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IN THE SUPERIOR COURT OF PENNSYLVANIA

461 WDA 2022, 462 WDA 2022

JORDAN BUDAI, et al.,
Plaintiffs-Appellees,
v.
COUNTRY FAIR, INC.,
Defendant-Appellant.

ASHLEY GENNOCK, et al.,
Plaintiffs-Appellees,
v.
KIRKLAND'S, INC.,
Defendant-Appellant.

AMICUS BRIEF OF NATIONAL RETAIL FEDERATION, PENNSYLVANIA RESTAURANT & LODGING ASSOCIATION, PENNSYLVANIA RETAILERS ASSOCIATION, RESTAURANT LAW CENTER, AND RETAIL LITIGATION CENTER, INC. IN SUPPORT OF APPELLANTS

Appeals from the Lawrence County Court of Common Pleas, Civil Division,
10896 OF 2019 & 11119 OF 2019

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INTEREST OF *AMICI CURIAE*[1]

The **National Retail Federation** is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants, and internet retailers from every corner of the United States. Retail is by far the largest private-sector employer in the United States. It supports 1 in 4 jobs—roughly 52 million American workers and contributed $3.9 trillion to annual GDP. The National Retail Federation regularly files amicus briefs in cases that raise issues of substantial importance to the retail industry.

The **Pennsylvania Restaurant & Lodging Association** ("PRLA") strives to promote, protect, and improve the hospitality and tourism industries in the Commonwealth of Pennsylvania. PRLA is the unified voice for the hospitality and tourism industries in the state—both of which significantly contribute to the economic growth of Pennsylvania. PRLA advocates for its members at the local, state and federal levels of government on issues that impact its members. As part of its advocacy work, PRLA represents the hospitality and tourism industries in the

[1] Counsel for *amici curiae* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, paid in whole or in part for the preparation of this brief. *See* Pa. R.A.P. 531(b)(2).

courts in cases, such as this one, that could have a significant short and long term impact on its members.

The **Pennsylvania Retailers Association** was founded in 1932 and is the only trade association throughout the Commonwealth which represents the retail industry. As the voice of retail, PRA's membership consists of both large, multistate and small independent retailers. Retail is the largest private sector employer in the Commonwealth, with over 1.1 million jobs. There are more than 156,000 retail establishments generating $44.7 billion in economic activity in Pennsylvania.

The **Restaurant Law Center** is the only independent public policy organization created specifically to represent the interests of the food service industry in the courts. This labor-intensive industry is comprised of over one million restaurants and other foodservice outlets employing nearly 16 million people—approximately 10 percent of the U.S. workforce. Restaurants and other foodservice providers are the second largest private sector employers in the United States. Through amicus participation, the Law Center provides courts with perspectives on legal issues that have the potential to significantly impact its members and their industry.

The **Retail Litigation Center, Inc.** provides courts with the perspective of the retail industry on important legal issues affecting its members, and on potential industry-wide consequences of significant court cases. Since its founding in 2010,

the Retail Litigation Center has participated as an amicus in nearly 200 cases of importance to retailers. The Retail Litigation Center is dedicated to representing the Nation's retail industry in the courts. Its member retailers employ millions of workers throughout the United States, provide goods and services to hundreds of millions of consumers, and account for more than a trillion dollars in annual sales.

Amici have a strong interest in this case. Retailers and restaurants are frequently the targets of class actions under FACTA. These class actions do not remedy any injury incurred by any class member but instead enrich class action lawyers while raising prices for consumers. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), appropriately curtailed such litigation by holding that uninjured class members could not bring suit. The Court of Common Pleas' decision, however, would sap *TransUnion* of practical effect by permitting uninjured plaintiffs to bring federal claims in state court—even though they would be barred from bringing those claims in federal court. *Amici* have an interest in curbing forum-shopping and ensuring that uninjured plaintiffs cannot assert barred federal claims in state court.

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs allege that Defendants violated FACTA. But Plaintiffs were not injured by Defendants' alleged statutory violations. As Defendants correctly argue, Plaintiffs' claims cannot proceed under Pennsylvania state standing law.

