

No. 20-5723

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**UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

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ONLINE MERCHANTS GUILD,

Plaintiff-Appellee,

v.

DANIEL CAMERON, in his official capacity as  
Attorney General of the State of Kentucky,

Defendant-Appellant.

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On Appeal from the United States District Court for the  
Eastern District of Kentucky, No. 3:20-cv-00029-GFVT

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**BRIEF OF AMICI CURIAE ILLINOIS, ALASKA, ARKANSAS,  
CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE,  
DISTRICT OF COLUMBIA, HAWAII, IDAHO, IOWA, KANSAS,  
MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN,  
MINNESOTA, NEVADA, NEW JERSEY, NEW YORK, NORTH  
CAROLINA, OHIO, OREGON, PENNSYLVANIA, RHODE  
ISLAND, TENNESSEE, TEXAS, VERMONT, VIRGINIA,  
WASHINGTON, AND WISCONSIN IN SUPPORT OF  
DEFENDANT-APPELLANT AND REVERSAL**

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## **IDENTITY AND INTEREST OF AMICI STATES**

Illinois, Alaska, Arkansas, California, Colorado, Connecticut, Delaware, the District of Columbia, Hawaii, Idaho, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Vermont, Virginia, Washington, and Wisconsin (collectively, the “amici States”) submit this brief in support of Defendant-Appellant Kentucky Attorney General Daniel Cameron (“Kentucky”) pursuant to Federal Rule of Appellate Procedure 29(a)(2). The amici States have a substantial interest in protecting the public welfare, which includes protecting their residents from price gouging during emergencies.

Indeed, the amici States are home to millions of consumers who rely on state regulators to investigate and pursue enforcement actions against merchants that charge excessive prices. The need for such protections has been especially acute during the Covid-19 pandemic,

which has caused financial instability for millions of Americans and created actual and threatened shortages of essential goods.<sup>1</sup>

Furthermore, the amici States have an interest in enforcing their price gouging regulations against online sellers, particularly during the Covid-19 pandemic. Given the highly infective and airborne nature of the virus, many States have implemented social distancing measures in public places, limited in-person activities, and recommended that residents stay at home when possible.<sup>2</sup> More consumers have thus turned to online sellers to procure food, medicine, and other essentials for themselves and their families. In fact, online sales increased by

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<sup>1</sup> See, e.g., Eli Rosenberg, Washington Post, *New unemployment claims top one million. Again.* (Aug. 20, 2020), <https://www.washingtonpost.com/business/2020/08/20/august-unemployment-claims/>; Megan L. Ranney et al., *Critical Supply Shortages—The Need for Ventilators and Personal Protective Equipment during the Covid-19 Pandemic*, New England J. Med. (Apr. 30, 2020), <https://www.nejm.org/doi/full/10.1056/NEJMp2006141>. All websites were last visited on September 22, 2020.

<sup>2</sup> See, e.g., Illinois Executive Order 2020-10 (Mar. 20, 2020), <https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-10.aspx>; New York Executive Order 202.8 (Mar. 20, 2020), <https://www.governor.ny.gov/news/no-2028-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>; Ohio Dep't of Health, Amended Director's Stay At Home Order (Apr. 2, 2020), [https://content.govdelivery.com/attachments/OHOOD/2020/04/02/file\\_attachments/1418062/Signed%20Amended%20Director%27s%20Stay%20At%20Home%20Order.pdf](https://content.govdelivery.com/attachments/OHOOD/2020/04/02/file_attachments/1418062/Signed%20Amended%20Director%27s%20Stay%20At%20Home%20Order.pdf).

31.8% between the first and second quarter of 2020, and 40% of consumers report that they have “increased or significantly increased’ their online shopping amid the pandemic.”<sup>3</sup>

The decision below—which preliminarily enjoined Kentucky from enforcing its price gouging prohibitions against merchants that sell their products on Amazon—interferes with these interests. If States are unable to enforce price gouging regulations against online sellers, bad actors will profit off of their residents by charging excessively high prices for scarce goods during emergencies. Accordingly, the amici States urge this Court to reverse the district court’s decision and vacate the preliminary injunction.

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<sup>3</sup> Annie Palmer, *Coronavirus pandemic turbocharges online sales, which were up more than 31% in just three months*, CNBC (Aug. 18, 2020), <https://www.cnbc.com/2020/08/18/e-commerce-sales-grew-more-than-30percent-between-q1-and-q2.html>.

## SUMMARY OF ARGUMENT

Earlier this year, the country was thrust into an “extraordinary health emergency,” *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring), that has threatened the health and safety of millions across the country. The States—which are charged with protecting the public welfare during emergencies—responded with measures designed to address the effects of the Covid-19 pandemic within their communities. Although many of these measures differed by locality, nearly every State prohibited price gouging on essential goods and services for the duration of the emergency.

Kentucky, like many other States, has utilized the ban on price gouging to pursue consumer complaints against online merchants charging excessive prices for essential goods. *See* Ky. Rev. Stat. Ann. §§ 367.170, 367.374. After Kentucky opened investigations into several Kentucky-based merchants, the Online Merchants Guild filed suit seeking to enjoin Kentucky from applying its price gouging statutes against merchants that sell goods on Amazon. The Merchants Guild argued, among other things, that applying price gouging regulations to

these sellers would violate the dormant Commerce Clause because it would constitute an impermissible regulation of extraterritorial commerce and, alternately, because the burden on interstate commerce would outweigh the regulations' benefits. The district court accepted the extraterritoriality argument and entered a preliminary injunction against Kentucky, without reaching whether the putative burden imposed by the Kentucky regulations outweighs their benefits.

