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No. 20-14605

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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SHAEDA BURGESS,

*Plaintiff-Appellant,*

v.

UNIVERSAL CITY DEVELOPMENT PARTNERS, LTD.,

*Defendant-Appellee.*

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On Appeal from a Final Order of the  
United States District Court for the Middle District of Florida  
No. 6:19-cv-01256-WWB-LRH, Hon. Wendy W. Berger, U.S.D.J.

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**BRIEF FOR AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT  
OF APPELLANT AND REVERSAL**

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February 9, 2021

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**No. 20-14605, *Burgess v. Universal City Development Partners, Ltd.***

**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT**

A. Pursuant to 11th Circuit Rules 26.1-1 through 26.1-3, Amicus Curiae Public Citizen provides the following list of the persons and entities that have or may have an interest in the outcome of this case:

Baker & Hostetler, LLP

Berger, Hon. Wendy W.

Burgess, Shaeda

Comcast Corporation (CMCSA)

The Consumer Rights Law Group, PLLC

DelGobbo, Bonnie Keane

Giardina, James S.

Griswold, Joel C.

Hoffman, Hon. Leslie R.

NBCUniversal Media, LLC

Nelson, Scott L.

Owens, Scott D.

Public Citizen Foundation

**No. 20-14605, *Burgess v. Universal City Development Partners, Ltd.***

Public Citizen, Inc.

Universal City Development Partners, Ltd

Scott D. Owens, P.A.

Zieve, Allison M.

**B.** Amicus curiae Public Citizen, Inc., is a nonprofit, non-stock corporation. It has no parent corporation, and no publicly traded corporation has an ownership interest in it of any kind.

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## INTEREST OF AMICUS CURIAE<sup>1</sup>

Public Citizen is a nonprofit consumer advocacy organization with members and supporters nationwide. Public Citizen advocates before Congress, administrative agencies, and courts on a wide range of issues, and works for enactment and enforcement of laws protecting consumers, workers, and the public. Public Citizen has a longstanding interest in ensuring that judicial remedies are available for violations of consumer-protection legislation and that class actions remain a viable means of pursuing such remedies. Public Citizen also has an interest in the proper construction of statutory provisions defining and limiting the jurisdiction of courts, including removal jurisdiction, which is sometimes misused to impede plaintiffs' ability to pursue valid claims. Public Citizen has filed numerous briefs as amicus curiae in cases raising important questions concerning removal jurisdiction and procedure.<sup>2</sup>

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<sup>1</sup> Amicus curiae has moved for leave to file this brief. The brief was not authored in whole or part by counsel for a party; no party or counsel for a party contributed money that was intended to fund this brief's preparation or submission; and no person other than the amicus curiae, its members, or its counsel contributed money intended to fund the brief's preparation or submission.

<sup>2</sup> See, e.g., *Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund*, 138 S. Ct. 1061 (2018); *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136  
*Footnote continued*

Public Citizen submits this brief because it is concerned that the district court's order in this case effectively allowed a defendant to use a jurisdictionally improper removal to gain a substantial and potentially case-dispositive advantage, under circumstances where the court could readily have avoided any prejudice to either party or to the court's own interests in avoiding waste of judicial resources. Amicus curiae believes that this short brief from a perspective different from that of either party may be helpful to this Court in deciding this appeal.

### **STATEMENT OF THE ISSUE**

Whether the district court erred in dismissing the plaintiff's complaint under the first-filed doctrine, where the court lacked Article III jurisdiction over both this case and the first-filed case, and where the dismissal was highly prejudicial to the plaintiff and absent members of the putative class that she sought to represent.

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S. Ct. 1562 (2016); *Dart Cherokee Basin Operating Co., LLC v. Owens*, 574 U.S. 81 (2014); *Miss. ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161 (2014); *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588 (2013); *Watson v. Philip Morris Cos.*, 551 U.S. 142 (2007).

