**No. 20-5723**

# In the 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.*

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Appeal from the United States District Court
for the Eastern District of Kentucky at Frankfort, No. 3:20-cv-00029.
The Honorable **Gregory F. Van Tatenhove**, Judge Presiding.

## BRIEF OF PLAINTIFF-APPELLEE ONLINE MERCHANTS GUILD

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## Statement Regarding Oral Argument

The Online Merchants Guild suggests that oral argument may assist the Court's consideration of this appeal.

## Statement of Jurisdiction

The Online Merchants Guild agrees with the Attorney General's Statement of Jurisdiction, except that the Guild has Article III standing on its own behalf and on behalf of its members as set forth below.

## Statement of Issues

The issues before the Court are as follows.

*Regarding standing*:

1. Whether the Attorney General of Kentucky is correct that a nonprofit association lacks standing to challenge government action because the topic of government action is germane to the association's organizational mission.
2. Whether small businesses can reasonably fear regulatory action is possible when the Attorney General has publicly vowed to "stop their predatory practices" while posing for reporters with property he "seized" from similar businesses; served them with warning letters, cease-and-desist orders, and document demands; urged the District Court to abstain under *Younger* because the AG was engaged in an "ongoing enforcement proceeding, specifically the enforcement" of the statutes at issue; refused to disavow prosecution under the challenged statutes; and when the small businesses have actually refrained from engaging in protected conduct as a result.

*Regarding the merits*:

3. Whether a state prosecutor has the constitutional power to control prices in the interstate market.

## Statement of the Case

This case arises from the Attorney General of Kentucky's use of state price-control laws to regulate prices in the national marketplace in response to perceived price gouging. The AG's stated goals of consumer protection are important, but his methods are beyond his constitutional authority.

The District Court found that the AG is effectively setting a national ceiling on prices when he seeks to apply the Commonwealth's price-control laws to the Online Merchants Guild's members. The reason is that the Guild's members supply goods to Amazon's national store and cannot engage in Kentucky-specific pricing or sales. The Guild's members must either comply with the AG's view of appropriate prices or exit the national marketplace.

The District Court then applied the Commerce Clause precedents of the Supreme Court, this Court, and other courts, which uniformly conclude that state regulators cannot dictate national prices. Finding the other preliminary injunction factors satisfied, the District Court enjoined the AG's use of Kentucky's price-control laws as against the Guild's members. The District Court tailored its injunction so that the AG could otherwise seek to combat price gouging. Most notably, the AG remains free to regulate Amazon if the AG remains concerned about pricing in Amazon's store.

This Court should affirm.

**a. Market Background**

The Online Merchants Guild is a "trade association for online merchants"—individuals and small businesses who make a living sourcing and supplying goods for online stores. Rafelson Dec., R. 10-1, Page ID # 61-62. As a recent example of the Guild's advocacy work on behalf of its members, the Guild was one of the most relied-upon authorities in the House Antitrust Subcommittee's landmark report on Amazon's business practices. *See* n.14, *infra*.

Guild members acquired Covid-response goods for sale early in 2020, when there was "no indication of emergency from the state or federal government," and known Covid cases were few and concentrated on the coasts. Rafelson Dec., R. 10-1, Page ID # 61. "[R]elying on supply chain relationships and market knowledge that they have cultivated over years," Guild members "acquir[ed] overseas goods that would otherwise likely not be accessible to the U.S. market." *Id*. Guild members also acquired goods in parts of the country where Covid cases were few, and used the markets to help reposition the goods to then-hot spots like New York City. *Id*.

To bring those products into the "national marketplace," Guild members used Amazon.com, which is "the dominant eCommerce" store in the country. *Id*. at Page ID # 61-62. As far as the Guild's members are concerned, "Amazon's online marketplace [is] a unitary interstate platform where prices are not state-specific." PI Order, R. 36, Page ID # 481. With "over 50% of all eCommerce sales in the country,

Amazon has the ability to set the market by regulating (or not) prices" in its store. Rafelson Dec., R. 10-1, Page ID # 64. Guild members may "propose" a listing price to Amazon "based on historical sales data Amazon provides," but "Amazon retains final control over the price it will accept for listing a good" in its store. *Id*. at Page ID # 63.

As the District Court found, "by selling through Amazon, merchants cannot restrict their sales to only Kentucky residents—inevitably transactions will occur outside of the state." PI Order, R. 36, Page ID # 485. Amazon "controls how and where items are listed . . . in search results." Rafelson Dec., R. 10-1, at Page ID # 63. Guild members "cannot prohibit items from appearing in certain states. Only Amazon can control where and how search results are displayed." *Id*. Amazon also controls the consumer sales process and interactions with what the company deems "'Amazon's customers.'" *Id*. at Page ID # 64-65.

Thus, as the District Court recognized, "Merchants Guild members, when interacting with Amazon, simply provide product but have only limited control over price and have no control over where the product is then sold." PI Order, R. 36, Page ID # 481. Guild members cannot "engage in Kentucky-specific sales or pricing; nor can they realistically avoid making sales in Kentucky. The same is true for every state—from the perspective of [Guild] members, Amazon is a single national marketplace." Rafelson Dec., R. 10-1, Page ID # 63.

**b. The AG's Investigations and Subsequent Actions**

In response to well-publicized instances of high prices for items like hand sanitizer, the Attorney General of Kentucky launched well-publicized investigations into alleged price gouging. The Kentucky AG invoked two state statutes: KRS 367.374, which during emergencies bans price increases that are "grossly in excess" of pre-emergency prices; and KRS 367.170, which always bans prices that are "unfair," with "unfair . . . construed to mean unconscionable." Among other things, the AG sent warning letters containing cease-and-desist orders and subpoenas to a number of online merchants who supply Amazon's store. PI Order, R. 36, Page ID # 464.

The AG promoted his investigations like this: "'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."[1] According to a press event the AG held, "over half" of the "top price gougers based in Kentucky . . . were served with cease and desist orders, and

[1] Attorney General of Kentucky, "Attorney General Cameron Issues Subpoenas to Amazon Third-Party Sellers for Price Gouging During COVID-19 Pandemic" (3/26/20), https://kentucky.gov/Pages/Activity-stream.aspx?n=AttorneyGeneral&prId=888.

investigations are continuing."[2] Evoking drug-bust imagery, the AG posed with property he "seized" from a seller and promised to do more.[3]

The AG promoted various other actions, including activating a consumer hotline and website for reporting complaints, and requesting that the Governor "renew the executive order activating Kentucky's price gouging laws."[4] After this case was filed, the AG also moved to compel compliance with his subpoenas as against at least one Guild member, Jones & Panda, LLC. Guild's Supp. Br., R. 34, Page ID # 347-48.

**c. The Proceedings Below**

The Guild filed suit on May 1, 2020, and promptly sought injunctive relief on the basis of the Commerce Clause and other liberty protections. *See generally* Guild's Mot. for TRO and PI, R. 10, Page ID # 37 *et seq*. After a telephonic hearing, the District Court denied the Guild's request for a temporary restraining order, while

[2] Lawrence Smith, "Kentucky, Tennessee Authorities Seize 17,000 Bottles of Hand Sanitizer in Alleged Price Gouging Scheme," *WDRB* (3/20/20), 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. The AG introduced that website into the record on appeal. AG Br. 3. Although that website was not before the District Court, it reinforces the District Court's finding that the Guild's members could reasonably take the AG's public posturing at face value.

[3] *Id*. (images at link).

[4] *Id*.

advising that the court's "review at this stage [was] preliminary." TRO Order, R. 18, Page ID # 96.

