
IN THE

Supreme Court of Pennsylvania

Western District

27 WAP 2023

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

Appellant,

v.

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

Appellees.

*Appeal from the Order dated March 14, 2023, in the Superior Court of
Pennsylvania Western District, 1320 WDA 2021, Reversing the Order dated July
14, 2021, in the Court of Common Pleas of Allegheny County, Civil Division,
GD-20-011057*

BRIEF OF AMICI CURIAE IN SUPPORT OF APPELLEES

DEBORAH R. WHITE
LARISSA M. WHITTINGHAM
RETAIL LITIGATION CENTER, INC.
99 M Street SE, Suite 700
Washington, DC 20003
(202) 869-0200

(Additional counsel on next page)

MICHAEL W. MCTIGUE JR.
(PA. BAR ID # 69548)
MEREDITH C. SLAWE
(PA. BAR ID # 201489)
RACHEL E. MOORE[†]
CAROLYN G. TAGLIENTI[†]
SKADDEN, ARPS, SLATE, MEAGHER
& FLOM LLP

JOHN HOLUB
PENNSYLVANIA RETAILERS'
ASSOCIATION
224 Pine Street
Harrisburg, PA 17101
(717) 233-7976

One Manhattan West
New York, NY 10001
(212) 735-3000

*Counsel for Retail Litigation Center, Inc.
and Pennsylvania Retailers' Association*

† *Of Counsel*; Admitted to Practice in
New York; Not Admitted in
Pennsylvania

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	iv
INTEREST OF <i>AMICI CURIAE</i>	1
INTRODUCTION.....	3
ARGUMENT.....	8
I. The Supreme Court Should Affirm the Superior Court’s Decision on Uniformity Grounds Alone.....	11
A. Section 1927 Mandates That “Trade or Commerce” Under the UTPCPL Be Interpreted Consistently	11
B. The Superior Court Was Correctly Guided by the Uniform Decisions from Other States	14
II. Public Policy Dictates Affirming the Superior Court’s Decision	22
CONCLUSION.....	24
CERTIFICATE OF COMPLIANCE WITH PA. R.A.P. 531 and 2135	25
CERTIFICATE OF COMPLIANCE WITH PA. R.A.P. 127.....	26
CERTIFICATE OF SERVICE.....	27

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>220 W. Rittenhouse Square Condominium Ass’n v. Stolker</i> , No. 2254, 2012 WL 1948515 (Pa. Ct. Com. Pl. May 15, 2012).....	17
<i>A/S Kreditt-Finans v. CIA Venetico de Navegacion S.A. of Panama</i> , 560 F. Supp. 705 (E.D. Pa. 1983).....	13
<i>Aldine Apartments, Inc. v. Commonwealth, Department of Revenue</i> , 379 A.2d 333 (Pa. Cmwlth. Ct. 1977).....	21
<i>Bailey Employment System, Inc. v. Hahn</i> , 655 F.2d 473 (2d Cir. 1981)	19
<i>Bartolotta v. Dunkin’ Brands Group, Inc.</i> , No. 16 CV 4137, 2016 WL 7104290 (N.D. Ill. Dec. 6, 2016).....	21
<i>Beyers v. Richmond</i> , 937 A.2d 1082 (Pa. 2007).....	17
<i>Blass v. Rite Aid of Connecticut, Inc.</i> , 16 A.3d 737 (Conn. App. Ct. 2011)	14, 15
<i>Commonwealth v. Gilmour Manufacturing Co.</i> , 822 A.2d 676 (Pa. 2003).....	12, 13, 20
<i>Commonwealth, ex rel. Creamer v. Monumental Properties, Inc.</i> , 329 A.2d 812 (Pa. 1974).....	19
<i>Continental Insurance Co. v. Schneider, Inc.</i> , 873 A.2d 1286 (Pa. 2005).....	11
<i>Danganan v. Guardian Protection Services</i> , 179 A.3d 9 (Pa. 2018).....	11, 12
<i>Feeney v. Dell Inc.</i> , 908 N.E.2d 753 (Mass. 2009).....	15, 16

