

No. 20-5723

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

ONLINE MERCHANTS GUILD,
Plaintiff-Appellee,

v.

DANIEL CAMERON, in his official capacity as
Attorney General of the State of Kentucky,
Defendant-Appellant.

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

**BRIEF OF AMICUS CURIAE UNITED EGG PRODUCERS, INC.
IN SUPPORT OF APPELLEE ONLINE MERCHANTS GUILD**

PROSKAUER ROSE LLP
Christopher E. Ondeck
Jennifer E. Tarr
1001 Pennsylvania Ave. NW
Suite 600
Washington, DC 20004
(202) 416-6800
condeck@proskauer.com
jtarr@proskauer.com

PROSKAUER ROSE LLP
Chantel L. Febus
Kelly Landers Hawthorne
Eleven Times Square
New York, NY 10036
(212) 969-3000
cfebus@proskauer.com
klandershawthorne@proskauer.com

Attorneys for Amicus United Egg Producers, Inc.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit

Case Number: 20-5723

Case Name: Online Merchants Guild v. Kentucky

Name of counsel: Jennifer E. Tarr

Pursuant to 6th Cir. R. 26.1, United Egg Producers, Inc.

Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on November 23, 2020 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Jennifer E. Tarr

1001 Pennsylvania Avenue NW

Washington, DC 20004

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

**6th Cir. R. 26.1
DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTEREST**

(a) **Parties Required to Make Disclosure.** With the exception of the United States government or agencies thereof or a state government or agencies or political subdivisions thereof, all parties and amici curiae to a civil or bankruptcy case, agency review proceeding, or original proceedings, and all corporate defendants in a criminal case shall file a corporate affiliate/financial interest disclosure statement. A negative report is required except in the case of individual criminal defendants.

(b) **Financial Interest to Be Disclosed.**

(1) Whenever a corporation that is a party to an appeal, or which appears as amicus curiae, is a subsidiary or affiliate of any publicly owned corporation not named in the appeal, counsel for the corporation that is a party or amicus shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the parent corporation or affiliate and the relationship between it and the corporation that is a party or amicus to the appeal. A corporation shall be considered an affiliate of a publicly owned corporation for purposes of this rule if it controls, is controlled by, or is under common control with a publicly owned corporation.

(2) Whenever, by reason of insurance, a franchise agreement, or indemnity agreement, a publicly owned corporation or its affiliate, not a party to the appeal, nor an amicus, has a substantial financial interest in the outcome of litigation, counsel for the party or amicus whose interest is aligned with that of the publicly owned corporation or its affiliate shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the publicly owned corporation and the nature of its or its affiliate's substantial financial interest in the outcome of the litigation.

(c) **Form and Time of Disclosure.** The disclosure statement shall be made on a form provided by the clerk and filed with the brief of a party or amicus or upon filing a motion, response, petition, or answer in this Court, whichever first occurs.

TABLE OF CONTENTS

| | Page |
|---|------|
| TABLE OF AUTHORITIES..... | ii |
| IDENTITY AND INTEREST OF AMICUS CURIAE..... | 1 |
| INTRODUCTION AND SUMMARY OF ARGUMENT..... | 5 |
| ARGUMENT..... | 7 |
| I. State Price Gouging Laws Form a Patchwork of Regulations With Which Multistate Businesses Must Contend..... | 7 |
| II. Overzealous Enforcement of State Price Gouging Laws During the Pandemic Has Harmed and Continues To Harm Both the Egg Industry and Consumers..... | 12 |
| A. Such Enforcement Fails To Take into Account that Egg Producers Have Faced Significant Hardships and Taken Extraordinary Actions To Help Consumers During the Pandemic. | 12 |
| B. The Continued Application of State Price Gouging Laws to the Egg Industry Throughout the Pandemic Has Been Counterproductive..... | 19 |
| III. The Fact-Specific Nature of the <i>Pike</i> Test Counsels Against this Court Reaching the Issue in the First Instance..... | 21 |
| IV. Kentucky’s Brief Incorrectly Suggests that the COVID-19 Pandemic Should Be a Thumb on the Scale of the <i>Pike</i> Balancing Test. | 28 |
| V. The State Amici Unnecessarily and Incorrectly Argue that Price Gouging Laws Are Always a Valid Exercise of State Police Powers. . | 30 |
| CONCLUSION | 32 |

TABLE OF AUTHORITIES

| | Page(s) |
|--|------------|
| CASES | |
| <i>Am. Beverage Ass’n v. Snyder</i> , 735 F.3d 362 (6th Cir. 2013)..... | 21, 22, 29 |
| <i>ANR Pipeline Co. v. Schneidewind</i> , 801 F.2d 228 (6th Cir. 1986), <i>aff’d</i> , 485 U.S. 293 (1988)..... | 22 |
| <i>Bell v. Cal-Maine Foods</i> , No. 20 Civ. 461 (W.D. Tex., filed Apr. 30, 2020)..... | 18 |
| <i>CTS Corp. v. Dynamics Corp. of Am.</i> , 481 U.S. 69 (1987)..... | 23, 25 |
| <i>McNeilus Truck & Mfg., Inc. v. Ohio ex rel. Montgomery</i> , 226 F.3d 429 (6th Cir. 2000)..... | 22, 27 |
| <i>New York v. Hillandale Farms</i> , Index No. 451650/2020 (N.Y. Supreme Ct., filed Aug. 11, 2020) | 19 |
| <i>Pike v. Bruce Church</i> , 397 U.S. 137 (1970)..... | 2, 21 |
| <i>R & M Oil & Supply, Inc. v. Saunders</i> , 307 F.3d 731 (8th Cir. 2002)..... | 23, 26, 27 |
| <i>Raymond Motor Transp., Inc. v. Rice</i> , 434 U.S. 429 (1978)..... | 22, 23, 25 |
| <i>West Virginia v. Dutt & Wagner</i> , No. 20-C-68 (Greenbrier Cty. Circuit Ct., filed July 14, 2020) | 18, 19 |

