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New York Supreme Court

Appellate Division—First Department

Appellate Case No. 2026-05253

THE PEOPLE OF THE STATE OF NEW YORK,
by LETITIA JAMES, New York Attorney General,

Plaintiff-Respondent,

— against —

EARLY WARNING SERVICES, LLC,

Defendant-Appellant.

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT

AMANDA FLUG DAVIDOFF
JOSHUA K. HANDELL
SULLIVAN & CROMWELL LLP
1700 New York Avenue NW
Washington, DC 20006
(202) 956-7500
davidoffa@sullcrom.com
handellj@sullcrom.com

Counsel for Proposed Amicus Curiae the Chamber of Commerce of the United States of America

New York County Clerk's Index No. 654753/25

PLEASE TAKE NOTICE that, upon the annexed affirmation of Amanda Flug Davidoff, dated November 24, 2026, and the accompanying proposed brief, undersigned counsel will move this Court at the Appellate Division Courthouse, located at 27 Madison Avenue, New York, New York, on December 7, 2026 at 10:00 A.M. or as soon thereafter as counsel may be heard, for an order granting leave to the Chamber of Commerce of the United States of America to file a brief as *amicus curiae* in support of defendant-appellant in the above-captioned action. A copy of the affirmation in support of this motion is annexed hereto as Exhibit A, and the proposed Brief of the Chamber as *Amicus Curiae* in Support of Defendant-Appellant & Reversal is annexed hereto as Exhibit B. Plaintiff-respondent and defendant-appellant have consented to the filing of a brief by the proposed *amicus curiae*.

Respectfully submitted.

s/Amanda Flug Davidoff
AMANDA FLUG DAVIDOFF
JOSHUA K. HANDELL
SULLIVAN & CROMWELL LLP
1700 New York Avenue NW
Washington, DC 20006
Telephone: (202) 956-7500

Counsel for Proposed Amicus Curiae the Chamber of Commerce of the United States of America

November 24, 2026

EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION—FIRST DEPARTMENT

The People of the State of New York, by Letitia James, New York Attorney General,

Plaintiff-Respondent,

— against —

Early Warning Services, LLC,

Defendant-Appellant.

Appellate Case No. 2026-05253

AFFIRMATION OF AMANDA FLUG DAVIDOFF IN SUPPORT OF MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

Amanda Flug Davidoff, an attorney duly admitted to practice law before the courts of the State of New York, affirms the following under penalties of perjury, pursuant to CPLR 2106:

1. I am a partner with Sullivan & Cromwell LLP, counsel for the Chamber of Commerce of the United States of America (the Chamber) in the above-captioned action. I submit this affirmation in support of the Chamber's motion to appear as *amicus curiae*.

2. Submitted herewith is a copy of the brief the Chamber wishes to file with the Court. *See* Ex. B, *infra*.

Identity and Interest of the Movant

3. The Chamber is the world's largest business organization. As the nation's leading advocate for business, the Chamber represents 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.

4. This case presents an important question about whether and in what circumstances American businesses can be held liable for the misconduct of third parties. Proper limits on that liability are critically important to the Chamber's members, including financial institutions and technology providers. The Chamber has often appeared as *amicus curiae* to address those limits.[1] The Chamber therefore has a strong interest in the resolution of this case.

[1] *See, e.g.*, *Amicus* Br. of the Chamber, *et al.*, *Cisco Sys., Inc.* v. *Doe I*, No. 24-856 (S. Ct. Feb. 25, 2026), 2026 WL 596406; *Amicus* Br. of the Chamber, *et al.*, *Wildman* v. *Deutsche Bank*, No. 23-132 (2d Cir. Aug. 17, 2023), 2023 WL 5431348; *Amicus* Br. of the Chamber, *et al.*, *Freeman* v. *HSBC Holdings PLC*, No. 19-3970 (2d Cir. May 26, 2020), 2020 WL 2847790; *Amicus* Br. of the Chamber, *et al.*, *Siegel* v. *HSBC North America Holdings Inc.*, No. 18-2540 (2d Cir. Nov. 30, 2018), 2018 WL 7199825; *Amicus Br.* of the Chamber,

Basis for *Amicus Curiae* Relief

5. The Chamber seeks leave to file this brief because it is well-suited to comment on the primary question presented in this case, which is whether defendant-appellant Early Warning Services, LLC should bear liability for the misuse of its Zelle payment-service platform by third-party scammers. In recent years, numerous American businesses (including Chamber members) have faced similar actions by private plaintiffs and state and municipal governments seeking to impose third-party liability for the misuse of lawful products and services. The Chamber and its members therefore have extensive experience litigating the legal principles relevant to this appeal and a substantial interest in the outcome. I believe that the Chamber can provide a unique nationwide perspective that would aid the Court's consideration of this case.

