NO. 13-679

IN THE

Supreme Court of the United States

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

v.

JAREK CHARVAT,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

MICHAEL LEWIS
The Lewis Firm PLLC
901 New York Avenue, NW
East Tower, Suite 450
Washington, DC 20001
(202) 630-6006

TRACY HIGHTOWER-HENNE
Hightower Reff Law LLC
1625 Farnam Street
Suite 830
Omaha, NE 68102
(402) 932-9550

DEEPAK GUPTA
Counsel of Record
GREGORY A. BECK
Gupta Beck PLLC
1625 Massachusetts Ave.
Suite 500
Washington, DC 20036
(202) 888-1741
deepak@guptabeck.com

Counsel for Respondent

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QUESTIONS PRESENTED

1. Did the respondent suffer an economic injury sufficient to support Article III standing when he was charged and paid fees that are prohibited by the Electronic Funds Transfer Act (EFTA)?

2. Did a one-sentence statement in respondents' district-court briefing waive his entitlement to rely on his payment of those illegal fees as a basis for standing to bring suit under EFTA?

3. Did the court of appeals correctly hold that, even setting aside the economic-injury and waiver issues, respondent suffered an informational injury sufficient to support standing when the petitioners denied him notice of the fees in the manner that EFTA requires?

4. Can petitioners prevail on all three logically antecedent questions listed above and, if so, can this case be accurately characterized as one in which the plaintiff "suffers no concrete harm and alleges an injury only as a bare, technical violation of a federal statute," as the petition assumes?

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INTRODUCTION

Petitioners pitch this case as a vehicle for exploring the issue left undecided in *First American Financial Corp. v. Edwards*, 132 S. Ct. 2536 (2012): whether a plaintiff with a statutory cause of action can satisfy Article III's injury-in-fact requirement when he or she has suffered "no concrete harm." Because that question was not decided below and is not presented here, this case would be an exceptionally poor vehicle to address it.

Petitioners' question rests on the assumption that respondent Jarek Charvat was not injured beyond a "bare, technical violation of a federal statute." But Charvat argued below that he *did* suffer concrete injury, in two distinct ways, when the petitioners charged him fees for using an ATM machine without posting notice of those fees in the manner then required by the Electronic Funds Transfer Act (EFTA).

First, Charvat argued that he was charged and paid fees that EFTA prohibits—a classic economic injury. Such "palpable economic injuries have long been recognized as sufficient to lay the basis for standing." *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972). *Second*, he argued that he was deprived of notice of those fees until he had nearly completed his transactions—an informational injury. The court of appeals agreed that he suffered informational injury and declined to address his economic injury because one injury was enough.

As a result, the court below had no occasion to address the question petitioners pose here: whether Charvat's EFTA claim, standing alone, would have given him standing absent any concrete injury. To the extent that the decision below touched on that question at all, it *agreed* with petitioners "that Article III precludes a plaintiff from asserting a claim for an abstract statutory violation." Pet. App. 9a (citing *Summers v. Earth Island*

Inst., 555 U.S. 488, 497 (2009)). And the court made clear that this case does *not* implicate that question because petitioners failed to provide Charvat with legally required notice and "charged him a prohibited fee following an ATM transaction that he initiated and completed"—thus injuring him "in a concrete and personal way," *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring)).

If this Court were to grant certiorari anyway, it would have to address both of Charvat's claimed injuries, along with the factbound, case-specific question of whether he waived his economic-injury argument in the district court, as petitioners contend. The answer to each one of these three threshold issues—economic injury, waiver, and informational injury—is a necessary "predicate to an intelligent resolution of the question presented." *Ohio v. Robinette*, 519 U.S. 33, 38 (1996). Petitioners do not even attempt to demonstrate that these threshold issues merit this Court's review. Nor could they. There is no circuit split: Every court to consider the question has held that plaintiffs in Charvat's shoes have standing under the EFTA provision at issue. Nor does the issue have any continuing importance given Congress's repeal of the provision under which Charvat is suing.