STATUTES

Ala. Code § 8-31-1, *et seq.* 7, 8, 9

2020 Alaska Sess. Laws Chapter 10, § 26..... 7

Ark. Code Ann. § 4-88-301 *et seq.* 7, 8

Cal. Penal Code § 396..... 7, 8, 9, 10

Colo. Rev. Stat. Ann. § 6-1-730 7

Conn. Gen. Stat. § 42-230 *et seq.* 7, 9

D.C. Code § 28-4101 *et seq.* 7, 9

Fla. Stat. § 501.160 *et seq.*..... 7, 8

Ga. Code Ann. §§ 10-1-393.4, 10-1-438..... 7, 8

Haw. Rev. Stat. § 127A-30 7, 8

Idaho Code Ann. § 48-603(19) 7

20 ILCS § 3305/7(14) 7

Ill. Admin. Code Title 14, § 465.30 7

Ind. Code § 4-6-9.1-1 *et seq.*..... 7, 9

Iowa Code § 714.16..... 7

Iowa Admin. Code § 61-31.1(714) 7, 10

Kan. Stat. Ann. §§ 50-627, 50-6,106 7

Ky. Rev. Stat. Ann. § 367.372 *et seq.* 7, 8, 9

La. Rev. Stat. Ann. § 29:732..... 7, 8, 9

Laws of Maryland 2020, Chapters 13 and 14 7

940 Mass. Code Reg. 3.18..... 7

Mass. Gen. Laws Chapter 93A, § 2(c) and Chapter 23 § 9H 7

Me. Stat. Title 10, § 1105 7, 8

Mich. Comp. Laws § 445.903 *et seq.* 7, 9

Miss. Code Ann. § 75-24-25..... 7

Mo. Code Regs. Ann. Title 15, § 60-8.010 and -8.030 7

N.C. Gen. Stat. §§ 75-37 to -38..... 7, 8

N.J. Stat. Ann. § 56:8-108 *et seq.* 7, 8

N.Y. Gen. Bus. Law § 396-r..... 7, 8

Okla. Stat. Title 15, § 777.1 *et seq.* 7

Or. Rev. Stat. §§ 401.960 to 970..... 7

73 Pa. Stat. § 232.1 *et seq.*..... 7

R.I. Gen. Laws §§ 6-13-21 *et seq.* 7, 9

S.C. Code Ann. § 39-5-145..... 7, 10

Tenn. Code Ann. § 47-18-5103 7

Tex. Bus. & Com. Code Ann. § 17.46(b)(27) 7, 8

7 U.S.C. §§ 291–92..... 1

Utah Code Ann. § 13-41-201 7

Va. Code Ann. § 59.1-525 *et seq.* 7

Vt. Stat. Ann. Title 9, § 2461d 7, 8

W. Va. Code Ann. § 46A-6J-1 *et seq.* 7

Wis. Adm. Code ATCP § 106.02 7

OTHER AUTHORITIES

Ariz. Exec. Order 2020-07 11

C.W. Davis, *An Analysis of the Enactment of Anti-Price Gouging Laws*, Chapter 4, January 2008 10, 29

Cal. Proclamation of State of Emergency, Aug. 18, 2020 10

Del. Exec. Decl. 2020-03 11

J. Ryan, “Price Gouging Complaints Flood Kentucky Attorney General’s Office, But Details Scarce,” WKYU, March 24, 2020 11

Minn. Exec. Order 20-10 11

Nev. Exec. Order 2020-03-12 11

Ohio Exec. Order 2020-01D 11

U.S. Food and Drug Administration, Guidance Document, *Temporary Policy Regarding Enforcement of 21 CFR Part 118 (the Egg Safety Rule) During the COVID-19 Public Health Emergency*, April 2020 16

UEP, “Utilization of U.S. Eggs” 13

US Bureau of Labor Statistics, *The impact of the COVID-19 pandemic on food indexes and data collection*, Labor Statistics, *The impact of the COVID-19 pandemic on food indexes and data collection* 5, 15, 18

USDA, Economic Research Service, LDP-M-309, *Livestock, Dairy, and Poultry Monthly Outlook: March 2020* 15

USDA, Economic Research Service, *Livestock, Dairy, and Poultry Monthly Outlook: May 2020* 15

IDENTITY AND INTEREST OF AMICUS CURIAE

United Egg Producers, Inc. (“UEP”) is a Capper-Volstead Agriculture Cooperative with egg farmer-members from around the country, who collectively represent approximately 95 percent of all U.S. egg production.¹ The majority of UEP members sell eggs to retailers and the food industry in multiple states, with the largest UEP member selling eggs in 28 states. UEP works at the direction of its members to advance high standards for egg safety, environmental responsibility, and hen well-being, while ensuring a nutritious and affordable supply of eggs.

The questions before this Court are narrow—namely, (1) whether Plaintiff-Appellee Online Merchant’s Guild (“Guild”) has standing to bring a declaratory action, and (2) whether the district court abused its discretion in granting the Guild a preliminary injunction on the ground that Kentucky’s price gouging law violates the dormant Commerce Clause’s *extraterritoriality principle* because the Kentucky Attorney General’s regulation of Amazon suppliers has the inevitable effect of

¹ A Capper-Volstead Cooperative is an association of persons or entities who produce agricultural products and are organized under the Capper-Volstead Co-operative Marketing Associations Act, 7 U.S.C. §§ 291–92.

controlling commercial conduct beyond Kentucky’s borders. Yet Kentucky and the State Amici also invite the Court to opine on two very different questions—(1) whether Kentucky’s price gouging law is invalid under the balancing test set forth in *Pike v. Bruce Church*, 397 U.S. 137 (1970),² and (2) whether state price gouging laws are a valid exercise of the States’ police powers. See Br. of the State of Kentucky (“Kentucky Br.”) at 28 n. 8; Br. of the State Amici (“States’ Br.”) at 5, 19–24.

