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7
8 **UNITED STATES DISTRICT COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA**
10 **OAKLAND DIVISION**

11 NELSON SEQUEIRA, ORSAY ALEGRIA,
and ISMAEL CORDERO, individually an on
12 behalf of all others similarly situated,

13 Plaintiffs,

14 v.

15 U.S. DEPARTMENT OF HOMELAND
SECURITY; U.S. IMMIGRATION &
16 CUSTOMS ENFORCEMENT; WESTERN
UNION FINANCIAL SERVICES, INC., a
Colorado corporation; CONTINENTAL
17 EXCHANGE SOLUTIONS, INC., a Kansas
corporation, d/b/a RIA FINANCIAL
18 SERVICES and AFEX MONEY EXPRESS;
VIAMERICAS CORPORATION, a Delaware
19 Corporation; and DOLEX DOLLAR
EXPRESS, INC., a Texas corporation,
20

21 Defendants.

Case No. 4:22-cv-07996-HSG

**BRIEF OF ELECTRONIC PRIVACY
INFORMATION CENTER AS *AMICUS
CURIAE* IN SUPPORT OF
PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTIONS TO
DISMISS**

Date: May 18, 2023
Time: 2:00 p.m.
Judge: Hon. Haywood S. Gilliam, Jr.
Court: Courtroom 2, 4th Floor, Oakland

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INTRODUCTION

1
2 The Right to Financial Privacy Act of 1978 (“RFPA”), 12 U.S.C. §§ 3401–342, created
3 a statutory right to privacy in financial transaction data. Congress passed the RFPA in response
4 to technological and legal changes that drastically impacted individuals’ right to privacy in their
5 financial transaction records. In 1970, Congress enacted the Bank Secrecy Act, which required
6 banks to collect and store more information about customers’ financial transactions than ever
7 before. At the same time, electronic payment methods, such as credit cards and electronic fund
8 transfers, were becoming widely used, resulting in bank and non-bank financial institutions
9 automatically recording and aggregating more and more transaction data. When the Supreme
10 Court refused to recognize a constitutional right to privacy in transaction data held by financial
11 institutions in *United States v. Miller*, 425 U.S. 435 (1976), it was clear Congress would have to
12 act to prevent endless government fishing expeditions into people’s sensitive financial
13 information. Congress included bank and non-bank institutions within the scope of the RFPA’s
14 definition of “financial institution” to ensure that companies that held comprehensive records
15 on customers’ transactions could not hand that information over to the government without first
16 giving the customers an opportunity to challenge the government’s access. This case—where
17 the Government sought years of Plaintiffs’ financial transaction data without any notice to
18 Plaintiffs—is precisely the type of situation that the RFPA was meant to protect against.

19 Money transfer businesses provide financial services to millions of people who cannot
20 afford to access the same services at banks. Non-bank financial institutions like money transfer
21 companies offer many of the same services as banks, just unbundled or simplified to be more
22 affordable. Millions of low-income Americans and U.S.-based immigrants rely on money
23 transfer companies to pay bills, make payments through reloadable cards, and contribute to
24 home, education, healthcare, and small business financing. The services provided by non-bank
25 consumer finance institutions generate the same types of sensitive financial transaction data that
26 bank services generate. It would be inconsistent with Congress’s intent—and cruelly ironic—to
27 exclude low-income and immigrant communities, who are already disproportionately
28 surveilled, from the RFPA’s protections.

1 **ARGUMENT**

2 **I. The RFPA protects customers' financial transaction data at bank and non-**
3 **bank financial services companies.**

4 The history and evolution of the RFPA show that the definition of “financial institution”
5 includes financial services companies that collect and store customers’ financial transaction
6 data—information that could be used to reconstruct a person’s habits, obligations, associations,
7 and political views. Whether financial transaction data was held by a traditional depository
8 institution or a non-bank financial services company, Congress intended for people to have a
9 privacy interest in this information and to be protected from government fishing expeditions.
10 By including the broad term “consumer finance institution” instead of the narrower “consumer
11 loan company,” Congress intended that the RFPA cover not just companies that provide
12 consumers with loans but also companies that provide other financial products, such as money
13 transfer services. Today, the consumer finance industry includes many different types of
14 companies that store financial transaction data that is just as detailed as—or even more detailed
15 than—the transaction data held at banks. To limit the scope of “consumer financial institution”
16 to loan companies would undermine congressional intent and exclude a subset of financial
17 institutions that serve as a critical resource for the under- and unbanked.

