No. 17-1309

# In the Supreme Court of the United States

UNIVERSAL PROCESSING SERVICES OF WISCONSIN, LLC,
PETITIONER

*v.*

FEDERAL TRADE COMMISSION

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION


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## QUESTIONS PRESENTED

The Federal Trade Commission's Telemarketing Sales Rule prohibits deceptive telemarketing acts or practices, 16 C.F.R. Pt. 310, and violations of the Rule are treated as violations of the statutory prohibition on "unfair or deceptive acts or practices," 15 U.S.C. 6102(c)(1). A person violates the Rule by "provid[ing] substantial assistance or support" to a telemarketer who violates the Rule if the person providing assistance "knows or consciously avoids knowing" of the telemarketer's illegal conduct. 16 C.F.R. 310.3(b). The questions presented are as follows:

1. Whether a company that, with the requisite scienter, provides substantial assistance to a fraudulent telemarketing scheme may be held jointly and severally liable for the amount of money taken from consumers.

2. Whether petitioner lacked constitutionally adequate notice that it could be held jointly and severally liable for its violation of the Rule.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-19) is reported at 877 F.3d 1234. The opinion of the district court (Pet. App. 20-46) is not published in the Federal Supplement but is available at 2015 WL 916349. A prior opinion of the court of appeals is not published in the Federal Reporter but is reprinted at 652 Fed. Appx. 837.

### JURISDICTION

The judgment of the court of appeals was entered on December 13, 2017. The petition for a writ of certiorari was filed on March 13, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. The Federal Trade Commission Act, 15 U.S.C. 41 *et seq.*, outlaws "unfair or deceptive acts or practices in

or affecting commerce," 15 U.S.C. 45(a)(1), and it authorizes the Federal Trade Commission (FTC or Commission) to seek judicial relief in response to violations of consumer-protection statutes within its jurisdiction, 15 U.S.C. 53. One such statute is the Telemarketing and Consumer Fraud and Abuse Prevention Act (Telemarketing Act), 15 U.S.C. 6101 *et seq.*, which Congress enacted to "offer consumers necessary protection from telemarketing deception and abuse." 15 U.S.C. 6101(5). The Telemarketing Act directs the Commission to "prescribe rules prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices." 15 U.S.C. 6102(a)(1). The Telemarketing Act further specifies that the FTC's rules should encompass "entities or individuals that assist or facilitate deceptive telemarketing." 15 U.S.C. 6102(a)(2).

Congress understood that fraudulent telemarketers often "mak[e] themselves appear legitimate" by "tell[ing] their victims that they can pay using a credit card." S. Rep. No. 80, 103d Cong., 1st Sess. 10 (1993). Access to the credit card system can thus help fraudulent telemarketing businesses target consumers more effectively, and Congress recognized that such practices had been "widely" adopted by fraudulent telemarketers. *Ibid.* Congress accordingly enacted the prohibition in Section 6102(a)(2) in order to limit access to the credit card system to legitimate businesses by forbidding companies that control access to the system from knowingly assisting and facilitating telemarketing fraud. See 60 Fed. Reg. 43,842, 43,853 (Aug. 23, 1995).

To carry out the Telemarketing Act, the Commission has promulgated a Telemarketing Sales Rule. 16 C.F.R. Pt. 310. The Rule requires telemarketers to make cer-

tain disclosures and to refrain from specified false, misleading, and abusive practices. See, *e.g.*, 16 C.F.R. 310.3(a), 310.4. The Rule also declares it a "deceptive telemarketing act or practice and a violation of th[e] Rule for a person to provide substantial assistance or support to any seller or telemarketer when that person knows or consciously avoids knowing that the seller or telemarketer is engaged in any act or practice that violates" the Rule. 16 C.F.R. 310.3(b).

