UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 20-5852

JOHN DOE; TARA BLESSING; CHRIS BLESSING, Parents and Natural Guardians of their minor son Next Friend Charles B. Blessing; JENNIFER FOUST; JOHN FOUST, Parents and Natural Guardians of their minor son Next Friend Austin Foust; GINA FRIES; DANIEL FRIES, Parents and Natural Guardians of their minor son Next Friend William Fries; SHANNON CRAIG; ANTHONY GARDNER, Parents and Natural Guardians of their minor son Next Friend Evan Anthony Gardner; LORI GRAY; MICHAEL GRAY, Parents and Natural Guardians of their minor son Next Friend Liam Gray; SAUNDRA SMITH: MICHAEL SMITH, Parents and Natural Guardians of their minor son Next Friend Charlie Smith; ERIC CURK; ANDREW GIBSON; PATRICK KENNEDY; WYATT SCHWARTZ; BRADLEY KATHMAN; NADINE PALEY: KEVIN PALEY, Parents and Natural Guardians of their minor son Next Friend Sam Paley

Plaintiffs-Appellants

v.

KATHY GRIFFIN

Defendant-Appellee

Appeal from the United States District Court
For the Eastern District of Kentucky
Case No. 2:19-cv-00126

BRIEF OF APPELLANTS

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DISCLOSURE OF CORPORATE AFFILIATIONS

Pursuant to Fed. App. R. 26.1 and 6 Cir. R. 26.1, Plaintiffs-Appellants make the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? **No.**

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? **No.**

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Plaintiffs-Appellants respectfully request oral argument because this appeal involves: a first impression question of Kentucky law; a substantial Constitutional question; and, a question of wide public interest.

I. STATEMENT OF JURISDICTION

1. The District Court had subject matter jurisdiction in this matter under 28 U.S.C. §1332.

2. On April 9, 2020, the District Court granted Defendant-Appellee Griffin's Motion to Dismiss (Memorandum Opinion and Order, RE 38, Page ID #220-234), and Judgment was entered in her favor. (RE 39, Page ID #235). Plaintiffs-Appellants' subsequent Motion for Reconsideration (RE 40, Page ID #236-249) was denied by the District Court on June 23, 2020 (Memorandum Opinion and Order, RE 43, Page ID 273-280).

3. On July 21, 2020, Plaintiffs-Appellants filed a timely Notice of Appeal. (RE 44, Page ID #281-282).

4. This appeal is from the District Court's final order that disposes of all parties' claims. This Court has jurisdiction pursuant to 28 U.S.C. §1291.

II. STATEMENT OF THE ISSUES

1. Whether the District Court erred when it failed to follow and apply the Sixth Circuit holding in *Gerber v. Riordan*, 649 F.3d 514 (6th Cir. 2011) that a defendant, like Appellee Griffin, voluntarily accepts the district court's jurisdiction and waives her personal jurisdiction defense when her first filing with the district court is a General Appearance by her counsel.

2. Whether, when the Kentucky General Assembly enacted Kentucky's long-arm statute in 1968, it intended that a non-resident's commission of tortious criminal conduct in the Commonwealth was the type of conduct – i.e., "causing tortious injury by an act . . . in this Commonwealth" – enumerated in KRS §454.210(2)(a)(3).

3. Whether a non-resident's commission of an intentional, tortious crime in Kentucky is conduct initiated by the defendant and purposely directed at and targeted to the Kentucky forum and its citizens that creates sufficient minimum contacts with Kentucky for the district court in a civil action to exercise personal jurisdiction over the defendant consistent with Constitutional due process.

III. STATEMENT OF THE CASE

Appellants are Covington Catholic High School minor students who were present at the Lincoln Memorial on January 18, 2019 during the internationally-publicized incident between CCH students and Mr. Nathan Phillips.[1] Multiple news organizations, public officials, public figures, and social media users reacted to the incident with robust, often vile, hateful, and noxious narrative and opinion,

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[1] The district court's Memorandum Opinion misdates the incident as occurring on January 19, 2019 (RE 38, Page ID #220). The incident occurred on January 18, 2019, with the public reaction beginning on January 19, 2019.

as was their First Amendment right. Some, unfortunately, crossed the Constitutional line from "speech-as-comment" to "speech-as-conduct," the content of which speech was integral to actionable criminal conduct. One of these was the well-known celebrity provocateur, Appellee Kathy Griffin.

Two days after the Lincoln Memorial incident, Griffin engaged in a criminal course of social media conduct. As part of a doxing campaign against the students, she posted a series of tweets calling upon her followers and others to collect and publicize their personal and private information for the purposes of harassing and humiliating them. (Complaint, RE 1, Page ID #4-5). Specifically, she tweeted:

- Ps. The reply from the school was pathetic and impotent. Name these kids. I want NAMES. Shame them. If you think these fuckers wouldn't dox you in a heartbeat, think again. (Complaint, RE 1, Page ID #4, 11).

- Names please. And stories from people who can identify them and vouch for their identity. Thank you. (Complaint, RE 1, Page ID #5, 12).

- Maybe you should let this fine Catholic school know how you feel about their students [*sic*] behavior toward the Vietnam veteran, Native American #NathanPhillips. (Complaint, RE 1, Page ID #5, 13).

