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IN THE

**Superior Court of Pennsylvania**

**Western District**

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59 WDM 2021

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AMERICAN EAGLE OUTFITTERS, INC., CARTER'S INC., CHICO'S FAS, INC.,  
EXPRESS, INC., GABRIEL BROTHERS, INC., GENESCO INC., HOT TOPIC, INC.,  
J. CREW GROUP, INC., KOHL'S CORPORATION, TAPESTRY, INC.,  
THE GAP, INC., VERA BRADLEY, INC., GENESCO INC., HOT TOPIC, INC.,  
and TAPESTRY, INC.

*Petitioners,*

v.

DANIEL GARCIA, individually and on behalf of all others similarly situated

*Appeal from the Order dated June 9, 2021, in the Court of Common Pleas of Allegheny  
County, Civil Division, GD-20-011057*

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**APPLICATION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE IN  
SUPPORT OF PETITION FOR PERMISSION TO APPEAL  
INTERLOCUTORY ORDER**

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*Counsel for Retail Litigation Center, Inc.*

Pursuant to Pa. R.A.P. 123(a) and 531(a) and (b)(1)(iii), the Retail Litigation Center, Inc. (“RLC”) applies for leave to submit the attached Brief of *Amicus Curiae* in Support of the Petition For Permission To Appeal Interlocutory Order filed by Petitioners in the above-captioned matter. In support, the RLC states as follows:

1. The RLC is the only trade association dedicated to representing the retail industry in the courts. The RLC’s members include many of the country’s largest and most innovative retailers. Across the United States, including in this Commonwealth, they collectively employ millions of workers, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales.

2. Through its amicus filings, the RLC seeks to provide retail-industry perspectives on important legal issues impacting its members and to highlight the potential industry-wide consequences of significant pending cases.

3. Plaintiff filed this case as a putative class action, alleging that Petitioners violated the Pennsylvania Unfair Trade Practices and

Consumer Protection Law (“UTPCPL”) when they collected Pennsylvania sales tax on Plaintiff’s serial purchases of protective, non-medical face masks after Governor Wolf’s declaration of a state of emergency pertaining to the COVID-19 pandemic.

4. The UTPCPL, like other state consumer protection laws, expressly limits its application to “unfair or deceptive activity `in the conduct of any *trade or commerce*.”” *Lisowski v. Walmart Stores, Inc.*, No. 20-1729, 2021 WL 3406659, at \*4–6 (W.D. Pa. Aug. 4, 2021) (Ranjan, J.) (emphasis added) (quoting 73 P.S. § 201-3(a)).

5. The Petitioners filed preliminary objections pursuant to Pa.R.C.P. 1028(a)(4), seeking dismissal of this action for failure to state a claim. See Defendants’ Preliminary Objections, *Garcia*, Dkt. Nos. 28–30, 32. Among other grounds, they argued that the collection of sales tax does not constitute “trade or commerce” and is therefore outside the reach of the UTPCPL.

6. By Order dated June 9, 2021—and without comment—the lower court overruled Petitioners’ preliminary objections. Order, *Garcia*, Dkt. No. 50.

7. This Court should accept this case for interlocutory appeal of the June 9, 2021 Order.

8. Rule 531(b)(1) of the Pennsylvania Rules of Appellate Procedure provides that an interested party may file a brief as *amicus curiae* by leave of court. See Pa. R.A.P. 531(b)(1) (“An *amicus curiae* may file a brief . . . by leave of court.”).

9. The RLC seeks leave to file an *amicus* brief to highlight the unanimous understanding that the collection of sales tax does not qualify as “trade or commerce” under state consumer protection statutes, including the UTPCPL. All courts that have directly addressed this threshold issue have uniformly concluded that the collection of sales tax does not constitute “trade or commerce” under the UTPCPL and similar state consumer protection statutes.

10. In fact, appellate courts in three states (Connecticut, Massachusetts, and Florida) have specifically held that when retailers “collect[] . . . money for taxes, [they do] so as an agent of the State” and are not engaged in “trade or commerce.” *Blass v. Rite Aid of Conn., Inc.*, 16 A.3d 855, 863 (Conn. Super. Ct. 2009), *aff’d*, 16 A.3d 737, 739 (Conn. App. 2011); see also *Feeney*

*v. Dell Inc.*, 908 N.E. 2d 753, 770–71 (Mass. 2009); *BJ’s Wholesale Club, Inc. v. Bugliaro*, --- So. 3d ---, No. 20-0686, 2021 WL 1395602 (Fla. Dist. Ct. App. Apr. 14, 2021). Critically, the Pennsylvania, Connecticut, Massachusetts, and Florida consumer protection statutes all use the same language to define “trade or commerce.” The well-reasoned rulings of these state appellate courts are aligned with the purpose and scope of state consumer protection statutes, all of which are modeled after Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1).

11. Section 1927 of Pennsylvania’s Statutory Construction Act, 1 Pa. C.S. § 1927, requires that “[s]tatutes uniform with those of other states shall be interpreted and construed to effect their general purpose to make uniform the laws of those states which enact them.” Pursuant to Section 1927, the UTPCPL’s “trade or commerce” prong should be interpreted consistent with the rulings of those courts.

