

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
FRANKFORT

ONLINE MERCHANTS GUILD,)	
)	
Plaintiff,)	Civil No. 3:20-cv-00029-GFVT
)	
V.)	
)	
DANIEL CAMERON, in his official)	MEMORANDUM OPINION
capacity as Attorney General of)	&
Kentucky,)	ORDER
)	
Defendant.)	

*** **

Is an old constitution relevant to a new economy? This case answers “yes.” 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.

At issue here are KRS § 367.170 and KRS § 367.374, two Kentucky statutes crafted to prevent, among other things, any price gouging of Kentucky consumers. In recent months, these statutes have served as the basis for investigations by the Attorney General into potentially excessive prices charged on Amazon’s online store. Plaintiff Online Merchants Guild takes issue with these investigations. On May 1, 2020, Merchants Guild filed suit, challenging what it believes is an unconstitutional application of the statutes as they relate to a specific class of retailers—those who use an online, interstate platform like Amazon. [R. 1.]

On May 15, 2020, the Court denied Merchant Guild’s Motion for Temporary Restraining Order. [R. 18.] The parties have since submitted additional briefing on the motion for preliminary injunction and participated in oral argument on the matter. The Court now addresses whether the circumstances warrant a preliminary injunction, enjoining Defendant

Attorney General Cameron from investigating Plaintiff’s members and similarly situated merchants for potential violations of KRS § 367.170 and KRS § 367.374 or undertaking any related enforcement actions. For the following reasons, Plaintiff Online Merchant Guild’s Motion for Preliminary Injunction [R. 10] is **GRANTED**.

I

In the wake of the coronavirus pandemic’s economic fallout, Kentucky Attorney General Daniel Cameron began investigating alleged price gouging in order to protect Kentucky consumers. [See R. 10-1 at ¶¶ 20, 37.] As part of this initiative, Attorney General Cameron investigated, and continues to investigate, potential price gouging in the sale of goods on Amazon’s online store. *Id.* at ¶ 20. As a result of these investigations, Merchants Guild, a trade association for online merchants, brought suit against the Attorney General. [R. 1.] Merchants Guild alleges that the Attorney General’s investigation into Amazon sales has recently been targeted at certain of its members—merchants who supply Amazon¹—and that the investigations have caused a large contingent of its membership to grow concerned over potential liability.

Merchants Guild does not contest whether Kentucky law allows for these investigations. Under the Kentucky Consumer Protection Act, the Attorney General has authority to investigate whether price gouging has occurred in violation of KRS § 367.170 and, in times of emergency, the closely related KRS § 367.374.² See KRS § 367.240. And, on the record, it appears the Attorney General acted pursuant to this authority in this instance.

¹ In its motion, Merchants Guild repeatedly represents that its members “are not even retailers—they are suppliers of *Amazon’s* store.” [R. 10 at 3 (emphasis in original).] The significance of this distinction will be addressed more fully below.

² Pursuant to KRS § 367.378, all powers and duties provided in the first portion of KRS Chapter 367 “apply with equal force and effect to an act declared unlawful by KRS 367.374.”

First, the Attorney General began working with Amazon to identify potential price gougers based in Kentucky. [R. 22 at 7 (citing Kentucky AG Press Release (March 26, 2020), <https://kentucky.gov/Pages/Activitystream.aspx?n=AttorneyGeneral&prId=888>).] Following discussions with Amazon, the Attorney General issued a civil investigative demand (CID) to a newly minted Merchants Guild member, Jones & Panda, LLC, in addition to other vendors who are not members.³ [See R. 22-1 at 13; see also Kentucky AG Press Release (March 26, 2020).] The CID explained that the Attorney General had “reason to believe” that Jones & Panda “ha[d] engaged in, is engaging in, or is about to engage in any act or practice declared to be unlawful by KRS 367.110 to 367.300 or KRS 367.372 to 376.378,” the price gouging statutes. [R. 22-1 at 13.] By way of the CID, the Attorney General requested certain business information from Jones & Panda regarding products it sold on Amazon. See *id.* at 16. After receipt, Jones & Panda brought suit in Fayette County Circuit Court seeking a court order setting aside or modifying the CID.⁴ *Id.* at 11. On the present record, that suit remains pending. [See R. 33; R. 34.]

