaging in a transaction without the required notice and walking away. Thus, we conclude Charvat's injury was fairly traceable to Appellees' conduct.

III.

Accordingly, we reverse the judgment of the district court and remand for further proceedings consistent with this opinion.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

JAREK CHARVAT, Individually and on behalf of all others similarly situated,	)	**CASE NO. 8:12CV97**
Plaintiff,	)	
v.	)	**MEMORANDUM AND ORDER**
FIRST NATIONAL BANK OF WAHOO,	)	
Defendant.	)	

This matter is before the Court on Defendant's Motion to Dismiss for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) (Filing No. 7). Defendant First National Bank of Wahoo ("FNBW") asserts that this Court has no subject matter jurisdiction over Plaintiff Jarek Charvat ("Charvat") because Charvat has suffered no injury in fact and therefore does not have standing to bring this claim. Alternatively, FNBW requests that all further proceedings in this matter be stayed pending the United States Supreme Court's decision in *First American Fin. Corp. v. Edwards*, 610 F.3d 514 (9th Cir. June 21, 2010), *cert. granted*, 131 S. Ct. 3022 (U.S. June 20, 2011) (No. 10-708) (hereinafter referred to as "*First American*"). For the reasons discussed below, all further proceedings in this matter

will be stayed pending the Supreme Court's decision in *First American*.

FACTUAL BACKGROUND

For purposes of the pending Motion, the Court accepts as true all well-pled factual allegations in the Class Action Complaint ("Complaint") (Filing No. 1), although the Court need not accept Charvat's legal conclusions. The following is a summary of the allegations in the Complaint.

Charvat made two separate electronic fund transfers ("EFTs") from FNBW's automated teller machine ("ATM") located at 354 North Chestnut Street, Wahoo, Nebraska, on or about January 22, 2012, and March 4, 2012. FNBW charged Charvat a fee of $2.00 in connection with each transaction. At the time of the EFTs, there was no notice posted "on or at" the ATM apprising consumers that a fee would be charged for the use of the ATM. Charvat does not allege that he received no on-screen notice that a fee would be charged. On March 8, 2012, Charvat brought this class action against FNBW alleging violations of the Electronic Fund Transfer Act ("EFTA") 15 U.S.C. § 1693-1693r and its implementing regulations 12 C.F.R. § 205.1-205.20. Charvat seeks statutory damages for himself and the members of the class and an award of costs and attorney fees.

The purpose of the EFTA is to define individual consumer rights. 15 U.S.C. § 1693(b). The EFTA requires any ATM operator who imposes fees on consumers in connection with EFTs to provide notice of the fact that a fee is being imposed and the amount of the fee. 15 U.S.C. § 1693b(d)(3)(A). The required notice must be posted in two places, both "on or at" the ATM, and on the screen of the ATM or, alterna-

tively, on a paper notice issued before the transaction is completed. 15 U.S.C. § 1693b(d)(3)(B). An ATM operator is prohibited from imposing a fee on a consumer unless the EFTA's notice requirements are followed. 15 U.S.C. § 1693b(d)(3)(C). FNBW violated the notice requirements of the EFTA, and was thus prohibited from imposing any fee on Charvat or the Class.

STANDARD OF REVIEW

A motion under Federal Rule of Civil Procedure 12(b)(1) challenges whether the Court has subject matter jurisdiction to hear the case. The party asserting jurisdiction bears the burden of proving that jurisdiction is proper. *Great Rivers Habitat Alliance v. FEMA*, 615 F.3d 985, 988 (8th Cir.2010). The Court, however, has "'wide discretion'" to decide the process with which its jurisdiction can best be determined. *Johnson v. United States*, 534 F.3d 958, 964 (8th Cir. 2008) (quoting *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir.1995)). It "has the authority to dismiss an action for lack of subject matter jurisdiction on any one of three separate bases: '(1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts.'" *Id*. at 962 (quoting *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981)); *see also Jessie v. Potter*, 516 F.3d 709, 712 (8th Cir. 2008) (stating that "[m]otions to dismiss for lack of subject-matter jurisdiction can be decided in three ways: at the pleading stage, like a Rule12(b)(6) motion; on undisputed facts, like a summary judgment motion; and on disputed facts"). According to Federal Rule of Civil Procedure 12(h)(3), a federal court must dismiss an action if it

determines at any time it lacks subject matter jurisdiction. *Harris v. P.A.M. Transp., Inc.*, 339 F.3d 635, 637 n.4 (8th Cir. 2003).