When her followers acted, she reacted by exhaulting in their behavior:

- Oooh gurrrl, you've triggered lots of verrry threatened bros. Yummy. It's delicious. (Complaint, RE 1, Page ID #5, 14).

Ms. Griffin's course of conduct was designed and intended to harass, threaten, and menace the CCH students by engendering in them the fear of violence by her followers, and the disruption of their lives that such fear created from the possibility that the threatened violence would occur. (Complaint, RE 1, Page ID #4). Ms. Griffin's conduct was purposely directed to and targeted at the minor CCH students in their Kentucky homes, their school, and their community. (Complaint, RE 1, Page ID #4-5). Ms. Griffin's conduct constituted the Kentucky crimes of harassment, threatening, and menacing, which were committed against the minor students when and where received in their Kentucky homes. (Complaint, RE 1, Page ID #6-9).

KRS 446.070 provided the students a private right of action against Ms. Griffin for her criminal conduct committed in the Commonwealth. (Complaint, RE 1, Page ID #6). Her conduct, in turn, "caused tortious injury by [such] acts . . . in this Commonwealth," as enumerated and encompassed by Kentucky's long-arm statute, KRS 454.210(2)(a)(3). (Complaint, RE 1, Page ID #6).

On September 16, 2019 the students filed their Complaint against Ms. Griffin for Civil Harassment, Menacing, and Threatening (KRS 525.070; 525.080; 508.050; and, 508.080), along with Invasion of Privacy. (Complaint, RE 1). On October 9, 2019 Ms. Griffin's first filing in response to the Complaint was a General Appearance entered by her counsel. (Appearance of Counsel, RE 6, Page

ID #28). This first filing was accompanied by a Motion for another counsel to appear pro hac vice (Motion for Admission, RE 7, Page ID #29-30), which was granted. (RE 8). Thereafter, on November 8, 2019, Ms. Griffin filed her Motion to Dismiss. (RE 9, Page ID #32-34).

On November 27, 2019, the students responded to Ms. Griffin's Motion. (Memorandum, RE 14, Page ID #70-102). They argued that the district court could exercise personal jurisdiction over Ms. Griffin because:

> 1. She waived her personal jurisdiction defense when her first filing was a General Appearance, citing the Sixth Circuit's holdings in *Gerber v. Riordan*, 649 F.3d 514 (6th Cir. 2011), and *M & C Corp. v. Erwin Behr GnbH & Co., KG,* 508 Fed. App'x. 498 (6th Cir. 2012); and,
>
> 2. Alternatively, the district court had personal jurisdiction over Ms. Griffin under Kentucky's long-arm statute, KRS 454.210(2)(a)(3), because her harassing, threatening, and menacing tweets were: (a) "communicative acts [that] occurred in Kentucky when the [students] viewed and read Defendant Griffin's harmful messages;" and, (b) her criminal tortious acts were intentionally aimed at Kentucky and its student citizens sufficiently to satisfy the Supreme Court's due process "effects" test."

The district court scheduled a telephonic oral argument to address "the personal jurisdiction question" raised by Ms. Griffin. (Order, RE 31, Page ID #157). During the hearing, the students noted that only the present Court's *Gerber* and *M & C Corp.* holdings were "directly on point;" i.e., where a defendant's first filing was a General Appearance, and "on those facts, the Court found that there

had been a waiver" of the personal jurisdiction defense. (Transcript, RE 47, Page ID #299). In other Sixth Circuit cases, prominently *King v. Taylor*, 694 F.3d 650 (6th Cir. 2012), and *Boulger v. Woods*, 917 F.3d 471 (6th Cir. 2019), "as soon as the defendant was sued, he asserted the personal jurisdiction defense in his answer." (Id. at Page ID #300). Later the defendant forfeited his defense by participating in the litigation including, in *King*, by filing a tardy General Appearance a year later, just a month before his motion to dismiss. (Id.). The controlling *Gerber* fact – Defendant's first filing of a General Appearance – was "precisely the situation before" the district court, and under this "bright-line test" Ms. Griffin waived her personal jurisdiction defense. (Id. at Page ID #301-302).

Alternatively, the students argued under the Supreme Court's "true threat" jurisprudence, where a defendant intends to cause the effect of fear, and the disruption that fear engenders, such criminal conduct is committed where and when received by its victims, the students in Kentucky. (Id. at Page ID #304-306). In defamation, the communicative act is directly between the speaker and the speaker's audience with only indirect effects on the victims' reputation. In incitement to riot (e.g., *Higgins v. Kentucky Sports Radio*, 951 F.3d 728 (6th Cir. 2020)) the speech goes from the speaker to followers who then harm the victims. By contrast, a criminal true threat by design intends to cause fear and disruption in the victim. This is "a direct one-on-one" communicative act between the speaker

and the victim. (Id. at Page ID #305-307). This act occurs when the communication is received and the fear caused; i.e., an act in Kentucky. (Id.).