But that is not the only reason why Plaintiffs' claims cannot proceed. The Court should hold, in the alternative, that permitting Plaintiffs' claims to proceed would violate the federal Constitution. In *TransUnion*, the Supreme Court held that the Constitution barred uninjured class members from recovering damages for two reasons. First, the class members lacked standing under Article III. Second, the lawsuit impinged on the President's authority under Article II. The Court's Article III holding applies only in federal court, but the Court's Article II holding applies in both state and federal court. When no one is injured, the President has the exclusive authority to decide whether to enforce federal law, and that authority is undermined just as much by a state-court suit as by a federal-court suit.

Additionally, two principles of federal statutory interpretation establish that no-injury suits should be barred in state court. First, courts presume that plaintiffs falling outside of a federal statute's "zone of interests" cannot bring suit. Here, uninjured plaintiffs who cannot sue in federal court fall outside FACTA's "zone of interests," and therefore lack a cause of action in any court. Second, courts presume that the enforceability of federal statutes does not vary from state to state. The only way to vindicate that presumption is to hold that no-injury suits are unavailable in state court.

The principle of constitutional avoidance further supports adopting this interpretation of FACTA. Accordingly, this Court should hold that Congress did not

authorize no-injury suits in any court under FACTA; the alternative would be that Congress enacted an unconstitutional law and that outcome should be avoided.

Finally, if FACTA really does authorize no-injury suits in federal court, then that portion of FACTA is unconstitutional and inseverable from the rest of the statute. Plaintiffs posit that no-injury federal claims can proceed in state court but not federal court. But that position would produce bizarre and harmful consequences that Congress would have never contemplated. For example, plaintiffs would counterintuitively have an incentive to argue that they are *not* injured, and FACTA—a federal statute that is supposed to be uniform nationwide—would be privately enforceable in some states but not others. Under well-settled principles of severability, the Court should avoid those counterintuitive outcomes by holding that uninjured private plaintiffs cannot sue under FACTA in state court.

ARGUMENT

Amici agree with Defendants that, under Pennsylvania law, Plaintiffs lack standing to bring their suits. To establish standing, Plaintiffs must show that "the matter complained of caused harm to the party's interest." *In re Hickson*, 821 A.2d 1238, 1243 (Pa. 2003). As Defendants explain, the alleged FACTA violations caused no harm to any plaintiff's interest. Therefore, under Pennsylvania standing law, these cases cannot proceed.

Amici submit this amicus brief to argue an alternative rationale for reversing the Court of Common Pleas: regardless of the scope of state standing law, *federal* law bars Plaintiffs' suit. Under *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), it would be unconstitutional for Plaintiffs' suit to proceed in either state or federal court. Moreover, federal principles of statutory interpretation, constitutional avoidance and severability establish that Plaintiffs' suit cannot proceed.

I. Statutes Authorizing Uninjured Plaintiffs to File Suit Are Unconstitutional in Both Federal Court and State Court.

The Supreme Court's *TransUnion* decision establishes that Acts of Congress permitting uninjured plaintiffs to sue are unconstitutional under both Article III and Article II of the Constitution. While the Supreme Court's Article III holding applies in federal court only, the Supreme Court's Article II holding applies in both state court and federal court.

In *TransUnion*, the plaintiff brought a class action alleging that TransUnion violated the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq*. The plaintiff alleged that TransUnion failed to follow reasonable procedures to ensure the accuracy of information in their credit files. The district court certified a class of 8,185 members, each of whom sought statutory damages from TransUnion. Many of those class members were uninjured by TransUnion's violation: although they had inaccurate information in their files, that inaccurate information was never transmitted to any third party. Nonetheless, a jury found for the entire plaintiff class, yielding an award

exceeding $60 million. 141 S. Ct. at 2202. The Ninth Circuit reduced the award to $40 million but otherwise affirmed. *Id.*

The Supreme Court ruled that the judgment was unconstitutional because it allowed uninjured class members to recover damages. The Supreme Court rested its decision on two independent rationales.

First, the Court held that the judgment violated Article III. As the Court explained, "Article III confines the federal judicial power to the resolution of 'Cases' and 'Controversies.'" *Id.* at 2203. To satisfy that requirement, "a plaintiff must show … that he suffered an injury in fact that is concrete, particularized, and actual or imminent." *Id.* Further, "[e]very class member must have Article III standing in order to recover individual damages." *Id.* at 2208. "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not." *Id.* (quotation marks omitted). Thus, the judgment awarding damages to uninjured class members violated Article III. *Id.* at 2214.