18 The RFPA was a response to a combination of technological and legal developments
19 that led the financial industry to keep detailed records about their customers’ financial
20 transactions—and also upended society’s expectations about the privacy of their financial
21 records. In a cash-based society, people completed everyday financial transactions
22 anonymously or near anonymously. To the extent that anyone kept records at all about who
23 paid what and to whom, these records were kept by the parties to the transaction—they were
24 not aggregated by financial institutions. As consumers began to use checks for everyday
25 transactions, new records were created: the physical checks themselves. Some banks kept
26 microfilm copies of checks drawn on their customers’ accounts, but the banks that did typically
27 only kept these records for a few months, 116 Cong. Rec. 16960 (1970) (statement of Rep.
28 Rees), and by the late 1960’s, many banks were moving away from microfilming, likely due to
cost. 116 Cong. Rec. 16953 (1970) (statement of Rep. Patman). To obtain detailed information

1 about a person's financial transactions, the government needed to serve a warrant on the
2 individual. The need for probable cause limited the government's ability to fish through
3 people's financial records for potentially incriminating information.

4 All of that changed in 1970 with the enactment of the Bank Secrecy Act. Meant to
5 ensure that companies kept paper trails of financial transactions for criminal investigators, the
6 Bank Secrecy Act gave the Treasury Department the power to impose recordkeeping and
7 disclosure requirements on many different kinds of financial institutions. *See* Bank Secrecy Act
8 of 1970, 31 U.S.C. §§ 5311–5330. The recordkeeping requirements that the Treasury
9 Department imposed on depository institutions pursuant to its authority under Title I of the Act
10 fundamentally changed the way that ordinary individuals' financial transactions were recorded
11 and kept by their banks. The Treasury Department required depository institutions to keep
12 microfilm copies of all checks of \$100 or more on hand for at least five years. U.S. Privacy
13 Prot. Study Comm'n, *Personal Privacy in an Information Society* 104, 105 (1977) [hereinafter
14 Privacy Commission Report].¹ The \$100 threshold was intended to exempt most checks written
15 for everyday transactions, but in practice, filtering out checks over \$99 was so expensive that
16 banks began to microfilm all checks. Privacy Commission Report at 105. The result was that,
17 for the first time, every bank in the United States was required to keep comprehensive records
18 on who paid what and to whom—information that could be used to reconstruct any account
19 holder's private life. 124 Cong. Rec. H11731 (daily ed. Oct. 5, 1978) (statement of Rep.
20 Rousellot).

21 The Bank Secrecy Act passed Congress with near unanimous support in part because
22 members assumed that investigative agencies could only obtain individuals' bank records
23 through legal process. 119 Cong. Rec. S14084 (daily ed. July 19, 1973) (statement of Sen.
24 Cranston). But when the Treasury Department announced its rules implementing the Act, it
25 became clear that Congress' assumption had been wrong. The Treasury Secretary revealed that
26 it was his position that there was no statutory or constitutional basis to prevent banks from
27 handing account holders' records over to government agencies. 119 Cong. Rec. H6527 (daily
28

¹ Available at <https://hdl.handle.net/2027/mdp.39015003840728>.

1 ed. July 23, 1973) (statement of Rep. Stark). Bank and government representatives confirmed
2 that banks regularly handed over account holders’ records to the government upon request.
3 Privacy Commission Report at 349; 364–65. Because the government made requests
4 informally—either with a phone call or an in-person visit to the bank—there were typically no
5 records of the requests, let alone any notification to the account holder that the government had
6 requested and received their personal records. *Id.* Civil society groups, along with concerned
7 bank representatives, responded by challenging the constitutionality of the Act, which the
8 Supreme Court ultimately rejected. *California Bankers Ass’n v. Schultz*, 416 U.S. 21 (1974).
9 Meanwhile, members of Congress responded by introducing the first iterations of what would
10 become the RFPA. *See, e.g.*, S. 3828, 92d Cong., 2d Sess. (July 21, 1972); H.R. 16088, 92d
11 Cong., 2d Sess. (July 27, 1972); 118 Cong. Rec. S11298–11315 (daily ed. July 20, 1972) (Sen.
12 Mathias introducing S. 3828).

13 The RFPA’s sponsors made clear that the objective of the legislation was to protect
14 financial transaction data because government agencies could—and, in fact, did—use the
15 information to discover sensitive, embarrassing, or incriminating facts about targeted people.
16 According to one of the RFPA’s primary architects, Sen. Charles Mathias, the problem with the
17 Bank Secrecy Act was that it enabled government agencies to go to depository institutions and
18 “obtain a complete history of the records of every citizen’s financial dealings, no matter how
19 small the amount nor how private the purpose.” 118 Cong. Rec. S11300 (daily ed. July 20,
20 1972) (statement of Sen. Mathias). Sen. Mathias noted that financial transaction information

21 is extremely revealing as to details of the customer’s personal and
22 political life. The information revealed by checks, other
23 withdrawals, or deposits, mirror the activities of the account
24 holder—the political causes he supports, the publications to which
25 he subscribes, the debts he owes, the purchases he makes, the source
26 of his income, and so forth. It reflects with considerable accuracy
27 the individual’s exercise of his rights under our Constitution, and
28 particularly his first amendment rights.