Following the hearing, the district court ordered the parties to submit supplemental briefs on the personal jurisdiction question. (Order, RE 34, Page ID #178). In their Supplemental Response (RE 35, Page ID #179-188) the students reemphasized that *Gerber* and *M & C Corp.* created "a 'bright-line' rule:" the first filing of a defendant's General Appearance waives the personal jurisdiction defense. (Id. at Page ID #180). By contrast, as the Sixth Circuit explained in *King*, "an appearance by counsel, filed **after** properly raising [the defense] in the first responsive pleading, did not waive the defense." (Id. at Page ID #181, quoting *King, supra* at 660 n.7. Emphasis added). The students also asserted that Ms. Griffin's criminal tortious threats were jurisdictional acts committed in Kentucky that "fit squarely within the *Calder-Keeton-Walden* 'effects test'," such that the district court could Constitutionally exercise jurisdiction over Ms. Griffin. (Id. at Page ID #185),

On April 9, 2020, the district court granted Ms. Griffin's Motion to Dismiss (Memorandum Opinion, RE 38, Page ID #220-234), and dismissed the Complaint (Judgment, RE 39, at Page ID #235). In its Memorandum Opinion, the district court held that the students' waiver "argument is not well taken. The Sixth Circuit has held that there is no 'bright-line rule' as to what conduct will serve as

'constructive consent to personal jurisdiction.'" (Memorandum Opinion, RE 38, Page ID #224). The court quoted *Boulger, supra* at 477, a case in which the defendant had not filed a General Appearance, neither as his first filing (*Gerber, M & C Corp.*), nor a year after litigating the case and a month before his motion to dismiss (*King*). Specifically, the district court cited neither *Gerber* nor *M & C Corp.* which are the only Sixth Circuit cases factually and directly on point.

On the jurisdictional merits, the district court applied Kentucky's two-step process: determine whether the cause of action arises from conduct enumerated in Kentucky's long-arm statute and, if so, whether exercising jurisdiction comports with Constitutional due process. It found that Ms. Griffin's threats were not acts in Kentucky, rejecting as "unavailing" the students' argument that, by their nature, true threats were "acts . . . in this Commonwealth." Instead it found that, rather than "tortious *actions*," Ms. Griffin's criminal tortious threats had only "tortious *consequences*" in Kentucky. (Memorandum Opinion, RE 38, Page ID #237).

On May 6, 2020 the students filed their Motion for Reconsideration. (RE 40, Page ID #236-249). On waiver, they asserted that the district court overlooked and failed to apply the Sixth Circuit's *Gerber* precedent that first filing a General Appearance waives personal jurisdiction (Id. at Page ID #239-241). On the merits, they asserted that Ms. Griffin's criminal tortious conduct was "an act in Kentucky" when and where the targeted students "heard or read the threat [and] reasonably

considered that an actual threat had been made." (Id. at Page ID #242). Moreover, by her criminal tortious conduct targeting Kentucky and Kentucky citizens, Ms. Griffin purposely availed herself of Kentucky's sovereignty and connected herself to Kentucky in a Constitutionally meaningful way. (Id. at Page ID #247-249).

On June 23, 2020, the district court denied the students' Motion. (Memorandum Opinion, RE 43, Page ID #273-280). On waiver, it rejected their contention that *Gerber* was "controlling precedent." (Id. at Page ID #273). It held that the students' "construction of *Gerber* was rejected by the Sixth Circuit in *King*," because the Sixth Circuit "held that a General Appearance by defendant's counsel filed one month prior to filing a motion to dismiss . . . did not constitute a forfeiture" of a jurisdictional defense. (Id. at Page ID #273-274). The district court did not comment on the fact that, unlike in *Gerber*, the *King* defendant had first preserved his defense in his answer before litigating and filing his General Appearance a year later, albeit a month before his motion. Rather, the district court held *Gerber* as "factually distinguishable," because the *Gerber* defendant also "participated extensively in the litigation before raising a personal jurisdiction defense." (Id. at Page ID #274-275).

On the jurisdictional merits, in a holding of first impression, the district court rejected the students' construction of Kentucky's long-arm statute that threatening criminal conduct, rendered civilly actionable by KRS 446.070, is an act

that occurs in Kentucky as enumerated in KRS 454.210(2)(a)(3). In so doing, the district court held that "whether defendant would be subject to criminal prosecution in Kentucky has no bearing on whether she is subject to personal jurisdiction in this matter," and that "this Court cannot by judicial decision achieve a result that neither the Kentucky legislature nor Kentucky courts" would allow. (Memorandum Opinion, RE 43, Page ID #277). Thereafter, on July 21, 2020, the students filed their Notice of Appeal. (RE 44, Page ID #281-282).

IV. SUMMARY OF THE ARGUMENT

A. Waiver

Precedent matters. Holdings, not dicta, are binding. And, a published Sixth Circuit panel opinion binds later panels unless overruled en banc or by the Supreme Court.

Gerber's conclusion that a defendant's first filing of a General Appearance by counsel is acceptance of the district court's jurisdiction, and a waiver of a personal jurisdiction defense, is its holding. This decision on the waiver issue contributed to the judgment. The Court clearly intended to rest its judgment on its conclusion. Equally clearly, the Court considered the issue and consciously reached its conclusion about it.