<i>Foflygen v. Zemel</i> , 615 A.2d 1345 (Pa. Super. 1992)	17
<i>Garcia v. American Eagle Outfitters, Inc.</i> , 293 A.3d 252 (Pa. 2023).....	6, 16, 20, 22
<i>Gilmour Manufacturing Co. v. Commonwealth</i> , 750 A.2d 948 (Pa. Cmwlth. Ct. 2000).....	11
<i>Husker News Co. v. Mahaska State Bank</i> , 460 N.W.2d 476 (Iowa 1990).....	13
<i>James v. Aldi Inc.</i> , No. 21-0209, 2021 WL 2896837 (W.D. Pa. July 9, 2021)	9, 18
<i>Jordan v. Petco Health & Wellness Co.</i> , No. 2:21-CV-1858, 2022 WL 4237519 (W.D. Pa. Sept. 14, 2022).....	10
<i>Kirtsaeng v. John Wiley & Sons, Inc.</i> , 568 U.S. 519 (2013).....	2
<i>Koken v. Reliance Insurance Co.</i> , 893 A.2d 70 (Pa. 2006).....	12, 13
<i>Kornfeind v. New Werner Holding Co.</i> , 241 A.3d 1212 (Pa. Super. 2020)	13
<i>Lilian v. Commonwealth</i> , 354 A.2d 250 (Pa. 1976).....	21
<i>Lisowski v. Walmart Stores, Inc.</i> , 552 F. Supp. 3d 519 (W.D. Pa. 2021)	<i>passim</i>
<i>McLean v. Big Lots Inc.</i> , 542 F. Supp. 3d 343 (W.D. Pa. 2021)	9, 18, 19, 21
<i>Meyer v. Community College of Beaver County</i> , 93 A.3d 806 (Pa. 2014).....	17
<i>In re Pharmaceutical Industry Average Wholesale Price Litig.</i> , 252 F.R.D. 83 (D. Mass. 2008)	19

<i>Ranalli v. Etsy.com, LLC</i> , 570 F. Supp. 3d 301 (W.D. Pa. 2021)	9, 17, 18, 19, 21
<i>Slaney v. Westwood Auto, Inc.</i> , 322 N.E.2d 768 (Mass. 1975).....	19
<i>South Dakota v. Wayfair, Inc.</i> , 585 U.S. 162 (2018).....	2
<i>Springfield Township v. Mellon PSFS Bank</i> , 889 A.2d 1184 (Pa. 2005).....	12
<i>Strausser Enterprises, Inc. v. Segal & Morel, Inc.</i> , 89 A.3d 292 (Pa. Super. 2014)	11
<i>Toy v. Metropolitan Life Insurance Co.</i> , 928 A.2d 186 (Pa. 2007).....	12
<i>White v. Accardo</i> , 15 Pa. D. & C.3d 609 (Pa. Ct. Com. Pl., Phila. Cty. 1980).....	12

Statutes

15 U.S.C. § 45.....	7, 19
1 Pa.C.S. § 1927	<i>passim</i>
72 P.S. § 7202	22
72 P.S. § 7208	22
72 P.S. § 7217	6
72 P.S. § 7221	22
72 P.S. § 7222	6
72 P.S. § 7225	6, 20
72 P.S. § 7237	20
72 P.S. § 7252	21, 23

72 P.S. § 7253	21
72 P.S. § 10003.1	23
73 P.S. § 201-2.....	14, 19
73 P.S. § 201-3.....	4
Conn. Gen. Stat. § 42-110a.....	19
Mass. G.L. ch. 93A, § 1	19

Regulations

61 Pa. Code § 34.2.....	6
61 Pa. Code § 35.2.....	22

Other Authorities

Pa. Dep’t of Rev., Sales and Use Tax Bulletin 2021-01 (Jan. 20, 2021), https://www.revenue.pa.gov/TaxLawPoliciesBulletinsNotices/ TaxBulletins/SUT/Documents/st_bulletin_2021-01.pdf	21–22
---	-------

INTEREST OF AMICI CURIAE

The Retail Litigation Center, Inc. (“RLC”) and the Pennsylvania Retailers’ Association (“PRA”) respectfully submit this brief as *amici curiae* in support of Appellees American Eagle Outfitters, Inc., Carter’s Inc., Chico’s FAS, Inc., Express, LLC, Gabriel Brothers, Inc., Genesco Inc., Hot Topic, Inc., J. Crew Group, LLC, Kohl’s Inc., Tapestry, Inc., The Gap, Inc., and Vera Bradley Sales, LLC.¹

The RLC is the only trade association dedicated to representing the retail industry in the courts. The RLC represents national and regional retailers, including many of the country’s largest and most innovative retailers, across a breadth of retail verticals. Across the United States, including in this Commonwealth, the RLC’s members 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 offers courts retail-industry perspectives on important legal issues and highlights the industry-wide consequences of significant pending cases. Since its founding in 2010, the RLC has filed more than 200 *amicus* briefs on issues of importance to the retail

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).

industry. Its *amicus* briefs have been favorably cited by multiple courts, including the United States Supreme Court. *See, e.g., South Dakota v. Wayfair, Inc.*, 585 U.S. 162, 184 (2018) (addressing the collection and remittance of sales tax); *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 542 (2013); *State v. Welch*, 595 S.W.3d 615, 630 (Tenn. 2020); *Chewy, Inc. v. U.S. Dep’t. of Lab.*, 69 F.4th 773 (11th Cir. 2023).

The PRA is the premier retail trade association in Pennsylvania whose encompassing membership consists of small independent retailers, as well as the largest online and bricks-and-mortar retail brands. Founded in 1932, the PRA’s mission is to represent the retailing industry in the state’s legislative chambers, protecting and promoting the welfare of those engaged in retailing, and keep its members informed about laws and regulations affecting the retail industry. The PRA members’ ability to sustain economic growth and job creation in the Commonwealth is dependent upon uniformity in the application of these laws and regulations. As such, the PRA’s members have a stake in the outcome of this litigation.