12. While neither the Pennsylvania Supreme Court nor the Third Circuit has directly opined on the issue, decisional law under the UTPCPL fully aligns with the rulings from these other states. See

*Lisowski*, 2021 WL 3406659, at \*4 (“No Pennsylvania appellate court has yet interpreted the UTPCPL’s ‘trade or commerce’ limitation in the context of a case alleging improper collection of sales tax. Absent such authority, this Court looks to ‘federal cases interpreting state law’ and ‘decisions from other jurisdictions that have discussed the issue’ for guidance.” (citation omitted)). Pennsylvania defines “trade or commerce” under the UTPCPL as commercial activity for profit. *See Meyer v. Cmty. Coll. of Beaver Cnty.*, 93 A.3d 806, 816 (2014) (Castille, J., concurring) (“‘Trade or commerce’ is mercantile activity in which the person engaged in that business is doing so for private profit which could motivate unfair or deceptive practices for private gain or, more accurately, private greed.” (internal quotation marks and citation omitted)); *see also Beyers v. Richmond*, 937 A.2d 1082, 1088 (Pa. 2007); *Foflygen v. Zemel*, 615 A.2d 1345, 1354 (Pa. Super. Ct. 1992). Where, as here, a retailer is acting as a mere agent of the Commonwealth and “carrying out a public duty, it is *not engaged in the conduct of a trade or commerce.*” *See Meyer*, 93 A.3d at 816 (internal quotation marks and citation omitted) (emphasis added);

see also *220 W. Rittenhouse Square Condo. Ass'n v. Stolker*, No. 2254, 2012 Phila. Ct. Com. Pl. LEXIS 142, at \*10 (May 16, 2012) (“[T]here can be no sale of services to constitute . . . being engaged in ‘trade or commerce’ when [the] performance of services is statutorily required.”).

13. In just the past two months, the United States District Court for the Western District of Pennsylvania has issued three decisions—including in a similar case brought by Plaintiff’s counsel—confirming that retailers are not engaged in “trade or commerce” under the UTPCPL when they collect sales tax as agents of the Commonwealth. *See Lisowski*, 2021 WL 3406659, at \*4–6 (Ranjan, J.); *James v. Aldi, Inc.*, No. 21-0209, 2021 WL 2896837, at \*2 (W.D. Pa. July 9, 2021) (Horan, J.); *McLean v. Big Lots Inc.*, No. 20-2000, 2021 WL 2317417, at \*4 (W.D. Pa. Jun. 7, 2021) (Horan, J.).

14. The RLC has a significant interest in having this Court grant the petition for allowance to appeal to correct the lower court’s error.

15. The uniform interpretation of substantially similar laws provides businesses with multistate or national operations with certainty as to the law. Many of *amicus curiae's* members have retail stores across the country, including in Pennsylvania. They should not be subject to the risk (only in this Commonwealth) of potentially significant liability when they are acting as mere agents of the taxing authorities in carrying out their public duties. That was not what the Pennsylvania General Assembly intended.

16. It makes no sense from a public policy perspective to penalize retailers that are simply trying to collect revenue for the Commonwealth as they are required to do under the law. Clarity is needed from this Court to ensure that retailers can conduct their public duty as agents of the Commonwealth's taxing authority free from the threat of baseless class actions in the Pennsylvania state courts.

17. Moreover, there has been a wave of misguided sales tax litigation in the Pennsylvania courts seeking to leverage the class action device and the UTPCPL to obtain windfall statutory damages. Over the last year, more than three dozen retailers, including

businesses based in Pennsylvania, have been named in substantially similar UTPCPL putative class actions. The actions turn on the same flawed theory that retailers are subject to liability when they make alleged mistakes in the collection of sales tax.

18. Finally, the conflict between the orders from the courts of common pleas and the rulings from the federal district courts has encouraged jurisdictional gamesmanship and forum shopping.

19. The RLC therefore urges this Court to grant *amicus curiae's* application. The RLC's *amicus* brief will provide this Court with the perspective of the RLC's members on these issues of added significance for all consumer-facing businesses with a presence in this Commonwealth.

WHEREFORE, the RLC respectfully requests that this Court grant this application for leave and accept, as filed, the Brief of *Amicus Curiae* in Support of the Petition For Permission To Appeal Interlocutory Order, which is attached to this application at Tab "A."

August 13, 2021

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 2135, I certify the following:

This application complies with the type-volume limitation of Rule 2135; this application contains 1,422 words excluding the parts of the brief exempted by this rule.

*/s/ Meredith C. Slawe*

Meredith C. Slawe

**CERTIFICATE OF COMPLIANCE WITH Pa. R.A.P. 127**

I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

August 13, 2021

/s/ Meredith C. Slawe  
Meredith C. Slawe

TAB “A”

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**TABLE OF CONTENTS**

	<b>Page</b>
INTEREST OF <i>AMICUS CURIAE</i> .....	1
INTRODUCTION.....	3
ARGUMENT .....	10
I. The Lower Court Should Have Dismissed the Action on Uniformity Grounds Alone .....	10
A. Section 1927 Mandates That “Trade or Commerce” Under the UTPCPL Be Interpreted Consistently .....	10
B. The Court Below Should Have Been Guided by the Uniform Decisions from Other States .....	13
II. Public Policy Dictates Reversal of the Lower Court’s Decision .....	22
CONCLUSION .....	24