We know this for several reasons. First, the *Gerber* panel told us:

> **CONCLUSION**
>
> Defendants waived their lack of personal jurisdiction defense, and voluntarily submitted to the district court's jurisdiction, when their attorney entered a general appearance with the district court on their behalf. Accordingly, we REVERSE the decision of the court below.

649 F.3d at 523. Second, the Concurring Judge disagreed "with the majority's conclusion that the critical point here was the defendant's counsel's filing of an Entry of Appearance." 649 F.3d at 523. She "believed that the holding of the majority is unwise." Id. at 523-524. Third, in *M & C Corp*. the Sixth Circuit reversed the district court's personal jurisdiction dismissal "because *Gerber* is directly on point" that a defendant's "first filing . . . was a general appearance entered by its counsel," and "because a panel of this Court cannot overrule the decision of another panel." 508 Fed. App'x. at 500.

The district court erred when it rejected the students' contention that *Gerber* was "controlling precedent" directly on point. It erred when it held that the students' construction of *Gerber's* holding – defendant's first filing of a General Appearance waives personal jurisdiction – was rejected by *King*. *King* did not, and could not, overrule *Gerber*. And the district court erred when it held *Gerber* was factually distinguishable because *Gerber's* conclusion was based upon the

defendants' litigation participation. This was the position of the *Gerber* concurrence, not the *Gerber* majority.

B. <u>Jurisdictional Merits</u>

1. <u>Act in Kentucky</u> – This appeal presents the Court with a matter of first impression statutory construction. Kentucky's long-arm statute extends personal jurisdiction to a person who acts "causing tortious injury by an act or omission in this Commonwealth." At issue is whether an out-of-state defendant's commission of Kentucky harassment, menacing, and threatening crimes against Kentucky citizens is the type of conduct that the Kentucky General Assembly intended to be included within its long-arm provision.

Because Kentucky's Supreme Court has not spoken on the issue, in this diversity case the Federal Court must predict what Kentucky's Supreme Court would do if confronted with the same question by looking at all the available data. Most prominently, this includes authoritative signals from Kentucky's legislature and its judiciary, including the general rules of construction promulgated and applied by Kentucky's legislature and judiciary. Additionally, the Federal Court looks to Federal decisions regarding similar Federal law, and to other state court decisions.

These guides to the Court's determination demonstrate that in 1968, when Kentucky's General Assembly promulgated its long-arm statute with the subject

"acts . . . in this Commonwealth" provision, it intended to include tortious criminal conduct committed against Kentucky citizens by out-of-state defendants.

Kentucky law assumes the General Assembly is aware of the existence of criminal laws and statutes when it enacts later legislation. All statutes are to be liberally construed to promote the objects and the intent of the legislature, which is found by construing the text according to its common legal usage and meaning. Furthermore, where a legal right exists, a legal remedy exists. Remedial statutes, like Kentucky's long-arm statute, extend existing rights and are to be broadly construed.

The General Assembly's 1968 enactment of Kentucky's long-arm statute was informed by two long-established Kentucky legal principles. First, committing a Kentucky crime required an act by the Defendant occurring in the Commonwealth. This *actus reas* requirement encompassed conduct by out-of-state actors who violated Kentucky's criminal statutes, including communicating harmful messages to Kentucky citizens by threatening letters and obscene telephone calls.

Second, since 1900, KRS 446.070 provided Kentucky citizens with a private right of action for violations of Kentucky criminal statutes where the plaintiffs belonged to its protected class. The General Assembly presumptively was aware

of KRS 446.070 in 1968 when it enacted Kentucky's long-arm statute. Accordingly, this latter legislation is to be harmonized with 446.070.

Ms. Griffin committed Kentucky crimes when she communicated her fear-engendering tweets into the Commonwealth and to the Kentucky students. Although not present in Kentucky at the time, Ms. Griffin's conduct was the type of criminal act in Kentucky for which KRS 446.070 provided the students with a civil cause of action against her. When it enacted the long-arm statute, the General Assembly understood this was Kentucky law. Liberally construed to promote its purpose to extend the rights and remedies of Kentucky citizens, and applying the established legal usage and understanding of what constituted a criminal "act . . . in this Commonwealth," this long-arm provision encompassed Ms. Griffin's out-of-state criminally tortious communicative conduct. Contrary to the district court, this is the result the Kentucky legislature and judiciary would intend.

2. Due Process – As refined by *Walden vs. Fiore*, the Supreme Court's due process minimum contact "effects test" applies to Ms. Griffin's criminal tortious harassing, threatening, and menacing threats. Ms. Griffin committed intentional crimes, which enhanced her contacts with Kentucky for civil personal jurisdictional purposes. Her crimes were communicative crimes, intended to engender fear of violence, and the disruption that such fear engenders, in the students. When Ms. Griffin purposely directed her communications into the

forum, these constitute the "heart" of the students' cause of action, and her communications alone constituted purposeful availment of Kentucky. By purposely directing intentional tortious communications into the Kentucky forum, and targeting Kentucky citizens, Ms. Griffin initiated her contact with Kentucky and connected herself with the Commonwealth in a Constitutionally meaningful way.

The CCH students were not mere bystanders to random, fortuitous, and attenuated rantings by Ms. Griffin. They were and remain the intended targets of her purposely directed, criminal tortious acts. Thus, the district court erred when it held it could not exercise personal jurisdiction over Ms. Griffin consistent with Constitutional due process.

