UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION AT FRANKFORT

Electronically filed

HOPE OF KENTUCKY, LLC, *et al.*,

Plaintiffs

v.

DANIEL CAMERON

Defendant

No. 3:22-cv-00062-GFVT
(Removed from Franklin Circuit Court
No. 22-CI-00842)

MOTION TO DISMISS

Defendant Daniel Cameron, in his official capacity as the Attorney General of the Commonwealth of Kentucky, respectfully moves the Court to dismiss the Plaintiffs' complaint under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. For the reasons stated below, the Plaintiffs lack standing. And even if they could establish standing, their complaint fails to state a claim upon which this Court can grant relief.

BACKGROUND

On October 19, 2022, the Attorney General issued subpoenas and civil investigative demands ("CID") to six financial institutions that operate[1] in the Commonwealth of Kentucky: (1) Bank of America Corporation; (2) Citigroup, Inc.; (3) JPMorgan Chase & Co.; (4) The Goldman Sachs Group, Inc.; (5) Morgan Stanley; and (6) Wells Fargo & Company (collectively, "Financial Institutions"). In issuing the CIDs, the Office of the Attorney General explained that it was investigating the Financial Institutions because the Attorney General has:

> reason to believe that a person has 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 ["the Kentucky Consumer Protection Act"]; or ha[s] reason to believe it is in the public interest that an investigation should be made to ascertain whether a person in fact has engaged in, is engaging in or is about to engage in, any act or practice declared to be unlawful by [the Kentucky Consumer Protection Act].

See, e.g., Plaintiffs' Exhibit 1, Doc. 1-1, PageID.31. Each CID noted evidence that prompted the Attorney General to believe the Financial Institution was engaged in unlawful activity, specifically including antitrust offenses. *See e.g.*, Plaintiffs' Exhibit 2, Doc. 1-1, PageID.39 ("In Your 2021 TCFD Report, Jane Fraser, Your CEO, asserted that "'[t]ackling climate change will require tremendous collaboration from everyone,' including Your 'industry peers.' Please explain what "collaboration" You have had with others in the financial services industry . . .."); Plaintiffs' Exhibit 3, Doc. 1-1,

[1] All six of the institutions have also been entrusted with significant investment holdings from the Kentucky Public Pensions Authority. *See* KTYALL Holdings as of 30 September 2022, KENTUCKY PUBLIC PENSIONS AUTHORITY, *available at* https://www.kyret.ky.gov/Investments/Investments%20Holdings/KTYALL%20Holdings%20as%20of%2030%20September%202022.pdf.

PageID.53 ("In Your 2021 TCFD Report, You asserted that You 'partner with industry groups and coalitions to . . . spur progress toward net zero . . . and advance a globally-coordinated approach to climate transition policy.' Please identify and explain all partnerships You have entered into with other financial institutions . . . ."). All six Financial Institutions were identified as members of the Net-Zero Banking Alliance, which means they have "committed to aligning their lending and investment portfolios with net-zero emissions by 2050."[2]

A little more than a week after the Attorney General served the CIDs on the Financial Institutions, Plaintiffs Hope of Kentucky, LLC and Kentucky Bankers Association sued the Attorney General. Neither Hope of Kentucky nor the Kentucky Bankers Association was served with a subpoena or CID, or otherwise made the subject of the Attorney General's investigation.

Hope of Kentucky is a limited liability company that works with financial institutions to finance housing projects. Compl. ¶ 1, Doc. 1-1, PageID.4. The Kentucky Bankers Association is a trade association with approximately 150 national banks as members. *Id*. ¶ 2a, Doc. 1-1, PageID.5. According to the Complaint, those members "represent[] virtually all of the commercial banking industry in Kentucky." *Id*. However, the Plaintiffs' complaint does not specifically allege that any of the six Financial Institutions who received the subpoenas and CIDs are members of the Kentucky Bankers Association, and the Plaintiffs do not purport to bring this action

[2] *Net-Zero Banking Alliance*, UNITED NATIONS, https://www.unepfi.org/net-zero-banking/ (last visited Nov. 16, 2022). The Net-Zero Banking Alliance is an "industry-led, UN-convened" group of banks that "reinforces, accelerates, and supports the implementation of decarbonisation strategies" and "executes coordinated advocacy and alignment." *Id*.

on behalf of any of the Financial Institutions. Indeed, none of the Financial Institutions who received the subpoenas and CIDs have moved to have the CIDs modified or set aside.[3] Neither Plaintiff received a subpoena or CID from the Office of the Attorney General.