Second, the Court held that the judgment violated Article II. Article II provides in relevant part: "The executive Power shall be vested in a President of the United States of America." U.S. Const. art. II, § 1, cl. 1. The Court explained: "A regime where Congress could freely authorize *unharmed* plaintiffs to sue defendants who violate federal law not only would violate Article III but also would infringe on the Executive Branch's Article II authority." 141 S. Ct. at 2207. "[T]he choice of

how to prioritize and how aggressively to pursue legal actions against defendants who violate the law falls within the discretion of the Executive Branch, not within the purview of private plaintiffs (and their attorneys)." *Id.* "Private plaintiffs are not accountable to the people and are not charged with pursuing the public interest in enforcing a defendant's general compliance with regulatory law." *Id.*

Each of these holdings is an alternative basis for finding that the lower-court judgment was unconstitutional. Each holding is thus binding precedent. *See Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949) ([W]here a decision rests on two or more grounds, none can be relegated to the category of obiter dictum."); *Commonwealth v. Markman*, 591 Pa. 249, 282 (2007) (same, under Pennsylvania law).

The Supreme Court's holding regarding Article III applies only in federal court. But as shown below, the Supreme Court's holding regarding Article II applies in both federal and state court. As a result, permitting this class action to proceed, even in state court, would violate Article II.

Nothing about the Court's Article II reasoning suggests that it is confined to federal court. The Court reasoned that the President is vested with the right and responsibility to enforce federal law in the public interest. The *President* gets to decide when—and when not—to enforce a law to ensure general regulatory compliance. The President exercises that authority via administrative agencies with

leaders appointed by the President. Consistent with that constitutional plan, FACTA includes a detailed provision expressly authorizing the Federal Trade Commission and other agencies within the Executive Branch to enforce FACTA. 15 U.S.C. § 1681s. Those agencies have the authority and mandate to enforce laws in the federal interest. When an uninjured private citizen sues to enforce federal law, that citizen undermines the Executive Branch's exclusive law enforcement authority—no matter where the lawsuit is filed.

Indeed, permitting uninjured plaintiffs to bring suit in state court is arguably worse from a separation-of-powers perspective than permitting uninjured plaintiffs to bring suit in federal court. The federal political branches are vested under Article I with the ultimate authority to oversee, and curb, the litigation and enforcement of federal statutes. For instance, the President appoints judges, subject to Senate confirmation. And Congress has the authority to legislate on civil procedure, subject to presidential veto. Finally, Congress has the budgetary authority to decide which efforts and agencies to fund, and at what levels and for which programmatic priorities. In state court, by contrast, the federal government has *no* influence over judicial selection, litigation procedures, or anything else. The Constitution does not

contemplate that unaccountable private plaintiffs will enforce federal law in this type of forum.[2]

Worse yet, permitting uninjured plaintiffs to bring suit in state court will yield intolerable geographic disparities. Some states follow federal standing law. *See, e.g.*, *In re Abbott*, 601 S.W.3d 802, 807 (Tex. 2020) ("The Texas standing requirements parallel the federal test for Article III standing."). In those states, uninjured plaintiffs cannot enforce federal law, no matter if the suit is filed in federal or state court. By contrast, under Plaintiffs' position, uninjured plaintiffs could enforce federal law in states with more relaxed standing doctrines.

The effect of Plaintiffs' position would be that bare regulatory violations of federal law would be enforced more rigorously in some states than others. That outcome would be antithetical to Article II. Under Article II, the Executive Branch has discretion to decide which violations of federal law do, and do not, lead to enforcement actions. *TransUnion*, 141 S. Ct. at 2207. Yet under Plaintiffs' position, whether or not a particular violation will lead to an enforcement action will turn not

[2] Of course, *injured* plaintiffs have the right to bring federal suits in state court—the Supreme Court has "consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States." *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 823 (1990) (quotation marks omitted). But when uninjured plaintiffs file suit, those plaintiffs are not pursuing their own claims but are instead stepping into the shoes of the Executive Branch. The Constitution does not contemplate that private plaintiffs will pursue that role in *any* court, and certainly not state court.

on the Executive Branch's exercise of discretion, but on the happenstance of whether a particular state's law of standing is more lenient than federal standing law.