6. Granting this motion will not delay or prejudice the proceedings, as the Chamber seeks only to submit the attached brief.

7. Plaintiff-respondent and defendant-appellant have consented to the filing of the Chamber's brief.

McCollum v. *Circle Internet Grp., Inc.*, No. 1:26-cv-11733 (D. Mass. June 29, 2026), 2026 WL 2980060; *Amicus* Br. of the Chamber, *et al.*, *Martin* v. *Fifth Third Bank Nat'l Ass'n*, No. 132935 (Ill. Aug. 5, 2026).

8. For the foregoing reasons, the Chamber respectfully requests that this Court grant leave to participate as *amicus curiae* and file its brief.

* * *

I affirm this 24th day of November 2026, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true to the best of my knowledge and belief, and I understand that this document may be filed in an action or proceeding in a court of law.

Affirmed: November 24, 2026
Washington, DC



AMANDA FLUG DAVIDOFF
SULLIVAN & CROMWELL LLP
1700 New York Avenue NW
Washington, DC 20006
Telephone: (202) 956-7500

EXHIBIT B

New York Supreme Court

Appellate Division—First Department

Appellate Case No. 2026-05253

THE PEOPLE OF THE STATE OF NEW YORK,
by LETITIA JAMES, New York Attorney General,

Plaintiff-Respondent,

— against —

EARLY WARNING SERVICES, LLC,

Defendant-Appellant.

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT & REVERSAL

AMANDA FLUG DAVIDOFF
JOSHUA K. HANDELL
SULLIVAN & CROMWELL LLP
1700 New York Avenue NW
Washington, DC 20006
(202) 956-7500
davidoffa@sullcrom.com
handellj@sullcrom.com

Counsel for Amicus Curiae
The Chamber of Commerce of
the United States of America

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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business organization. As the nation's leading advocate for business, the Chamber represents 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.

This case presents an important question about whether and when American businesses can be held liable for the misconduct of third parties. Proper limits on that liability are critically important to the Chamber's members, including financial institutions and technology providers in New York. The Chamber has repeatedly appeared as *amicus curiae* to address those limits.[1] The Chamber therefore has a strong interest in the resolution of this case.

---

[1] *See, e.g.*, *Amicus* Br. of the Chamber, *et al.*, *Cisco Sys., Inc.* v. *Doe I*, No. 24-856 (S. Ct. Feb. 25, 2026), 2026 WL 596406; *Amicus* Br. of the Chamber, *et al.*, *Wildman* v. *Deutsche Bank*, No. 23-132 (2d Cir. Aug. 17, 2023), 2023 WL 5431348; *Amicus* Br. of the Chamber, *et al.*, *Freeman* v. *HSBC Holdings PLC*, No. 19-3970 (2d Cir. May 26, 2020), 2020 WL 2847790; *Amicus* Br. of the Chamber, *et al.*, *Siegel* v. *HSBC North America Holdings Inc.*, No. 18-2540

ARGUMENT

In recent years, American businesses have been deluged by lawsuits seeking to impose liability for the independent conduct of third parties using their lawful products and services. As this case demonstrates, providers of consumer financial services have been especially frequent targets for such actions. But this contagion has spread well beyond the financial sector: Expansive theories of third-party liability threaten virtually every consumer-facing business in the nation. And while the plaintiffs' bar has long pioneered novel tort suits, state and municipal governments are increasingly pursuing new theories of litigation to hold businesses liable for the misconduct of third parties.