The amici States agree with Kentucky that the district court misapplied the extraterritoriality doctrine and abused its discretion in entering the preliminary injunction. They write separately, however, to highlight the critical role that state price gouging regulations play in protecting the public welfare during emergencies like the Covid-19 pandemic and explain why these regulations are a valid exercise of the States' police powers.

State regulation may violate the dormant Commerce Clause if it is protectionist, impermissibly extraterritorial, or if the burdens on interstate commerce outweigh the benefits of the regulation. None of these attributes are present here. In particular, States implement price gouging regulations to promote the public welfare during times of

emergency, and not for a protectionist or discriminatory reason. These regulations, moreover, do not directly regulate interstate commerce or control out-of-state prices.<sup>4</sup> Accordingly, the district court erred in concluding that the Merchants Guild was likely to succeed on the merits of its dormant Commerce Clause claim.

## ARGUMENT

### **I. State Price Gouging Regulations Protect Consumers During Emergencies.**

Price gouging regulations are a critical tool that States use to protect consumers from paying excessive prices for goods and services that are impacted during emergencies. Indeed, national and local emergencies, like the Covid-19 pandemic, can create significant shortages of necessary items, including food, household goods, and medical supplies. And state price gouging laws ensure a more fair allocation of such items to the State's consumers.

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<sup>4</sup> Because the district court has not yet had the opportunity to determine whether any burden imposed by the Kentucky regulations outweighs state benefits under *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), this brief does not address the *Pike* balancing analysis. See Ky. Br. at 28 n.8.

Absent such laws, the free market can rely on price to dictate the allocation of scarce resources, which in turn, distributes goods and services to those who can easily pay exorbitant prices, rather than those who most need them.<sup>5</sup> State price gouging measures have thus helped ensure a more equitable distribution of goods and services among high- and low-income consumers. Indeed, consumers across the country have relied on state protections to report bad actors, remedy nefarious conduct, and ensure payment of fair prices going forward.

During the ongoing Covid-19 pandemic, for instance, consumers have submitted a record number of price gouging complaints. The Michigan Attorney General's Office received more than 4,000 price gouging complaints within the first month of the pandemic, which far outpaced the 80 contacts that the office would typically receive in any given year.<sup>6</sup> By late April 2020, the New Jersey Attorney General's

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<sup>5</sup> Geoffrey C. Rapp, *Gouging: Terrorist Attacks, Hurricanes, and the Legal and Economic Aspects of Post-Disaster Price Regulation*, 94 Ky. L.J. 535, 538 (2005-06).

<sup>6</sup> Mark Hornberck & Careena Eggleston, *Attorney General price-gouging complaints soaring during pandemic*, AARP (Apr. 17, 2020), <https://states.aarp.org/michigan/attorney-general-says-covid-fraud-rampant>.

Office had “logged a total of 3,623 complaints related to the COVID-19 emergency,” approximately 90% of which alleged “unfair price increases on personal protective equipment, sanitizers, disinfectants, food, bottled water and other items in demand by consumers concerned about keeping safe and having enough food and supplies.”<sup>7</sup> And in Illinois, consumers have filed approximately 3,500 complaints since March 2020, more than 1,700 of which focus on price gouging.

In response to these and other complaints, States have taken action that has been crucial to curbing price gouging during the Covid-19 crisis, including working toward voluntary compliance, issuing subpoenas, sending cease and desist letters, and filing civil actions. In Illinois, for example, the Attorney General’s Office has investigated complaints of alleged price gouging on essential items such as personal protective equipment, paper goods, and food with the goal of ensuring businesses comply with Illinois law. To that end, Illinois has sent approximately 100 letters securing the agreement of businesses to

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<sup>7</sup> Press Release, New Jersey Attorney General, *AG Grewal and Division of Consumer Affairs Issue Enforcement Update on Price Increases During COVID-19 Emergency* (Apr. 24, 2020), <https://www.nj.gov/oag/newsreleases20/pr20200424a.html>.

comply with its price gouging laws. In one case, Illinois entered into an Assurance of Voluntary Compliance agreement with an online retailer that made misleading statements about the quality and price of face masks sold on its website. That agreement requires the retailer to comply with state law and pay restitution to consumers who had purchased the misrepresented products.

Other attorneys general have used subpoenas and cease-and-desist orders to achieve compliance. The Florida Attorney General, for instance, has issued dozens of subpoenas to sellers allegedly charging excessive prices and worked with online sellers to “deactivate[ ] more than 100 online posts,” including one “selling four cans of Lysol disinfectant spray” for \$10,100 and another seeking \$68.99 for Clorox wipes.<sup>8</sup> And by June, the New York Attorney General had “issued more than 1,565 cease-and-desist orders to businesses that stand accused of

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<sup>8</sup> Melissa E. Holsman, *Coronavirus Florida: Attorney General cracking down on COVID-19 ‘essential commodities’ price gouging*, The Daytona Beach News-Journal (Apr. 7, 2020), <https://www.news-journalonline.com/news/20200407/coronavirus-florida-attorney-general-cracking-down-on-covid-19-essential-commodities-price-gouging>.