Judge Newsom's concurrence in *Laufer v. Arpan LLC*, 29 F.4th 1268 (11th Cir. 2022), interpreting the *TransUnion* decision, provides persuasive insight into why Article II bars uninjured private plaintiffs from bringing suit. While Judge Newsom's concurrence is not binding precedent in this or any other court, it provides the most detailed elaboration on *TransUnion*'s discussion of Article II and hence warrants the Court's consideration.

In his concurrence, Judge Newsom "unpack[s] the *TransUnion* Court's brief discussion of executive enforcement discretion, by reference to both modern doctrine and Framing-era history." *Id.* at 1291 (Newsom, J., concurring). As Judge Newsom explains, "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case," including the discretion to bring "civil-enforcement actions." *Id.* (internal quotation marks omitted). That discretion "flows not from a desire to give carte blanche to law enforcement officials but from recognition of the constitutional principle of separation of powers." *Id.* (quotation marks omitted).

Moreover, "modern Article II doctrine—which holds that case-by-case enforcement discretion is a core and nondelegable component of the executive power—is firmly rooted in Founding-era history and practice." *Id.* at 1292

(Newsom, J., concurring). Both pre-American sources and the country's Framers "saw the separation of the power to prosecute from the power to legislate as essential to preserving individual liberty." *Id.* (quoting *In re Aiken County*, 725 F.3d 255, 264 (D.C. Cir. 2013) (opinion of Kavanaugh, J.)). In particular, "[w]ere the President obliged to enforce congressional statutes to the hilt, the separation of executive and legislative functions would do nothing to moderate tyrannical laws." *Id.* at 1293 (Newsom, J., concurring) (quoting Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 Vand. L. Rev. 671, 701 (2014)). "The separation of legislative and executive functions helps prevent tyranny *precisely because* a discretionary decision by executive officers intervenes between the enactment of the prohibition and its application to any particular individual." *Id.* (quoting Price, 67 Vand. L. Rev. at 701).

As a result of the separation of powers embodied in the Constitution, *every* enforcement action—whether criminal or civil—involves an exercise of that constitutionally guaranteed discretion. "Executive Branch officials make these sorts of discretionary enforcement judgments every day. In doing so, they carry out the Framers' design and check the ambition of potentially overzealous legislators. And for their choices, they are accountable—both politically, to the voters, and legally, to the Constitution." *Id.* at 1296 (Newsom, J., concurring) (emphasis omitted).

Permitting uninjured private plaintiffs to enforce federal law would overturn the Constitution's plan by vesting the authority to enforce the law in agents who are *not* charged with checking legislators' ambitions. "Unaccountable private parties (and their fee-conscious lawyers) have no incentive to play that role. By making enforcement decisions that are not only different from those that Executive Branch officials might make but are also unchecked by the sorts of political and legal constraints that bind government enforcers, private parties may actually exacerbate the risk of arbitrary power." *Id.* Of course, *injured* plaintiffs may assert their *own* rights without impinging on the President's executive authority to combat violations of federal law. But when uninjured plaintiffs bring suit, they are attempting to enforce federal law on behalf of the people of the United States but only the President may speak for the people.

These cases well illustrate the point. Plaintiffs accuse Kirkland's and Country Fair of violating FACTA. But Kirkland's and Country Fair hurt no one. If the allegations against them are true, then Defendants committed, at most, a violation of federal law that injured the sovereign rather than any specific person. To protect liberty, the Constitution vests the Executive Branch with the authority to decide whether this particular violation of federal law (if it occurred) should be punished. In making that decision, the Executive Branch would consider matters such as the extent of the alleged violations; the number of people who were actually affected;

how the defendants' conduct compares to the conduct of other businesses; and innumerable other discretionary considerations. By contrast, Plaintiffs' counsel care about none of this. They simply want to obtain a share of a large classwide statutory damages award, likely extracted via a settlement. Permitting plaintiffs with these incentives to enforce federal law would contradict the constitutional plan.

II. As a Matter of Statutory Interpretation, FACTA Does Not Permit Uninjured Plaintiffs To Pursue Claims in State Court.

The Court should additionally hold that, as a matter of statutory interpretation, FACTA does not permit uninjured plaintiffs to file suit in state court. That holding would rest on federal law, and would not require analyzing Pennsylvania state standing law.

