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

In the United States Court of Appeals for the Eighth Circuit

JAREK CHARVAT,
Plaintiff-Appellant,

v.

MUTUAL FIRST FEDERAL CREDIT UNION,
Defendant-Appellee.

JAREK CHARVAT,
Plaintiff-Appellant,

v.

FIRST NATIONAL BANK OF WAHOO,
Defendant-Appellee.

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

REPLY BRIEF FOR APPELLANT JAREK CHARVAT

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Although appellees insist that this appeal turns on the particular facts of Charvat's claims, the unprecedented jurisdictional theories they advance would in fact have effects far beyond this case. "While a statute remains on the books, it must be enforced rather than subverted." *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 954 (7th Cir. 2006). Yet the banks ask this Court to render unenforceable not only the provision at issue here, but a wide range of statutes. Indeed, the banks' theory would deprive federal courts of authority to adjudicate even economic injuries, such as Charvat's payment of a fee, as long as the plaintiff is provided notice before the fee is incurred. This is thus far from a "case of *last* impression," as First National contends—it is, as the banks argue it, an invitation for this Court to be the *first* to restrict Congress's authority to create enforceable causes of action.

Federal courts have consistently rejected such arguments, and the banks provide no reason to reach a different result here. The banks' view that Charvat's claims are too trivial to justify federal jurisdiction amounts to nothing more than a policy disagreement with Congress. But although Congress could have eliminated Charvat's claims in its recent amendments to EFTA, it did not. Regardless of the merits of that decision as a policy matter, the banks' desire to avoid liability in Charvat's surviving dispute cannot justify setting aside Congress's judgment. Much less can it justify adopting a new constitutional theory that would nullify countless causes of action under *other* statutes.

I. Charvat Is in the Zone of Interests Created by EFTA.

A. Mutual First devotes its entire brief to an argument not passed on below: that Charvat lacks standing because "[i]t is reasonable to infer" that he is a "knowledgeable and informed plaintiff" rather than "the uninformed consumer that … EFTA was designed to protect." Mutual First Br. 4. That inference, however, is not one that was drawn by the district court. The court dismissed Charvat's claims without factual findings, holding, as a matter of law, that failure to provide the statutorily required on-machine notice does not give rise to an "injury" for Article III purposes. The question Mutual First raises is thus not at issue on appeal. "[I]t is for the trial court rather than the appellate court to draw legitimate and permissible inferences." *Lewis v. Super Valu Stores, Inc.*, 364 F.2d 555, 556 (8th Cir. 1966).

In any event, the question whether Charvat is a "knowledgeable and informed plaintiff" is irrelevant to the question of his standing. The crux of Mutual First's argument is that Charvat does not fall within the "zone of interests" that Congress designed EFTA to protect. *FEC v. Akins*, 524 U.S. 11, 20 (1998). For standing purposes, however, it is enough that "the injury asserted by a plaintiff *arguably* falls within the zone of interests to be protected … by the statute." *Id.* (emphasis added; internal quotation marks and alteration omitted). Here, Charvat's claims are more than just "arguably" within the scope of the statute's

protection—they fall *directly* within the plain language of EFTA's statutory cause of action.

EFTA provides that a bank that violates its requirements "with respect to *any* consumer" is "liable to such consumer" for statutory damages. 15 U.S.C. § 1693m(a). Neither appellee claims that the phrase "any consumer" excludes Charvat. EFTA's plain language thus establishes that Congress "intended to authorize this kind of suit." *Akins*, 524 U.S. at 20. Because Charvat "suffered the precise 'injury'" that EFTA proscribes, "[n]o Article III (or prudential) standing problem arises." *Beaudry v. TeleCheck Services, Inc.*, 579 F.3d 702, 705, 707 (6th Cir. 2009).