2. a. Treasure Your Success (TYS) was a telemarketing scheme designed "to extract payments from consumers in exchange for fraudulent credit card interest reduction services." Pet. App. 2-3. Under the scheme, robocalls informed consumers "that they could lower their credit card interest rates by dialing the number one." *Id.* at 3. Upon doing so, a consumer would be transferred to a sales representative who "'promise[d] the world,' albeit in an intentionally confusing manner, in order to persuade the consumer to divulge his or her credit card number." *Ibid.* (bracket and ellipsis omitted). Consumers were falsely told that, "by authorizing TYS to charge between $600 and $1000 to the consumer's credit card, the consumer would be entitled to receive $2500 or more in credit card interest rate reductions." *Ibid.* By making such promises to consumers, TYS "fraudulently amass[ed] more than $2.5 million." *Ibid.*

b. Petitioner is a "payment[] processor"—one of the gatekeepers to the credit card payment system. Pet. App. 28. For a fee, petitioner connects merchants that want to accept payment via credit card with banks that issue credit cards. *Ibid.* In that capacity, petitioner controls access to the credit card system by granting or denying applications to open "merchant account[s]." *Id.*

at 4. Businesses that wish to accept credit cards must apply for a merchant account and undergo a rigorous underwriting process that is intended to weed out fraud and to ensure that the applicant is a legitimate and creditworthy business. See 1 C.A. R.E. 119-120. Payment processors thus carefully scrutinize merchant account applications, and they usually deny applications from businesses that present a high risk of fraud or that engage in suspect activities, such as lotteries, psychics, and credit repair services. *Id.* at 132.

Petitioner twice approved TYS's applications for merchant accounts, both times through procedures that deviated from its normal underwriting process. 1 C.A. R.E. 120. TYS's initial application contained "several glaring red flags indicating TYS might be a fraud risk." Pet. App. 4. *Inter alia*, the application showed that both of TYS's principals had no meaningful income, unusually low credit scores, and serious delinquencies on past debts, and their credit reports contained "high risk fraud alert[s]." *Id.* at 30; see 5 C.A. R.E. 813, 815. The TYS merchant application also claimed suspiciously high anticipated sales from outbound telemarketing solicitations, which are often implicated in fraud and which are considered an "Unacceptable Business Type" under petitioner's own underwriting standards. 1 C.A. R.E. 132; see 4 C.A. R.E. 686.

Notwithstanding these red flags, TYS's application was personally reviewed and approved by petitioner's president, Derek DePuydt. Pet. App. 4. For years, DePuydt bypassed petitioner's normal underwriting process and personally approved applications promoted by sales agent Hal Smith, who had previously referred a number of "profitable" but risky ventures to peti-

tioner. *Ibid.*; see 1 C.A. R.E. 147. Members of petitioner's underwriting department repeatedly rejected Smith's applications, calling them "garbage," but were repeatedly overruled by DePuydt. 1 C.A. R.E. 147. The accounts referred by Smith were profitable because petitioner retained a fee of 15% for each transaction—several times the industry average—and withheld an additional 15% in reserve for the "chargeback" refunds petitioner anticipated it would have to pay to consumers who challenged the charges. 5 C.A. R.E. 773, 777.

Almost as soon as petitioner started processing charges for TYS, consumers started disputing them. See 4 C.A. R.E. 697. The typical legitimate internet-based business has a chargeback rate of about two out of each thousand credit card charges (0.2%). *Id.* at 695. From the start, TYS "experience[d] an unusually high number of chargebacks," Pet. App. 4, and the chargeback rate increased every subsequent month, with more than 30% of TYS's customers ultimately asking for refunds, see 4 C.A. R.E. 698-699. Instead of terminating the TYS account, however, DePuydt personally approved a second merchant account for the operation. Pet. App. 4.