## TABLE OF AUTHORITIES

**Page(s)**

### **Federal Cases**

<i>A/S Kreditt-Finans v. CIA Venetico de Navegacion S.A. of Pan.,</i> 560 F. Supp. 705 (E.D. Pa. 1983) .....	13
<i>Bailey Emp. Sys., Inc. v. Hahn,</i> 655 F.2d 473 (2d Cir. 1981).....	19
<i>Bartolotta v. Dunkin’ Brands Grp., Inc.,</i> No. 16-4137, 2016 WL 7104290 (N.D. Ill. Dec. 6, 2016) .....	21
<i>James v. Aldi, Inc.,</i> No. 21-0209, 2021 WL 2896837 (W.D. Pa. July 9, 2021) (Horan, J.) .....	7, 18
<i>Kirtsaeng v. John Wiley &amp; Sons, Inc.,</i> 568 U.S. 519 (2013) .....	2
<i>Lisowski v. Walmart Stores, Inc.,</i> No. 20-1729, 2021 WL 3406659 (W.D. Pa. Aug. 4, 2021) (Ranjan, J.) .....	<i>passim</i>
<i>McLean v. Big Lots Inc.,</i> No. 20-2000, 2021 WL 2317417 (W.D. Pa. Jun. 7, 2021) (Horan, J.) .....	<i>passim</i>
<i>In re Pharm. Indus. Average Wholesale Price Litig.,</i> 252 F.R.D. 83 (D. Mass. 2008) .....	19
<i>South Dakota v. Wayfair, Inc.,</i> 138 S. Ct. 2080 (2018) .....	1

## State Cases

<i>220 W. Rittenhouse Square Condo. Ass’n v. Stolker</i> , No. 2254, 2012 Phila. Ct. Com. Pl. LEXIS 142 (May 16, 2012) .....	17
<i>Aldine Apartments, Inc. v. Commonwealth, Dep’t of Revenue</i> , 379 A.2d 333 (Pa. Commw. Ct. 1977) .....	21
<i>Beyers v. Richmond</i> , 937 A.2d 1082 (Pa. 2007) .....	17
<i>BJ’s Wholesale Club, Inc. v. Bugliaro</i> , --- So. 3d ---, No. 20-0686, 2021 WL 1395602 (Fla. Dist. Ct. App. Apr. 14, 2021) .....	6, 16
<i>Blass v. Rite Aid of Conn., Inc.</i> , 16 A.3d 855 (Conn. Super. Ct. 2009), <i>aff’d</i> , 16 A.3d 737 (Conn. App. 2011) .....	6, 14, 15, 18
<i>Commonwealth v. Gilmour Mfg. Co. (“Gilmour II”)</i> , 822 A.2d 676 (Pa. 2003) .....	12, 13, 20
<i>Cont’l Ins. Co. v. Schneider, Inc.</i> , 873 A.2d 1286 (Pa. 2005) .....	11
<i>Commonwealth, ex rel. Creamer v. Monumental Props., Inc.</i> , 329 A.2d 812 (Pa. 1974) .....	19
<i>Danganan v. Guardian Prot. Servs.</i> , 179 A.3d 9 (Pa. 2018) .....	11
<i>Feeney v. Dell Inc.</i> , 908 N.E.2d 753 (Mass. 2009) .....	6, 15, 18
<i>Foflygen v. Zemel</i> , 615 A.2d 1345 (Pa. Super. Ct. 1992) .....	17

<i>Garcia v. Am. Eagle Outfitters</i> , No. GD-20-011057 (Pa. Ct. Com. Pl., Allegheny Cnty. Oct. 22, 2020).....	4
<i>Gilmour Mfg. Co. v. Commonwealth</i> , 750 A.2d 948 (Pa. Cmmw. Ct. 2000).....	11
<i>Husker News Co. v. Mahaska State Bank</i> , 460 N.W. 2d 476 (Iowa 1990).....	13
<i>Koken v. Reliance Ins. Co.</i> , 893 A.2d 70 (Pa. 2006).....	12
<i>Kornfeind v. New Werner Holding Co.</i> , 241 A.3d 1212 (Pa. Super. Ct. 2020).....	13
<i>Lilian v. Commonwealth</i> , 354 A.2d 250 (Pa. 1976).....	22
<i>Meyer v. Cmty. Coll. of Beaver Cnty.</i> , 93 A.3d 806 (Pa. 2014) (Castille, J., concurring).....	5, 17
<i>Porsche Cars N. Am., Inc. v. Diamond</i> , 140 So. 3d 1090 (Fla. Dist. Ct. App. 2014).....	19
<i>Slaney v. Westwood Auto, Inc.</i> , 322 N.E.2d 768 (Mass. 1975).....	19
<i>Springfield Twp. v. Mellon PSFS Bank</i> , 889 A.2d 1184 (Pa. 2005).....	12
<i>Strausser Enters., Inc. v. Segal &amp; Morel, Inc.</i> , 89 A.3d 292 (Pa. Super. Ct. 2014).....	10
<i>White v. Accardo</i> , 15 Pa. D. & C.3d 609 (Pa. Ct. Com. Pl., Phila. Cnty. 1980).....	11

**Federal Statutes**

Federal Trade Commission Act § 5,  
15 U.S.C. § 45(a)(1) ..... 6, 19

**State Statutes**

1 Pa. C.S. § 1927 .....*passim*  
72 P.S. § 7202(a) ..... 23  
72 P.S. § 7208(b.1) ..... 23  
72 P.S. § 7217(a) ..... 5  
72 P.S. § 7221 ..... 23  
72 P.S. § 7237(b)(1) ..... 20  
72 P.S. § 7252 ..... 3, 4, 22  
72 P.S. § 7253 ..... 3, 4, 22  
73 P.S. § 201-2 ..... 14, 19  
Conn. Gen. Stat. § 42-110a(4) ..... 19  
Fla. Stat. § 501.203(8) ..... 19  
Mass. G.L. Chapter 93A, § 1(b) ..... 19