V. STANDARD OF REVIEW

A district court's dismissal of a complaint for lack of personal jurisdiction, and its determination as to state law in a diversity case, is reviewed *de novo.* *Gerber, supra; State Auto v. Hargis*, 785 F.3d 189, (6th Cir. 2015).

VI. ARGUMENT

A. Ms. Griffin Waived Her Personal Jurisdiction Defense.

Gerber and *M & C Corp.* are the only two Sixth Circuit cases "directly on point" with Ms. Griffin's circumstance where her "first filing" with the district court "was a general appearance entered by [her] counsel." *M & C Corp, supra* at 501. *Gerber* held that by this act alone defendants "waive their lack of personal jurisdiction defense, and voluntarily submit to the district court's jurisdiction." *Gerber*, at 523. *Gerber* based its holding on Court precedent and FRCP (12)(h), explaining that under the Rule "a party waives the right to contest personal jurisdiction by failing to raise the issue when making their responsive pleading or a general appearance." Id. at 520, quoting *Reynolds v. Int'l Amateur Athletic Fed.*, 23 F.3d 1110, 1120 (6th Cir. 1994).

Gerber also analyzed circumstances where, consistent with Rule 12(h), a defendant properly reserves the personal jurisdiction defense, but whose subsequent participation in the litigation "serves as constructive consent to the personal jurisdiction of the district court." Id. at 519. However, this analysis was not germane to the Court's holding because "at the end of the day we find the defendants did waive their personal jurisdiction defenses when their attorney entered a general appearance." Id. at 519.

This is the *Gerber* holding. Its conclusion contributed to its judgment reversing the district court's lack of personal jurisdiction dismissal (id. at 523); the Court clearly and repeatedly rested its judgment on its conclusion; and, it clearly considered the first-filing-of-general-appearance issue and consciously rendered its decision about it. *Wright v. Spaulding*, 931 F.3d 695, 701-702 (6th Cir. 2019). Concurring Judge Moore recognized that the majority's conclusion was its holding, albeit one she believed to be unwise. Id. at 523-524. *M & C Corp.* confirms: "*Gerber* is directly on point" when defendant's "first filing [is] a general appearance by counsel." 508 Fed. App'x. at 500. As an unpublished opinion *M & C Corp.* is not itself binding, 6 Cir. R. 32.1; however, it confirms that *Gerber* is such precedent.

"Precedent matters." *Wright, supra* at 709 (Thapar, Concurring). Litigants like Ms. Griffin "are bound by a precedent *all the time*" and when "precedent cuts against a party" it must "(1) distinguish it, (2) persuade us to overrule it en banc, or (3) persuade the Supreme Court to correct our error." Id. (Emphasis in original). Until one of the two latter circumstances occurs, "the holding of a published panel opinion binds all later panels." Id., 939 F.3d at 700.

The district court and Ms. Griffin's reliance on *King, supra* and *Bougler, supra* is misplaced. These cases are readily distinguished. In both, the defendants preserved their jurisdictional defenses in the first filing of their answers. Neither

defendant first filed a general appearance of counsel. The *King* defendant only filed his general appearance a year into the litigation; the *Boulger* defendant never filed one.

The district court erred when it failed to apply the *Gerber* precedent and find that Ms. Griffin's first filing of counsel's General Appearance waived her personal jurisdiction defense. The district court also erred when it held that in *King* this Court rejected *Gerber*. First, the *King* panel could not reject or otherwise overrule *Gerber*. *Wright, supra*. Second, *King* did not attempt to do so; rather, the panel distinguished its case from *Gerber* noting that its defendant filed his appearance of counsel a year into the litigation "after properly raising lack of proper service in the first responsive pleading, [and] did not waive the defense." *King*, 694 F.3d at 660 n. 7. Third, the timing and content of *Gerber*, *King*, and *M & C Corp.* confirm that *Gerber* remains binding precedent, unaffected by *King*.

Gerber was decided on August 16, 2011. *King* was decided a year later on July 17, 2012, and a hearing en banc denied on October 19, 2012. Thereafter, on December 17, 2017 the Sixth Circuit in *M & C Corp*. affirmed that *Gerber's* holding remained the law, notwithstanding the intervening *King* case.

Other Sixth Circuit cases have since been decided within the *Gerber* framework. Parties preserve their personal jurisdiction defense by first filing it in their answers or other responsive pleadings (*Boulger, supra*), or by first filing a

special appearance. *Parchman v. SLM Corp.*, 896 F.3d 728 (6th Cir. 2018), and *Means v. US Conference of Catholic Bishops*, 836 F.3d 643 (6th Cir. 2016). Of course, defendants do not need to file a special appearance if they choose to raise their defense in their first filing. Similarly, parties do not need to first file a general appearance (*King*), or to file at all. (*Boulger*). However, if they choose to first file a general appearance, they must either preserve their personal jurisdiction defense in the appearance, or choose not to do so and to accept the district court's jurisdiction. *Gerber, supra.*

B. KRS 454.210(2)(a)(3) Provided The District Court Personal Jurisdiction Over Ms. Griffin's Criminal Tortious Acts In Kentucky.

