Case No. 20-5723

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ONLINE MERCHANTS GUILD

Plaintiff-Appellee

v.

DANIEL J. CAMERON, in his official capacity as Attorney General of Kentucky

Defendant-Appellant

On Appeal from the United States District Court for the Eastern District of Kentucky
Case No. 3:20-cv-29

BRIEF OF ATTORNEY GENERAL CAMERON

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STATEMENT REGARDING ORAL ARGUMENT

This appeal requires the Court to decide whether to extend the extraterritoriality doctrine of the dormant Commerce Clause into an entirely new context. This is a question of first impression. This appeal also raises important questions about a recent organizational-standing decision from this Court. Oral argument should be held.

STATEMENT OF JURISDICTION

Online Merchants Guild invoked the district court's jurisdiction under 28 U.S.C. § 1331, as this matter arises under the United States Constitution. The Guild, however, lacks Article III standing. The district court granted the Guild's motion for a preliminary injunction on June 23, 2020, and Attorney General Daniel Cameron timely appealed on June 29, 2020. This Court has jurisdiction over the district court's interlocutory order granting the Guild's motion for a preliminary injunction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF ISSUES

This appeal challenges the district court's grant of a preliminary injunction against the Attorney General's enforcement of two Kentucky statutes in certain circumstances. The issues to be decided are:

1. Whether the district court correctly concluded that the Guild has established the requisite likelihood of success on the merits as to Article III standing (both organizational and associational standing) and as to the constitutionality of Ky. Rev. Stat. 367.374 and Ky. Rev. Stat. 367.170.
2. Whether the district court abused its discretion in granting a preliminary injunction.

STATEMENT OF THE CASE

During the Covid-19 pandemic, Kentucky Attorney General Daniel Cameron has actively protected Kentuckians against price gouging in the sale of essential goods. This has been important work, and there is more left to do.

A quick story demonstrates the stakes. In March of this year, two brothers amassed over 17,000 bottles of hand sanitizer and thousands of packs of antibacterial wipes. Jack Nicas, *He Has 17,700 Bottles of Hand Sanitizer & Nowhere to Sell Them*, N.Y. Times (Mar. 14, 2020).[1] Their stash came from driving a U-Haul across Tennessee and into Kentucky and filling it with all the essential goods they could buy. *Id.* One of the brothers "posted 300 bottles of hand sanitizer on [Amazon] and immediately sold them all for between $8 and $70 each, multiples higher than what he had bought them for." *Id.* The Attorneys General of Tennessee and Kentucky promptly investigated the brothers' scheme, after which the brothers donated the goods back to local communities. Lawrence Smith, *Kentucky, Tennessee authorities seize 17,000 bottles of hand sanitizer in alleged price gouging scheme*, WDRB.com (Mar. 20, 2020).[2]

This is only a small part of what Attorney General Cameron has done to combat price gouging during the Covid-19 crisis. To illustrate the volume of this undertaking,

[1] https://www.nytimes.com/2020/03/14/technology/coronavirus-purell-wipes-amazon-sellers.html (last visited Sept. 14, 2020).

[2] https://www.wdrb.com/news/kentucky-tennessee-authorities-seize-17-000-bottles-of-hand-sanitizer-in-alleged-price-gouging-scheme/article_cd56f5e0-6ac7-11ea-bf6b-ff9ce788c5be.html (last visited Sept. 14, 2020).

the Attorney General has received several thousand price-gouging complaints since the pandemic began. [Cocanougher Dec., R.21-2, PageID#133]. As relevant here, Attorney General Cameron also received information from Amazon.com, Inc. regarding alleged price gouging by Kentucky-based sellers on Amazon. [*Id.* at PageID#134]. This information related to the "prices of essential emergency medical supplies, including hand sanitizer and respirator masks." [*Id.*]. It showed "price increases from 79% to 1,951% based on the average selling price of the various items." [*Id.*].

Kentucky's protections against price gouging.

After receiving this information from Amazon, the Attorney General issued subpoenas and civil investigative demands (CIDs for short) to the identified Kentucky-based sellers. [*Id.*]. Kentucky's Consumer Protection Act empowers the Attorney General to take these investigatory steps. Ky. Rev. Stat. 367.240(1); Ky. Rev. Stat. 367.250. Kentucky law sets a low threshold for issuing a CID in these circumstances. *See Commonwealth ex rel. Hancock v. Pineur*, 533 S.W.2d 527, 529 (Ky. 1976) (allowing such "by nothing more than official curiosity" (citation omitted)). Because this evidentiary threshold is so low, it follows that a price-gouging investigation by the Attorney General does not necessarily mean that price gouging has occurred or that the Attorney General will institute enforcement proceedings.

Two Kentucky statutes limit price gouging of Kentuckians. The more specific of these statutes only applies during a specified emergency declared by Kentucky's governor or by the United States Department of Homeland Security. Ky. Rev. Stat.

367.374(1)(a). The Covid-19 virus prompted a governor-declared emergency in the Commonwealth. Kentucky's governor declared a state of emergency in the Commonwealth on March 6, 2020, and activated the price-gouging protections in Ky. Rev. Stat. 367.374 the next day. Exec. Order 2020-215 (Mar. 6, 2020); Exec. Order 2020-216 (Mar. 7, 2020).[3] These protections continue in force as of the filing of this brief. Exec. Order 2020-776 (Sept. 14, 2020).

This statute does not prohibit any and all price increases during a governor-declared emergency. Far from it. Instead, it prohibits a person from selling, renting, or offering to sell or rent specified goods or services "for a price which is grossly in excess of the price prior to the declaration [of emergency] and unrelated to any increased cost to the seller." Ky. Rev. Stat. 367.374(1)(b). The statute has several meaningful safe harbors. It does not apply, for example, if the seller's current price is ten percent or less above the price prior to the emergency declaration, if the current price is ten percent or less "above the sum of the person's costs and normal markup for a good or service," or if the current price is "[g]enerally consistent with fluctuations in applicable commodity, regional, national, or international markets, or seasonal fluctuations." Ky. Rev. Stat. 367.374(1)(c). Whether a seller has violated this statute requires consideration of "all

[3] The executive orders can be accessed on the Kentucky Secretary of State's website: http://web.sos.ky.gov/execjournal/(S(cyg40uuasoexs2n0qpzojved))/jrnl.aspx (last visited Sept. 15, 2020).

relevant circumstances, including prices prevailing in the locality at the time." Ky. Rev. Stat. 367.374(1)(d).

The other Kentucky statute that regulates price gouging is the general prohibition in Kentucky's Consumer Protection Act. This provision prohibits "[u]nfair, false, misleading, or deceptive acts or practices in the conduct of any trade or commerce." Ky. Rev. Stat. 367.170(1). The term "unfair"—what applies in the context of price gouging—means "unconscionable." Ky. Rev. Stat. 367.170(2). As relevant here, the terms "trade" and "commerce" mean advertising, offering for sale, or distributing a good so as to "directly or indirectly affect[] the people of this Commonwealth." Ky. Rev. Stat. 367.110(2). This statute, in other words, protects "Kentucky consumers." *See Stevens v. Motorists Mut. Ins. Co.*, 759 S.W.2d 819, 821 (Ky. 1988).

Although the Attorney General has opened price-gouging investigations of the Kentucky-based sellers identified by Amazon, the Attorney General has not taken enforcement action against any of them. Nor was he, prior to the preliminary injunction issued in this case, close to doing so. At that point, his investigations were "in their preliminary stages." [Cocanougher Dec., R.21-2, PageID#134].

This lawsuit.

Online Merchants Guild, which bills itself as a "trade association" that advocates for online merchants, filed this suit on May 1, 2020. [Compl., R.1, PageID#3]. Although the Attorney General has not sent a subpoena and CID to the Guild, this lawsuit nev-

ertheless seeks—on the Guild's behalf and on behalf of its members—to halt the Attorney General's investigations of Amazon sellers before those investigations get off the ground.[4] The Guild's legal claims are sweeping: In its view, it is unconstitutional for the Attorney General to enforce Kentucky's price-gouging statutes against anyone that sells goods on Amazon, even if a seller offers or sells goods to a Kentuckian. [*Id.* at PageID#14–16]. Although the Guild's complaint invokes a host of constitutional provisions, at issue now is whether the dormant Commerce Clause, specifically its protection against extraterritorial state action, prohibits the Attorney General from enforcing Kentucky's price-gouging statutes against Kentucky-based Amazon sellers that sell or offer to sell goods to Kentuckians.

The Guild sought immediate injunctive relief upon filing suit. [Inj. Mtn., R.10, PageID#37–57]. Its motion attached a lengthy, self-serving declaration—replete with hearsay and speculation—from the Guild's executive director, who also is counsel of record in this matter. As relevant here, the Guild's counsel describes how, in his view, Amazon's online marketplace works for sellers like the Guild's members.[5] The Guild's

[4] One of the Guild's members also sued the Attorney General in Kentucky state court seeking to set aside the Attorney General's CID. *Jones & Panda, LLC v. Commonwealth*, 2020-CI-1252 (Fayette Circuit Court). The court initially prohibited enforcement of the CID on state-law grounds, and that action is now stayed pending the resolution of this appeal.

