No. 17-1309

# In the Supreme Court of the United States

UNIVERSAL PROCESSING SERVICES
OF WISCONSIN, LLC,
*Petitioner*,

v.

FEDERAL TRADE COMMISSION,
*Respondent*.

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit*

## REPLY BRIEF FOR PETITIONER


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## ARGUMENT

The Federal Trade Commission Act ("FTC Act") vests the Federal Trade Commission ("Commission") with *limited* authority to enjoin violations of the FTC Act. *See* 15 U.S.C. § 45(a)(1). The Eleventh Circuit's opinion improperly expands this limited authority to include joint and several liability against an entity that was not alleged to have violated the FTC Act, was only found liable for a violation of the Telemarketing Sales Rule ("TSR") and was not part of the common enterprise that perpetrated the scheme. This case presents an important question regarding the opinion's unwarranted expansion of remedies under the TSR, and the impact this expansion will have on payment processors and other intermediaries who play a vital role in processing electronic transactions, which account for the lion's share of all commerce.

The outlier holding of the Eleventh Circuit is the first time a court has imposed joint and several liability: (1) for a violation of the TSR; and (2) on a defendant that was not part of the common enterprise (or had the requisite interrelatedness with or control over its co-defendants) that perpetrated the underlying substantive violations of the FTC Act. The opinion below unreasonably expands the Commission's ability to seek joint and several liability against those who played little to no role in the substantive FTC Act violations, but received course of business payments from defendants engaged in such misconduct.

Not only is the judgment incorrect as a matter of law and in contrast to other circuits that have addressed the applicability of joint and several liability, it has significant implications for payment processors, like Petitioner Universal Processing Services of Wisconsin, LLC ("Universal") and any entity acting as a passive intermediary, in processing credit transactions, which are ubiquitous in today's economy. They facilitate the vast majority of payments between merchants and their customers. Without restraint, under the rule espoused by the Eleventh Circuit, the Commission will be free to find a financially-solvent processor, like Universal, on which to allege "substantial assistance" liability and, consequently, joint and several liability, regardless of how tangential that processor's association with the underlying wrongdoer. Payment processors will be turned into the proverbial "brother's keeper" for all merchants whose transactions they process. This gives the Commission extraordinary leverage to force processors to settle with it to avoid the Damocles sword of potential massive joint and several liability awards for the bad acts of unrelated co-defendants that the processors do not control.

The arguments raised by the Commission in opposition to this petition lack merit and do not diminish the need for Court intervention and guidance on this crucial issue. The Commission contends that the Eleventh Circuit's holding does not conflict with the holdings of other circuits, but neglects to note that no other court has found a TSR violation alone sufficient to impose joint and several liability, leaving the Eleventh Circuit's holding an outlier. Resp. Br. at 13-14. Similarly, the Commission's reliance on the restatement of torts advances form over substance in contending that being found to have provided "substantial assistance" under the TSR, by virtue of its name alone, is sufficient to impose joint and several liability without any further analysis of the degree of assistance provided. *Id*. at 11-13. Finally, the Commission's due process argument lacks merit as Universal raised its lack of notice in its opening brief to the Eleventh Circuit and Universal was not on notice that its non-substantive violations of the TSR could result in the imposition of joint and several liability. *Id*. at 14-15.

This case presents the appropriate vehicle to determine the proper scope of liability for companies that are found solely liable for a TSR violation but are not part of the common enterprise that perpetrated the FTC Act violations. The Court should grant certiorari and correct the Eleventh Circuit's improper imposition of joint and several liability beyond what the TSR and FTC Act authorize.

### I. Universal Was Not Part of the TYS Scheme Common Enterprise.

In its opposition, the Commission portrays Universal as an active participant in the Treasure Your Success ("TYS") scheme. Resp. Br. at 3-4. The Commission's insinuations of misconduct are contrary to the findings below. The inconvenient fact is that the Commission never even *charged* Universal with a violation of the FTC Act, and no court ever found that Universal was part of the common enterprise that violated the FTC Act. App. 1-19.