ARGUMENT

I. Neither Plaintiff has standing.

"Standing is a threshold issue for bringing a claim . . . and must be present at the time the complaint is filed." *Moody v. Michigan Gaming Control Bd.*, 847 F.3d 399, 402 (6th Cir. 2017) (internal citations omitted). To have standing, Plaintiffs must establish injury-in-fact, causation, and redressability. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992); *Phillips v. DeWine*, 841 F.3d 405, 414 (6th Cir. 2016). These three requirements must be met by each Plaintiff for each claim. *Phillips*, 841 F. 3d at 414 (citing *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008)).

A. The Plaintiffs fail to demonstrate personal standing.

Neither Plaintiff has demonstrated a personal injury-in-fact that this Court could redress by a favorable ruling. An injury-in-fact requires "an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical." *Id.* (cleaned up). The Plaintiffs assert they have standing on two grounds: (1) under Ky. Rev. Stat. § 367.260 by alleging the CIDs were unreasonable; and (2) as taxpayers by alleging the Attorney General is "improperly

[3] Rather, all six of the Financial Institutions have already cooperated with the Office of the Attorney General to set production schedules.

using taxpayer funds in connection with his subpoenas and civil investigative demands." Compl. ¶ 7, Doc. 1-1, PageID.7.

1. The Plaintiffs do not have standing under Ky. Rev. Stat. § 367.260.

Ky. Rev. Stat. § 367.260 does not give the Plaintiffs standing. The statute only provides for a private cause of action for a person who is the subject of an allegedly unreasonable investigation. The Plaintiffs did not receive subpoenas or CIDs from the Office of the Attorney General. Nor does the complaint assert any concrete and imminent invasion of the Plaintiffs' protected interests because of the subpoenas and CIDs sent to the Financial Institutions. The Plaintiffs' bald assertion that, "[s]ince the Bankers Association is involved in providing relief to [the recent Kentucky flooding] disasters, Paragraph 1 of the CIDs Demands for Information would require the Bankers Association to identify" divisions and groups with related responsibilities and "would permit AG Cameron to demand production of 'all Documents and Communications related' to these activities," Compl. ¶ 22a, Doc. 1-1, PageID.11, completely misunderstands the scope of civil investigative demands.

The obligation to respond to a CID is only borne by the party who was served with the CID. *See* Ky. Rev. Stat. § 367.240(1) ("[The Attorney General] may execute in writing and cause to be served upon any person who is believed to have information, documentary material or physical evidence relevant to the alleged or suspected violation, an investigative demand requiring *such person* to furnish, under oath or otherwise, a report in writing setting forth the relevant facts and circumstances of which he has knowledge." (emphasis added)). The Plaintiffs have

not been served with a CID, and the Attorney General cannot compel a party not served with a CID to respond to a CID that was indisputably served on a different party. *See* Ky. Rev. Stat. § 367.290 (allowing the Attorney General to seek a court order against "the person charged with failing to answer the investigative demand or subpoena pursuant to [Ky. Rev. Stat. §§] 367.240 or 367.250").

Furthermore, the Plaintiffs' assertion that the "CIDs bear upon subjects involving constructing affordable housing" because "the financing and construction of affordable housing plainly has 'social . . . risks, opportunities, impacts, or effects' within the meaning of ESG Factors as used in the CIDs," Compl. ¶ 16, Doc. 1-1, PageID.9, is wholly insufficient to establish standing. That the CIDs directed to other parties may tangentially relate to the Plaintiffs' field of work does not, by any stretch, mean the Plaintiffs are affected—let alone injured—by the CIDs. The Plaintiffs here are strangers to the Attorney General's investigation, and they have gratuitously inserted themselves into the proceeding. Any assertion of harm to the Plaintiffs is, at best, attenuated and hypothetical.