**Rules**

Pa. R.A.P. 531 ..... 1, 3  
Pa. R.C.P. 1028(a)(4) ..... 5

**Regulations**

61 Pa. Code § 34.2(d) ..... 5  
61 Pa. Code § 35.2 ..... 23

**Other Authorities**

Rev., *Sales and Use Tax Bulletin 2021-01* (Jan. 20, 2021),  
available at [https://www.revenue.pa.gov/  
TaxLawPoliciesBulletinsNotices/TaxBulletins/SUT/Docum  
ents/st\\_bulletin\\_2021-01.pdf](https://www.revenue.pa.gov/TaxLawPoliciesBulletinsNotices/TaxBulletins/SUT/Documents/st_bulletin_2021-01.pdf) ..... 4, 22

## **INTEREST OF AMICUS CURIAE**

Pursuant to Pa. R.A.P. 531, the Retail Litigation Center, Inc. (“RLC”) files this *amicus* brief in support of Petitioners’ Petition For Permission To Appeal Interlocutory Order. The RLC is the only trade association dedicated to representing the retail industry in the courts. The RLC’s members include many of the country’s largest and most innovative retailers. Across the United States, including in this Commonwealth, they collectively employ millions of workers, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues impacting its members and to highlight the potential industry-wide consequences of significant pending cases. Since its founding in 2010, the RLC has participated as *amicus curiae* in well over 150 cases. Its *amicus* briefs have been favorably cited by multiple courts, including the United States Supreme Court. *See, e.g., South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2097 (2018) (addressing the collection and remittance

of sales tax); *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 542 (2013).

The issue presented for appeal here has significant implications for retailers doing business in this Commonwealth. The uniform conclusion of courts across the country is that retailers are not engaged in “trade or commerce,” as that term is defined in state consumer protection statutes, when they collect sales tax. The Pennsylvania Court of Common Pleas for Allegheny County, however, without opinion and in direct conflict with decisions from Pennsylvania federal district courts, overruled preliminary objections raising this dispositive defense in a case brought under the Pennsylvania Unfair Trade Practices and Consumer Protection Law (“UTPCPL”). Retailers and the business community at large have a compelling interest in having “trade or commerce” interpreted uniformly in connection with state consumer protection statutes. The RLC therefore urges this Court to accept this case for interlocutory appeal and its considered review.<sup>1</sup>

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<sup>1</sup> Counsel for *amicus curiae* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or

## **INTRODUCTION**

The UTPCPL, like other state consumer protection laws, expressly limits its application to “unfair or deceptive activity ‘in the conduct of any *trade or commerce*.’” *Lisowski v. Walmart Stores, Inc.*, No. 20-1729, 2021 WL 3406659, at \*4–6 (W.D. Pa. Aug. 4, 2021) (Ranjan, J.) (emphasis added) (quoting 73 P.S. § 201-3(a)). The statute authorizes prevailing plaintiffs to recover \$100 in statutory damages per violation, absent greater actual damages, with no cap on damages in the class context. Drawn to the potential for aggregate damages, opportunistic plaintiffs have filed a series of actions alleging that retailers violated the UTPCPL when they collected sales tax in connection with purchases of goods—despite the existence of a bespoke remedy for alleged over collection of sales tax under 72 P.S. §§ 7252–53. Central to their claims is the assertion that collecting sales tax on behalf of the Commonwealth constitutes “trade or commerce” within the meaning of the UTPCPL. This is one such action.

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entity other than *amicus* or their counsel, paid in whole or in part for the preparation of this brief. See Pa. R.A.P. 531(b)(2).

Here, Plaintiff alleges that the defendant retailers violated the UTPCPL when they collected Pennsylvania sales tax on Plaintiff's serial purchases<sup>2</sup> of protective, non-medical face masks after Governor Wolf's declaration of a state of emergency pertaining to the COVID-19 pandemic. But the retailer's tax collection activities fall squarely outside the scope of the UTPCPL.<sup>3</sup> When retailers collect sales tax they are not engaged in "trade or commerce" as

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<sup>2</sup> While this issue is not before this Court, the receipts attached to Plaintiff's complaint reflect that he engaged in a series of consecutive transactions that are suggestive of an intent to manufacture claims against retailers and that he certainly was not deceived about the potential that sales tax might be collected on the transaction. See Compl. Exs. 4-18 (demonstrating that Plaintiff purchased cloth masks at six stores within an hour, and two days later, purchased cloth masks at four additional stores in a span of less than 30 minutes).

<sup>3</sup> And, as set forth below, where consumers—like Plaintiff—contend they might have been mistakenly assessed sales tax on purchases in the Commonwealth, the Pennsylvania General Assembly created a statutory procedure by which they could seek refunds from the Department of Revenue. 72 P.S. §§ 7252–53, 10003.1. This process has been reinforced by the Department of Revenue in connection with protective, non-medical face masks during the pandemic; specifically, the Department of Revenue has offered guidance to consumers that they could seek refunds by making certifications specific to the use of each product that it would consider on a case-by-case basis. Pa. Dep't of Rev., *Sales and Use Tax Bulletin 2021-01* (Jan. 20, 2021) ("*Sales and Use Tax Bulletin 2021-01*"), available at [https://www.revenue.pa.gov/TaxLawPoliciesBulletinsNotices/TaxBulletins/SUT/Documents/st\\_bulletin\\_2021-01.pdf](https://www.revenue.pa.gov/TaxLawPoliciesBulletinsNotices/TaxBulletins/SUT/Documents/st_bulletin_2021-01.pdf) (citing 61 Pa. Code. § 52.1(a)). In the complaint, Plaintiff disclaimed any refund and instead asserted UTPCPL claims – along with demands for associated statutory damages and attorneys' fees – on behalf of putative class members. See Compl. ¶¶ 202–76, *Garcia v. Am. Eagle Outfitters*, No. GD-20-011057 (Pa. Ct. Com. Pl., Allegheny Cnty. Oct. 22, 2020).