120 Cong. Rec. S5166 (daily ed. April 3, 1974) (PDF) (statement of Sen. Mathias). The
primary concern with open government access to these records was that “basic individual rights
and liberties can be trampled by abuse of the information.” *Id.*

1 Other RFPA sponsors echoed Sen. Mathias' views. Sen. Alan Cranston, who first
2 introduced the RFPA in the Senate, noted that financial transaction data had to be protected
3 because it “mirror[s] the activities of the account holder. From this information, the details of
4 an individual's life can be re-constructed.” 119 Cong. Rec. S14084 (daily ed. July 19, 1973).
5 Rep. John Joseph Cavanaugh, who sponsored several versions of the RFPA in the House, *see*
6 H. Rep. No. 95-1383, at 34 (1978), declared that the RFPA was meant to address customers’
7 “fear of fishing expeditions” through their sensitive financial records. 124 Cong. Rec. H11695-
8 11751 (daily ed. Oct. 5, 1978). Rep. Fortney “Pete” Stark, who was a sponsor of early versions
9 of the RFPA in the House, *see* 119 Cong. Rec. H6527–6528 (daily ed. July 23, 1973), as well as
10 the president of a depository institution in California and a plaintiff in *California Bankers Ass’n*
11 *v. Schultz*, noted, “Government agencies have, in the past, ravaged through [financial] records
12 on pure fishing expeditions often for political purposes.” 124 Cong. Rec. H11740 (daily ed.
13 Oct. 5, 1978). Sen. Cranston pointed to “the cases of Jane Fonda, Dr. Spock, and Daniel
14 Ellsburg,” whose “bank accounts were monitored because of their controversial opinions rather
15 than for suspected criminal activity.” 123 Cong. Rec. S14884 (daily ed. Sept. 14, 1977). Rep.
16 Newton Steers complained that “[w]e constantly hear of domestic surveillance by Government
17 agencies when there is no record of, or attempt to show, any criminal behavior by a citizen.”
18 123 Cong. Rec. H313 (daily ed. Jan. 11, 1977). Since customers—and not their financial
19 institutions—are the ones most invested in challenging access requests, 123 Cong. Rec. S14884
20 (daily ed. Sept. 14, 1977) (Sen. Cranston explaining that banks have “no compelling interest to
21 resist” subpoenas), the RFPA gave customers “a right to know when their financial records are
22 being examined” and “an opportunity to challenge disclosure or dissemination of the
23 information.” *Id.* (statement of Sen. Cranston); *see also* H. Rep. No. 95-1383, at 34 (describing
24 these as the “two key principles” upon which the RFPA was based).

25 Because the RFPA was initially a response to the recordkeeping requirements of Title I
26 of the Bank Secrecy Act, which only applied to depository institutions, early versions of the
27 RFPA also only applied to depository institutions. *See, e.g.*, S. 3828, 92d Cong., 2d Sess. (July
28 21, 1972) (“fiduciary institution” defined the same as “financial institution” in Title I of Bank

1 Secrecy Act); S. 2200, 93d Cong., 1st Sess. (July 19, 1973) (“financial institution” limited to
2 depository institutions in first bill with name “Right to Financial Privacy”); H.R. 9424, 93d
3 Cong., 1st Sess. (July 19, 1973) (House companion of S. 2200). But in the years that Congress
4 considered a statutory right to financial privacy—from 1972 to 1978—additional technological
5 and legal developments led Congress to expand the RFPA’s reach to non-bank financial
6 institutions that, like banks, collected and stored detailed financial transaction data that could be
7 used to reconstruct private information about customers.

8 In 1976, the Supreme Court announced its decision in *United States v. Miller*, 425 U.S.
9 435 (1976), which held that individuals had no Fourth Amendment-protected privacy interest in
10 financial information held at banks. The records at issue in *Miller* were the type of records that
11 the Bank Secrecy Act required depository institutions to keep: microfilmed checks and
12 withdrawal and deposit slips. *Id.* at 438. But the RFPA’s sponsors took note of the Court’s
13 broad pronouncement on individuals’ lack of a privacy interest in records kept by third parties,
14 which created a sense of “urgency” for Congress to protect financial transaction data wherever
15 it could be found. 122 Cong. Rec. E2863 (daily ed. May 26, 1976) (statement of Sen. Mathias).
16 As one RFPA sponsor noted, “the reach of the *Miller* decision extends far beyond bank records,
17 it applied to credit card receipts, finance companies, and to every conceivable type of
18 recordkeeper.” 124 Cong. Rec. H11731 (daily ed. Oct. 5, 1978) (statement of Rep. Rousellot).