2. The Plaintiffs do not have taxpayer standing.

The Plaintiffs also do not have standing based on their status as taxpayers. "Generally, individuals lack standing when their only interest in the matter is as a taxpayer." *Pedreira v. Ky. Baptist Homes for Child., Inc.,* 579 F.3d 722, 729 (6th Cir. 2009). Federal courts have only recognized an exception to this bar if the challenge alleges a violation of the Establishment Clause. *See Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 609 (2007) (plurality opinion) ("We have declined to lower

the taxpayer standing bar in suits alleging violations of any constitutional provision apart from the Establishment Clause.").[4]

Here, no Establishment Clause challenge has been asserted by the Plaintiffs. Rather, the Constitutional issues raised by the Plaintiffs are alleged violations of free speech, freedom of association, and the Commerce Clause. As a result, the Plaintiffs lack the kind of particularized injury that is required for standing. The Plaintiffs cannot assert that, "having paid lawfully collected taxes into the Federal Treasury at some point, they have a continuing, legally cognizable interest in ensuring that those funds are not *used* by the Government in a way that violates the Constitution." *Hein*, 551 U.S. at 599. The U.S. Supreme Court has "consistently held that this type of interest is too generalized and attenuated to support Article III standing." *Id.*

B. The complaint has not sufficiently alleged facts to demonstrate associational standing.

While courts have allowed associations and organizations to assert standing "as the representative of its members," *MX Grp., Inc. v. City of Covington*, 293 F.3d 326, 332–33 (6th Cir. 2002), the association must demonstrate "its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Ne. Ohio Coal. for Homeless & Serv. Emps. Int'l Union, Loc. 1199 v. Blackwell,* 467 F.3d 999, 1010 (6th

[4] Kentucky courts have recognized taxpayer standing "in certain circumstances as a matter of equity." *Overstreet v. Mayberry*, 603 S.W.3d 244, 263 (Ky. 2020). But even in those circumstances, "'justiciability' . . . has generally necessitated that taxpayers possess a pecuniary interest in the subject matter of their action." *Rosenbalm v. Commonwealth Bank of Middlesboro*, 838 S.W.2d 423, 428 (Ky. App. 1992). Nowhere in the complaint do the Plaintiffs allege that their pecuniary interests are directly affected such that it would be equitable to recognize taxpayer standing here.

Cir. 2006*) (*quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Sevs. (TOC), Inc.,* 528 U.S. 167, 181 (2000)). The burden is on the Plaintiffs "to clearly allege facts that demonstrate each element of standing." *Memphis A. Philip Randolph Inst. v. Hargett*, 978 F.3d 378, 386 (6th Cir. 2020).

The Attorney General does not dispute that individual Financial Institutions that are members of the Kentucky Bankers Association could potentially have standing to sue if they themselves received a CID or subpoena, but the Plaintiffs' complaint fails to demonstrate facts in support of this element—or either of the other two elements.

The Sixth Circuit recently had an opportunity to consider how a party may establish the first element of associational standing while considering a challenge to the Kentucky Attorney General's issuance of a CID. *See Online Merchants Guild*, *supra*. The Court used the four *McKay* factors to analyze "whether there is a credible threat of prosecution sufficient to confer standing," and explained what information in a record would support a finding of standing. *Id*. at 550–51. Here, the Plaintiffs' complaint is devoid of any averments of fact that would attempt to demonstrate in the record that members of the Kentucky Bankers Association would have standing. Indeed, as already noted, the Plaintiffs do not even state whether any of the Financial Institutions are members of the Kentucky Bankers Association.