Although FACTA does not expressly exclude no-injury claims from its coverage, the statute must be construed in view of background principles of statutory interpretation. Two interpretive principles—each rooted in federal law—support a construction of FACTA that would prevent these lawsuits from proceeding in state court. The constitutional avoidance canon provides a third basis that further militates in favor of adopting this construction.

The "zone of interests" test. Federal courts "presume that a statutory cause of action extends only to plaintiffs whose interests fall within the zone of interests protected by the law invoked." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129 (2014) (internal quotation marks omitted). This principle

applies even if a statute does not expressly recite it: "it is a requirement of general application; and … Congress is presumed to legislate against the background of the zone-of-interests limitation, which applies unless it is expressly negated." *Id.* (internal quotation marks and alteration omitted).

For example, because the federal Lanham Act's false advertising provision was intended to protect competitors from unfair competition, only plaintiffs who "allege an injury to a commercial interest in reputation or sales" fall within the Lanham Act's zone of interests. *Id.* at 131-32. "A consumer who is hoodwinked into purchasing a disappointing product may well have an injury-in-fact cognizable under Article III, but he cannot invoke the protection of the Lanham Act." *Id.* at 132. This limitation does not expressly appear in the Lanham Act; instead, courts have inferred from the Lanham Act's purposes that such plaintiffs fall outside the zone of interests that the statute protects. *Id.*

Where, as here, plaintiffs bring claims under federal law, applying the zone-of-interests test turns on "the meaning of the congressionally enacted provision creating a cause of action." *Id.* at 128. So the zone-of-interests test presents a question of federal law, not state law.[3]

[3] Notably, under Pennsylvania state law, "a zone of interests analysis may (and should) be employed to assist a court in determining whether a party has been sufficiently aggrieved, and therefore has standing." *Johnson v. Am. Standard*, 607 Pa. 492, 516 (2010). Thus, even if the Court resolves this issue under state law, it should take into account that Plaintiffs fall outside the statute's zone of interests.

The Court should hold that uninjured plaintiffs fall outside the zone of interests protected by FACTA. FACTA was enacted to protect consumers from "identity thieves" who could harm their credit and their pocketbooks. S. Rep. No. 108-166, at 13 (2003). Consumers whose harms are so attenuated that they are not even capable of bringing suit in federal court do not fall within the "zone of interests" that Congress intended to protect under FACTA.

The canon that the applicability of federal law does not depend on state law. Courts must "start … with the general assumption that in the absence of a plain indication to the contrary, Congress when it enacts a statute is not making the application of the federal act dependent on state law." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 (1989) (internal quotation marks and alteration omitted). "One reason for this rule of construction is that federal statutes are generally intended to have uniform nationwide application." *Id.* Federal statutes are typically not "administered in accordance with whatever different standards the respective states may see fit to adopt for the disposition of unrelated, local problems." *Id.* at 44 (quotation marks omitted).

Considering those principles, the Court should interpret FACTA to bar uninjured plaintiffs from suing in any forum. Congress did not intend for FACTA to be administered differently in different states based on the vagaries of state standing law, which developed because of "unrelated, local problems." *Id.*

(quotation marks omitted). Instead, FACTA relief should be available either everywhere or nowhere. When plaintiffs are injured by a FACTA violation, relief is available everywhere, in both federal and state court; when they are uninjured, it is available nowhere. *See, e.g.*, *Corozzo v. Wal-Mart Stores, Inc.*, 531 S.W.3d 566, 574-75 (Mo. Ct. App. 2017) (finding that uninjured plaintiff could not bring Fair Credit Reporting Act claim in state court because where "the law at issue is a federal statute that provides concurrent jurisdiction in both state and federal courts," there should be "consistency in the legal standards to be applied by our state courts and [federal courts] if at all possible" (quotation marks omitted)).

Constitutional avoidance. The canon of constitutional avoidance likewise supports an interpretation of FACTA that would bar no-injury suits from proceeding in state court.