The District Court requested additional briefing and a second hearing to permit "a more extensive analysis of the constitutional issues and factual intricacies at play." *Id*. at Page ID # 96-97. After that second hearing—at which the AG referenced *Younger* abstention—the District Court requested supplemental briefing on *Younger* and related items. Supp. Br. Order, R. 29, Page ID # 217-18. In that supplemental briefing, the Guild argued that *Younger* abstention was unwarranted, while the AG argued that the District Court should abstain due to "an ongoing civil proceeding, specifically the enforcement of Kentucky's price gouging statutes" to Guild member Jones & Panda. AG's Supp. Br., R. 33, Page ID # 226.

Later, the Guild filed a notice of supplemental authority and request for judicial notice of a *Bloomberg* article entitled "Amazon Price-Gouging Crackdown Worsened Shortage of Sanitizer, Wipes." Guild's Notice of Supp. Auth., R. 35, Page ID # 447. The article described how merchants, concerned about exposure to conflicting state price-gouging laws, withdrew from the online marketplace, leading to shortages of goods. *Id*.[5]

[5] The District Court took judicial notice of the *Bloomberg* article, which is available here: Spencer Soper, "Amazon-Price Gouging Crackdown Worsened Shortage of Sanitizer, Wipes," *Bloomberg* (6/11/20), https://www.bloomberg.com/news/articles/2020-06-11/amazon-price-gouging-crackdown-worsened-shortage-of-sanitizer-wipes. PI Order, R. 36, Page ID # 487.

On June 23, 2020, the District Court granted the Guild's motion for a preliminary injunction, concluding that "it appears the inevitable effect of the Attorney General regulating Amazon suppliers is to control commercial conduct beyond Kentucky's borders," a power the AG lacks under the Commerce Clause. PI Order, R. 36, Page ID # 24.

This appeal followed.

## Summary of Argument

Our Framers deliberately placed the power to regulate interstate commerce in the hands of Congress, not the States. "The Commerce Clause emerged as the Framers' response to the central problem giving rise to the Constitution itself: the absence of any federal commerce power under the Articles of Confederation," which led to conflicting state regulation and economic disunion. *Gonzales v. Raich*, 545 U.S. 1, 16 (2005).

It flows naturally from that design that state officials may not engage in regulatory conduct "that has the practical effect of establishing a scale of prices for use in other states." *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989) (cleaned up). Otherwise, state officials could "create just the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude." *Id*. at 337; *accord, e.g.*, *Snyder v. Am. Bev. Ass'n*, 735 F.3d 362 (6th Cir. 2013) (invalidating state law that would have controlled product labeling in the interstate

market); *Ass'n for Accessible Meds. v. Frosh*, 887 F.3d 664 (4th Cir. 2018) (invalidating state law that would have controlled drug prices in the interstate market).

Cases like this one confirm the wisdom of that design. If every one of the country's thousands of prosecutors could use state laws to regulate interstate e-commerce, based on his or her prosecutorial preferences or semi-subjective definition of prices that are "too high," the result would be chaos.

The District Court's factual findings and application of precedent were exactly right. "Because the Attorney General threatens to enforce the price-gouging statutes against members for their listings on Amazon, an interstate marketplace, the Attorney General's actions have the practical effect of controlling the price of transactions that occur wholly outside the state. And, to avoid potential liability Merchants Guild members must either 'treat Kentucky prices as a national ceiling, or exit the national marketplace.'" PI Order, R. 36, Page ID # 481 (quoting the Guild's papers). That "is the type of extraterritorial effect prohibited by the dormant Commerce Clause." *Id*. at Page ID # 475.

The AG does not seriously try to undo the District Court's factual findings and could not upset them in any event. The District Court carefully considered the largely uncontroverted record and drew reasonable conclusions.

The AG's real dispute is with the law as written. He offers various arguments for skirting the body of precedent, but they all come down to a variation on the same theme: the AG wants a power that the Constitution allocates instead to Congress. The Framers struck a different balance for good reason: the need for "maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce." *Healy*, 491 U.S. at 335-36. The AG's efforts, however well-intentioned, are "invalid." *Id*. That is so even though the operative technology is new. As the District Court explained, the "protections of the Commerce Clause are available to those in a virtual economy no less than those who trade in an economy defined by bricks and mortar." PI Order, R. 36, Page ID # 262.

Lastly, the Guild has standing to challenge the AG's regulatory efforts. This is a classic pre-enforcement suit brought by a private association on behalf of itself and its members. The Guild has had to divert resources to address the AG's efforts, and the Guild's members reasonably fear that the AG will target them. After all, he vowed to do so. The AG's standing position is contrary to the facts as the District Court found them and the law as it is.

This Court should uphold the District Court's straightforward application of precedent to the facts.

## Argument

### I. Standard of Review

The Court reviews a preliminary injunction ruling "for abuse of discretion," a "standard of review [that] is highly deferential to the district court's decision." *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 540-41 (6th Cir. 2007) (citations omitted). Factual findings cannot be overturned unless they are "clearly erroneous." *Id*. And although the likelihood-of-success question is "reviewed *de novo*," the "district court's ultimate determination as to whether the four preliminary injunction factors weigh in favor of granting or denying preliminary relief is reviewed for abuse of discretion." *Id*.

### II. The Court has jurisdiction because the Guild has standing.

The Online Merchants Guild has standing on its own behalf because the AG's conduct has forced a diversion of the Guild's resources. The Guild has standing on behalf of its members because they reasonably fear the AG will enforce the price-control statutes against them.[6]

[6] In this brief, the Guild concentrates on the aspects of the District Court's standing rulings that the AG specifically challenged on appeal.

### A. The Guild has organizational standing in this routine association-led civil rights case.

The Guild has standing in its own right because the AG has injured the organization itself. An association "can establish standing by alleging a concrete and demonstrable injury, including an injury arising from a purportedly illegal action that increases the resources the group must devote to programs independent of its suit challenging the action." *Housing Opportunities Made Equal v. Cincinnati Enquirer*, 943 F.2d 644, 646 (6th Cir. 1991). Thus, an association like the Guild has standing where the defendant's unlawful conduct "has caused [the association] to devote resources to investigate and negate the impact" of that conduct. *Id.*

The District Court correctly found such diversion is happening here. Previously the Guild "spent 'little to no time' on price gouging issues," and the Guild's "recent efforts are not ordinary undertakings in the context of the services and benefits it typically offers its members." PI Order, R. 36, Page ID # 468-69. Instead, the Guild "'has had to expend organization resources . . . working with targeted merchants to understand and respond to the subpoenas,'" while "'analyz[ing] the complex web of investigations and discuss[ing] open questions with concerned merchants who have not received subpoenas.'" *Id.*, Page ID # 468 (quoting Rafelson Dec., R. 10-1) (cleaned up). The District Court explicitly credited the Guild's evidence and found that "addressing these novel matters constitutes a

diversion of resources from [the Guild's] ordinary spending as an organization." PI Order, R. 36, Page ID # 468.

With those factual findings, this is a straightforward case of organizational standing. On appeal, the AG disagrees with the District Court's fact-finding, but does not explicitly ask this Court to find an abuse of discretion and could not meet that "highly deferential" standard in any event. *Certified Restoration*, 511 F.3d at 541.

Instead the AG concentrates on a radical argument: that organizations lack standing to sue for injuries that are "consistent with the organization's mission." AG Br., R. 20 at 25. That theory raises the "stakes" of this appeal well beyond "bottles of hand sanitizer," AG Br. 3, to the very fundamentals of civil rights practice. The world of litigation—and the real world—would look very different if organizations could not sue to challenge "concerns" precisely because they are "part and parcel of [their] organizational mission." AG Br. 10.

