No. 24-3174

In the United States Court of Appeals for the Seventh Circuit

FEDERAL TRADE COMMISSION,
PLAINTIFF-APPELLEE

v.

WALMART INC.,
DEFENDANT-APPELLANT

ON APPEAL FROM U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS
NO. 1:22-CV-03372
HON. MANISH S. SHAH, PRESIDING

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT AND REVERSAL

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 24-3174

Short Caption: Federal Trade Commission v. Walmart Inc.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

None

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

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Attorney's Printed Name: Steffen N. Johnson

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Attorney's Printed Name: Maureen K. Olhausen

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N/A

Attorney's Signature: /s/ Paul N. Harold Date: 2/19/25

Attorney's Printed Name: Paul N. Harold

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Attorney's Signature: /s/ Maria C. Monaghan Date: 2/19/25

Attorney's Printed Name: Maria C. Monaghan

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INTERESTS OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("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. One important function of the Chamber is to represent the interests of its members before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community.

The Chamber advocates 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—by chilling innovation, raising barriers to entry for new competitors, and resulting in higher costs passed on to consumers.

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[1] No party's counsel authored any part of this brief. No one, apart from amicus curiae, its members, and its counsel, contributed money intended to fund the brief's preparation or submission. All parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The FTC is charged by law with the laudable mission of fighting unfair and deceptive practices, including deterring fraudsters seeking to victimize consumers. But in this case, the agency has sought to achieve this goal in a manner that runs roughshod over both statutory guardrails designed to channel the agency's enforcement activities and fundamental principles of due process and fair notice. Whatever the FTC's intentions, that approach will ultimately do more harm than good, to the detriment of both consumers and the businesses that serve them.

Section 13(b) of the FTC Act authorizes the agency to skip its core in-house adjudication process and seek an injunction in federal court only if a party "is violating, or is about to violate," the Act. 15 U.S.C. § 53(b). It was not until 1973 that Congress granted the FTC this fast-track to federal court, recognizing that in some circumstances the agency might need to stop "ongoing or imminent" harm to consumers while it undertook the sometimes lengthy process of securing a final cease-and-desist order. *See FTC v. Credit Bureau Ctr., LLC*, 937 F.3d 764, 772 (7th Cir. 2019). But where Congress gave the agency an inch, it took a mile, employing § 13(b) with "great frequency," "bypass[ing]" its core administrative

process, and misusing its authorization to seek injunctive relief as a license to "obtain monetary relief directly from courts." *AMG Cap. Mgmt., LLC v. FTC*, 593 U.S. 67, 74 (2021). And while the Supreme Court has reined in the FTC's practice of using § 13(b) as a fast-track to monetary relief, *id.* at 75, the agency continues to stretch the language of § 13(b) in another way, on display in this case.

Despite Congress's clear mandate that the regulated party must be "about to violate" the law, the FTC insists that it may resort to § 13(b)'s fast-track so long as it alleges past unlawful conduct and "some likelihood that [it] will recur." A49. That reading cannot be squared with § 13(b)'s text, statutory context, or legislative history, all of which establish that § 13(b) "unambiguous[ly]" requires "existing or impending conduct." *FTC v. Shire Viropharma, Inc.*, 917 F.3d 147, 156 (3rd Cir. 2019). And as Walmart explains (Br. 38-39), the FTC cannot make that showing here.

The FTC's attempt to bypass its own tools and rush to federal court also runs afoul of cardinal due process principles. "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." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). That bedrock

constitutional command is essential to providing the legal certainty that businesses need to operate, innovate, and grow.

The approach that the FTC has all too often taken—eschewing its in-house administrative process, forgoing consumer protection rulemaking in favor of regulation-by-injunction, and otherwise failing to provide any advance notice of what it believes the law requires of businesses like Walmart—flouts these fundamental principles, to the detriment of businesses and the very consumers the agency is supposed to protect. Here, the FTC's failure to articulate what specific anti-fraud measures it believes the law requires may pressure businesses to adopt unnecessary or unduly burdensome anti-fraud measures that invade consumer privacy, violate anti-discrimination laws, and increase costs of the service. Or it may chill businesses from providing money transfer services at all, depriving consumers of a valuable service.