Even if the three threshold questions could be overcome, this Court would be faced, at best, with reviewing Congress's authority to pass a hypothetical statute that would have allowed *any* person to sue, regardless of whether they were charged a fee or even visited a bank. A decision in such a case would have no real-world impact, even on the handful of other cases still pending under the repealed statute. If petitioners are correct that the question presented "arises again and again, under numerous federal statutes," this Court can afford to wait for a case in which the issue has actually been decided by the lower court and is presented by the facts of the case.

STATEMENT

Before its amendment in 2012, the Electronic Fund Transfer Act (EFTA) prohibited ATM operators from imposing fees for ATM cash withdrawals unless they provided prior notice of the fee in a specific manner. 15 U.S.C. § 1693b(d)(3)(A), (C), *amended* Pub. L. No. 112-216 (Dec. 20, 2012). First, the statute required an ATM operator to provide on-machine notice "posted in a prominent and conspicuous location on or at the automated teller machine." *Id.* § 1693b(d)(3)(B). Second, the statute required a separate on-screen notice "after the transaction is initiated and before the consumer is irrevocably committed to completing the transaction." *Id.* Taken together, these provisions made it illegal for an ATM operator to charge a fee without providing both the required on-machine and on-screen notices.

Plaintiff-appellant Jarek Charvat made a withdrawal from an ATM owned by petitioner Mutual First Credit Union. Pet. App. 2a-3a. Although Mutual First charged Charvat a $2 fee for the transaction, Charvat alleged that no notice of the fee was posted on the machine or in its vicinity. *Id.* Charvat therefore did not receive notice until he had almost completed his transaction, when an on-screen notice informed him of the fee. *Id.* Charvat later made separate cash withdrawals from another ATM owned by petitioner First National Bank of Wahoo. *Id.* Again, no notice of the fee was posted on the ATM, but Charvat was nevertheless charged $2 for his transactions. *Id.*

Charvat sued petitioners in the U.S. District Court for the District of Nebraska, alleging that the banks failed to post notice of their ATM fees "on or at" their machines, as required by EFTA at that time. 15 U.S.C. § 1693b(d)(3)(B). First National Bank of Wahoo moved to dismiss, arguing that the district court lacked subject-

matter jurisdiction because Charvat had suffered no injury and thus lacked standing to bring his claim. Pet. App. 3a. The district agreed, dismissing both complaints for lack of jurisdiction on the ground that Charvat failed to allege an Article III injury and thus lacked standing to enforce his rights under the statute. *Id.*

Charvat appealed to the Eighth Circuit, arguing that "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 [the banks'] failure to provide the statutorily required notice." *Id.* at 5a. The petitioners responded to the economic injury point by arguing that Charvat had waived it in the district court. *Id.* The Eighth Circuit "assum[ed], without deciding, that Charvat … waive[d] the claim that the $2.00 fee constituted an injury in fact," concluding it was unnecessary to decide the issue because Charvat's informational injury was "alone … sufficient to confer standing, even without an additional economic or other injury." *Id.* at 7a.

The court agreed with the petitioners "that Article III precludes a plaintiff from asserting a claim for an abstract statutory violation," Pet. App. 9a (citing *Summers*, 555 U.S. at 497), but held that failure to provide Charvat with the legally required notice before "charg[ing] him a prohibited fee" injured him "in a concrete and personal way." *Id.* (quoting *Lujan*, 504 U.S. at 581 (Kennedy, J., concurring)). The court therefore concluded that the district court had erred in holding that Charvat lacked standing. *Id.*

REASONS FOR DENYING THE PETITION

I. Because Charvat Suffered a Direct Economic Injury, this Case Does Not Implicate the Petitioners' Question Presented.

Petitioners' entire argument is premised on a flawed assumption: that Charvat alleged only a "technical statutory violation that inflict[ed] no economic or other harm." Pet. 9. In fact, the gravamen of Charvat's complaint is that the petitioners caused him concrete economic harm by charging him ATM fees in violation of EFTA. Because Charvat *was* injured, this case does not present the question whether Charvat would have standing in the *absence* of an injury. The question that the petitioners ask this Court to address is thus not presented in this case.