violating” the State’s consumer protection law by charging excessive prices.<sup>9</sup>

And in some States, these investigations have led to civil actions. In Pennsylvania, the Attorney General is pursuing a civil action to prevent Amazon sellers from overcharging for hand sanitizer after an investigation revealed that a seller was charging \$65 to \$75 for an 8-oz bottle that would normally sell for \$6 to \$10.<sup>10</sup> Similarly, the Tennessee Attorney General successfully reached a settlement with two brothers who hoarded 17,000 bottles of hand sanitizer for sale on Amazon for up to \$70 a bottle.<sup>11</sup> As part of the settlement, the brothers agreed to

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<sup>9</sup> Press Release, New York Attorney General, *Attorney General James’ Price Gouging Authority Strengthened After Governor Cuomo Signs New Bill Into Law* (June 6, 2020), <https://ag.ny.gov/press-release/2020/attorney-general-james-price-gouging-authority-strengthened-after-governor-cuomo>.

<sup>10</sup> Matt Fair, *Pa. AG Hits Amazon Seller With Sanitizer Price-Gouging Suit*, Law360 (Aug. 21, 2020), <https://www.law360.com/articles/1302922/pa-ag-hits-amazon-seller-with-sanitizer-price-gouging-suit>.

<sup>11</sup> Press Release, Tennessee Attorney General, *AG Slatery Reaches Settlement with Colvin Brothers* (Apr. 21, 2020), <https://www.tn.gov/attorneygeneral/news/2020/4/21/pr20-13.html>; Neil Vigdor, *Tennessee Brothers Who Hoarded Hand Sanitizer Settle to Avoid Price-Gouging Fine*, N.Y. Times (Apr. 22, 2020), <https://www.nytimes.com/2020/04/22/us/hand-sanitizer-matt-colvin-noah-coronavirus.html>.

donate the remaining hand sanitizer to those in need.<sup>12</sup> And in June 2020, the Ohio Attorney General brought suit against a couple who sold 600 hundred bottles of hand sanitizer on Amazon “for 11 times the retail price,” which yielded them \$26,700.<sup>13</sup>

Similar misconduct has been uncovered in the personal protective equipment market. As one example, the Alaska Attorney General brought suit against an individual who purportedly purchased N-95 respirator masks at several Alaska stores—including purchasing Lowe’s entire stock of 293 boxes, for \$17 to \$23 a box—and resold them on Amazon for an average price of \$89.25 and on Ebay for as much as \$89.99.<sup>14</sup> Similarly, in April 2020, the Ohio Attorney General filed a civil enforcement action against a state resident who allegedly “hoarded over 1,200 N95 respirator masks, then sold the masks through an

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<sup>12</sup> Vigdor, *supra* note 11.

<sup>13</sup> Press Release, Ohio Attorney General, *AG Yost Sues Price Gougers Who Inflated Hand Sanitizer Prices on Amazon* (June 18, 2020), <https://www.ohioattorneygeneral.gov/Media/News-Releases/June-2020/AG-Yost-Sues-Price-Gougers-Who-Inflated-Hand-Sanit>.

<sup>14</sup> Tess Williams, *Anchorage man who allegedly resold face masks online at inflated prices now faces steep fines*, Anchorage Daily News (Apr. 2, 2020), <https://www.adn.com/alaska-news/crime-courts/2020/04/01/anchorage-man-who-resold-face-masks-online-at-inflated-prices-now-faces-steep-fines/>.

online platform at an average increase over pre-pandemic retail prices of 1,700 percent.”<sup>15</sup> The case ultimately settled on terms that required the defendant to refund more than \$15,000 to consumers and give nearly 600 masks to first responders.<sup>16</sup>

It is also important to note that these patterns of price gouging emerge during other types of emergencies, such as natural disasters. Indeed, following Hurricane Charley in 2004, certain hotels took advantage of the need for shelter, including a Days Inn hotel in West Palm Beach that more than doubled the price of hotel rooms and “creat[ed] a sense of urgency to pay the inflated price” by telling consumers that “it had only two rooms left.”<sup>17</sup> The Florida Attorney

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<sup>15</sup> Matthew P. Denn, *Coronavirus: State Attorneys General take action against alleged price gouging in personal protection equipment* (Apr. 21, 2020), <https://www.dlapiper.com/en/us/insights/publications/2020/04/coronavirus-state-attorneys-general-take-action-against-alleged-price-gouging-in-ppe-sales/>.

<sup>16</sup> Jonathan Walsh, *Man settles lawsuit accusing him of price gouging N95 masks, but doesn't admit liability*, News 5 Cleveland (Apr. 23, 2020), <https://www.news5cleveland.com/rebound/coronavirus-investigations/man-settles-lawsuit-accusing-him-of-price-gouging-n95-masks-but-doesnt-admit-liability>.

<sup>17</sup> Edward J. Page, Min K. Cho, *Price Gouging 101: A Call to Florida Lawmakers to Perfect Florida's Price Gouging Law*, Fla. B.J. at 49 (Apr. 2006) (cleaned up).