These issues, however, were not decided by the district court and therefore are not properly before this Court. Because the district court’s decision on the Guild’s likelihood of success on the merits was limited to a determination that Kentucky’s price gouging law is likely extraterritorial, and given the case’s early procedural posture before the district court, the factual record needed to resolve the additional issues raised by Kentucky and the State Amici is not developed. In particular, the record does not clearly present critical facts about the undue burdens

² The *Pike* balancing test requires courts to balance the burden on interstate commerce with the state’s interest in the law and determine whether the former is “clearly excessive” in relation to the latter. *Id.*

such laws can impose under *Pike* or the extent to which police powers justify the prolonged application of economic restraints on market commerce.

UEP therefore files this amicus brief in support of Appellee Online Merchants Guild to urge this Court to decline the invitations of Kentucky and the State Amici to reach issues not developed or decided below and to opine on the general validity of state price gouging laws under the dormant Commerce Clause. While it is true that states generally enacted such laws to protect the public welfare, their good intentions do not categorically insulate price gouging laws from constitutional scrutiny. And applying *Pike* requires a fact-intensive inquiry that this Court is not best positioned to undertake in the first instance.

That discretion is the better part of valor here is underscored by looking at the example of the egg industry. As explained below, the protracted application of over 40 separate state price gouging laws and orders imposes undue burdens on both the egg industry and downstream consumers. Indeed, a discussion of the constitutional barriers to imposing price-gouging statutes on UEP members makes clear both the

shortcomings of the limited record here and the risks of deciding the issues raised by Kentucky and the State Amici on that record. The significant adverse impact of the application of those laws to the egg industry for the better part of a year far outweighs any putative local benefits, thus violating the dormant Commerce Clause under *Pike*.

Were the Court to go beyond the questions properly before it and make an inherently fact-specific determination without the requisite facts, it risks issuing an opinion with unanticipated and far-reaching effects. Any decision that does so risks further harming UEP members because litigants could use it to file unwarranted lawsuits against them and to undercut legitimate defenses to such suits. UEP thus has a strong interest in protecting its farmer-members by ensuring that state price gouging laws are not applied to them in an unconstitutional manner.³

³ UEP files this amicus brief pursuant to the consent of the parties. No counsel for a party authored any part of this brief or made any monetary contribution towards this brief, and no person other than UEP, its members, or its counsel made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

The coronavirus pandemic has upended every facet of American life. As the pandemic spread in March 2020 and states issued Stay at Home Orders, food consumption drastically shifted from restaurants to homes. Retail demand for many household staples surged, while demand from the food service industry plummeted.⁴

As detailed below, the egg industry has undertaken extraordinary measures to respond to the public's needs during the pandemic, from quickly pivoting away from restaurant sales and entering retail sales to reflect new consumption patterns, to hiring additional staff, to paying workers hazard pay, to adopting strict COVID-19 safety measures, to operating at a loss. Nonetheless, because of a temporary spike in egg prices at the outset of the pandemic, egg producers have been unfairly targeted by price gouging lawsuits and investigations that have gone far beyond the intended purpose and proper scope of the price gouging laws.

⁴ See, e.g., US Bureau of Labor Statistics, *The impact of the COVID-19 pandemic on food indexes and data collection*, August 2020, available at <https://www.bls.gov/opub/mlr/2020/article/the-impact-of-the-covid-19-pandemic-on-food-price-indexes-and-data-collection.htm>.

The over-application of price gouging laws to the egg industry has harmed both the industry and downstream consumers, and could put some egg producers out of business precisely when they are needed most. The undue burden that these laws place on egg producers far outweighs the putative benefits of such laws (particularly given that their over-application can harm the very consumers they purport to protect). As applied to the egg industry during the COVID-19 pandemic, they violate the dormant Commerce Clause under *Pike*.

Given the absence of factual development here, the inherently fact-specific nature of the *Pike* balancing test, and the fact that the questions of whether Kentucky's price gouging law is valid under *Pike* or as a proper exercise of police powers are not properly before the Court, UEP respectfully urges the Court not to opine on the general constitutionality or validity of state price gouging laws.

ARGUMENT

I. State Price Gouging Laws Form a Patchwork of Regulations With Which Multistate Businesses Must Contend.

Thirty-seven states (plus the District of Columbia) currently have their own individual price gouging laws,⁵ and they vary greatly. The laws differ significantly in what they prohibit, when they apply, how they measure price increases, to what goods and/or services they apply, and what exemptions (if any) exist. For example, some states prohibit all

⁵ See Ala. Code § 8-31-1, *et seq.*; 2020 Alaska Sess. Laws Ch. 10, § 26; Ark. Code Ann. § 4-88-301 *et seq.*; Cal. Penal Code § 396; Colo. Rev. Stat. Ann. § 6-1-730; Conn. Gen. Stat. § 42-230, 42-232, 42-234; D.C. Code § 28-4101 *et seq.*; Fla. Stat. § 501.160 *et seq.*; Ga. Code Ann. §§ 10-1-393.4, 10-1-438; Haw. Rev. Stat. § 127A-30; Idaho Code Ann. § 48-603(19); 20 ILCS § 3305/7(14); Ill. Admin. Code tit. 14, § 465.30; Ind. Code § 4-6-9.1-1 *et seq.*; Iowa Code § 714.16; Iowa Admin. Code § 61-31.1(714); Kan. Stat. Ann. §§ 50-627, 50-6,106; Ky. Rev. Stat. Ann. § 367.372 *et seq.*; La. Rev. Stat. Ann. § 29:732; Me. Stat. tit. 10, § 1105; Chapters 13 and 14, Laws of Maryland 2020; Mass. Gen. Laws Ch. 93A, § 2(c) and Ch. 23 §9H; 940 Mass. Code Reg. 3.18; Mich. Comp. Laws § 445.903 *et seq.*; Miss. Code Ann. § 75-24-25; Mo. Code Regs. Ann. tit. 15, § 60-8.010 and -8.030; N.J. Stat. Ann. § 56:8-108 to 109; N.Y. Gen. Bus. Law § 396-r; N.C. Gen. Stat. §§ 75-37 to -38; § 166A-19.23; Okla. Stat. tit. 15, § 777.1 *et seq.*; Or. Rev. Stat. §§ 401.960 to 970; 73 Pa. Stat. § 232.1 *et seq.*; R.I. Gen. Laws §§ 6-13-21, § 30-15-9(e)(12); S.C. Code Ann. § 39-5-145; Tenn. Code Ann. § 47-18-5103; Tex. Bus. & Com. Code Ann. § 17.46(b)(27); Utah Code Ann. § 13-41-201; Vt. Stat. Ann. tit. 9, § 2461d; Va. Code Ann. § 59.1-525 *et seq.*; W. Va. Code Ann. § 46A-6J-1 *et seq.*; Wis. Adm. Code ATCP § 106.02.