The AG's striking argument, for which he cites only portions of the *per curiam* decision in *Shelby Advocates for Valid Elections v. Hargett*, 947 F.3d 977 (6th Cir. 2020), is very difficult to reconcile with precedent and federal practice.[7] For instance, in *Susan B. Anthony List*, the unanimous Court found Article III injury

[7] Standing is of course subject to this Court's review at any time, but it does not appear that the AG made this argument—or even cited *Shelby Advocates*—below.

where "pro-life advocacy organization[s]" would have to "expend time and resources" responding to burdens on the groups' pro-life activities. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 153-55 (2104). In *Havens Realty*, the unanimous Court found that a housing advocacy group—"whose purpose was to make equal opportunity in housing a reality"—had "suffered injury in fact" because the challenged government practice "perceptibly impaired HOME's ability to provide counselling and referral service for low- and moderate-income home seekers." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 368; 378-79 (1982). And this Court found diversion-of-resources injury on behalf of a voter-education group that had to "redirect its focus" to address a change in voting laws. *N.E. Ohio Coalition for the Homeless v. Husted*, 837 F.3d 612, 624 (6th Cir. 2016).

It is commonplace for private associations—who exist to advocate for their members—to do so in the courts when circumstances warrant. To take just one repeat example, there is a vast body of case law upholding "the standing of voter-advocacy organizations that challenged election laws based on [] drains on their resources." *Common Cause Ind. v. Lawson*, 937 F.3d 944, 952-52 (7th Cir. 2019) (collecting at least seven circuit decisions, including, *inter alia*, *N.E. Ohio Coal. for the Homeless*).

That practice makes eminent sense and furthers our society's interest in the promotion of civil rights by those institutions able to shoulder the effort. *See*

*Blanchard v. Bergeron*, 489 U.S. 87, 95 (1989) ("Congress has elected to encourage meritorious civil rights claims because of the benefits of such litigation for the named plaintiff and for society at large.").

Ignoring that body of law, the AG reads *Shelby Advocates* to mean that 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." AG Br. 10. Hardly. For one thing, that is not really what *Shelby Advocates* held. There, the Court concluded that a group had not been injured when the resources that were supposedly diverted were actually spent no differently than they would have been anyway. *See* 947 F.3d at 982. Under those circumstances, the Court concluded that the group had not actually experienced an Article III injury. That is quite different from the broad reading the AG urges. And it is quite different from this case, since the District Court made a specific finding that the Guild's "recent efforts are not ordinary undertakings in the context of the services and benefits it typically offers its members." PI Order, R. 36, Page ID # 469.

The AG's theory also cannot withstand scrutiny as a conceptual matter. A major theme of the AG's argument is that because the Guild describes its mission as "advocating" for the interests of its members, the Guild has somehow lost the right to petition the federal courts when the Guild itself is injured in that mission. In essence, according to the AG, using your First Amendment right to "assemble" and

engage in "speech" will cost you your First Amendment right to "petition the Government for a redress of grievances" in court. U.S. Const. amend. I. To draw that out is to see why it is not the law. And consider just a few of the private associations from across the political spectrum who routinely "advocate" for civil rights:

- NAACP: "Since 1941, the NAACP has been the premier civil rights *advocacy* entity on Capitol Hill."[8]
- U.S. Chamber of Commerce: "*Advocacy*. The fundamental activity of the U.S. Chamber of Commerce is to develop and implement policy on major issues affecting business."[9]
- Susan B. Anthony List: "SBA List's mission is to end abortion by electing national leaders and *advocating* for laws that save lives, with a special calling to promote pro-life women leaders."[10]

[8] NAACP, "Federal Advocacy," https://www.naacp.org/issues/federal-advocacy/ (emphasis added).

[9] "U.S. Chamber of Commerce, "Advocacy," https://www.uschamber.com/about-us/about-us-chamber/advocacy (emphasis added).

[10] Susan B. Anthony List, "About Susan B. Anthony List," https://www.sba-list.org/about-susan-b-anthony-list (emphasis added).

- NARAL Pro-Choice America: "Leading Pro-Choice *Advocacy Group* NARAL Pro-Choice America" endorses candidate for office.[11]

To hear the AG tell it, since those groups advocate for the issues they and their constituents care about, the groups cannot possibly come into federal court and challenge state laws that interfere with the groups' work. That cannot possibly be right.

The AG's standing theory also makes little practical sense. Why would an organization ever sue to challenge something that was outside the organization's mission? Plus, the interaction between the AG's new theory of organizational standing and the germaneness requirement of associational standing would produce a bizarre result. Groups that have standing on behalf of their members because the issue is germane to the group's purpose would lack standing in their own right because the issue is *too* germane. That puzzle would serve no purpose.

Given precedent and practice, *Shelby Advocates* expressed no intent to announce a controversial new restriction on organizational standing. Read sensibly in the context of settled law, *Shelby Advocates* stands for the unremarkable proposition that an association does not experience an injury when it does the exact things it was going to do absent the challenged conduct.

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[11] NARAL Pro-Choice America, "Press Release" (7/30/19), https://www.prochoiceamerica.org/2019/07/30/naral-riley-collins-endorsement/ (emphasis added).

New threats to members' civil rights, on the other hand, demand action by any association worthy of the designation. And when those groups are forced to respond—diverting resources they would otherwise use differently—they have standing to sue. The District Court found such diversion of resources here. This Court should affirm that finding.

### B. The Guild has associational standing because Guild members credibly fear that the AG will make good on his threats.

The Court should also affirm the District Court's finding that the Guild "has established a credible threat of prosecution" of its members, so as to give the Guild associational standing. PI Order, R. 36, Page ID # 473. In reaching that conclusion, the District Court considered the record in light of the *Susan B. Anthony List* factors, as "clarified by the Sixth Circuit in *McKay v. Federspiel*." PI Order, R. 36, Page ID # 472 (citations omitted).

The "credible threat" standard does not require "official enforcement action." *Kiser v. Reitz*, 765 F.3d 601, 609 (6th Cir. 2014) (finding fear credible prior to "official enforcement action"). Instead, the standard is "quite forgiving" and allows pre-enforcement challenges well before prosecution. *Wollschlaeger v. Governor*, 848 F.3d 1293, 1305 (11th Cir. 2017) (*en banc*) (citation omitted); *accord N.H. Right to Life PAC v. Gardner*, 99 F.3d 8, 14 (1st Cir. 1996) (same).

That framework makes sense for three reasons. First, the courts "do not require a plaintiff to expose himself to liability before bringing suit to challenge the

basis for the threat." *Susan B. Anthony List*, 573 U.S. at 158-59. Otherwise, Americans would be chilled in their exercise of constitutional rights, or the jails would be full of civil disobedients.

Second, constitutional injury can occur well before an actual prosecution. Guild members are already incurring "significant time and resources to hire legal counsel and respond to" the investigations. *Susan B. Anthony List*, 573 U.S. at 165l; *see* PI Order, R. 36, Page ID # 464 (describing a member who had to bring suit to address the AG's investigation). As the District Court found, the AG's actions have already caused constitutional and "economic injury," as members are "hesitant to engage in the interstate marketplace due to the real possibility of price gouging liability." PI Order, R. 36, Page ID # 471 (accepting testimony from Jones & Panda's owner); *see also*, *e.g.*, Rafelson Dec., R. 10-1, Page ID # 68-69 (describing how members were abstaining from sourcing goods because of concerns about the AG's actions).