General filed suit, which eventually resulted in a \$70,000 settlement, with a portion reserved for customer restitution and the Florida Hurricane Relief Fund.<sup>18</sup> Price gouging following Hurricane Charley also impacted the provision of necessary services. In Winter Park, a tree removal company provided a \$30,000 estimate to remove three trees that fell on a house, which the consumers eventually negotiated to a total cost of \$11,000.<sup>19</sup> This negotiated cost, however, was more than triple the average cost of tree removal in that part of Florida, leading the Florida attorney general to pursue a civil complaint.<sup>20</sup>

A similar pattern in the aftermath of the 1993 Northridge Earthquake in Los Angeles prompted the California legislature to bolster its statewide price gouging regulations.<sup>21</sup> Indeed, just two days

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<sup>18</sup> *Id.*; *see also id.* at 51 (describing the investigation of two men who sold generators on the side of the road for \$650 apiece when the retail price was \$300).

<sup>19</sup> *Id.* at 51.

<sup>20</sup> *Id.*

<sup>21</sup> Emily Bae, *Are Anti-Price Gouging Legislations Effective Against Sellers During Disasters?*, 4 *Entrepreneurial Bus. L.J.* 79, 83-84 (2009); *see also* Cynthia H. Craft, *Assembly Passes Bill That Targets Price Gouging Following Disaster*, *L.A. Times* (June 14, 1994), <https://www.latimes.com/archives/la-xpm-1994-06-14-me-4053-story.html>.

after the earthquake, the Los Angeles Consumer Affairs Department received 150 complaints on its fraud hotline, with more than 1,400 complaints coming in during the first month.<sup>22</sup> Among other complaints, “Waste Management, Inc. charged nearly \$200 more per bin as compared to pre-earthquake,” and stores were charging \$8 for a gallon of milk and \$200 per sheet of plywood.<sup>23</sup>

As these examples demonstrate, price gouging laws protect residents by enabling state regulators to remove ads that seek excessive prices, obtain voluntary compliance, bring civil actions against bad actors, and remedy financial loss. And these laws are especially beneficial now, as we endure an unprecedented pandemic that has resulted in actual or threatened shortages of essential goods and thus created circumstances ripe for abusive sales practices.

## **II. Kentucky’s Price Gouging Statutes Are Not Invalid Under The Dormant Commerce Clause.**

In addition to providing substantial benefits to consumers, state regulation of price gouging respects the dormant Commerce Clause.

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<sup>22</sup> Bae, *supra* note 21.

<sup>23</sup> *Id.*

The district court's decision to the contrary relied on an erroneous determination that applying Kentucky's price gouging statutes to Amazon sellers would have an impermissible extraterritorial reach, thus violating the dormant Commerce Clause. Opinion, R.36, Page ID# 482. It reached this conclusion notwithstanding the fact that the foundational principles underlying the dormant Commerce Clause doctrine—preventing economic protectionism and discriminatory regulation—are not served by enjoining state price gouging prohibitions. Rather, regulation of price gouging is a valid, non-protectionist exercise of state police powers that is designed to aid vulnerable consumers during emergencies.

Furthermore, the Kentucky statutes do not have an impermissible extraterritorial effect on commerce because they do not control commerce in other States or create conflicting regulatory burdens. Unlike other regulations that have been struck down under the extraterritoriality doctrine, price gouging laws like Kentucky's affect only the price of goods within the State, without dictating the price for out-of-state sales. And although state price gouging laws may vary, there is no actual conflict among them.

**A. The dormant Commerce Clause reserves to the States broad regulatory authority to protect the public health and safety.**

The Commerce Clause grants Congress the power “[t]o regulate Commerce . . . among the several States.” U.S. Const. art. I, § 8, cl. 3. In addition to this affirmative grant of authority, the Commerce Clause “has long been understood to have a ‘negative’ aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce.” *Oregon Waste Sys., Inc. v. Dep’t of Envtl. Quality of Oregon*, 511 U.S. 93, 98 (1994).

As the Supreme Court has explained, the dormant Commerce Clause must balance dual objectives: preserving a “national economic union unfettered by state-imposed limitations on interstate commerce,” while protecting the “autonomy of the individual States within their respective spheres.” *Healy v. Beer Inst. Inc.*, 491 U.S. 324, 336 (1989). The former recognizes that the Framers sought “to prevent a State from retreating into the economic isolation that had plagued relations among the Colonies and later among the States under the Articles of Confederation.” *Dep’t of Revenue of Kentucky v. Davis*, 553 U.S. 328, 338 (2008) (cleaned up). This “distrust of economic Balkanization,”

however, is balanced by the latter objective, which acknowledges that the federalism espoused by the Framers favors “a degree of local autonomy.” *Id.*

In other words, the “limitation imposed by the Commerce Clause on state regulatory power is by no means absolute”; on the contrary, “the States retain authority under their general police powers to regulate matters of legitimate local concern, even though interstate commerce may be affected.” *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (cleaned up). Consistent with these principles, the “modern” dormant Commerce Clause doctrine “is driven by concern about economic protectionism” and “regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.” *Davis*, 553 U.S. at 337-38 (cleaned up); *see also Am. Bev. Ass’n v. Snyder*, 735 F.3d 362, 378 (6th Cir. 2013) (Sutton, J., concurring) (“The key point of today’s dormant Commerce Clause jurisprudence is to prevent States from discriminating against out-of-state entities in favor of in-state ones.”).