[5] At this early stage, and due to the expedited nature of briefing and argument on the Guild's motion for a preliminary injunction, the self-serving declaration of the Guild's counsel and executive director is the only evidence in the record about how Amazon functions. The Guild's averments will be thoroughly tested during discovery.

counsel labels Amazon a "single national marketplace," in which a seller cannot "engage in Kentucky-specific sales or pricing" or "realistically avoid making sales in Kentucky." [Rafelson Dec., R.10-1, PageID#63]. He avers that "[o]nly Amazon can control where and how search results are displayed" and that "Amazon has ultimate control over prices in its store." [*Id.*]. The long and short of the Guild's view is that Amazon does not allow third-party sellers to market only to Kentuckians or at Kentucky-specific prices.

The district court denied the Guild's motion for a temporary restraining order due to the lack of immediate irreparable harm. [Order, R.18, PageID#96]. The court reasoned: "Based on the limited record in this case, there is no indication that any of [the Guild's] members are in jeopardy of being prosecuted in the very near future. As conceded by [the Guild], all that is alleged is that the Attorney General has begun investigating its members which *may* lead to enforcement actions." [*Id.*].

The district court's preliminary injunction.

Nevertheless, after expedited briefing and oral argument, the district court sustained the Guild's motion for a preliminary injunction. *Online Merchants Guild v. Cameron*, __ F. Supp. 3d __, 2020 WL 3440933 (E.D. Ky. June 23, 2020).

The court began by concluding that the Guild possesses Article III standing in its own right and on behalf of its members. Taking each in turn, the district court found that the Guild had suffered an injury-in-fact due to a "diversion of resources from its

ordinary spending as an organization." *Id.* at *4. The Guild's actions related to the Attorney General's price-gouging investigations, the court reasoned, "are not ordinary undertakings in the context of the services and benefits [the Guild] typically offers its members." *Id.* As to associational standing, the court acknowledged that the "statutes at issue have yet to be enforced against . . . any Merchants Guild member, making this a pre-enforcement challenge." *Id.* at *5. The court reasoned that one of the Guild's members has a "credible threat of prosecution" by the Attorney General and that the Guild satisfies the remaining elements of associational standing. *Id.* at *5–*6.

As to the merits, the district court found that the Guild "is likely to succeed in showing that the practical effect of [the] Attorney General's recent investigations into possible [price-gouging] violations violates the dormant Commerce Clause." *Id.* at *10. This case, the court held, implicates what is known as the extraterritoriality doctrine, which prohibits state laws that "directly control[] commerce occurring wholly outside the boundaries of a State . . . ." *Id.* at *9 (citation omitted). In applying this doctrine, the court found that "the nature of [the Guild's] members' relationship with Amazon is key." *Id.* at *10. It reasoned: "[I]f the Attorney General deems a price [on Amazon] excessive as compared to other Kentucky prices, then Merchants Guild's members are effectively restricted from changing that price in Kentucky or anywhere else." *Id.*

The court broadly enjoined the Attorney General "from applying KRS § 367.170 and KRS § 367.374, including by subpoena, investigation, or prosecution, to Amazon suppliers in connection with offers or sales on Amazon." *Id.* at *13. Since this injunction

issued, the Attorney General has been categorically prohibited from merely investigating alleged price gouging by any Amazon seller.

SUMMARY OF ARGUMENT

The district court's preliminary injunction should be reversed. It prevents the Attorney General—in the midst of the Covid-19 crisis—from investigating suspected price gouging by any seller on Amazon's website.

The merits of the Guild's constitutional challenge to Kentucky's price-gouging laws do not warrant this far-reaching relief. For starters, the Guild lacks Article III standing. The Guild does not have standing in its own right because responding to its members' price-gouging concerns is part and parcel of its organizational mission. This being so, the Guild cannot establish that the Attorney General's price-gouging investigations caused any diversion of resources from this mission sufficient to establish an injury-in-fact. Nor does the Guild possess standing through its members. Considering all relevant circumstances, the Attorney General's investigations do not give rise to a credible threat of an enforcement action under Kentucky's price-gouging laws.

Even putting aside the Guild's lack of standing, the Guild's dormant Commerce Clause claim is bound to fail. The district court concluded otherwise by invoking the extraterritoriality doctrine. But this narrow, little-used doctrine only applies where state law dictates or controls wholly out-of-state conduct, and there are good reasons not to expand this doctrine. Kentucky's price-gouging laws operate within the historical bounds of the extraterritoriality doctrine because the statutes allow sellers to sell goods

in Kentucky for one price while selling those same goods in other states for different prices. The nature of Amazon's platform, which the Guild claims limits a seller's ability to charge a Kentucky-specific price or market to a Kentucky-specific audience, does not alter this conclusion. For those sellers that voluntarily choose to sell goods through Amazon's platform, Kentucky law does not control wholly out-of-state conduct. In addition, the extraterritoriality doctrine focuses on ensuring that sellers can charge state-specific prices, not on enabling sellers to charge a single price nationwide that states cannot regulate under their police powers. Moreover, the Guild's expansive view of the extraterritoriality doctrine runs headlong into the longstanding rule that states, consistent with the Commerce Clause, can regulate the structure of a particular market.

The other preliminary-injunction factors likewise weigh in the Attorney General's favor. Without a likelihood of success on the merits, the Guild cannot demonstrate any irreparable harm. In addition, the harm to others that flows from the district court's preliminary injunction is substantial. Under the preliminary injunction, the Attorney General cannot even investigate an Amazon seller for suspected price gouging, no matter the severity of the seller's alleged conduct. The public interest favors allowing the Attorney General to enforce Kentucky's price-gouging laws to protect Kentuckians.

STANDARD OF REVIEW

The Court reviews the ultimate decision to grant a preliminary injunction for an abuse of discretion. *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014) (en banc) (per curiam). However, whether the moving party has established

a likelihood of success on the merits is a legal question subject to *de novo* review, while the Court's review of any factual findings is for clear error. *Id.*

ARGUMENT

This appeal challenges a preliminary injunction that prohibits Kentucky's Attorney General from enforcing the Commonwealth's price-gouging statutes against third parties that sell goods on Amazon. This preliminary injunction meaningfully limits the Commonwealth's ability to regulate price gouging during the Covid-19 pandemic and, therefore, to protect its citizens as it sees fit.

Preliminary injunctions are not the norm. Instead, they are an "extraordinary remedy" that involves the "exercise of a very far-reaching power." *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000) (citation omitted). As such, a preliminary injunction should be granted "only if the movant carries his or her burden of proving that the circumstances clearly demand it." *Overstreet v. Lexington-Fayette Urban Cty. Gov't*, 305 F.3d 566, 573 (6th Cir. 2002). In applying this exacting standard, a court must weigh four factors: "whether the plaintiff[] will likely win down the road, whether an injunction would prevent the plaintiff[] from being irreparably harmed, whether an injunction would harm others, and how the injunction would impact the public interest." *McNeil v. Cmty. Probation Servs., LLC*, 945 F.3d 991, 994 (6th Cir. 2019).

For the reasons that follow, all four factors cut decidedly in the Attorney General's favor. The Guild has not established Article III standing, and its constitutional

argument requires stretching the extraterritoriality doctrine past its breaking point. A preliminary injunction should not have issued.

I. The Guild has not sufficiently demonstrated Article III standing.

An essential part of showing a likelihood of success on the merits is establishing Article III standing. *Waskul v. Washtenaw Cty. Cmty. Mental Health*, 900 F.3d 250, 256 n.4 (6th Cir. 2018). The Guild has failed to demonstrate that it possesses either organizational standing or associational standing.

A. The Guild lacks organizational standing.

The Guild does not have standing in its own right because the Guild has not demonstrated an injury-in-fact. In holding to the contrary, the district court misinterpreted this Court's recent organizational-standing decision in *Shelby Advocates for Valid Elections v. Hargett*, 947 F.3d 977 (6th Cir. 2020) (per curiam).

In *Shelby Advocates*, a group of plaintiffs sued several state election officials. *Id.* at 979. The central issue was whether the plaintiffs, made up of both individuals and one organization, possessed Article III standing. *Id.* at 979–80. The organizational plaintiff "focuse[d] on 'research, advocacy, and education to ensure the fundamental right to vote in public elections.'" *Id.* at 979. The organization "pursue[d] these goals by submitting open records requests about elections, reporting on election security, monitoring national developments in election law, organizing public events, and advocating for election reform." *Id.* To prove its organizational standing, the organization advanced a

diversion-of-resources theory, much like the Guild has here. *Id.* at 981 ("And [the organization] says it separately has organizational standing to litigate in its own right because the election problems caused it to divert resources from its other activities.").

