



Online
Merchants
Guild

ONLINE MERCHANTS GUILD
OPEN LETTER TO STATES' ATTORNEYS GENERAL:

STOP PURSUING ONLINE "MARKETPLACE" MERCHANTS FOR PRICE GOUGING
AND
WITHDRAW ALL SUBPOENAS, DEMANDS, OR OTHER INQUIRIES

My name is Paul Rafelson, and I am the Executive Director of The Online Merchants Guild. In addition to my role at The Online Merchants Guild, I am also an adjunct professor at Pace Law School in New York, where I teach a course on Constitutional Law (The Commerce Clause) and taxation. The Online Merchants Guild is a trade association that advocates for small eCommerce businesses, many of whom sell products in Amazon's store.

I am writing because it has come to our attention that a number of States' Attorneys have issued subpoenas, demand letters or inquiries requesting information from third-party merchants who supply goods to Amazon's national retail store; the very store that has disclosed merchant information to you, without prior warning. It also appears that Amazon may be assisting you in drafting the language of these subpoenas, demand letters and inquiries.

Please be advised that the subpoenas you are issuing pertain to laws that, when applied to Amazon's third-party merchants, are unconstitutional. However, even if the laws were constitutionally applicable to these merchants, these laws are being misapplied. Consumer price gouging laws protect the consumer, and it is the party that sells to the consumer that is accountable, not the supplier. Amazon's merchants are not retail stores operating in a mall, they don't have rights to solicit the customer and don't even receive the name and information of the customer, unless they direct ship, nor do they set their own return policies or make customer service decisions. In fact, if you took the time to compare how a shopping mall operates versus how Amazon operates, you'll see pretty quickly, that Amazon's claims that it's not a store and just a marketplace or mall are merely smoke and mirrors. Amazon's goal is to deflect your attention away from its wrong-doing, and to put the blame on your resident merchants, Amazon's scapegoats.

And while I understand that in some states Amazon has a way of getting away with things that no other large company would, with its promise of jobs or even a headquarters (or three), in their political efforts to placate to Amazon, I often find states don't consider how many small Amazon merchants live in their state. Therefore, I've provided a link to a map of sellers by state in the footnote, and just to highlight a few: 175,000 in California; 85,000 in New York; 75,000 in Florida; and 60,000 in Texas. Also, keep in mind that this map is a few years old, and

based on Amazon's marketplace growth over the last two years, the numbers are likely to be larger.²

Frankly, I am not surprised to see Amazon sell-out their merchants in an effort to save itself from liability for its price gouging, it's an all too common practice in other areas of the law. In fact, unless you're The State of South Carolina, Amazon is probably getting away with the biggest tax evasion scheme in US history, federal or state, and owes your state a substantial amount of back taxes, for sales taxes it didn't collect for the last few years. In fact, the tax evasion Amazon perpetuated in your state was based on the same excuse it's using now with price gouging, that it is just a "marketplace" platform and not a store.

This is the excuse that Amazon relied on when it was selling goods tax free in your state, while the local businesses in your state could not, and had to operate at a competitive disadvantage.³ In some states, such as Florida (Amazon's second largest state in terms of customers) and Missouri, Amazon is still taking advantage of that loophole as it sells freely in those states by claiming it's a marketplace, while local businesses struggle to compete. Sadly, many of your tax department leaders are under enormous political pressure to let Amazon get away with exploiting your market while depriving your state of much needed revenue and leaving local business owners helpless because they just couldn't compete with Amazon's quasi "duty-free" treatment in your state. It certainly wasn't the law that stopped them, as you'll see that, Amazon is the store factually, by their own admission, and under the law.

And just like with price gouging, when states wanted to collect back taxes, not only had Amazon denied it was a store it, it also helped state tax authorities go after business owners in your state. Amazon provided them with your resident merchants' personal information, leaving your residents small business owners fending for themselves as the State of California (30,000 Amazon Jobs), Washington (Amazon's Home State) and Massachusetts, have been systematically persecuting the merchants in your state. These tax witch-hunts are not only unconstitutional, and in violation of state law, as California's own Treasurer and former Sales Tax Chief stated in a six page letter to the governor, they were also destructive, as California and others were claiming these sellers owed their life savings in back taxes, even though under their state law Amazon was the liable party. You can read the California Treasurer's eye-opening letter using the link in the footnote.⁴