Fortunately, the courts have largely resisted this trend. The bulk of judicial authority has adhered to the longstanding rule that a person is not liable for the misconduct of another unless he acted "in concert with the other" or provided "substantial assistance or encouragement to the other" with specific and actionable knowledge of the particular wrongdoing. Restatement (Second) of Torts § 876(a)-(b) (A.L.I. 1979). In the commercial context, courts have

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(2d Cir. Nov. 30, 2018), 2018 WL 7199825; *Amicus Br.* of the Chamber, *McCollum* v. *Circle Internet Grp., Inc.*, No. 1:26-cv-11733 (D. Mass. June 29, 2026), 2026 WL 2980060; *Amicus* Br. of the Chamber, *et al.*, *Martin* v. *Fifth Third Bank Nat'l Ass'n*, No. 132935 (Ill. Aug. 5, 2026).

emphasized that secondary liability attaches only where the business, acting with the requisite knowledge, controlled the instrumentality of harm with no independent act by the primary tortfeasor breaking the chain of causation. That rule makes sense, as American law generally imposes "no 'duty to control the conduct of third persons to prevent them from causing injury to others.'" *Oddo* v. *Queens Vill. Comm. for Mental Health for Jamaica Cmty. Adolescent Program, Inc.*, 28 N.Y.3d 731, 735 (2017). And it ensures that innocent businesses will not be penalized—nor innocent consumers deprived of needed goods and services—due to the independent misconduct of bad actors.

In the decision below, the Supreme Court departed from these principles—and, in doing so, became an outlier among state and federal courts addressing similarly expansive theories. It was sufficient, in the court's view, that the New York Attorney General (NYAG) alleged that Early Warning Services, LLC (EWS) had general awareness of nonspecific "fraudulent schemes" by third parties accessing its platform—never mind that more than 99.9% of Zelle transactions are completed without any allegation of fraud or scam, and never mind that only parties beyond EWS's control are alleged to have committed misconduct in the remaining fraction. Relying on a ratification theory without precedent, limitation, or basis in the complaint, the court allowed its

own assessment of the "exponential rise in digital interactions, coupled with rapidly advancing technology," Op. 2, to upend centuries of hornbook law.

This decision was error, and a costly one at that. Left intact, the decision below will hamstring businesses in the State of New York—not just EWS, and not just its fellow providers of consumer financial services, but potentially *any* company that supplies a product or provides a service that might be used by someone else to commit a crime or tort (which is to say, virtually any company). As a result, consumers could face higher costs and disruptions in service, and they would be deprived of the "efficient and innovative technologies," Op. 1, on which they presently rely. To avoid those pernicious outcomes, restore uniformity in the caselaw, and enforce longstanding principles of secondary liability, *amicus curiae* respectfully urges this Court to reverse.

A. American Businesses Face a Rising Tide of Litigation Seeking to Hold Them Liable for the Illegal Acts of Third Parties.

The NYAG's theory—that defendant-appellant EWS is liable because it "create[d] an atmosphere conducive to fraud," Compl. ¶ 154—lacks both originality and merit. Over the past two decades, scores of private and public litigants have tried to hold businesses liable for the acts of third parties who misused their products and services. The template is by now familiar: The defendant business sold a lawful product or service; third parties misused that

product or service to cause harm; and the plaintiff sought to impose penalties not because the business conspired with or assisted the wrongdoers, but simply because it knew at some level of abstraction—though not in connection with any particular transaction—that wrongdoing was taking place. Plaintiffs have invoked an array of legal theories in their efforts to subject businesses to third-party liability, from ordinary negligence and aiding-and-abetting to public nuisance. Time and again, courts have rejected their attempts to distort these doctrines beyond any historical grounding.

1. *Common-Law Torts.* Plaintiffs have repeatedly failed in their efforts to impose an affirmative tort duty on financial institutions to detect and prevent misconduct committed using their lawful services. To the contrary, it is "[t]he almost-universal law in this country," *SFS Check, LLC* v. *First Bank of Delaware*, 774 F.3d 351, 357 (6th Cir. 2014), that banks "owe[] … no duty of care to monitor a customer's activities" for potential wrongs against others, *El Camino Res., Ltd* v. *Huntington Nat'l Bank*, 722 F. Supp. 2d 875, 907 (W.D. Mich. 2010); *see, e.g.*, *Winkler* v. *Battery Trading, Inc.*, 934 N.Y.S.2d 199, 201 (2d Dep't 2011) ("As a general rule, banks do not owe non-customers a duty to protect them from the intentional torts of their customers." (brackets and internal quotation marks omitted)). Although third parties sometimes use bank

accounts as instrumentalities of wrongdoing, "the contract opening a bank account … does not involve any implied duty [on the part of the bank] to supervise account activity or to inquire into the purpose for which the funds are being used." *Lovings* v. *Adams*, 2026 WL 1455011, at *2 (C.D. Cal. Apr. 16, 2026) (internal quotation marks omitted). Imposing such an expansive supervisory duty "would be contrary to the normal understanding of the purpose of a bank account and would expose banks to unlimited liability for unforeseeable frauds." *Eisenberg* v. *Wachovia Bank, N.A.*, 301 F.3d 220, 226 (4th Cir. 2002).

