**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
ILLINOIS EASTERN DIVISION**

FEDERAL TRADE COMMISSION, Plaintiff, v. WALMART INC., Defendant.	Case No. 1:22-cv-3372 Hon. Manish S. Shah

**BRIEF OF THE CHAMBER OF COMMERCE
OF THE UNITED STATES OF AMERICA AND RETAIL LITIGATION CENTER, INC., AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS**

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The Federal Trade Commission asks this Court to green light an unprecedented claim that would expand the Commission's power to regulate unfair trade practices beyond the limits of its authority under the FTC Act or any rules it has promulgated. The FTC seeks to impose liability on a business that provides lawful, routine money-transfer services to millions of satisfied consumers, based on its alleged failure to prevent a small fraction of transactions in which third-party fraudsters use its publicly offered intermediary services as a vehicle to collect payments. The complaint acknowledges that Walmart has implemented significant anti-fraud programs and has continued to enhance them over time. But it faults Walmart for not doing more—without pointing to any authority that requires businesses to adopt the FTC's preferred anti-fraud measures, nor any law that provides fair notice of what anti-fraud measures the FTC believes are necessary. The Chamber of Commerce of the United States of America and the Retail Litigation Center, Inc., submit this brief as *amici curiae* in order to highlight the dangers of the FTC's overreach to millions of American businesses, small and large, that offer products and services to the public.

The Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Retail Litigation Center, Inc., was established for the purpose of representing the Nation's leading retailers in the courts. Its member retailers employ millions of workers

throughout the United States, provide goods and services to hundreds of millions of consumers, and account for more than a trillion dollars in annual sales.

The Chamber and the RLC advocate for clear rules under which businesses can operate with predictability, as well as for limiting regulatory overreach that imposes undue costs on businesses. Legal uncertainty and increased regulatory compliance costs harm businesses and consumers alike. They chill innovation, raise barriers to entry for new competitors, and result in higher costs passed on to consumers.

The FTC's action here, even if motivated by the best intentions to help some consumers who are victims of fraud, has impacts for commerce far beyond the money-transfer transactions that are the direct subject of the suit. Indeed, the FTC itself warns that scammers also commonly attempt to have victims purchase gift cards for transfer to the scammers, which can be purchased from a variety of different sellers and can be redeemed at a wide range of businesses.[1] If the FTC's theory is correct, any number of other legitimate services could also be accused of being used by criminals to support their fraudulent actions. In the course of perpetrating a fraud, a con man may create a dummy email address to message his mark; buy a new SIM card for a follow-up text; forge a document using word-processing software; pick up a money transfer or redeem a gift card purchased by the victim; or use a ride-share app to summon a getaway car. Under the FTC's theory, the email service provider, the phone company, the software maker, the money transfer business or gift card retailer, and the ride-share company all face new legal uncertainty; they may know at the aggregate level that some small fraction of their products or services will be used by criminals to facilitate a fraud, but they have no idea what they are obligated to do to prevent it or whether they will face liability for not doing enough.

[1] *See Gift Card Scams*, FTC, https://consumer.ftc.gov/articles/gift-card-scams (last visited Sept. 6, 2022).

The broad impacts of the FTC's novel theory here also highlight that the FTC is far beyond its authority. Nothing in the FTC Act adopted in 1914 or the Telemarketing and Consumer Fraud and Abuse Prevention Act adopted in 1994 (the "Telemarketing Act") indicates that Congress empowered the FTC to become a nationwide regulator of businesses' anti-fraud monitoring programs. Now, after over 100 years of enforcement of the FTC Act and 25 years since the FTC first adopted the Telemarketing Sales Rule in 1995, the FTC claims to have discovered new and transformative powers previously hidden in its long-existing statutory authorization. This is a bridge too far. Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001); *see also AMG Capital Mgmt., LLC v. FTC*, 141 S. Ct. 1341, 1349 (quoting *American Trucking* and rejecting the FTC's claim of authority to seek monetary remedies). And even if such power could be construed as within the FTC Act's authority to regulate "unfair" acts or the Telemarketing Act's direction to regulate telemarketing, the FTC has not promulgated any regulations requiring businesses to adopt anti-fraud compliance measures to prevent their honest services from being used by bad actors. Businesses will be left without fair notice of what is required for them to comply with the law (or at least the FTC's newfound interpretation of the law).

To allow the FTC's complaint to go forward would be legally incorrect and would risk exposing lawful businesses nationwide to vague claims and expensive discovery to evaluate whether they do "enough" in handling routine transactions to detect and prevent crimes by unrelated third parties. *Amici* urge the Court to grant Walmart's motion and dismiss this case at the pleading stage.