DISCUSSION

I. Charvat did not allege an injury in fact to satisfy the constitutional minimum requirement of standing.

Three requirements constitute the "irreducible constitutional minimum" of standing, the first of which is "an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The requirement of injury in fact is a "hard floor of Article III jurisdiction that cannot be removed by statute." *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009). This injury "may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing . . . .' Of course, Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself." *Warth v. Seldin*, 422 U.S. 490, 500-01 (1975) (quoting *Linda R.S. v. Richard D.*, 410 U .S. 614, 617 n.3 (1973)). "It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines v. Byrd*, 521 U.S. 811, 820 n. 3 (1997). It is undisputed that Congress can create a legal right sufficient for standing under the EFTA, but Plaintiff must still allege a "distinct and palpable injury to himself." *Warth*, 422 U.S. at 501. The issue then is whether FNBW's failure to give a notice to which Charvat was statutorily entitled in itself constitutes an injury in fact to Charvat. This Court concludes it does not.

Three district courts 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—regardless of whether the plaintiff had actual knowledge of the fee through the on-screen notice and affirmatively accepted it. *Campbell v. Hope Cmty. Credit Union*, No. 10-2649-STA, 2012 WL 423432, at *2 (W.D. Tenn. Feb. 8, 2012); *Kinder v. Dearborn Fed. Sav. Bank*, No. 10-12570, 2011 WL 6371184, at **4-5 (E.D. Mich. Dec. 20, 2011); *In re Regions Bank ATM Fee Notice Litig.*, Nos. 2:11-MD-1000, 1001, 1002, & 2202-KS-MTP, 2011 WL 4036691, at *3 (S.D. Miss. Sept. 12, 2011). The *Campbell* and *In re Regions Bank* courts both noted that the EFTA is a remedial consumer statute which should be construed broadly in favor of the consumer. *Campbell*, 2012 WL 423432, at *2; *In re Regions Bank*, 2011 WL 4036691, at *3. These two courts then stated that the EFTA provides for the recovery of actual and statutory damages, indicating Congress's intent for private causes of action despite minimal or no actual damage. *Campbell*, 2012 WL 423432, at *2; *In re Regions Bank*, 2011 WL 4036691, at *3. In *Kinder*, the court considered the argument that the plaintiff did not suffer an injury because he had actual knowledge. *Kinder*, 2011 WL 6371184, at *2. The *Kinder* court noted that "[a]lthough this argument has some appeal, it has been rejected by at least one court." *Id.* The court then relied on the reasoning of *In re Regions Bank* and granted standing. *Id.*

These three district court opinions did not address the "hard floor" constitutional requirement of injury in *fact*. The Constitution requires more than mere injury in *law*. A plaintiff must allege an injury in *fact* that was caused by the lack of an exterior fee

notice on the ATM. This Court agrees that the EFTA should be construed broadly in favor of the consumer, but the provision for actual and statutory damages in the EFTA does not automatically mean that a litigant is entitled to damages when he has alleged no injury in fact. The authorization of statutory damages is unrelated to *injury*. "An interest unrelated to injury in fact is insufficient to give a plaintiff standing." *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772 (2000). Here, Charvat alleges only a statutory violation of the EFTA because FNBW failed to provide an exterior fee notice on its ATM. Charvat has not alleged an injury in fact caused by FNBW's violation of the notice requirements, and he will not be accorded standing.