## SUMMARY OF ARGUMENT

In this case, the district court invoked the “first-filed doctrine” to dismiss an action that had been removed from a Florida state court. The court did so because the plaintiff, Shaeda Burgess, had earlier invoked federal-question jurisdiction to file a case in the district court raising the same claims against the same defendant, Universal City Development Partners, and that case was still pending. Burgess had filed the second case (“*Burgess II*”) in the state court because of substantial doubts over whether her first-filed case (“*Burgess I*”) was subject to federal jurisdiction—doubts that were confirmed when this Court ruled in *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917 (11th Cir. 2020) (en banc), that allegations substantially identical to Burgess’s are insufficient to establish Article III standing. Under this Court’s holding in *Muransky*, the district court never had either original jurisdiction over *Burgess I* or removal jurisdiction over *Burgess II*. Nonetheless, rather than waiting for the outcome in *Muransky*, the district court dismissed the removed case even though it was aware that its jurisdiction over both cases was in serious doubt.

The court justified its unusual action on the ground that dismissal was necessary to prevent Burgess from “hav[ing] her cake and eat[ing] it too,” J.A. 194, by obtaining a remand allowing litigation of *Burgess II* in state court while maintaining *Burgess I* in federal court pending the outcome in *Muransky*. The district court’s order, however, had the effect of allowing Universal to have *its* cake and eat it too. That is, the order allowed Universal to maintain its opposition to federal jurisdiction in *Burgess I* based on lack of standing—and ultimately obtain a voluntary dismissal on that ground following this Court’s en banc decision in *Muransky*—while, in this case, invoking the very jurisdiction it claimed was lacking in *Burgess I* to stymie Burgess’s effort to preserve her claim and those of absent class members by filing a parallel case in state court.

Under these circumstances, the district court’s order was not necessary to fulfill the purpose of the first-filed doctrine—preventing duplicative litigation—and it needlessly prejudiced Burgess and the putative class. Moreover, the district court had a readily available alternative to dismissal that would have protected the legitimate interests of both parties and prejudiced no one: It could have deferred consideration of both Universal’s motion to dismiss and Burgess’s motion

to remand in *Burgess II* pending the en banc decision in *Muransky*, just as it was already deferring consideration of Universal’s motion to dismiss in *Burgess I*. Then, following this Court’s decision, the district court could, and should, have disposed of both cases consistently with that decision. That is, had this Court found Article III standing in *Muransky*, the district court would have retained its jurisdiction over both *Burgess I* and *Burgess II*, and it could have coordinated the proceedings or stayed *Burgess II* to avoid duplicative litigation. Given the en banc Court’s holding in *Muransky*—that allegations such as those here do not support Article III standard—deferring consideration of the motions to dismiss and remand would have allowed the district to dismiss *Burgess I* and remand *Burgess II* to the state court where, in the absence of Article III standing, the case belongs. See *McGee v. Solicitor Gen. of Richmond Cty., Ga.*, 727 F.3d 1322, 1326 (11th Cir. 2013). Proceeding in this manner would have ensured that, whatever the result in *Muransky*, the claims in the *Burgess* cases would be adjudicated in the court system where they belonged, there would be no duplicative litigation, and no party would be prejudiced.

The pendency of Burgess’s Rule 59(e) motion seeking reconsideration of the dismissal order gave the district court the opportunity to dispose of the case in exactly that way. That motion remained pending when this Court decided *Muransky*. At that point, once *Burgess I* was dismissed in light of *Muransky*, the district court should have vacated its earlier dismissal order and remanded *Burgess II*. Instead, even though the first-filed case was no longer pending and despite the clear absence of federal jurisdiction over both cases, the court denied reconsideration and left its dismissal order in effect. Doing so served no purposes of the first-filed rule; violated the statutory command that a removed case “shall” be remanded when “it appears that the district court lacks subject matter jurisdiction,” 28 U.S.C. § 1447(c); prejudiced the interests of Burgess and absent class members; and allowed Universal to obtain an advantage from having removed a claim that it had always contended—correctly, as it turned out, under this Court’s decision in *Muransky*—fell outside federal jurisdiction. Given the ready availability of an alternative course of action that would have protected the interests of all parties and prejudiced no one, the district court’s action was, at a minimum, a clear abuse of discretion.

## ARGUMENT

The district court erred in dismissing this action rather than remanding it to state court. The court’s order arose out of circumstances in which two opposing parties took reasonable steps to protect their interests. Both then requested relief from the district court that would have given them a tactical advantage. The district court, however, penalized one party—Burgess—for what it considered to be “vexatious and ridiculous litigation tactics,” J.A. 194, while rewarding the other—Universal—with a dismissal that truncated the potential plaintiff class and was unnecessary to serve the interests of the first-filed doctrine on which the court relied. For that reason, the dismissal order was a clear abuse of discretion.