The issue presented for appeal has significant implications for retailers with a presence in the 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. Retailers and the business community at large have a compelling interest in having “trade or commerce” interpreted uniformly across state consumer protection laws, as directed by Pennsylvania statute.

The Pennsylvania Court of Common Pleas for Allegheny County—without opinion and in direct conflict with four recent decisions from Pennsylvania federal district courts as well as *all* of the appellate courts in other states to have interpreted identical language in their consumer protection statutes—overruled preliminary objections raising this defense in a case brought under the Pennsylvania Unfair Trade Practices and Consumer Protection Law (“UTPCPL”). The Superior Court of Pennsylvania Western District correctly reversed that decision, holding that the court erred because the collection of sales tax is not “conduct of any trade or commerce” within the meaning of the UTPCPL.

INTRODUCTION

This Court should affirm the Superior Court’s reading of the plain text of the UTPCPL. Affirming would ensure consistency in the application of uniform consumer protection statutes across states. It would prevent Pennsylvania from becoming a single state outlier in the interpretation of “trade or commerce” and

the collection of sales tax, which would cause its courts to be flooded with “gotcha” class actions seeking to contort the UTPCPL and bypass the Legislature’s procedures for addressing consumer sales tax disputes. The RLC therefore respectfully urges this Court to affirm the Superior Court’s decision in reversing the lower court’s order overruling the Appellees’ preliminary objections.

The UTPCPL is derived from uniform law. Consistent with other state consumer protection statutes, the UTPCPL expressly limits its application to “unfair or deceptive” activity “in the *conduct of any trade or commerce.*” 73 P.S. § 201-3 (emphasis added). Under the UTPCPL, “trade or commerce” is commercial activity that a business engages in for profit. Tax collection mandated by and on behalf of the Commonwealth does not constitute “trade or commerce.”

The UTPCPL permits prevailing plaintiffs to recover \$100 in statutory damages per violation, absent greater actual damages, with no cap on damages in the class context. As a result, opportunistic plaintiffs have filed a series of putative class actions in this Commonwealth alleging that retailers violated the UTPCPL when they collected sales tax in connection with purchases of goods. This is one such action. Appellant initiated this action despite the existence of an

express remedy for the alleged over-collection of sales tax under title 72, sections 7252 and 7253 of the Pennsylvania Statutes and Consolidated Statutes. Integral to Appellant's claims is the assertion that by collecting sales tax as the Commonwealth's agents to fulfill their public duties, retailers are engaged in "trade or commerce" under the UTPCPL.

Appellant alleges that the Appellees violated the UTPCPL when they "unfairly and deceptively" collected sales tax on Appellant's successive purchases of protective, non-medical face masks following Governor Wolf's declaration of a state of emergency in connection with the COVID-19 pandemic. In overruling the Appellees' preliminary objections without explanation, the lower court departed from consistent and well-reasoned decisions from other courts within and outside of this Commonwealth interpreting the UTPCPL and uniform consumer protection statutes. The Superior Court correctly reversed the order of the lower court, finding that the collection of sales tax is not trade or commerce under the UTPCPL. To reach this decision, the Superior Court analyzed "the unambiguous language of the operative provisions of the UTPCPL, its purposes as delineated by our Supreme Court, the dictionary definition of 'conduct', the treatment of sales tax under the Pennsylvania Code, and persuasive

authority from other jurisdictions.” *Garcia v. Am. Eagle Outfitters, Inc.*, 293 A.3d 252, 260 (Pa. 2023). For the reasons outlined below, this Court should affirm.

First, the Appellees’ tax collection activities fall outside the scope of the UTPCPL. When retailers collect sales tax they are not engaged in “trade or commerce” as that term is defined under the UTPCPL and substantially similar state consumer protection statutes. They are serving as agents of the Commonwealth, collecting the tax funds as required by Pennsylvania law, briefly holding those funds 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.

Second, complying with their public duty to collect sales tax does not financially benefit retailers. Collecting sales tax actually *increases* retailers’ costs and the price consumers see, which all run counter to retailers’ financial self-interest. Retailers engage in the collection of sales tax, not as a profit-generating activity, but because the law compels them to do so. All of the funds collected by the retailers as agents of the Commonwealth are collected on behalf of the Department of Revenue. The ownership and control of these funds thus lie with the Department of Revenue, not with the retailers. There is a straightforward procedure by which consumers may seek a refund (and be made whole) by

petitioning the Department of Revenue should they believe sales tax was collected in error.