While "[a]ll factual allegations in the complaint must be presumed to be true, and reasonable inferences must be made in favor of the non-moving party," the Court cannot plead for the Plaintiffs. *See Total Benefits Plan. Agency, Inc. v. Anthem Blue*

Cross & Blue Shield, 552 F.3d 430, 434 (6th Cir. 2008); *see also Morgan v. O'Neil*, 652 S.W.2d 83, 85 (Ky. 1983) (explaining that the "leniency" shown in construing whether a complaint or petition states a cause of action does not mean the court can forego requiring the pleader to provide "a short and plain statement" showing he is entitled to relief). Simply alleging that the Kentucky Bankers Association is a trade association with the purpose of, *inter alia*, promoting "the general welfare and usefulness of banks," Compl. ¶ 2b, Doc. 1-1, PageID.6, falls "far short of asserting that any of [its] members have suffered or will imminently suffer a concrete, actual injury traceable" to the issuance or enforcement of the CIDs. *See Blackwell*, 467 F.3d at 1010. Likewise, the complaint is devoid of any allegations that would demonstrate that the Plaintiffs' attempted collateral attack on the CIDs issued to the six specific Financial Institutions is "germane to the organization's purpose." *See id.*

Furthermore, Plaintiffs do not have associational standing because the claims here would require the participation of the individual members served with the CIDs. *See id*. An assessment of whether the investigative action is "unreasonable" for purposes of a challenge arising under Ky. Rev. Stat § 367.260 would need to address fact issues specific to the party or parties that are the target(s) of the investigation. Likewise, whether the investigative action chills speech would necessitate looking at the party facing enforcement. Therefore, challenges to CIDs, like the ones raised here, would require the participation of the six Financial Institutions who were served with the CIDs.

* * *

In sum, the complaint fails to demonstrate that the Plaintiffs or their members have suffered or will imminently suffer an injury-in-fact because of CIDs that were not directed to them. Moreover, the complaint does not assert associational standing, and fails to allege facts that would support such an assertion. Accordingly, because the Plaintiffs do not have standing to bring their claims, the Court should dismiss this case for lack of subject matter jurisdiction.

II. The Plaintiffs fail to state a claim upon which relief can be granted.

Even if the Plaintiffs had standing, this Court should dismiss their complaint because it fails to state any claim upon which relief can be granted. Rule 8(a)(2) of the Federal Rules of Civil Procedure requires the complaint to provide "a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citation omitted). And while the complaint does not need "detailed factual allegations," the Plaintiffs are obligated to provide "more than labels and conclusions." *Id*. The Plaintiffs must allege facts in the complaint that, when accepted as true, make it plausible that they are entitled to relief by pleading facts that allow the court to reasonably infer that the defendant has acted unlawfully. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see also Twombly*, 550 U.S. at 555 ("Factual allegations must be enough to raise a right to relief above the speculative level[.]"). The Plaintiffs have failed to make this showing with respect to any of their three claims.

A. The Attorney General has authority to issue subpoenas and civil investigative demands to the Financial Institutions.

Counts 1 and 3 of the complaint both allege the Attorney General does not have authority to issue the subpoenas and CIDs to the Financial Institutions. But the Plaintiffs' allegations are nothing more than unsupported conclusions, and therefore should be dismissed under Rule 12(b)(6).

1. None of the allegations in Count 1 sufficiently support finding the CIDs were unreasonable.

The Plaintiffs assert that the CIDs were unreasonable because the Attorney General acted in excess of his authority. Compl. ¶ 36, Doc. 1-1, PageID.13. But the complaint fails to allege facts sufficient to show the CIDs are not a reasonable exercise of the Attorney General's authority to enforce, *inter alia*, the anti-trust provisions of the Kentucky Consumer Protection Act.

When there is a challenge to a CID, Kentucky courts have followed a two-step, burden shifting analysis. The burden is first on a plaintiff, who must make "a *prima facie* showing of facts entitling him to relief." *Commonwealth ex rel. Hancock v. Pineur,* 533 S.W.2d 527, 530 (Ky. 1976). If he makes the *prima facie* showing, then the Attorney General "has the onus of coming forward with a showing of reasonable justification." *Id.* The Plaintiffs have not met their initial burden because, as discussed above, they have not demonstrated they have any injury-in-fact that could confer standing on them. Even if the Plaintiffs had made a *prima facie* showing that they are entitled to relief, for the reasons discussed below, the CIDs issued here are reasonable.