The Court rejected the organization's diversion argument. It reasoned that the organization "did not divert resources from its mission to prepare for litigation in this case. The alleged diversionary actions—spending money to 'bring, fund, and participate in this litigation' and spending its resources 'to address the voting inequities and irregularities' throughout the county—do not divert resources from its mission. That is its mission." *Id.* at 982 (internal citations omitted). *Shelby Advocates* therefore instructs that if the alleged diversionary actions are actually part of the organization's mission, then there is no diversion of resources and thus no injury-in-fact. *See id.*; *see also Nemes v. Bensinger*, __ F.R.D. __, 2020 WL 3260994, at *5 (W.D. Ky. June 16, 2020) (applying *Shelby Advocates* to conclude that "the Campaign cannot establish organizational standing by simply spending more money on initiatives that ultimately support its mission").

In this case, the Guild has similarly argued that it has organizational standing because it diverted resources "to address the impacts of the challenged law." [Compl., R.1, PageID#4]. However, a careful examination reveals that, in reality, no such diversion occurred. The Guild's self-proclaimed purpose is to "*advocate* for a free and fairly-regulated online marketplace, and for the interests of online merchants." [Rafelson Dec., R.10-1, Page ID#60 (emphasis added)]. With that as its mission, the Guild has

not established how the Attorney General's investigation prompted a diversion of resources as opposed to a mere expenditure of resources. The Guild's alleged diversionary actions are not distinct from the reason that the Guild exists. These actions—working with its members to address price-gouging concerns [*id.* at PageID#65–66]—are quintessential examples of protecting "the interests of online merchants" and advocating for what the Guild views as "a free and fairly-regulated online marketplace." The Guild's averments about how the Attorney General's investigation allegedly affects online merchants and the online marketplace prove this point. [*Id.* at PageID#66–68].

The district court nonetheless found a sufficient diversion of resources. Although the court cited *Shelby Advocates*, it failed to do what that decision requires: to compare the alleged diversionary actions with the organization's mission and determine if the former is part of the latter. Instead, the district court emphasized that before the Covid-19 crisis, the Guild did not regularly deal with price gouging. The court reasoned: "Merchants Guild's counsel represented that it spent 'little to no time' on price gouging issues prior to the pandemic. In other words, Merchants Guild's recent efforts are not ordinary undertakings in the context of the services and benefits it typically offers its members." *See Online Merchants Guild*, 2020 WL 3440933, at *4. To the court, this comparison of prior conduct to current conduct served as conclusive evidence that responding to price-gouging investigations was a "novel matter" for the Guild that "constitutes a diversion of resources from its ordinary spending as an organization." *Id.*

This analysis misses the mark for several reasons. To begin, *Shelby Advocates* contains no such "novel matter" exception to its rule. Under the district court's holding, an organization can show a diversion of resources merely by undertaking an activity for the first time, regardless of whether that activity is part of the organization's mission. *Shelby Advocates* does not leave room for an "ordinary undertaking" versus "novel matter" test. *See Shelby Advocates*, 947 F.3d at 982 ("The alleged diversionary actions . . . do not divert resources from its mission. That is its mission.").

Aside from there being no support for it, the "novel matter" exception also is ill-advised because it ignores the reality that an activity can be both novel *and* consistent with the organization's mission. Those two concepts—novelty and consistency with the mission—are not mutually exclusive. Take, for example, an activity that the Guild admits falls within the scope of its mission: advising members about the tax implications of selling goods online. [Oral Arg. Trans., R.40, PageID#546]. As part of this work, the Guild filed an *amicus curiae* brief in *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018). Brief of *Amicus Curiae* Online Merchants Guild in Support of Respondents, *South Dakota v. Wayfair, Inc.*, 2018 WL 1705597 (Apr. 4, 2018). No doubt that after the Supreme Court issued its landmark decision in *Wayfair*, the Guild advised its members—*for the*

first time—of the implications of the decision.[6] In that limited sense, advising its members regarding *Wayfair* was "novel." However, that "novel" undertaking and the attendant expenditure of organizational resources were not inconsistent with the Guild's mission. Rather, that activity was simply a new way of achieving the same old mission.

Likewise, the Covid-19 pandemic may have caused the Guild to begin advising its members about the implications of price-gouging laws. But that undertaking was simply an instance of the Guild applying its preexisting mission to a new issue facing its members. That is to say, activity related to what is currently confronting the Guild's members is a mere use, not a diversion, of organizational resources. "That is [the Guild's] mission." *See Shelby Advocates*, 947 F.3d at 982.

Had the district court applied the framework from *Shelby Advocates*, the court would have appreciated the importance of the unmistakable connection between the Guild's conduct and its mission. Indeed, this connection was not lost on the district court. In finding that the Guild also has associational standing (discussed in detail below), the court "easily" concluded that the relief sought by the Guild is "germane to its purpose." *Online Merchants Guild*, 2020 WL 3440933, at *6. As the court put it, the Guild seeks "enjoinment of the investigatory and enforcement actions undertaken pursuant

[6] To this end, the Guild has dedicated part of its website to explaining the impact of *Wayfair*, which the Guild published the day after the decision came down. What Wayfair Means for Online Merchants, *available at* https://onlinemerchantsguild.org/what-wayfair-means-for-online-merchants/ (last visited Sept. 15, 2020).

to the price gouging statutes—relief which is *certainly in line* with its purpose of advocating for a free and fairly-regulated marketplace." *Id.* (emphasis added). Under *Shelby Advocates*, this acknowledgement undercuts the district court's diversion-of-resources holding.

B. The Guild lacks associational standing.

The Guild's second standing argument fares no better. To prove associational standing, the Guild must demonstrate, among other things, that one of its members would have standing if it sued directly. *See Sierra Club v. E.P.A.*, 793 F.3d 656, 661–62 (6th Cir. 2015). This the Guild cannot do because the purported injury suffered by its members—fear that the Attorney General *might* bring an enforcement action at some point in the future—is too speculative and remote. At the time the Guild filed this action, and even to this day, all the Attorney General has done is attempt to investigate allegations of price gouging. And under Kentucky law, the Attorney General's investigation into the Guild's members is not simply a formality before bringing an enforcement action. Investigation and enforcement are two separate processes, with the investigation playing a critical role in determining whether a price-gouging violation occurred in the first place.

In a pre-enforcement challenge like this, an "allegation of future injury" may satisfy the injury-in-fact requirement if the "threatened injury is certainly impending, or there is a substantial risk that the harm will occur." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (internal quotation marks and citation omitted). Specifically, a

plaintiff must establish "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by statute, and there exists a credible threat of prosecution thereunder." *Id.* at 159 (citation omitted). This Court has distilled the "credible threat of prosecution" showing to require, as relevant here, a plaintiff to "point to some combination of the following factors: (1) a history of past enforcement against the plaintiffs or others; (2) enforcement warning letters sent to the plaintiffs regarding their specific conduct; and/or (3) an attribute of the challenged statute that makes enforcement easier or more likely, such as a provision allowing any member of the public to initiate an enforcement action." *McKay v. Federspiel*, 823 F.3d 862, 869 (6th Cir. 2016) (internal citations omitted). The Court also "take[s] into consideration a defendant's refusal to disavow enforcement of the challenged statute against a particular plaintiff." *Id.*

Although the district court correctly identified the factors from *McKay* as establishing the relevant standard, the court incorrectly applied that standard.

1. History of past enforcement.

The Guild failed to carry its burden under the history-of-past-enforcement factor. The record lacks any evidence that the Attorney General has previously enforced Kentucky's price-gouging statutes against online merchants. This lack of evidence weighs against finding a sufficiently imminent threat of future enforcement. *See Susan B. Anthony List*, 573 U.S. at 164 ("We have observed that past enforcement against the

same conduct is good evidence that the threat of enforcement is not 'chimerical.'" (citation omitted)).

2. Warning letters.

Next, the Guild has failed to satisfy the second factor: the existence of warning letters. The Guild argued below, and the district court agreed, that the language in the CID that the Attorney General sent to one of the Guild's members is probative evidence of a credible threat of prosecution. *Online Merchants Guild*, 2020 WL 3440933, at *6. A close examination of the CID, however, shows that it is nothing like the warning letters that this Court has previously found to create a credible threat of prosecution.

A review of two of the leading "warning letter" cases in this Court, *Kiser v. Reitz*, 765 F.3d 601 (6th Cir. 2014), and *Berry v. Schmitt*, 688 F.3d 290 (6th Cir. 2012), makes this point clear. In *Kiser*, the Court held that the plaintiff, a dentist, had shown a credible threat of enforcement by the state dental board where the board had sent him two separate letters. *Kiser*, 765 F.3d at 609. In the first, the board indicated that it had "investigated his practice and determined that his advertising or services were 'outside the scope' of his specialty, and thus in violation of the regulations." *Id.* Several years later, the dentist asked the board to approve signage for his office. *Id.* at 605. In response, the board sent him a second letter, "reiterat[ing] its warning that [the dentist] was advertising beyond the scope of his specialty" in violation of state law and recommending that he consult legal counsel. *Id.* at 605, 609. The second letter also attached a copy of

the first letter. *Id.* at 605. The Court held that "together" these letters "constitute[d] a credible threat that [the dentist] will be subject to an enforcement action." *Id.* at 609.