Sitting in diversity, the district court can exercise personal jurisdiction over Ms. Griffin if a Kentucky court could do so. Kentucky's long-arm jurisdictional analysis: (1) determines whether the cause of action is the type of conduct enumerated in KRS 454.210; and (2) if so, assesses whether exercising jurisdiction is consistent with due process. *Caesers Riverboat Casino, LLC v. Beach*, 336 S.W. 3d 51, 57 (Ky. 2011).

Subpart (2)(a)(3) of Kentucky's long-arm statute extends personal jurisdiction to the person who acts "causing tortious injury by an act or omission in this Commonwealth." Ms. Griffin's out-of-state commission of Kentucky harassment, menacing, and threatening crimes against the students is the type of

conduct that in 1968 the Kentucky General Assembly intended to include as such "an act" within this provision.

Because this legal question is a matter of first impression in Kentucky, this Court must predict how Kentucky's Supreme Court "would rule by looking to all the available data," including "authoritative signals from the state's legislature or judiciary." *Hargis*, *supra*, 785 F.3d at 195. The Court also applies "the general rules of statutory construction as embraced by the judiciary" and legislature. *United States v. Simpson*, 520 F.3d 531, 536 (6th Cir. 2008). Additionally, the Court looks to relevant Federal and State court decisions. *Hargis, supra*; *In re Amazon*, 852 F.3d 601 (6th Cir. 2017).

Kentucky's statutory rules of construction provide that all Kentucky statutes "shall be liberally construed with a view to promote their objects and carry out the intent of the legislature," and words or phrases that "have acquired a peculiar or appropriate meaning in the law, shall be construed according to such meaning." KRS 446.080(1), (4). See, *Commonwealth v. Plowman,* 86 S.W.3d 47 (Ky. 2002). In Kentucky where a legal right exists, a legal remedy exists. *Dorsey & Co. v. Phillips & Co.,* 8 Ky. L. Rptr. 405, 406 (1886), Ky. Consti. §14. See also, *Marbury v. Madison*, 5 U.S. 137, 163 (1803). Moreover, a remedial statute like Kentucky's long-arm statute "implies an intention . . . to extend existing rights," *Ky. Ins. Guar. Ass'n. v. Jeffers*, 13 S.W.3d 606, 610 (Ky. 2000), and is "to be

broadly construed to effectuate [its] remedial prupose." *Sevier v. Commonwealth*, 434 S.W.3d 443, 469 (Ky. 2014).

When construing statutes, Kentucky also "assumes that the General Assembly was aware of the existence of [a prior] statute when it enacted" a later statute, and intends that the two statutes "be harmonized." *State Farm Mut. Ins. Co. v. Reeder,* 763 S.W.2d 116, 118 (Ky. 1989). The specific prior statute in *Reeder* was KRS 446.070 – the statute at issue in this appeal – that "creates a private right of action for violation of any statute as long as the plaintiff belongs to the class intended to be protected by the statute." Id.

In 1968, Kentucky adhered to the long established "'*actus reas*' and '*mens reas*' requirements for criminal liability," *Commonwealth v. Mitchell*, 516 S.W.3d 803, 809 (Ky. 2017), which "required a union of act and intention for criminality." *Staples v. Commonwealth*, 454 S.W.3d 803, 812 (Ky. 2014). Under common law territoriality principles Kentucky could only prosecute a crime if "the unlawful act charged occurred in Kentucky," *Flaughter v. Commonwealth*, 279 S.W.2d 775, 776 (Ky. 1955); otherwise, "it would violate both Section 11 of the Kentucky Constitution and the Sixth Amendment to the United States Constitution." *Hayes v. Commonwealth*, 698 S.W.2d 827, 830 (Ky. 1985). *See, United States v. Wood,* 364 F.3d 704, 709-710 (6th Cir. 2004).

Under the territoriality principle, it was well established that the perpetrator did not need to be present in the jurisdiction for his act to occur in the state. Where "one puts in force an agency for the commission of the crime, he in legal contemplation accompanies the same to the place where it becomes effective." 1 Wharton Criminal Law §14 (15th ed. 2020). Kentucky adopted this principle in 1889:

> . . . it is well settled that, where one puts into operation the force or power that causes the injury, he is responsible where the wrong is perpetrated, although he may not be actually present. If either of the appellants had stood on the Virginia shore, and shot the deceased on the Kentucky side, the offense would have been against the laws of Kentucky.

Hatfield v. Commonwealth, 11 Ky.L.Rptr. 468, 12 S.W. 309 (1889).[2] Thereafter, the General Assembly enacted criminal statutes that prosecuted perpetrators of interstate communication crimes, including sending threatening letters (KRS 435.250) in 1942 and making obscene telephone calls (KRS 436.107) in 1966. Because the victims received these messages in Kentucky, these criminal acts occurred in Kentucky "where the wrong is perpetrated." *Hatfield, supra.*

Here is what the General Assembly knew when it enacted KRS 454.210:

- Constitutionally, Kentucky only had jurisdiction to prosecute crimes when the act occurred in Kentucky;

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[2] This case arises from the fabled feud of the Hatfields and McCoys.