This is what Amazon does, they distort the law to benefit themselves, and use their political influence to shift the blame on to their merchants. The tax witch hunt is still going on today, and many small business owners in your state that are suffering right now are even more helpless, because they cannot defend themselves in the complex multistate tax litigation reserved for the Fortune 500, like the Philadelphia Amazon merchant who received a \$1.5 million dollar tax assessment from California, for taxes that Amazon owed under the law, not the merchant, as reported in the Philadelphia Inquirer.⁵ Meanwhile, Amazon is taking advantage of this price gouging crisis by inciting States' Attorneys to adopt a fundamental assumption to Amazon's

² <https://www.marketplacepulse.com/amazon/top-states>

³ <https://www.yourcentralvalley.com/news/fresno-business-files-lawsuit-claiming-amazon-owes-billions-in-back-taxes/>

⁴ <https://onlinemerchantsguild.org/wp-content/uploads/2019/03/Letter-to-Governor-Newsom.pdf>

⁵ <https://www.inquirer.com/business/california-sales-tax-amazon-seller-philadelphia-business-20191105.html>

“duty free” status, namely that it is not a seller and is just a mall, which only helps Amazon further their efforts to avoid liability for the tens of billions in back taxes it collectively owes the states, but likely won’t ever be held liable for because states seem to be ok with letting them off the hook (except South Carolina).

Now, the purpose of this letter isn’t to address Amazon’s sales tax avoidance via its marketplace, or the tens of billions it currently owes across the states. But it is important, highlight Amazon’s sordid history, as Amazon’s claims to be merely a passive marketplace has become its modus operandi for violating your tax laws, environmental laws, consumer safety laws as well as many other laws, including price gouging. And what is worse, states choose to let Amazon get away with it.

For example, when inventors and brand owners in your state are regularly ripped off by counterfeiters in China, Amazon makes it tedious if not impossible for these intellectual property rights owners to stop them, forcing these rights owners to play a never-ending game of whack-a-mole, while profiting handsomely on every illegal sale. In fact, it’s not uncommon for an intellectual property rights owner to report infringers to Amazon, only to have those products receive the Amazon’s choice badge.

Then of course there is the issue of dangerous products being sold to consumers in your state, such as products containing lead sold to children by Amazon merchants based in China. The Wall Street Journal did an in-depth investigation into this, but what action did you take to protect your residents?⁶ What happens when those products hurt your residents, like Mrs. Oberdorf in Pennsylvania who lost eyesight in one eye after buying a product in Amazon’s store, only to have the so called “retailer” disappear, and be left with trying to bring a claim against Amazon, which of course claims they can’t be held liable because they aren’t the store.

Did Amazon act responsibly, Absolutely not! Once again, Amazon claims they’re not the store so they can’t be held accountable, and you are letting them get away with it, by refusing to take action against Amazon’s fiction. With over half of Amazon’s 4-5 million merchants based in China, and with no incentive for those merchants carry any liability insurance since it’s nearly impossible to sue them, your citizens are left with no path to recover damages when they are injured by the countless dangerous products Amazon sells. Their only option is to take on Amazon, who routinely denies liability for the harm caused the products they sold to your in-state consumers, claiming they are not the store. The fact that Amazon has over two million merchants operating in China with complete impunity is no coincidence. As long as you allow Amazon to get away with its “we’re just a mall or marketplace” defense, your citizens will continue to be victims of dangerous goods sold by sellers on Amazon.

However, there are scenarios where Amazon “wants to” be the store, so much so that they even said it was their store under oath, multiple times, to a House Subcommittee on Antitrust.⁷ So, when it comes to antitrust law, Amazon wants to make it abundantly clear that it is their store, not a marketplace, which is what they did in their testimony to the House

⁶ <https://www.wsj.com/articles/amazon-has-ceded-control-of-its-site-the-result-thousands-of-banned-unsafe-or-mislabeled-products-11566564990>

⁷ <https://docs.house.gov/meetings/JU/JU05/20190716/109793/HHRG-116-JU05-20190716-SD038.pdf>

Subcommittee and in a 70-page written response to a Congressional inquiry issued by the House Subcommittee on Antitrust. But why would Amazon want to offer such an inconsistent statement?¹⁰

Perhaps it has to do with the fact that Amazon is being investigated for its unfair business practices, including how it uses information it receives from its merchants, the local business owners in your state, to compete against them.¹² For example: When a seller in your state comes up with a great product, Amazon is known to come in and push them out of the market with their “Amazon Basics” or other private-label brands. In addition, Amazon is known to manipulate the search results so that when a customer is searching for the merchants branded goods, Amazon’s brand comes up instead. For a neutral marketplace that could sound alarming. But not for a store. As a store, Amazon can argue that promoting Amazon Basics is no different than a store brand offering, such as: Kirkland at Costco, Great Value at Walmart, or Method at Target.

