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## WHITE PAPER

August 2020

### Avoiding Price-Gouging Pitfalls While Navigating Price Increases in the Era of COVID-19

As COVID-19 continues to impact communities across the country—causing many state and local authorities to extend (or reinstate) emergency orders and other pricing restrictions—the road companies must travel to implement price increases (no matter how justifiable) continues to be littered with price-gouging statutes that, if not skillfully navigated, can lead to costly exposure. Because price gouging is currently governed by state law, with each state setting its own requirements, ensuring compliance on a national scale is difficult, expensive, and fraught with pitfalls. But there are actions companies can take to minimize the risk of a collision with state attorneys general and/or class actions filed by private litigants.

This Jones Day *White Paper* outlines the most important aspects of, and differences among, the current state statutes, the issues companies often face in determining whether and how to implement a price increase, and tips companies can use to avoid, or at least minimize, the bumps in the road to obtain a smoother ride.

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## THE CURRENT RULES OF THE ROAD

Price-gouging statutes have long been the province of state law. And, as with many other state-specific statutes, there is a rich, and often conflicting, assortment of approaches that states have taken. A mere four have not waded into the price-gouging waters,<sup>1</sup> while the vast majority of states and the District of Columbia—38—have express price-gouging laws (including some recently enacted in response to the pandemic<sup>2</sup>), as do five territories.<sup>3</sup> Other states and territories (at least seven) have other laws, usually found in consumer protection or deceptive trade practice statutes, that are broad enough to cover price-gouging conduct. Yet other states have included in emergency orders provisions to guard against price gouging,<sup>4</sup> and still others (at least three—New Hampshire, Ohio, Washington) are contemplating more specific price-gouging laws in addition to their current consumer protection laws.

Even though laws aimed at preventing price gouging are nearly ubiquitous, as outlined below, they differ widely in scope, triggers, enforcement, and thresholds/defenses.

### Scope

One of the first questions to answer when analyzing a price-gouging statute is: “What does the statute cover?” This inquiry has two parts. First, what is covered (products, services, etc.) by the statute? Some statutes, like Idaho’s,<sup>5</sup> which applies only to “consumer fuel or food, pharmaceuticals, or water for human consumption,” are limited in scope.<sup>6</sup> Others have much broader application—for example, Georgia’s statute applies to any “goods or services.”<sup>7</sup>

Second, what levels of the supply chain are implicated (retail, wholesale, manufacturing)? Certain statutes, like the one in Alabama, expressly cover sales by wholesalers and retailers,<sup>8</sup> while others—like that in the District of Columbia<sup>9</sup>—appear to limit application to sales at retail to consumers.<sup>10</sup>

### Triggers

With one exception (Michigan),<sup>11</sup> all pure price-gouging statutes on the books require a trigger before they go into effect. Typically, this trigger is the declaration of a state of emergency, but whose declaration counts (the state governor, the President of the United States, both, others?) varies. The duration of effect also often is tied to the triggering event—for

example, in West Virginia, the price-gouging law takes effect on the date the emergency is declared and lasts for 180 days.<sup>12</sup> In some states, who can trigger price-gouging statutes and how long they stay in effect are intertwined: In Utah, while the declaration of an emergency by either the President or the Governor can trigger the price-gouging statute, the statute is in effect for the entire time period for which the Governor-declared emergency exists, but only 30 days if triggered by a Presidential declaration.<sup>13</sup>

### Enforcement

Who has the power to enforce price-gouging restrictions? There, too, variety reigns, although there is one constant—the state attorneys general always have the power to enforce price-gouging statutes. After that, anything goes. Some states, like Indiana and Minnesota,<sup>14</sup> grant the state attorneys general or other state authority the sole authority to police price gouging, while others (e.g., Oklahoma and West Virginia)<sup>15</sup> provide for a private right of action. State statutes also vary as to the scope of penalties available to the attorney general: Sometimes an attorney general has the option to seek criminal or civil penalties, like in Mississippi;<sup>16</sup> in other circumstances (Virginia, to name one<sup>17</sup>), attorneys general can seek only civil penalties; and in still other circumstances, an attorney general may seek restitution or some other form of relief (for example, in addition to civil penalties, Pennsylvania’s statute allows for injunctive relief and restitution).<sup>18</sup> And the amount of penalties or fines also varies widely, as illustrated by comparing New Jersey, which features a civil penalty of up to \$10,000 for the first violation, to up to \$20,000 for each subsequent violation, with Missouri—just a \$1,000 civil penalty per violation.<sup>19</sup>