Third, all courts that have directly addressed the issue have concluded that the collection of sales tax does not constitute “trade or commerce” under the UTPCPL and similar state consumer protection statutes. These statutes all use the same language to define “trade or commerce.” As set forth below, appellate courts in both Connecticut and Massachusetts have specifically recognized that when retailers collect sales tax, they are acting as agents of the state and are not engaged in “trade or commerce.” The rulings of these state appellate courts are aligned with the purpose and scope of state consumer protection statutes, which share the same objectives as Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (“FTC Act”). Pursuant to Section 1927 of Pennsylvania’s Statutory Construction Act, 1 Pa.C.S. § 1927 (“Section 1927”), the UTPCPL’s “trade or commerce” provision should be interpreted consistently with the rulings of those courts. The United States District Court for the Western District of Pennsylvania recently issued four decisions—including in a putative class action brought by counsel for Appellant in this case—confirming that retailers are not engaged in “trade or commerce” under the UTPCPL when they collect sales tax as agents of the Commonwealth.

Finally, there is a strong public policy interest in ensuring the consistent interpretation of “trade or commerce” under the UTPCPL and avoiding the weaponization of the statute in this context. Reversing the Superior Court’s well-reasoned decision would transform tax collection efforts into a risky endeavor for retailers operating in this Commonwealth and would have the immediate effect of promoting jurisdictional gamesmanship. The viability of a plaintiff’s claim under the UTPCPL should not depend on the court in which the action is heard.

This Court should affirm the Superior Court’s decision to ensure the proper application of the UTPCPL. A decision by this Court doing so would be consistent with the plain language of the statute, applicable case law, and sound public policy.

ARGUMENT

The issue raised in this appeal has implications for all retailers in Pennsylvania. There has been a wave of misguided sales tax litigation in the Pennsylvania courts seeking to leverage the class action device to obtain aggregate statutory damages under the UTPCPL. Over the last year, dozens of retailers, including businesses based in Pennsylvania, have been named in substantially similar UTPCPL putative class actions. All of these actions turn on the same flawed theory: that retailers are subject to liability under the UTPCPL

when they allegedly err in the collection of sales tax. The collection of sales tax, however, does not constitute “trade or commerce,” and therefore, falls outside of the UTPCPL.

Four cases in federal court have been dismissed with prejudice on the retailers’ motions, while cases in the courts of common pleas have been permitted to proceed over the preliminary objections of the retailers or otherwise remain pending. *See Ranalli v. Etsy.com, LLC*, 570 F. Supp. 3d 301,303 (W.D. Pa. 2021) (Colville, J.); *Lisowski v. Walmart Stores, Inc.*, 552 F. Supp. 3d 519, 533 (W.D. Pa. 2021) (Ranjan, J.), *aff’d*, No. 21-2501, 2022 WL 2763698 (3d Cir. July 15, 2022); *James v. Aldi Inc.*, No. 21-0209, 2021 WL 2896837, at *4 (W.D. Pa. July 9, 2021) (Horan, J.); *McLean v. Big Lots Inc.*, 542 F. Supp. 3d 343, 354 (W.D. Pa. 2021) (Horan, J.).

The conflict between the orders from the courts of common pleas and the rulings from the federal district courts has already encouraged jurisdictional gamesmanship and forum shopping. For example, the case captioned *McLean* was originally brought by seven named plaintiffs against nine retailer 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 putative class actions against those defendants in state court to avoid federal court jurisdiction. *See Marous v. Giant Eagle, Inc.*, No. GD-21-003220 (Pa. Ct. Com. Pl., Allegheny Cty., filed Apr. 1, 2021); *Duranko v. Ollie's Bargain Outlet Inc.*, No. GD-21-003189 (Pa. Ct. Com. Pl., Allegheny Cty., filed Apr. 1, 2021); *Bailey v. Ulta Salon Cosmetics & Fragrance Inc.*, No. GD-21-003192 (Pa. Ct. Com. Pl., Allegheny Cty., filed Apr. 1, 2021).

While *McLean* has now been resolved in the retailers' favor on their motion to dismiss, the state actions remain pending against those former *McLean* defendants. Another enterprising plaintiff—who is actually an attorney at his counsel's law firm—filed a putative class action complaint against a retailer defendant under the UTPCPL and challenged federal court jurisdiction on a motion to remand—despite his arguments having been squarely rejected in another case brought by his law firm. Guided by the ruling in *Lisowski*, the court denied the motion to remand. *Jordan v. Petco Health & Wellness Co.*, No. 2:21-CV-1858, 2022 WL 4237519, at *2 (W.D. Pa. Sept. 14, 2022).

The Superior Court's decision is well-reasoned and correct. If reversed, it will generate a flood of outlier class action lawsuits in Pennsylvania that would burden the courts, usurp the exclusive and adequate procedure for seeking refunds for the over-collection of sales tax, and create meaningful exposure for retailers

in Pennsylvania when they are merely acting as agents of the Commonwealth's taxing authority. Respectfully, this Court should affirm.