Accordingly, “[d]iscriminatory laws motivated by simple economic protectionism are subject to a virtually *per se* rule of invalidity, which

can only be overcome by a showing that the State has no other means to advance a legitimate local purpose.” *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007) (cleaned up). Laws that *directly* regulate commerce taking place wholly outside the State will also normally be struck down. *Brown-Forman Distillers Corp. v. N.Y. State. Liquor Auth.*, 476 U.S. 573, 579 (1986); *see also Int’l Dairy Foods Ass’n v. Boggs*, 622 F.3d 628, 646 (6th Cir. 2010).

But so “long as a State does not needlessly obstruct interstate trade or attempt to place itself in a position of economic isolation, it retains broad regulatory authority under the commerce clause to protect the health and safety of its citizens.” *Taylor*, 477 U.S. at 151. And regulations that do not discriminate or regulate extraterritorially may be upheld as valid exercises of state authority, as long as the burden they impose is not “clearly excessive in relation to the putative local benefits.” *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). As now explained, the district court erred in holding that the Merchants Guild is likely to succeed on its claim that Kentucky’s price gouging laws are invalid under these standards.

**B. Regulating price gouging is a valid, non-protectionist exercise of state police powers.**

As discussed, the dormant Commerce Clause is primarily concerned with rooting out protectionist regulations that discriminate against out-of-state economic interests. Accordingly, it does not divest States of their authority to enforce non-discriminatory laws that regulate matters of local concern, even if there is an incidental burden on interstate commerce. And here, as even the district court recognized, Kentucky's goal in pursuing price gougers is "to protect Kentucky consumers," Opinion, R.36, Page ID# 487, not to discriminate against interstate commerce. Enjoining application of state price gouging regulations to online sellers thus does not serve the fundamental goals of the dormant Commerce Clause. Instead, it impairs the State's ability to fulfill its duty to protect the public welfare during emergencies.

To begin, there is no question that regulating price gouging is a "typical and traditional concern of local government." *United Haulers Ass'n*, 550 U.S. at 347. The prohibition on price gouging is a key component of consumer protection regulation, and consumer protection has long been viewed as an area "over which the states have traditionally exercised their police powers." *Greenwood Tr. Co. v.*

*Massachusetts*, 971 F.2d 818, 828 (1st Cir. 1992); *see also Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146 (1963) (prohibition on consumer deception was “a regulation well within the scope of California’s police powers”). Indeed, although the federal government recognizes the importance of preventing price gouging, regulation has largely been left to the States, the vast majority of which have implemented such statutes or regulations.<sup>24</sup>

Furthermore, it is well established that States have always possessed “great latitude” to exercise their police powers to protect “the lives, limbs, health, comfort, and quiet of all persons,” *Gonzales v. Oregon*, 546 U.S. 243, 269-70 (2006) (cleaned up), including during emergencies like the Covid-19 pandemic, *see, e.g., League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer*, 814 F. App’x 125, 127 (6th Cir. 2020) (“All agree that the police power retained by the states

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<sup>24</sup> *See, e.g.,* Federal Trade Commission, *Investigation of Gasoline Price Manipulation and Post-Katrina Gasoline Price Increases* (Spring 2006), <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-investigation-gasoline-price-manipulation-and-post-katrina-gasoline-price/060518publicgasolinepricesinvestigation-reportfinal.pdf>. A list of state price gouging laws can be found at <https://consumer.findlaw.com/consumer-transactions/price-gouging-laws-by-state.html>.

empowers state officials to address pandemics such as COVID-19 largely without interference from the courts.” (citing *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)).

Thus, States have traditionally invoked price gouging regulations during emergencies or at other times when protecting the public welfare is paramount.<sup>25</sup> Indeed, many state price gouging laws may only be applied if a federal, state, or local government has declared a state of emergency.<sup>26</sup> In Kentucky, for example, the Governor’s authority to implement the price gouging statute at issue here is triggered by the declaration of a state of emergency. Ky. Rev. Stat. Ann. § 367.374(1)(a). Once invoked, the prohibition on price gouging is limited to a 15-day

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<sup>25</sup> Kimberly J. Winbush, *Litigation of Prohibitions Against Price Gouging*, 161 Am. Jur. Trials 551 (2019) (section II.A.3.).

<sup>26</sup> *See, e.g.*, Ky Rev. Stat. Ann. § 367.374(a)(1); Ala Code § 8-31-4; Ark. Code Ann. § 4-88-303(c); Cal. Penal Code § 396(b); Conn. Gen. Stat. Ann. § 42-230; D.C. Code § 28-4102; Fla. Stat. Ann. § 501.160(2); Ga. Code Ann. § 10-1393.4; Haw. Rev. Stat. Ann. § 127A-30(a); Idaho Code § 48-603(19); Iowa Admin. Code 61-31.1(714); Kan. Stat. Ann. § 50-6106; La. Stat. Ann. § 29:732(A); N.J. Stat. Ann. § 56:8-108(2); N.Y. Gen. Bus. Law § 396-r(2); Okla. Stat. Ann. tit. 15 § 777.4(A); *see also* Me. Rev. Stat. Ann. Tit. 10 § 1105(2) (upon Governor’s declaration of market disruption).

period, unless an extension is “necessary to protect the lives, property, or welfare of the citizens.” *Id.* § 367.374 (1)(a), (2).

There is also no indication that price gouging regulations are protectionist. On the contrary, the purpose of price gouging regulations is to serve the public welfare by protecting vulnerable state residents from financial profiteering during periods when goods and services are scarce. This is reflected in the legislative history and text of the States’ price gouging statutes.