Many businesses, including Walmart, are dedicated to their customers and undertake extensive voluntary efforts to help them avoid fraud. *See* Walmart Br. 5-6. Before these businesses are punished for not doing more, they deserve fair notice of what the law requires. *Amicus* urges the Court to reverse the district court's order and dismiss this case.

ARGUMENT

I. To invoke § 13(b), the FTC must show an ongoing or imminent violation.

To bring suit and obtain an injunction under § 13(b), the FTC must show that a defendant "is violating, or is about to violate, [the law]." 15 U.S.C. § 53(b). Properly construed in light of its text, broader statutory context, and legislative history, Section 13(b) requires that a violation be "ongoing or imminent." *See Credit Bureau Ctr.*, 937 F.3d at 772. The district court and the FTC thus err in reading § 13(b) to "mirror[]" the "common law standard for injunctive relief," and thereby allowing the FTC to sue based on "past conduct" and "some likelihood that [it] will recur." A47-49. Under the proper standard, the FTC's action against Walmart cannot proceed.

A. Text, statutory context, and legislative history all confirm that § 13(b) requires showing ongoing or imminent unlawful conduct.

Courts "must give effect to the text Congress enacted," *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 228 (2008), and "enforce plain and unambiguous statutory language according to its terms," *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010). As other courts have recognized, the plain language of Section 13(b) "is unambiguous" in

requiring "existing or impending conduct." *Shire*, 917 F.3d at 156; *accord FTC v. AMG Cap. Mgmt., LLC*, 910 F.3d 417, 431 (9th Cir. 2018) ("§ 13(b) empowers the Commission to stop *imminent* or *ongoing* violations") (O'Scannlain, J., specially concurring), *rev'd and remanded on other grounds sub nom. AMG Cap. Mgmt., LLC v. FTC*, 593 U.S. 67 (2021).

Text. In both legal and common parlance, the phrase "about to" denotes a temporally proximate or imminent activity or event. That was true when Congress enacted Section 13(b), and it remains true today. Leading dictionaries have long defined "about to" as "[o]n the verge of," as in "[t]he chorus is about to sing" (*The American Heritage Dictionary* (4th ed. 2006), and "ready; likely immediately," as in "I was about to speak" (*Webster's New World College Dictionary* (5th ed. 2014)); *see also Random House Dictionary of the English Language* (1973) ("on the verge or point of" as in "about to leave"); *Ballantine's Law Dictionary* (3d ed. 1969) ("on the point of"; "the words 'about to abandon' are synonymous with 'intended now to abandon'"); *Black's Law Dictionary* (4th ed. 1968) ("just ready" as in "'about to sail' means just ready to sail").

The district court's contrary interpretation of Section 13(b) cannot be reconciled with the statute's plain terms. According to the district

court, the "about to violate" standard is satisfied so long as there is past unlawful conduct and "some likelihood that [the] unlawful conduct will recur." *See, e.g.*, A49 (about to violate sufficiently alleged based on "some likelihood that Walmart's unlawful conduct will recur"). But it would be nonsensical to find that someone is "about to" do something, when there is only "some likelihood" that they will do it—maybe in the distant future, or maybe never at all. As the Third Circuit has held, "[t]he plain language of Section 13(b)" confirms that "'is about to violate' means something more than a past violation and a likelihood of recurrence." *Shire*, 917 F.3d at 158.

What is more, "'[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.'" *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (quoting 2A N. Singer, Statutes and Statutory Construction § 46.06, pp. 181–186 (rev. 6th ed. 2000). But for at least two reasons the district court's reading would render § 13(b)(1)'s "about to" requirement inoperative. First, Section 13(b)(1)'s requirement that a person be "violating" or "about to violate" the law is a "condition" precedent to the FTC's authority to sue for injunctive relief. *See Credit Bureau Ctr.*, 937 F.3d at 772.