3. In October 2012, the Commission initiated suit against TYS, its principals, and its related businesses, charging them with violations of the Federal Trade Commission Act, the Telemarketing Act, and the Telemarketing Sales Rule. Pet. App. 4. The Commission later amended its complaint to name as defendants Smith (and his alter-ego company), DePuydt, and petitioner. *Id.* at 4-5. Petitioner was charged with providing substantial assistance to TYS while knowing, or consciously avoiding the knowledge, that TYS was violating the Telemarketing Sales Rule. *Id.* at 5. All defendants

except petitioner, Smith, and Smith's personal corporation settled. *Ibid.*

a. The district court granted summary judgment to the Commission, concluding that petitioner had violated the Telemarketing Sales Rule. Pet. App. 5. The court found that petitioner "knew or consciously avoided knowing of the fraudulent activities TYS conducted, and that [petitioner] substantially assisted TYS in perpetuating the scheme by providing the merchant accounts." *Ibid.* The court held petitioner jointly and severally liable, along with Smith, for $1,734,972, "the amount of the unjust gains that accrued to the TYS scheme less chargebacks and refunds already remitted." *Ibid.*

b. Petitioner appealed, conceding that it had violated the Telemarketing Sales Rule but challenging the amount of monetary liability imposed by the district court. Pet. App. 5-6. Petitioner argued that the court could not properly hold it jointly and severally liable without a finding that petitioner "had operated together with the other TYS defendants as a common enterprise in perpetuating the fraud." *Id.* at 6. The court of appeals vacated the monetary relief order, instructing the district court "to state whether [petitioner] was a part of the common enterprise or, if not, what other grounds there were for imposing joint and several liability." *Ibid.*

On remand, the district court again found that petitioner was jointly and severally liable for the amount it had helped TYS take from consumers. Pet. App. 6. The court "clarified" that petitioner's liability was based on its provision of substantial assistance to the TYS scheme, "rather than on a common enterprise theory." *Ibid.* The court noted that restitution and disgorgement are sanctions authorized by the Federal Trade

Commission Act, and it drew guidance from tort and securities law, which "suggested that joint and several liability is appropriate where a defendant substantially assists the primary violator." *Id.* at 7.

4. The court of appeals affirmed. Pet. App. 1-19. The court noted that petitioner had not disputed either its own liability for violating the Telemarketing Sales Rule, *id.* at 2, or any of the facts underlying the district court's finding of liability, *id.* at 3 n.1. See *id.* at 8 ("It was undisputed in both this and the prior appeal that [petitioner] violated [the Telemarketing Sales Rule] by providing two merchant accounts to TYS despite a slew of red flags indicating TYS was engaged in a fraudulent telemarketing scheme."). The court of appeals explained that "[t]he sole issue before us is whether joint and several liability was available as a matter of law, and we hold that it was." *Id.* at 2.

The court of appeals first rejected petitioner's argument that joint and several liability can be imposed under the Federal Trade Commission Act only after proof that a defendant was "a participant in a common enterprise with the primary violators." Pet. App. 9. That contention, the court explained, "mistakes a sufficient condition for a necessary one. That a common enterprise finding can support joint and several liability does not mean that such liability cannot attach without one." *Ibid.* The court noted that petitioner had "cite[d] no authority," and the court had "found none," supporting the proposition that a common enterprise is a prerequisite to such relief. *Ibid.*

Next, the court of appeals determined that "the text of the [Telemarketing Sales Rule]" supports the conclusion that petitioner could be held jointly and severally liable. Pet. App. 10. The court explained that, under

the Rule and the Federal Trade Commission Act, a violation of the Rule is also a violation of Act itself. *Ibid.* (citing 15 U.S.C. 6105(b)). Thus, by providing substantial assistance to the TYS scheme in violation of the Rule, petitioner "violated the FTC Act and is subject to its penalties," including "equitable monetary relief of the kind sought here." *Ibid.*

The court of appeals found support for its conclusion in background tort principles. Under the common law, for instance, one who gives "substantial assistance" to another's tortious conduct, and who "knows that the other's conduct constitutes a breach of duty," may himself be subject to joint and several liability for any resulting harm. Pet. App. 11 (quoting Restatement (Second) of Torts § 876(b) (1979) (Restatement)). The court further explained that, in this case, "[t]here can be little mistaking the resemblance" between the substantial-assistance provision of the Telemarketing Sales Rule and the liability rule announced in the Restatement. *Ibid.* In that regard, the court observed that, in adopting the Rule, the Commission had relied on § 876(b) of the Restatement to support liability for substantial-assistance violations. *Ibid.* (citing 60 Fed. Reg. 43,851 n.96). The court further explained that "aiding and abetting in tort can result in joint and several liability." *Ibid.*; see *id.* at 11-12 ("In tort, the aider-abettor is liable to the injured party 'for the entire harm.'") (quoting Restatement § 875 & cmt. *a*). The court also found "perhaps even more striking a resemblance" between the Telemarketing Sales Rule and aiding-and-abetting principles in securities law, where one who knowingly or recklessly provides substantial assistance to a securities violator may face joint and several liability. *Id.* at 13-14.