Holding a federal statute unconstitutional is strongly disfavored. *See Shelby County v. Holder*, 570 U.S. 529, 556 (2013) (noting that invalidating an Act of Congress is "the gravest and most delicate duty that this Court is called on to perform" (quotation marks omitted)). When possible, courts should strive to interpret statutes so as to avoid constitutional concerns rather than in a manner that would lead to striking down the statutes. To that end, the Supreme Court has articulated the canon of constitutional avoidance. That canon provides that when one interpretation of a statute would raise "serious constitutional doubts," the courts

should reject it in favor of another interpretation that will not, based on the "reasonable presumption that Congress did not intend the alternative [interpretation] which raises [such] doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005).

The canon of constitutional avoidance applies here. For willful violations, FACTA authorizes plaintiffs to recover either "actual damages" or "damages of not less than $100 and not more than $1,000." 15 U.S.C. § 1681n(a)(1)(A). Plaintiffs interpret this authorization to obtain statutory damages as an authorization for *uninjured* plaintiffs to file lawsuits. But if Plaintiffs' interpretation is correct, then that would imply that Congress enacted an unconstitutional statute. At a minimum, under Plaintiffs' interpretation, *TransUnion* creates constitutional doubt over whether FACTA is constitutional under Article II and Article III. Hence, the Court should apply the canon of constitutional avoidance and hold that FACTA, as a matter of statutory interpretation, does not permit uninjured plaintiffs to sue and, thereby, avoid deeming FACTA unconstitutional.[4]

[4] Even if these constitutional concerns arise in federal court only, an interpretation that avoids those constitutional concerns would apply in both federal court and state court. *Clark*, 543 U.S. at 382 (a statute is not a "chameleon, its meaning subject to change depending on the presence or absence of constitutional concerns in each individual case").

III. If FACTA Is Unconstitutional as Applied to Federal Court Suits, Severability Principles Require Invalidating FACTA as Applied to State Court Suits, Too.

As argued above, the Court should hold that Article II prohibits this suit, or alternatively, interpret FACTA to exclude lawsuits by uninjured plaintiffs. But if this Court should instead hold that the only bar to an uninjured plaintiff's bringing suit is Article III, a grave question of severability would arise and demand a fatal answer.

Under 15 U.S.C. § 1681p, lawsuits may be filed "in any appropriate United States district court, without regard to the amount in controversy, or in any other court of competent jurisdiction." If FACTA, by its terms, permits uninjured plaintiffs to sue, then under *TransUnion*, the portion of § 1681p authorizing suit "in any appropriate United States district court" would definitely be unconstitutional under Article III.

The Court must then reckon with whether it can sever that unconstitutional provision from the statute. If that provision is severable, then the portion of § 1681p authorizing suit "in any other court of competent jurisdiction" remains in place. If the provisions of § 1681p are inseverable, then the Court would hold that all of § 1681p —including the authorization to sue in "any other court of competent jurisdiction" (such as state court)—is off the books as applied to uninjured plaintiffs.

The Court should hold that the statute is inseverable. If the authorization to sue in federal court is unconstitutional as applied to uninjured plaintiffs, then the authorization to sue in state court must fall along with it.

For a statute to be inseverable, "it must be evident that Congress would not have enacted those provisions which are within its power, independently of those which are not." *Murphy v. National Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1482 (2018) (quotation marks and alterations omitted). "In conducting that inquiry," courts "ask whether the law remains fully operative without the invalid provisions." *Id.* (internal quotation marks omitted). Courts "cannot rewrite a statute and give it an effect altogether different from that sought by the measure viewed as a whole." *Id.* (quotation marks omitted). In *Murphy*, for example, the Court invalidated a federal statute that barred states from authorizing privately operated sports gambling schemes. *Id.* at 1475-81. The Court then analyzed whether this provision was inseverable from several other surrounding provisions, such as a bar on state-run sports lotteries and a bar on private actors sponsoring sports gambling schemes pursuant to state law. *Id.* at 1482-84. The Court held that those other provisions must also fall because they were intended to work together with the unconstitutional statute. *Id.* In the Court's view, leaving those surrounding provisions intact would lead to results that "would have seemed exactly backwards." *Id.* at 1483; *see also*

id. at 1484 ("We do not think that Congress ever contemplated that such a weird result would come to pass.").