### Thresholds/Defenses

Even when a sale triggers a price-gouging statute, whether a price increase on a covered product or service violates the statute depends on the statutory language, which, again, differs greatly across the United States. At least one statute (U.S. Virgin Islands) prohibits *any* price increase regardless of amount or rationale. The majority, however, set a specific threshold for a price increase, usually a percentage increase from some comparison point identified, but often not explained, in the statute. For example, Oregon makes unlawful a price increase of “15% or more [above] the price at which the goods or services were sold or offered for sale by the merchant or wholesaler in the usual course of business immediately prior to or during a declaration of an abnormal disruption

of the market,” or the price at which the “goods or services were readily obtainable by other consumers in or near the geographical area covered by the declaration,” unless the amount is “attributable to additional costs.”<sup>20</sup> And then there are states that prohibit merely “unconscionable,” “unconscionably high,” or “excessive” prices, or prices “grossly in excess of” or that otherwise evidence a “gross disparity with” (or words to similar effect) certain prices prior to the emergency.<sup>21</sup>

Additional complexity and diversity exist with regard to potential defenses. A type of cost-based defense is the most common one identified by price-gouging statutes,<sup>22</sup> but not all costs are treated equally under all statutes. For example, Idaho’s statute treats all costs of doing business as potentially providing a defense, while Indiana’s statute limits its cost defense to “replacement costs, taxes, and transportation costs incurred by the retailer.”<sup>23</sup> Several of these cost defenses also permit a company to include its typical markup.<sup>24</sup> Still other statutes, e.g., Michigan and Texas,<sup>25</sup> apply a strict liability-type standard, with no potential defenses identified.

In addition to, or in lieu of, cost-based defenses, a handful of states also allow other defenses. These include a “market defense” (price increases due to specified market changes),<sup>26</sup> exclusion of certain providers, like growers;<sup>27</sup> and safe harbors for sellers who unintentionally violate the statute once certain conditions are met.<sup>28</sup>

The differences outlined above, while striking, are by no means the only ways in which price-gouging statutes differ. Indeed, a few require a showing of willfulness (e.g., South Carolina),<sup>29</sup> some may allow for extraterritorial application (e.g., New York),<sup>30</sup> and some can be in effect only in certain counties or regions (such as the declared “disaster area”) rather than statewide (e.g., Missouri<sup>31</sup>).

Although they differ in their approaches, the states are virtually uniform in their efforts to prevent, or at least curb and punish, price gouging.

## **MANY ROADS MEANS MANY POTHOLES**

Unfortunately, as is so often the case, quantity does not mean quality, or clarity. States not only currently apply differing rules,

regulations, and standards but do so in a way that can make conducting business in interstate commerce—i.e., the manner in which businesses operate every day—difficult and expensive, and without clearly defining the different standards and rules to which sellers are subject. This reality leaves companies with the potential to misstep when instituting, during a time of emergency, a price increase of any amount (even one that was decided upon pre-emergency).

For example, although, as discussed above, some states (such as Alabama, Alaska, and Arkansas, just to name a few) specify a precise threshold increase below which post-emergency price increases are not prohibited,<sup>32</sup> others simply prohibit prices that are “excessive” or “unconscionably high” as compared to some pre-emergency price.

This initial, base-level legislative ambiguity is compounded in at least seven more ways.

*First*, the price against which the post-emergency price is to be compared is often unclear. Some statutes indicate that the post-emergency price will be compared to the “average price” during a given period just prior to the emergency.<sup>33</sup> But, what if the good was on special promotion during some or all of that period? Does that discounted price count toward the average? Although Mississippi law makes clear that post-emergency prices are to be compared to those “ordinarily charged” for comparable goods or services at the time of the emergency declaration (or immediately before), and expressly indicates that the ordinary price does *not* include temporary discounted prices,<sup>34</sup> its clarity in this regard is largely anomalous. Many other statutes merely compare the post-emergency price to the “average price” of the good during the “usual course of business” over some pre-emergency period.<sup>35</sup>

And the reference to a pre-emergency period raises a *second* question: What is the relevant pre-emergency period? Some statutes clearly indicate that the pre-emergency price is to be determined by the average price over a given period immediately preceding the emergency (e.g., the seven-day period prior to the emergency (or 30, 60, or 90 days prior)<sup>36</sup>) but other states, such as Arkansas, Delaware, Georgia, and Louisiana, merely compare post-emergency prices to those in effect “immediately preceding” the declaration.<sup>37</sup> What does “immediately preceding” even mean?