So, which one is it, is Amazon a store, or is it a mall? Well, if you ask Amazon the answer clearly depends on who’s asking. However, who’s asking is not how the law works. In the law, substantive fact carries over pretextual formalities used to avoid it. The substance in Amazon’s case says that the clear answer is that Amazon is a store. Therefore, if anyone can be held accountable for state price gouging, the law says it can only be Amazon.

I. Price Gouging Laws, When Applied to Amazon’s Third-Party Merchants, Are Unconstitutional

A state price gouging law cannot be applied to merchants whose goods are sold by online websites like Amazon, because the merchant cannot control the price of a commodity on a state by state basis, only Amazon can. When a state law seeks to restrict a merchant’s ability to sell goods on a national platform, but those merchants lack the ability to direct their activity towards or away from a particular state, as they are simply placing goods into the stream of commerce, that law has the effect of regulating extraterritorial commerce. Therefore these laws as applied to Amazon’s merchants, is in violation of the commerce clause.

For example: If Florida issues a state of emergency during a hurricane and institutes its price gouging law, constitutionally, that law could only be applied to local business, stores, that sell intrastate. When Florida seeks to apply that law to merchants who sell in interstate commerce, via national eCommerce web stores such as Amazon, it creates an undue burden on interstate commerce, because the law is restricting the ability of that seller to engage in transactions in other states, as the seller doesn’t have the ability to choose what markets to sell to, nor do they have the ability to set a price based on each state’s law. Only Amazon can do that.

In other words, while a hammer selling for \$20.00 in a Florida hardware store might be considered price gouging during a state of emergency, under Florida law, if that same hammer is offered for sale on Amazon, and available to be purchased by anyone in the US, it cannot be

¹⁰*Id.*

¹² <https://www.cnn.com/2018/10/02/amazon-is-testing-a-new-feature-that-promotes-its-private-label-brands-inside-a-competitors-product-listing.html>

subject to Florida's price gouging law, even in a state of emergency, just because there is a possibility that a Floridian might buy it, as this application of law restricts the sellers ability to sell into the 49 other states.

Since Amazon's merchants are not given the option by Amazon to price commodities on a state by state basis, only the ability to offer their goods nationally via Amazon's webstore, they cannot be held liable for violating a state's price gouging law, even if the merchant resides in the state. By attempting to apply state price gouging law to Amazon's merchants, you are regulating the price, supply and availability of goods extraterritorially, in violation of the commerce clause.

The principle factors of extraterritoriality are outlined by The United States Supreme Court in *Healy v. Beer Institute*¹³. The three factors established by the *Healy* Court are as follows:

1. A state statute may not regulate "commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State.
2. A statute that directly controls commerce occurring wholly outside the [legislating state's] boundaries ... is invalid regardless of whether the statute's extraterritorial reach was intended (emphasis mine).
3. In evaluating a statute's "practical effect," the Court considers "not only ... the consequences of the statute itself, but also ... how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if ... every state adopted similar legislation." This is because "the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State."¹⁴

In 2018, The Fourth Circuit Court of Appeals had addressed a similar issue involving a pharmaceutical price gouging law enacted in Maryland, noting that:

[T]he fundamental problem with the Act is that it "regulate[s] the price of [an] out-of-state transaction." The Act instructs prescription drug manufacturers that they are prohibited from charging an "unconscionable" price in the initial sale of a drug, which occurs outside Maryland's borders. Maryland cannot, even in an effort to protect its consumers from skyrocketing prescription drug costs, impose its preferences in this manner. The "practical effect" of the Act, much like the effect of the statutes struck down in *Brown-Forman* and *Healy*, is to specify the price at which goods may be sold beyond Maryland's borders (emphasis mine). *See Healy*, 491 U.S. at 336, 109 S.Ct. 2491 ("The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." (citing *Brown-Forman*, 476 U.S. at 579, 106 S.Ct. 2080)). The district court erred by failing to account for this impact¹⁵

¹³ *Healy v. Beer Institute*, 491 U.S. 324 (1989).