that term is defined under the UTPCPL and substantially similar state consumer protection statutes. Instead, they are acting as agents of the Commonwealth, briefly holding the tax funds collected in trust and promptly remitting them to the Department of Revenue. 61 Pa. Code § 34.2(d); 72 P.S. §§ 7217(a)(2)–(4); 7222(a), 7225. As the Pennsylvania Supreme Court acknowledged in another context, when an entity is acting as a mere agent of the Commonwealth and “carrying out a public duty, it is not engaged in trade or commerce.” See *Meyer v. Cmty. Coll. of Beaver Cnty.*, 93 A.3d 806, 810 (Pa. 2014) (Castille, J., concurring) (internal quotation marks and citation omitted). “In fact, collecting sales tax ‘increases the retailer’s prices, working against its economic interest.’” *Lisowski*, 2021 WL 3406659 at \*7 (internal citation omitted).

The defendant retailers filed preliminary objections pursuant to Pa. R.C.P. 1028(a)(4), seeking dismissal of this action for failure to state a claim. Among other grounds, they argued that the collection of sales tax does not constitute “trade or commerce” and is therefore outside the reach of the UTPCPL. By Order dated June

9, 2021—and without comment—the lower court overruled the defendant retailers’ preliminary objections.

But all courts that have directly addressed this threshold issue have uniformly concluded that the collection of sales tax does not constitute “trade or commerce” under the UTPCPL and similar state consumer protection statutes. In fact, appellate courts in three states (Connecticut, Massachusetts, and Florida) have specifically held that when retailers “collect[] . . . money for taxes, [they do] so as an agent of the State” and are not engaged in “trade or commerce.” *Blass v. Rite Aid of Conn., Inc.*, 16 A.3d 855, 863 (Conn. Super. Ct. 2009), *aff’d*, 16 A.3d 737, 739 (Conn. App. 2011); *see also Feeney v. Dell Inc.*, 908 N.E.2d 753, 770–71 (Mass. 2009); *BJ’s Wholesale Club, Inc. v. Bugliaro*, --- So. 3d---, No. 20-0686, 2021 WL 1395602 (Fla. Dist. Ct. App. Apr. 14, 2021). The well-reasoned rulings of these state appellate courts are aligned with the purpose and scope of state consumer protection statutes, all of which are modeled after Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (“FTC Act”). And pursuant to Section 1927 of Pennsylvania’s Statutory Construction

Act, 1 Pa. C.S. § 1927 (“Section 1927”), the UTPCPL’s “trade or commerce” prong should be interpreted consistently with the rulings of those courts.

In just the past two months, the United States District Court for the Western District of Pennsylvania has issued three decisions—including in a similar case brought by Plaintiff’s counsel—confirming that retailers are not engaged in “trade or commerce” under the UTPCPL when they collect sales tax as agents of the Commonwealth. See *Lisowski*, 2021 WL 3406659, at \*4 (Ranjan, J.); *James v. Aldi, Inc.*, No. 21-0209, 2021 WL 2896837, at \*2 (W.D. Pa. July 9, 2021) (Horan, J.); *McLean v. Big Lots Inc.*, No. 20-2000, 2021 WL 2317417, at \*4 (W.D. Pa. Jun. 7, 2021) (Horan, J.). In reaching their conclusions, Judge J. Nicholas Ranjan and Judge Marilyn J. Horan each acknowledged the importance of consistently interpreting “nearly identical” consumer protection statutes. *Lisowski*, 2021 WL 3406659, at \*5 (noting that, because “all of these consumer protection statutes are patterned after the federal unfair trade practices act,” “interpretations of nearly identical statutes in other states, such as those in Massachusetts

and Connecticut [], are entitled to greater persuasive weight here than usual"); *McLean*, 2021 WL 2317417, at \*3 (“[T]his Court . . . will examine persuasive reasoning from the Commonwealth Court . . . and from other jurisdictions who have evaluated mis-collection of sales tax.”).

Section 1927’s mandate makes sense: the uniform interpretation of substantially similar laws provides businesses with multistate or national operations with certainty as to the law. Many of *amicus curiae*’s members have stores in multiple states, including Pennsylvania. They should not be subject to the risk (only in this Commonwealth) of potentially significant liability when they are acting as mere agents of the taxing authorities in carrying out their public duties. That was not what the Pennsylvania General Assembly intended. And that is why consumers have recourse to be made whole through the Department of Revenue should they believe they paid sales tax in error.

The discrete issue raised in this appeal matters to all consumer-facing businesses with a presence in this Commonwealth. There has been a wave of misguided sales tax

litigation in the Pennsylvania courts seeking to leverage the class action device and the UTPCPL to obtain windfall statutory damages. Over the last year, more than three dozen retailers, including businesses based in Pennsylvania, have been named in substantially similar UTPCPL putative class actions. The actions turn on the same flawed theory that retailers are subject to liability when they make alleged mistakes in the collection of sales tax. Three cases in federal court have all been dismissed with prejudice on the retailers' motions, while several cases in the courts of common pleas have been permitted to proceed over the preliminary objections of the retailers or otherwise remain pending.

The conflict between the orders from the courts of common pleas and the rulings from the federal district courts has encouraged jurisdictional gamesmanship and forum shopping. For example, *McLean* was originally brought by seven named plaintiffs against nine retail defendants. After the defendants removed the case to federal court and the plaintiffs' motion to remand was denied, three plaintiffs in the case voluntarily dismissed their claims against three non-diverse defendants and *immediately re-*

*filed* three distinct UTPCPL actions against those defendants in state court to avoid federal court jurisdiction. While *McLean* has now been finally resolved in the retailers' favor, the state actions remain pending against those former *McLean* defendants. The viability of a plaintiff's claim under the UTPCPL should not depend on the court in which the action is heard.