Courts have extended that logic to non-bank payment-service providers as well. In *Bibicheff* v. *PayPal, Inc.*, 844 F. App'x 394 (2d Cir. 2021), for example, a plaintiff alleged that PayPal was liable because it had "failed to monitor and investigate twelve fake accounts created under [the plaintiff's] name … by her office manager, who defrauded her," *id.* at 395. The district court dismissed the claims, and the Second Circuit affirmed. *Id.* at 397. In doing so, the court of appeals "agree[d] … that New York courts generally do not impose a duty on businesses to protect their customers from the acts of third parties absent special circumstances not alleged here." *Id.* at 396; *see also RLFShop, LLC* v. *Am. Express Co.*, 2018 WL 4030544, at *4-10 (S.D. Ohio Aug. 23, 2018) (dismissing claims against PayPal stemming from the use of a

PayPal account to defraud a business). As previously noted in this litigation, *see* Mot. to Dismiss 12-13, suits involving Zelle itself have met the same fate. *See, e.g.*, *Holmes* v. *Capital One, N.A.*, 2023 WL 6318883, at *10-11 (N.D.N.Y. Sep. 28, 2023) (rejecting theory that Zelle's alleged "vulnerability to fraud" gave rise to liability under New York law, because "[t]he cause of Plaintiff's loss was the criminal acts of a third party" that EWS "had no control over").

Those decisions align with the rigorous approach that courts have taken when analyzing tort theories against other online platforms. For example, courts have repeatedly rejected tort liability against online providers of rental services for harms inflicted by third-party users. *See, e.g.*, *Harrington* v. *Neutron Holdings, Inc.*, 564 P.3d 309, 311-315 (Colo. App. 2024) (rejecting claims against scooter-rental app Lime after a user struck a bicyclist, reasoning that liability based on "general foreseeability" would "effectively require Lime to continuously monitor and control the conduct of every one of its users").

2. *Aiding and Abetting.* Courts at every level have likewise rejected expansive theories of aiding-and-abetting liability predicated only on a business's provision of lawful services and general awareness of misuse.

Twice in the last four years, the Supreme Court of the United States has cautioned against imposing secondary liability for lawful commerce in digital

services. In *Twitter, Inc.* v. *Taamneh*, 598 U.S. 471 (2023)—in which plaintiffs sought to hold social-media platforms responsible for "aiding and abetting" violent acts by third parties who used their services on the same terms as all other users—the Court held that "[t]he mere creation of those platforms … [wa]s not culpable," nor did the platforms "incur culpability merely for providing their services to the public writ large," *id.* at 499. "Culpability of some sort is necessary to justify punishment of a secondary actor," the Court explained, "lest mostly passive actors like banks become liable for all of their customers' crimes by virtue of carrying out routine transactions." *Id.* at 491 (citation modified). And the Court reinforced this principle in *Cox Communications, Inc.* v. *Sony Music Entertainment*, 146 S. Ct. 959, 964 (2026), where it held that "merely providing a service to the general public with knowledge that it will be used by some to infringe" does not make an internet service provider contributorily liable for its subscribers' copyright infringement.

3. *Public-Nuisance Laws.* Finally, courts have resisted state and municipal governments' attempts to stretch their public-nuisance laws to impose liability for consumer misuse of lawful products and services.