The Plaintiffs first assert that, because Ky. Rev. Stat. § 286.1-011(2) directs the Department of Financial Institutions to exercise administrative functions relating to "the regulation, supervision, chartering, and licensing of banks," the Attorney General is precluded from issuing CIDs to financial institutions. Compl. ¶¶ 25–26, Doc. 1-1, PageID.11–12. But nothing in that statute even suggests it supersedes or overrides the Attorney General's authority to enforce the Kentucky Consumer Protection Act. The General Assembly has been clear: the authority to enforce the Kentucky Consumer Protection Act belongs to the Attorney General and not the Department of Financial Institutions. *See* Ky. Rev. Stat. § 367.120(1) (codifying the General Assembly's intent that the "Division of Consumer Protection of the Department of Law" be "created for the purpose of . . . enforcing consumer protection statutes"); *see also Commonwealth ex rel. Chandler v. Anthem Ins. Cos., Inc.*, 8 S.W.3d 48, 55 (Ky. App. 1999) (finding it to be the "General Assembly's intent that the Consumer Protection Act, *in the hands of the Attorney General*, be a flexible and effective means of combating abusive trade practices however novel their forms or well disguised their sources" (emphasis added)). If that were not enough, the General Assembly also enacted Ky. Rev. Stat. § 367.150, which assigns to the Attorney General the power and duty "[t]o promote the coordination of consumer protection activities of all departments, divisions and branches of state, county and city government, concerned with activities involving consumer interests," including by conducting investigations. *See also* Ky. Rev. Stat. § 367.160(1) (providing that "[a]ll departments, agencies, officers, and employees of the Commonwealth shall

cooperate with the Attorney General in carrying out the functions of" the Consumer Protection Act); Ky. Rev. Stat. § 367.240 (containing the Attorney General's authority to issue CIDs). Indeed, Kentucky courts have said that the Act should have "the broadest application in order to give Kentucky consumers the broadest possible protection for allegedly illegal acts." *Stevens v. Motorists Mut. Ins. Co.*, 759 S.W.2d 819, 821 (Ky. 1988); *see also Am. Nat'l Univ. of Kentucky, Inc. v. Commonwealth ex rel. Besheaer,* 2019 WL 2479608, at *7 (Ky. App. Jun. 14, 2019) (finding the Act was to "be a flexible and effective means of combating abusive trade practices").[5] And the Attorney General has been given the role of "policeman of the marketplace." *Chandler*, 8 S.W.3d at 55.

Accordingly, the Attorney General has statutory authority to invoke his investigative power to require businesses or individuals to produce relevant information whenever "he believes it to be in the public interest that an investigation should be made to ascertain whether a person in fact has engaged in, is engaging in or is about to engage in, any act or practice declared to be unlawful by" the Consumer Protection Act. Ky. Rev. Stat. § 367.240. The Supreme Court of Kentucky has recognized that the Attorney General can invoke this investigatory power even if the request for information was motivated "by nothing more than official curiosity" because "law-enforcing agencies have a legitimate right to satisfy themselves that

[5] Kentucky courts have also noted that the Kentucky Attorney General has broader subpoena and investigatory authority under the Act than the Attorneys General of other states have in the area of consumer protection. *See Ward v. Commonwealth ex rel. Stephens*, 566 S.W.2d 426, 429 (Ky. App. 1978) (contrasting the Kentucky Attorney General's authority with other states where the Attorney General "must first seek injunctive relief in the courts and . . . follow normal discovery channels").

corporate behavior is consistent with the law and the public interest." *Pineur*, 533 S.W.2d at 529 (Ky. 1976).[6]

And that is what the Office of the Attorney General is doing with the subpoenas and CIDs it served to the Financial Institutions: it is investigating to determine whether the Financial Institutions' behavior is consistent with the law and the public interest. Based on public statements made by the Financial Institutions, including representations that the Financial Institutions are members of the Net-Zero Banking Alliance, which proclaims that its members are "committed to aligning their lending and investment portfolios with net-zero emissions by 2050," the Attorney General has a basis to believe the Financial Institutions may be acting unlawfully.[7] If the Financial Institutions are coordinating to deny financing in this manner, that potentially could be an unreasonable restraint on trade in violation of the Consumer Protection Act. *See* Ky. Rev. Stat. § 367.175(1) ("Every . . . conspiracy, in restraint of trade or commerce in this Commonwealth shall be unlawful.").[8]