19 Indeed, by the mid-1970s, new technologies for electronic payment, such as credit cards
20 and electronic fund transfers, meant that non-bank institutions were collecting financial
21 transaction data that was just as detailed as—or more detailed than—the records that the Bank
22 Secrecy Act required depository institutions keep. Privacy Commission Report at 114. As Rep.
23 L. Richardson Preyer explained:

24 Financial privacy legislation has its origins in recent structural
25 changes in the management of personal financial affairs. Not too
26 many years ago, credit cards and checking accounts were rare, and
27 most ordinary personal transactions were in cash. Today, we are in
28 the midst of a transition to a so-called cashless society, and an ever-
increasing percentage of our purchases of goods and services do not
involve the exchange of cash. One of the major consequences of the
use of other payment methods is the accumulation of large amounts
of personal information in the hands of third parties”

1 124 Cong. Rec. H9351–52 (daily ed. Sept. 8, 1978). During the RFPA hearings, several
2 witnesses called for Congress to expand the RFPA’s definition of financial institutions “to other
3 financial-type institutions.” *The Safe Banking Act of 1977: Hearing Before Subcomm. on Fin.*
4 *Inst.’s Supervision, Regul. and Ins. of the Comm. on Banking, Fin. and Urban Affairs, 95th*
5 *Cong. (Sept. 28, 29; Oct. 3, 1977), at 2364* (statement of George LeMaistre, FDIC chair). Sen.
6 Bill Brock, who supported adding credit card issuers and other non-bank financial services
7 institutions to the RFPA, said that “we are a cash-less society, whether we admit it or not and, if
8 we don't take into account noncash transaction devices, we are not going to get to the root of
9 this problem.” *Right to Financial Privacy Act: Hearing Before Subcomm. on Fin. Inst.’s of the*
10 *Comm. on Banking, Hous. and Urban Affairs, 94th Cong. (June 16 and 17, 1976), at 33.*

11 Congress added credit card issuers and consumer finance institutions to the RFPA
12 because it recognized that these companies offered services similar to those offered by banks—
13 and thus, created similar financial transaction records as banks. Sen. John Tower explained why
14 he added credit card issuers to his version of the RFPA: “[a]lthough the non-bank credit card
15 issuers are not subject to the recordkeeping requirements of the Bank Secrecy Act, the cards are
16 used in a manner similar to a checking account. The breach of the confidentiality of these
17 records can seriously injure the credit card customer.” 123 Cong. Rec. S7098 (daily ed. May 5,
18 1977) (statement of Sen. Tower). Money transfer services are also used in a similar way as
19 checking accounts—they are, essentially, the checking accounts of the under- and unbanked.
20 *See § II.* Electronic fund transfers, such as wire transfers, are also clearly covered by the RFPA
21 when performed through a depository institution; it would undercut the purposes of the RFPA
22 to exclude wire transfers performed by non-bank institutions.

23 Thus, the very clear interests underlying the RFPA are not served by limiting the term
24 “consumer finance institution” to companies that offer loans to consumers. The term “consumer
25 finance institution” covers a broad range of non-bank financial services companies that collect
26 and store detailed financial transaction records on their customers. If Congress wished to limit
27 the RFPA’s obligations to companies that issued loans to consumers, Congress could have
28 instead used the term “consumer loan institution” or “loan company.” The consumer finance

1 industry “isn’t just limited to companies that originate loans or issue credit cards.” The Motley
2 Fool, *Investing in Consumer Finance Stocks* (Mar. 2, 2023).² A consumer finance company is
3 “a non-bank company that provides financial products to individuals.” *Id.* While loans may
4 have been the primary financial product on offer in the 1970’s, that is not the case anymore.
5 Today, consumer finance companies include both traditional and fintech companies that
6 provide a wide variety of services, such as budgeting and payment. *Id.* Indeed, a recent
7 Congressional Research Service report explicitly includes money transfer companies and
8 remittances as part of the consumer finance industry. Cong. Rsch. Serv., *Consumer Finance*
9 *and Financial Technology (Fintech)* 4 (Mar. 15, 2023).³ What consumer finance companies
10 have in common is that they collect detailed financial transaction data about their users. This is
11 precisely the kind of data the RFPA was meant to cover and to protect from unbounded
12 government scrutiny. Even if Congress could not have foreseen the expansion of the consumer
13 finance industry into a panoply of electronic financial services, a court should not “decline to
14 enforce the plain terms of the law” when a “new application emerges that is both unexpected
15 and important.” *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1750 (2020).

16 As the next section explains, money transfer companies occupy an important space in
17 the consumer finance industry today, particularly for those who are unable to access services at
18 depository institutions. This Court should recognize that the plain text and congressional intent
19 show that money transfer companies are consumer finance institutions under the RFPA.