Third, once there is an ongoing proceeding, *Younger* abstention is on the table. The AG's position, which appears to be that cases aren't susceptible to review until there is an ongoing prosecution—at which point federal courts might have to abstain—would undo the entire pre-enforcement challenge regime. That cannot be right. The Supreme Court specifically held that "it is not necessary that [a plaintiff] expose himself to actual arrest or prosecution to be entitled to challenge a statute

that he claims deters the exercise of his constitutional rights." *Susan B. Anthony List*, 573 U.S. at 159.

Thus, a pre-enforcement case is viable when the plaintiff "alleges an intention to engage in a course of conduct arguably affected with a constitutional interest, but [arguably] proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Susan B. Anthony List*, 573 U.S. at 159 (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979)). Credible does not mean certain—just more than "imaginary or wholly speculative." *Id*. at 160.

*Susan B. Anthony List* identified various indicia supporting a credible threat finding: enforcement warnings, *id*. at 159; the regulated party's intent to engage in arguably proscribed conduct, *id*. at 160; the presence of "costly compliance measures" that might deter business conduct, *id*. at 160; and the government's refusal to "disavow" prosecution, *id*. at 161.

The District Court found record evidence of each of those indicia. The AG's warning letters state that he has "'reason to believe'" that Guild members "'ha[ve] engaged in, [are] engaging in, or [are] about to engage in any act or practice declared to be unlawful by'" the statutes. PI Order, R. 36, Page ID # 473 (quoting AG's warning letter to Guild member Jones & Panda). The AG's letters order recipients to "cease-and-desist" their conduct. *Id*. at Page ID # 469. The AG's letters also contain subpoenas or civil investigative demands for business information, "which,

logically, will factor into the decision on whether to bring suit for price gouging under the statutes." *Id*.

The AG has also gone on a media blitz, describing Guild members as "predator[s]" whose property he has "seized" and whose "egregious actions" he will "stop."[12] In short, the AG is on active footing.

The AG tries to equate this case to *McKay*, but that case and this one are at far ends of the enforcement spectrum. In *McKay*, there was no sense that law enforcement was actually going to use the law in question. *McKay v. Federspiel*, 823 F.3d 862, 869-70 (6th Cir. 2016) (describing a law which the government seemed uninterested in enforcing). Here, the AG is actively using the laws in question and warning targets he intends to keep doing so.

The District Court also considered how the AG's actions were actually impacting the Guild's members. Guild members like Jones & Panda intend to "engag[e] in online sales via Amazon," behavior which is "affected with at least one [] constitutional interest[]—the dormant Commerce Clause." PI Order, R. 36, Page ID # 472. "Understandably," as the District Court found, Guild members "who supply goods to Amazon at an increased price due to recent changes in supply and demand now express concern that they will be labeled and prosecuted as price-gougers." *Id*. at Page ID # 468. "[G]iven the Attorney General's view on the matter

[12] *See* nn.1-2, *supra*.

and the potentially broad range of conduct implicated by the wording of the statutory prohibitions," it is reasonable to fear sales on Amazon could expose Guild members to liability. PI Order, R. 36, Page ID # 472. So members have refrained from engaging in commercial activity, and have had to consult counsel and the Guild to deal with the AG's efforts. *Id*. at Page ID # 464; 485.

"The Attorney General has [] repeatedly refused to disavow enforcement of the statutes, as evidenced [by] his public statements and the ongoing nature of this litigation and the Jones & Panda litigation." PI Order, R. 36. Page ID # 473. The AG continues to refuse to disavow prosecution in this Court. In fact, the whole point of his appeal is that he thinks he *can* prosecute Guild members under the statutes in question. The AG misses the point on the disavowal inquiry when he tries to make it about whether he moves forward or not with individual prosecutions down the road. *See* AG Br. 26. The Guild and its members have been and will continue to be injured long before then. PI Order, R. 36, Page ID # 464; 485; *accord Susan B. Anthony List*, 573 U.S. at 165l

All told, there is more than enough to support the District Court's credible threat finding. The AG would have this Court atomize the inquiry and reach a different factual conclusion, but that is not the standard of review and is not persuasive. The AG's lead argument is that he has not enforced the laws in question against similarly-situated online merchants, but that is not informative. The e-

commerce economy is still relatively new. The key statute—KRS 367.374—only comes into play during states of emergency, and 2020's never-ending state of emergency is *sui generis*. So there have not been that many opportunities for the AG to do what he is doing here. Not to mention, prior enforcement cannot be a prerequisite to standing, or else the first person affected by a law could not challenge it, which makes no sense. What matters is what the AG has specifically done this year: make public threats, seize property, order businesses to stop their conduct, and refuse to disavow further use of the statutes in question.

The AG also asks this Court to isolate the warning letters and (re)parse them line-by-line in comparison to warning letters in other cases. But the law does not require magic words to trigger a credible threat finding, and the District Court was well within its discretion to conclude that small business owners who receive such letters might reasonably alter their conduct in response—which was, after all, likely the intended effect. It is easy for the AG's brief to downplay a warning letter from the Commonwealth's top prosecutor, since the AG was not on the receiving end. In the real world, anyone receiving such a warning would feel a chill. Especially when the AG is already on record making statements "designed for public consumption and [] broadcast widely"—*i.e.*, promises to voters—that he is going to "stop these predatory practices." AG Br. 23 (quoting the AG's press release).

Further, the AG's warning letters do not exist in a vacuum. They are just one piece of evidence the District Court considered in total, because they are just one piece of evidence underlying the AG's conduct and the Guild's members' fears.

There are also reasons to be skeptical of the AG's characterization of his enforcement posture. Below, the AG spent six pages urging the District Court to "abstain under the *Younger* abstention doctrine." AG's Supp Br., R. 33, Page ID # 225-230. As relevant here, *Younger* only comes into play when there is an ongoing enforcement proceeding, so the AG led with the representation that there was "an ongoing civil proceeding, specifically the enforcement of Kentucky's price gouging statutes" to Guild member Jones & Panda. *Id*. at Page ID # 226. Now the AG says something different—that he "has not taken any enforcement action against any [sellers]." AG Br. 6. There is tension between those positions, but in any event, the District Court could fairly conclude that the AG means business and enforcement is far more than "imaginary." *Susan B. Anthony List*, 573 U.S. at 160.

This Court should affirm the District Court's finding that the Guild's member's fears are reasonable enough for standing purposes.

## III. The District Court properly concluded that the AG is violating the Commerce Clause by seeking to control prices in the interstate e-commerce market.

This case is straightforward on the merits. The "inevitable effect of the Attorney General regulating Amazon suppliers is to control commercial conduct

beyond Kentucky's borders," PI Order, R. 36, Page ID # 485, which "exceeds the inherent limits of [the AG's] authority and is invalid." *Healy*, 491 U.S. at 336. The District Court's conclusion stands on undisputed facts and solid precedent.

**a. The District Court correctly found the operative facts: Amazon is a national market in which the Guild's members cannot engage in Kentucky-specific sales or pricing.**

The AG does not contest (and could not disturb) the District Court's findings regarding "the nature of [the Guild's] members' relationship with Amazon." PI Order, R. 20, Page ID # 481. Guild members "are suppliers of Amazon's online marketplace, a unitary interstate platform where prices are not state-specific." PI Order, R. 36, Page ID # 481. Amazon controls prices, listings, and sales; Guild members "simply provide product but have only limited control over price and have no control over where the product is then sold." *Id*.