## **ARGUMENT**

### **I. The Lower Court Should Have Dismissed the Action on Uniformity Grounds Alone**

#### **A. Section 1927 Mandates That "Trade or Commerce" Under the UTPCPL Be Interpreted Consistently**

"[I]n all matters requiring statutory interpretation, [Pennsylvania state courts] are guided by the provisions of the Statutory Construction Act." *Strausser Enters., Inc. v. Segal & Morel, Inc.*, 89 A.3d 292, 297–98 (Pa. Super. Ct. 2014). Section 1927, in turn, requires that "[s]tatutes uniform with those of other states shall be interpreted and construed to effect their general purpose to make uniform the laws of those states which enact them." 1 Pa. C. S. § 1927. The Pennsylvania legislature has thus spoken and requires the courts of the state to interpret uniform

Pennsylvania statutes consistently with other states' interpretations of "similar" language. *Gilmour Mfg. Co. v. Commonwealth*, 750 A.2d 948, 952 n.5 (Pa. Cmmw. Ct. 2000); *Cont'l Ins. Co. v. Schneider, Inc.*, 873 A.2d 1286, 1293 n.10 (Pa. 2005) (applying Section 1927 and treating other states as "persuasive authority" where their statutes were "substantially similar" to the Pennsylvania provisions). Indeed, the Pennsylvania Supreme Court recently recognized the importance of interpreting the "trade or commerce" requirement under the UTPCPL consistently across states. In holding that "trade or commerce" encompassed extraterritorial conduct, the Court considered and adopted the Supreme Court of Washington's interpretation under that state's substantially similar consumer protection statute. See *Danganan v. Guardian Prot. Servs.*, 179 A.3d 9, 16 (Pa. 2018) (recognizing that the Washington state court opinion offered "persuasive support" for interpreting the UTPCPL).

In interpreting "trade or commerce," the rulings of other state courts "must be considered" to "effect the general purpose" of uniformity. *White v. Accardo*, 15 Pa. D. & C.3d 609, 615 (Pa. Ct.

Com. Pl., Phila. Cnty. 1980); *Koken v. Reliance Ins. Co.*, 893 A.2d 70, 83 (Pa. 2006) (“[I]n construing a uniform law, [Pennsylvania state courts] must consider the decisions of our sister states who have adopted and interpreted such uniform law and must afford these decisions great deference.” (internal quotation marks and citation omitted)); *Springfield Twp. v. Mellon PSFS Bank*, 889 A.2d 1184, 1192 (Pa. 2005) (because relevant statute was a “uniform act,” “we endeavor to interpret it consistently with those other states that have enacted it”); *Commonwealth v. Gilmour Mfg. Co.* (“*Gilmour II*”), 822 A.2d 676, 682 (Pa. 2003) (Where “other jurisdictions have uniformly interpreted corresponding statutes,” this “weighs heavily in favor” of conformity”).

The purpose behind Section 1927 is practical. The Pennsylvania General Assembly was concerned with “promot[ing] consistent interpretations across state lines.” *Koken*, 893 A.2d at 84 n.20. For example, in *Gilmour II*, the Pennsylvania Supreme Court relied on decisions from other states in interpreting a Pennsylvania tax statute that was “similar or identical” to statutes in other states. It recognized that “uniform interpretation of

legislation affecting multistate matters is preferable.” 822 A.2d at 682; see also *A/S Kreditt-Finans v. CIA Venetico de Navegacion S.A. of Pan.*, 560 F. Supp. 705, 711 n.15 (E.D. Pa. 1983); *Husker News Co. v. Mahaska State Bank*, 460 N.W. 2d 476, 477 (Iowa 1990) (identifying objectives of UCC that include “uniform application of commercial law among the states and the presumption in favor of predictability and finality of commercial transactions”). Indeed, the policy behind Section 1927 is so compelling that Pennsylvania courts have applied it to interpret a uniform statute that had been adopted by only two other states. See, e.g., *Kornfeind v. New Werner Holding Co.*, 241 A.3d 1212, 1224–25 (Pa. Super. Ct. 2020) (applying Section 1927 and adopting the Oklahoma Supreme Court’s analysis even though only “two other states” had adopted the uniform law).

**B. The Court Below Should Have Been Guided by the Uniform Decisions from Other States**

Under the UTPCPL, “‘Trade’ and ‘Commerce’ mean the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever

situate, and includes any trade or commerce directly or indirectly affecting the people of this Commonwealth.” 73 P.S. § 201-2(3).

Appellate courts from at least three other states have all agreed that a retailer’s collection of sales tax does *not* satisfy the “trade or commerce” requirement under substantially similar consumer protection statutes. No state appellate court (and no federal court) that has considered this issue has held to the contrary.

**Connecticut.** In *Blass*, the Superior Court of Connecticut held in a similar case that, even if the defendant retailer had collected tax in error, the plaintiff’s claim under the Connecticut Unfair Trade Practices Act (“CUTPA”) must be dismissed. 16 A.3d at 863. The court held that the state consumer protection law “seeks to protect consumers from ‘deceptive acts or practices *in the conduct of any trade or commerce,*’” and that “[t]he miscollection of taxes, whether negligent or intentional, does not constitute an unfair or deceptive act or practice in the conduct of any trade or commerce under the language of CUTPA.” *Id.* The court reasoned that the defendant’s conduct could not have been

an unfair or deceptive act because “[a] retailer gains no personal benefit from the over-collection of taxes. In fact, such activity only increases the retailer’s prices, working against its economic interest.” *Id.* Nor could the plaintiff show that the defendant’s conduct occurred in “trade or commerce” because “when it collected the plaintiff’s money for taxes, it did so as an agent of the State.” *Id.* The Appellate Court of Connecticut affirmed the Superior Court’s decision. *Blass*, 16 A.3d at 739.