Congress's recent amendment of the statute to eliminate certain *future* cases based on the on-machine notice requirement only reinforces its intent to create a cause of action in *this* case. Although the amendment gave Congress the opportunity to eliminate pending claims, as advocates for the banking industry urged,[1] it chose not to do so. As the United States notes in its Rule 28(j) letter—and the banks do not dispute—the amendment has no effect on pending cases. It thus

[1] *See, e.g.*, Bart Murphy, *Bill Introduced in House to Curtail EFTA ATM Notice Class Actions*, May 19, 2012, *available at* http://www.icemiller.com/publication_detail/id/1868/index.aspx.

affirms Congress's considered judgment to provide a cause of action for plaintiffs in Charvat's position.[2]

If Mutual First disagrees with that policy judgment, its remedy is with Congress, not the courts. *See Dowd v. USW, Local No. 286*, 253 F.3d 1093, 1105 (8th Cir. 2001). Regardless of whether a court "dislike[s] the outcome" Congress has mandated, it is "not at liberty to rewrite the statute." *Id.*; *see also Kinder v. Dearborn Fed. Sav. Bank*, 2011 WL 6371184, at *4 (E.D. Mich. Dec. 20, 2011) ("[T]he court must enforce [EFTA] as it is written."). Rather, "[w]hile a statute remains on the books, it must be enforced rather than subverted." *Murray*, 434 F.3d at 954.

B. At bottom, Mutual First's argument is not about standing, but its view that Charvat's claims are "frivolous," and that his invocation of the cause of action Congress gave him is an "abuse" of the statute. Mutual First Br. 9-11. Mutual First's characterization of Charvat's claims as frivolous cannot be reconciled with its failure to articulate any reason why he is not entitled to recovery under the

[2] Unless Congress expressly provides to the contrary, statutory amendments do not apply retroactively. *See Owner-Operator Indep. Drivers Ass'n, Inc. v. New Prime, Inc.*, 339 F.3d 1001, 1007 (8th Cir. 2003). In the absence of such an express statement, the "traditional presumption against applying statutes affecting substantive rights, liabilities, or duties to conduct arising before their enactment" controls. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 278 (1994); *see also Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring) ("The principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal.").

statute's plain language. Its view that Charvat's claims are too trivial to justify relief is thus no more than a policy disagreement with the statute. But, as Judge Easterbrook explained in *Murray*, "it is not appropriate to use procedural devices to undermine laws of which a judge disapproves." 434 F.3d at 954.[3]

The plaintiff in *Murray*, like Charvat here, alleged a violation of a statutory notice requirement—in that case, the Fair Credit Reporting Act's requirement of "clear and conspicuous" notice of the right to prohibit use of credit information without prior consent. *Id.* at 951. As here, the statute provided minimum damages of $100 per violation and, also as here, had recently been amended to eliminate claims arising after its effective date. *Id.* The district court dismissed the plaintiff's class claims in part on the ground that she and her family, as participants in "more than fifty assorted suits seeking compensation for technical violations of the FCRA," were "professional plaintiffs" who were "merely seeking the 'quick buck.'" *Id.* at 954. But the Seventh Circuit flatly rejected the district court's effort "to curtail the aggregate damages for violations [it] deemed trivial." *Id.* at 953–54.

[3] The legislative history on which Mutual First relies makes clear that Congress's concern about "abuse" and "frivolous lawsuit[s]" was not based on claims for genuine violations of the statute, as Charvat's claims are here. Rather, Congress was concerned with reports that plaintiffs in other cases had "remove[d] stickers from ATMs across the country, thereby placing financial institutions and merchants out of compliance." 158 Cong. Rec. H4664–01. Here, the banks do not claim that their failure to provide on-machine notice was anything other than their own fault. This case thus does not involve the sort of "abuse" that motivated Congress's amendment.

"[T]he district judge did not explain," the Court wrote, "why 'professional' is a dirty word." *Id.* at 954.

The banks' characterization of Charvat as a "profiteer" is an equally flimsy basis for dismissing his claims. Like the plaintiff in *Murray*, Charvat "did not accept compensation to put [himself] in the way of injury—though 'testers,' who do this in housing and employment litigation, usually are praised rather than vilified." *Id.* The only "profit" Charvat seeks is the $100 in minimum statutory damages to which, as the banks do not dispute, the statute entitles him. As this Court has recognized, the purpose of statutory damage provisions is to provide incentives for individual plaintiffs to enforce a statute's terms. *See Dryden v. Lou Budke's Arrow Fin. Co.*, 630 F.2d 641, 647 (8th Cir. 1980) (*Dryden I*). Charvat's invocation of EFTA's statutory damages provisions for the very purpose Congress intended puts him squarely within the class of plaintiffs the statute is designed to protect.