20 **II. A narrow interpretation of “consumer finance institution” denies financial**
21 **privacy to the millions of U.S. immigrants and other vulnerable consumers**
22 **who rely on money transfer businesses for financial services they otherwise**
23 **cannot afford to access at banks.**

24 Financial inclusion should not come at the expense of privacy. Millions of low-income,
25 minority Americans and U.S. immigrants rely on money transfers daily to buy food and
26 clothing, pay bills, and contribute to home, education, healthcare, and small business financing.
27 Excluding money transfer businesses from the definition of “consumer finance institution” is

28 ² <https://www.fool.com/investing/stock-market/market-sectors/financials/consumer-finance-stocks/>.

³ <https://sgp.fas.org/crs/misc/R47475.pdf>.

1 inconsistent with how and why consumers use money transfer services. It also undermines the
2 purpose of the RFPA by limiting the reach of financial privacy to only those who can afford to
3 access traditional lending and depository institutions and exposing populations that are already
4 disproportionately vulnerable to privacy violations by the government to further unwarranted
5 surveillance.

6 Non-bank financial institutions compete in the consumer finance market by “offering
7 unbundled bank-like services, specializing in a single product or service or targeting a specific
8 customer segment.” U.S. Dep’t of Treasury, *Assessing the Impact of New Entrant Non-bank*
9 *Firms on Competition in Consumer Finance Markets* 15 (Nov. 2022).⁴ Money transfer
10 companies have historically targeted the U.S. immigrant population for its specific customer
11 segment. In the early 20th century, money transmitters were “informally referred to as
12 ‘immigrant banks,’” having “gr[own] out of local businesses, like grocery stores and butcher
13 shops, to facilitate ticket sales for immigrants entering the United States via steamship” and to
14 provide to immigrants “access to financial services.” Andrew P. Scott, Cong. Rsch. Serv.,
15 *Telegraphs, Steamships, and Virtual Currency: An Analysis of Money Transmitter Regulation* 2
16 (2020).⁵

17 From the humble beginnings of the first wire transfer in 1871, *see* Cecilia Hendrix, 6
18 *Fascinating Things about Western Union’s History*, Western Union Blog (Oct. 8, 2019),⁶
19 money transfer companies have continued to rely on migrants to drive their industry. When
20 Western Union’s once-prosperous communications business declined to the point of bankruptcy
21 in the mid-1990s, the company pivoted completely to money transfer, beginning with a
22 marketing campaign aimed at the Mexico-U.S. migration corridor; it is now the largest money
23 transfer business in the world. Drake Bennett & Lauren Etter, *Give Us Your Tired, Your Poor,*
24 *Your Huddled Masses Yearning to Send Cash*, Bloomberg (June 16, 2017).⁷ Looking to
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26 ⁴ <https://home.treasury.gov/system/files/136/Assessing-the-Impact-of-New-Entrant-Non-bank-Firms.pdf>.

27 ⁵ <https://sgp.fas.org/crs/misc/R46486.pdf>.

28 ⁶ <https://www.westernunion.com/blog/en/6-fascinating-things-about-western-unions-history/>.

⁷ <https://www.bloomberg.com/news/features/2017-06-16/for-western-union-refugees-and-immigrants-are-the-ultimate-market>.

1 capitalize on the financial needs of newly arriving immigrants, several competitors sprang up.
2 Ria Money Transfer opened in New York in 1987 “as a money transfer institution for Latin
3 American countries,” Ria Money Transfer, *About Us*,⁸ and DolEx Dollar Express was founded
4 in 1996 to provide “consumer-to-consumer electronic money transfer services to the large and
5 rapidly growing Latino community living in the U.S. and their Latin American families
6 abroad.” SEC, Press Release, Global Payments Completes DolEx Dollar Express Acquisition
7 (Nov. 12, 2003).⁹ By 2019, personal money transfers, or remittances, had become “the largest
8 financial flow in the world,” Dany Bahar, *Remittances: One More Thing That Economists*
9 *Failed at Predicting during COVID-19*, Brookings Inst. (July 1, 2021),¹⁰ reaching a market
10 value of \$700 billion by 2020. Allied Mkt. Rsch., *Remittance Market Report Overview* (Jan.
11 2022).¹¹ Used primarily for personal, family, and household purposes, remittances are a lifeline
12 for U.S. immigrants and their families abroad and serve as a form of peer-to-peer consumer
13 finance. See Dilip Ratha, *Remittances: Funds for the Folks Back Home*, IMF Fin. & Devel.
14 (Apr. 24, 2014).¹²

15 Immigrants’ reliance on money transfer companies speaks to the larger customer
16 segment of which they are a part: the unbanked and underbanked. The Federal Reserve defines
17 “unbanked” as lacking any form of checking, savings, or money market account, while
18 “underbanked” refers to those who possess a bank account but still rely on alternative financial
19 services. Bd. of Governors, Fed. Reserve Sys., *Report on the Economic Well-Being of U.S.*
20 *Households in 2018* at 25 (May 2019).¹³ As of 2019, 5.9 million people in the U.S. were
21 unbanked and 18.7 million people were underbanked, with higher rates of both among Black
22 and Hispanic households, FDIC, *2021 FDIC National Survey of Unbanked and Underbanked*
23

24 ⁸ <https://riacapital.me/en/about-us/>.