The provision of EFTA on which Charvat's claims are based, prior to its amendment in 2012, provided that "*[n]o fee may be imposed* by any automated teller machine operator" unless the notices required by the statute—including a prominent notice posted on the machine—are first provided to the consumer. 15 U.S.C. § 1693b(d)(3)(C) (emphasis added). The statute thus provided banks with a choice: Either charge a fee and provide the notice required by statute, or provide no notice and charge no fee. Petitioners here, however, charged a fee *without* providing the required notice, and, thus, charged Charvat a fee that the statute prohibited. Charvat's cause of action challenges these illegal fees and thus presents a classic injury-in-fact. Such "palpable economic injuries have long been recognized as sufficient to lay the basis for standing." *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972).

To be sure, Charvat's payment of ATM fees is not a large injury. But standing requires only that the plaintiff has suffered a concrete injury, not that the injury must

be "significant." *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 690 (1973). The injury-in-fact requirement "serves to distinguish a person with a direct stake in the outcome of a litigation—even though small—from a person with a mere interest in the problem." *Id.* An actual out-of-pocket cost attributable to a defendant's conduct—no matter how small—is thus necessarily sufficient to establish Article III standing. *See id.* ("We have allowed important interests to be vindicated by plaintiffs with no more at stake in the outcome of an action than a fraction of a vote, ... a $5 fine and costs, ... and a $1.50 poll tax."). The injury is both concrete and particularized to Charvat. Article III's requirements are thus satisfied.[1]

The question whether Charvat suffered an actual injury is a logically "prior question," *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 381-82 (1995), to the question presented, that the Court would need to resolve as a necessary "predicate to an intelligent resolution of the question." *Ohio v. Robinette*, 519 U.S. 33, 38 (1996). Because Charvat suffered an actual, economic injury, the Court would have no need to reach the question the petitioners ask it to decide.

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[1] That Charvat chose to proceed with his transaction after receiving on-screen notice has no bearing on whether he suffered an injury for Article III purposes. Charvat has less money today because the defendants violated the statute. Moreover, because the right to receive on-machine notice is unwaivable, Charvat could not have consented to paying a fee in violation of the statute. EFTA prohibits waiver by agreement "of any right conferred or cause of action created by this [statute]." 15 U.S.C. § 1693*l*.

II. The Unresolved Question of Whether Charvat Waived Reliance on His Economic Injury Makes This Case Even Less Suitable for Review.

In response to Charvat's claimed economic injury, the respondents argued below that Charvat had waived the issue in the district court. The Eighth Circuit assumed, without deciding, that the petitioners were correct. But this Court would not have that luxury if it wishes to reach the question presented. The Court cannot simply *assume* that Charvat suffered no injury for the purpose of reaching the question of whether he would still have standing. Such an assumption could later be "show[n] to be ridiculous, a risk that ought to be avoided." *Lebron*, 513 U.S. at 382. Whether Charvat waived his claim to economic injury is thus a second "prior question," *id.*, to the question presented.

A. If this Court reviewed the waiver question, it would conclude that economic injury was not waived below. The complaints plainly plead an economic injury, alleging that the defendants charged Charvat "a fee of $2.00 in connection with the transaction[s]," Cmplt. at 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 has consistently been 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.

In arguing that the issue was waived, the petitioners relied on a single sentence from Charvat's trial-court briefing, where he wrote that his "injury … is not the $2.00 fee, but the failure to provide information in the manner prescribed by Congress." That statement is entirely consistent with the position in his complaint. Taken

in context, the statement means only that the injury did not arise from the petitioners' charging of a fee *alone*, but from the 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 given him proper notice of the fee; nor could he have brought a claim for lack of required notice if no fee had been charged. 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 (or even a plausible reading) of his position as presented in the district court.

But even if the banks were correct that Charvat did not raise the illegal fee in the district court, it would not render the issue waived. Although issues not raised in the district court generally cannot be made for the first time on appeal, "parties are not limited to the precise arguments they made below." *Yee v. Escondido*, 503 U.S. 519, 534 (1993). "Once a ... claim is properly presented, a party can make any argument in support of that claim." *Id.*; *see also Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 78 n.2 (1988).

At most, Charvat's point that payment of an illegal fee gives him standing raised a new *argument* in the court of appeals, not a new *issue*. Charvat unquestionably contended in the district court that he had standing to pursue his claims, and an additional reason in support of that contention would be, at most, "a new argument to support what has been [a] consistent claim." *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 893 (2010) (internal quotation marks omitted).