With those facts "established, the rest of Merchants Guild's argument is straightforward. Because the Attorney General threatens to enforce the price-gouging statutes against members for their listings on Amazon, the Attorney General's actions have the practical effect of controlling the price of transactions that occur wholly outside the state. And, to avoid potential liability Merchants Guild members must either 'treat Kentucky prices as a national ceiling, or exit the national marketplace.'" PI Order, R. 36, Page ID # 481 (quoting the Guild's submissions).

**b. The District Court correctly applied the Commerce Clause to the facts.**

On that record, the District Court's reasoning flows directly from the governing precedents: "the Attorney General's actions effectively dictate the price of items for sale on Amazon nationwide," which violates the Commerce Clause. PI Order, R. 36, at Page ID # 482.

The District Court's reasoning was exactly right. 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." *Healy*, 491 U.S. at 336 (citations omitted). Such laws "exceed[] the inherent limits" of state power. *Id.* They are "invalid regardless of whether the statute's extraterritorial reach was intended by the legislature," *id.*, or "by logical extension, . . . the executive branch in enforcing the law." PI Order, R. 36, Page ID # 484. The "critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Healy*, 491 U.S. at 336 (citing *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986)).

Applying those principles, the Supreme Court twice struck down state laws that would have effectively dictated prices in other states. *Healy*, *supra*; *Brown-Forman*, *supra*. The Supreme Court recognized that restraint on State power long before those cases. At least as far back as the Depression the Court held that "the Commerce Clause does not permit a State 'to establish . . . a scale of prices for use

in other states, and to bar the sale of the products . . . unless the scale has been observed.'" *Healy*, 491 U.S. at 333 (quoting *Baldwin v. G.A.F. Seeling, Inc.*, 294 U.S. 511, 528 (1935) (Cardozo, J.)). And since then, the lower federal courts have invalidated various laws with extraterritorial effects. *See infra*.

The AG observes that "'the Supreme Court has applied the extraterritoriality doctrine only in the limited context of price-affirmation statutes.'" AG Br. 32 (quoting *Snyder*, 735 F.3d at 373). Contrary to the AG's characterization, however, this case is essentially that context. The "practical effect" of a law, not its label, is what matters, 491 U.S. at 336, and the price controls in *Healy* and *Brown-Forman* are economically indistinguishable from the AG's price controls. Both types of laws dictate prices beyond state borders. In *Healy* and *Brown-Forman*, by requiring sellers to tie foreign prices to the state's prices. In this case, by using the threat of quasi-criminal punishment to make the prices the AG deems appropriate for Kentucky the national price. Slightly different methods, but the same basic economic effect.

In some ways, the AG's price controls are worse in this case. For one thing, the AG's rule would apply to the whole "interstate marketplace," PI Order, R. 36, Page ID # 481, rather than just a small number of neighboring states as in *Healy*. For another, at least the compliance standards in *Healy* and *Brown-Forman* were ascertainable; sellers could set their own prices in the subject state, and were only

limited in their ability to set them differently in other states. Here, by contrast, the statutory language is so vague and subjective that no one actually knows which products are covered and which prices the AG will allow. Rafelson Dec., R. 10-1, Page ID # 66. It was onerous but possible to comply with the laws in *Healy* and *Brown-Forman*; here, compliance is all but impossible.

And even if there were some daylight between this case and *Healy* and *Brown-Forman*, "the principles set forth in these decisions are not limited to that context." *Nat'l Solid Wastes Mgmt. Ass'n v. Meyer*, 63 F.3d 652, 659 (7th Cir. 1995). Relying on those principles, this Court and others have struck down a number of state statutes with extraterritorial effect on prices or other aspects of national commerce. *See, e.g.*, *Edgar v. MITE Corp.*, 457 U.S. 624, 642-43 (1982) (securities transactions); *Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320, 1325 (9th Cir. 2015) (*en banc*) ("apply[ing] the simple, well established constitutional rule summarized in *Healy*" to a state law regarding commissions on art sales); *Snyder v. Am. Bev. Ass'n*, 735 F.3d 362 (6th Cir. 2013) (applying the extraterritoriality doctrine to product labeling even though that was a "novel" context); *Allergan, Inc. v. Athena Cosmetics, Inc.*, 738 F.3d 1350, 1359 (Fed. Cir. 2013) (holding that California may not "extend its unfair competition law to other states"); *Ass'n for Accessible Meds. v. Frosh*, 887 F.3d 664 (4th Cir. 2018) (prescription drug "price gouging"); *Legato Vapors, LLC v. Cook*, 847 F.3d 825, 833 (7th Cir. 2017) (manufacturing conditions); *Am.*

*Booksellers Found. v. Dean*, 342 F.3d 96, 103-04 (2d Cir. 2003) (sexually explicit materials on the Internet); *Meyer*, 660-61 (waste regulation); *NCAA v. Miller*, 10 F.3d 633, 639 (9th Cir. 1993) (rules for college sports). The list could go on. Point being, it isn't just a couple of cases about beer.

A few cases bear particular emphasis in addition to *Healy* and *Brown-Forman*. In *Frosh*, the Fourth Circuit struck down Maryland's analogous extraterritorial price control. 887 F.3d at 671. In *Snyder*, this Court struck down a Michigan law that would have controlled product labeling beyond the border. 735 F.3d at 376. In *Dean*, the Second Circuit struck down a Vermont law that regulated content on the Internet because the law would have controlled not only what Vermonters posted and saw, but also what everyone else did too. 342 F.3d at 103-04. And in *Allergan*, the Federal Circuit held that California's unfair competition law—which is similar to Kentucky's price-control laws—could not apply to transactions outside the state. 738 F.3d at 1358-59. As the District Court found, the AG's use of Kentucky's price control laws has similar—and similarly unconstitutional—effects.

This case also illustrates why courts "not only consider[] the consequences of the statute itself, but also [] consider[] 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." *Healy*, 491 U.S. at 336;

*see also Snyder*, 735 F.3d at 376 (considering the "extraterritorial problems triggered by" the state's law).

Those are not abstract concerns here. As the District Court explained, prices that might be lawful in, say, Alabama may be illegal in Kentucky; "[c]onsideration of the potential for conflicting state requirements cuts in favor of finding that Kentucky's price gouging statutes violate the extraterritoriality doctrine." PI Order, R. 36, Page ID # 483-84.

The brief on behalf of other Attorneys General fleshes that problem out even more. "[S]ome States apply a rebuttable presumption that a price increase of up to 10, 15, 20, or 25 percent is presumptively unlawful." Br. of *Amici* AGs 39 (citing various states' laws). Exactly—a single price offered nationwide could be presumptively unlawful in some states while being presumptively lawful in others. The burden is even worse because many states rely on standardless terms like "unconscionable" or "excessive" to characterize unlawful prices. *Amici* acknowledge "some variations" in how states define those terms, *id*. at 31, but that is an understatement—no one can know what those terms mean in advance and factor them into a single national price. *See* PI Order, R. 36, Page ID # 483-84; Rafelson Dec., R. 10-1, Page ID # 66-69; Guild's Notice of Supp. Auth., R. 35, Page ID # 447. As the *Healy* Court warned, applying such vague and conflicting standards to the interstate marketplace "create[s] just the kind of competing and interlocking

local economic regulation that the Commerce Clause was meant to preclude." *Healy*, 491 U.S at 337.