Universal is in the business of helping merchants process credit card transactions by linking merchants with sponsoring bank members of the Visa and MasterCard networks. The underlying action involved a fraudulent scheme related to two merchant accounts brought to Universal by an independent sales agent. *Id*. at 5-6. For context, Universal maintained 15,000 merchant accounts at the time. *Id*. at 6. Eight months after the first TYS account was opened, Universal shut down the TYS accounts after noticing an increase in refund claims (known as "chargebacks"). *Id*. That was only the first of Universal's many remedial steps.

The Commission did not allege that Universal violated the FTC Act, controlled any of the common enterprise defendants or participated in the common enterprise. App. 8. Yet the Commission successfully petitioned for an award of $1.7 million in equitable and monetary relief against Universal under a theory of joint and several liability. That sum represents the entire amount of unjust gains accrued by the participants in the TYS scheme (less chargeback refunds already remitted by Universal) and nearly 255 times the amount by which Universal was unjustly enriched. App. 5.

## II. The Eleventh Circuit's Imposition of Joint and Several Liability Is Unprecedented.

The Commission does not dispute that the Eleventh Circuit's Order is the first to impose joint and several liability against a passive intermediary solely liable for a TSR violation or on an entity that was not part of the common enterprise. To date, courts of appeals have imposed joint and several liability only where the defendant is found to have violated the FTC Act and been a member of the common enterprise (or had the requisite interrelatedness or control over the entity) that violated the FTC Act. *See e.g.*, *FTC v. E.M.A. Nationwide, Inc.*, 767 F.3d 611, 636-37 (6th Cir. 2014); *FTC v. Bay Area Bus. Council, Inc.*, 423 F.3d 627, 635

(7th Cir. 2005); *Delaware Watch Co. v. FTC*, 332 F.2d 745, 746 (2d Cir. 1964). The absence of any case imposing joint and several liability in the manner in which it was imposed against Universal is striking. The courts below went beyond the bounds of what other courts have held, finding Universal jointly and severally liability despite it only being found to have violated the TSR and no proof—*or even allegations*—that Universal was part of the common enterprise. The Court should review the Eleventh Circuit's opinion to resolve this split so that businesses operating in different jurisdictions can be guided accordingly.

The Commission's reliance on *Louisville & Nashville Railroad Co. v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925), is misplaced. The statute at issue in *Louisville* specifically provided for the imposition of joint and several liability by providing that "common carrier[s] shall be liable for the full amount of damages sustained in consequence of any such violation of the provisions of [the statute]." *Id.* at 232. On the other hand, the TSR does not specifically provide for the imposition of joint and several liability. Moreover, in *Louisville*, the railroad's liability was premised on the fact that the excessive rates were established by a joint agreement among various railroads. *Id.* Although the railroad independently set its own rate, it was done in concurrence with the other railroads. It is precisely this kind of common agreement or enterprise that is lacking in this case and therefore *Louisville* does not support the unprecedented imposition of joint and several liability against Universal.

### III. Liability for Violating the TSR Should Not Be Conflated With the Imposition of Joint and Several Liability.

The Eleventh Circuit incorrectly found that violation of the TSR § 310.3 alone justifies the imposition of joint and several liability. The Commission, and the courts below, conflate the substantial assistance rule with the imposition of joint and several liability.

The TSR, however, explicitly draws a distinction between joint and several liability and "substantial assistance" under 16 C.F.R. § 310.3(b). Prior to the promulgation of the TSR, the Commission "decline[d] to read joint and several liability for sellers and telemarketers into the Telemarketing Act." TSR, 60 Fed. Reg. 43,842, 43,845 (Aug. 23, 1995). In its response brief, the Commission explains that this statement means only that "sellers and telemarketers should not automatically be held jointly responsible for the actions of the other." Resp. Br. at 13. But that is precisely what the Eleventh Circuit did here: it held Universal jointly and severally liable solely because it provided the TYS common enterprise defendants with substantial assistance (credit card merchant accounts) in violation of the TSR. App. 3.