In California, for instance, the legislature recognized that although “the pricing of consumer goods and services is generally best left to the marketplace under ordinary conditions,” when a state of emergency “results in abnormal disruptions of the market, the public interest requires that excessive and unjustified increases in the prices of essential consumer goods and services be prohibited.” Cal. Penal Code § 396(a). Therefore, it declared that it was “the intent of the Legislature in enacting this act to protect citizens from excessive and unjustified increases in the prices charged during or shortly after a declared state of emergency or local emergency for goods and services that are vital and necessary for the health, safety, and welfare of

consumers.” *Id.*

In New York, the legislature similarly found that “during periods of abnormal disruption of the market caused by strikes, power failures, severe shortages or other extraordinary adverse circumstances, some parties within the chain of distribution of goods have taken unfair advantage of the public by charging grossly excessive prices for essential goods and services.” N.Y. Gen. Bus. Law § 396-r(1).

Accordingly, to prevent individuals “from taking unfair advantage of the public,” the legislature declared “that the public interest requires that such conduct be prohibited and made subject to civil penalties.” *Id.*<sup>27</sup>

Consistent with this purpose, price gouging laws are limited in scope to address the economic effects of an emergency on the enacting State’s citizens. In addition to being tied to a declared emergency, these regulations typically apply only to goods and services that are impacted while the emergency endures.<sup>28</sup> In Kentucky, for example, the

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<sup>27</sup> *See also, e.g.*, Ark. Code Ann. § 4-88-301 (declaring legislative purpose to prevent “excessive and unjustified increases” in prices).

<sup>28</sup> *See, e.g.*, 2020 Alaska Laws Ch. 10 § 26 (S.B. 241) (food, medicine, medical equipment, fuel, sanitation products, hygiene products, essential household supplies, and other essential goods); Ark. Code Ann. § 4-88-303(a)(1) (consumer food items or goods, goods or services used

emergency price gouging statute is limited to consumer food items; goods or services used for emergency cleanup; emergency supplies; medical supplies; home heating oil; building materials; housing; transportation, freight, and storage services; and gasoline or other motor fuels. Ky. Rev. Stat. Ann. § 367.374(b)(1)-(9).

In other words, the purpose of these laws is tied to protecting the public welfare during an emergency, not benefitting in-state economic interests. Again, even the district court recognized that Kentucky’s goal was to protect its consumers. Opinion, R.36, Page ID# 487. For this reason, price gouging regulations, including Kentucky’s, constitute a valid exercise of state police powers that do not implicate the protectionist concerns underlying the dormant Commerce Clause.

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for emergency cleanup, emergency supplies, medical supplies, home heating oil, building materials, housing, transportation, freight, and storage services, or gasoline or other motor fuels); Ga. Code Ann. § 10-1-393.4 (“any goods or services identified by the Governor in the declaration of the state of emergency necessary to preserve, protect, or sustain the life, health, or safety of persons or their property”); Idaho Code Ann. § 48-603(19) (“fuel or food, pharmaceuticals, or water”); Iowa Admin. Code 61-31.1(714) (“water, food, medicines, sanitation supplies, utilities, building materials, and materials, goods, or services for cleanup or repair”).

**C. The extraterritoriality doctrine does not limit the States' authority to regulate price gouging within their borders.**

Although the district court understood that Kentucky's price gouging regulations are properly designed to protect consumers, and not motivated by economic protectionism, the court concluded that the regulations likely have an impermissibly extraterritorial reach. This was legal error. A state law runs afoul of the extraterritoriality doctrine only if it directly controls, or has the "practical effect" of controlling, commerce that occurs entirely outside its own borders. *Healy*, 491 U.S. at 336. As the Supreme Court explained in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), a State cannot "project its legislation into" another State, by for example, dictating out-of-state prices. *Id.* at 521-22. This does not describe the statutes challenged here.

The Supreme Court has only very rarely struck down state laws as extraterritorial under this principle, doing so only with respect to liquor price affirmation schemes that controlled prices in other State's markets. *See Healy*, 491 U.S. at 331-40; *Brown-Forman*, 476 U.S. 581-84. In *Brown-Forman*, the Court considered a New York statute that

required all liquor distillers to report their monthly prices and affirm that their in-state prices were “no higher than the lowest price” that they charged out-of-state wholesalers. 476 U.S. at 575-76. The Court held that the statute was invalid because it impermissibly regulated out-of-state liquor prices by “mak[ing] it illegal for a distiller to reduce its price in other States” while its posted New York price was in effect. *Id.* at 579-80.

In *Healy*, the Supreme Court struck down a similar Connecticut statute that required beer makers to affirm that the prices they charged to in-state wholesalers were no higher than those charged in neighboring States. *Healy*, 491 U.S. at 326. The Court concluded that the Connecticut law was impermissibly extraterritorial because, by tying its prices to another State’s regulatory scheme, the Connecticut statute had the practical effect of controlling prices in Massachusetts’ market. *Id.* at 337-38.