25 ⁹ <https://sec.edgar-online.com/global-payments-inc/8-k-current-report-filing/2003/11/12/section5.aspx>.

26 ¹⁰ <https://www.brookings.edu/blog/future-development/2021/07/01/remittances-one-more-thing-that-economists-failed-at-predicting-during-covid-19/>.

27 ¹¹ <https://www.alliedmarketresearch.com/remittance-market>.

28 ¹² <https://www.imf.org/en/Publications/fandd/issues/Series/Back-to-Basics/Remittances>.

¹³ <https://www.federalreserve.gov/publications/files/2018-report-economic-well-being-us-households-201905.pdf>.

1 *Households* 1 (Nov. 14, 2022),¹⁴ and especially high rates among immigrant households. *See*
2 Joyce M. Northwood & Sherrie L.W. Rhine, FDIC, *Use of Bank and Non-bank Financial*
3 *Services: Financial Decision Making by Immigrants and Native Born* 3 (Aug. 2016);¹⁵ Paula
4 Boel & Peter Zimmerman, *Unbanked in America: A Review of the Literature*, Fed. Reserve
5 Bank of Cleveland: Economic Commentary 6 (May 26, 2022).¹⁶

6 Because they are under- or unbanked, low-income immigrant communities and
7 communities of color often rely on less traditional financial institutions like money transfer
8 companies. The vast majority of those who are under- or unbanked are poor: the most cited
9 reason for not having or using a bank account is not having enough money to maintain the
10 minimum balance requirements. FDIC, *2021 FDIC National Survey of Unbanked and*
11 *Underbanked Households* 3 (Nov. 14, 2022).¹⁷ Depository institutions' requirements are, in the
12 long run, often less financially onerous than the predatorily high fees associated with money
13 transfer businesses and other non-bank financial services. But for the under- and unbanked, "the
14 differences between the clearly posted (but incomplete) fees at alternative financial services
15 providers and the difficult-to-find fees at banks make the choice an easy one. Go for the
16 alternative financial service, so you know what you are getting into." Emily Guy Birken, *The*
17 *Costs of Being Unbanked or Underbanked*, *Forbes Advisor* (Dec. 2, 2022).¹⁸ Individuals have
18 also reported that they do not have a bank account because they "don't trust banks" and believe
19 that "avoiding a bank gives more privacy." FDIC, *2021 FDIC National Survey of Unbanked*
20 *and Underbanked Households* 3 (Nov. 14, 2022).¹⁹ For immigrants, such beliefs often stem
21 from language barriers and stricter documentation requirements. FDIC, *2009 FDIC National*
22 *Survey of Unbanked and Underbanked Households* 25 (Dec. 2009).²⁰

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25 ¹⁴ <https://www.fdic.gov/analysis/household-survey/2021report.pdf>.

26 ¹⁵ <https://www.fdic.gov/analysis/cfr/consumer/2016/documents/northwood-paper.pdf>.

27 ¹⁶ <https://www.clevelandfed.org/publications/economic-commentary/2022/ec-202207-unbanked-in-america-a-review-of-the-literature>.

28 ¹⁷ <https://www.fdic.gov/analysis/household-survey/2021report.pdf>.

¹⁸ <https://www.forbes.com/advisor/banking/costs-of-being-unbanked-or-underbanked/>.

¹⁹ <https://www.fdic.gov/analysis/household-survey/2021report.pdf>.

²⁰ <https://www.fdic.gov/analysis/household-survey/2009/2009report.pdf>.

1 Moreover, the “long history of racialized exclusion from mainstream financial products”
2 has created an inverse trend of racialized exploitation by alternative financial institutions. Jacob
3 William Faber, *Segregation and the Cost of Money: Race, Poverty, and the Prevalence of*
4 *Alternative Financial Institutions*, 98 *Social Forces* (2019). A 2020 study found that the costs of
5 opening a bank account are higher in areas with larger Black and Hispanic populations, Paula
6 Boel & Peter Zimmerman, *Unbanked in America*, while at the same time, alternative financial
7 institutions like money transfer businesses are “significantly more common in neighborhoods
8 with larger [B]lack and Latino populations, poorer residents, and more immigrants”—so much
9 so that in some cities, they are more common than McDonalds. William Faber, *Segregation and*
10 *the Cost of Money*.