¹⁴ *Assoc. for Accessible Medicines v. Frosh*, 887 F.3d 664 (April 13, 2018), cert denied.

¹⁵ *Id.*

Similarly, the practical effect of the state price gouging laws when applied to Amazon sellers, is to limit the price which goods may be sold, beyond the state's borders.

However, that does not mean that state price gouging laws can't be applied to Amazon. Certainly, Amazon did have the power to limit price increases by category of goods (e.g. N95 masks or Hand Sanitizer), and block attempts to set prices above a certain average price for a state that has declared a state of emergency. And, because Amazon's buy box algorithm is partial to the location of goods relative to the location of the consumer, we know Amazon was also able to limit the available prices of a commodity, on a state by state basis. This means that if a state declared a state of emergency Amazon could have rejected the ability to offer that commodity at a price above a trailing average price (e.g. 30,60,90 days), so that the products would not be sold at those prices to consumers in your state.

Therefore, based on a longstanding principle of constitutional law, the commerce clause, Amazon merchants cannot be subject to state price gouging laws for goods sold via Amazon's store, as such application has the effect of regulating extraterritorial commerce when applied to Amazon's third-party merchant suppliers.

II. Only Amazon Can Be Liable for Price Gouging Under State Law

In addition to the constitutional barrier, the price gouging laws have another defect when applied to Amazon's merchants, and that's the fact that the merchants residing in your state are not retail sellers; they are not the store. Amazon is the store, the merchants are the suppliers of Amazon's store.

When consumers buy products supplied by the merchant, the customer is Amazon's customer. Amazon's Business Solutions Agreement expressly forbids its third-party merchants from soliciting their customers. Customers check out via Amazon's shopping cart (online equivalent of a cash register), regardless of whether the goods are offered by Amazon, by its merchants or if its a mix of the two in the same shopping cart transaction.

Additionally, as an Amazon merchant, it is Amazon that sets the return policy, handles all customer service disputes (almost always siding with the buyer), sets pricing policies, suspends selling activities, charges the consumers credit card (Amazon.com), withholds funds for period of time after goods were delivered. Even the emails Amazon sends to its customers for products supplied by third-party merchants say thank you for shopping with Amazon, with no mention of the merchant. Most importantly, Amazon is the sole party in privity of contract with its customer, and their business services agreement specifically states that there is no agency relationship between Amazon and its third-party merchants.

This is quite the opposite of how an actual mall works, where stores are free to encourage their customers to transact outside of the mall (e.g. Skip the trip to the mall: Shop online next time and save 10%). Similarly, malls don't dictate the terms of each sale of their independent retailers, they do not set the return policy, and they do not make customer services decisions. In other words, if a person is upset about their iPhone warranty, they don't go to the Mall of

America's customer service desk with the expectation that the Mall of America will force The Apple Store to give that customer their money back. With Amazon it's quite the opposite, because Amazon is a store, not a mall.

A. Amazon's Antitrust Admissions Under Oath: It's Our Store

If you are still not convinced that Amazon is the store, perhaps you should refer to Amazon's recent statements to the House Antitrust Committee, which are deemed to be made under penalty of perjury. For example, when Amazon was asked by Committee Member Cicilline to "[D]escribe how Amazon responds when it discovers that a product sold by a Marketplace merchant is being sold at a lower price on a non-Amazon website," Amazon responded as follows:

Customers come to Amazon for a vast selection of products with great prices and convenient delivery. If customers are disappointed in the offerings at Amazon, they will quickly turn to other stores to find the best selection, prices, and convenience. To maintain trust with customers that they will find low prices in the Amazon store, Amazon sets the prices on its first party sales to match competitors across all channels of retail. For sales by third parties, who are responsible for setting their own prices in the Amazon store, **Amazon may** suggest that a seller to lower its price in its store, offer an Amazon-funded discount on the product, or **choose not to feature higher-priced offers on a product's detail page.**¹⁷

So, not only does Amazon makes it clear in their near 70-page statement to the committee, and under penalty of perjury, that it is, in fact, Amazon's store, Amazon also admits that it has the ability to block prices, if they deem them to be too high. These pricing error notifications Amazon is referring to are a regular occurrence on Amazon, and have even led to a class action lawsuit for price fixing. This is because Amazon regularly suspends its sellers' ability to sell a product at a certain price if Amazon's scanner software discovered that the same product was offered in another marketplace, such as eBay, at a lower price.¹⁸

B. Amazon Retains Ultimate Control of the Price Ceiling and Price Floor

Amazon has the final say when it comes to the prices that are set in its store. Sellers suggest a price, just as manufacturers suggest prices, but Amazon, like any other retail store has the ultimate right to decide what price goods can sell for in its store. But by baking in a little ambiguity into how goods are priced, by not telling sellers what an acceptable price is and leaving them to guess, while retaining the right to reject a price, Amazon can claim it didn't set the price, even though it accepted it, in order to weasel out of its obligations not to price gouge, which is exactly what Amazon did, and continues to do, during the Covid-19 crisis.