The Oklahoma Supreme Court, for example, "reject[ed] the State's invitation to expand" public-nuisance doctrine in a suit against pharmaceutical

manufacturers, reasoning that others "control[led] the instrumentality … at the time [the alleged harm] occurred." *Oklahoma ex rel. Hunter* v. *Johnson & Johnson*, 499 P.3d 719, 722-723, 728 (Okla. 2021). When the NYAG sued PepsiCo on allegations that consumers had discarded large quantities of its plastic bottles in the Buffalo River, the Supreme Court appropriately dismissed the claim, reasoning that "[i]mposing civil liability on a manufacturer for the acts of a third party" would be "contrary to every norm of established jurisprudence." *People ex rel. James* v. *PepsiCo, Inc.*, 222 N.Y.S.3d 907, 910, 914 (Sup. Ct. 2024). And financial institutions have repeatedly prevailed over meritless suits claiming that their provision of a lawful consumer financial product or service gave rise to a "public nuisance." *See, e.g.*, *City of Cleveland* v. *Ameriquest Mortg. Sec., Inc.*, 615 F.3d 496, 504, 507 (6th Cir. 2010); *accord City of Oakland* v. *Wells Fargo & Co.*, 14 F.4th 1030, 1032-1033 (9th Cir. 2021) (*en banc*); *City of Cincinnati* v. *Deutsche Bank Nat'l Tr. Co.*, 897 F. Supp. 2d 633, 636, 640-641 (S.D. Ohio 2012); *Mayor & City Council of Balt.* v. *Wells Fargo Bank, N.A.*, 677 F. Supp. 2d 847, 848-850 (D. Md. 2010).

B. In Rejecting Expansive Theories of Third-Party Liability, Courts Have Articulated Several Principles Relevant Here.

Over the last two decades of (largely failed) litigation seeking to impose third-party liability on American businesses, courts—including this one—have

coalesced around several principles that should inform the disposition of the NYAG's suit against EWS.

1. *No General Duty to Police Third Parties.* As noted *supra* p. 3, it is a bedrock principle of American law that parties are under no general "duty to control the conduct of third persons to prevent them from causing injury to others." *Oddo*, 28 N.Y.3d at 735. This principle holds "even where as a practical matter defendant can exercise such control," *D'Amico* v. *Christie*, 71 N.Y.2d 76, 88 (1987)—a circumstance not presented here, where (based on the NYAG's own allegations) Zelle facilitates more than *six million* transactions each day, *see* Compl. ¶ 127. And that principle has appropriately precluded liability for technology companies, financial institutions, and beyond. *See, e.g.*, *Twitter*, 598 U.S. at 501.

2. *Proximate and Intervening Causes.* Even a defendant who furnishes a "condition that made [the] resulting injury possible" does not proximately cause an injury that flows from an independent unlawful act or other derogation. *City of Chicago* v. *Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1136-1137 (2004). That principle animated each of the cases just discussed: Whether the "condition" was offering banking services (*Bibicheff*; *RLFShop*; *Holmes*), financing loans (*Cleveland*; *Oakland*; *Baltimore*), matching users

and providers on an app (*Harrington*), manufacturing and marketing pharmaceuticals (*Johnson & Johnson*), or providing access to an online platform (*Twitter*; *Cox*), courts have consistently held that intervening unlawful, tortious, or negligent acts sever the chain of causation.

3. *Control of the Instrumentality.* Courts have also broadly required a showing that the defendant business "control[led] the instrumentality alleged to [have caused the harm] at the time it occurred." *Johnson & Johnson*, 499 P.3d at 728. A business that has placed a product or service into the stream of commerce "does not generally have control of its product once it is sold" and thus cannot "be held perpetually liable" for the harm caused by others who misuse it. *Ibid.* This principle likewise applies to situations where the business continues to exercise some general supervisory function over the instrumentality—*i.e.*, by setting and enforcing policies related to the use of its product or services—but lacks immediate control at the moment of the wrongdoing. *See, e.g.*, *Harrington*, 564 P.3d at 314 (concluding that "such ancillary restrictions" as the fact "that Lime scooters have 'GPS capabilities' and are restricted from being driven in 'certain areas' … fall well short of the degree of control associated with the categories of special relationships previously recognized" to create a duty of care).