II. Charvat's Payment of an Illegally Charged Fee Is an Injury in Fact And Was Not Waived Below.

A. The banks here do not dispute that payment of a fee is an "economic injury" that is "sufficient to meet the demands of Art[icle] III." *Rodeway Inns v. Frank*, 541 F.2d 759, 763 (8th Cir. 1976). Instead, they contend that Charvat's payment of a fee did not injure him for Article III purposes because he had "actual knowledge of the fact and amount of the fee." First Nat'l Br. 39. The banks'

argument that *knowledge* of an illegal fee deprives a plaintiff of standing to challenge that fee, if adopted by this Court, would have disastrous consequences for the law. The argument suggests, for example, that federal courts would lack jurisdiction to hear a woman's claim of discriminatory pay under the Equal Pay Act as long as she knew her salary before taking the job. It is thus unsurprising that the banks do not cite even a single case adopting their position.

As explained in our opening brief, the question whether a plaintiff has suffered an injury has nothing to do with whether the plaintiff is *aware* of that injury. "[T]he standing requirements are satisfied" as long as the plaintiff's "injuries are actual, particularized to [the plaintiff], traceable to [the defendants'] acts, and redressable by a verdict in [plaintiff's] favor." *Curtis Lumber Co., Inc. v. La. Pac. Corp.*, 618 F.3d 762, 770 (8th Cir. 2010). Whether the plaintiff knew about or agreed to pay the fee constituting the injury, this Court has explained, is a separate question "better left to the applicable substantive law." *Id.* at 770-71. And under EFTA, the "applicable substantive law" is clear: a consumer cannot agree to waive the statute's requirements. *See* 15 U.S.C. § 1693l. Both this Court's precedent and EFTA itself thus foreclose the banks' "actual knowledge" argument. The banks make no response to these points.

B. The banks devote the majority of their discussion of the illegal fee to their claim that Charvat waived the issue. As explained below, the issue was in fact

squarely before the district court. But even if the banks were correct that Charvat did not raise the illegal fee, it would not render the issue waived. The banks' argument overlooks the "difference between a new argument and a new issue." *Hintz v. JPMorgan Chase Bank*, 686 F.3d 505, 508 (8th Cir. 2012); *see also Universal Title Ins. Co. v. United States*, 942 F.2d 1311, 1314 (8th Cir. 1991) (holding that the relevant question is not whether an argument raised on appeal is new, but whether the argument raises a new issue). At most, Charvat's argument that payment of an illegal fee gives him standing "raises only a new argument, not a new issue, and thus is not barred from review." *Hintz*, 686 F.3d at 508.

There is no question that the *issue* in this appeal—whether Charvat has standing to challenge the banks' failure to provide EFTA's required on-machine notice—"was squarely at issue below." *Weitz Co., LLC v. Lloyd's of London*, 574 F.3d 885, 891 (8th Cir. 2009). The question of Charvat's standing, and each element of the standing test, thus "were before the district court," and the court accordingly "analyzed each element" in concluding that Charvat lacks standing. *Hintz*, 686 F.3d at 508. Because both Charvat's argument and the district court's decision "essentially addressed the issue" of standing, the issue below is "broad enough to encompass all … related arguments on appeal." *Universal Title Ins.*, 942 F.2d at 1314. As this Court has explained, "it would be in disharmony with one of the primary purposes of appellate review were we to refuse to consider each nuance or

shift in approach urged by a party simply because it was not similarly urged below." *Id.* at 1314.

In any event, the question of the illegal fee was squarely before the district court. The complaints allege that the defendants charged Charvat "a fee of $2.00 in connection with the transaction[s]," JA 7 ¶ 7, 25 ¶ 7, and that both EFTA and its implementing regulations "prohibit ATM operators from imposing a fee on a consumer unless EFTA's notice and posting requirements are followed by the ATM operator." *Id.* at 9 ¶ 16, 27 ¶ 16. The theme of Charvat's claims is thus that the statutorily required on-machine notice is a "prerequisite to imposition of a usage fee upon a consumer." *Id.* at 11 ¶ 30, 29 ¶ 30. Indeed, the basis for his claims is that the defendants violated the statute by charging a fee without providing the notice EFTA requires.

Charvat's statement in response briefs filed in the district court that his "injury … is not the $2.00 fee, but the failure to provide information in the manner prescribed by Congress" is entirely consistent with the position in his complaint. Taken in context, the statement means only that the injury did not arise from First National's charging of a fee *alone*, but from its charging of an *illegal* fee in violation of EFTA's statutory notice requirement. The issues go hand in hand: Charvat could not, after all, have claimed that the defendants charged him an illegal fee if they had complied with EFTA's notice requirements; nor could he have brought a

claim for lack of required notice if he had not been charged a fee. To disclaim the issue of the fee would thus be to disclaim the foundation on which Charvat's claims are based. That is not a fair reading of his position as presented in the district court.