I. Businesses are entitled to fair notice of what is prohibited or required under the FTC Act and TSR.

The FTC's action should be dismissed because the FTC lacks the legal authority to declare the conduct at issue in this case illegal. But even if the Court were to accept that the FTC has newly discovered some long-dormant authority buried in the FTC Act or the Telemarketing Act, nothing in those statutes or the FTC's promulgated regulations provides fair notice to Walmart—or any other business—that the kind of conduct alleged here is illegal. The FTC's complaint here is a dramatic overreach. It attempts to hold a business offering routine intermediary services liable for violations of Section 5 of the FTC Act, 15 U.S.C. 45(a), and its Telemarketing Sales Rule (the "TSR"), 16 C.F.R. § 310.3, simply because third parties abused the company's services.

As Walmart's brief aptly explains, the powers of the FTC and the Court are limited by constitutional and statutory constraints to sanctioning conduct only when alleged violators have received fair notice of what the law prohibits or requires. *See* Walmart Br. at 30-31, 38-40; *see also FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (holding that the Due Process Clause provides that "[a] fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required"). The requirement of fair notice is particularly acute when an administrative agency, like the FTC, is given authority under a vague statue prohibiting "unfair" acts and charged with promulgating "rules which define with specificity acts or practices which are unfair or deceptive…." *See* Walmart Br. at 38; 15 U.S.C. § 57a(a)(1)(B).

Without fair notice, businesses undertaking even ordinary and common industry practices face uncertainty as to whether they are doing something—or failing to do something—that will lead the FTC to declare it "unfair" and to seek to penalize the business. Such uncertainty has real economic costs, which the Court must consider when construing the law. Indeed, judicial

construction of laws regulating businesses is "grounded not only on economic prediction" but also on "business certainty." *Arizona v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 354 (1982) (describing judicial construction of the Sherman Act). To be a "profitable business," a company "must have some degree of certainty beforehand as to when it may proceed to reach decisions without fear of later evaluations labeling its conduct" as unlawful. *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 679 (1981). Business uncertainty hampers innovation and investment activity to the detriment of businesses and consumers alike.

As the federal regulator of unfair business practices, the FTC has a significant effect on business practices throughout the country. Confusion about the FTC's powers—particularly when paired with the threat of liability in the millions or billions of dollars—harms the nation's economy. Further, businesses cannot discern from enforcement actions how to steer future conduct and comply with the law, because the FTC uses the statute to extract settlements that yield little insight as to what constitutes illegal conduct for other businesses. *See* Walmart Br. at 39-40 (discussing the complaint's citation to nonprecedential consent orders negotiated with MoneyGram and Western Union). In the absence of binding law, businesses providing routine lawful services have no fair notice as to how much anti-fraud policing they are required to do. And without fair notice, claims like those here cannot be allowed to succeed. *See Fox Television Stations*, 567 U.S. at 253.

II. Completing a routine sale of a publicly offered good or service is not "substantial assistance" of a fraudster.

The FTC's action also seeks to drastically expand its powers under the TSR by turning providers of routine business services into insurers against third-party misconduct. Congress authorized the FTC to promulgate the TSR in order to prevent deceptive and abusive telemarketing acts or practices. 15 U.S.C. § 6102; *see also* Compl. ¶ 111. To state its claim

under 16 CFR § 310.3(b), the FTC must allege, *inter alia*, that the defendant provided "substantial assistance or support" to a person that it "knows or consciously avoids knowing" is engaged in illegal telemarketing. 16 C.F.R. § 310.3(b).

As Walmart's brief explains well, the "substantial assistance" element incorporates traditional aiding-and-abetting principles into the Section 310.3(b) claim and requires "something more than routine professional services provided to the primary wrongdoer," such that the conduct rises to the level of "active participation" in the unlawful acts of another. Walmart Br. at 17-18 (quoting Restatement (Third) of Torts: Liability for Economic Harm § 28 cmt. d (2020)). By definition, a business's decision not to adopt all of the FTC's preferred anti-fraud measures is not the same as active participation in the acts of to a fraudster. Walmart Br. at 20-22. This is consistent with the well-established principle that intermediary service providers are not liable for third-party criminal activity that uses their services. *See* Walmart Br. at 31-34 (citing caselaw explaining there is no public policy that imposes on intermediaries a duty to detect fraud or prevent injury caused by third parties).