4. *Insufficiency of General Knowledge.* Finally, courts have repeatedly declined to impose liability on the basis of a company's mere general awareness that its products or services are being misused. That is true when plaintiffs allege constructive knowledge at a high level of abstraction, such as "general foreseeability" of third-party misuse. *See Harrington*, 564 P.3d at 315 (explaining that "[t]he general foreseeability that *someone* might use the scooter while intoxicated or otherwise in violation of traffic laws cannot alone justify imposing a duty upon Lime to prevent all such improper use"). And it holds equally true when plaintiffs assert a business's concrete knowledge of past misuse but fail to allege that the business knew identifiable users would misuse its products or services on specific occasions in the future. *See Smith & Wesson Brands, Inc.* v. *Estados Unidos Mexicanos*, 605 U.S. 280, 293 (2025) ("When a company merely knows that 'some bad actors' are taking 'advantage' of its products for criminal purposes, it does not aid and abet.").

C. The Supreme Court Erred by Departing from These Established Principles.

Courts have consistently applied these sensible common-law rules to limit liability for third-party conduct, regardless of industry or cause of action. As EWS explains, nothing in Executive Law § 63(12) displaces those principles. *See* EWS Opening Br. 32-42. They therefore apply with full force here.

Yet the decision below transgressed each of them. The Supreme Court purported to apply a "ratification" theory, under which "[b]enefitting from unauthorized transactions, despite knowledge of the fraudulent nature of the transaction, is sufficient to allege that a defendant created an atmosphere conducive to fraud." Op. 11. In doing so, the court below committed reversible error by (1) effectively assigning to EWS responsibility for all actions of all transacting customers on a novel ratification theory; (2) ignoring critical intervening events—namely, the schemes, carried out by third parties, that precipitated the transfers in question; (3) failing to meaningfully consider that EWS lacks control over such off-platform schemes underlying the victims' validly authorized Zelle transactions; and (4) ultimately holding EWS liable for its abstract awareness of potential wrongdoing on its platform.

1. The Supreme Court's ratification analysis effectively imputed to EWS full responsibility for the misconduct of third parties with whom—by the court's own acknowledgment—EWS maintains no agency relationship. *See* Op. 11 (asserting that the "absence of an agency relationship between the creator of the market, goods, or services and the parties using that market or those goods and services to perpetrate fraud is not fatal to an Executive Law § 63(12) claim"). That was error. Even assuming that mere ratification could

transfer responsibility to EWS for the third-party wrongdoing in this case, the NYAG has not alleged that EWS ratified any alleged scams on its platform. At a minimum, ratification requires that the third party "acted or purported to act as an agent on the [defendant's] behalf." Restatement (Third) of Agency § 4.03 & cmt. a (A.L.I. 2006). "There is such a thing as affirming or disaffirming the unauthorized acts of one's agents; but there must first be an agency." *Dumois* v. *Hill*, 37 N.Y.S. 1093, 1094 (1st Dep't 1896). As no one has contended that the third parties were authorized to, purported to, or in fact did act on EWS's behalf, there was no agency relationship and thus no duty on EWS's part to police their independent misconduct.[2]

Nor can the Supreme Court's explanation that EWS "implicitly" ratified the fraud by continuing to "collect and retain transaction fees," Op. 14-15, be squared with the third-party-liability precedents discussed above. Indeed, in almost every one of those cases, the defendant profited from selling a product or service that was later misused to inflict harm. And in many cases, the profits continued from the tortfeasors' ongoing use of the company's services. But

[2] Indeed, the absence of any alleged relationship between EWS and the off-platform third parties here stands in marked contrast to *People ex rel. James* v. *N. Leasing Sys., Inc.*, 193 A.D.3d 67, 71 (1st Dep't 2021), where the contractors expressly "act[ed] on behalf of" the defendants who had hired them. *Cf.* Op. 11 (purporting to rely on *Northern Leasing* for ratification analysis).

none of those courts deemed the standard "collect[ion of] … fees" incident to lawful products and services sufficient to demonstrate that the manufacturers, sellers, and service providers "ratified" the unlawful or tortious conduct of third parties. Taken to its logical conclusion, the Supreme Court's contrary reasoning would find implicit ratification—and therefore third-party liability—by any for-profit enterprise.[3]

2. The Supreme Court also bypassed the principle that an unlawful act by the primary tortfeasor breaks the chain of causation leading back to an upstream supplier.[4] This Court has consistently refused to impose liability for a "lawful commercial activity" merely because it was "followed by harm to person and property caused directly and principally by the criminal activity of intervening third parties." *People ex rel. Spitzer* v. *Sturm, Ruger & Co.*, 309 A.D.2d 91, 103 (1st Dep't 2003). But the Supreme Court—despite seeming to

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[3] Moreover, the fees at issue here were not enhanced by or tethered to the *culpable nature* of the transactions. Rather, the NYAG concedes that Zelle charges a per-transaction fee and a monthly maintenance fee—but "[n]either" is "impacted by fraud." Compl. ¶¶ 122-123. EWS thus collects the same fees regardless of whether any given transaction is the product of a scam.