**Massachusetts.** In *Feeney*, the plaintiffs brought a putative class action against a defendant retailer for allegedly violating the Massachusetts consumer protection law by collecting sales tax on optional service contracts when no sales tax was allegedly due. 908 N.E.2d at 757. The Supreme Judicial Court of Massachusetts dismissed the plaintiffs’ claims because the “collection of such tax was not motivated by ‘business or personal reasons’ but was pursuant to legislative mandate” and was not “commercial” activity according to the statute. *Id.* at 770–71 (“Where a party’s actions are motivated by legislative mandate, not business or personal reasons, this court has repeatedly held that [the consumer

protection law] does not apply” (internal quotation marks and citations omitted)).

**Florida.** In *BJ’s Wholesale Club*, a Florida appellate court likewise doubted that “the assessment, collection, and remittance of sales tax is an act or practice engaging in ‘trade or commerce’” under the Florida Deceptive and Unfair Trade Practices Act (the “FDUTPA”) in an action involving the alleged overcharging of sales tax. *BJ’s Wholesale Club, Inc.*, 2021 WL 1395602, at \*5. The court reasoned that because a retailer is “required to charge, collect, and remit sales taxes to the Department of Revenue,” in collecting sales tax, the retailer “is merely serving as a conduit to collect and remit the taxes at issue.” *Id.* As such, the court concluded that the dispute “is not the type of dispute intended to be addressed under FDUTPA.” *Id.*

**Pennsylvania.** While neither the Pennsylvania Supreme Court nor the Third Circuit has directly opined on the issue, decisional law under the UTPCPL fully supports the rulings from these other states. *See Lisowski*, 2021 WL 3406659, at \*4 (“No Pennsylvania appellate court has yet interpreted the UTPCPL’s

'trade or commerce' limitation in the context of a case alleging improper collection of sales tax. Absent such authority, this Court looks to 'federal cases interpreting state law' and 'decisions from other jurisdictions that have discussed the issue' for guidance." (citation omitted)). Pennsylvania defines "trade or commerce" under the UTPCPL as commercial activity for profit. See *Meyer*, 93 A.3d at 816 ("'Trade or commerce' is mercantile activity in which the person engaged in that business is doing so for private profit which could motivate unfair or deceptive practices for private gain or, more accurately, private greed." (internal quotation marks and citation omitted)); see also *Beyers v. Richmond*, 937 A.2d 1082, 1088 (Pa. 2007); *Foflygen v. Zemel*, 615 A.2d 1345, 1354 (Pa. Super. Ct. 1992). Where, as here, a retailer is acting as a mere agent of the Commonwealth and "carrying out a public duty, it is *not engaged in the conduct of a trade or commerce.*" See *Meyer*, 93 A.3d at 816; see also *220 W. Rittenhouse Square Condo. Ass'n v. Stolker*, No. 2254, 2012 Phila. Ct. Com. Pl. LEXIS 142, at \*10 (May 16, 2012) ("[T]here can be no sale of services to constitute .

. . . being engaged in 'trade or commerce' when [the] performance of services is statutorily required.”).

In dismissing substantially similar class actions, two federal courts each carefully considered and were guided by the uniform appellate decisions outside of this Commonwealth and held that a retailer’s collection of sales tax did not qualify as “trade or commerce” under the UTPCPL. See *Lisowski*, 2021 WL 3406659, at \*4–7; *McLean*, 2021 WL 2317417, at \*4; *James*, 2021 WL 2896837, at \*2 (incorporating reasoning of *McLean* in dismissing UTPCPL claims). These courts relied on the *Feeney* and *Blass* holdings, finding them “persuasive” and “consistent with the statutory text.” *McLean*, 2021 WL 2317417, at \*4; *Lisowski*, 2021 WL 3406659, at \*6. Indeed, one court noted that the only “authority” cited by the plaintiffs to support their position were short orders from the courts of common pleas that merely overruled preliminary objections without opinion. *Lisowski*, 2021 WL 3406659, at \*5.

Critically, the Pennsylvania, Connecticut, Massachusetts, and Florida consumer protection statutes all use the same language to

define “trade or commerce.” See 73 P.S. § 201-2(3); Conn. Gen. Stat. § 42-110a(4); Mass. G.L. ch. 93A, § 1(b); Fla. Stat. § 501.203(8). Indeed, all of the state consumer protection statutes derive from section 5(a) of the Federal Trade Commission Act, which prohibits “[u]nfair methods of competition” and “unfair or deceptive acts or practices *in or affecting commerce.*” 15 U.S.C. § 45(a)(1) (emphasis added); see *Commonwealth, ex rel. Creamer v. Monumental Props., Inc.*, 329 A.2d 812, 818 (Pa. 1974) (“[I]n all relevant respects the language of section 3 of the Consumer Protection Law and section 5 of the FTC Act is identical.”); see also *Slaney v. Westwood Auto, Inc.*, 322 N.E.2d 768, 773 n.8 (Mass. 1975); *Bailey Emp. Sys., Inc. v. Hahn*, 655 F.2d 473, 476, 477 n.6 (2d Cir. 1981); *Porsche Cars N. Am., Inc. v. Diamond*, 140 So. 3d 1090, 1097 (Fla. Dist. Ct. App. 2014) (“Section 45(a)(1) is the federal law upon which FDUTPA was modeled. Its language is virtually identical to section 501.204(1), [ ] which is the keystone provision of FDUTPA.”); see also *In re Pharm. Indus. Average Wholesale Price Litig.*, 252 F.R.D. 83, 94 (D. Mass. 2008) (noting that all fifty states “provide causes of action for unfair or deceptive