The AG is correct that the Supreme Court itself has only struck down a few exterritorial laws. But high court precedents do not evaporate over time, and the doctrine is alive and well in the lower courts. It is also entirely routine for the Supreme Court to make broad pronouncements and leave it to the lower courts to apply that guidance to various fact patterns. And although the meaning of *certiorari* denials is limited, the Court refused to take up challenges to *Snyder* and *Frosh* and *Sam Francis Foundation*, to name a few recent denials. *See Snyder*, *cert. denied*, 134 S. Ct. 61 (2013); *Frosh*, *reh'g en banc denied*, 742 F. App'x 720 (2018), *cert. denied*, 139 S. Ct. 1168 (2019); *Sam Francis Found.*, *cert. denied*, 136 S. Ct. 795 (2015). Even though the AG might think the Supreme Court should revisit the extraterritoriality doctrine, the law remains binding.

The AG also does not propose a new test for evaluating extraterritorial laws and has thus waived the opportunity to do so in this Court or any other. To the extent he would rely on the *Pike* standard, his actions would fail that test. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). The District Court found ample evidence of significant burdens on interstate commerce, whereas the AG submitted no evidence of any actual in-state benefit that he could not otherwise achieve. Further, as the Guild pointed out below, there is reason to view the AG's actions as discriminatory:

he has favored Amazon—which has significant in-state presence and political power—over relatively powerless actors in interstate commerce. *See* Rafelson Dec., R. 10-1, Page ID # 72; *Snyder*, 735 F.3d at 370 ("Discrimination against interstate commerce in favor of local business or investment is per se invalid.") (cleaned up).

Those reasons for affirmance are cumulative. The extraterritoriality doctrine alone controls the outcome.

**c. The AG's assertion of power over the national market is not grounded in the law.**

The AG does not identify a precedent that gives him the power to control interstate prices because none exists. Instead, he turns to *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127 (1978), where the Court explained that the Commerce Clause does not "protect[] the particular structure or methods of operation in a retail market." From there, the AG asserts that he can regulate prices beyond Kentucky's borders after all.

The AG has "torn" that language "from the context out of which it arose." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 58 (1999). *Exxon* was a case about purely in-state regulation, in which the state had freedom to regulate so long as it was not discriminatory or impermissibly burdensome. *Exxon*, 437. U.S. at 128. In that context, it made sense to observe that the effect of state law might be to shape the in-state market, which states can do within the boundaries of *Pike* (and other

constitutional restrictions). *See Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) (outlining the framework for evaluating in-state regulation).

The extraterritoriality cases are different, because they focus on the antecedent question whether the state has any power to impose the regulation at all. Whether the state has that authority is the "first consideration." *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 646 (6th Cir. 2010). "[T]he *Pike* balancing test controls" only *after* the Court first determines that the law is "[n]either extraterritorial or discriminatory in effect," in which case the law would be "'virtually *per se* invalid.'" *Id*. (quoting *Brown-Forman*, 476 U.S. at 579). And when a state lacks the power to regulate at all, the state by definition cannot reorder the market through such regulation.

The AG cites no authority applying *Exxon* his way, and the Fourth Circuit rejected a similar argument in *Frosh*. Extraterritorial price controls "do more than alter [] distribution channels," which states have some license to do within their borders. 887 F.3d at 673. Such laws go further and set "prices in a way that 'interferes with the natural function of the interstate market' by superseding market forces that dictate the price of a good," which states cannot do. *Id*. (quoting *McBurney v. Young*, 569 U.S. 221, 235 (2013)) (cleaned up).

There is a reason no Commerce Clause decision reads *Exxon* the AG's way. The same reason neither *Healy* nor *Brown-Forman* troubled with *Exxon*. The AG's view of *Exxon* would swallow up the extraterritoriality doctrine.

Read together, *Healy* and *Brown-Forman* stand for the limits of states' authority, and *Exxon* stands for what states may do within the limits of that authority. The problem with the AG's use of *Exxon* is the same problem with his application of the price-control statutes. He blew past the threshold question whether he had the constitutional power to act. The AG may have been motivated by the crisis, but as he has argued elsewhere, "even during a pandemic, the rule of law still applies."[13]

If there were any remaining doubt that the AG thinks he can seize the power to control the interstate market, look to his solution for the Guild's members' concerns: just abandon their "insistence on using Amazon." AG Br. 41. That could be the answer in every constitutional case: just don't exercise the right in question. But that is not how the law works, and abandoning Amazon could mean abandoning e-commerce entirely. Rafelson Dec., R. 10-1, Page ID # 62.

The AG's position is essentially the "stop-selling theory" for avoiding constitutional injury, which the Supreme Court rejected for its "incoherence." *Mut.*

[13] Attorney General of Kentucky, "Attorney General Defends the Constitutional Rights of Kentuckians Before the Supreme Court of Kentucky, Challenges the Governor's Broad COVID-19 Emergency Powers" (9/17/20), https://kentucky.gov/Pages/Activity-stream.aspx?n=AttorneyGeneral&prId=961.

*Pharm. Co. v. Bartlett*, 570 U.S. 472, 488 (2013). *Bartlett* arose in the analogous preemption context, which like the extraterritoriality doctrine is a function of federal supremacy in certain economic domains. The Court rejected the theory that drug makers could avoid conflicting state and federal obligations by simply "pull[ing] their products from the market altogether." *Id*. Not only would that theory nullify the constitutional rights in question, it would mean that "the vast majority—if not all—of the cases" upholding those rights "were wrongly decided." *Id*. at 489.

So too here. If the AG were right, all of the extraterritoriality cases were wrongly decided because the companies in question could have simply stopped operating in the interstate market. The companies in *Healy* and *Brown-Forman*, for example, could have simply stopped selling alcohol outside Connecticut and New York. The beverage companies in *Snyder* could have stopped selling drinks outside Michigan. And the pharmaceutical companies in *Frosh* could have simply stopped selling drugs outside Maryland. For that matter, the companies could have simply stopped selling the product in question entirely, thereby eliminating the constitutional objection altogether. Of course that is not how constitutional rights work.

The Court should reject the AG's attempt to replace settled law with a new power of interstate price regulation.

**d. The AG's hands are not tied.**

Lastly, although it is unnecessary doctrinally for the Guild to prevail, it is worth observing that the AG could use "likely alternative measures" to address the perceived problem. PI Order, R. 36, Page ID # 485. The injunction operates only "as towards Amazon suppliers, not any other retailer or supplier." *Id*. at Page ID # 487. Importantly, the AG "could regulate Amazon," which controls prices and listings in its store. *Id*.; *see also id.* (citing letter from dozens of AG's—but not Kentucky's AG—urging Amazon to "creat[e] and enforce[e] strong policies that prevent sellers from deviating in any significant way from the price the product was sold at prior to the onset of the emergency.").

Not only would policing Amazon directly avoid the constitutional problems at issue here—it would make a lot more sense. Unlike the Guild's members, Amazon has the power to ensure that its store complies with the laws that apply to transactions with its customers. *See* PI Order, R. 36, Page ID # 486 (describing how Amazon has removed hundreds of thousands of offers from its store and suspended thousands of accounts for violating Amazon's pricing policies). Point being, the District Court's injunction does not leave the problem unfixable.

## IV. The District Court correctly found that the other factors favor an injunction.

The District Court reasonably exercised its broad discretion to weigh the relevant factors and make the "ultimate determination . . . in favor of granting" the preliminary injunction. *Certified Restoration*, 511 F.3d at 540-41.

As the District Court explained, "'[w]hen a party seeks a preliminary injunction on the basis of a potential constitutional violation, the likelihood of success on the merits will often be the determinative factor.'" PI Order, R. 36, Page ID # 466 (quoting *City of Pontiac Retired Employees Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014)). Here, the District Court found that that factor—and the others—warranted an injunction. *Id*. at Page ID # 485-86.