Charvat cites *White v. Arlen Realty & Dev. Corp.*, 540 F.2d 645 (4th Cir.1975), in support of his position that a statutory violation of the EFTA is in itself an injury creating standing. In *White*, a credit provider violated the disclosure requirements of the Truth in Lending Act ("TILA"), 15 U.S.C. § 1637(b)(2), by failing to give a brief identification of the charges on the plaintiff's charge card statement. *Id.* at 647-48. The court held that even though the plaintiff had actual knowledge of the purchases he had made on his card, he had a "right to specific information"—a description of his purchases on the charge card statement. *Id.* at 649–50. Charvat cites this case as rejecting the proposition that "a consumer who already knows of the information not provided by the defendant cannot claim to be injured ." (Filing No. 11, at 5.) In *White*, however, it was not the plaintiff's actual knowledge of his purchases that was at issue. The plaintiff suffered injury in fact, although he had actual knowledge of the purchases he had made on his charge card, because he did not

know what the creditor *claimed* to be his purchases. The *White* case demonstrates the constitutional requirement that an injury in fact, which may be caused by a statutory violation, must be *alleged*. Here, Charvat has not alleged an injury in fact caused by FNBW's failure to provide notice of the fee on the exterior of its ATM.

Charvat also cites cases where "testers" have been granted standing to bring suit under statutorily created rights to certain information, despite not relying on the information or being misled by false information. Charvat first cites *Village of Bellwood v. Dwivedi*, 895 F.2d 1521 (7th Cir. 1990), wherein the court held that "testers" paid to determine housing discrimination had standing even though they had no actual intent to purchase property and were not misled by the false information provided by realty companies, as Congress had created a statutory right for purchasers to be free from such misrepresentations. *Id.* at 1526-27 (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 374 (1982)). Charvat then points to "testers" who have been held to have standing to sue for non-compliant transportation facilities under the American with Disabilities Act, even though they have no intention of using public transportation themselves. *Tandy v. City of Wichita*, 380 F.3d 1277, 1285-88 (10th Cir. 2004). Finally, Charvat points to employment "testers" that have been held to have standing to enforce non-discrimination statutes, because Congress has mandated that every individual receive equal employment *opportunity*, even though the "testers" had no intention of taking the jobs for which they applied. *Kyles v. J.K. Guardian Sec. Servs., Inc.*, 222 F.3d 289, 298-300 (7th Cir. 2000). It is true that like Charvat, the "tester" plaintiffs did not rely on the information they received

and did not personally allege an injury that operated to their detriment. The information presented to the "testers," however, was deficient in that it was false, misleading, or delayed. Charvat does not allege that FNBW's failure to provide a fee notice "on or at" the ATM was in any way false or misleading. The fee information was available to him through the on-screen notice. The cases that Charvat cites do not change the fact that he must allege an *injury in fact* caused by FNBW's failure to comply with the EFTA notice requirements.

Charvat suggests that if this Court determines that a statutory violation of the notice requirements of the EFTA is not in itself an injury, the Court would be stripping the statute of a requirement purposefully imposed by Congress. He notes that Congress may have discerned that one notification was not enough, or that unscrupulous ATM operators should be prevented from luring consumers under the false presumption that no transaction fee would be incurred. This Court does not question Congress's purpose for imposing the notice requirements. Instead, this Court is respectful of the constitutional minimum requirement of standing that a plaintiff must have to proceed in an action before the Court. This limitation on judicial power "is no mere formality: it 'defines with respect to the Judicial Branch the idea of separation of powers on which the federal government is founded.'" *Dominguez v. UAL Corp.*, 666 F.3d 1359, 1361 (D.C. Cir. 2012) (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1983)).

II. The federal government did not assign its "federal interests" to private actors to enforce the notice requirements of the EFTA.

In an attempt to circumvent Article III's standing requirement, Charvat alleges that the federal government assigned its "federal interests" to private actors to enforce the notice requirements of the EFTA. This argument is rejected for two reasons. First, the EFTA is not a *qui tam* statute that clearly assigns the federal government's standing to private actors; and second, the purpose of the EFTA is to protect consumer interests and not federal interests, thus there are no "federal interests" to assign.