Similarly, in *Berry*, the Court held that the plaintiff, an attorney, had shown a credible threat of enforcement after receiving two written warnings from a state bar association. *Berry*, 688 F.3d at 297. Based on its "lengthy investigation," the bar association had concluded that the attorney's initial conduct was inappropriate. *Id.* at 295, 297. Crucial to the Court's analysis was the first letter "unequivocally stat[ing]" that the attorney had violated the relevant rule and its "caution[] . . . not to let it happen again." *Id.* at 297. The bar association's second letter "reaffirmed the threat of future enforcement." *Id.*

Here, the CID issued to one of the Guild's members meaningfully differs from the multiple letters in *Kiser* and *Berry*. The cover letter to the CID made clear that the Attorney General was "opening" an investigation into whether any violation of state law had occurred, not that an investigation had been conducted and completed. [CID, R.22-1, PageID#173]. Consequently, unlike the *Kiser* and *Berry* warning letters, the CID did not state, nor could it have stated, that the Attorney General had evaluated all relevant evidence after an investigation and concluded that the recipient had broken the law. Moreover, the Attorney General issued a single CID with a cover letter to the Guild's member, whereas the government actors in *Kiser* and *Berry* sent repeated letters.

The district court emphasized language in the CID stating that the Attorney General had "reason to believe" that the recipient "ha[d] engaged in, is engaging in, or is

about to engage in any act or practice declared to be unlawful by" the price-gouging statutes. *Online Merchants Guild*, 2020 WL 3440933, at *6. But that language simply recites part of the statutory standard for issuing a CID. *See* Ky. Rev. Stat. 367.240(1). Moreover, as the district court noted, "[t]he CID then goes on to list specific information [the Guild member] is to provide to the Attorney General which, logically, will factor into the decision on whether to bring suit for price gouging under the statutes." *Online Merchants Guild*, 2020 WL 3440933, at *6. In other words, the CID demonstrates that the Attorney General has not pre-judged the matter and needs additional information before deciding whether any price-gouging violation has occurred and whether to institute enforcement proceedings.

The Guild likewise attaches outsized importance to a single sentence in the cover letter that accompanied the CID. The Guild points to the "cease and desist" language therein—namely, "[t]o the extent your current pricing practices are in violation of the aforementioned statute, you are hereby directed to immediately cease and desist from such violations." [CID, R.22-1, PageID#173]. However, the "[t]o the extent" qualification in this sentence acknowledges that the member's conduct may not violate the price-gouging statutes. Moreover, this sentence does not negate the overall message of the letter, which is that the Attorney General was just starting an investigation and that additional information was needed. Perhaps more importantly, the cited language evidences nothing more than a general admonishment to follow the law.

3. Public statements.

In addition to the language of the CID, the district court pointed to the Attorney General's "public statements" as proof of a credible threat of enforcement. *Online Merchants Guild*, 2020 WL 3440933, at *6. The only public statement mentioned by the Guild is a press release from March 26, 2020, in which the Attorney General announced his office's efforts to respond to suspected price gouging by Amazon sellers during the Covid-19 crisis. The Guild is most critical of the following language: "The egregious actions of these third-party sellers will not be tolerated in Kentucky, and the subpoenas we issued should serve as a warning to anyone who tries to illegally profit from COVID-19. I am grateful to Amazon for working with us to stop these predatory practices by third-party sellers."[7] However, when the press release is read as a whole, and when it is compared to the CID, it is obvious that enforcement by the Attorney General is not sufficiently imminent. The release notes that the price gouging is "suspected" and "alleged[]," emphasizing that "investigations are continuing"—all of which convey that the Attorney General is not on the cusp of enforcement. This is especially true considering that the CID on which the Guild relies was issued the day before the Attorney General's press release.

In addition, the press release was designed for public consumption and was broadcast widely. Because of that, the press release is a statement that "address[es] the

[7] Mar. 26, 2020 Press Release, *available at* https://kentucky.gov/Pages/Activitystream.aspx?n=AttorneyGeneral&prId=888 (last visited Sept. 15, 2020).

general public" that "do[es] not give rise to the same level of threatened enforcement." *See McKay*, 823 F.3d at 869. In any event, the press release still lacks probative value for the same reasons that the language in the CID does not suffice. Simply put, unlike the warning letters in *Kiser* and *Berry*, the Attorney General's press release does not communicate that the Attorney General has completed an investigation and that charges will be forthcoming unless the subject changes his or her behavior.

4. Nature of the price-gouging statutes.

The third *McKay* factor—whether an attribute of the challenged statutes makes enforcement easier or more likely—also weighs in the Attorney General's favor. Here, the primary price-gouging statute, Ky. Rev. Stat. 367.374, contains several safe harbors and exceptions to a finding of liability. It lists five separate circumstances under which "[a] person's price does not violate this subsection," including if the price is ten percent or less above the sum of the person's costs and normal markup for a good or service. Ky. Rev. Stat. 367.374(1)(c)(3). Together, these defenses, which are either individualized or context-specific, "make enforcement less certain." *See McKay*, 823 F.3d at 869.

These statutory exceptions also indicate that the Attorney General is hard pressed to determine whether the price-gouging statute has been violated until after he reviews data about the seller's business practices. He must ascertain, for example, the seller's "costs and normal markup for a good or service" or whether there was an "additional cost imposed by a supplier of a good or other costs of providing the good or service." Ky. Rev. Stat. 367.374(c)(1), (3). In short, these statutory exceptions make clear

that a CID is not a mere precursor to an enforcement action, but is an investigatory tool to determine whether a statutory violation occurred under the unique circumstances facing the seller.

The same goes for Ky. Rev. Stat. 367.170, the other Kentucky statute relevant to price gouging. As explained above, this statute does not prohibit any and all price increases, but only those that are "unconscionable." Ky. Rev. Stat. 367.170(2). This requires the Attorney General to take account of all relevant circumstances. *See Ford Motor Co. v. Mayes*, 575 S.W.2d 480, 485–86 (Ky. App. 1978). Thus, under Ky. Rev. Stat. 367.170 as well, a CID is an investigatory tool to ascertain the relevant facts, not a tell that an enforcement action is forthcoming.

The fact that Kentucky law allows a consumer to bring a private collection action against an alleged price gouger under certain circumstances does not change any of the above. *See* Ky. Rev. Stat. 367.220(1). The Attorney General is, far and away, the primary enforcer of Kentucky's Consumer Protection Act. *See Commonwealth ex rel. v. Stephens v. N. Am. Van Lines, Inc.*, 600 S.W.2d 459, 460–61 (Ky. App. 1979); *Commonwealth ex rel. Chandler v. Anthem Ins. Cos., Inc.*, 8 S.W.3d 48, 55 (Ky. App. 1999). Only the Attorney General can conduct investigations using CIDs and subpoenas. Ky. Rev. Stat. 367.240; Ky. Rev. Stat. 367.250. And only the Attorney General can seek broad injunctive relief and civil penalties against suspected price gougers. Ky. Rev. Stat. 367.190(1); Ky. Rev. Stat. 367.990(2). If the Attorney General secures relief under the act, that is prima facie

evidence of illegality in a private action. Ky. Rev. Stat. 367.220(4). And often, the timeliness of a private action is keyed to when the Attorney General concludes an enforcement action. Ky. Rev. Stat. 367.220(5). The Attorney General's primacy in enforcing Kentucky's price-gouging laws, with only residual enforcement power given to consumers, is altogether unlike the statute in *Susan B. Anthony* list. *See Susan B. Anthony List*, 573 U.S. at 164.

5. Disavowal of prosecution.

The final piece of evidence cited by the district court as proof of a credible threat of enforcement is the Attorney General's "repeated[] refus[al] to disavow enforcement of the statutes." *Online Merchants Guild*, 2020 WL 3440933, at *6. Like in *McKay*, however, the district court should have used a more flexible, "nuanced" approach. *See McKay*, 823 F.3d at 870 ("Finally, the issue of disavowal in this case appears to be more nuanced than [the plaintiff] suggests."). Specifically, the court should have held that because the Attorney General has only begun investigating suspected price gouging, he cannot be expected to disavow future enforcement. That is, what reasonable government official would disavow enforcement before he or she even investigates and reviews all of the relevant evidence, especially in a situation where the possible defenses are fact-specific and defendant-specific? It is not reasonable to expect the Attorney General to disavow enforcement under these circumstances.

* * *

When the record is considered as a whole, the Guild has not established a credible threat of enforcement of the price-gouging statutes against one of its members. It therefore lacks associational standing.

II. The Guild has not sufficiently demonstrated a violation of the dormant Commerce Clause.

The district court's merits holding rests entirely on its conclusion that Kentucky's price-gouging laws have the "type of impermissible extraterritorial effect on interstate commerce forbidden by the dormant Commerce Clause." *Online Merchants Guild*, 2020 WL 3440933, at *12. This represents a dramatic and unwarranted expansion of the current doctrine, not to mention a significant curb on states' police powers.