With the outbreak, Amazon saw it was in their financial interest to allow high priced, counterfeit or sub-standard goods to be sold to a panicking public, earn the higher fees and

¹⁷<https://docs.house.gov/meetings/JU/JU05/20190716/109793/HHRG-116-JU05-20190716-SD038.pdf>

¹⁸<https://www.law.com/2020/03/20/amazon-hit-with-antitrust-class-action/?sreturn=20200304185550>

commission and shift the blame to the merchants who supply them, the usual scapegoat. Many of these merchants would list their products using Amazon's "match lowest price option," thinking that how could it be price gouging if Amazon's offering them a low price button. What they did not know, was that Amazon was going to make their merchants think their price was legitimate by allowing the price to go live, collect their fees, only to later sell those merchants out to their own state officials.

C. Amazon Could Have Prevented Price Gouging by Blocking Automatic Reprice Software

Many of the merchants use automatic repricing software that can change a merchant's price, automatically re-pricing a product as the market conditions change, via Amazon's application protocol interface ("API"). This means that a commodity originally listed for 10, can be automatically adjusted to 15 based on the software's algorithm, and unless the seller is paying attention, they may not even know. As the panic began to grow, so did the prices of various commodities, and the repricing tools appeared to get out of control. But, had Amazon simply turned off the feature in their API that allows these repricing tools to work, many of the high prices inflated via the repricing tools would have been mitigated. But why would Amazon want to do that when the repricing tools enable Amazon to earn higher commission and fees, and especially when Amazon can shift the blame onto its sellers.

This model of no accountability, just profits, has worked really well for Amazon. Even if states were successful at stopping every supposed "price-gouger" in the US, Amazon will still profit from its over two million merchants in other countries, especially China where many of the masks sold on Amazon right now are coming from. These merchants will continue to sell goods into the marketplace at any price and without any adherence to consumer or safety standards, with complete impunity. And that impunity will extend to Amazon as well, as long as States' Attorneys allow Amazon to get away with this distortion of the law; that they are merely a marketplace or a mall, not the store.

D. Courts (including SCOTUS) Are Aware of the Marketplace Fallacy

As convenient as Amazon's split personality is for them, our legal system certainly operates under the principle of substance over form. In other words, just because someone says they aren't a duck, doesn't mean they aren't. In fact until Amazon, we were pretty sure it was just the opposite. Thankfully, courts, including The Supreme Court of the United States, have seen through this charade, meaning now is the time for the States' Attorneys to who are charged with enforcing the law to take action.

For example, a South Carolina tax court recently found that Amazon was liable for uncollected sales tax pertaining to its marketplace, despite Amazon claims that each of its 4-5 million sellers were individually responsible (over half of whom are not in the US). The Court made pretty quick work of Amazon's claims, holding that:¹⁹

¹⁹ *Amazon Services, LLC v. South Carolina Dept. of Revenue* 17-ALJ-17-0238-CC (September 10, 2019) Available at <https://src.bna.com/Leb>.

Customers meaningfully interact with Amazon Services to consummate the sales of Merchant products and no one else. Moreover, Amazon Services' self-characterization as a service provider could be employed by any brick-and-mortar retail store or consignment shop to evade tax responsibility as a seller. Either could claim that instead of being engaged in the business of selling tangible personal property, they just provide an array of discrete, non-taxable services, charging the same types of "service" fees as Amazon Services even though, in reality, they are selling products. Separating the actions of a retail seller such as Target into discrete, non-taxable services would be absurd, and so it is here.