Charvat develops his "assigned standing" argument by relying on *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765 (2000), wherein the court held that a *qui tam* plaintiff who had suffered no injury had standing to bring suit on behalf of the United States because he was a partial assignee of the United States' interests under the False Claims Act ("FCA"). *Id.* at 773. The FCA is a *qui tam* statute, meaning that it allows an injury to the federal government—in this case fraud committed against the federal government—to confer standing upon a private actor so that he may enforce the federal government's interests. *Id.* at 768-69. Unlike the FCA, the EFTA is not a *qui tam* statute. The few *qui tam* statutes still in effect today make it clear within the statute that an individual may sue on the federal government's behalf. *Id.* at 802 n.1. There is no language in the EFTA suggesting that a private actor may sue on the federal government's behalf. Although Charvat cites the provision for damages in the EFTA statute as evidence of Congress's intent to encourage private actors to bring suit to enforce the

statute, the authorization of damages does not make the EFTA a *qui tam* statute. *Vermont Agency* takes care to note that an interest unrelated to injury in fact, like the bounty a *qui tam* plaintiff would recover by statute after a successful suit (or the statutory damages Charvat would receive), is not enough to create standing. *Id*. at 772. Instead, a *qui tam* plaintiff has standing because the federal government assigned its claims to private actors. *Id*. at 773. Moreover, the purpose of the EFTA is not to protect "federal interests" but rather to protect consumer interests. 15 U.S.C. § 1693(b). The EFTA provides that a person is liable under 15 U.S.C. § 1693m(a) for failing to comply with any provision of the Act "with respect to any consumer." Because the federal government has no federal interests in the EFTA to assign to private actors, the federal government could not have assigned its standing.

Charvat's allegations suggest his interest appears to be solely in the enforcement of the EFTA statute. Unless Charvat alleges an injury in fact, he does not have *standing* to enforce the statute. Where the government has not assigned its claims to private citizens, only the United States Attorney General may sue to redress the injury to the Government. *City of Kansas City v. Yarco Co., Inc.*, 625 F.3d 1038, 1041 (8th Cir. 2010). Therefore, FNBW is entitled to dismissal of this action because Charvat has not alleged an injury in fact.

III. The standing issue before the Supreme Court in *First American* has bearing on the standing issue presented here.

The issue before the Supreme Court in *First Am. Fin. Corp. v. Edwards*, 610 F.3d 514 (9th Cir. June 21, 2010), *cert. granted*, 131 S.Ct. 3022 (U.S. June

20, 2011) (No. 10-708) is similar to the standing issue presented here, and the Supreme Court's decision will be relevant to this motion. It is possible that the pending decision of the Supreme Court in *First American* may alter this Court's understanding of the constitutional minimum requirement of standing. Therefore, it is in the best interest of Charvat that all further proceedings in this matter to be stayed pending the Supreme Court's decision.

In *First American*, plaintiff/respondent Edwards sued defendant/petitioner First American Financial Corporation, a title insurance underwriter, for failing to disclose a "kickback" to a title agency in which First American had an ownership interest. Edwards's claim is that she was injured because First American's ownership interest violated the mandatory disclosure requirements of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2607(a). *First Am. Fin. Corp.*, 610 F.3d at 515, 517. Edwards had no complaint about the price or quality of the title insurance she received and alleged no other harm than a statutory violation of RESPA. Petition for Writ of Certiorari, *First Am. Fin. Corp. V. Edwards*, 2010 WL 4876485, at *1 (No. 10-708).

First American argues that Edwards did not suffer an injury in fact because Edwards would have been charged the same fee for title insurance by any provider and she made no claim that any alleged violation of RESPA operated to her detriment. *Id*. at *8. The fees for title insurance in Ohio are set by state law, so disclosing the affiliation to the title agency would not have changed the fee Edwards was charged. *Id*. at **5-6. First American raised the question of "whether a plaintiff can establish standing to sue under RESPA merely by alleging a statu-

tory violation, without any claim that the violation affected the settlement services rendered." *Id*. at *11. The Supreme Court granted certiorari to hear the following question presented:

> Does such a purchaser have standing to sue under Article III, § 2 of the United States Constitution, which provides that the federal judicial power is limited to "Cases" and "Controversies" and which this Court has interpreted to require the plaintiff to "have suffered an 'injury in fact,'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)?