price increases during a state of emergency,⁶ while others prohibit increases over a set amount,⁷ and still others prohibit “unconscionable” or “excessive” price increases⁸ that provide little guidance to businesses. Some states measure price increases from a business’s price the day before the state of emergency was declared,⁹ while others measure price increases over the average of that business’s prices for some period prior to the emergency,¹⁰ and still

⁶ See, e.g., Ga. Code Ann. §§ 10-1-393.4, 10-1-438; Haw. Rev. Stat. § 127A-30; La. Rev. Stat. Ann. § 29:732.

⁷ See, e.g., Cal. Penal Code § 396 (prohibiting price increases over 10%); Me. Stat. tit. 10, § 1105 (price increases over 15% create a rebuttable presumption of unconscionability); Ala. Code § 8-31-1, *et seq.* (price increases over 25% are prima facie evidence of unconscionability).

⁸ See, e.g., Ky. Rev. Stat. Ann. § 367.372 *et seq.* (prohibiting increases that are “grossly in excess” of prior prices); Tex. Bus. & Com. Code Ann. § 17.46(b)(27) (prohibiting “exorbitant or excessive” increases); Vt. Stat. Ann. tit. 9, § 2461d (prohibiting “unconscionably high” increases); N.Y. Gen. Bus. Law § 396-r (prohibiting “unconscionably excessive” increases).

⁹ See, e.g., Ark. Code Ann. § 4-88-303; Cal. Penal Code § 396; N.J. Stat. Ann. § 56:8-108.

¹⁰ See, e.g., Fla. Stat. § 501.160 *et seq.* (price increases measured from business’s average price in the 30 days before the emergency); N.C. Gen. Stat. §§ 75-37 to -38 (price increases measured from business’s average price in the 60 days before the emergency).

others measure price increases above the average price for similar goods in the area over some period of time.¹¹ Some state price gouging laws apply only to specific goods; others apply more broadly.¹² Some exempt price increases that result from market fluctuations or increased costs; others are silent on the issue.¹³

Adding additional complexity to this patchwork of laws and regulations, the statutes are triggered at different times¹⁴ and turn

¹¹ *See, e.g.*, Ala. Code § 8-31-1, *et seq.* (price increases measured from average price for similar goods in the 30 days before the emergency); D.C. Code § 28-4101 *et seq.* (price increases measured from average price in the 90 days before the emergency).

¹² *Compare, e.g.*, Ky. Rev. Stat. Ann. § 367.372 *et seq.* (enumerated categories of essential goods and services covered) *with* Conn. Gen. Stat. § 42-230 (“any item” at retail) *and* Ind. Code § 4-6-9.1-2 (fuel only).

¹³ *Compare, e.g.*, La. Rev. Stat. Ann. § 29:732 (exempting fluctuations in “applicable commodity markets”) *with* Cal. Penal Code § 396 (exempting price increases that are proven “directly attributable” to additional costs if the new price is “no more than 10 percent greater than the total of the cost to the seller plus the markup customarily applied by the seller for that good or service in the usual course of business immediately prior to the onset of the state of emergency or local emergency.”) *and* Mich. Comp. Laws § 445.903(z) (silent on the question of whether price fluctuations or increased costs are taken into account in determining whether an increase constitutes gouging).

¹⁴ *Compare, e.g.*, R.I. Gen. Laws §§ 6-13-21 (price gouging law activated “[u]pon a declaration of a state of emergency by the governor, or federal

off at different times.¹⁵ And in some states that have also issued additional emergency declarations for emergencies unrelated to the pandemic, it is not even clear which emergency declarations control when evaluating the baseline date from which price increases are measured under the laws.¹⁶ While price gouging laws are ordinarily active only in a small number of states at once, and for a short period of time (for example, during a localized weather emergency),¹⁷ during

disaster declaration by the president”) *with* Cal. Penal Code § 396 (price gouging law activated upon a “state of emergency declared by the President...or the Governor, or upon the declaration of a local emergency by an official, board, or other governing body vested with authority to make that declaration in any county, city, or city and county”).

¹⁵ *Compare, e.g.*, Cal. Penal Code § 396 (price gouging law active for 30 days following the emergency declaration for certain goods and services and 180 days following emergency declaration for other goods and services, unless extended) *with* S.C. Code Ann. § 39-5-145 (price gouging law active through duration of emergency) *and* Iowa Admin. Code § 61-31.1(714) (price gouging law active throughout duration of emergency and the “subsequent recovery period”).

¹⁶ *See, e.g.*, Cal. Proclamation of State of Emergency, Aug. 18, 2020 (declaring state of emergency in response to California wildfires), *available at* <https://www.gov.ca.gov/wp-content/uploads/2020/08/8.18.20-Fire-State-of-Emergency-Proclamation-text.pdf>.