By "declin[ing] to distinguish between the requirements of § 13(b)(1) and the common law standard for injunctive relief," A48, the district court's interpretation renders the requirement of a condition precedent toothless. Second, Article III's injury-in-fact requirement already demands, for lawsuits based on threatened conduct, that there be "a substantial risk that the harm will occur." *Dep't of Com. v. New York*, 588 U.S. 752, 767 (2019). The district court's reading renders the "about to" requirement meaningless in light of what Article III already demands.

Statutory Context. Reading "about to violate" as requiring imminence is also the only way to make sense of the text in light of the "overall statutory scheme." *King v. Burwell*, 576 U.S. 473, 487 (2015). The Federal Trade Commission Act prohibits, and authorizes the FTC to prevent, "[u]nfair methods of competition" and "unfair or deceptive acts or practices." 15 U.S.C. §§ 45(a)(1)–(2). Ever since Congress created the FTC in 1914, the agency has been authorized to enforce the Act through its own administrative proceedings, according to procedures detailed in Section 5 of the Act. Those proceedings can be lengthy, involving the filing of an administrative complaint, a hearing before an administrative law judge, a cease-and-desist order, review by the Commission, and then review by

a court of appeals. *See AMG*, 593 U.S. at 72. Any order becomes final and enforceable only after review by the court of appeals or expiration of the time for such review. 15 U.S.C. § 45(g).

In the 1970s, Congress authorized the Commission to seek additional remedies in court. In 1973, Congress added § 13(b), the provision at issue here, and also amended § 5(l) to authorize district courts, in instances where a final cease-and-desist order had been violated, to award civil penalties, issue injunctions, and grant equitable relief. 15 U.S.C. § 45(l). Two years later, Congress added Section 19, which authorizes district courts to grant "such relief as the court finds necessary to redress injury to consumers," provided the respondent had violated a "final cease and desist order." 15 U.S.C. § 57b(a)-(b).

Alone among these mechanisms, Section 13 authorizes the FTC to obtain relief in federal court *before* securing a final cease-and-desist order.[2] Seen in this context, it becomes even clearer that "[i]njunctive relief in § 13(b) … functions as a simple stop-gap measure that allows the

[2] Similarly to § 13(b), § 13(a) authorizes the FTC to seek injunctive relief against an entity who "is engaged in, or is about to engage in," false advertising for food, drugs, devices, services, or cosmetics before it obtains a final cease and desist order.

Commission to act quickly to prevent harm." *AMG*, 910 F.3d at 431 (O'Scannlain, J., specially concurring). Through Section 13(b), Congress sought to "solve one of the main problems of the FTC's relatively slow-moving administrative regime—the need to quickly enjoin ongoing or imminent illegal conduct." *Shire*, 917 F.3d at 155.

Congress's choice of "about to" in Section 13(b) contrasts with language in other provisions of both the FTC Act and other statutes authorizing injunctive relief. Elsewhere in the FTC Act itself, Congress authorized suit against those who "violate[]" final cease-and-desist orders, including suits to secure "mandatory injunctions and such other and further equitable relief as [courts] deem appropriate." 15 U.S.C. § 45(l). That garden-variety injunctive relief provision stands in stark contrast to the "about to" language of Section 13(b). And "where Congress includes particular language in one section of a statute but omits it in another … , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983).

Similarly, the Clayton Act authorizes private parties to obtain "injunctive relief … against threatened loss or damage by a violation of the

antitrust laws … when and under the same conditions and principles as injunctive relief … is granted by courts of equity." 15 U.S.C. § 26. Both these statutes illustrate that, when Congress intends the common law standards for injunctive relief to apply, "Congress knows how to" say so. *See Astrue v. Ratliff*, 560 U.S. 586, 595 (2010).

