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Sixth Circuit Remands Price Gouging Case, Allows Kentucky AG to Resume Investigations

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The Sixth Circuit issued its opinion in the *Online Merchants Guild v. Cameron* case on April 29, 2021, dissolving a preliminary injunction that had prevented the Kentucky Attorney General from investigating alleged violations of Kentucky's price gouging laws, and remanding to the district court for further proceedings.

Last June, a Kentucky federal court had granted a preliminary injunction to the Online Merchants Guild, halting the AG's investigations "into potentially excessive prices charged on Amazon's online store." The Online Merchants Guild argued that Kentucky's enforcement of its price gouging laws violated the dormant Commerce clause for multiple reasons, including that they were impermissibly extraterritorial. According to the Online Merchants Guild, because their sales of goods in Amazon's online marketplace were governed by Amazon's own internal requirement that all goods in the Amazon marketplace be priced the same nationwide, by investigating violations of Kentucky's price gouging laws, in effect, Kentucky was demanding that the vendors charge Kentucky-based pricing in all 50 states. The district court found that the Online Merchants Guild was "likely to succeed in showing that the practical effect of [the] Attorney General's recent investigations into possible violations violates the dormant Commerce Clause." The district court's decision was based in large part on the determination that the impact of the application of the Kentucky price gouging laws on the Online Merchants Guild was impermissibly extraterritorial.

Kentucky Attorney General Daniel Cameron appealed the preliminary injunction to the Sixth Circuit. The Sixth Circuit agreed with AG Cameron that Kentucky's law was not impermissibly extraterritorial in violation of the dormant Commerce Clause because even if Kentucky's price gouging laws did have an effect on "wholly out-of-state commerce, that effect is not the law's direct or inevitable result." In effect, it was Amazon's pricing structure that led to any extraterritorial effect, not the price gouging law itself. The Circuit's ruling was narrowly tailored to the district court opinion on extraterritoriality and did not touch the other dormant Commerce Clause arguments that were pleaded but not fully briefed below. Instead, the Court found the extraterritoriality argument a particularly bad fit given that "in a modern economy just about every state law will have some 'practical effect' on extraterritorial commerce."

Online Merchants Guild has filed papers indicating they plan to move for an en banc hearing. Its motion papers for rehearing are due on June 1, 2021.

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