By the time the district court denied plaintiff’s Rule 59(e) motion, the court’s decision to dismiss rather than remand became more than an abuse of discretion: It violated 28 U.S.C. § 1447(c)’s unambiguous command that a district court “shall” remand an action if, at any time before its judgment becomes final, it appears that the court lacks subject-matter jurisdiction. The absence of subject-matter jurisdiction became apparent when this Court issued its en banc decision in *Muransky*. At

that point, the law required the district court to remand. Instead, the court adhered to its order dismissing the case under the first-filed rule *even though the first-filed case no longer exists*—a result that would be a clear abuse of discretion even if the statute did not unambiguously require remand rather than dismissal.

**I. Both parties acted reasonably.**

The background of this appeal began unremarkably when Burgess filed *Burgess I* in June 2019, alleging violations of the Fair and Accurate Credit Transactions Act (FACTA), 15 U.S.C. § 1681c(g), on behalf of herself and a putative class. At the time, a panel of this Court had held that a plaintiff alleging similar FACTA violations had Article III standing regardless of whether she alleged an injury beyond the violation itself. *See Muransky v. Godiva Chocolatier, Inc.*, 922 F.3d 1175 (11th Cir. 2019). Because a petition for rehearing en banc was pending in *Muransky*, Universal understandably moved to dismiss *Burgess I* for lack of Article III standing to preserve its position that *Muransky* was wrongly decided and that the plaintiff had failed to allege an injury-in-fact sufficient to create a justiciable case or controversy. J.A. 53. Shortly after Universal filed that motion, this Court granted rehearing en banc in

*Muransky*. See 939 F.3d 1278 (11th Cir. 2019). Within a week, Universal had filed a notice of supplemental authority informing the district court of this development. See *Burgess I*, No. 6:19-cv-01041, Doc. 39 (M.D. Fla. Oct. 11, 2019). Three days later, Burgess sensibly moved for a stay pending the decision in *Muransky*, which would undoubtedly control the disposition of Universal’s motion to dismiss. Burgess’s motion informed the court of her intention in the meantime to file her FACTA claim in a Florida state court. *Burgess I*, Doc. 40 (Oct. 14, 2019).

Universal did not object to the request for a stay. The district court granted the stay on November 16, 2019, because “[t]he outcome in *Muransky* could be dispositive in this litigation.” *Burgess I*, Doc. 44, at 2. Meanwhile, Burgess had filed this action, *Burgess II*, in a Florida state court. That filing reflected her counsel’s realization that, if *Muransky* were decided in a way that precluded federal jurisdiction, her claims could be litigated only in state court; but if she waited until *Muransky* was decided before filing a state-court action, the claims of class members (and perhaps even of Burgess herself) might be lost to the statute of limitations. This risk was magnified by Florida case law indicating that a putative federal class action dismissed for lack of subject matter

jurisdiction would not toll class members' claims during its pendency. *See HCA Health Servs. of Fla., Inc. v. Hillman*, 906 So. 2d 1094 (Fla. Dist. Ct. App. 2004). Thus, as Burgess had explained in her motion to stay, “[t]he concurrent filing in state court will avoid prejudice to potential class members by preventing any lapse in the statute of limitations ... that might occur if the case were to be dismissed here before being re-filed in state court.” *Burgess I*, Doc. 40, at 2.

Burgess's action, although reasonable, created a dilemma for Universal. Although Universal's position was that there was no federal jurisdiction over Burgess's FACTA claims, federal jurisdiction over *Burgess I* would be proper if *Muransky* ended up supporting Burgess's standing, and Universal would then be facing the same claims in two different court systems. Universal could avoid that prospect by removing *Burgess II*, but that option would be unavailable if Universal were to wait for the outcome in *Muransky*, because a defendant has only 30 days in which to remove an action after being served with a pleading or paper from which it may be ascertained that the case is removable. *See* 28 U.S.C. § 1446(b). It was of course apparent from the face of Burgess's FACTA complaint that it raised a federal question as to which there was

at least arguably standing. Thus, although Universal’s legal position was that Burgess lacked standing to proceed in federal court, it had to remove promptly to protect itself, rather than waiting to see the outcome in *Muransky*. Universal removed the case on November 12, 2019, J.A. 6, and the case was assigned to the judge presiding over *Burgess I* the next day, J.A. 37.