11 Recognizing that “the world’s financial industry is built for those with credit, plastic,
12 stable income,” Western Union and its competitors target “everyday consumers with financial
13 needs and few others to whom they can turn,” Western Union, Press Release, Western Union
14 Celebrates 160 Years of Innovation (May 19, 2011)²¹—not just through money transfer, but
15 through a whole array of financial services. Western Union, for instance, “has pushed into the
16 payments business, helping people settle their mortgages and electric bills.” Bennett & Etter,
17 *supra*.²² In addition to a prepaid debit card that offers direct deposit and a digital savings
18 account, *see* Western Union, *Western Union Netspend Prepaid Mastercard*, (2023); Western
19 Union, *Western Union Digital Banking*, (2023),²³ Western Union also has a points system—My
20 WU—that lets consumers earn rewards, cash back, and retail store loyalty deals. Western
21 Union, *My WU* (2023).²⁴ DoIEx goes even further: in partnership with Oportun, the money

25 ²¹ <https://ir.westernunion.com/news/archived-press-releases/press-release-details/2011/Western-Union-Celebrates-160-Years-of-Innovation/default.aspx>.

26 ²² <https://www.bloomberg.com/news/features/2017-06-16/for-western-union-refugees-and-immigrants-are-the-ultimate-market>.

27 ²³ <https://www.wunetspendprepaid.com/>.

28 <https://www.westernunion.com/ro/en/wuplus.html#:~:text=Bank%20in%20multiple%20currencies%20and,0%20RON%20transfer%20fee3>.

²⁴ <https://www.westernunion.com/us/en/mywu/home.html>.

1 transfer business offers consumers personal loans of up to \$10,000. DoIEx, *Oportun Personal*
2 *Loans*, (2022).²⁵

3 Contrary to what the term “alternative financial services” suggests, as the FDIC has
4 noted, “many of the products and services [AFS] provide are not ‘alternative’; rather, they are
5 the same or similar to those offered by banks.” Christine Bradley et al., *Alternative Financial*
6 *Services: A Primer*, 3 FDIC Quarterly 39, 39 (2009).²⁶ For example, banks allow their
7 customers to send remittances, the core of money transfer companies’ business. *See, e.g.*, Wells
8 Fargo, *ExpressSend — Global Remittance Services*, (2023).²⁷ While companies like Western
9 Union expand their services to the point of increasingly resembling depository institutions,
10 under a narrow interpretation of “consumer finance institution,” they can avoid providing their
11 financially and otherwise vulnerable customers with baseline privacy protections.

12 Regulators and consumer finance institutions themselves recognize that money transfer
13 companies are alternatives to, not separate species from, banks and other depository
14 institutions. The U.S. Treasury Department has explained that the “core consumer finance
15 market[.]” includes “(non-bank) firms that largely focus[.] on singular products and services,
16 such as . . . money transmission.” U.S. Dep’t of the Treasury, *Assessing the Impact of New*
17 *Entrant Non-bank Firms on Competition in Consumer Finance Markets* 8 (Nov. 2022);²⁸ *see*
18 *also, e.g.*, Mississippi Dep’t of Banking & Consumer Finance, *Consumer Finance* (2020)
19 (regulating money transfer companies as consumer finance institutions).²⁹ Meanwhile, banks
20 identify competitive threats by evaluating actors disrupting money transfer companies and other
21 non-bank financial institutions. *See, e.g.*, Cong. Rsch. Serv., *Consumer Finance and Financial*
22 *Technology (Fintech)* 2–3 (Mar. 15, 2023) (“Fintech has the potential to continue to change
23 consumer finance products and services, including in consumer payments and lending
24

25 ²⁵ <https://www.dolex.com/loans/>.

26 ²⁶ <https://www.fdic.gov/analysis/quarterly-banking-profile/fdic-quarterly/2009-vol3-1/fdic140-quarterlyvol3no1-afs-final.pdf>.

27 ²⁷ <https://www.wellsfargo.com/international-remittances/>.

28 ²⁸ <https://home.treasury.gov/system/files/136/Assessing-the-Impact-of-New-Entrant-Non-bank-Firms.pdf>.

29 ²⁹ <https://dbcf.ms.gov/consumer-finance/>.

1 markets.”);³⁰ Kevin Wack, *Walmart Shakes Up Domestic Money Transfer Market*, Am. Banker
2 (May 4, 2015) (“Walmart's dramatic impact on what Western Union and MoneyGram charge
3 certain customers offers a reminder of why banks remain so fearful of the megastore's
4 ambitions in consumer finance.”).³¹