I. The Supreme Court Should Affirm the Superior Court's Decision 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. 2014) (citation omitted). 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 Pennsylvania courts 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. Cmwlth. Ct. 2000), *aff'd*, 822 A.2d 676 (Pa. 2003); *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).

For example, this Court recently applied and followed the requirements of uniformity set forth in Section 1927 in *Danganan v. Guardian Protection*

Services, 179 A.3d 9, 16 (Pa. 2018). The Pennsylvania Supreme Court recognized that “trade or commerce” under the UTPCPL has the same meaning as that term in another state’s consumer fraud statute when adopting the Washington Supreme Court’s interpretation for purposes of evaluating extraterritorial conduct.² In interpreting “trade or commerce,” the rulings of other state courts “must be considered” to “effect the general purpose” of uniformity. See *White v. Accardo*, 15 Pa. D. & C.3d 609, 615 (Pa. Ct. Com. Pl., Phila. Cty. 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.” (first alteration in original) (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.*, 822 A.2d 676, 682 (Pa. 2003) [hereinafter *Gilmour II*] (where “other jurisdictions

² This Court has noted that state consumer protection statutes differ in some respects. See *Toy v. Metro. Life Ins. Co.*, 928 A.2d 186, 203 n.20 (Pa. 2007). But as this Court recognized in *Danganan*, it is clear that the meaning of “trade or commerce” should be universally construed. 179 A.3d at 16.

have uniformly interpreted corresponding statutes,” this “weighs heavily in favor” of conformity).

There is a practical purpose behind Section 1927. 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), *aff’d sub nom. Cia. Venetico De Navegacion S.A. of Pan. v. Presthus*, 729 F.2d 1446 (3d Cir. 1984); *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. 2020) (applying Section 1927 and adopting the Oklahoma Supreme Court’s analysis even though

only “two other states” had adopted the uniform law), *aff’d*, 280 A.3d 918 (Pa. 2022).

B. The Superior Court Was Correctly Guided by the Uniform Decisions from Other States

As referenced above, 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 two other states have 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 v. Rite Aid of Connecticut, Inc.*, 16 A.3d 855 (Conn. Super. Ct. 2009), the Superior Court of Connecticut held in a similar case that, even if the defendant retailer had improperly collected sales tax, the plaintiff’s claim under the Connecticut Unfair Trade Practices Act (“CUTPA”) must be dismissed. *Id.* at 863, *aff’d*, 16 A.3d 737, 739 (Conn. App. Ct. 2011). 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.* (first citation omitted). 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 overcollection 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.* at 863–64. The Appellate Court of Connecticut affirmed the Superior Court’s decision. *Blass v. Rite Aid of Conn., Inc.*, 16 A.3d 737, 739 (Conn. App. Ct. 2011).

Massachusetts. In *Feeney v. Dell Inc.*, 908 N.E.2d 753 (Mass. 2009), 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. *Id.* 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.’” (citation omitted)).

The Pennsylvania Superior Court correctly applied Section 1927 when it examined the decisions in *Feeney* and *Blass*, among other state court decisions. “Because these courts considered substantially identical statutory language under a uniform consumer protection law,” the Superior Court properly concluded, the decisions “deserve great deference.” *Garcia v. Am. Eagle Outfitters, Inc.*, 293 A.3d 252, 258 (Pa. 2023).

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*, 552 F. Supp. 3d at 526 (“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 Cty.*, 93 A.3d 806, 816 (Pa. 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 . . .” (citation omitted)); *see also Beyers v. Richmond*, 937 A.2d 1082, 1088 (Pa. 2007); *Foflygen v. Zemel*, 615 A.2d 1345, 1354 (Pa. Super. 1992). Where, as here, a retailer is acting as an agent of the Commonwealth and “‘carrying out a public duty, it is *not engaged in the conduct of a trade or commerce.*’” *Meyer*, 93 A.3d at 816 (Castille, J., concurring) (citation omitted); *see also 220 W. Rittenhouse Square Condo. Ass’n v. Stolker*, No. 2254, 2012 WL 1948515, at *7 (Pa. Ct. Com. Pl. May 15, 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.”).

As the Superior Court recognized, four federal district courts recently dismissed substantially similar class actions. In each case, the court carefully considered, and was guided by, the uniform appellate decisions outside of the Commonwealth holding that a retailer’s collection of sales tax did not qualify as “trade or commerce” under the UTPCPL. *See Ranalli*, 570 F. Supp. 3d at 307

(incorporating the reasoning of *Lisowski*, *James* and *McLean* in dismissing UTPCPL claims); *Lisowski*, 552 F. Supp. 3d at 525–30; *James*, 2021 WL 2896837, at *2; *McLean*, 542 F. Supp. 3d at 349–50.

In reaching their conclusions, the courts acknowledged the importance of consistently interpreting “‘nearly identical’” consumer protection statutes.