Further, it is in the public interest to determine if the Financial Institutions are complying with Kentucky law, especially when they are receiving tens of millions

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[6] Because the investigatory power can be used merely to satisfy the government's "official curiosity," the Attorney General can seek information from a scope beyond what it could file an enforcement action against. *See Commonwealth v. Johnson*, 423 S.W. 3d 718, 725 (recognizing the Attorney General's power to investigate must be broader than his enforcement authority based on the "common sense concept of investigating before filing a suit") (citing *Strong v. Chandler*, 70 S.W. 3d 405, 410 (Ky. 2002)).

[7] And the subpoenas and CIDs do not rely solely on the fact that the Financial Institutions are members of the Net Zero Banking Alliance, but also provide various statements and quotes from papers and reports produced by the Financial Institutions that provide evidence of possible unlawful behavior.

[8] By citing Ky. Rev. Stat. § 367.175, the Attorney General in no way waives, and expressly reserves, his right to investigate and seek relief for any other violations of law, including Ky. Rev. Stat. § 367.170, that in the course of his investigation he determines occurred.

of public dollars through investments held by the Kentucky Public Pension Authority.[9] As one court put it, the public interest is "heightened" when businesses "directly and indirectly benefit[] from tax dollars" because the public "has an overwhelming interest in determining that its limited tax dollars are well spent." *See ABC, Inc. v. Commonwealth ex rel. Conway*, 2012 WL 3629487, at *5 (Ky. App. Aug. 24, 2012) (affirming, in part, the trial court's finding that the Attorney General's CID was justified under the public interest prong of Ky. Rev. Stat. § 367.240(1)).

Simply put, under Ky. Rev. Stat. § 367.240, the Attorney General has a right to investigate potentially unlawful conduct. By issuing the CIDs to the Financial Institutions, the Attorney General is simply "tak[ing] steps to inform itself as to whether there is [a] probable violation of the law." *Pineur*, 533 S.W.2d at 529 (citing *United States v. Morton Salt Co.*, 338 U.S. 632, 643 (1950)). And he has the "legitimate right" to do so. *Id.*

2. Senate Bill 205 did not alter the Attorney General's authority to issue subpoenas and civil investigative demands.

The Plaintiffs allege in Count 3 that the subpoenas and CIDs issued by the Attorney General to the Financial Institutions violate Senate Bill 205 enacted in 2022[10] and codified at Ky. Rev. Stat. §§ 41.470 to 41.480. In particular, the Plaintiffs argue that the CIDs violate Senate Bill 205 because: (1) the Treasurer, not the Attorney General, is given the task of determining which companies are engaged in

[9] *See* KTYALL Holdings as of 30 September 2022, KENTUCKY PUBLIC PENSIONS AUTHORITY, *available at* https://www.kyret.ky.gov/Investments/Investments%20Holdings/KTYALL%20Holdings%20as%20of%2030%20September%202022.pdf.

[10] 2022 Ky. Acts ch. 120.

energy company boycotts; (2) energy boycotts are not made illegal by Senate Bill 205 so the Attorney General cannot issue CIDs relating to energy boycotts; and (3) Senate Bill 205 only allows the Attorney General to bring a civil action for alleged violations of the statute, not issue CIDs. The Plaintiffs misunderstand Senate Bill 205 and how it interacts with the KCPA as it relates to the Attorney General's authority to issue CIDs.

First, nothing in Ky. Rev. Stat. § 41.474 precludes the Attorney General from issuing CIDs that may reveal a company is engaged in an energy company boycott. The language of the statute assigns to the Treasurer the duty to "prepare and maintain . . . a list of all financial companies that, to the Treasurer's knowledge, have engaged in energy company boycotts." The statute does not say that the Treasurer must acquire this knowledge on her own without any involvement of other government agencies. In fact, the very next provision says that the Treasurer may rely "on all available information regarding financial companies, including information provided by the Commonwealth" and "governmental entities." That would include information provided by the Attorney General obtained through an investigation pursuant to his authority in the Kentucky Consumer Protection Act. Further, the Treasurer's authority to request written verification from the companies as to their involvement in energy company boycotts does not preclude the Attorney General's ability to issue CIDs when he has reason to believe the company is or is about to act unlawfully; that authority exists separately and is not dependent on these statutory provisions.