III. The Banks' Failure to Provide Notice in the Form Prescribed by Congress Is an Independent Injury for Standing Purposes.

The banks argue that Charvat did not suffer an informational injury because he received on-screen notice of the fees and thus "did not suffer a complete failure to obtain information." First Nat'l Br. 31. That misses the point. That Charvat may have received *some* notice does not forgive the banks' failure to provide notice "*in the form prescribed by Congress*." *In re Regions Bank ATM Fee Notice Litig.*, 2011 WL 4036691, at *4 (S.D. Miss. Sept. 12, 2011). In EFTA, "Congress created a statutory right to a particular form of notice," and a defendant's failure to provide that notice causes "a concrete, particular injury" under Article III. *Id.*

As our opening brief explains, First National's argument would effectively render unenforceable statutory notice requirements under a variety of statutes. A lender, for example, could simply bypass the Truth in Lending Act's requirement that it prominently disclose a loan's annual percentage rate in an offer of credit by disclosing the rate in the borrower's first monthly statement. And a debt collector could avoid disclosing that it is attempting to collect a debt as long as the fact is

disclosed at some point before the debtor makes a payment. Defendants under those and other statutes could always argue that the information required to be provided by notice was conveyed in some other way and thus that the statutory right to notice at the time and in the form prescribed by Congress is unenforceable. As this Court explained in *Dryden I*, a key purpose of statutory damages provisions is to "encourage private enforcement." 630 F.2d at 647. To "create an exception for debtors who have actual knowledge of their rights" would "undermine [that] purpose." *Weeden v. Auto Workers Credit Union, Inc.*, 173 F.3d 857 (6th Cir. 1999) (holding that the plaintiff's actual knowledge of the right to rescind a transaction did not excuse the defendants' failure to provide statutorily required notice of the right).

This Court and others have thus consistently rejected arguments that a plaintiff's actual knowledge of information required to be disclosed excuses the defendant from liability for failure to comply with a statutory notice requirement. In *Dryden II*, for example, this Court held the defendant liable for failure to make required TILA disclosures in writing as the statute required. *Dryden v. Lou Budke's Arrow Fin. Co.*, 661 F.2d 1186, 1190-91 (8th Cir. 1981). Although the plaintiff admitted that the terms were explained to her orally before she signed the loan papers, the Court concluded that it lacked "the power to excuse the failures of disclosure as technical or possibly orally made." *Id.* Regardless of whether it

"disagree[s] with Congress's wisdom in providing for statutory damages," the Court wrote, it is "bound to recognize the remedial purpose of the Act." *Id.* at 1191. Thus, "TILA plaintiffs who are otherwise entitled to recover need not show that they sustained actual damages stemming from the TILA violations before they may recover the statutory damages provided." *Id.*; *see also Whitlock v. Midwest Acceptance Corp.*, 575 F.2d 652, 654 (8th Cir. 1978) (holding that the defendant was liable under TILA for failing to "clearly identif[y]" a creditor in the transaction regardless of the plaintiff's "actual knowledge of the [other creditor's] precise role in the financing transaction").[4]

Similarly, every court to address the issue, other than the district court below, has held that failure to provide the on-machine notice required by EFTA gives rise to a cause of action for statutory damages even if on-screen notice was provided. *See* Charvat Br. 20-21. The banks do not dispute that adopting their theory would effectively eliminate EFTA's dual-notice requirement even for pending cases—a policy choice Congress rejected in amending the statute—because consumers who receive *either* of the two required forms of notice would

[4] Other courts have reached the same conclusion. *See, e.g., Purtle v. Eldridge Auto Sales, Inc.*, 91 F.3d 797, 800 (6th Cir. 1996) (holding that a consumer did not need to show that she "was actually misled or deceived" to prevail on a TILA claim for statutory damages); *Eustace v. Cooper Agency, Inc.*, 741 F.2d 294, 300–01 (10th Cir. 1984) (holding that the plaintiff's admission "that all material facts were known to her before she entered into the transaction" did "not excuse a failure to comply with the mandatory disclosure requirements, or prevent recovery").

always have the "actual knowledge" that, the banks claim, would deprive them of standing. The banks' theory, in other words, proves too much.