Here, the money transfers at issue are not fraudulent in the sense of being unauthorized by the sender or sent by an imposter posing as the sender; they are transfers that bona fide senders intended to initiate and asked Walmart to process. The fraud at issue is that a criminal has, before the consumer sets foot in a Walmart, tricked that consumer into initiating the transfer for a false purpose. In other words, the FTC wants businesses to do more to deny services to real customers based on *why* those customers want to purchase services. The fact that there are real customers initiating these transactions readily distinguishes the FTC's claims here from past FTC enforcement actions where businesses offered products that were easily used to initiate unauthorized money transfers without consent of the true accountholder. *Cf. FTC v. Neovi, Inc.*,

604 F.3d 1150, 1153 (9th Cir. 2010) (website allowed fraudsters to create and deliver unverified checks from unauthorized accounts); *FTC v. Windward Mktg., Inc.*, 1997 WL 33642380, at *6 (N.D. Ga. Sept. 30, 1997) (defendant continually deposited unauthorized bank drafts into telemarketer's account, despite 40% being returned as unauthorized).[2]

At most, the TSR states that businesses should not complete transactions if they "know or consciously avoid knowing" that a party to the transaction is engaged in telemarking fraud. But the TSR creates no affirmative obligation to investigate each transaction in order to gain knowledge, nor does it require businesses to err on the side of denying transactions whenever there is any doubt. *See* Walmart Br. at 22-24 (summarizing caselaw on the high bar to establish conscious avoidance of knowledge).

Mere knowledge that a business's payment processing service has been used by fraudsters—in this case, general knowledge that a miniscule fraction of millions of transactions were induced by third parties' fraud—cannot be enough to hold the business liable. Courts analyzing comparable situations have declined to extend liability for businesses offering routine intermediary services absent knowledge of a specific act by a specific third party. *See Perfect 10, Inc. v. Visa Int'l Service Ass'n.,* 494 F 3d 788, 796 (9th Cir. 2007) (declining to hold credit card companies liable for processing payments to the infringing websites despite having general knowledge of ongoing infringement); *Doe No. 1 v. Uber Techs., Inc.* 79 Cal. App. 5th 410, 415 (2022) (holding company not liable under tort for third-party criminal acts occurring to riders because the company did not create the risk of the criminal activity).

In sum, completing routine, lawful transactions that bona fide customers wish to initiate—particularly when only a tiny fraction of such transactions are subject to a third party's

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[2] The FTC pursued solely Section 5 claims in both *Neovi* and *Windward Marketing*, which further underscores the unprecedented nature of its TSR claims in this action.

fraud—is not the same as actively participating in fraud and is not actionable under the FTC Act or the TSR.

III. Overly aggressive anti-fraud measures harm consumers and chill commerce.

Allowing claims like these to succeed would have a detrimental impact on businesses and consumers alike. Essentially, the FTC seeks to obligate businesses to dig deeper into why their customers are purchasing particular services, and to deny those services if the customer's response does not meet some unspecified criteria to validate that they are purchasing those services for the "right" reasons. The result would be both inequitable and ineffective.

Setting the optimum level of anti-fraud measures is a complex calculus in which harm to consumers can occur on both sides of the spectrum, whether a business's anti-fraud program is more conservative or more aggressive in blocking customer's transactions. If the business is more conservative about intervening in consumer transactions, it will permit more transactions to be completed and a greater number of fraudulent transactions may slip through. If the business is more aggressive, it will block more transactions and have a greater number of false positives where it blocks legitimate transactions that raise suspicion in some way.

There can be real harm to consumers when businesses block legitimate transactions. For example, the FTC points to pernicious "grandparent" scams, in which fraudsters pretend to be grandchildren in need. Those are certainly awful crimes that should be policed. But there are doubtless *real* transfers from grandparents to grandchildren. Set the legal regulatory dials too tightly—say, by punishing providers of money-transfer services that process payments for elderly consumers who say they are sending money to their grandchildren—and businesses may block real transfers to their actual grandchildren. And in addition to the harm to those real customers, businesses may also face liability for discrimination if they block transactions based on profiling elderly customers, as the FTC's complaint seems to suggest. *See* Walmart Br. at 34;

Compl. ¶ 96. The idea that retailers should train store associates to ask for the purpose behind a customer's attempted purchase—and then to try to dissuade the customer from proceeding, or deny the customer the requested service in the absence of a reason that lives up to the store associate's understanding—could set a standard for intruding into customers' purchases that is anathema to retailers.