Ranalli, 570 F. Supp. 3d at 306 (quoting *McLean*, 542 F. Supp. 3d at 349)

(“[T]he UTPCPL does not apply to Plaintiff’s claims as the assessment of sales tax does not fall within the meaning of ‘trade or commerce.’”); *see also*

Lisowski, 552 F. Supp. 3d at 527 (noting that, because “all of these consumer protection statutes are patterned after the federal unfair trade practices act[,]”

therefore “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*, 542 F. Supp. 3d at 349 (“[T]his Court . . .

will examine persuasive reasoning from the Commonwealth Court . . . and from

other jurisdictions who have evaluated mis-collection of sales tax.”); *James*,

2021 WL 2896837, at *2 (incorporating its analysis in *McLean*).

These courts similarly relied on the *Feeney* and *Blass* holdings from the Supreme Judicial Court of Massachusetts and the Superior Court of Connecticut, finding them “persuasive and consistent with the statutory text.” *Lisowski*, 552

F. Supp. 3d at 527–28; *see also McLean*, 542 F. Supp. 3d at 349; *Ranalli*, 570 F. Supp. 3d at 307. 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. *See Lisowski*, 552 F. Supp. 3d at 527.

The Pennsylvania, Connecticut, and Massachusetts 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). The state consumer protection statutes align with the FTC Act, which also prohibits unfair methods of competition involving commerce. 15 U.S.C. § 45(a)(1); *see also 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.” (footnote omitted)); *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); *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” (citation omitted)). Guided by the common goals of the FTC Act, the “trade or commerce” requirement should be interpreted consistently by Pennsylvania courts as directed by Section 1927.

In addition, the Connecticut and Massachusetts 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 are 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. *See* 72 P.S. § 7225; *Garcia*, 293 A.3d at 256–57 (“Collection of sales tax . . . is a statutory obligation attendant to the conduct or commerce. . . . By statute, retailers must collect sales tax at the time of sale and remit it to the DoR. . . . Tax, once collected, is held in trust for the Commonwealth.” (citations omitted)); *see also* 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. Cmwlth. Ct. 1977) (holding that the utility companies 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 conduits for purposes of collecting sales tax and are not motivated by business or commercial objectives. *Lisowski*, 522 F. Supp. 3d at 527 (recognizing that retailers “do not reap any profits or other tangible benefits for carrying out their legal duty to collect tax”); *McLean*, 542 F. Supp. 3d at 350 (“The collection of sales tax is divorced from private profit.”); *Ranalli*, 570 F. Supp. 3d at 307 (“The ‘collection of sales tax by retailers, acting as agents of a state government, is an activity ‘divorced from private profit’ that does not occur ‘in the conduct of any trade or commerce.’” (citation omitted)). 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 CV 4137, 2016 WL 7104290, at *9 (N.D. Ill. Dec. 6, 2016).³

³ Even if Appellant had paid sales tax not owed, he would be entitled to a refund from the Department of Revenue and would thus be made whole by following the statutorily prescribed refund procedure. See 72 P.S. §§ 7252, 7253; see also *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”); Pa. Dep’t of Rev., *Sales and Use Tax Bulletin 2021-01* (cont’d)

The Superior Court recognized that retailers:

have no profit motive to collect tax on nontaxable items because (1) doing so would put them at a competitive disadvantage against other retailers selling the same product; and (2) the tax revenue, collected properly or improperly, is held in trust for the government and therefore does not enrich the retailer.

Garcia, 293 A.3d at 257. The Superior Court correctly interpreted and applied the UTPCPL consistently with the uniform interpretations from other states and the federal courts in this Commonwealth as mandated by Section 1927. This Court should therefore affirm the Superior Court's decision.

II. Public Policy Dictates Affirming the Superior Court's Decision

There are strong public policy grounds that support affirming the Superior Court's decision. Under Appellant's theory, every transaction involving the collection of sales tax by a retailer in this Commonwealth could create potential exposure under the UTPCPL for statutory damages, punitive damages, and attorneys' fees. This would transform the retailers' actions as agents of the Commonwealth, seeking to comply with their public duties,⁴ into a very risky

(Jan. 20, 2021), https://www.revenue.pa.gov/TaxLawPoliciesBulletinsNotices/TaxBulletins/SUT/Documents/st_bulletin_2021-01.pdf (citing 61 Pa. Code § 52.1(a)).

⁴ Retailers already face potential action by this Commonwealth should they incorrectly collect and remit sales tax. The failure to do so can result in the imposition of fines or penalties and enforcement actions. *See* 72 P.S. §§ 7202(a), 7208(b.1), 7221; 61 Pa. Code § 35.2; *see also Lisowski*, 552 F. Supp. 3d at 528–29.

endeavor. Such risk would inhibit commerce in Pennsylvania and limit merchandising decisions. This could not have been the intent of the General Assembly.