Although the parties’ actions were reasonable, the result was that both parties took positions on jurisdiction in *Burgess II* that were at odds with their positions in *Burgess I*. Universal, having argued against federal jurisdiction in *Burgess I*, now not only invoked it by removing *Burgess II*, but went on to move for a merits dismissal of *Burgess II* under Rule 12(b)(6)—an action that is clearly improper for a court that lacks Article III jurisdiction. *See Steel Co. v. Citizens for a Better Env’t.*, 523 U.S. 83, 89 (1998). In the alternative, Universal sought a non-merits dismissal under the first-filed doctrine, which provides that, in general, “when parties have instituted competing or parallel litigation in separate courts, the court initially seized of the controversy should hear the case.” *Collegiate Licensing Co. v. Am. Cas. Co. of Reading, Pa.*, 713 F.3d 71, 78 (11th Cir. 2013). Although courts may under some circumstances order a

non-merits dismissal without first determining that they have jurisdiction, *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422 (2007), a court's ability to take such action in a removed case is limited by the mandatory, statutory requirement that the court remand the case if at any time it appears that the Court lacks subject-matter jurisdiction, *see* 28 U.S.C. § 1447(c). Moreover, Universal's argument that the claims should be heard in *Burgess I* presupposed that the court possessed jurisdiction in that case—a position that Universal disputed.

For her part, Burgess moved to remand *Burgess II* to the state court on the ground that Universal had not shown that her claims satisfied Article III standing requirements that are a prerequisite for the assertion of federal jurisdiction. Burgess's position relied on the firmly established principle that a federal court must remand a removed case if it finds that the plaintiff lacks Article III standing. *See McGee*, 727 F.3d at 1326; *Collier v. SP Plus Corp.*, 889 F.3d 894, 897 (7th Cir. 2018); *Polo v. Innoventions Int'l, LLC*, 833 F.3d 1193 (9th Cir. 2016); *Hill v. Vanderbilt Capital Advisors, LLC*, 702 F.3d 1220, 1225 (10th Cir. 2012). Her argument for remand also found support in the proposition that the party invoking federal jurisdiction has the burden of establishing its

existence—a view that has led courts to conclude that, although a defendant who removes a case to federal court need not *plead* the plaintiff’s Article III standing in its notice of removal, the defendant does bear the burden of proving the plaintiff’s standing if the plaintiff contests it in a motion to remand. *See Mittenthal v. Fla. Panthers Hockey Club, Ltd.*, 472 F. Supp. 3d 1211, 1222 (S.D. Fla. 2020). Nonetheless, in asserting that Universal had not proved her standing in *Burgess II*, Burgess was taking a position that was in tension with her claim in *Burgess I* that (depending on the outcome in *Muransky*) she did have standing to assert her FACTA claim in federal court.

**II. The district court abused its discretion in dismissing this case under the first-filed doctrine.**

In dismissing Burgess’s complaint under the first-filed doctrine (and threatening sanctions for its filing), the district court castigated Burgess and her counsel for taking inconsistent positions, which the court described as seeking to “have her cake and eat it too” by “simultaneously maintain[ing] identical cases against Defendant in both state and federal courts.” J.A. 194. But the court failed to recognize that its order allowed Universal to have it both ways, because it was disputing federal jurisdiction in *Burgess I* while simultaneously *invoking* that

jurisdiction to remove *Burgess II* and then claiming that Burgess's claims *should* be heard in federal court in the first-filed case.

In addition to condemning what the district court perceived to be gamesmanship on Burgess's part while rewarding similar conduct on Universal's, the court's order had severe consequences that the court did not adequately address: If this Court were to decide in *Muransky* that plaintiffs like Burgess lacked standing (as the Court ultimately did), the dismissal of *Burgess II* would, if not overturned, have the effect of eliminating Burgess's ability to assert claims on behalf of any class members whose limitations period expired in the over five months between the filing of *Burgess II* and its dismissal. Further, the court's ruling effectively foreclosed Burgess from filing another action to prevent the running of the statute against additional class members, because if she attempted to do so, Universal would simply remove again, obtain another first-filed dismissal, and again prevent Burgess from establishing a filing date that would protect the claims of absent class members. Even leaving aside the likelihood of sanctions if Burgess were to attempt another filing, the court's action left her with no way to both preserve her ability to maintain *Burgess I* in federal court if *Muransky*

went her way and preserve the claims of absent class members if it did not.