The District Court found irreparable injury because "[i]t is well-established that 'when constitutional rights are threatened or impaired, irreparable injury is presumed.'" PI Order, R. 36, Page ID # 486 (quoting *Obama for Am. v. Husted*, 497 F.3d 423, 436 (6th Cir. 2012)). The District Court further found that the Guild and its members would suffer "unquantifiable economic injury" as well as diverted resources. *Id*. at Page ID # 486. The District Court then balanced the harms, and found that the public interest in "the robust enforcement of constitutional rights" should prevail. *Id*. (quoting *Am. Freedom Def. Initiative v. SMART*, 698 F.3d 885, 896 (6th Cir. 2012). Especially since, "contrary to the Attorney General's assertions, it is not clear from the record that enjoining the Attorney General's investigations

into price gouging will necessarily 'cause substantial harm to Kentuckians in need of fairly priced emergency and medical supplies.'" *Id*. (quoting the AG's brief). In other words, the District Court considered but did not credit the AG's vague claims of harm.

The AG's short effort to undo the District Court's discretionary weighing of the other preliminary injunction factors is unpersuasive. The AG's main argument seems to be a concern that prices on Amazon might be excessive, but—as the District Court found—the "Attorney General partly acknowledges the key role that Amazon plays in controlling price gouging on its platform." *Id*. If prices on Amazon remain a problem, the AG "could regulate Amazon." *Id*. at Page ID # 485. The AG's unwillingness to do so undermines his claims of harm.

All considered, the District Court carefully weighed the preliminary injunction factors and reached the correct result. Exercising its "highly deferential" standard of review, this Court should affirm. *Certified Restoration*, 511 F.3d at 540-41.

## V. This Court could also affirm the injunction on multiple other grounds.

Lastly, although it is unnecessary to reach the Guild's other constitutional arguments to affirm the District Court, this Court "may affirm the district court's injunction for any reason supported by the record." *McGirr v. Rehme*, 891 F.3d 603,

510 (6th Cir. 2018). Below, the Guild raised several arguments that independently support an injunction.

**a. Kentucky's price-control statutes are unconstitutionally vague.**

For "over a hundred years," the courts have struck down statutes "so vague that [they] fail[] to give ordinary people fair notice of the conduct [they] punish[], or so standardless that [they] invite[] arbitrary enforcement." *Shuti v. Lynch*, 828 F.3d 440, 443 (6th Cir. 2016) (quoting *Johnson v. United States*, --- U.S. ---, 135 S. Ct. 2551, 2556 (2015); *Collins v. Kentucky*, 234 U.S. 634, 638 (1914)). Such laws "violate[] the fundamental principles of justice embraced in the conception of due process of law." *Shuti*, 828 F.3d at 443.

Just over a century ago the Supreme Court struck down a Kentucky law barring prices in excess of the "market value under fair competition." *Int'l Harvester v. Kentucky*, 234 U.S. 216, 221 (1914). Estimating such a price, on pain of prosecution, unlawfully required "exact gifts that mankind does not possess." *Id*. at 223-24.

Kentucky's statutes are likewise beyond advance comprehension. During an emergency, KRS 367.374 bans price increases that are "grossly in excess" of pre-emergency prices. What is a "gross excess"? The statute does not say; merchants can only guess. *See* Rafelson Dec., R. 10-1, Page ID # 67-68 (describing confusion among merchants).

The statute does contain a few carve-outs, *see* KRS 367.374(c), but they add to the ambiguity. A price increase might not be unlawful if it is "related to an additional cost imposed by a supplier," but what does "related to" mean? How "related" must the cost be? Likewise, a price increase might not be illegal if it is "generally consistent with fluctuations" in the market, but again—what does that mean? The AG emphasizes that the statute does not apply if the increase is ten percent or less of the pre-emergency price, but that floor provides no specific guidance for higher price increases. On top of that, the statute might be read to frame those carve-outs as defenses that the accused must prove, at least to avoid prosecution.

KRS 367.170 is worse—it is unlimited to emergencies, and is at least as vague. Relevant here, the statute bans "unfair" trade practices, with "unfair . . . construed to mean unconscionable." KIRS 367.170(1); (2). That definition only exchanges one vague word (unfair), for another (unconscionable). The Online Merchants Guild's members have no way of determining *ex ante* whether a sale price violates that standard. And, unlike KRS 367.374, which at least appears to offer some consideration of cost increases due to the emergency, KRS 367.170 does not, so the AG can prosecute under one statute what the other makes lawful.

The interaction between Kentucky's laws and those of other states only makes things more confusing in a single, nationwide market. Businesses—especially small

businesses—cannot function with that kind of uncertainty. The price-control laws are creating fear of arbitrary, *post hoc* application to prices or goods that online merchants could not foresee would be considered unlawful. Look no further than the AG's apparent position that the statutes regulate the price of peanut butter but not spices, even though both are plausibly "Consumer food items." Rafelson Dec., R. 10-1, Page ID # 66; KRS 367.374(b)(1). Or look to the AG's apparent decision to target small online merchants but not the titan Amazon. *Id*. at Page ID # 71-72. The confusion and risk of "arbitrary enforcement" render the statutes unconstitutionally vague. *Shuti*, 828 F.3d at 443.

**b. The AG's use of Kentucky's price-control statutes violates the First Amendment.**

Below, the Guild challenged the AG's actions on First Amendment grounds. Essentially, the AG is suppressing commercial speech outside of Kentucky because Guild members are afraid to advertise their products at prices that may be lawful elsewhere. *See* Rafelson Dec., R. 10-1, Page ID # 70. And even within the Commonwealth, the AG is suppressing the entire advertisement, not just the pricing component.

The AG failed to meet his "burden" to demonstrate that his application of Kentucky's price control statutes to the nationwide market is "consistent with the First Amendment." *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 571-72 (2011) (citing,

*inter alia*, *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980)).

To the extent that *Central Hudson*'s intermediate scrutiny applies, the AG failed to prove that his conduct "directly advances a substantial governmental interest and that the measure is drawn to achieve that interest." 564 U.S. at 571-72. The AG has no authority to suppress speech that is lawful outside the Commonwealth. The AG also cannot surgically restrict the suppression to in-state effects. And even if he could, he would still be eliminating the balance of the advertising, and the ultimate effect would not be to reduce consumer prices in Kentucky, but rather to create market distortions and possibly higher prices. *See, e.g.*, PI Order, R. 36, Page ID # 481 (observing how the AG's actions could distort the market); Guild's Notice of Supp. Auth., R. 35, Page ID # 447 (documenting how suppliers' fears had led to shortages); Rafelson Dec., R. 10-1, Page ID # 68-70 (same). The AG's conduct thus fails intermediate scrutiny.

Moreover, heightened scrutiny should apply, which the AG's actions also cannot survive. Following *Sorrell*, the lower courts have wrestled with whether and when speaker- and content-based commercial speech restrictions should undergo strict scrutiny. *See Flying Dog Brewery, LLLP v. Mich. Liquor Control Comm'n*, 597 F. App'x 342, 366 (6th Cir. 2015) (Moore, J., concurring in part and dissenting in part); *Vugo, Inc. v. City of N.Y*, 931 F.3d 42, 50 (2d Cir. 2019) (collecting cases).