Then there is the Supreme Court's ruling in *Apple v. Pepper* where the Court found a similar claim made by Apple, that its app store was merely a marketplace or mall (as opposed to a retail seller of the apps) to be nonsensical, holding that:²⁰

Under Apple's rule a consumer could sue a monopolistic retailer when the retailer set the retail price by marking up the price it had paid the manufacturer or supplier for the good or service. But a consumer could not sue a monopolistic retailer when the manufacturer or supplier set the retail price and the retailer took a commission on each sale. Apple's line-drawing does not make a lot of sense, other than as a way to gerrymander Apple out of this and similar lawsuits. In particular, we fail to see why the form of the upstream arrangement between the manufacturer or supplier and the retailer should determine whether a monopolistic retailer can be sued by a downstream consumer who has purchased a good or service directly from the retailer and has paid a higher-than-competitive price because of the retailer's unlawful monopolistic conduct. As the Court of Appeals aptly stated, "the distinction between a markup and a commission is immaterial."

Frankly, I think the world is a little tired of Amazon's benefitting from constantly breaking the rules, and acting as if rules don't apply because they label their retail store a "marketplace."²¹ By letting Amazon off the hook and shifting the blame to the small sellers in your state, you only encourage Amazon to continue with its reckless disregard for your laws, while using its sellers, your local business owners, as scapegoats, in order to get away with it. Amazon is not above the law, and it's time somebody let them know.

III. Amazon Should Have Acted Responsibly

So, while you can blame the merchants, the in-state small business owners, the employers, the second-income earners known as retail arbitragers, who all year round sell things online found in stores for substantial multiples over what they paid for it, please understand that this is what they do. This is how they earn a living. This is how many of your residents pulled themselves out of poverty, got through hard times, support their families, all year round to earn

²⁰ *Apple v. Pepper* 587, U.S. ___; 139 S. Ct. 1514 (2019).

²¹ See *Oberdorf v. Amazon, Inc.*, 930 F.3d 136 (2019); See also <https://www.inquirer.com/business/amazon-online-sale-product-liability-law-oberdorf--20191202.html>

income and become self-reliant. When a person buys a bathing suit on clearance for 90% off at a Boston retail store in November and resells it online for 1,500% profit to Amazon's customer in Florida, it's a perfectly legal activity, and it's pretty typical. Now, in this one instance, we see that you are seeking to punish these people because they didn't fully understand the implications of a pandemic in January or February of 2019. But who really did?

Is it fair to blame a single-mother in Tennessee for failing to understand the gravity of Covid-19 in January or February, when no state of emergency had been declared, and the idea that we would all be forced to shelter-in-place had not crossed most people's mind? I'm going to go out on a limb and say, no.

What about Amazon? Did Amazon understand the potential for higher prices due to Covid-19 in January and February? Did Amazon foresee that there was potential for price-panic in their store? Could Amazon have taken swift action early on to have prevented the panic buying from ensuing in their store? Absolutely! But did Amazon take any reasonable measures to stop it? No, they did not. They chose to allow the panic to ensue, profit from it, and pass the blame on to its merchants.

\$700 toilet paper in Amazon's store could have been avoided if Amazon had done the right thing by preventing it from ever happening, implementing price ceilings pro-actively on essential products, such as masks and sanitizer, based on trailing price averages. Their systems saw that prices were starting to move into panic mode, and once they allowed those prices to go live in their store, they became accountable for the further panic in the market that ensued. It was a cascading effect, Amazon could have prevented. Yes, Amazon could have done that, but why would they if they could profit from it instead, especially when they have the perfect scapegoat, their merchant business owners in your state that you are now punishing, while predictably falling for Amazon's alibi, it's not our store.

Let me put it another way, as a hypothetical: imagine walking into your local Walmart store and seeing a \$700 "rollback" on toilet-paper. You immediately speak to the manager, raising your concerns, and the manager responds: "We've adopted a new business model here at Walmart where our physical store acts as a marketplace for some of the items we sell. Now, we let the toilet paper suppliers tell us what price to sell toilet paper for, and we just earn a commission on every sale. Therefore, technically we're not the ones price gouging, and can't be held responsible."

Do you honestly think this type of excuse, our store is now a marketplace, would end well for Walmart in this hypothetical? I didn't think so. But, for some reason when it comes to Amazon, it does. It ends well every single time, whether its tax, avoiding responsibility for dangerous goods, counterfeits and now price gouging. Why? Because, whether you realize it or not, you let Amazon get away with it every time, and by letting them get away with it, you only enable them to take it further and further. It's time to put a stop to it.