Finally, the court of appeals explained that its holding would not work any "injustice in practical application." Pet. App. 14. Substantial-assistance liability may be imposed only on a defendant who "knows or consciously avoids knowing that the person to whom the defendant renders such assistance is engaged in telemarketing violations." *Ibid.* As a result, joint and several liability may be imposed only on those with "a culpable mind," ensuring that such liability "will not result in collateral damage to innocent third parties." *Ibid.*

**ARGUMENT**

Petitioner contends (Pet. 9-13) that the courts of appeals are divided on the question whether joint and several liability may be imposed on a violator of the Telemarketing Sales Rule without a separate finding that the defendant was part of a common enterprise that violated the Federal Trade Commission Act. The decision below is correct and does not conflict with any decision of this Court or another court of appeals. Petitioner further contends (Pet. 13-14) that the ruling below violated petitioner's due process rights. That contention, which was not pressed or passed upon below, also lacks merit. Further review is not warranted.

1. a. Congress has directed the FTC to "prescribe rules prohibiting deceptive telemarketing acts or practices." 15 U.S.C. 6102(a)(1). "Any person who violates such rule shall be subject to the penalties * * * provided in the Federal Trade Commission Act." 15 U.S.C. 6105(b).[1] A violation of an FTC rule promulgated under

[1] Congress has further specified that "[a]ny violation of any rule" so prescribed "shall be treated as a violation of a rule under section 57a of [Title 15] regarding unfair or deceptive acts or practices." 15 U.S.C. 6102(c)(1). Section 57a(1)(B) of Title 15 in turn authorizes the Commission to promulgate "rules which define with specificity

Section 6102(a)(1) thus is treated as a violation of the Federal Trade Commission Act itself.

Congress has also directed more specifically that the prohibition on deceptive telemarketing acts should include "entities or individuals that assist or facilitate deceptive telemarketing." 15 U.S.C. 6102(a)(1) and (2). The Commission's Telemarketing Sales Rule, 16 C.F.R. Pt. 310, was adopted to carry out that statutory mandate. Persons who violate the Rule are subject to "equitable monetary relief" such as the relief ordered by the district court here. Pet. App. 10 (citing 15 U.S.C. 53(b)).

Petitioner argues (Pet. 12) that subjecting it to joint and several liability for violating the Telemarketing Sales Rule—without a showing that petitioner was engaged in a common enterprise with TYS—would "expand[]" liability beyond what traditional principles would authorize. That is incorrect. In *Louisville & Nashville Railroad Co.* v. *Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925), for instance, the Court upheld the imposition of liability on connecting railroads that carried freight shipped under end-to-end "through rates" that exceeded lawful rates. *Id.* at 231. The railroads argued that they were responsible only for the part of the overcharge attributable to their segment of the shipment, rather than jointly and severally liable for the full amount of the overcharge. *Id.* at 231-232. The

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acts or practices which are unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 45(a)(1) of [Title 15])." 15 U.S.C. 57a(1)(B). Section 45(a)(1) states that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful." 15 U.S.C. 45(a)(1).

Court rejected that contention. It agreed that the connecting railroads were not vicariously liable for one another's acts, as they would be if they were "partners * * * engaged in [a] common enterprise." *Id.* at 232; see *id.* at 233 ("Each connecting carrier is liable only for its own act."). Nevertheless, the Court explained, the harm to shippers resulting from the illegal rates was caused by "[a] single charge * * * for the transportation from point of origin to point of destination," and the railroads had each agreed to that charge. *Id.* at 233. Thus, each railroad was "liable jointly and severally for all the damage sustained." *Id.* at 232.