¹⁷ *See, e.g.*, C.W. Davis, *An Analysis of the Enactment of Anti-Price Gouging Laws*, Chapter 4, January 2008, *available at*

this pandemic, the states' broad array of price gouging laws were all activated nearly at once and many have remained active for eight months and counting.

Entities doing business in more than one state must consider not just the varied state price gouging laws discussed above, but also the regulatory structures imposed by states that address purported price gouging through other means. Multiple states have no price gouging law on the books but have enacted Executive Orders during the pandemic that claim to prohibit price gouging under the state's consumer protection law.¹⁸ Taking these states into account as well, over 40 states currently have some form of active price gouging rule.

<https://scholarworks.montana.edu/xmlui/bitstream/handle/1/1145/DavisC0508.pdf>.

Indeed, prior to the pandemic, since 2008, the only times Kentucky had triggered its state price gouging laws was in response to severe weather incidents. See J. Ryan, "Price Gouging Complaints Flood Kentucky Attorney General's Office, But Details Scarce," WKYU, March 24, 2020, *available at* <https://www.wkyufm.org/post/price-gouging-complaints-flood-kentucky-attorney-general-s-office-details-scarce#stream/0>.

¹⁸ See, e.g., Ariz. Exec. Order 2020-07; Del. Exec. Decl. 2020-03; Minn. Exec. Order 20-10; Nev. Exec. Order 2020-03-12; Ohio Exec. Order 2020-01D.

For egg producers that sell into multiple states—that is, the majority of UEP members, these price gouging laws have posed immense compliance burdens at the same time as producers are bending over backwards to ensure a steady supply of eggs for consumers in a profoundly disrupted national market. As noted above, the majority of UEP members sell eggs to retailers and the food industry in multiple states, with the largest UEP member selling eggs in 28 states. But despite many of them selling in more than one state, they face a series of widely varying state laws and orders in the midst of a prolonged pandemic. The ensuing burdens harm both egg producers and consumers alike.

II. Overzealous Enforcement of State Price Gouging Laws During the Pandemic Has Harmed and Continues To Harm Both the Egg Industry and Consumers.

A. Such Enforcement Fails To Take into Account that Egg Producers Have Faced Significant Hardships and Taken Extraordinary Actions To Help Consumers During the Pandemic.

As discussed below, the egg industry is defined by certain specific characteristics that mean that it had to surmount extraordinary obstacles in responding to the pandemic. Those industry-specific

concerns underscore the risks of reaching *Pike* on an underdeveloped factual record or issuing a broad ruling that does not take into account the fundamentally fact-specific nature of the inquiry.

1. The Typical Egg Market

In a typical year, egg producers sell roughly 60 percent of the eggs produced in the United States to national grocery store chains and other similar retailers that then price and sell the eggs to the public.¹⁹ The majority of these retailers are highly sophisticated entities with whom the egg producers have long-standing sales relationships (and who thus have a deep understanding of the egg industry, the number of eggs they might want to buy in a given period, and the type of pricing structure they wish to enter into). In cases where a retailer operates in more than one state, contracts between egg producers and their retailers often call for the use of an agreed-upon price that covers multiple states at once.

By their nature, wholesale shell egg prices fluctuate over the course of the year as demand fluctuates. Generally, conventional fresh shell egg

¹⁹ See UEP, “Utilization of U.S. Eggs,” available at <https://unitedegg.com/facts-stats/> (source: USDA 2019 data).

prices are highest around holidays, including Thanksgiving, Christmas, and Easter, and lower during the rest of the year. Due to these fluctuations, UEP members experience periods of profitability followed by periods of significant losses, and their financial results change dramatically even between quarters in the same fiscal year. As a result, egg producers necessarily rely on their profitable periods to offset periods of lower demand.

Also by their nature, shell egg prices can be significantly affected by small decreases in production or increases in demand because it takes time to increase egg supply. Increasing supply requires growing additional hens to a mature laying age, which takes months. And because eggs are perishable, egg producers cannot maintain significant excess inventory in anticipation of increased future demand. As a result, where a producer has contracted to provide eggs to a retailer at a specific price and has fewer eggs available on their farm than due under the contract (a reasonably frequent occurrence given fluctuations in demand and the perishability of eggs), they need to purchase the remaining eggs on the “spot sale” market, which reflects the price of eggs on a given day.

If the price of eggs goes up, the producer can actually lose money because they could end up paying a higher price for the eggs they are selling to the retailer than the retailer will be paying them under the contract.

2. The Impact of the Pandemic on Egg Production and Sales

When the pandemic hit the United States in March 2020, egg prices were beginning to start their natural climb toward higher Easter pricing.²⁰ As the food service industry shut down and Americans rushed to grocery stores, retailers saw a surge in demand for staple supplies, including eggs.²¹ The number of eggs purchased by the retail sector increased significantly over their five-year average, while demand from the food service industry decreased dramatically.²² The FDA’s “Egg Safety Rule”—a rule that ordinarily prevents eggs slated for further

²⁰ See, e.g., USDA, Economic Research Service, LDP-M-309, *Livestock, Dairy, and Poultry Monthly Outlook: March 2020*, p. 18, available at <https://www.ers.usda.gov/publications/pub-details/?pubid=98073>.

²¹ See, e.g., US Bureau of Labor Statistics, *The impact of the COVID-19 pandemic on food indexes and data collection*, *supra* note 2.

²² See, e.g., USDA, Economic Research Service, LDP-M-311, *Livestock, Dairy, and Poultry Monthly Outlook: May 2020*, p. 28, available at <https://www.ers.usda.gov/publications/pub-details/?pubid=98462>.

processing (and eventual sale to the food industry) from being sold in grocery stores—meant that the egg supply originally intended for the food industry could not automatically be repurposed for retail sales.