IV. EFTA Itself Creates a Statutory Injury that Is Concrete And Particularized.

In response to Charvat's argument that violation of statutory rights created by EFTA constitute an Article III injury, the banks contend that "EFTA … cannot simply eliminate the constitutional requirement that a plaintiff demonstrate a concrete and particularized injury in fact." First Nat'l Br. 27-28. While that is correct as a general matter, the banks are wrong to assume that the "concrete and particularized injury" that Article III requires must originate from some interest *outside* the statute. As we explained in our opening brief (at 26-27), injuries arise from violations of legally protected rights, and those rights, in turn, arise from statutes. Thus, "Congress has the power to create new legal rights, including rights of action whose only injury-in-fact involves the violation of that statutory right." *Beaudry*, 579 F.3d at 707 (internal quotation marks omitted); *see Oti Kaga, Inc. v. S. Dakota Hous. Dev. Auth.*, 342 F.3d 871, 881 (8th Cir. 2003) ("Congress may … enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." (internal quotation marks omitted)). In such cases, Article III's injury requirement "is directly linked to the question of whether [the plaintiff] has suffered a cognizable statutory injury under the

[statute]." *Robey v. Shapiro, Marianos & Cejda, L.L.C.*, 434 F.3d 1208, 1212 (10th Cir. 2006) (holding that a plaintiff had standing to bring FDCPA claims in the absence of actual injury).

The banks make no effort to explain why their violation of Charvat's statutory rights under EFTA are not "concrete and particularized" in the way that Article III requires. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). EFTA does not "authorize suits by members of the public at large." *Beaudry*, 579 F.3d at 707 (internal quotation marks omitted). Rather, it creates a cause of action against banks that fail to comply with its requirements "with respect to any consumer." 15 U.S.C. § 1693m(a). The statute thus requires a nexus between the individual plaintiff and the legal violation, and Charvat is "among the injured," because he alleges that the defendants violated the statute "with respect to" him. *Beaudry*, 579 F.3d at 707. Charvat's personal involvement in ATM transactions involving illegal fees provides a court all the concrete particularity needed to resolve his claims.

V. The Banks Caused Charvat's Injury.

Finally, the banks make a half-hearted causation argument, contending that Charvat lacks standing because his "Complaint fails to include any allegations of [their] 'prominent role' in relation to [his] alleged injuries." First Nat'l Br. 47. But Charvat's complaints spell out exactly how the banks injured him: by failing to provide him with the on-machine notice required by statute and then charging him

an unlawful "fee of $2.00 in connection with the transaction." JA 7 ¶¶ 7 & 9, 25 ¶¶ 7 & 9. That is precisely the sort of causal link between the injury asserted and the challenged conduct that standing requires.

Disputing this, and rehashing their injury-in-fact argument, the banks contend that Charvat's "claimed injuries on appeal—being charged a $2.00 fee and not receiving an on-machine notice of the fee—are not fairly traceable to any wrongful action" on their part. First Nat'l Br. at 47. But Charvat was not simply "charged a $2.00 fee"; he was charged an *illegal* $2.00 fee *by the banks*. And what made the fee illegal was the banks' own failure to comply with federal law. If that does not satisfy the causation test for standing, it is hard to think of what would.[5]

The banks contend that Charvat's informational injury is "not fairly traceable" to their unlawful conduct. First Nat'l Br. 47. That contention blinks reality. If Charvat has suffered a cognizable injury by not receiving information in the manner prescribed by Congress (and, as shown above, he has), then that injury is unquestionably attributable to the banks' failure to provide him with the required information.

[5] The banks assert that *Charvat's acquiescence* is the action that caused his injury, not their failure to comply with the statute. First Nat'l Br. at 48. But, as previously explained (at 7), both this Court's precedent and EFTA foreclose acquiescence as a basis for defeating Charvat's claims.

CONCLUSION

This Court should reverse the district court's decisions below.

Respectfully submitted,

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January 30, 2013

CERTIFICATE OF COMPLIANCE

I hereby certify that my word processing program, Microsoft Word, counted 3,962 words in the foregoing brief, exclusive of the portions excluded by Rule 32(a)(7)(B)(iii).

/s/ Deepak Gupta

Deepak Gupta

January 30, 2013

CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2013, I electronically filed foregoing brief with the Clerk of the Court by using the Appellate CM/ECF system. All participants are registered CM/ECF users, and will be served by the Appellate CM/ECF system.

/s/ Deepak Gupta

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