Instead, the Legislature established a framework through which sales tax would be collected and promptly remitted to the Commonwealth by retailers without fear that an inadvertent transgression might subject them to class action litigation. When consumers believe there might have been errors in the collection of sales tax, which the General Assembly contemplated might happen, they may petition the Department of Revenue for refunds consistent with the statutory procedure. *See* 72 P.S. § 10003.1(a); *see also id.* § 7252 (requiring the Department of Revenue to “refund all taxes, interest and penalties paid to the Commonwealth under the provisions of this article and to which the Commonwealth is not rightfully entitled”). The Department of Revenue is tasked with determining whether such a refund is appropriate in a particular situation. This carefully crafted legislative structure would be upended if consumers could disregard it and sue retailers through private litigation.

It makes no sense to penalize retailers for fulfilling their public obligation to collect revenue for the Commonwealth. Clarity is needed from this Court to ensure consistency in the application of uniform statutes and to ensure that

retailers can fulfill their public duty as agents of the Commonwealth's taxing authority without the threat of baseless and outlier private litigation. Affirming the Superior Court's decision will also preserve the statutory procedure created for these very situations where consumers believe they might be entitled to sales tax refunds.

CONCLUSION

For the reasons set forth herein, *amici curiae* respectfully request this Court affirm.

March 27, 2024

Deborah R. White
Larissa M. Whittingham
RETAIL LITIGATION CENTER, INC.
99 M Street SE, Suite 700
Washington, DC 20003
(202) 869-0200

John Holub
PENNSYLVANIA RETAILERS'
ASSOCIATION
224 Pine Street
Harrisburg, PA 17101
(717) 233-7976

/s/ Michael W. McTigue Jr.

Michael W. McTigue Jr.

(Pa. Bar ID # 69548)

Meredith C. Slawe

(Pa. Bar ID # 201489)

Rachel E. Moore[†]

Carolyn G. Taglienti[†]

SKADDEN, ARPS, SLATE, MEAGHER
& FLOM LLP

One Manhattan West

New York, NY 10001

(212) 735-3000

*Counsel for Retail Litigation
Center, Inc. and Pennsylvania
Retailers' Association*

[†]Of Counsel; Admitted to Practice in
New York; Not Admitted in
Pennsylvania

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.

March 27, 2024

/s/ Michael W. McTigue Jr.
Michael W. McTigue Jr.

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.

March 27, 2024

/s/ Michael W. McTigue Jr.
Michael W. McTigue Jr.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served on the 27th day of March, 2024 upon the following counsel of record by e-mail in accordance with the requirements of Pa.

R.A.P. 121:

Jarrold D. Shaw, Esquire
Courtney S. Schorr, Esquire
MCGUIRE WOODS LLP
260 Forbes Avenue, Suite 1800
Pittsburgh, Pennsylvania 15222
jshaw@mcguirewoods.com
cschorr@mcguirewoods.com

Matthew A. Fitzgerald, Esquire
MCGUIRE WOODS LLP
800 East Canal Street
Richmond, Virginia 32319
mftizgerald@mcguirewoods.com

*Counsel for Appellees American Eagle Outfitters, Inc.,
Carter's Inc., Chico's FAS, Inc., Express, LLC, Gabriel Brothers,
Inc., J. Crew Group, LLC, Kohl's Inc., The Gap, Inc., and
Vera Bradley Sales, LLC*

James C. Martin, Esquire
James L. Rockney, Jr., Esquire
Ted A. Hages, Esquire
REED SMITH LLP
225 Fifth Avenue, Suite 1200
Pittsburgh, Pennsylvania 15222
jrockney@reedsmith.com
jmartin@reedsmith.com

Counsel for Appellees Genesco Inc.

Mark A. Grace, Esquire
COHEN & GRACE, LLC
105 Braunlich Drive, Suite 300
Pittsburgh, Pennsylvania 15237
mgrace@cohengrace.com

Counsel for Appellees Hot Topic, Inc. and Tapestry, Inc.

Kevin W. Tucker, Esquire
Kevin Abramowicz, Esquire
Stephanie Moore, Esquire
Helen C. Steiger, Esquire
EAST END TRIAL GROUP LLC
186 42nd Street
P.O. Box 40127
Pittsburgh, Pennsylvania 15201
ktucker@eastendtrialgroup.com
kabramowicz@eastendtrialgroup.com

Corrie A. Woods
WOODS LAW OFFICES PLLC
200 Commerce Drive, Suite 210
Moon Township, Pennsylvania 15108
cwoods@woodslawoffices.com

Counsel for Appellant

March 27, 2024

/s/ Michael W. McTigue Jr.
Michael W. McTigue Jr.