Second, while the Attorney General agrees with the Plaintiffs that Senate Bill 205 did not make energy boycotts unlawful, he notes that the bill did nothing to change or undermine that coordination among companies to engage in an energy company boycott may be unlawful under the Consumer Protection Act. "Group boycotts, or concerted refusals by traders to deal with other traders" have frequently been found to violate federal antitrust law. *See Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959). Depending on whether the group boycott is horizontal or vertical, the group boycott may be a *per se* violation of the Sherman Antitrust Act or may require analysis under the Rule of Reason. *See Crane & Shovel Sales Corp. v. Bucyrus-Erie Co.,* 854 F.2d 802, 805 (6th Cir. 1988); *see KASP, Inc. v. Adesa Lexington, LLC*, 2006 WL 385310, at *6 (E.D. Ky. Feb. 17, 2006) (defining horizontal group boycotts as "naked restraints of trade with no purpose except stifling competition" and vertical group boycotts as those that "might promote certain efficiencies such as lower prices or more efficient distribution"). "The Kentucky Consumer Protection Act is virtually identical to the Sherman Antitrust Act." *KASP*, 2006 WL 385310 at *10. Therefore, if a violation of the Sherman Act can be established, a violation of the Kentucky Consumer Protection Act would also be established. *Id*.

Finally, the authority given to the Attorney General to bring a civil action to enforce Senate Bill 205 is irrelevant here. The subpoenas and CIDs served on the Financial Institutions were issued not on the basis of the Attorney General's authority under Ky. Rev. Stat. § 41.476(2), but on his authority under the Kentucky

Consumer Protection Act. Even if there is some debate as to whether the Attorney General must first initiate a civil action for a violation of Ky. Rev. Stat. §§ 41.470 to 41.480,[11] the Kentucky Consumer Protection Act clearly establishes the Attorney General's authority to serve subpoenas and CIDs to investigate potential violations of the Act without first initiating a civil action.[12]

B. The Plaintiffs fail to plead facts demonstrating the civil investigative demands violate the First Amendment.

The Plaintiffs appear to raise both a facial and an as-applied challenge to the CIDs under the First Amendment. But as noted above, the CIDs are not directed to the Plaintiffs and the Plaintiffs have not identified any injury—current or imminent—to them because of the CIDs. Accordingly, the Plaintiffs lack standing to bring any First Amendment claim. Even if they did have standing, the complaint fails to state a claim upon which this Court can grant relief.

According to the Plaintiffs, "[t]he very existence of the CIDs . . . chills the Plaintiffs' rights to think, speak, and associate freely and without unwarranted governmental intrusion or criticism." Compl. ¶ 40, Doc. 1-1, PageID.14. This seems to be a claim that CIDs are "invalid *in toto*—and therefore incapable of any valid

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[11] The Attorney General disagrees with the Plaintiffs that the language of Ky. Rev. Stat. § 41.476(2) would require the Attorney General to bring a civil action in court rather than issue a subpoena or CID because the language in the bill is permissive and not mandatory. *See id*. ("The Attorney General . . . *may* bring any civil action to enforce" Sections 1 to 4 and 5 of this Act. (emphasis added)).

[12] *See ABC, Inc.*, 2012 WL 3629487, at *3 (stating that prohibiting the Attorney General from making an initial inquiry into whether a plaintiff has complied with its obligations under the Consumer Protection Act "would erect an unjustified and significant practical obstacle to legitimate consumer protection investigations, essentially requiring the Attorney General to go to court and reveal his evidence and legal theories before ever obtaining the relevant information from the business whose practices are under scrutiny").

application." *See Speet v. Schuette*, 726 F.3d 867, 872 (6th Cir. 2013) (internal citation omitted). Typically, sustaining a facial attack is an "exceptional remedy" with a heavy burden on a plaintiff, but because the facial challenge is raised under the First Amendment, the Plaintiffs have a lesser burden. *Id*. Rather than showing that there is *no* instance where the law could be applied constitutionally, the Plaintiffs must demonstrate "that a substantial number of instances exist in which the law cannot be applied constitutionally." *Id*. (internal citation omitted). Yet, the Plaintiffs have not met even this lesser burden.