Although the Commerce Clause is "framed as a positive grant of power to Congress," the clause "also prohibits state laws that unduly restrict interstate commerce." *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2459 (2019) (citation omitted). This is known as the dormant Commerce Clause, and it is "driven by concern about 'economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'" *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 337–38 (2008) (citation omitted).

In most cases, dormant Commerce Clause challenges proceed in two steps. The Court first asks whether a law discriminates against interstate commerce. *E. Ky. Res. v. Fiscal Court of Magoffin Cty.*, 127 F.3d 532, 540 (6th Cir. 1997). If a law is discriminatory,

to withstand scrutiny, it must be narrowly tailored to advance a legitimate local purpose. *Thomas*, 139 S. Ct. at 2461. If a law is not discriminatory, the court proceeds to step two, which asks whether any "burdens on interstate commerce [created by the law] are 'clearly excessive in relation to the putative local benefits.'"[8] *E. Ky. Res.*, 127 F.3d at 540 (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

But this two-step test is not the be-all-end-all. The dormant Commerce Clause also prohibits laws that violate the so-called extraterritoriality doctrine. This doctrine is the "dormant branch of the dormant Commerce Clause." *Am. Beverage Ass'n v. Snyder*, 735 F.3d 362, 377 (6th Cir. 2013) (Sutton, J., concurring) (citation omitted). A majority of the Supreme Court has used it "to strike down state laws only three times." *Energy & Env't Legal Inst. v. Epel*, 793 F.3d 1169, 1172 (10th Cir. 2015) (Gorsuch, J.). And in *none* of those cases did the Supreme Court "rel[y] exclusively on the extraterritoriality doctrine to invalidate a state law."[9] *Snyder*, 735 F.3d at 381 (Sutton, J., concurring). The district court's merits holding, however, turns exclusively on this little-used doctrine.

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[8] The district court has not yet applied this second step—known as the *Pike* balancing test—to Kentucky's price-gouging laws. The Supreme Court, however, "has not invalidated a law under *Pike* balancing in three decades." *Garber v. Menendez*, 888 F.3d 839, 845 (6th Cir. 2018). And this case is not a "good candidate to break the streak." *See id.* At this early stage, the Guild has come nowhere close to meeting its burden of proof as to *Pike* balancing, especially in light of the importance of protecting Kentucky consumers during the Covid-19 crisis.

[9] Some members of this Court have questioned whether, as a matter of first principles, the extraterritoriality doctrine should continue to apply. *Snyder*, 735 F.3d at 378 (Sutton, J., concurring); *Ammex, Inc. v. Wenk*, 936 F.3d 355, 369 (6th Cir. 2019) (Bush, J., concurring in the judgment). The district court raised similar concerns. *Online Merchants*

The doctrine traces to *Baldwin v. G.A.F. Seelig, Inc.*, which concerned a state law that prohibited the sale of out-of-state milk unless the producer received the minimum amount payable to an in-state producer. 294 U.S. 511, 519 (1935). The parties agreed that one state "has no power to project its legislation into [another state] by regulating the price to be paid in that state for milk acquired there." *Id.* at 521.

The notion of one state "project[ing] its legislation" into another state meaningfully reappeared in the 1980's in *Brown-Forman Distillers Corporation v. New York State Liquor Authority*, 476 U.S. 573 (1986), and *Healy v. Beer Institute, Inc.*, 491 U.S. 324 (1989).[10] In *Brown-Forman*, New York required distillers that sell liquor to wholesalers in the state to affirm that their New York prices are no higher than the lowest price they charge nationwide. *Brown-Forman*, 476 U.S. at 575–76. New York tried to use this statute to revoke Brown-Forman's license because Brown-Forman had given promotional allowances to wholesalers in other states, which New York believed impermissibly "lowered the effective price of Brown-Forman brands to those wholesalers." *Id.* at 576–77.

In finding New York's statute to be invalid, the Court observed that "[o]nce a distiller has posted prices in New York, it is not free to change its prices elsewhere in the United States during the relevant month. Forcing a merchant to seek regulatory

Guild, 2020 WL 3440933, at *9 n.9. At this stage, however, that issue is not open for debate.

[10] Another relevant case is *Edgar v. MITE Corporation*, in which a plurality of the Court applied the extraterritoriality doctrine. 457 U.S. 624, 641–43 (1982) (plurality op.).

approval in one state before undertaking a transaction in another directly regulates interstate commerce." *Id.* at 582 (footnote omitted). The state, the Court explained, "may regulate the sale of liquor within its borders, and may seek low prices for its residents, [but] it may not 'project its legislation into [other States] by regulating the price to be paid' for liquor in those States." *Id.* at 582–83 (citation omitted).

The Court built on *Brown-Forman* three years later in *Healy*, which concerned Connecticut's price-affirmation statute for beer. This statute required "out-of-state shippers of beer to affirm that their posted prices for products sold to Connecticut wholesales are, as of the moment of posting, no higher than the prices at which those products are sold" in bordering states. *Healy*, 491 U.S. at 326. In considering this statute, the Court laid out three "propositions":

- "First, the Commerce Clause precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State . . . ." *Id.* at 336 (citation omitted) (cleaned up).

- "Second, a statute that directly controls commerce wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature." *Id.* In making this determination, the "critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Id.*

- "Third, the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation." *Id.*

Applying these principles, *Healy* concluded that "the Connecticut statute has the extraterritorial effect, condemned in *Brown-Forman*, of preventing brewers from undertaking competitive pricing in [a bordering state] based on prevailing market conditions." *Id.* at 338. Justice Scalia wrote separately, labeling the Court's extraterritoriality discussion as "questionable" given that "innumerable valid state laws affect pricing decisions in other States." *Id.* at 345 (Scalia, J., concurring in part and concurring in the judgment).

After *Healy*, the Supreme Court did not return to the extraterritoriality doctrine until *Pharmaceutical Research & Manufacturers of America v. Walsh*, 538 U.S. 644 (2003). There, the Court summarily rejected an attempt to invoke the doctrine:

> Petitioner argues that the reasoning [of *Baldwin* and *Healy*] applies to what it characterizes as Maine's regulation of the terms of transactions that occur elsewhere. But . . . unlike price control or price affirmation statutes, the Maine Act does not regulate the price of any out-of-state transaction, either by its express terms or by its inevitable effect. Maine does not insist that manufacturers sell their drugs to a wholesaler for a certain price. Similarly, Maine is not tying the price of its in-state products to out-of-state prices.

Id. at 669 (internal quotation marks omitted). Two courts of appeals have taken *Walsh*'s language to establish the outside bounds of the extraterritoriality doctrine—namely, that it only guards against price-affirmation statutes like those in *Brown-Forman* and *Healy*. *See Epel*, 793 F.3d at 1173–74; *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 951 (9th Cir. 2013). *But see Ass'n for Accessible Medicines v. Frosh*, 887 F.3d 664, 669–70 (4th Cir. 2018).

This Court has not gone quite that far. While noting that "the Supreme Court has applied the extraterritoriality doctrine only in the limited context of price-affirmation statutes," *Snyder*, 735 F.3d at 373, it appears that this Court has used the doctrine as the exclusive basis to invalidate a statute outside of that narrow context only once. *Id.* at 376. This paucity reflects the fact that any extension of the extraterritoriality doctrine risks invalidating a host of state laws, given the "modern reality" that "the States frequently regulate activities that occur entirely within one State but that have effects in many." *See Snyder*, 735 F.3d at 379 (Sutton, J., concurring). Or as then-Judge Gorsuch put it, expanding the extraterritoriality doctrine from its origin is an "audacious invitation we think the [Supreme] Court unlikely to take up." *See Epel*, 793 F.3d at 1175. As such, the Court should be circumspect in applying the extraterritoriality doctrine in new contexts.

This is such a context. This case differs from prior extraterritoriality cases in two fundamental ways. First, unlike the statutes invalidated in *Baldwin*, *Brown-Forman*, and *Healy*, Kentucky's price-gouging statutes do not dictate or control wholly out-of-state conduct. Kentucky law only regulates price gouging of Kentuckians. The extraterritoriality doctrine does not immunize from state regulation a seller's voluntary decision to sell goods in a way that only permits a single price. Second, Kentucky's price-gouging statutes, at most, affect the structure of part of the market. This is not a Commerce Clause problem. Decades ago, the Supreme Court rejected the "notion that the Com-

merce Clause protects the particular structure or methods of operation in a retail market." *See Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 127 (1978). For either or both of these overarching reasons, Kentucky's price-gouging laws do not violate the dormant Commerce Clause.

A. This case does not implicate the extraterritoriality doctrine.

The district court took the extraterritoriality doctrine to places it has never been. As explained below, the district court sustained the doctrine even though Kentucky's price-gouging statutes do not dictate wholly out-of-state conduct. The court did so on the novel theory that Kentucky law impermissibly limits a seller's ability to utilize Amazon. But the extraterritoriality doctrine does not create a constitutional right to utilize—without state oversight—an online platform that limits a seller's ability to establish state-specific prices.