Legislative History. Although the statute's clear command makes it unnecessary to consult the FTC Act's legislative history, "for those who consider legislative history useful," the history here confirms that Congress meant what it said. *Tapia v. United States*, 564 U.S. 319, 331 (2011); *accord In re Sinclair*, 870 F.2d 1340, 1344 (7th Cir. 1989). "Unlike Section 5, Section 13 was not part of the original FTC Act." *Shire*, 917 F.3d at 155. "Rather, [it] was added later [in 1973] in an effort to solve one of the main problems of the FTC's relatively slow-moving administrative regime—the need to quickly enjoin ongoing or imminent illegal conduct." *Id*.

To address that issue, Congress enacted Section 13(b). *See* Pub. L. No. 93-153, § 408(f), 87 Stat. 576, 592 (1973). Congress intended Section 13(b) to grant the FTC additional authority to remedy misconduct that was already occurring or was on the verge of occurring "pending

completion of FTC administrative hearings." *Shire*, 917 F.3d at 156 (citing S. Rep. No. 93-151, at 30 (1973)). As explained in a Senate report discussing an earlier version of Section 13(b) containing substantially similar "about to" language, "[t]he purpose of [Section 13(b)] is to permit the Commission to bring an immediate halt to" violations that "might continue for several years until agency action is completed." S. Rep. No. 93-151, at 30 (1973); *see also* 119 Cong. Rec. 36,610 (1973) ("[I]t is essential that the Commission have authority to prevent the aggregation of serious public harm during the period required for the Commission to complete [administrative proceedings]."). [3] At the time, the FTC itself explained that it was seeking the power to enjoin misconduct that posed an immediate threat of harm. *See* 119 Cong. Rec. S21,445 (1973) (letter from FTC General Counsel Dietrich to Sen. Jackson explaining that, in § 13(b), the FTC sought "the statutory authority to seek directly in the federal

[3] While Section 13(b) ultimately passed as part of a different bill, *see Trans-Alaska Pipeline Act*, Pub. L. No. 93-153, § 408, 87 Stat. 576, 591 (1973), multiple courts have relied on the Senate report to inform their understanding of the provision, *see FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1027 (7th Cir. 1988); *Shire*, 917 F.3d at 156; *FTC v. H. N. Singer, Inc.*, 668 F.2d 1107, 1110-11 (9th Cir. 1982).

courts preliminary injunctions against the continuance of anticompetitive conduct").

In sum, the FTC Act's plain language, statutory context, and legislative history all establish that the FTC lacks authority to seek injunctive relief under § 13(b) without a showing of a need for immediate relief to stop violations of Section 5 that are ongoing or about to occur. Congress's limited grant of authority in § 13(b) to sue in federal court demands nothing less. If the FTC wants to ride in the procedural fast lane, it must show an imminent need.

B. The FTC has failed to allege that Walmart is violating or is about to violate the law.

To proceed with its claim under the proper standard, the FTC must allege sufficient facts that Walmart "is violating" or "is about to" violate the law, 15 U.S.C. § 53(b)—in other words, "ongoing or imminent" violations, *see Credit Bureau Ctr*, 937 F.3d at 772. Yet the bulk of the FTC's complaint focuses on conduct long past—namely, Walmart's alleged failure to take specific anti-fraud measures several years before this case was filed. *See* A144-172 ¶¶ 58-111. Absent plausible factual allegations that Walmart is poised to restart practices it long ago ceased, those allegations of supposedly unfair practices are insufficient grounds for

injunctive relief under 13(b). And one searches the complaint in vain for allegations about anything other than stale activity.

To the extent that the FTC seeks to pursue a claim based on ongoing violations in Walmart's current anti-fraud program, it has not clearly alleged such a claim. The allegations that might support that claim are, at best, conclusory, scattered, and untethered to a clear theory of unfairness. *See* A196 ¶ 164 (asserting that "in some cases, Walmart continues to violate laws enforced by the FTC"). Without well-pled allegations that Walmart either is violating the law or is poised to do so imminently, the FTC's Section 13(b) claim should be dismissed.