To demonstrate that CIDs are facially unconstitutional under the First Amendment, the Plaintiffs needed to allege facts demonstrating that the challenged government action "in all its applications directly restricts protected First Amendment activity and does not employ means narrowly tailored to serve a compelling governmental interest." *Id*. at 873 (quoting *Sec'y of State of Md. v. Joseph H. Munson Co., Inc.,* 467 U.S. 947, 966 n. 13 (1984)). "A plaintiff 'must demonstrate from the text of the statute and from actual fact that a substantial number of instances exist in which the law cannot be applied constitutionally.'" *Id. (quoting United States v. Coss,* 677 F.3d 278, 289 (6th Cir. 2012)). But aside from the cited conclusory statement, Plaintiffs have not alleged facts indicating that the existence of the CIDs chills speech or association. The Plaintiffs have not even demonstrated that the CIDs chill speech and association in *this instance*, let alone that they chill speech in a "*substantial number* of instances." As a result, the Plaintiffs' facial challenge should fail.

The as-applied challenge should fail as well. An as-applied challenge asserts that the "law is unconstitutional as enforced against the plaintiffs." *Speet*, 726 F.3d at 872. To meet their burden, the Plaintiffs needed to show both that the challenged action chills speech and association, and that there is a credible threat of enforcement. *See Fischer v. Thomas*, 52 F.4th 303, 307–08 (6th Cir. 2022). For a court to find that the CIDs issued to the Financial Institutions chill speech and association would require the Plaintiffs to show that they are self-censoring for fear of enforcement. *See id*. But the Plaintiffs do not allege facts indicating they have stopped communications relating to any of the topics covered by the CIDs to the Financial Institutions.

And even if they did, the Plaintiffs would fail on the second step: showing a credible threat of enforcement. The Sixth Circuit has identified four commonly recurring factors to consider when assessing whether there is a credible threat to enforcement: "(1) Does the relevant prosecuting entity have a prior history of enforcing the challenged provision against the plaintiffs or others? (2) Has that entity sent warning letters to the plaintiffs regarding their conduct? (3) Does the challenged regulatory regime make enforcement easier or more likely? and (4) Did the prosecuting entity refuse to disavow enforcement of the challenged provision against the plaintiffs?" *Id.* at 307 (citing *McKay v. Federspiel*, 823 F.3d 862, 869 (6th Cir. 2016)). Using the *McKay* factors, it can easily be determined that there is no threat of enforcement against the Plaintiffs. While the Office of the Attorney General certainly has a history of enforcing CIDs, it has not served either Plaintiff here with

a CID or sent warning letters to the Plaintiffs regarding their conduct. As to disavowing enforcement, it is axiomatic that the Attorney General will not enforce the challenged CIDs against the Plaintiffs because the Plaintiffs have not been served with them. That the Plaintiffs were not named in, served with, or implicated by the challenged CIDs, and the corresponding absence of any alleged injury makes it clear that there is no credible threat of enforcement that is chilling the Plaintiffs' ability to exercise their First Amendment rights.

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In all three counts, the Plaintiffs have failed to state a claim upon which this Court could grant relief. The Court should therefore dismiss their complaint.

CONCLUSION

The Plaintiffs seek to use this lawsuit to limit legitimate exercises of the Attorney General's broad authority to act as the "policeman of the marketplace." But they have challenged CIDs that did not name them, were not served upon them, and cannot be enforced against them. Because Plaintiffs so glaringly lack standing and have failed to state any claim upon which this Court could grant relief, the complaint must be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on November 23, 2022, the above document was filed with the CM/ECF filing system, which electronically served a copy to all counsel of record.

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