As these cases establish, extraterritoriality is a narrow doctrine. Indeed, in its most recent application of these principles, the Supreme Court rejected an extraterritoriality claim because the state law did not dictate price or otherwise control the terms of wholly out-of-state

transactions. *See Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644 (2003). And this Court and many others have held that these principles do not prohibit a State from requiring out-of-state sellers to comply with state law when selling products *within* the State.<sup>29</sup> *See, e.g., Int'l Dairy Foods Ass'n*, 622 F.3d at 643-44 (upholding food labeling regulation that applied only to products sold in-state); *Quik Payday, Inc. v. Stork*, 549 F.3d 1302 (10th Cir. 2008) (upholding Kansas predatory lending regulation as applied to internet lender making loans within Kansas); *SPGGC, LLC v. Blumenthal*, 505 F.3d 183 (2d Cir. 2007) (upholding Connecticut prohibition of expiration dates on gift cards sold electronically within State); *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104 (2d. Cir 2001) (Vermont law requiring warning labels on mercury-containing lights applied only to items sold in-state and thus was not impermissibly extraterritorial).

And here, Kentucky's price gouging statutes regulate consumer transactions targeted to its residents. These laws regulate commerce occurring within the State or a smaller "geographical area" specified by

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<sup>29</sup> This case does not address the application of a State's consumer protection laws to a company operating in that State's jurisdiction when it transacts with out-of-state consumers.

the Governor’s declaration of emergency. Ky. Rev. Stat. Ann. § 367.374(a)(1); Ky. Rev. Stat. Ann. § 367.110(2) (defining “trade or commerce” as conduct “directly or indirectly affecting the people of [Kentucky]”). By their express terms, they therefore address only the prices at which goods and services are offered or sold to Kentuckians. The statutes do not dictate the price that can be charged to consumers outside of the State. Other States’ price gouging laws similarly apply only to in-state transactions.<sup>30</sup>

The district court nonetheless concluded that Kentucky’s price gouging statutes were impermissibly extraterritorial as applied to the Merchants Guild’s members because, purportedly, they cannot offer state-specific prices in the Amazon marketplace and would be subject to conflicting state regulations. Opinion, R.36, Page ID# 481-83. This was incorrect for several reasons.

As an initial matter, the court analyzed the effects of the regulations with regard to the Merchants Guild members’ relationship

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<sup>30</sup> See, e.g., Idaho Code Ann. § 48-603(19) (price restrictions applied only within location specified in declaration of emergency); Or. Rev. Stat. Ann. § 401.965(3) (same); Wis. Admin. Code § ATCP 106.01 (same).

with Amazon, which the members asserted, allowed them only to propose a final price for their goods. But the dormant Commerce Clause is not concerned with the effects of a State's laws on a private seller's business decision to insist on a nationwide price. As the Supreme Court has explained, the dormant Commerce Clause does not protect "particular interstate firms" or "the particular structure or methods of operation in a retail market." *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 127 (1978).

Furthermore, there is no indication that the Merchants Guild membership would be subject to multiple, conflicting regulations. State laws will have an impermissible extraterritorial effect only if they are in actual conflict with other applicable state-law schemes. *Instructional Sys., Inc. v. Computer Curriculum Corp.*, 35 F.3d 813, 826 (3d Cir. 1994). By contrast, state laws that "merely create additional, but not irreconcilable, obligations are not considered to be 'inconsistent'" and thus are not invalid. *Id.*; see *Nat'l Elec. Mfrs. Assoc.*, 272 F.3d at 112 (finding that labeling regulation was not impermissibly extraterritorial because it did not conflict with any other state law); *Procter & Gamble*

*Co. v. City of Chicago*, 509 F.2d 69, 77 (7th Cir. 1975) (recognizing that “it is actual conflict, not potential conflict, that is relevant.”).

Here, as noted, the Kentucky price gouging statutes target sellers who offer or sell goods or services to Kentucky consumers at unreasonably high prices. Ky. Rev. St. Ann. § 367.374(1)(b). A price is not often subject to more than one jurisdiction’s pricing regulations, because such regulations—like the ones at issue here—most often apply only to transactions in the State of the consumer. *See Quik Payday, Inc.*, 549 F.3d at 1312 (extraterritoriality determined by potential conflicting laws applied to particular transaction).

In any event, even if a seller ultimately seeks to comply with multiple States’ consumer protection laws, there would be no *actual* conflict among the laws. On the contrary, state price gouging laws are largely consistent.<sup>31</sup> Like Kentucky’s price gouging law, other States

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<sup>31</sup> *See, e.g.*, Caitlin E. Ball, *Sticker Shock at the Pump: An Evaluation of the Massachusetts Petroleum Price-Gouging Regulation*, 44 Suffolk U. L. Rev. 907, 911-12 (2011) (“Although the precise meaning of ‘excessively high prices’ varies by jurisdiction, it generally involves pricing at a level that is unreasonable when compared to prior rates, as determined through an examination of the seller’s retail price and gross margin of profit before and after the emergency.”).

target sellers who charge “unconscionable” or “excessive” prices for necessary goods or services during an emergency.<sup>32</sup> Although there are some variations among state laws with respect to how “unconscionable” and “excessive” are defined, these variations do not necessarily create a conflict that would require sellers to charge different prices in each State or face liability. For example, some States apply a rebuttable presumption that a price increase of up to 10, 15, 20, or 25 percent is presumptively unlawful.<sup>33</sup> Other States, like Kentucky, provide a safe

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<sup>32</sup> Compare Ky. Rev. Stat. Ann. § 367.374(1)(b) (prohibits sales or rentals of specified goods and services for a price that is “grossly in excess” of the price before declaration of emergency) *with, e.g.*, Ala. Code § 8-31-4 (prohibits “unconscionable prices for the sale or rental of any commodity or rental facility during the period of a declared state of emergency”); Kan. Stat. Ann. § 50-6.106 (prohibits profiteering from a disaster by unjustifiably increasing price of any “necessary property or service”); 73 Pa. Cons. Stat. § 232.4 (prohibits selling “goods or services” for “an unconscionable excessive price” within the geographic region of declared state of emergency).