[4] "[E]vidence regarding … causation plainly is relevant to determining whether the Attorney General has established that the challenged conduct has the capacity or tendency to deceive, or creates an atmosphere conducive to fraud." *People ex rel. James* v. *Domino's Pizza, Inc.*, 2021 WL 39592, at *11 (N.Y. Sup. Ct. Jan. 5, 2021) (emphasis omitted).

recognize the main culprits as "fraudsters impersonating banks, governments, or merchants" who perpetrate "a variety of schemes" to induce customers to "send[] money to an imposter," Op. 4-5—nevertheless permitted this action to proceed *against EWS* for engaging in lawful commercial activity. As the caselaw makes clear, however, the fact that "bad actors … are able to use platforms like defendant['s] for illegal … ends," *Twitter*, 598 U.S. at 499, is good reason to impose civil and criminal liability on the *bad actors* themselves—not on the platform used by their victims.

3. Relatedly, the decision below would hold EWS accountable for conduct that it does not—and indeed cannot—control: the perpetration of misconduct beyond its reach. Third-party liability generally attaches only when the defendant can exercise "actual control of the third person's actions," *Hamilton* v. *Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 233 (2001), or at least "control of the instrumentality" through which the culpable conduct is undertaken, *Johnson & Johnson*, 499 P.3d at 731. The NYAG has alleged neither: This case concerns only Zelle transactions that were validly authorized on Zelle based on scams that occurred *outside of* the Zelle platform.[5] Although—as even the

[5] As EWS pointed out below, users whose bank accounts are accessed through Zelle without their authorization—*i.e.*, fraud *on the Zelle platform*—receive reimbursement of any stolen funds. Mot. to Dismiss 9 n.3.

NYAG acknowledges, *see* Compl. ¶¶ 46(a), 51-52—EWS goes to great lengths to mitigate harm from bad actors, it has no ability to police the infinite outside communication channels through which third parties may trick their victims. Nor do EWS's efforts to prevent criminality mean that it "controls" third-party, off-platform conduct. Terms of service and enforcement policies that aim to prevent third-party misconduct do not make the service provider liable for residual misconduct outside its control. *See Harrington*, 564 P.3d at 314.

4. Finally, the Supreme Court deemed sufficient the allegation that EWS had general knowledge of misconduct by third parties accessing its platform. Op. 14-15. But as the Supreme Court of the United States explained just last year, "an ordinary merchant does not become liable for all criminal misuses of his goods, even if he knows that in some fraction of cases misuse will occur." *Smith & Wesson*, 605 U.S. at 292 (citation modified). Rather, "[t]he merchant becomes liable only if, beyond providing the good on the open market, he takes steps to 'promote' the resulting crime and 'make it his own.'" *Ibid.* (quoting *United States* v. *Falcone*, 109 F.2d 579, 581 (2d Cir. 1940) (L. Hand, J.)). The approach adopted by the court below converts every service provider's general awareness of misconduct—however abstract and inactionable—into ratification of every instance of it.

D. Left in Place, the Decision Below Will Have Negative Consequences for Businesses and Consumers Alike.

If the decision below stands, its consequences could extend far beyond Zelle, or even the financial sector writ large. The Supreme Court's reasoning—that a company can be liable for third-party misconduct merely because it offered a product or service, charged fees, and allegedly knew of some abstract likelihood of misuse—has no limiting principle. As EWS has noted, "[t]he NYAG's theory would convert" a wide swath of lawful, legitimate businesses across numerous sectors "into *de facto* insurers against third-party misconduct." Mot. to Dismiss 35.