5 Regardless of whether at a bank or a money transfer business, money transfer
6 transactions create financial records that expose a great deal of personal information. When a
7 consumer transfers money, a money transfer business will collect, at the very least, the sender’s
8 full name and phone number, monetary amount, information associated with the payment and
9 payout method, and the recipient’s full name, phone number, and address. *See* Christy Lowry,
10 *What Information Is Needed for a Wire Transfer?*, Western Union Blog (May 31, 2022);³² Ria
11 Help Center, *What Details Do I Need to Send Money?* (July 2022).³³ Oftentimes, companies
12 will also require copies of identity verification documents like a driver’s license or passport,
13 and may even ask for secondary identification information, including citizenship or residence
14 status and country of birth. Western Union, *What Information Do I Need to Send Money?* (July
15 13, 2019).³⁴ Several money transfer businesses indicate that when consumers use their services,
16 they may additionally collect the following personal data: biometric information, criminal
17 conviction information, social security numbers, phone and email communications, and device
18 and internet data such as IP address, browsing history, search history, and geolocation
19 information. *See* Western Union, *Western Union’s Global Privacy Statement*, (Nov. 1, 2021);³⁵
20 DoLex Fin. Serv., *Compliance* (Jan. 1, 2023);³⁶ Ria Fin. Serv., *Global Privacy Notice* (Apr.
21 2022);³⁷ Viamericas Corps, *Viamericas Privacy Statement*³⁸ Money transfer businesses also

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23 ³⁰ <https://sgp.fas.org/crs/misc/R47475.pdf>.

24 ³¹ <https://www.americanbanker.com/news/walmart-shakes-up-domestic-money-transfer-market>.

25 ³² <https://www.westernunion.com/blog/en/us/what-information-needed-for-wire-transfer/>.

26 ³³ <https://help.riamoneytransfer.com/hc/en-us/articles/4406286465297-What-details-do-I-need-to-send-money->

27 ³⁴ https://wucare.westernunion.com/s/article/What-do-I-need-to-send-money?language=en_US.

28 ³⁵ <https://www.westernunion.com/global/en/privacy-statement.html>.

³⁶ https://www.dolex.com/legals/#privacy_policy.

³⁷ <https://app.riamoneytransfer.com/en-us/app-privacy-policy/#personalData>.

³⁸ https://s3.amazonaws.com/cdn.govianex.com/privacy-policy/www/viamericas_privacy-policy.pdf.

1 collect sensitive financial data such as “[a]ccount balances, transaction and payment history,
2 loyalty program information, wire transfer instructions, credit information, debit and other bank
3 account information.” Western Union, *U.S. Consumer Privacy Notice* (2021).³⁹ This
4 information is nearly indistinguishable from what many banks collect. *See* Wells Fargo,
5 *California Consumer Privacy Notice* (2023) (explaining that Wells Fargo will collect “account
6 number and balance,” “transaction histories,” “purchase information,” and “credit and debit
7 card numbers,” along with the same demographic information as listed above).⁴⁰ And the
8 information that money transfer companies collect today is much more detailed than the
9 information financial institutions collected at the time the RFPA was passed.

10 Money tells a story, and in the context of money transfers it can reveal the private
11 details of a person’s life. Depending on to whom money is sent, money transfers can reveal
12 family and other personal and potentially undisclosed relationships; religious affiliations;
13 philanthropic interests; and political affiliations and activities. Money transfer transactions
14 provide the kind of “intimate window into a person’s life” that the Supreme Court said carries
15 with it a strong privacy interest in *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018).
16 The privacy interests of individuals who wire money through their bank or credit union and the
17 privacy interests of individuals who wire money through a money transfer company are
18 identical; a statute intended to extend privacy protections to financial information should not be
19 read to exclude the latter, simply because the people who use the services lack the financial
20 means to open and maintain a bank account.

21 The cruel irony of denying the RFPA protections to marginalized individuals relying on
22 money transfer businesses and other non-traditional financial institutions for their money needs
23 is that people of color, immigrants, and the poor are already disproportionately targeted by
24 federal government surveillance and experience the harms of privacy violations more
25 immediately and more acutely. *See* Alvaro M. Bedoya, *Privacy as Civil Right*, 50 N.M.L. Rev.
26 301 (2020). In addition to deportation, wrongful arrest and incarceration, and the myriad

27 _____
28 ³⁹ https://www.westernunion.com/staticassets/R22-09.02.0/media/US_Consumer_Privacy_Notice_en_sp_Version_020419.pdf.

⁴⁰ <https://www.wellsfargo.com/privacy-security/california-consumer-privacy-notice/>.

1 collateral housing, employment and other consequences associated with surveillance and
2 criminalization, “surveillance systems result in ‘system avoidance,’ or deliberate efforts by
3 individuals to avoid institutions that gather and keep formal records.” Michele Gilman &
4 Rebecca Green, *The Surveillance Gap: The Harms of Extreme Privacy & Data*
5 *Marginalization*, 42 N.Y.U. Rev. L. & Social Change 253, 265 (2018). Thus, the same people
6 who distrust banks may now distrust money transfer businesses, leaving them with no
7 alternative source of consumer finance and putting them—and for immigrants, their friends and
8 relatives abroad who rely on remittances—at an even greater economic disadvantage. It is
9 untenable that Congress intended for income level to dictate one’s level of privacy rights under
10 the RFPA.

11 **CONCLUSION**

12 *Amicus* respectfully requests that the Court deny the Defendants’ motions to dismiss.

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