- Kentucky could prosecute interstate communication crimes – telephone calls, letters – because the criminal act occurred in the Commonwealth when received by the victim;

- The victims could bring civil causes of actions against the perpetrators for their criminal tortious conduct, such as threatening telephone calls or letters KRS 446.070;

- As remedial legislation, Kentucky's long-arm statute was intended to extend the existing rights of Kentucky citizens, including against such out-of-state perpetrators; and,

- Kentucky's long-arm statute, like KRS 446.070 before it, and like every "civil, penal, and criminal statute" in Kentucky is to be liberally construed to promote its objects. KRS 446.080.

These "authoritative signals from the state's legislature or judiciary," *Hargis,* 785 F.3d at 195, demonstrate that the Kentucky Supreme Court would construe "an act . . . in this Commonwealth" as encompassing Ms. Griffin's out-of-state criminal tortious communications directed at the Commonwealth and targeted to its student citizens. In 1968, such threatening communications were precisely and necessarily understood as such "acts" for which victims could civilly sue the perpetrators. Indeed, the law Constitutionally required that the victim's receipt of the threat was the foundational "act" occurring in the State.

Other Federal and State authorities hold that criminal communicative acts occur where received. Under the Supreme Court's "true threat" analysis a speaker has no First Amendment protection because prohibiting

> true threats "protect(s) individuals from the fear of violence" and "from the disruption that fear engenders," in addition to protecting people "from the possibility that the threatened violence will occur."

Virginia v. Black, 538 US 343, 360 (2003). Such "true threats" are acts which occur when and where "those who hear or read the threat reasonably consider that an actual threat has been made." *United States v. Wheeler*, 776 F.3d 736, 743 (10th Cir. 2015). See also, *United States v. Alkhabaz*, 104 F.3d 1492, 1496 (6th Cir. 1997) (*actus reas* occurs when the communication is received and the recipient's well-being is disrupted.) State authorities are consistent. *State v. Meyers*, 825 P.2d 1062, 1064-65 (Hi. 1992) (a threat "constitutes conduct in the jurisdiction in which [it] is received."); *State v. Woolverton,* 159 P.3d 985, 993 (Ks. 2007) (a threatening communication "must be perceived and comprehended."); and, *Sykes v. State*, 578 N.W.2d 807 (Minn. App. 1998) (letters, telephone calls).

Kentucky adopted the Kentucky Penal Code in 1975 and abolished common law offenses. KRS 500.020(1). Nonetheless, the Code retains "the foundational provision" that a crime must include an act and an intention, *Mitchell, supra* at 805, citing KRS 501.030, and the territorial principle that a crime occurs in Kentucky where "the conduct or the result which is an element of the offense

occurs within this state." KRS 500.060. The Code includes the "true threat" harassment, threatening, and menacing communications provisions at issue in this case, which expand from threatening letters and telephone calls to all electronic forms of communication including the internet. See. e.g., KRS 525.080. Although the nature and scope of communication has changed, the fundamental principle remains: out-of-state threats to Kentucky residents are jurisdictional acts in Kentucky.

The criminal statutory origins of Kentucky "true threat" torts distinguishes these torts from common law communication torts involving out-of-state acts with only harmful consequences in Kentucky, such as mailing an invasion of privacy letter, *Pierce v. Serafin*, 767 S.W.2d 705 (Ky. App. 1990), or telephoning and emailing fraudulent representations or solicitations. *Management Registry, Inc. v. Consulting Partners, Inc.*, Civil Action no. 3:19-CV-00340 (W.D. Ky. 9/18/2019), *Perkins v. Bennett*, 2013 WL 6002761 (W.D. Ky. 2013), and *Barker v. Collins*, 2013 WL 3790904 (W.D. Ky. 2013). These torts do not Constitutionally require that, to be actionable, the tortious act occurred in Kentucky; rather, consequences are enough. However, "true threat" crimes that are actionable torts comprising both acts and intended harmful consequences in Kentucky. That is what the General Assembly understood and intended when it enacted Kentucky's long-arm statute to expand the rights and remedies of Kentucky citizens against out-of-state

perpetrators. Moreover, because criminally sourced torts arising from KRS 446.070 necessarily include predicate acts committed in Kentucky, recognizing that the General Assembly intended to encompass these within KRS 454.210(2)(a)(3) does not obviate subpart (2)(a)(4), which otherwise bars tortious consequence only claims. Similarly, such recognition does not throw Kentucky courthouse doors open to every set of facts which might give rise to tortious injury in Kentucky.

C. The District Court Could Exercise Personal Jurisdiction Over Ms. Griffin.

Territorial jurisdiction for criminal acts is not coextensive with personal jurisdiction in a civil case. Prosecutions only require the defendant's physical presence in the jurisdiction, irrespective how it was obtained, absent shocking and outrageous behavior. 2 LaFave, *Criminal Procedure* §3.1(j) at 56 (4th Ed. 2015). Civil actions require that the defendant "purposely availed himself of the privilege of acting in the forum state" by establishing a "substantial connection with the forum state" sufficient to satisfy due process "minimum contacts" with the forum so as to be fairly brought to its courts. *Power Investment, LLC v. SL EC LLC*, 927 F.3d 914, 917 (6th Cir. 2019), citing *Walden v. Fiore*, 571 US 277 (2014), and *Burger King Corp. v. Rudzewicz*, 471 US 462 (1985).