Even setting aside the technology and consumer-goods examples discussed above, imposing broad third-party liability on financial-services providers would "unreasonably expand [their] orbit of duty," *Century Bus. Credit Corp.* v. *N. Fork Bank*, 668 N.Y.S.2d 18, 19 (1st Dep't 1998), and thereby "substantially impede[]" the "flow of commerce," *Karen Kane, Inc.* v. *Bank of Am.*, 67 Cal. App. 4th 1192, 1199 (1998), by requiring such providers to litigation-proof their services. The resulting frictions between transacting parties "would imperil both customer privacy and the expedited processing of banking transactions so crucial to a modern economy." *Kurtz-Ahlers, LLC* v. *Bank of Am., N.A.*, 48 Cal. App. 4th 952, 961 (2020). Businesses rely on banks and

payment platforms to process their transactions in a timely fashion and have organized their operations around that expectation. Customers need to know when transfers will be credited to their accounts and payments processed.

Liability of the kind that the NYAG seeks would undermine that system, forcing financial institutions to curtail access and potentially forgo participation in free-to-consumer transfer services altogether. It would also result in overinclusive and burdensome restrictions based on mere allegations, disrupt legitimate payment activity, reduce certainty and finality in payment systems, and could lead to litigation about those measures and their impact on consumers and businesses. Moreover, there is no guarantee that future plaintiffs and courts, with the advantage of hindsight, would not still deem the providers' safety measures inadequate. The upshot is that consumers would suffer "loss of privacy, expense, and commercial havoc" with little-to-no upside. *Chicago Title Ins. Co.* v. *Superior Ct.*, 174 Cal. App. 4th 1142, 1159 (1985).

Narrowing the lens solely to Zelle, the downstream ramifications of the decision below would still prove severe. Zelle is a peer-to-peer service provided at no cost to customers and offered by more than 2,200 financial institutions, including community banks and credit unions in New York. Compl. ¶¶ 20, 33. The NYAG alleges that, in 2022, EWS received approximately 1.25

million fraud reports out of 2.3 *billion* transfers—less than one-tenth of 1%, meaning that more than 99.9% of all Zelle transfers proceed without any reported misconduct. *Id.* ¶¶ 108, 127. Creating the risk of liability as to authorized payments would impose costs on *every transaction* to address an alleged issue affecting less than 0.1% of transfers. And any conceivable defensive measures (in addition to likely proving futile) would frustrate Zelle users, who—as the Supreme Court recognized—value the platform precisely because it is "instantaneous" and "exceedingly simple" to use.[6] Op. 3; *see also* Op. 4 (noting EWS's "emphasis on efficiency and accessibility").

No reason exists to go down that path. As things now stand, the Supreme Court's decision leaves New York an extreme outlier: Courts across the country—state and federal; trial and appellate; in suits asserting tort, aiding-and-abetting, and public-nuisance claims; against providers of financial services, pharmaceuticals, technology, and consumer products—have consistently rejected the theory that a business is liable for the harms caused by third parties who misuse its products or services. By departing from that consensus

[6] *See* Paola Boel *et al.*, *The Accounts of the Unbanked and Underbanked*, Federal Reserve Bank of Cleveland (Feb. 23, 2026), https://doi.org/10.26509/frbc-ec-202602 ("[Underbanked p]articipants highlighted the convenience of fintech tools such as … Zelle, particularly for peer-to-peer money transfers.").

and the sound principles on which it is based, the Supreme Court distorted the law of secondary liability beyond recognition, to the certain detriment of companies and consumers alike. This Court should correct that error.[7]

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Supreme Court and remand with instructions to dismiss the complaint.

Respectfully submitted.

s/Amanda Flug Davidoff
AMANDA FLUG DAVIDOFF
JOSHUA K. HANDELL
SULLIVAN & CROMWELL LLP
1700 New York Avenue NW
Washington, DC 20006
Telephone: (202) 956-7500

Counsel for Amicus Curiae
The Chamber of Commerce of
the United States of America

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[7] Although this brief focuses on the issue of third-party liability, *amicus curiae* notes one further error in the decision below. The Supreme Court assessed whether EWS's marketing representations—that its platform is "safe," "secure," and "backed by the banks"—would likely deceive a "credulous and unthinking consumer." Op. 12 (citations omitted). That is the wrong standard: The Court of Appeals has held that the proper benchmark is the "reasonable consumer" and the proper inquiry whether a representation is "likely to mislead a reasonable consumer acting reasonably under the circumstances." *Oswego Laborers' Loc. 214 Pension Fund* v. *Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 26 (1995). The "credulous and unthinking consumer" standard both lowers and confuses the bar for liability.

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