Strict scrutiny should apply in a case like this because the AG is selectively pursuing some speakers (the Guild's members) but not others (Amazon) for the same advertising—in Amazon's store no less. As the Third Circuit explained, when a "regulation has the practical effect" of choosing between "some messages or some speakers based on the content of the speech or the identity of the speaker, something more than intermediate scrutiny may be necessary to survive a First Amendment inquiry." *Greater Phila. Chamber of Commerce v. City of Phila.*, 949 F.3d 116, 139 (3d Cir. 2019). That makes eminent sense here. The government cannot lawfully pick and choose between multiple speakers on the same topic. That is just as true in the commercial speech context as in the rest of free-speech law—especially when prosecutors can control speech using vague laws. The AG made no meaningful attempt to satisfy strict scrutiny and cannot meet that demanding test.

The Court could affirm the injunction because the AG is violating Guild members' First Amendment rights.

**c. The AG is also violating due process limits on personal jurisdiction.**

The Due Process Clause forbids the AG from using Kentucky law to regulate the conduct of non-Kentuckians who did not deliberately affiliate with the Commonwealth by supplying goods for Amazon's interstate store. *See Walden v. Fiore*, 571 U.S. 277, 283-84 (2014) (due process forbids application of a state's law to foreign citizens who do not seek an "affiliation" with the state).

The AG may claim that he is only targeting Kentucky residents, but even if that is so, his actions are still coercing non-residents who cannot prevent Kentuckians from seeing or purchasing goods they supplied to Amazon. *See* Rafelson Dec., Ro. 10-1, Page ID # ¶ 72 (describing non-Kentucky members whom the Kentucky AG is nonetheless effectively coercing). As for whom the AG is actually targeting, we have not seen from the AG a definitive disclaimer that he can prosecute non-Kentuckians under the statutes in question. At best, he suggests that he has not done so yet.

Simply supplying goods to Amazon's store—without deliberately targeting Kentucky residents specifically—is insufficient to create minimum contacts with the Commonwealth. This Court uses the "stream of commerce plus theory of specific personal jurisdiction," under which, "for a defendant to purposely avail himself of the privilege of acting within a forum state, he must do more than merely place a product into the stream of commerce." *Parker v. Winwood*, 938 F.3d 833, 840 (6th Cir. 2019) (citing *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987) (O'Connor, J.) (plurality op.)). The "plus" approach requires "affirmative[]" direction of a product into a specific state, not being "merely aware" that a product might enter one of the fifty states. *Id*. at 840-41; *see also J. McIntyre Mach. Ltd. v. Nicastro*, 564 U.S. 873, 883 (2011) (plurality op.) (rejecting mere "foreseeability" that a product would enter a state as a basis for personal jurisdiction).

As explained above, the Guild's members do not and cannot use Amazon's store to specifically solicit business in Kentucky, so their use of Amazon does not satisfy the stream of commerce plus test. Thus, the Due Process Clause prevents the AG from applying Kentucky's price-control statutes to the Guild's non-Kentucky members.

The Court could affirm the injunction on personal jurisdiction grounds insofar as non-Kentuckians are concerned.

**d. There is an equal protection problem with the AG's selective efforts.**

The AG is heavily targeting individual online merchants while taking a light-touch approach with Amazon. He has described being "grateful to Amazon for working with us" to target "third-party sellers" for their alleged "egregious actions,"[14] while ignoring Amazon's accountability for *its* store, Amazon's first-party sales, and Amazon's significant markup to the cost of "third-party" sales. *See* Rafelson Dec., R. 10-1, Page ID # 63-65 (describing Amazon's first-party sales and controlling role in third-party sales). An investigation released subsequent to the District Court's ruling found that "Amazon has publicly blamed third-party sellers for price increases while continuing to raise prices on its own products and allowing those sellers to raise their prices. . . . [I]nstead of policing price gouging on its platform as it promised early in the pandemic, Amazon coordinated a public

[14] *See* n.1, *supra*.

relations campaign attempting to wash its hands of price gouging, laying the blame entirely on third-party sellers."[15]

By regulating unequally, the AG is burdening the Online Merchants Guild's members' fundamental rights as set forth above, so heightened scrutiny applies. *Kiser v. Kandmar*, 831 F.3d 784, 792 (6th Cir. 2016) (tying equal protection standard to standard for substantive rights violated). The AG cannot satisfy that standard because whatever substantial interest the AG has will not be served by targeting individual merchants on an *ad hoc* basis while leaving Amazon alone. Amazon controls its store: which customers, in which states, see which items at which price. By contrast, targeting individual merchants will not accomplish the AG's price-control goals—but will devastate small businesses. The AG cannot defend that unequal and ineffective regime.

The AG's gerrymandered application of Kentucky's price-control statutes would also fail rational basis review. As this Court has explained, state action fails rational basis review when the state's purpose is "protecting the economic interests" of one group while burdening a less-favored group. *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002); *accord, e.g.*, *Merrifield v. Lockyer*, 547 F.3d 978, 991-92

[15] Public Citizen, "Amazon's Pandemic Price Gouging Shows Need for New Federal Law" (9/10/20), https://www.citizen.org/news/amazons-pandemic-price-gouging-shows-need-for-new-federal-law/.

(9th Cir. 2008) (regulation "designed to favor economically certain constituents at the expense of others similarly situated" is unconstitutional).

There is no real dispute that Amazon is a significant economic and political force in Kentucky, while the Guild's members are not. *See, e.g.*, Rafelson Dec., R. 10-1, Page ID # 72. In keeping with that idea, Congressional investigators, in a report published after the District Court's ruling, found that "extracting state subsidies" and other forms of regulatory capture have long been part of Amazon's model. U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Antitrust, Commercial and Administrative Law, "Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations," 261.[16] Whether that explains the enforcement pattern here remains to be seen, but the AG offered little explanation and no evidence for why—if the problem is prices in a store—he is targeting a store's suppliers but not the store itself. That itself is telling. *See Craigmiles*, 312 F.3d at 225 (the "weakness of [a state's] proffered explanations" for differential treatment evinces a suspect rationale). The record could certainly fill out in discovery, but the apparent equal protection problems further support an injunction while the litigation proceeds.

[16] The House Antitrust Subcommittee report is available here: https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf

## Conclusion

The themes underlying this case are important, but resolution of this appeal is fairly straightforward. The District Court carefully evaluated the record and drew reasonable factual conclusions, and then applied settled doctrine to those facts. The injunction protects the Guild's members' rights during the pendency of this litigation, while leaving the AG free to protect consumers—an interest the Guild endorses—through lawful means. This Court should affirm.

Respectfully submitted this 16th day of November, 2020.

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Dated: November 16, 2020

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**Certificate of Service**

The undersigned hereby certifies that on November 16, 2020, an electronic copy of the Brief of Plaintiff-Appellee 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 all participants are registered CM/ECF users and will be served via the CM/ECF system.

*/s/ Aaron K. Block*
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## Addendum

The Online Merchants Guild designates the following as relevant documents from the record:

1. The Online Merchants Guild's complaint, R. 1, Page ID # 1-17
2. The Online Merchants Guild's motion for temporary restraining order and preliminary injunction and attached declaration of the Guild's counsel and executive director, R. 10, R. 10-1, Page ID # 37-73
3. The Attorney General's response to motion for preliminary injunction and attached declaration of the AG's counsel, R. 21-1, R. 21-2, Page ID # 104-34
4. The Online Merchants Guild's 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, Page ID # 136-209
5. The 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, Page ID # 223-345
6. The Online Merchants 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, Page ID # 346-446
7. The Online Merchants Guild's notice of supplemental authority and attached exhibits, R. 35, R. 35-1, R. 35-2, Page ID # 447-61

8. Transcript of oral argument from May 13, 2020, R. 39, Page ID # 493-520

9. Transcript of oral argument from May 21, 2020, R. 40, Page ID # 521-75