trade practices, most of which are based on the [FTC] Act,” including statutes, like Pennsylvania’s, which “prohibi[t] . . . ‘unfair methods of competition’ and ‘unfair or deceptive acts or practices’ in or affecting commerce, a formulation identical to the [FTC Act]’s prohibition”). Because the “trade or commerce” requirement derives from the same source, it should be interpreted consistently across the country as directed by Section 1927.

In addition, the Connecticut, Massachusetts, and Florida appellate courts “have persuasively explained why their construction is commanded by the language and intent of the legislation,” which further warrants following their guidance in accordance with Section 1927. *Gilmour II*, 822 A.2d at 682. In this Commonwealth, retailers act as agents of the state when they collect sales tax, and they hold those funds in trust briefly for the Commonwealth until they are remitted to the Department of Revenue. 72 P.S. § 7237(b)(1) (“Every person maintaining a place of business in this Commonwealth and selling or leasing tangible personal property or services, . . . the sale or use of which is subject to tax shall collect the tax from the purchaser or lessee at

the time of making the sale or lease, and shall remit the tax to the department"); see also *Aldine Apartments, Inc. v. Commonwealth, Dep't of Revenue*, 379 A.2d 333, 336 (Pa. Commw. Ct. 1977) (holding that the utility companies that were alleged to have improperly collected sales tax were "*merely collecting agents* and, legally, [could] play no role in the refund of these taxes" (emphasis added)). Thus, retailers are mere conduits for purposes of collecting sales tax and not motivated by business or commercial purposes. *Lisowski*, 2021 WL 3406659, at \*7 (recognizing that retailers "do not reap any profits or other tangible benefits for carrying out their legal duty to collect tax"); *McLean*, 2021 WL 2317417, at \*4 ("The collection of sales tax is divorced from private profit."). As one federal court aptly explained, "it makes absolutely no sense for the Store to charge a higher rate than it legitimately thinks it is required to charge because it is not in its economic interest to do so." *Bartolotta v. Dunkin' Brands Grp., Inc.*, No. 16-4137, 2016 WL 7104290, at \*9 (N.D. Ill. Dec. 6, 2016).<sup>4</sup>

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<sup>4</sup> Even if Plaintiff had paid sales tax not due, he would be entitled to a refund from the Department of Revenue and would thus be made whole by following the prescribed statutory refund procedure set forth in the Tax Code.

The lower court should have interpreted and applied the UTPCPL consistently with the universal interpretations from other states and the federal courts in this Commonwealth as mandated by Section 1927. This Court should therefore accept this case on appeal to correct the manifest error.

## **II. Public Policy Dictates Reversal of the Lower Court's Decision**

In addition to the sound legal arguments set forth above for this Court to correct the error below, public policy directs that outcome. Under Plaintiff's theory, every transaction involving the collection of sales tax by a retailer in this Commonwealth could create potential liability under the UTPCPL for statutory damages, punitive damages, and attorneys' fees. That would transform the retailers' actions as agents of the Commonwealth into a very risky endeavor, which was not contemplated nor endorsed by the General Assembly.<sup>5</sup> Instead, the legislature established a regime

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See 72 P.S. §§ 7252–53; *Lilian v. Commonwealth*, 354 A.2d 250, 252 (Pa. 1976) (explaining the statutory process that “provide[s] for the refunding of improperly assessed or paid sales taxes, and set[s] forth the procedure whereby such refunds may be obtained”); Sales and Use Tax Bulletin 2021-01 (citing 61 Pa. Code. § 52.1(a)).

<sup>5</sup> The failure to collect and remit sales tax to the Commonwealth can result in the imposition of fines or penalties and enforcement actions. See 72

through which sales tax would be collected and promptly remitted to the Commonwealth by retailers without fear that a mistake might subject them to consumer litigation. When consumers believe there have been mistakes in the collection of sales tax, which the General Assembly contemplated might happen, they may seek a refund from the Department of Revenue and recoup those funds. It is up to the Department of Revenue to determine whether such a refund would be appropriate in a given situation. This carefully crafted legislative scheme would be upended if consumers were permitted to ignore it entirely and instead sue retailers under the UTPCPL.

It makes no sense from a public policy perspective to penalize retailers who are simply trying to collect revenue for the Commonwealth as they are required to do under the law. Clarity is needed from this Court to ensure that retailers can conduct their public duty as agents of the Commonwealth's taxing authority free

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P.S. §§ 7202(a), 7208(b.1); 7221; 61 Pa. Code § 35.2; *see also Lisowski*, 2021 WL 3406659 at \*7.

from the threat of baseless class actions in the Pennsylvania state courts.

**CONCLUSION**

For the reasons set forth herein, *amicus curiae* respectfully asks this Court to grant the Petition for Permission to Appeal Interlocutory Order.

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 2135, I certify the following:

This brief complies with the type-volume limitation of Rule 2135; this brief contains 4,473 words excluding the parts of the brief exempted by this rule.

*/s/ Meredith C. Slawe*

## **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing document was served on the 13th day of August, 2021 upon the following counsel of record by e-mail in accordance with the requirements of Pa. R.A.P. 121:

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