B. If the Court agreed that the fee issue is waived, it would make the case an even worse vehicle for reviewing the question presented. The question that the petitioners ask this Court to decide is whether "Congress has the

authority to confer Article III standing to sue" based on "only a bare, technical violation of a federal statute." Pet. i. But the now-repealed statute at issue in this case did not create any such abstract right. It prohibited the charging of ATM fees, and created a right of action for violating that prohibition—a right that could be vindicated only by individuals who actually paid the illegal fees. It is difficult to understand how this Court could decide whether Congress had authority to create that cause of action without considering the conduct that the statute prohibited.

At best, the Court would be faced with reviewing Congress's authority to pass a hypothetical version of the statute that would have allowed *any* person to sue, regardless of whether that person was charged a fee or even visited the bank branch. A decision in such a case would have no real-world impact, even on the handful of other cases still pending under the repealed statute.

If the Court wishes to review Congress's power to create the cause of action at issue in this case, it would be better served by waiting for a case that allows it to consider all aspects of the statute under review. Otherwise, the issue is not worth the Court's attention.

III. The Holding that Charvat Suffered an Informational Injury Implicates Neither a Circuit Split Nor a Question of Continuing Importance.

Even setting aside Charvat's financial injury, this case does not present the question whether a plaintiff may sue in the absence of concrete harm. The court of appeals held that Charvat suffered a *separate* injury when he was deprived of notice of ATM fees before beginning his transaction. Because the court held that Charvat *had* suffered an injury, it never held—as the petitioners claim—that plaintiffs have standing to bring

statutory claims "regardless of whether they can claim actual harm." Pet. 12. To the contrary, to the extent that the decision below passed upon petitioners' question presented at all, it *agreed* with petitioners "that Article III precludes a plaintiff from asserting a claim for an abstract statutory violation." Pet. App. 9a.

A. EFTA's former requirement that ATM operators provide notice "on or at" ATMs in addition to on-screen notice was an essential part of the statute's notification scheme. As Congress recognized, consumers are much less likely to reject an ATM fee after they have already invested time in a transaction. EFTA's requirement of notice before consumers begin a transaction was thus necessary to accomplish its purpose of protecting consumers and encouraging competition among ATM operators. The Eighth Circuit's holding that the failure to provide this notice constituted information injury is an independent basis for Charvat's Article III standing and yet another issue that this Court would need to resolve before reaching the question presented.

This Court has long held that violation of a statutory right to receive information is an injury sufficient to satisfy Article III's requirements even in the absence of financial loss. In light of that precedent, every court to have considered the issue—other than the district court below—has held that failure to provide the on-machine notice EFTA requires constitutes a concrete, particular injury for Article III purposes.

In passing EFTA's notice requirements, Congress relied on a Congressional Budget Office report warning that banks often failed to disclose fees before consumers initiated ATM transactions and that this failure was an "important factor inhibiting price competition among Bank ATM owners." *Congressional Budget Office, Competition in ATM Markets* (1998), *available at*

http://www.cbo.gov/publication/10946. By requiring on-machine notice, Congress ensured that a consumer can determine what fee will be charged *before* the consumer has waited in line, "inserted his or her card, entered a PIN, viewed an advertising message, selected an account, and inserted an amount," by which time "the consumer is trapped into paying the fee." *Hearing on Automatic Teller Machine Fees and Surcharges Before the Senate Comm. on Banking, Housing and Urban Affairs* (June 11, 1997) (prepared testimony of Edmund Mierzwinski). Congress recognized that those actions take time that commits consumers to the transaction, making it unlikely that they will go through the trouble of leaving the ATM and repeating the process elsewhere. As Senator D'Amato, a key proponent of the law, explained:

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

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

B. In light of Congress's intentional adoption of a dual-notice scheme, the lower courts have been unanimous in holding that failure to provide the on-machine notice required by EFTA constitutes an injury for Article III purposes even in the absence of monetary damages. As one district court explained, "Congress created a statutory right to a particular form of notice" under EFTA, and a defendant's failure to provide that notice to

the plaintiff "is a concrete, particular injury" under Article III. *In re Regions Bank ATM Fee Notice Litig.*, 2011 WL 4036691 (S.D. Miss. 2011).[2]