In many instances, the significantly increased demand from retailers and the concurrent rise in egg prices cost egg producers dearly as they sought to honor their contractual obligations and ensure a steady supply of eggs to grocery stores. The early days of the pandemic created a perfect storm for egg producers—producers that did not have sufficient supply purchased eggs at increased prices on the spot sale market and sold them to their retail customers at a steep loss.

Egg producers that usually sell eggs to the food service industry were also hard-hit as their customers shut down. The egg industry worked with the FDA to secure temporary exceptions to the “Egg Safety Rule,” which, as noted above, would normally prevent certain eggs intended for the food industry from being sold in grocery stores.²³

²³ See U.S. Food and Drug Administration, Guidance Document, *Temporary Policy Regarding Enforcement of 21 CFR Part 118 (the Egg Safety Rule) During the COVID-19 Public Health Emergency*, April 2020, available at <https://www.fda.gov/regulatory-information/search-fda->

Producers pivoted quickly to meet the newly increased demand at grocery stores, often at increased cost. They developed new packaging methods and secured retail-sized cartons, which also became scarce given the sudden spike in demand for them. In certain instances, they used packaging without their preferred logos (at a loss to their own brand recognition) in order to meet retail demand. In other instances, they bought cartons that were up to 80 percent more expensive than the ones they normally use. By May 2020, eggs previously destined for now-closed restaurants and food service businesses were redirected to supermarket supply channels.

Even though some obstacles could be overcome, egg production itself also became more expensive during the pandemic. To ensure a continued supply of shell eggs for public consumption, egg producers have incurred significant burdens and increased costs, as a result of (1) implementing rigorous controls and screening measures to ensure the health of their employees, (2) providing employees with crisis pay, (3)

[guidance-documents/temporary-policy-regarding-enforcement-21-cfr-part-118-egg-safety-rule-during-covid-19-public-health.](#)

hiring additional employees to meet demand, and/or (4) cost increases related to additional transportation and logistics.

As egg producers have worked overtime to provide food to consumers in the middle of a pandemic, they have had to contend with the patchwork of price gouging laws across the country as well as numerous price gouging lawsuits and investigations that seized on the natural fluctuations of egg pricing as a convenient (but inaccurate) scapegoat for pandemic-related frustrations. Notably, egg prices decreased to pre-COVID-19 levels by May 2020, tracking both the natural fluctuation of the market and the egg industry's extraordinary efforts to meet retail demand for eggs.²⁴

Nonetheless, the egg industry has continued to be hit with price-gouging lawsuits and civil investigative demands from state attorneys general, with multiple lawsuits filed against egg producers across the nation as late as this August. *See, e.g., Bell v. Cal-Maine Foods*, No. 20 Civ. 461 (W.D. Tex., filed Apr. 30, 2020); *West Virginia v. Dutt & Wagner*,

²⁴ *See, e.g.,* US Bureau of Labor Statistics, *The impact of the COVID-19 pandemic on food indexes and data collection*, *supra* note 2.

No. 20-C-68 (Greenbrier Cty. Circuit Ct., filed July 14, 2020); *New York v. Hillandale Farms*, Index No. 451650/2020 (N.Y. Supreme Ct., filed Aug. 11, 2020).²⁵

B. The Continued Application of State Price Gouging Laws to the Egg Industry Throughout the Pandemic Has Been Counterproductive.

The unexpected consequences that can arise from the application of state price gouging laws provide yet another reason to avoid an overbroad or premature ruling in this case (particularly given the fact that this is an appeal from a preliminary injunction with a limited record). The egg industry again provides an instructive example. As discussed above, multistate businesses trying to operate in the pandemic era face a patchwork of inconsistent state price gouging laws and regulations with which they must expend valuable time and resources attempting to

²⁵ In each of these lawsuits, the egg producers were sued by an attorney general from a state into which they transact business in interstate commerce; the producers were all headquartered elsewhere.

comply.²⁶ The continued application of these laws to egg producers has additional harms: given the cyclical nature of egg pricing, if the baseline from which increased prices are measured were set during one of the down periods in the cycle, producers would be in significant financial trouble as they would be precluded from raising prices on their normal schedule for months on end.

The price gouging laws can have significant and unintended adverse effects on consumers as well. By capping prices, the laws can discourage innovation and entry into new markets—after all, why spend resources innovating or entering new markets now when any return on such investment is capped or precluded? For states that cap prices at an amount below that necessary to earn a sufficient profit (a significant possibility in the egg industry given the cyclical nature of pricing), egg producers might not financially be able to

²⁶ Indeed, where egg producers sell at wholesale to retailers that in turn sell eggs to consumers in multiple states, sales by a particular producer to a particular retailer based on the same contract and pricing model can comply with price gouging laws in one state and be subject to prosecution and plaintiff suits in another.

afford to enter into new contracts in that state. And in some instances, overzealous enforcement of price gouging laws has scared law-abiding egg producers away from entering particular markets or contracting with purchasers that seek to set contractual prices based on market indices. No matter the reason, where the prolonged application of price gouging laws leads to fewer eggs in a given state, consumers are harmed.

III. The Fact-Specific Nature of the *Pike* Test Counsels Against this Court Reaching the Issue in the First Instance.

Statutes violate the dormant Commerce Clause where they (1) impermissibly discriminate against interstate commerce, (2) are impermissibly extraterritorial, or (3) impose a “burden on interstate commerce” that is “clearly excessive” in relation to the state’s interest in the law. *See, e.g., Am. Beverage Ass’n v. Snyder*, 735 F.3d 362, 369–70 (6th Cir. 2013) (quoting *Pike*, 397 U.S. at 142). The district court addressed only whether the statute violated the extraterritoriality principle. Given the fact-specific nature of the *Pike* balancing test (as highlighted below in the context of the egg industry), this Court should decline to apply it in the first instance on an underdeveloped record.