Id. at *i; *First. Am. Fin. Corp.*, 131 S. Ct. at 3022 (granting petition for writ of certiorari to the above question).

Charvat contends *First American* has no bearing on the standing issue here because there is not a competitive market in Ohio for title insurance fees and the disclosure of the ownership interest in the title agency would not have affected the fee. In this case, unlike *First American*, a competitive market exists for ATM fees. Charvat believes the presence of a competitive market distinguishes the standing question here because the EFTA mandates the fee notice requirements so that consumers can make an informed choice of whether to make an EFT.

The presence of a competitive market does not change the relevance of the question presented in *First American* and its applicability to the standing issue here. 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. For this reason, and because it is in Charvat's interest that his action

not be dismissed by this Court for lack of subject matter jurisdiction pending the Supreme Court's decision in *First American*, this Court will grant FNBW's request to stay the proceedings in this matter pending the Supreme Court's decision.

IT IS ORDERED:

1. All further proceedings in this matter are stayed pending the Supreme Court's decision in *First American Financial Corp. v. Edwards*, No. 10-708 (cert. granted, June 20, 2011); and

2. When the Supreme Court's decision is filed, the Defendant must notify the Court of the decision by filing a notice with the Court within seven days of the date of the decision.

DATED this 4th day of June, 2012.

BY THE COURT:

s/Laurie Smith Camp
Chief United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

JAREK CHARVAT, Individually and on behalf of all others similarly situated,	)	**CASE NO. 8:12CV97**
Plaintiff,	)	
v.	)	**ORDER TO SHOW CAUSE**
FIRST NATIONAL BANK OF WAHOO,	)	
Defendant.	)	

This matter is before the Court on Defendant's Motion to Dismiss for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) (Filing No. 7). The Motion was stayed (Filing No. 13) pending the Supreme Court's decision in *First American Fin. Corp. v. Edwards,* 610 F.3d (9th Cir. 2010), *cert. granted*, 131 S. Ct. 3022 (U.S. June 20, 2011) (No. 10-708). On June 28, 2012, the Supreme Court dismissed the writ of certiorari as improvidently granted. *First Am. Fin. Corp. v. Edwards,* 2012 WL 2427807 (U.S. June 28, 2012 (No. 10-708)). Because the Supreme Court did not address the issue of standing related to this case, the Court's analysis in the June 4, 2012, Order is not altered. In the absence of good cause shown, the Motion will be

granted for the reasons set forth in the Court's June 4, 2012, Order (Filing No. 13). The Court directs the parties to show cause, if any, on or before July 9, 2012, why the Motion to Dismiss should not be granted.

Accordingly,

IT IS ORDERED that on or before July 9, 2012, the parties may file a response to this Order, showing cause, if any, as to why the Motion to Dismiss (Filing No. 7), filed by Defendant First National Bank of Wahoo, should not be granted.

DATED this 2nd day of July, 2012.

BY THE COURT:

s/Laurie Smith Camp
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JAREK CHARVAT, Individually and on behalf of all others similarly situated,	)	**CASE NO. 8:12CV97**
Plaintiff,	)	
v.	)	**ORDER**
FIRST NATIONAL BANK OF WAHOO,	)	
Defendant.	)	

For the reasons stated in this Court's Memorandum and Order of June 4, 2012 (Filing No. 13):

IT IS ORDERED:

1. The Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction, (Filing No. 7) is granted; and

2. The Plaintiff's Complaint is dismissed, with prejudice.

DATED this 12th day of July, 2012.