II. The Constitution demands that businesses receive fair notice of what the FTC seeks to prohibit or mandate.

It is a bedrock principle of law that, before punishing alleged violators of the law, the government must provide fair notice of what the law prohibits or requires. The FTC is no exception. In fact, fair notice is all the more critical when Congress gives an administrative agency like the FTC broad authority to prohibit "unfair" acts. 15 U.S.C. § 45(a)(1). Yet nothing in the FTC Act or the FTC's promulgated regulations provides fair notice to Walmart—or any other business—that the kind of conduct alleged here is illegal.

A. The Constitution demands fair notice, and the public benefits from the legal certainty that fair notice provides.

Both historical and contemporary understandings of due process confirm that the Constitution demands fair notice. The "requirement of notice" is not just a technicality—it is a matter of basic fairness with historical roots deeply "[e]ngrained in our concept of due process." *Lambert v. California*, 355 U.S. 225, 228 (1957); *see Earle v. McVeigh*, 91 U.S. 503, 504, 510 (1875). "For more than a century the central meaning of procedural due process has been clear": notice must be "granted at a meaningful time and in a meaningful manner." *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (collecting cases). That "essential constitutional promise[]" "may not be eroded." *Id.*

As early as the 1800s—before courts had "define[d] with precision the words 'due process of law'"—the Supreme Court held that due process at a minimum covered "certain immutable principles of justice," including "due notice," that "inhere[d] in the very idea of free government." *Holden v. Hardy*, 169 U.S. 366, 389-90 (1898); *see also State of Mo. ex rel. Hurwitz v. North*, 271 U.S. 40, 42 (1926) (due process requires "reasonable notice"); *Honeyman v. Hanan*, 302 U.S. 375, 378 (1937) (same).

Today, as at the Founding, "fair notice" remains a "fundamental principle" that requires the "clarity in regulation" that is "essential" to due process. *Fox Television Stations*, 567 U.S. at 253.

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.

Legal uncertainty deters productive conduct and stifles innovation—a reality the courts have long understood. "[V]ague laws … operate to inhibit protected [conduct] by inducing citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *Buckley v. Valeo*, 424 U.S. 1, 41 n.48 (1976) (cleaned up). That is particularly true of the business community. Without clarity, firms are left to guess whether "they are in compliance with applicable … laws, or need to be in compliance with them at all," making it "difficult for [them] to operate for fear of an enforcement action." Center for Capital Markets Competitiveness, *Growth Engine*, U.S. Chamber of Commerce, at 74 (Nov. 16, 2020), https://www.uschamber.com/assets/documents/ccmc_growthengine_final.pdf. Business uncertainty hampers

innovation and investment activity, to the ultimate detriment of businesses and consumers alike.

As the Supreme Court has explained, 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). Courts must therefore take account of these real economic costs when construing the law.

As the federal regulator of unfair business practices, the FTC has a major effect on business conduct across the country. Confusion about the scope of the FTC's powers harms the national 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. In the absence of binding law, businesses providing routine lawful services lack fair notice as to how much or what

kind of anti-fraud policing against third-party bad actors they must do. And without fair notice, claims like those here cannot be allowed to succeed. *See Fox Television Stations*, 567 U.S. at 253. Any interpretation of the FTC Act should be informed by this principle of fair notice. *See* Walmart Br. 43-44.

B. The FTC's conduct here exemplifies these problems.

The FTC's approach in this lawsuit puts the lack of fair notice to Walmart in stark relief. The complaint's sole count for a violation of § 5 of the FTC Act states simply, without elaboration, that "[i]n numerous instances, in connection with providing money transfer services at its locations, Defendant has failed to take timely, appropriate, and effective action to detect and prevent fraud-induced money transfers." A197 ¶ 167; *id.* ¶ 169 (asserting, without elaboration, that "Defendant's acts or practices as set forth in Paragraph 167 constitute unfair acts or practices"). That allegation provides scant notice to Walmart—or any other business offering money transfer services—of the specific conduct that the FTC believes is "unfair," or of the specific anti-fraud practices that businesses must adopt to satisfy § 5.