In determining whether a statute imposes an undue burden on interstate commerce under *Pike*, courts examine whether “the burden on interstate commerce outweighs the local benefits” from the statute. *Am. Bev. Ass’n*, 735 F.3d at 368. Where a statute provides significant benefits, there is a “strong presumption” that the statute is valid. *See Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 444–45 (1978) (noting strong presumption that regulations promoting highway safety are valid). In contrast, where a statute does not provide a “significant local benefit,” even “an incidental burden on interstate commerce posed by the” statute would be “clearly excessive” in violation of the dormant Commerce Clause. *See McNeilus Truck & Mfg., Inc. v. Ohio ex rel. Montgomery*, 226 F.3d 429, 444 (6th Cir. 2000).

Even where courts find that the state had a legitimate interest in enacting or enforcing the law, courts have not hesitated to find statutes unconstitutionally burdensome where the purported benefits of the statute are outweighed by the impediments placed on interstate commerce. *See, e.g., ANR Pipeline Co. v. Schneidewind*, 801 F.2d 228, 238 (6th Cir. 1986), *aff’d*, 485 U.S. 293 (1988) (state statute

unconstitutionally burdened interstate commerce where “burdens of expense, delay, and administrative hassle of ‘advance approval’ securities regulation far outweigh[ed] the benefits, if any, of [state’s] interests in protecting consumers and investors”); *see also, e.g., Raymond*, 434 U.S. at 447 (overturning state regulation governing the length of transport trucks permitted to operate within state boundaries despite “strong presumption” that highway safety statutes are valid because regulation “place[d] a substantial burden on interstate commerce and...cannot be said to make more than the most speculative contribution to highway safety”); *R & M Oil & Supply, Inc. v. Saunders*, 307 F.3d 731, 733–37 (8th Cir. 2002) (state law requiring sellers of propane to maintain minimum propane storage facilities in state imposed burden on interstate commerce that outweighed state’s goal of ensuring adequate propane supply for citizens). The Supreme Court has applied particularly searching scrutiny to those statutes that “adversely affect interstate commerce by subjecting activities to inconsistent regulations.” *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88 (1987) (collecting cases).

As applied to egg producers, the burdens on interstate commerce imposed by the application of state price gouging laws during the pandemic are clearly excessive in relation to the purported benefits of the statutes. Egg producers must deal with a patchwork of inconsistent laws (a fact highlighted by the sheer number of states that joined the States' amicus brief). The more states a producer sells into, the more burdens they face.

For egg producers that sell into many states, the cost of compliance has been immense, as producers must calculate the price they can offer in each state based on wildly varying laws, deal with the impact of differing price gouging laws on multistate contracts that require a set price to be used across multiple states,²⁷ and obtain legal assistance where necessary. Some producers have incurred hundreds of thousands

²⁷ Where a UEP member has a contract with a large retailer that both covers multiple states and sets the same price for eggs in each state, the member faces a Hobson's choice: comply with the terms of their contract and face potential lawsuits and investigations by those states that set their price cap lower than the price contracted to by the parties, or decide not to comply with the contract and face potential lawsuits by retailers for breach of contract.

of dollars in legal bills as a result of the patchwork application of the price gouging laws. But despite those efforts, they may nonetheless find themselves confronted with a situation in which sales to the same customer under the same agreement based on the same pricing model can be legal in one state but not another.

In contrast, an egg producer that only sells into one state (or only in states that exempt agricultural products or commodities from their price gouging laws) would not have to deal with the same compliance costs or litigation risks. The difference highlights the burdens that the inconsistent application of price gouging laws impose specifically on interstate commerce. Such burdens are substantial. *See Raymond*, 434 U.S. at 444 (regulations impose substantial burden on interstate movement of goods where they substantially increase the cost of such movement); *accord CTS Corp*, 481 U.S. at 88 (compliance with inconsistent state regulations imposes substantial burden on interstate commerce).

In contrast to the significant burdens imposed on multistate egg producers, the benefits of the continued application of state price gouging

laws to them are minimal to nonexistent. The Eighth Circuit’s decision in *R & M Oil & Supply*, 307 F.3d 731, is instructive. There, the court affirmed a district court ruling enjoining enforcement of a Missouri statute that regulated the propane industry. Like the egg industry, prices in the oil industry fluctuate throughout the year, with demand spiking in the winter. *See id.* at 733. To protect residents that rely on propane to heat their homes from winter propane shortages, Missouri required bulk propane sellers to maintain at least 18,000 gallons of storage capacity within the state. *See id.*

The Eighth Circuit held that even if it assumed that the statute was “designed to further Missouri’s legitimate interest in protecting the health and safety of its citizens,” the “local benefit actually derived from the statute is minimal or nonexistent.” *See id.* at 735. Imposing burdens on propane sellers was not likely to protect Missourians from propane shortages, but rather could conceivably have “precisely the opposite effect.” *Id.* Given the choice between complying with the Missouri law at additional cost or not doing business in Missouri, the Eighth Circuit noted that propane sellers “might well conclude that there is not enough

existing or potential business in Missouri to justify the increased costs incurred by complying with Missouri law.” *See id.* at 735–36. When compared with the financial burdens of compliance, the court found it likely that the statute was unconstitutional. *See generally id.*

The same holds true here. Faced with significant additional compliance costs and the threat of aggressive lawsuits, some egg producers might well conclude that it is not worth it to sell into states that are overzealously enforcing their price gouging laws over eight months after the states of emergency were first declared. In the end, the laws could have the opposite of their intended effect by lowering the supply of goods for consumers to access in those states.

In light of such harms to downstream consumers, as applied to the egg industry, the burden such laws impose on interstate commerce is even more excessive in relation to their putative local benefits. *See, e.g., McNeilus*, 226 F.3d at 444 (even small burden on interstate commerce is excessive where statute provides no local benefits). But, as this discussion makes clear, that analysis can vary depending on the facts of

each particular case (and each particular industry). Accordingly, this Court should not reach this issue in the first instance.