BY THE COURT:

s/Laurie Smith Camp
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

JAREK CHARVAT, Individually and on behalf of all others similarly situated,	)	**CASE NO. 8:12CV11**
Plaintiff,	)	
v.	)	**ORDER TO SHOW CAUSE**
MUTUAL FIRST FEDERAL CREDIT UNION,	)	
Defendant.	)	

It has come to the attention of the Court, through a related action, that the Court may lack subject-matter jurisdiction in this case. Plaintiff Jarek Charvat ("Charvat") has not alleged an injury in fact caused by Mutual First Federal Credit Union ("Mutual First"), and the Court will direct the parties to show cause, if any, why this action should not be dismissed for lack of standing.

SUMMARY OF RELATED ACTIONS

Charvat filed four related actions alleging violations of the Electronic Fund Transfer Act ("EFTA") 15 U.S.C. § 1693-1693r (Case Nos. 8:12CV11, 8:12CV12, 8:12CV13, 8:12CV97). In case number 8:12CV97, the defendant filed a motion to dismiss

(Filing No. 7) for lack of standing pursuant to Federal Rule of Civil Procedure 12(b)(1), because Charvat had not alleged an injury in fact. The Court agreed that Charvat had not alleged an injury. The facts of this action are similar and the Court finds Charvat has not alleged an injury in fact here.

STANDARD OF REVIEW

The Court is obligated to raise subject matter jurisdiction *sua sponte*. *Sanders v. Clemco Indus.*, 823 F.2d 214, 216 (8th Cir. 1987). Under Federal Rule of Civil Procedure 12(b)(1), the Court has "'wide discretion'" to decide the process with which its jurisdiction can best be determined. *Johnson v. United States*, 534 F.3d 958, 964 (8th Cir. 2008) (quoting *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995)). It "has the authority to dismiss an action for lack of subject matter jurisdiction on any one of three separate bases: '(1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts.'" *Id*. at 962 (quoting *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981)); *see also Jessie v. Potter*, 516 F.3d 709, 712 (8th Cir. 2008) (stating that "[m]otions to dismiss for lack of subject-matter jurisdiction can be decided in three ways: at the pleading stage, like a Rule12(b)(6) motion; on undisputed facts, like a summary judgment motion; and on disputed facts"). According to Federal Rule of Civil Procedure 12(h)(3), a federal court must dismiss an action if it determines at any time it lacks subject matter jurisdiction. *Harris v. P.A.M. Transp., Inc.*, 339 F.3d 635, 637 n.4 (8th Cir. 2003).

DISCUSSION

Three requirements constitute the "irreducible constitutional minimum" of standing, the first of which is "an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The requirement of injury in fact is a "hard floor of Article III jurisdiction that cannot be removed by statute." *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009). This injury "may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing . . . .' Of course, Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself." *Warth v. Seldin*, 422 U.S. 490, 500-01 (1975) (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973)). "It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997). It is undisputed that Congress can create a legal right sufficient for standing under the EFTA, but Plaintiff must still allege a "distinct and palpable injury to himself." *Warth*, 422 U.S. at 501. The issue then is whether Mutual First's failure to give a notice to which Charvat was statutorily entitled in itself constitutes an injury in fact to Charvat. This Court concludes it does not.

Three district courts 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—regardless of whether the plaintiff had actual knowledge of the fee

through the on-screen notice and affirmatively accepted it. *Campbell v. Hope Cmty. Credit Union,* No. 10-2649-STA, 2012 WL 423432, at *2 (W.D. Tenn. Feb. 8, 2012); *Kinder v. Dearborn Fed. Sav. Bank,* No. 10-12570, 2011 WL 6371184, at **4-5 (E.D. Mich. Dec. 20, 2011); *In re Regions Bank ATM Fee Notice Litig.,* Nos. 2:11-MD-1000, 1001, 1002, & 2202-KS-MTP, 2011 WL 4036691, at *3 (S.D. Miss. Sept. 12, 2011). The *Campbell* and *In re Regions Bank* courts both noted that the EFTA is a remedial consumer statute which should be construed broadly in favor of the consumer. *Campbell,* 2012 WL 423432, at *2; *In re Regions Bank,* 2011 WL 4036691, at *3. These two courts then stated that the EFTA provides for the recovery of actual and statutory damages, indicating Congress's intent for private causes of action despite minimal or no actual damage. *Campbell,* 2012 WL 423432, at *2; *In re Regions Bank,* 2011 WL 4036691, at *3. In *Kinder,* the court considered the argument that the plaintiff did not suffer an injury because he had actual knowledge. *Kinder,* 2011 WL 6371184, at *2. The *Kinder* court noted that "[a]lthough this argument has some appeal, it has been rejected by at least one court." *Id.* The court then relied on the reasoning of *In re Regions Bank* and granted standing. *Id.*