Here, too, permitting only state courts and not federal courts to have jurisdiction over no-injury FACTA claims would produce "weird result[s]" that Congress would not have "contemplated … would come to pass." *Id.* Among them:

- Plaintiffs would now have an incentive to plead that they were *not* injured, and devise class definitions encompassing only *uninjured* class members, to keep cases in state court. Defendants, by contrast, would now have an incentive to respond that they *did* injure the plaintiff. This leads to man-bites-dog litigation in which defendants argue that they injured the plaintiffs and the plaintiffs deny it—the opposite of how litigation is supposed to work. *See, e.g.*, *Thornley v. Clearview AI, Inc.*, 984 F.3d 1241, 1242 (7th Cir. 2021) (noting "peculiar" nature of this type of litigation).
- As a practical matter, FACTA would operate differently in different states. In states with lenient local standing rules, businesses would face the persistent risk of class actions based on alleged technical violations that harmed no one. They would be forced to take precautionary measures to avoid potential litigation under even the most far-fetched interpretations of FACTA that a class-action lawyer could dream up.

In states with more rigorous standing rules, businesses could focus on protecting their customers' concrete interests. This outcome is antithetical to Congress's goal of enacting a single federal rule.

- FACTA law would develop on two parallel tracks. One batch of cases—cases brought by injured plaintiffs or by federal regulators—would be filed in (or removed to) federal court, leading to a line of federal cases interpreting FACTA. Another batch of cases—cases brought by uninjured plaintiffs—would be filed in state court, leading to a line of state cases interpreting FACTA in that distinct procedural posture. Federal and state jurisprudence might diverge, with no possible way of reconciling the two lines of cases unless the Supreme Court weighs in. Congress would have never intended this outcome—it expected federal courts to have jurisdiction over *all* FACTA cases.
- State courts, which are already busy enough, would be forced by Congress to add a uniquely harmful type of class action to their dockets. While all class actions impose burdens on defendants, no-injury class actions are particularly pernicious. They tend to involve particularly large classes, leading to uniquely high settlement pressures on defendants. In addition, because they do not remedy any actual injury, such class actions benefit class counsel while doing little, if anything,

for the class. Under Plaintiffs' theory, Congress enacted a federal statute authorizing such class actions—while foisting the burden on state courts to hear and resolve them.[5]

No rational legislator could have wanted or expected any of these outcomes. FACTA's authorization to sue in federal court is thus inseverable from FACTA's authorization to sue in state court. If the former is unconstitutional, the latter must also fall.

CONCLUSION

This Court should reverse the judgments below and direct that these suits be dismissed with prejudice.

August 4, 2022

Respectfully submitted,

/s/ Meredith C. Slawe

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[5] Of course, state courts could make their local standing rules more rigorous to avoid such suits, but they may not want to alter state law merely to avoid hearing federal claims. And if state courts refuse to hear no-injury federal claims while adhering to local standing rules for state claims, they would face a charge of impermissibly discriminating against federal law. *See, e.g.*, *Haywood v. Drown*, 556 U.S. 729 (2009).

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CERTIFICATE OF COMPLIANCE

Pursuant to Pa. R.A.P. 531, I certify that the foregoing brief does not exceed the word limitation of Pa. R.A.P. 531(b)(3), as it contains 5,210 words, excluding the parts of the brief exempted by this rule.

Pursuant to Pa. R.A.P. 2135, I certify that the foregoing brief complies with the type-volume limitation of Rule 2135.

August 4, 2022

/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 Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

August 4, 2022

/s/ Meredith C. Slawe
Meredith C. Slawe

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document was served on the 4th day of August, 2022, upon the following counsel of record by e-mail in accordance with the requirements of Pa. R.A.P. 121:

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461 WDA 2022

IN THE SUPERIOR COURT OF PENNSYLVANIA

Jordan Budai, Andrea Sciola, and Ashley Gennock, individually and on behalf of all other similarly situated	:	461 WDA 2022

v.
Country Fair, Inc.
Appellant

PROOF OF SERVICE

I hereby certify that this 4th day of August, 2022, I have served the attached document(s) to the persons on the date(s) and in the manner(s) stated below, which service satisfies the requirements of Pa.R.A.P. 121:

Service

Served:	Gary F. Lynch
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IN THE SUPERIOR COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

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/s/ Meredith Connie Slawe

(Signature of Person Serving)

Person Serving:	Slawe, Meredith Connie
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