Contrary to the district court's assertion, Burgess's problem was not "exclusively of her own making," J.A. 194, and she could not have addressed the problem "by motion in *Burgess I*," J.A. 193. The problem she faced arose from the uncertainty over standing in FACTA claims based on the pendency of *Muransky*. And nothing Burgess could do in *Burgess I* would address the problem that, if this Court ultimately held that the federal courts lack jurisdiction over such cases, the ensuing jurisdictional dismissal of *Burgess I* would likely prevent that case from preserving the claims of any class members whose limitations period had run out while the case was pending in federal court.

The dismissal of *Burgess II* was, moreover, wholly unnecessary to prevent prejudice to Universal or fulfill the first-filed rule's purpose of avoiding duplicative litigation and friction between courts. *See AEP Energy Servs. Gas Holding Co. v. Bank of Am., N.A.*, 626 F.3d 699, 722 (2d Cir. 2010); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Haydu*, 675 F.2d 1169, 1173 (11th Cir. 1982). While *Burgess I* and *Burgess II* were pending before the same court, the court could avoid any such problems.

The obvious way to do so was to defer consideration of the parties' motions in *Burgess II* pending this Court's decision in *Muransky*, just as it had deferred consideration of the issue of jurisdiction in *Burgess I*. That course of action would ensure that, however *Muransky* came out, the jurisdictional issues in *Burgess I* and *Burgess II* would be resolved consistently, and the claims would proceed in the proper court system. If *Muransky* affirmed the existence of federal jurisdiction, the cases would remain in federal court and could be resolved together, with no duplication of effort (assuming Burgess did not simply dismiss *Burgess II* at that point as unnecessary under those circumstances). If, as ultimately happened, *Muransky* held that plaintiffs such as Burgess lacked Article III standing, *Burgess I* would be dismissed for lack of subject-matter jurisdiction, and *Burgess II* would be remanded to state court. Neither party would be prejudiced. That each party instead sought a ruling on their respective motion was no reason for the court to ignore an alternative that would protect the interests of both.

The district court's dismissal in such circumstances was a clear abuse of discretion in light of the discretionary, equitable nature of the first-filed doctrine, *see Collegiate Licensing*, 713 F.3d at 80; the

preference for staying cases rather than dismissing them, *see Central States, SE & SW Areas Pension Fund v. Paramount Liquor Co.*, 203 F.3d 442, 444 (7th Cir. 2000); the caution that courts should exercise in applying the doctrine when jurisdiction over the first-filed case is in question, *see Orthmann v. Apple River Campground, Inc.*, 765 F.2d 119, 121 (8th Cir. 1985); and the overriding consideration that the doctrine should not be applied to prejudice a plaintiff's ability to present her claims, *see Chavez v. Dole Food Co.*, 836 F.3d 205, 217 (3d Cir. 2016). The district court inconsistently condemned what it saw as one party's effort to have it both ways while rewarding the same conduct by the opposing party; it disregarded the severe consequences of its action; and it failed to adopt an obvious alternative course of action that would avoid duplicative litigation, ensure consistent disposition of the two cases and protect the legitimate interests of both parties. Together, these flaws reflect an "unreasonable" application of law and a "clear error of judgment." *Collegiate Licensing*, 713 F.3d at 77.