IV. Kentucky’s Brief Incorrectly Suggests that the COVID-19 Pandemic Should Be a Thumb on the Scale of the *Pike* Balancing Test.

If this Court were to reach the *Pike* test, it should reject the suggestion that the pandemic puts a thumb on the constitutional scale. Specifically, Kentucky states that the Guild “has come nowhere close to meeting its burden of proof as to *Pike* balancing, *especially in light of the importance of protecting Kentucky consumers during the Covid-19 crisis.*” Kentucky Br. at 28 n. 8 (emphasis added). Kentucky thus implies that the COVID-19 pandemic should be a thumb on the scale of the *Pike* balancing test—one that leads to the apparently inexorable conclusion that state price gouging laws are especially constitutional given the importance of protecting state residents from price increases over the course of the pandemic. The Court should decline to reach this issue because it is not properly before the Court. To the extent the Court does address the issue, it should reject Kentucky’s argument.

As detailed above, the *Pike* balancing test evaluates the burdens a statute imposes on interstate commerce in relation to its putative local benefits. *See, e.g., Am. Bev. Ass'n*, 735 F.3d at 368. For price gouging statutes, the putative local benefit is preventing individuals from taking advantage of disasters and their accompanying supply shocks by charging unconscionably excessive prices in the immediate aftermath of an emergency.²⁸ In the context of the “Covid-19 crisis,” the immediate aftermath of the emergency is long gone, replaced by a new normal.

Indeed, the continuation of the pandemic over the course of nearly a year does not make the continued application of price gouging statutes more constitutional, but less. As detailed above, the continued application of the patchwork of state price gouging laws to the egg industry imposes additional and long-lasting compliance costs and risks on law-abiding businesses seeking to adjust to a new normal, which is not what the laws intended. And for all the reasons set forth above, the longer those statutes are applied, the more the benefits diminish while

²⁸ *See, e.g., Davis, An Analysis of the Enactment of Anti-Price Gouging Laws*, Chapter 4, *supra* note 17.

the burdens increase. Far from providing a reason that price gouging statutes should be especially constitutional under *Pike*, the length of the pandemic highlights the reasons why the continued application of such laws outside imposes an unconstitutionally undue burden on interstate commerce.

V. The State Amici Unnecessarily and Incorrectly Argue that Price Gouging Laws Are Always a Valid Exercise of State Police Powers.

The State amici further argue that the application of their price gouging laws is a valid exercise of their respective state police powers. *See States' Br.* at 19–24. Like Kentucky, in doing so, they implicitly argue that the price gouging laws would always be constitutional, regardless of their duration or their consequent burden on interstate commerce. The Court should decline to reach this issue because it is not properly before the Court. To the extent the Court does reach it, the Court should reject the States' view.

In defending the importance of price gouging laws to protecting the public welfare, the States' brief focuses on precisely the types of actions ordinarily covered by price gouging laws—charging excessively high

prices for hotel rooms and tree removal in the immediate aftermath of a hurricane, *see id.* at 12–13; charging excessively high prices for waste management services, milk, and plywood two days after a major earthquake, *see id.* at 13–14; or hoarding N-95 masks and disinfectant at the outset of the pandemic, only to sell those products back to the public at an excessive markup, *see id.* at 9–12.

Those examples each have a critical fact in common—they all involve bad actors deliberately taking advantage of a crisis, not law-abiding businesses simply trying to respond to an unprecedented pandemic to the best of their abilities. This focus is no accident—it is exactly what price gouging laws were meant to cover.

But the States then try to draw a false equivalence between those scenarios and this one, arguing that their price gouging “laws are especially beneficial now, as we endure” what the States concede is an “unprecedented” pandemic that has “resulted in actual or threatened shortages of essential goods.” *See id.* at 14. Never before have price gouging laws been applied for such an extended period of time. We are no longer discussing short-term market disruptions and statutory efforts

to remedy them. Eight months and counting into the pandemic, we are discussing a new normal and, if price gouging statutes are to be applied in such an extended fashion, long-term state price controls.

While States may have a legitimate interest in enforcing price gouging laws in the immediate aftermath of an emergency, they cannot hide behind that interest to avoid dealing with the significant burdens that the extended application of a patchwork of over 40 individual regulatory regimes has imposed on interstate commerce. As applied to the egg industry, those burdens are unconstitutionally excessive. A blanket invocation of state police powers does not immunize the statutes at issue here from constitutional scrutiny. Any holding that implies otherwise would greatly harm the egg industry by making it more difficult to raise their legitimate dormant Commerce Clause defenses to the application of state price gouging laws to them.

CONCLUSION

For the foregoing reasons, the Court should decline to opine on the general validity of the price gouging laws under the dormant Commerce

Clause and should instead limit its opinion to the narrow issues currently before the Court.

Dated: November 23, 2020

Respectfully submitted,

PROSKAUER ROSE LLP

By: s/ Jennifer E. Tarr

Christopher E. Ondeck
Jennifer E. Tarr
1001 Pennsylvania Ave. NW
Suite 600S
Washington, DC 20004
(202) 416-6800

Chantel L. Febus
Kelly Landers Hawthorne
Eleven Times Square
New York, NY 10036
(212) 969-3000

*Counsel for Amicus United Egg
Producers, Inc.*

CERTIFICATE OF COMPLIANCE

As required by Federal Rule of Appellate Procedure 32(g) and 6th Cir. R. 32, I certify that this brief complies with the type-volume limitation in Fed. R. App. P. 29(a)(5), Fed. R. App. P. 32(a)(7), and 6th Cir. R. 32(b)(1) because it contains 6,367 words, excluding the parts of the brief exempted by 6th Cir. R. 32(b)(1).

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

s/ Jennifer E. Tarr

CERTIFICATE OF SERVICE

I certify that on November 23, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Jennifer E. Tarr