Statutes that violate the extraterritoriality doctrine invariably do far more than merely *affect* wholly out-of-state conduct—they *control* it. That much is clear from *Brown-Forman* and *Healy*. Take *Brown-Forman*'s statement that "[f]orcing a merchant to seek regulatory approval in one State before undertaking a transaction in another directly regulates interstate commerce." *Brown-Forman*, 476 U.S. at 582. Or as *Healy* put it: "[A] statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority . . . ." *Healy*, 491 U.S. at 336. Put simply, to "force" or to "directly control" wholly out-of-state conduct connotes that the statue affirmatively dictates such conduct.

The facts of *Brown-Forman* and *Healy* reiterate this. In *Brown-Forman*, New York tried to suspend Brown-Forman's license due entirely to its out-of-state conduct. *Brown-Forman*, 476 U.S. at 577. That is, New York brought to bear in-state consequences for wholly out-of-state conduct. Similarly, in *Healy*, Connecticut licensed importers and its statute "preclude[d] the alteration of out-of-state prices after the moment of [price] affirmation." *Healy*, 491 U.S. at 326 n.2, 338. The Second Circuit therefore got it exactly right in reading *Brown-Forman* and *Healy* as "attaching in-state consequences" to wholly out-of-state conduct. *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 221 (2d Cir. 2004).

This Court has likewise emphasized the importance of in-state consequences for wholly out-of-state conduct. In *Snyder*, Michigan's bottling statute required beverage companies to place a mark on each bottle that is "unique to the state" and that, important for present purposes, can be "used only in this state and 1 or more other states that have laws substantially similar to this act." *Snyder*, 735 F.3d at 367 (citation omitted). In invalidating this statute, the panel emphasized that the "real issue" is that the statute "not only requires beverage companies to package a product unique to Michigan but also allows Michigan to *dictate* where the product can be sold." *Id.* at 376 (emphasis added). Note *Snyder*'s choice of words: The statute enabled Michigan to "dictate" wholly out-of-state conduct. *See id.* The Court observed that Michigan accomplished this by imposing a "criminal penalty for violations." *Id.*

Here, by contrast, Kentucky's price-gouging statutes do not dictate or control wholly out-of-state conduct. They only regulate conduct directed at Kentuckians. Nor

do the statutes impose in-state consequences for wholly out-of-state conduct. No matter what price gougers do wholly out of state, that conduct carries no penalty under Kentucky law.

Start with Ky. Rev. Stat. 367.374, which imposes price-gouging restrictions during a governor-declared state of emergency. Under this statute, the governor's executive order must be "limited to the geographical area indicated in the declaration of emergency." Ky. Rev. Stat. 367.374(1)(a). That is to say, the statute, by its terms, cannot apply beyond "the geographical area indicated in the declaration of emergency." *See id.* Here, Kentucky's governor declared a state of emergency "in the Commonwealth of Kentucky."[11] Exec. Order 2020-215 (Mar. 6, 2020). Thus, as applied here, Ky. Rev. Stat. 367.374 prohibits a person from selling, renting, or offering to sell or rent specified goods or services *within the Commonwealth*. As a result, this statute does not dictate or control wholly out-of-state conduct. Nor does it carry in-state penalties for such conduct.

[11] The implementing executive orders are in accord. Exec. Order 2020-216 (Mar. 7, 2020); Exec. Order 2020-245 (Mar. 20, 2020); Exec. Order 2020-268 (Apr. 6, 2020); Exec. Order 2020-285 (Apr. 20, 2020); Exec. Order 2020-316 (May 6, 2020); Exec. Order 2020-414 (May 21, 2020); Exec. Order 2020-449 (June 4, 2020); Exec. Order 2020-515 (June 19, 2020); Exec. Order 2020-579 (July 6, 2020); Exec. Order 2020-611 (July 21, 2020); Exec. Order 2020-650 (Aug. 5, 2020); Exec. Order 2020-698 (Aug. 21, 2020); Exec. Order 2020-776 (Sept. 14, 2020).

The same goes for Ky. Rev. Stat. 367.170. As summarized above, it prohibits "[u]nfair, false, misleading, or deceptive acts or practices in the conduct of any trade or commerce." Ky. Rev. Stat. 367.170(1). The terms "trade" and "commerce" mean:

> [A]dvertising, offering for 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, and shall include any trade or commerce directly or indirectly affecting the people of this Commonwealth.

Ky. Rev. Stat. 367.110(2). The final clause of the above establishes that Ky. Rev. Stat. 367.170 does not regulate wholly out-of-state conduct. By focusing on conduct that "affect[s] the people of this Commonwealth," Ky. Rev. Stat. 367.170 only applies to the advertising, offering for sale, or distribution of goods *within the Commonwealth*.[12] If this language left any doubt, Kentucky's highest court long ago held that Kentucky's Consumer Protection Act protects "Kentucky consumers." *See Stevens*, 759 S.W.2d at 821. Consequently, Ky. Rev. Stat. 367.170 only prohibits conduct directed towards Kentucky consumers.

As their terms make clear, Kentucky's price-gouging statutes do not dictate or control wholly out-of-state conduct. Unlike the statutes in *Brown-Forman* and *Healy*, Kentucky's laws do not restrict the prices that can be charged wholly out of state. Consistent with Kentucky's price-gouging laws, a seller can charge one price for goods sold in Kentucky and another price for those same goods in neighboring Indiana. Nor do

[12] Kentucky law also follows the presumption against the extraterritorial application of its statutes. *See Union Underwear Co., Inc. v. Barnhart*, 50 S.W.3d 188, 190 (Ky. 2001).

Kentucky's statutes impose in-state consequences for wholly out-of-state conduct, like the criminal penalties in *Snyder* or the license revocation in *Brown-Forman*. For these simple reasons, this case is altogether unlike previous extraterritoriality decisions in which the Supreme Court or this Court invalidated a state statute.

This case, instead, is analogous to *International Dairy Foods Association v. Boggs*, where this Court rejected an extraterritoriality challenge to an Ohio product-labeling regulation. 622 F.3d 628, 646–47 (6th Cir. 2010). The plaintiffs in *Boggs* claimed that the regulation violated the extraterritoriality doctrine because it "*in effect* forces them to create a nationwide label in accordance with Ohio's requirements." *Id.* at 647 (emphasis added). The Court refused to extend the doctrine that far:

> [U]nlike the price-affirmation statutes [in *Brown-Forman* and *Healy*], which directly tied their pricing requirements to the prices charged by the distillers in other states, the Ohio Rule's labeling requirements have no direct effect on the Processors' out-of-state labeling conduct. That is to say, how the Processors label their products in Ohio has no bearing on how they are *required* to label their products in other states (or vice versa).

Id. (emphasis added). In other words, a state law that might prompt a business to choose voluntarily to alter wholly out-of-state conduct is different in kind from a statute that "require[s]" such a change. *See id.*

The district court nevertheless concluded that Kentucky's price-gouging statutes likely violate the extraterritoriality doctrine. The court relied heavily on the Fourth Circuit's divided decision in *Association for Accessible Medicines v. Frosh*, which invalidated Maryland's statute prohibiting price gouging in the sale of pharmaceutical drugs. 887

F.3d at 666. However, unlike Kentucky's statutes, the law in *Frosh* did not simply regulate sales to in-state consumers, but instead prohibited upstream manufacturers and wholesale distributors from engaging in price gouging. *Id.* The Fourth Circuit found this point to be key, emphasizing that the statute "does not limit the Act's application to sales that actually occur within Maryland, nor does it restrict the Act's operation to the context of a resale transaction with a Maryland consumer." *Id.* at 671. In reaching this conclusion, *Frosh* distinguished a prior decision in which the Fourth Circuit had upheld against an extraterritoriality challenge a statute that only regulated sales within a certain state. *Id.* at 670–71 (discussing *Star Scientific Inc. v. Beales*, 278 F.3d 339 (4th Cir. 2002)).

In the alternative, *Frosh* reasoned that "[e]ven if the Act did require a nexus to an actual sale in Maryland, it is nonetheless invalid because it still controls the price of transactions that occur wholly outside the state." *Id.* at 671. The court found that the statute "makes clear that the conduct the Act targets is the upstream pricing and sale of prescription drugs, and the parties agreed that nearly all of these transactions occur outside Maryland." *Id.* The challenged act, the court underscored, "is not fixated on the price the Maryland consumer ultimately pays for the drug." *Id.*

Kentucky's price-gouging laws are in no way analogous to Maryland's statute. For one thing, Kentucky's statutes only regulate conduct directed at Kentucky consumers, making this case analogous to the decision that *Frosh* distinguished. *See id.* at 670–71 (discussing *Star Scientific*). Nor do Kentucky's statutes regulate upstream conduct that

occurs wholly outside of Kentucky. Instead, Kentucky's statutes are "fixated" on the prices directed at and charged to Kentucky consumers. *See id.* at 671. Thus, even accepting *Frosh*'s holding,[13] Kentucky's price-gouging statutes readily survive scrutiny.