IN THE SUPREME COURT OF PENNSYLVANIA

Daniel Garcia, individually and behalf of all others : 27 WAP 2023
similarly situated, Appellant :
:

v.
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., Appellees

PROOF OF SERVICE

I hereby certify that this 27th day of March, 2024, 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:

IN THE SUPREME COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Service

Served: Abramowicz, Kevin J.
Service Method: eService
Email: kabramowicz@eastendtrialgroup.com
Service Date: 3/27/2024
Address: 5138 Holmes Street
Pittsburgh, PA 15201
Phone: 412-223-5740
Representing: Appellant Garcia, Daniel

Served: Grace, Mark A.
Service Method: eService
Email: mgrace@cohengrace.com
Service Date: 3/27/2024
Address: 105 Braunlich Dr.
Suite 300
Pittsburgh, PA 15237
Phone: 412--84-7-0300
Representing: Appellee Hot Topic, Inc
Appellee Tapestry, Inc.

Served: Hages, Ted Angelo
Service Method: eService
Email: thages@reedsmith.com
Service Date: 3/27/2024
Address: 3061 Windermere Avenue
Pittsburgh, PA 15216
Phone: 412--52-3-3571
Representing: Appellee Genesco Inc.

Served: Martin, James Christopher
Service Method: eService
Email: jcmartin@reedsmith.com
Service Date: 3/27/2024
Address: 808 West Waldheim Road
Pittsburgh, PA 15215
Phone: 412- 28-8 3546
Representing: Appellee Genesco Inc.

IN THE SUPREME COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served: Moore, Stephanie
Service Method: eService
Email: smoore@eastendtrialgroup.com
Service Date: 3/27/2024
Address: 6901 Lynn Way, Suite 215
Pittsburgh, PA 15208
Phone: 412-877-5220
Representing: Appellant Garcia, Daniel

Served: Rockney, James Louis, Jr.
Service Method: eService
Email: jrockney@reedsmith.com
Service Date: 3/27/2024
Address: 225 Fifth Avenue
Pittsburgh, PA 15222
Phone: 412--28-8-4046
Representing: Appellee Genesco Inc.

Served: Schorr, Courtney South
Service Method: eService
Email: cschorr@mcguirewoods.com
Service Date: 3/27/2024
Address: 625 Liberty Ave
23rd Floor
Pittsburgh, PA 15222
Phone: 412--66-7-7947
Representing: Appellee American Eagle Outfitters, Et Al

Served: Shaw, Jarrod D.
Service Method: eService
Email: jshaw@mcguirewoods.com
Service Date: 3/27/2024
Address: 260 Forebes Ave
Suite 1800
Pittsburgh, PA 15222
Phone: 412-667-7907
Representing: Appellee American Eagle Outfitters, Et Al
Appellee Hot Topic, Inc
Appellee Tapestry, Inc.

IN THE SUPREME COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served: Steiger, Helen Chandler
Service Method: eService
Email: csteiger@eastendtrialgroup.com
Service Date: 3/27/2024
Address: 6901 Lynn Way
Suite 215
Pittsburgh, PA 15208
Phone: 412-877-5220
Representing: Appellant Garcia, Daniel

Served: Tucker, Kevin William
Service Method: eService
Email: ktucker@eastendtrialgroup.com
Service Date: 3/27/2024
Address: 161 Lloyd Ave.
Pittsburgh, PA 15218
Phone: 412-877-5220
Representing: Appellant Garcia, Daniel

Served: Woods, Corrie Allen
Service Method: eService
Email: cwoods@woodslawoffices.com
Service Date: 3/27/2024
Address: 200 Commerce Drive
Suite 210
Moon Township, PA 15108
Phone: 412-329-7751
Representing: Appellant Garcia, Daniel

IN THE SUPREME COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Courtesy Copy

Served: Heller, Gregory Buchwald
Service Method: eService
Email: gheller@feldmanshepherd.com
Service Date: 3/27/2024
Address: 1845 Walnut Street
21st Floor
PHILADELPHIA, PA 19103
Phone: 215-567-8300
Representing: Amicus Curiae Pennsylvania Association for Justice

Served: Karpchuk, Jennifer Weidler
Service Method: eService
Email: jennifer.karpchuk@chamberlainlaw.com
Service Date: 3/27/2024
Address: 300 Conshohocken State Road
Suite 570
West Conshohocken, PA 19428
Phone: 610-772-2314
Representing: Amicus Curiae Council On State Taxation

Served: Salpietro, Frank Gugliotta
Service Method: eService
Email: fgsalpietro@rothmangordon.com
Service Date: 3/27/2024
Address: Rothman Gordon, PC
310 Grant Street, 3rd Floor Grant Bldg
Pittsburgh, PA 15219
Phone: 412--33-8-1185
Representing: Amicus Curiae Barger, Michael
Amicus Curiae Lisowski, Christopher

IN THE SUPREME COURT OF PENNSYLVANIA

/s/ Michael Wayne McTigue, Jr.

(Signature of Person Serving)

Person Serving: McTigue, Michael Wayne, Jr.
Attorney Registration No: 069548
Law Firm:
Address: Skadden Arps Slate Meagher & Flom LLP
1 Manhattan W
New York, NY 10001
Representing: Amicus Curiae Pennsylvania Retailers' Association
Amicus Curiae Retail Litigation Center, Inc.