In the present suit, Merchants Guild contests the constitutionality of the price gouging statutes that serve as the basis for the Attorney General’s recent investigations—KRS § 367.170 and § 367.374. [R. 10 at 1.] In different ways, each statute prohibits price gouging. KRS § 367.170 prohibits “unfair” acts or practices of any trade or commerce, defining unfair as unconscionable. KRS § 367.374 is more specific, prohibiting prices charges “grossly in excess” of prices charged prior to a declared emergency. It further specifies that a price will not violate

³ Merchants Guild also suggests, without providing details, that additional members have been the target of investigatory actions. [See R. 22 at 4 (“[T]he AG knows whom it targeted. . . . Assistant AG Cocanougher has participated in telephone calls with Guild members and Mr. Rafelson regarding the investigations”]; see also R. 34 at 7 (discussing “other Guild members who have received subpoenas”).]

⁴ Merchants Guild is not a party to the state court lawsuit.

the subsection if it is 10% percent or less above the price prior to the emergency declaration or 10% or less above the sum of the person's costs and normal markup. KRS § 367.374(1)(c).

Merchants Guild argues the Attorney General's recent application of these statutes are in violation of numerous constitutional provisions: (1) the dormant Commerce Clause; (2) the First Amendment; (3) the Due Process Clause; and (4) the Equal Protection Clause. [R. 10 at 7.] In response, Attorney General Cameron argues first that there is no federal subject matter jurisdiction such that a preliminary injunction is not available and, alternatively, that the statutes do not violate the constitutional provisions at issue. [R. 21-1 at 1.]

II

“A preliminary injunction is an extraordinary remedy which should be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it.” *Overstreet v. Lexington–Fayette Urban County Government*, 305 F.3d 566, 573 (6th Cir. 2002) (citing *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000) (cleaned up) (“[A] preliminary injunction involv[es] the exercise of a very far-reaching power”). To determine whether to issue a preliminary injunction, a court must consider: 1) whether the movant has shown a strong likelihood of success on the merits; 2) whether the movant will suffer irreparable harm if the injunction is not issued; 3) whether the issuance of the injunction would cause substantial harm to others; and 4) whether the public interest would be served by issuing the injunction. *Overstreet*, 305 F.3d at 573 (citations omitted).

A court need not consider all of the factors if it is clear that there is no likelihood of success on the merits. *See Amoco Protection Co. v. Village of Gambell, AK*, 480 U.S. 531, 546 n. 12 (1987) (“The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on

the merits rather than actual success.”). Relatedly, the Sixth Circuit has clarified that, “[w]hen a party seeks a preliminary injunction on the basis of a potential constitutional violation, the likelihood of success on the merits often will be the determinative factor.” *City of Pontiac Retired Employees Ass’n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014) (quoting *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012)). However, even if the plaintiff is unable “to show a strong or substantial probability of ultimate success on the merits” an injunction can be issued when the plaintiff “at least shows serious questions going to the merits and irreparable harm which decidedly outweighs any potential harm to the defendant if an injunction is issued.” *In re Delorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985).

A

The Court will first consider whether Merchants Guild can establish a likelihood of success on the merits which, as noted, is often the determinative factor in this context. *Schimmel*, 751 F.3d at 430. In this case, before proceeding to the substance of the constitutional claims, certain jurisdictional considerations must be addressed.

1

An essential part of establishing a likelihood of success is establishing standing to sue. The Sixth Circuit has explained that an “affirmative burden of showing a likelihood of success on the merits . . . necessarily includes a likelihood of the court’s *reaching* the merits, which in turn depends on a likelihood that plaintiff has standing.” *Waskul v. Washtenaw Cty. Cmty. Mental Health*, 900 F.3d 250, 260 n. 5 (6th Cir. 2018) (quoting *National Wildlife Federation v. Burford*, 835 F.2d 305, 328 (D.C. Cir. 1987) (emphasis in original)).

To satisfy the case or controversy requirement of Article III—“the ‘irreducible constitutional minimum’ of standing”—a plaintiff must demonstrate three things: “that he has suffered an ‘injury in fact,’ that the injury is ‘fairly traceable’ to the actions of the defendant, and

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