Aside from *Frosh*, the district court placed great weight on what it viewed as the "inevitable effect" or "practical effect" of Kentucky's price-gouging statutes. *Online Merchants Guild*, 2020 WL 3440933, at *10. It reasoned that because of how Amazon's platform operates, "the Attorney General's actions effectively dictate the price of items for sale on Amazon nationwide." *See id.* The court underscored: "[T]he nature of Amazon's online store and its relationship with suppliers is key." *Id.* This reasoning, however, takes a near-boundless view of the extraterritoriality doctrine and wrongly equates the voluntary decisions of Amazon sellers with affirmative regulation by the Attorney General.

Contrary to the district court's holding, what "effectively dictates" wholly out-of-state conduct is not Kentucky's price-gouging laws, but a seller's voluntary decision to sell goods through a platform that only allows a nationwide price. Put differently, Kentucky's statutes do not control a seller's ability to establish out-of-state prices as the seller sees fit. If a seller desires to sell goods to Kentucky consumers, it can do so in accordance with Kentucky law while simultaneously selling the same goods for varying

[13] This holding prompted two dissents. *Frosh*, 887 F.3d at 674–93 (Wynn, J., dissenting); *Ass'n for Accessible Medicines v. Frosh*, 742 Fed. App'x 720, 721–24 (4th Cir. 2018) (Wynn, J., dissenting from denial of rehearing en banc).

prices in other states. The purported constitutional injury identified by the district court arises *only if* a seller voluntarily chooses to sell goods at a nationwide price through Amazon. Put simply, Kentucky law does not dictate wholly out-of-state conduct; Amazon's platform does.

To grasp this point, consider how Kentucky's price-gouging laws would apply to a business that operates its own online store as opposed to selling through Amazon. Such a business presumably could design its website to comply with Kentucky's price-gouging laws while also allowing the business to set differing prices for out-of-state consumers. [Prelim. Inj. Mtn., R.10, PageID#39 (admitting that "direct-to-consumer sellers outside of Amazon's store" "can calibrate their conduct as to a specific state like Kentucky")]. For such a standalone online store, there can be no doubt that Kentucky's laws do not dictate wholly out-of-state conduct. Removing Amazon's platform from the equation thus underscores the central problem with the district court's reasoning: It is Amazon's platform, which a seller voluntarily chooses to utilize, that dictates wholly out-of-state conduct. Kentucky law comes into play only after the seller has chosen—of its own volition—to enter the market in a way that prohibits state-specific pricing. This is not an extraterritoriality problem. *See Am. Express Travel Related Servs. Co., Inc. v. Kentucky*, 730 F.3d 628, 634 (6th Cir. 2013) (noting that a business "may choose on its own volition" how to respond to the challenged statute, which "differs" from the statutes in *Healy* and *Brown-Forman*); *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 110 (2d

Cir. 2001) ("To the extent the statute may be said to 'require' labels on lamps sold outside Vermont, then, it is only because the manufacturers *are unwilling* to modify their production and distribution systems to differentiate between Vermont-bound and non-Vermont-bound lamps." (emphasis added)). In sum, the Guild's members' insistence on using Amazon does not somehow render Kentucky law unconstitutional as applied to them.

The district court identified no case law that has applied the extraterritoriality doctrine in such a circumstance. With good reason. The underlying premise of *Brown-Forman* and *Healy* is that a business should be free to set varying prices in each state without direct interference from another state. *See Brown-Forman*, 476 U.S. at 580 ("While a State may seek lower prices for its consumers, it may not insist that producers or consumers in other States surrender whatever competitive advantages they may possess."); *Healy*, 491 U.S. at 338 ("[T]he Connecticut statute has the extraterritorial effect, condemned in *Brown-Forman*, of preventing brewers from undertaking competitive pricing in [another state] based on prevailing market conditions."). Kentucky's price-gouging statutes do not restrict that freedom. They say nothing about, for example, what price an Ohio company can charge a Tennessean for a particular good. *See In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 613 (7th Cir. 1997) ("State *A* cannot use its antitrust law to make a seller in State *B* charge a lower price to a buyer in *C*."), *abrogated on other grounds by Rivet v. Regions Bank of La.*, 522 U.S. 470, 474 n.2 (1998).

Instead of restricting a seller's ability to set state-specific prices, as in *Brown-Forman* and *Healy*, Kentucky's price-gouging statutes apply here, if at all, only as to a seller's ability to charge a single price nationwide. This shows just how different this case is from prior applications of the extraterritoriality doctrine. In *Brown-Forman* and *Healy*, the sellers sought to charge varying prices depending on state-specific conditions. Here, by contrast, the sellers seek the opposite: to sell at a uniform price regardless of the particular conditions in a given state. And the sellers desire to sell at this uniform price regardless of what the Commonwealth's laws (or any other state's laws, for that matter) say.

The extraterritoriality doctrine does not reach nearly this far. Indeed, *Brown-Forman* itself recognized that states "may seek to lower prices for [their] consumers." *Brown-Forman*, 476 U.S. at 580. There's nothing new about this proposition. In *Nebbia v. People of New York*, 291 U.S. 502 (1934), for example, the Supreme Court upheld against a constitutional challenge a state statute establishing the in-state price of milk. *Id.* at 515, 539. The district court's decision hollows out *Brown-Forman* and *Nebbia*. In the district court's paradigm, a state is powerless to regulate a seller's in-state pricing merely if the seller, of its own accord, utilizes a sales method that only allows a nationwide price. In such a circumstance—contrary to *Brown-Forman*—a state is significantly limited in "seek[ing] to lower prices for its consumers." A seller, of course, cannot so easily circumvent the states' police powers. That is to say, a seller cannot insulate itself from

states' consumer-protection laws simply by voluntarily limiting its ability to set state-specific prices.

The district court's reasoning is further flawed because it lacks a limiting principle. *See Epel*, 793 F.3d at 1175 (criticizing a reading of the extraterritoriality doctrine that "risk[ed] serious problems of overinclusion"). If the district court is correct that Kentucky's price-gouging statutes implicate the extraterritoriality doctrine, so presumably do other similar state price-gouging statutes as applied to Amazon. The district court's extraterritoriality rationale essentially puts online sellers that use a sales method without the functionality to establish state-specific pricing beyond the states' power to regulate.[14] The court appears to have acknowledged this sweeping consequence. *See Online Merchants Guild*, 2020 WL 3440933, at *11 ("So, clearly, if various states' price gouging laws were applied to products listed on Amazon then it would be incumbent on the suppliers to check with each state before listing to avoid the potential for liability."). The Commerce Clause, however, does not wall off online sellers from price-gouging oversight. *See SPGGC, LLC v. Blumenthal*, 505 F.3d 183, 195 (2d Cir. 2007) ("The fact

[14] The Guild argued below that the Attorney General should instead regulate Amazon. But the Commerce Clause does not pigeonhole states into a single way of protecting their citizens. Plus, there is good reason for the Attorney General to investigate individual sellers, given that the state-law defenses to price-gouging liability rest on facts unique to those sellers. *E.g.*, Ky. Rev. Stat. 367.374(1)(c)(3). In any event, Amazon has not been left on the sidelines of the Attorney General's response to alleged price gouging. As outlined above, Amazon voluntarily turned over a list of suspected Kentucky-based price gougers on its website to the Attorney General. [Cocanougher Dec., R. 21-2, PageID#134].

that an ordinary commercial transaction happens to occur in cyberspace does not insulate it from otherwise applicable state consumer protection laws.").

This leads to still-another problem with the district court's holding: it allows Amazon merchants to sell goods to Kentuckians for higher prices than those that brick-and-mortar stores in Kentucky or direct-to-consumer online stores can charge. This varying treatment is at cross-purposes with the Commerce Clause. *See Wayfair*, 138 S. Ct. at 2094 ("[I]t is certainly not the purpose of the Commerce Clause to permit the Judiciary to create market distortions."). In fact, the Supreme Court recently went so far as to overrule a prior Commerce Clause decision in part because it "treat[ed] economically identical actors differently, and for arbitrary reasons." *Id.* The Commerce Clause, the Supreme Court emphasized, "eschew[s] formalism for a sensitive, case-by-case analysis of purposes and effects." *Id.* (citation omitted).

One final point. The district court further erred in discussing how Kentucky's laws interact with other states' price-gouging regimes. Given that, as discussed above, Kentucky's statutes only protect Kentucky consumers, these laws create no risk of "inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another state." *See Healy*, 491 U.S. at 336–37. Although there is some variance among states' price-gouging laws, Kentucky's statutes are similar in many respects to other states' laws. *E.g.*, Tenn. Code Ann. 47-18-5103; Mich. Comp. Laws 445.903(1)(z); Ark. Code Ann. 4-88-303; Fla. Stat. 501.160. Regardless, the fact that states protect their citizens from price gouging in different ways is a feature, not a bug,

of our Constitution. *See Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 817 (2015) ("This Court has 'long recognized the role of the States as laboratories for devising solutions to difficult legal problems.'" (citation omitted)).