Now, perhaps the reason it always ends well for Amazon is that you haven't taken the time to learn the facts (hopefully). Or, perhaps the political pressure of Amazon's promise of jobs has limited your ability to take adverse action against them (sad but quite common). Which

one is it for you? Is Washington going to continue to look the other way because Amazon is their home state? Is California going to blame the small business owners because Amazon has 20,000 jobs in the state, like they are currently doing when it comes to holding Amazon accountable for billions in back taxes, going after the out-of-state merchants instead?²² The right answer here is to hold Amazon accountable, not to let them off the hook just so you don't hurt your state's chances at Amazon's HQ 3, 4 or 50.

Not only should you be taking action because Amazon allowed the transactions to go on, but for using the crisis as an opportunity to profit while misleading and entrapping the merchants in your state. Fooling your local business owners into doing Amazon's dirty work by telling them their prices were acceptable, even offering sellers a "match lowest price" option so they would think they were operating within the rules is deplorable behavior. Amazon knew that when the price gouging inquiries came Amazon would sell their merchants out; your citizens, your small business owners, your voters.

To Amazon the merchants are merely pawns, every one of which are disposable to them. Take this merchant from Redmond, WA featured in a recent New York Times Article. This merchant was once one of Amazon's most celebrated electronics brand-owner merchants, and now Amazon is using all their dirty tricks to push him out, and drive his customers to Amazon basics.²³ This is what ruthless Amazon thinks of your small business owners, and this is what they do to them time and time again, so is it any surprise that they were entrapping your local businesses to do Amazon's dirty work, while Amazon earned its commission?

Let me repeat that, Amazon earned between 15% to 30% commission (again what the Supreme Court says is synonymous with a markup in the Apple case) on every sale of abnormally high priced commodities sold to your residents, more profit than most of the merchants actually made, especially those who had to pay for shipping the goods. Yet, Amazon receives none of the accountability. This is Amazon's fault, Amazon could have prevented it. But they chose not to, because they had the perfect scapegoat, your constituent residents and business owners.

IV. Withdraw Your Subpoenas

Enough is enough, don't put your merchants through more misery than they have already been through. Message received, you have scared the heck out of our merchants to the point where they are afraid to sell travel pillows in this environment, because they think they could get accused of price gouging. But this has to end now, because your message is having an unconstitutional chilling effect, that is restricting their ability to engage in interstate commerce.

Now is the time for Amazon to be taught a lesson. From the merchants' perspective, this is long overdue, and would be a nice change after decades of watching Amazon act as if they are above the law after robbing the states of tens of billions of tax revenue, allowing dangerous

²² <https://www.forbes.com/sites/kirimasters/2019/08/08/california-lawsuit-says-amazon-should-pay-billions-in-back-taxes/#613be5eb729a>

²³ <https://www.nytimes.com/2019/12/19/technology/amazon-sellers.html>

products to harm consumers, profiting from counterfeits, and take advantage of your in state merchants, all the while hiding behind arbitration clauses in their adhesive agreements that prevent the merchants from having any meaningful recourse against them.

I have spent a lot of time over the last few years educating people on the realities of Amazon's marketplace, as it is very misunderstood. Most people, especially in government only hear Amazon's explanation of how the marketplace works, so we are willing to accept that this is a misunderstanding, and we want to help you understand the realities of being an Amazon seller. Reach out to us at Online Merchants Guild, speak to the merchants in your community, learn the truth. We are here to help you in any way we can to make that happen.

But now that you have heard the real story. Now that you know the facts, not Amazon's fairytale, we expect you to do the right thing and withdraw every subpoena. However, if this continues, if our merchants continue to be harassed, based on unconstitutional and unconscionable legal theories, we are prepared to take action which may include filing for a temporary restraining order in federal court (in light of the fact that multiple states are pursuing these unconstitutional inquiries, civil and criminal). We are also prepared to seek damages under 42 USC 1983, as the Supreme Court has recognized that damages for commerce clause violations are recoverable in civil rights cases.²⁴

But, our hope is that this won't be necessary. Our hope is that you will do the right thing: Withdraw the subpoenas; revisit your facts; stop taking Amazon's side and stand up for your small businesses and residents FOR ONCE! Stop acting as Amazon's enforcer, facilitating Amazon's efforts to turn your constituents into Amazon scapegoats, while Amazon profited in violation of your state's price-gouging laws.

Sincerely,



Paul Rafelson
Executive Director
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²⁴ *Dennis v. Higgins* 498 U.S. 439 (1991).