The conclusion of those courts is compelled by this Court's longstanding precedent holding that the statutory right to receive information is sufficient to establish Article III standing. *See, e.g., Fed. Election Comm'n v. Akins*, 524 U.S. 11, 21 (1998). In *Public Citizen v. U.S. Department of Justice*, for example, this Court held that the plaintiff had standing to challenge the Justice Department's failure to provide access to information, the disclosure of which was allegedly required by the Federal Advisory Committee Act, because the inability to obtain such information "constitutes a sufficiently distinct injury to provide standing to sue." 491 U.S. 440, 449 (1989); *see also Akins*, 524 U.S. at 24-25. Following *Public Citizen* and *Akins*, the federal circuits have identified informational injuries sufficient to confer standing in a wide variety of statutory contexts, from government-sunshine and election law to health, safety, and environmental regulation.[3]

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[2] *See, e.g.*, *Mabary v. Hometown Bank, N.A.*, 2012 WL 3765020 (S.D. Tex. 2012); *Zabienski v. ONB Bank & Trust*, 2012 WL 3583020, at *1 (N.D. Okla. 2012); *Sucec v. The Greenbrier*, 2012 WL 3079233 (S.D.W. Va. 2012), *report and recommendation adopted*, 2012 WL 3079212 (S.D.W. Va. 2012); *Campbell v. Hope Cmty. Credit Union*, 2012 WL 423432 (W.D. Tenn. 2012); *Kinder v. Dearborn Fed. Sav. Bank*, 2011 WL 6371184 (E.D. Mich. 2011); *Regions Bank*, 2011 WL 4036691.

[3] *See, e.g.*, *Am. Canoe Ass'n, Inc. v. City of Louisa Water & Sewer Comm'n*, 389 F.3d 536, 542 (6th Cir. 2004) (ongoing failure to comply with monitoring and reporting requirements of the Clean Water Act created informational injury); *Grant v. Gilbert*, 324 F.3d 383, 387 (5th Cir. 2003) ("The inability to obtain information required to be disclosed by statute constitutes a sufficiently concrete

(continued …)

* * *

At the end of the day, this case is a wholly unsuitable vehicle to address the question that the petitioners want this Court to address. That is so for one simple reason: The case does not present that question at all. Instead, this case would require the Court to confront three threshold issues—economic injury, waiver, and informational injury—none of which is even claimed to be certworthy. Nor can the Court skip over those questions; their resolution would determine whether the premise on which the entire petition rests is true or false. The only alternative—to decide a case on the basis of a manifestly false premise—is unacceptable.

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and palpable injury to qualify as an Article III injury-in-fact."); *Heartwood v. U.S. Forest Serv.*, 230 F.3d 947, 952 n.5 (7th Cir. 2000) (because the National Environmental Policy Act requires environmental assessments "to provide stakeholders with information necessary to monitor agency activity," failure to perform an assessment creates "a cognizable injury-in-fact for plaintiffs who are deprived of this information"); *Pub. Citizen v. FTC*, 869 F.2d 1541, 1543 (D.C. Cir. 1989) (plaintiffs have standing where "they are being deprived of information and warnings that will be of substantial value to them and to which they are legally entitled" under the Comprehensive Smokeless Tobacco Health Education Act); *Alvarez v. Longboy*, 697 F.2d 1333, 1338 (9th Cir. 1983) (failure to provide notice of an ongoing strike at time of employment as required by the Farm Labor Contractor Registration Act).

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

DEEPAK GUPTA
Counsel of Record
GREGORY A. BECK
Gupta Beck PLLC
1625 Massachusetts Avenue, NW
Washington, DC 20036
(202) 888-1741
deepak@guptabeck.com

MICHAEL LEWIS
The Lewis Firm PLLC
901 New York Avenue, NW
East Tower, Suite 450
Washington, DC 20001
(202) 630-6006

TRACY HIGHTOWER-HENNE
Hightower Reff Law LLC
1625 Farnam Street, Suite 830
Omaha, NE 68102
(402) 932-9550

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