While recognizing this due process distinction, the criminal nature of Kentucky's true threat torts directly informs a Kentucky court's personal

jurisdiction over the plaintiffs/students' civil claims against Ms. Griffin. As noted, Ms. Griffin's predicate criminal acts Constitutionally and necessarily occurred in Kentucky.

> "[T]he locus delecti [of the crime charged] must be determined from the nature of the crime alleged and the location of the act or acts constituting it." *United States v. Cabrales,* 524 U.S. at 6-7. In determining the "locus delecti" of a crime, the Supreme Court directs us to "initially identify the conduct constituting the offense (the nature of the crime) and then discern the location of the commission of the criminal acts." *United States v. Rodriguez-Moreno*, 526 U.S. 275, 279.

Wood, supra, 364 F.3d at 710. By committing her criminal tortious conduct in Kentucky, Ms. Griffin is the person whose "unilateral activity" initiated the contact with the State, and whose "effects were purposely directed towards residents of Kentucky." *Power Investment, supra*, 927 F.3d at 919, quoting *Walden*, 571 US at 286, and *Burger King*, 471 US at 476. Because the students' "cause of action arises directly from [Ms. Griffin's] communications into Kentucky, it is reasonable to hold [her] to account in the State." *Power Investment* at 919.

In addition to the location of Ms. Griffin's communicative acts, the communicative nature of her criminal tortious behavior is determinative. It is the "quality of the contacts, not the quantity, that determines whether they constitute purposeful availment." *Neal v. Janssen*, 270 F.3d 328, 332 (6th Cir. 2001). Here, Ms. Griffin's criminally tortious communications were intentional; the content of

these communications was the core of her tortious activity; and, these communications necessarily had to be received in Kentucky.

Under the Supreme Court's "effects test" originating in *Calder v. Jones*, 465 U.S. 783 (1984) and *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), and modified by *Walden, supra*, "the existence of intentional tortious conduct nonetheless 'enhances' a party's other contacts with the forum state for the purposes" of personal jurisdiction. *Air Products and Control, Inc. v. Safetech Int'l., Inc.,* 503 F.3d 544, 552-553 (6th Cir. 2007). Moreover, "when the actual content of the communications into the forum gives rise to an intentional tort action, that alone may constitute purposeful availment." *Neal, supra* at 332. And, although Ms. Griffin "never entered Kentucky," the reality of modern communication is that her electronic communications into the Commonwealth were criminally tortious acts that she initiated and which were "purposely directed toward residents of" Kentucky. *Power Investment, supra* at 919, quoting *Burger King.*

Ms. Griffin's criminally tortious acts in Kentucky were not merely "random, fortuitous, or attenuated." *Burger King*, 471 U.S. at 475; *Walden*, 571 U.S. at 277. She did not accidentally send to her followers innocent information harmless to the Plaintiff students. Rather, she called for them to be doxed, electronically harassed, by revealing their personal and private information. Ms. Griffin's communications

were criminally tortious behavior targeted at the students for the purpose designed of engendering fear and disruption in them and their lives. Accordingly, Kentucky "has an especial interest in exercising judicial jurisdiction over those [like Ms. Griffin] who commit torts within its territory." *Keeton*, 465 U.S. at 776.

VII. CONCLUSION

The Court should reverse the District Court's Judgment under Civil Rule 12(b)(2) and remand the case for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This document complies with the page limitations in FRAP 32(a)(7) because the brief has 29 pages.

2. This document complies with the typeface requirements of FRAP 32(a)(5) and the type-style requirements of FRAP 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Times New Roman 14-point font.

/s/ Kent W. Seifried

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 8, 2020, an electronic copy of the Brief of Appellants was filed with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. The undersigned also certifies that the following participants who are registered users will be served via the CM/ECF system.

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ADDENDUM

DESIGNATION OF LOWER COURT DOCUMENTS

Pursuant to 6 Cir. R. 30(g), Appellants, hereby designate as relevant to this appeal those portions of the following District Court documents by record entry number and brief description:

Record Entry	Description	Page ID #
1	Complaint	1-13
6	Appearance of Counsel	28
7	Motion for Admission	29-30
9	Defendant Griffin's Motion to Dismiss for Lack of Jurisdiction	32-34
9-1	Defendant Griffin's Supporting Memorandum	35-58
14	Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss	70-102
20	Defendant Griffin's Reply Brief	113-134
31	Order Telephonic Hearing	157
47	Transcript of Proceedings: Motion Hearing on March 10, 2020	287-312
35	Plaintiffs' Supplemental Brief on Personal Jurisdiction	179-188
36	Defendant's Reply Brief	189-204
38	Memorandum Opinion & Order	220-234

39	Judgment	235
40	Plaintiffs' Motion for Reconsideration	236-249
41	Defendant's Response Opposing Motion for Reconsideration	251-263
42	Plaintiffs' Reply in Support of Motion for Reconsideration	264-272
43	Memorandum Opinion & Order	273-280
44	Plaintiffs' Notice of Appeal	281-282