<sup>33</sup> See, e.g., Ala. Code § 8-31-4 (price *prima facie* unconscionable if 25 percent higher than average price during 30-day period immediately preceding emergency); 73 Pa. Cons. Stat. § 232.4 (price *prima facie* unconscionably excessive if 20 percent or more above average price in the affected area during seven-day period immediately prior to declared emergency); Me. Rev. Stat. Ann. tit. 10 § 1105(1)(D), (3) (rebuttable presumption that price is “unconscionable” if it exceeds by more than 15 percent the sum of price offered by that person immediately prior to emergency and increased cost).

harbor to sellers whose prices do not rise above that threshold level.<sup>34</sup> Still others do not directly cap the price sellers are allowed to charge, instead prohibiting sellers from increasing the percentage markup they charge for necessities during an emergency.<sup>35</sup> A seller therefore could simultaneously comply with these state price gouging regulations.

Moreover, not all price increases subject a seller to liability. Price gouging laws, including Kentucky's, typically recognize a defense from liability for sellers that increase prices as a result of factors outside their control, such as increased costs of supplies or labor.<sup>36</sup> Indeed,

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<sup>34</sup> See Ark. Code Ann. § 4-88-301 (prohibits selling or offering “essential goods and services” for more than ten percent above the pre-emergency price); Cal. Penal Code § 396 (prohibiting sellers from setting emergency prices more than ten percent above price charged for those goods or services immediately prior to emergency); Ky. Rev. Stat. Ann. § 367.374(1)(b) (no liability for emergency price increases of ten percent or less above either price prior to emergency declaration or sum of person’s costs and normal markup for good or service).

<sup>35</sup> See Conn. Gen. Stat. Ann. § 42-230 (prohibits price increases, outside of regular market fluctuations, during emergency); D.C. Code § 28-4101, 4102 (requiring sellers to maintain same “retail mark-up for similar merchandise” sold in area prior to emergency); Ga. Code Ann. § 10-1-393.4 (prohibits price increases on certain goods, unless increase represents retailer’s costs plus “average markup percentage” that had applied before emergency).

<sup>36</sup> See Ky. Rev. Stat. Ann. § 367.374(1)(c); *see also, e.g.*, Ala. Code § 8-31-4; Ark. Code Ann. §§ 44-88-303(a)(2) & (b)(2); Cal. Penal Code § 396(b); Conn. Gen. Stat. Ann. § 42-232; Fla. Stat. Ann. § 501.160(1)(b);

contrary to the district court’s suggestion, Opinion, R.36, Page ID# 483, price gouging regulations generally do not rely on “gross disparities in price alone” when determining whether a violation occurred, *White v. R.M. Packer Co.*, 635 F.3d 571, 588 (1st Cir. 2011); *see also People by Abrams v. Two Wheel Corp.*, 525 N.E.2d 692, 695-96 (1988) (“We do not mean to say that all price increases are prohibited during periods of abnormal market disruptions. The statute itself places the burden upon the Attorney General to establish that the increases are not attributable to additional costs imposed by suppliers.”).

In any event, even if a seller must ultimately charge different prices to consumers in different States to comply with each State’s own price gouging statutes, such variations do not subject the same transaction to conflicting state laws or significantly burden sellers or the interstate markets. Sellers, whether in a storefront or an online sales platform, can tailor the prices charged for their goods and services to meet the requirements of state price gouging regulations in the same

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Ga. Code Ann. § 10-1-393.4; Haw. Rev. Stat. Ann. § 127A-30(b); Iowa Admin. Code 61-31.1 (714); Kan. Stat. Ann. § 50-6106; La. Stat. Ann. § 29:732(A).

way that they comply with state tax laws, product labeling requirements, and other regulations that may vary from State to State. *See, e.g., Int'l Dairy Foods Ass'n*, 622 F.3d at 643-44 (state milk labeling regulation was not extraterritorial, despite producers' claim that it would require them "to create a nationwide label in accordance with [the State]'s requirement"); *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 220-21 (2d Cir. 2004) (state law was not impermissibly extraterritorial because it required cigarette importers who sold in New York to comply with state law, thereby increasing their costs of doing business out-of-state). And, as noted, to the extent the Merchants Guild contends that its members are constrained from adjusting prices, their problem lies with their chosen marketplace, not with state price gouging laws. *Exxon Corp.*, 437 U.S. at 127.

In short, because price gouging laws like Kentucky's affect only the price of goods within the State, without dictating prices in other States' markets, those laws do not run afoul of the extraterritoriality doctrine.

## CONCLUSION

This Court should reverse the district court order granting injunctive relief.

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## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. of App. P. 29(a)(4)(G) and 32(g), I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(C) because it contains 6,473 words, excluding the parts of the brief exempted by Fed. R. App. P. 29(a)(5) and 32(a)(7).

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 Century Schoolbook font using Microsoft Word.

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## **CERTIFICATE OF FILING AND SERVICE**

I hereby certify that on September 23, 2020, I electronically filed the foregoing Brief of Amici Curiae Illinois, *et al.*, with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by 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.

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