The Court should also be mindful of the substantial compliance costs that businesses—and indirectly, consumers—will incur if the FTC's case and others like it are allowed to proceed. Under the FTC's sweeping approach to the law, essentially any routine business practice could be pleaded as "unfair" when third-party scammers take advantage of it in the course of injuring some small fraction of the business's customers. To be clear, this is not a case where the defendant had no anti-fraud program at all, but rather one where the FTC alleges the program did not go far enough. *Cf. FTC v. Wyndham Worldwide Corp.*, 799 F.3d 236, 256 (3d Cir. 2015) (rejecting defendant's argument that it lacked fair notice of specific cybersecurity practices required under Section 5 where "the complaint does not allege that [defendant] used *weak* firewalls, IP address restrictions, encryption software, and passwords. Rather, it alleges that [defendant] failed to use *any*…") (emphasis original). Indeed, according to the complaint, Walmart invested in a significant anti-fraud program that it continues to hone and improve over time, including providing employees with policies, online training, corporate communications, conference calls, and webinars, in addition to implementing software to require employees to question senders and to prevent untrained employees from processing transfers. Compl. ¶¶ 71, 72, 75, 76, 80. If these measures are insufficient to meet the FTC's unwritten standards, then less sophisticated, less well-resourced businesses and start-ups will face even greater struggles and proportionate expenses to comply with this newly expanded theory of vicarious liability.

Increased regulation imposes high compliance costs and acts as a barrier to entry. Small businesses are especially burdened. Researchers for the Chamber have conducted comprehensive studies of the effects of regulations on small business, which are key drivers of innovation and job growth in this country. *See* U.S. Chamber of Commerce Foundation, *The Regulatory Impact on Small Business: Complex. Cumbersome. Costly.* (Mar. 2017).[3] The report found that the costs and burdens of federal regulations disproportionately impact small businesses, costing millions of lost jobs and undermining small business competitiveness. *Id*. at 8-10. Having fewer competitors (each of which faces higher regulatory costs) harms competition and drives prices higher for consumers. The Court should dismiss the FTC's claims to avoid these negative outcomes.

IV. Allowing the FTC's novel claims to proceed would impose heavy burdens on businesses.

If a case proceeds past the pleading stage, Section 5 claims require a fact-intensive cost-benefit analysis, weighing whether any injury to consumers (to the extent it is not reasonably avoidable by consumers themselves) is outweighed by countervailing benefits to consumers or to competition. *See* 15 U.S.C. § 45(n); *see also* Compl. ¶ 107, Walmart Br. at 36. Even for businesses that can readily demonstrate the benefits of their practices to consumers, defending such claims will necessarily entail tremendous expense, with broad fact and expert discovery akin to a rule-of-reason antitrust case. Recognizing those expenses reinforces the need for a clear legal standard that both courts and businesses can apply at the pleading stage. *Cf. Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007) ("[I]t is one thing to be cautious before dismissing

[3] *Available at* https://www.uschamberfoundation.org/smallbizregs/assets/files/Small_Business_Regulation_Study.pdf. (last visited Sept. 6, 2022).

an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive.") (internal citation omitted).

In addition to the chilling effect on commerce and the direct litigation costs inflicted by the FTC's action, the FTC also seeks substantial monetary penalties here. *See* Compl. at 58 (prayer for relief). This is remarkable considering the Supreme Court's recent unanimous ruling that the FTC lacks statutory authority under the FTC Act to seek monetary relief. *AMG Capital Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021). This context may help explain the complaint's rough attempt to shoehorn its allegations into an unprecedented TSR claim that, inapposite though it is to the complaint's allegations, offers the FTC a chance for monetary penalties otherwise unavailable. Against this backdrop of questionable FTC authority, the Court should be highly skeptical of the FTC's claims.

The danger the FTC's action poses to the business community is not limited to the four corners of the FTC's complaint. Following FTC action, businesses may also face private class actions seeking millions or billions in damages. Private actions are possible under the Telemarketing Act. 15 U.S.C. § 6104. And, although Section 5 of the FTC Act does not provide for a private right of action, many states have "little FTC Acts" modeled on the FTC Act that do allow such private claims and permit plaintiffs to recover treble damages. *See* Dissenting Statement of FTC Commissioner Kovacic, *In re Negotiated Data Solutions, LLC*, FTC File No. 051-0094 (Jan. 23, 2008) (expressing concern about Section 5 claims' spillover effects in private litigation). This Court should be especially wary of a radical expansion of FTC Act liability when the Court's influence would flow to those state laws as well.

In sum, the FTC's action seeks to expose businesses providing routine, lawful services to massive regulatory uncertainty, legal costs, and potential financial penalties and private damages

claims—all based on shaky authority and a contorted interpretation of rules meant to regulate telemarketing. The complaint is not grounded in the law and should be dismissed.

CONCLUSION

The FTC's action here poses an immense risk to businesses both large and small. For these reasons, and for those stated in Walmart's memorandum of law, the motion to dismiss should be granted.

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Respectfully submitted,

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