These three district court opinions did not address the "hard floor" constitutional requirement of injury in *fact.* The Constitution requires more than mere injury in *law.* A plaintiff must allege an injury in *fact* that was caused by the lack of an exterior fee notice on the ATM. This Court agrees that the EFTA should be construed broadly in favor of the consumer, but the provision for actual and statutory damages in the EFTA does not automatically mean that a

litigant is entitled to damages when he has alleged no injury in fact. The authorization of statutory damages is unrelated to *injury.* "An interest unrelated to injury in fact is insufficient to give a plaintiff standing." *Vermont Agency of Natural Res. v. United States ex rel. Stevens,* 529 U.S. 765, 772 (2000). Here, Charvat alleges only a statutory violation of the EFTA because First Mutual failed to provide an exterior fee notice on its ATM. Charvat has not alleged an injury in fact caused by Mutual First's violation of the notice requirements, and he lacks standing to bring this action.

Accordingly,

IT IS ORDERED that on or before July 9, 2012, the parties may file a response to this Order, showing cause, if any, as to why this action should not be dismissed for lack of standing.

DATED this 2nd day of July, 2012.

BY THE COURT:

s/Laurie Smith Camp
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JAREK CHARVAT, Individually and on behalf of all others similarly situated,	)	**CASE NO. 8:12CV11**
Plaintiff,	)	**ORDER**
v.	)	
MUTUAL FIRST FEDERAL CREDIT UNION,	)	
Defendant.	)	

For the reasons stated in this Court's Memorandum and Order of July 2, 2012 (Filing No. 15):

IT IS ORDERED:

1. The Court lacks subject matter jurisdiction over the Plaintiff's action, and

2. The Plaintiff's Complaint is dismissed, with prejudice.

DATED this 12th day of July, 2012.

BY THE COURT:

s/Laurie Smith Camp
United States District Judge

APPENDIX G

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

§ 1693b (2012). Regulations

* * * * *

(d) Applicability to service providers other than certain financial institutions

(1) In general

If electronic fund transfer services are made available to consumers by a person other than a financial institution holding a consumer's account, the Bureau shall by regulation assure that the disclosures, protections, responsibilities, and remedies created by this subchapter are made applicable to such persons and services.

* * * * *

(3) Fee disclosures at automated teller machines

(A) In general

The regulations prescribed under paragraph (1) shall require any automated teller machine operator who imposes a fee on any consumer for providing host transfer services to such consumer to provide notice in accordance with subparagraph (B) to the consumer (at the time the service is provided) of—

(i) the fact that a fee is imposed by such operator for providing the service; and

(ii) the amount of any such fee.

(B) Notice requirements

(i) On the machine

The notice required under clause (i) of subparagraph (A) with respect to any fee described in such subparagraph shall be posted in a prominent and conspicuous location on or at the automated teller machine at which the electronic fund transfer is initiated by the consumer.

(ii) On the screen

The notice required under clauses (i) and (ii) of subparagraph (A) with respect to any fee described in such subparagraph shall appear on the screen of the automated teller machine, or on a paper notice issued from such machine, after the transaction is initiated and before the consumer is irrevocably committed to completing the transaction, except that during the period beginning on November 12, 1999, and ending on December 31, 2004, this clause shall not apply to any automated teller machine that lacks the technical capability to disclose the notice on the screen or to issue a paper notice after the transaction is initiated and before the consumer is irrevocably committed to completing the transaction.