In accepting the false premise that "substantial assistance" permits the imposition of joint and several liability, the Eleventh Circuit abrogated its duty to conduct an analysis as to whether Universal's conduct was sufficient to warrant imposition of joint and several liability. Nor did the Eleventh Circuit articulate a standard by which the imposition of joint and several liability can be assessed. While the

Eleventh Circuit may be correct that a finding of a common enterprise can suffice to justify the imposition of joint and several liability, substantial assistance alone cannot. To hold otherwise deviates from other circuits and ignores the Commission's unambiguous guidance in the TSR's commentary.

Furthermore, the Restatement (Second) of Torts § 876(b) does not state or imply that joint and several liability attaches merely because one tortfeasor assisted the other, regardless of the degree of assistance. Restatement (Second) of Torts § 876(b) comment D ("The assistance of or participation by the defendant may be so slight that he is not liable for the act of the other."). The Restatement contemplates that factors such as "the nature of the act encouraged, the amount of assistance given by the defendant, his presence or absence at the time of the tort, his relation to the other and his state of mind are all considered." *Id.* These factors determine ultimate liability for the tort of another and are akin to the common enterprise test. *Id.*

The Commission dismisses the exceptions to joint and several liability contained in the Restatement by asserting that "the Telemarketing Sales rule applies by its terms only to those who provide 'substantial assistance or support.'" Resp. Br. at 12. There is no standard for when assistance of support is "substantial" enough to constitute a violation of the TSR, and the titling used in the TSR is not a substitute for the analysis of factors contemplated by the Restatement. The Court should articulate a standard for courts determining whether substantial assistance is enough to impose joint and several liability for the bad acts of unrelated common enterprise defendants.

## IV. The Imposition of Joint and Several Liability Violates Universal's Due Process Rights.

The Commission claims that joint and several liability is equitable relief and not the type of penalty that requires notice. Resp. Br. at 15. On the contrary, it is irrelevant that the court of appeals called the relief "equitable." Indeed this relief was anything but equitable: the Eleventh Circuit imposed penalties of restitution and disgorgement on Universal in an amount far beyond what Universal received as part of its involvement in the TYS scheme. The cost to Universal is precisely the type of impermissible "grossly excessive or arbitrary punishment[] on a tortfeasor" that requires notice. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003); *Kokesh v. SEC*, 137 S. Ct. 1635, 1644 (2017) (finding disgorgement that exceeds the profits gained as a result of a violation to be punitive rather than remedial); *see also Great-West Life & Annuity Ins. Co., v. Knudson*, 534 U.S. 204, 214 (2002) (noting an award of equitable restitution "must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession").

Universal was not on notice that its non-substantive violations of the TSR could result in the imposition of joint and several liability for the simple reason that the Commission's regulations do not contemplate such a remedy and no court had imposed it. Despite the unambiguous language in the Commission's guidance (*see* Sec. III *supra*) and no other court's imposition of joint and several liability in this context, the Commission, without fair (or any) warning, pursued the unprecedented imposition of joint and several liability against Universal, following the district court's entry of summary judgment. The assessment of such a penalty against Universal violates the due process clause of the Fifth Amendment. *See Howmet Corp. v. EPA*, 614 F.3d 544, 553 (D.C. Cir. 2010).[1]

## CONCLUSION

The petition for a writ of certiorari should be granted.

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[1] The Commission argues that Universal waived its due process argument because it did not raise it in the court of appeals proceedings. Resp. Br. at 14. This is plainly false. Appellant's Br. at 54 (11th Cir. Case No. 16-17727) (arguing that "because UPS was not alleged to have violated the FTC Act, nor in fact found to be in violation of the Act, UPS was not on notice that it could be subject to remedies available under Section 13(b), including joint and several liability"). Universal did not therefore waive its due process argument.

Respectfully submitted,

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