Indeed, the FTC's failure to articulate—in this complaint or anywhere else—specifically what practices are unlawful risks chilling businesses from providing money transfer services at all, or on convenient terms to consumers, without onerous anti-fraud measures that invade consumer privacy or potentially violate anti-discrimination laws. The potential chilling effect is plain from the district court's reasoning. The court counted the mere fact that Walmart operates a successful business offering these services as evidence that Walmart is "about to" commit unfair practices. *See* A50 ("And the company has opportunity and incentive to continue its lax security practices: Walmart still processes large amounts of money transfers and makes millions of dollars in related fees."). To state the obvious, simply operating a successful business should not invite a lawsuit from the FTC.

The district court wrongly dismissed these fair notice concerns. First, the court concluded that the "text" of § 5(n) provided sufficient notice that Walmart's allegedly "lax security measures" were unfair. A53-54. Section 5(n), however, simply specifies that an act or practice is *not* "unfair" *unless* "the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers

themselves and not outweighed by countervailing benefits to consumers or to competition." 15 U.S.C. § 45(n). And it permits the FTC in making unfairness determinations to consider "established public policies," provided those policies are not the "primary basis" for the determinations. *Id.* Section 5(n) thus sets limits on the FTC's unfairness authority; it does not define unfairness, much less clarify for a business whether its anti-fraud practices comply with the Act.

To be sure, § 5 is intentionally flexible, but as with the Commission's authority over unfair methods of competition, that does not relieve the FTC of its "duty to define the conditions under which conduct ... would be unfair so that businesses will have an inkling as to what they can lawfully do rather than be left in a state of complete unpredictability." *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 138-39 (2d Cir. 1984). Congress gave the agency ample tools to fulfill that duty, including consumer protection rulemaking and agency adjudication. *See* 15 U.S.C. § 57a; 15 U.S.C. § 45(b). The FTC should be required to employ those tools rather than rushing to federal court for an injunction based on vague allegations of unfairly lax anti-fraud practices.

Second, the district court emphasized that Walmart had fair notice here because "[a] sophisticated corporation" like Walmart was "well-positioned to conduct [the § 5(n) unfairness] analysis." A53. But the fair notice requirement inherent in due process rests on an objective standard; the law must "provide a person of ordinary intelligence fair notice." *Fox Television Stations*, 567 U.S. at 253. Due process does not require businesses to exercise "extraordinary intuition," sophistication, or clairvoyance. *United States v. Chrysler Corp.*, 158 F.3d 1350, 1357 (D.C. Cir. 1998). The FTC's unfairness authority impacts businesses big and small, sophisticated and ordinary. The FTC's decision to target a leading business does not excuse its failure to provide fair notice.

Third, in finding that Walmart had fair notice here, the district court relied in part on prior FTC "complaints" and "resulting consent orders." A56-57. But complaints and consent orders "do[] not establish illegal conduct." *Intergraph Corp. v. Intel Corp.*, 253 F.3d 695, 698 (Fed. Cir. 2001). Because a complaint or consent order "is not a decision on the merits and therefore does not adjudicate the legality of any action by any party thereto," it does not and cannot provide fair notice of what the law requires or proscribes. *Beatrice Foods Co. v. FTC*, 540 F.2d 303, 312 (7th

Cir. 1976). Indeed, as the Supreme Court has explained, "[t]he circumstances surrounding … negotiated [consent orders] are so different that they cannot be persuasively cited in a litigation context." *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 330 n.12 (1961). The decision to settle, rather than fight an FTC complaint, may reflect nothing more than a pragmatic business decision to avoid costly and protracted litigation.

CONCLUSION

For these reasons, the district court's order should be reversed, and the FTC's complaint dismissed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and the Seventh Circuit's Local Rule 29 because this brief contains 4,453 words, excluding the parts of the brief exempt by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system on February 19, 2025. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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