(C) Prohibition on fees not properly disclosed and explicitly assumed by consumer

No fee may be imposed by any automated teller machine operator in connection with any electronic fund transfer initiated by a consumer for which a notice is required under subparagraph (A), unless—

(i) the consumer receives such notice in accordance with subparagraph (B); and

(ii) the consumer elects to continue in the manner necessary to effect the transaction after receiving such notice.

* * * * *

15 U.S.C. § 1693m. Civil Liability

(a) Individual or class action for damages; amount of award

Except as otherwise provided by this section and section 1693h of this title, any person who fails to comply with any provision of this subchapter with respect to any consumer, except for an error resolved in accordance with section 1693f of this title, is liable to such consumer in an amount equal to the sum of—

(1) any actual damage sustained by such consumer as a result of such failure;

(2)(A) in the case of an individual action, an amount not less than $100 nor greater than $1,000; or

(B) in the case of a class action, such amount as the court may allow, except that (i) as to each member of the class no minimum recovery shall be applicable, and (ii) the total recovery under this subparagraph in any class action or series of class actions arising out of the same failure to comply by the same person shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the defendant; and

(3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court.

* * * * *

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

JAREK CHARVAT, Individually and on behalf of all others similarly situated,

Plaintiff,

v.

FIRST NATIONAL BANK OF WAHOO,

Defendants.

CASE NO. 8:12-cv-00097

AFFIDAVIT OF STEVE SALLENBACH

STATE OF NEBRASKA)
) ss.
COUNTY OF SAUNDERS)

I, Steve Sallenbach, being first duly sworn upon oath, states:

1. I am over the age of 21, I am competent, and I have first-hand knowledge of the facts herein stated.

2. I am the President and Chief Executive Office of First National Bank of Wahoo ("FNBW"), the Defendant in the above captioned matter.

3. FNBW sponsors the operation of four automatic teller machines ("ATM") in different locations in Saunders, Otto, and Johnson Counties, Nebraska.

4. On or about October 25, 2011, FNBW began charging a service fee of $2.00 per transaction to any non-bank customer of FNBW that completes a cash withdrawal transaction from an ATM sponsored by FNBW.

5. Any non-bank customer who would be charged the $2.00 service fee receives an on-screen notice of the fee and must affirmatively accept the fee to be able to complete the transaction.

6. The on-screen notice provides:

FIRST NATIONAL BANK

THE SPONSOR OF THIS ATM

CHARGES A FEE OF $2.00

FOR CASH WITHDRAWALS AT THIS ATM. THIS FEE IS ADDED TO YOUR TRANSACTION AMOUNT AND IS IN ADDITION TO ANY FEES THAT MAY BE CHARGED BY YOUR FINANCIAL INSTITUTION.

PRESS HERE TO ACCEPT THIS FEE [indicates button to press to continue transaction].

TO EXIT PRESS CANCEL.

7. A true and accurate depiction of the on-screen notice provided at the ATM located at 354 North Chestnut Street, Wahoo, Nebraska, is attached hereto as Exhibit "1".

8. If any non-bank customer does not affirmatively accept the fee by pressing the button indicated, the non-bank customer will be unable to complete the transaction.

FURTHER AFFIANT SAYETH NOT.

Dated this 29th day of March, 2012.

s/
Steve Sallenbach

SUBSCRIBED AND SWORN to before me this 29th day of March, 2012.

s/
Notary Public

EXHIBIT “1”


FIRST NATIONAL BANK
THE SPONSOR OF THIS ATM.
CHARGES A FEE OF $ 2.00
FOR CASH WITHDRAWALS AT THIS
ATM. THIS FEE IS ADDED TO YOUR
TRANSACTION AMOUNT AND IS IN
ADDITION TO ANY FEES THAT MAY
BE CHARGED BY YOUR FINANCIAL
INSTITUTION.
PRESS HERE
TO ACCEPT THIS FEE
TO EXIT PRESS CANCEL