**III. The district court compounded its error by reaffirming the dismissal after this Court decided *Muransky*.**

Burgess's motion for reconsideration under Federal Rule of Civil Procedure 59(e) provided the district court another opportunity to take a

more measured course by awaiting the outcome of *Muransky* before resolving the motions in both *Burgess I* and *Burgess II* consistently with this Court’s ruling on the dispositive issue of Article III standing. And, in fact, the district court allowed the motion for reconsideration to remain pending for more than five months. Exactly five months after Burgess filed her Rule 59(e) motion, this Court decided *Muransky* adversely to the plaintiff’s Article III standing in that case—and, a fortiori, to Burgess’s Article III standing in *Burgess I* and *Burgess II*. Less than two weeks later, on November 10, 2020, Burgess voluntarily dismissed *Burgess I*, acknowledging that, under this Court’s holding in *Muransky*, she lacked Article III standing. *Burgess I*, Doc. 48. Although the dismissal did not require a court order under Federal Rule of Civil Procedure 41(a)(1)(A)(i), the district court entered its own order six days later directing the clerk to terminate all pending motions and close the case. *Burgess I*, Doc. 49 (Nov. 16, 2020).

With *Burgess I* closed, there was no longer a pending first-filed case. Moreover, it was undisputed that the district court lacked Article III jurisdiction over Burgess’s FACTA claim—as Universal had argued all along, *Muransky* had confirmed, and Burgess now acknowledged. Even

so, on the same day that the district court entered its order directing that *Burgess I* be closed, the court denied reconsideration in *Burgess II* and left its dismissal order standing. Under such circumstances, the dismissal constituted reversible error.

*First*, the district court was required to remand rather than dismiss as soon as it became clear that, under this Court's holding in *Muransky*, there was no Article III case or controversy over which it could exercise jurisdiction of the removed case. The governing statute, 28 U.S.C. § 1447(c), provides that: "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." As the Supreme Court has observed, "the literal words of § 1447(c) ... on their face, give ... no discretion to dismiss rather than remand an action." *Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72, 89 (1991) (citation omitted). Here, because of the pendency of Burgess's Rule 59(e) motion, the finality of the district court's dismissal was suspended when this Court issued *Muransky*, at which point it was apparent that the district court lacked jurisdiction. Whatever discretion the court might have had earlier to order a non-merits dismissal when its subject-matter jurisdiction had not been determined,

the court was required to remand once *Muransky* confirmed that the court lacked subject-matter jurisdiction because of the absence of Article III standing. *See McGee*, 727 F.3d at 1326.

*Second*, it was a clear abuse of discretion to maintain the dismissal of *Burgess II* under the first-filed doctrine after the first-filed case had been dismissed—and after *Muransky*'s holding had established that the district court had not possessed Article III jurisdiction over *Burgess I* in the first place. Application of the first-filed doctrine, after all, represents an equitable determination that, when competing actions are pending, “the court initially seized of the controversy should hear the case.” *Collegiate Licensing*, 713 F.3d at 78. The predicates for application of the doctrine are completely absent when (1) there is no longer a first-filed action, and (2) it is undisputed that the court in which the first-filed action was formerly pending was never properly “seized of the controversy”—that is, it not only *should not* hear the case but *cannot* do so because it has no jurisdiction over it.

The district court's assertion that its action would not prejudice *Burgess* because she still had time remaining to refile her action in state court, J.A. 270, cannot justify the court's action. In the absence of a

pending first-filed case, dismissal under the first-filed doctrine has no logical basis, even if dismissal would do no more than inconvenience the plaintiff by requiring her to refile; indeed, dismissing under such circumstances would be pointless.

Here, moreover, the district court's observation about the time Burgess had remaining to file her individual claim failed to address the problem that the claims of any class members for whom the statute of limitations had run in the 13 months between the filing of *Burgess II* and the denial of reconsideration would likely be irrevocably lost. And it ignored the in terrorem effect of the still-pending collateral issue of sanctions, which remains before the district court and may have a chilling effect on Burgess's and her counsel's willingness to engage in any further state-court proceedings—unless and until this Court reverses the dismissal of the *Burgess II* complaint so that this case can be remanded to the state courts.

## CONCLUSION

For the foregoing reasons, this Court should reverse the district court's order dismissing the complaint and remand with directions that the court remand this case to the state court.

Respectfully submitted,

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## **CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that the foregoing brief is proportionately spaced, has a type face of 14 points (Century Schoolbook), and, as calculated by my word processing software (Microsoft Word), contains 4,370 words, less than half the number of words permitted by the Court for the parties' briefs.

/s/ Scott L. Nelson  
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## CERTIFICATE OF SERVICE

I hereby certify that this brief has been served on February 9, 2021, through the Court's ECF system on counsel of record for all parties required to be served, as follows:

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