The district court nevertheless found a risk of inconsistent state laws by comparing Kentucky's price-gouging statutes to Alabama's corresponding law. *Online Merchants Guild*, 2020 WL 3440933, at *11 (citing Ala. Code 8-31-4). According to the district court, an Amazon seller might conclude that Alabama law permits its online listing but Kentucky law does not, which the court deemed problematic. *See id.* But, under the district court's regime, the same could be said for any two state statutes that treat price gouging even slightly differently. Even so, such a scenario is not driven by Kentucky law, but by a seller's voluntary decision to enter the market such that it can only set a nationwide price. Kentucky law did not force that choice on the seller. To the contrary, under Kentucky's price-gouging laws, the seller is free to charge one price in Kentucky and another in Alabama.

B. The Commerce Clause does not protect a particular market structure.

The district court also erred in applying the Commerce Clause to prohibit the Attorney General from regulating third-party sellers on Amazon.

It is well established that the Commerce Clause does not protect a particular market structure from state regulation. Nor does the Clause protect particular interstate firms. In *Exxon Corporation v. Governor of Maryland*, the challenged statute prohibited a

producer or refiner of petroleum from operating a retail service station within Maryland. 437 U.S. at 119. All of the businesses then subject to this prohibition were from outside of Maryland. *Id.* at 123. These out-of-state businesses claimed that the statute impermissibly "interfered with the natural functioning of the interstate market either through prohibition or through burdensome regulation." *Id.* at 127 (internal quotation marks and citation omitted). The Supreme Court disagreed. It refused to "accept . . . [the] underlying notion that the Commerce Clause protects the particular structure or methods of operation in a retail market." *Id.* (citing *Breard v. Alexandria*, 341 U.S. 622 (1951)). The Commerce Clause, the Court continued, "protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations." *Id.* at 127–28. In so holding, the Court acknowledged that Maryland's statute might "injure[]" the "consuming public" by restricting a way of doing business, but reasoned that such a consideration "relates to the wisdom of the statute, not to its burden on commerce." *Id.* at 128.

If a state, consistent with the Commerce Clause, can *prohibit* a business method used by out-of-state firms within the state's borders, as *Exxon Corp.* holds, then the Attorney General can *regulate* Kentucky-based sellers on Amazon that sell or offer to sell goods to Kentuckians. To conclude otherwise means that the Commerce Clause protects a particular way of doing business—a premise that *Exxon Corp.* rejected. *See id.* at 127. Based upon *Exxon Corp.*, this Court's sister circuits have correctly refused attempts to use the Commerce Clause to put a particular business method entirely beyond the reach of the states. *E.g.*, *Valley Bank of Nev. v. Plus Sys., Inc.*, 914 F.2d 1186, 1193 (9th

Cir. 1990) ("[T]he commerce clause does not prevent states from taking action that may be inconsistent with a [business's] concept of business efficiency; the Constitution does not protect any particular economic structure or approach."); *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 213 (2d Cir. 2003) (upholding statute that "merely prohibits one manner in which cigarettes could otherwise be sold to New York consumers, namely through direct shipments."). In short, the Guild's legal position cannot coexist with *Exxon Corp.*

The Attorney General raised the applicability of *Exxon Corp.* below [Prelim. Inj. Resp., R.21-1, PageID#119], but the district court did not address this argument. The Guild did, however. In its view, *Exxon Corp.*'s rule simply does not apply in the context of an extraterritoriality challenge. [Prelim. Inj. Reply, R.22, PageID#147]. But *Exxon Corp.* did not limit its holding in the way that the Guild suggests. *Exxon Corp.* rejected the "underlying notion that *the Commerce Clause* protects the particular structure or methods of operation in a retail market." *See Exxon Corp.*, 437 U.S. at 127 (emphasis added). *Exxon Corp.* continued by noting that "*the Clause* protects the interstate market, not particular firms, from prohibitive or burdensome regulations." *Id.* at 127–28 (emphasis added). *Exxon Corp.*'s categorical language about what the Commerce Clause guards against cannot be squared with the Guild's position.

To be sure, *Exxon Corp.* does not permit a state to flout the extraterritoriality doctrine. After all, the out-of-state firms that sought relief in *Exxon Corp.* wanted to do business in Maryland in their desired way. The point, instead, is that *Exxon Corp.* affirms

that a seller's preferred way of doing business does not overrule the state's prerogative to require otherwise within its borders. Rather than expand the extraterritoriality doctrine to place a meaningful asterisk on *Exxon Corp.*'s longstanding rule, as the Guild invites, the Court should keep the extraterritoriality doctrine in its appropriate lane so as to protect the authority guaranteed to the states by *Exxon Corp.* In sum, Kentucky's price-gouging laws are miles closer to the law upheld in *Exxon Corp.* than to the laws struck down in *Brown-Forman* and *Healy*.

III. The other preliminary-injunction factors weigh in the Attorney General's favor.

The district court gave only brief attention to the other preliminary-injunction factors. *Online Merchants Guild*, 2020 WL 3440933, at *12. They, however, plainly favor the Attorney General.

Take irreparable harm. The district court's discussion of irreparable harm largely focused on the alleged unconstitutionality of the Attorney General's actions. *See id.* However, without a likelihood of success on the merits, any alleged irreparable harm falls away. *See Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1249 (6th Cir. 1997) ("[A] preliminary injunction issued where there is simply no likelihood of success on the merits must be reversed."). In discussing irreparable harm, the district court also mentioned the "alleged unquantifiable economic injury that will befall [the Guild's] members"—namely the members' "hesitancy to engage in the interstate marketplace." *Online Merchants Guild*, 2020 WL 3440933, at *12. But the Guild's members do not face an either-

or choice. They can sell goods in Kentucky for prices that comply with Kentucky law while selling the same goods for different prices in other states. The only purported consequence is the sellers' ability to choose a sales platform that only offers a nation-wide price. The district court's irreparable-harm discussion also mentioned the "additional resources" that the Guild will spend "to advis[e] its members" and to "analyz[e] the complex web of investigations." *Id.* As explained above, however, this is part and parcel of the Guild's mission. This is not the stuff of irreparable harm.

The harms to the Attorney General—more specifically, to the citizens he represents—as a result of the trial court's preliminary injunction are substantial. The district court acknowledged that the Attorney General's effort to combat price gouging is "good work" designed to "protect Kentucky consumers." *Id.* But that "good work" has been stopped due to this case. Under the district court's preliminary injunction, the Attorney General cannot even investigate third-party Amazon sellers, much less take enforcement action against them as he deems necessary. *See Maryland v. King*, 567 U.S. 1301, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers))). The district court tried to minimize this harm by noting that it only enjoined the Attorney General's actions "as towards Amazon suppliers, not any other retailer or supplier." *Online Merchants Guild*, 2020 WL 3440933, at *12. But that is small comfort to Kentuckians, given that, by the

Guild's estimation, more than 50 percent of online sales occur on Amazon. [Rafelson Dec., R.10-1, PageID#64]. The public-interest and harm-to-others factors therefore favor the Attorney General.

CONCLUSION

The Court should reverse the district court's grant of a preliminary injunction.

Respectfully submitted by,

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CERTIFICATE OF COMPLIANCE

As required by Federal Rule of Appellate Procedure 32(g) and 6th Cir. R. 32, I certify that this brief complies with the type-volume limitation in Fed. R. App. P. 32(a)(7)(C) because it contains 12,402 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7) and 6th Cir. R. 32(b)(1).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in 14-point Garamond font using Microsoft Word.

s/Matthew F. Kuhn

CERTIFICATE OF SERVICE

I certify that on September 16, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Matthew F. Kuhn

ADDENDUM

The Attorney General designates the following as relevant documents from the district court record:

1. Complaint, R.1, PageID#1–17
2. Motion for temporary restraining order and preliminary injunction and attached declaration of the Guild's counsel and executive director, R.10, R.10-1, PageID#37–73
3. Response to motion for preliminary injunction and attached declaration, R.21-1, R.21-2, PageID#104–34
4. Reply regarding motion for preliminary injunction and attached exhibits, R.22, R.22-1, R.22-2, R. 22-3, R.22-4, R.22-5, R.22-6, PageID#136–209
5. Attorney General's brief regarding abstention and attached exhibits, R.33, R.33-1, R.33-2, R.33-3, R.33-4, R.33-5, PageID#223–345
6. The Guild's brief regarding abstention and attached exhibits, R.34, R.34-1, R.34-2, R.34-3, R.34-4, R.34-5, R.34-6, PageID#346–446
7. Notice of supplemental authority and attached exhibits, R.35, R.35-1, R.35-2, PageID#447–61
8. Transcript of oral argument from May 13, 2020, R.39, PageID#493–520
9. Transcript of oral argument from May 21, 2020, R.40, PageID#521–75