The Court's holding in *Louisville & Nashville Railroad* was rooted in longstanding principles governing joint and several liability. Under tort law, for instance, "[e]ach of two or more persons whose tortious conduct is a legal cause of a single and indivisible harm to the injured party is subject to liability to the injured party for the entire harm." Restatement § 875; see *Honeycutt* v. *United States*, 137 S. Ct. 1626, 1631 (2017) ("If two or more defendants jointly cause harm, each defendant is held liable for the entire amount of the harm."); *Jackson* v. *Smith*, 254 U.S. 586, 589 (1921) (those who "knowingly join" in unlawful conduct "become jointly and severally liable" for resulting harm). Thus, while the theory of joint and several liability undoubtedly *includes* defendants who act as part of a common enterprise, it is not limited to such defendants.

Those longstanding legal principles apply fully here. Petitioner has conceded that it violated the Telemarketing Sales Rule by knowingly providing "substantial assistance" to TYS's prohibited telemarketing practices. 16 C.F.R. 310.3(b). TYS depended for its success on the

merchant accounts that petitioner made available, despite clear indications that TYS was using the accounts for fraudulent purposes. Thus, as an entity that "kn[ew] that [TYS's] conduct [wa]s a breach of duty" and yet "g[ave] substantial assistance or encouragement" to those violations, petitioner "is subject to liability" for "harm resulting to" consumers. Restatement § 876(b). Indeed, the Commission expressly "invoked" § 876(b) of the Restatement when it adopted the Rule's "substantial assistance" provision. Pet. App. 11 (citing 60 Fed. Reg. at 43,851 n.96).

In resisting that conclusion, petitioner notes that, under the Restatement, "the simple act of assisting another tortfeasor" may not "automatically make[] one liable for the acts of the tortfeasor." Pet. 13. In particular, "[t]he assistance of or participation by the defendant may be so slight that he is not liable for the act of the other." *Ibid.* (quoting Restatement § 876(b) cmt. *d*). That exception cannot help petitioner, however, because the Telemarketing Sales Rule applies by its terms only to those who provide "substantial assistance or support" to another's violation of the Rule. 16 C.F.R. 310.3(b). Petitioner's concession that it violated the Rule thus precludes petitioner from invoking the Restatement's exception for trivial forms of assistance or participation.

For similar reasons, the decision below will not have the "deep and far-reaching consequences" predicted by petitioner (Pet. 4). Persons who do not themselves engage in telemarketing fraud may be held liable under the Telemarketing Sales Rule only if, like petitioner, they (a) provide substantial assistance to fraudulent telemarketing and (b) do so while knowing, or consciously

avoiding knowledge, of the fraud. Petitioner is thus incorrect in warning (Pet. 11) that "innocent but solvent defendants" will be held responsible "for the wrongdoing of others."

Finally, petitioner is incorrect in arguing (Pet. 12, 14) that the Commission did not intend to impose joint and several liability on those who commit substantial-assistance violations of the Telemarketing Sales Rule. Petitioner relies for that argument on a single sentence from the FTC's commentary on the Rule, in which the Commission stated that it "decline[d] to read joint and several liability for sellers and telemarketers into the Telemarketing Act." 60 Fed. Reg. at 43,845. That statement, however, explained only that "sellers" and "telemarketers" should not *automatically* be held jointly responsible "for the actions of the other." *Id.* at 43,844. In the sentence following the one on which petitioner relies, the Commission explained that "[t]he assisting and facilitating provisions in § 310.3(b) of the Rule more appropriately provide a basis" to impose liability against "others involved in the deceptive telemarketing scheme." *Id.* at 43,844-43,845. Later in the same commentary, the FTC explained that "knowledge of, and substantial assistance to, another's wrongdoing are a sufficient basis for liability in tort." *Id.* at 43,851 (citing Restatement § 876). That is the basis on which petitioner was held liable for the harm caused by the TYS scheme.

b. Petitioner argues (Pet. 9-11) that the decision below conflicts with rulings of other courts of appeals, which petitioner characterizes as holding that joint and several liability is appropriate only when a defendant is part of a common enterprise. Petitioner's reliance on those rulings is misplaced.

None of those decisions considered—much less decided—whether participation in a common enterprise was *necessary* to impose joint and several liability. Rather, because each case involved corporate defendants who operated as a single enterprise, the courts had no occasion to consider whether joint and several liability would have been appropriate in other circumstances. See *FTC* v. *E.M.A. Nationwide, Inc.*, 767 F.3d 611, 637 (6th Cir. 2014) (considering defendants as a common enterprise where defendants were "interrelated business entities"); *FTC* v. *Bay Area Bus. Council, Inc.*, 423 F.3d 627, 635 (7th Cir. 2005) (corporate defendants "d[id] not dispute the district court's conclusion that they operated as a 'common enterprise'"); *Delaware Watch Co.* v. *FTC*, 332 F.2d 745, 746 (2d Cir. 1964) (per curiam) (upholding liability for defendants "transacting an integrated business through a maze of interrelated companies"). As the court below aptly explained, petitioner's argument thus "mistakes a sufficient condition for a necessary one." Pet. App. 9. Petitioner has identified no decision holding that *only* common-enterprise defendants may be held jointly and severally liable.

2. Petitioner argues (Pet. 13-14) that constitutional principles of due process required the Commission to warn petitioner that it could be held jointly and severally liable for violating the Telemarketing Sales Rule. Petitioner does not contend that the courts of appeals are divided on the issue, and petitioner's argument lacks merit.

As an initial matter, petitioner forfeited any possible due process argument by failing to raise it in the court of appeals. See *Muhammad* v. *Close*, 540 U.S. 749, 755 (2004) (per curiam). Petitioner did not argue below that it was denied due process by the district court's ruling,

nor did the court of appeals consider or decide that issue. See Pet. App. 2 ("The sole issue before us is whether joint and several liability was available as a matter of law."). "Having failed to raise the claim when its legal and factual premises could have been litigated, [petitioner] cannot raise it now." *Muhammad*, 540 U.S. at 755. The Court should decline review on that ground alone.[2]

In any event, petitioner's argument lacks merit. The Due Process Clause requires the government to provide notice of conduct that can result in *punishment*, including notice regarding the severity of the potential penalty. See *State Farm Mut. Auto Ins. Co.* v. *Campbell*, 538 U.S. 408, 417 (2003). But the relief ordered in this case was not a punitive sanction. The measure of equitable relief ordered here was the net amount that consumers had lost to the TYS scheme as a result of the statutory violations, including petitioner's. Pet. App. 41. Relief that is tied to "actual or potential harm suffered" is, by definition, distinct from a "punitive damages award." *State Farm*, 538 U.S. at 418.

Petitioner had constitutionally sufficient notice, moreover, of its exposure to joint and several liability for violating the Telemarketing Sales Rule. As described above, the district court upheld the imposition

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[2] Petitioner's amicus urges the Court to consider various other issues that were never raised by petitioner, were not considered or decided by the court of appeals, and are not encompassed by the question presented in the petition. See Electronic Transactions Ass'n Amicus Br. 6-18. This Court generally does not entertain such arguments, see *United Parcel Serv., Inc.* v. *Mitchell*, 451 U.S. 56, 60 n.2 (1981) ("declin[ing]" to consider argument raised by amicus "since it was not raised by either of the parties"); *Bell* v. *Wolfish*, 441 U.S. 520, 532 n.13 (1979) (similar), and there is no sound reason to deviate from that practice here.

of joint and several liability under long-established principles, including tort principles that the Commission had invoked when it adopted the Rule. See pp. 10-12, *supra*. In addition, the statutory scheme made clear that petitioner's violation of the Rule would be treated as a violation of the Federal Trade Commission Act, see pp. 9-10 & n.1, *supra*, and the decisions on which petitioner relies (Pet. 10-11) show that joint and several liability has for decades been imposed for such violations. Petitioner cannot claim any unfair surprise.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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