And even if the pre-emergency “price” and the pre-emergency period during which that “price” is calculated are clear, most statutes suffer from yet a *third* critical ambiguity: What is the geographic area in which the prices are to be measured? Again, many statutes just refer to the “trade area” or “market area” in which the good or service is sold. But how far does that extend? A city? A county? The entire state? What about areas that border other states and for which interstate shopping is common?<sup>38</sup> Kentucky applies its statute to the “designated emergency area,” but under Kentucky law, such emergencies can be declared by the Governor of Kentucky, the President of the United States, or Homeland Security.<sup>39</sup> In such circumstances, could Kentucky’s law apply to sales made in other states? Would regulation of sales by Kentucky law in other states even be Constitutionally permissible?<sup>40</sup> Would the answer change if the out-of-state purchase was made by a Kentucky resident?

A *fourth* issue the current statutes often do not adequately address is the permissible price of new products launched after an emergency declaration. Kentucky, Maine, North Carolina, and Utah are among the few states that specifically deal with the issue.<sup>41</sup> Under Kentucky’s statute, if a product or service was not sold by a given seller prior to the emergency, the baseline price against which the new seller’s price is measured is the average price at which the good or service was available in the area prior to the emergency.<sup>42</sup> Even ignoring the ambiguity of the term “area,” some might question whether a new seller (especially a new manufacturer of a given good) has the same cost structure as an existing seller such that the existing seller’s prices should dictate the amount the new seller can lawfully charge. Moreover, it might be difficult to apply such a rule when the existing seller’s price is not transparent to other sellers (as might be the case for prices above store-level prices).

A *fifth* issue relates to the existence of defenses, or the ambiguity of the defenses, as stated, in existing statutes. As explained above, while most states recognize a defense for price increases linked to increases in cost,<sup>43</sup> some, like Texas,<sup>44</sup> do not.<sup>45</sup> And, even in those statutes that allow for cost-related price increases, the particular costs that count are frequently not specified. When a statute does spell out costs, there may be a question about whether the costs reflect the range of costs that businesses incur. Arkansas’s statute attempts to address this issue: It prohibits selling certain

goods or services after a declared state of emergency for more than 10% over the cost of those items immediately preceding the declaration “unless the increase is proven to be directly attributable to additional costs,” and defines costs as those imposed by the supplier of the goods or “‘directly attributable’ to costs for labor or materials,” provided that the price still may not be more than 10% above the total cost to the seller plus its usual markup.<sup>46</sup> By contrast, Alabama allows a cost defense for price increases attributable to “reasonable costs incurred in connection with” the rental or sale of a covered commodity but provides no further detail.<sup>47</sup> Other states, like Alaska, have statutes to similar effect.<sup>48</sup> But what are “reasonable costs,” and do they allow for the inclusion of the seller’s normal markup? And are all relevant costs covered even by Arkansas’s approach?

Kentucky’s statute seems to be one of the more detailed in terms of defenses, allowing for price increases on any of three bases:

- **Cost Defense:** Price increases that can be linked to additional cost (where “cost” is defined to mean “any cost directly or indirectly related to the sale of a good, provision of a service, or the operation of the seller’s business, and includes any actual or anticipated replacement cost”), or an increase of 10% or less of the price for the good or service the day before the declaration, or a price increase of 10% or less of the sum of the seller’s cost and normal markup;
- **Market Defense:** Price increases consistent with “fluctuations in applicable commodity, regional, national, or international markets”; and
- **Pre-Emergency Agreement:** Price increases due to a contract agreed to, or that are the result of a price formula established prior to, the emergency order.<sup>49</sup>

Kentucky’s detailed package of defenses is atypical and will not be available in most other states.

A *sixth* issue associated with current price-gouging laws is that they do not allow retail sellers to limit the per-visit quantity purchased of any item. The result is that panic buying may be left unchecked, creating shortages, which in turn could create an environment hospitable to price gouging.<sup>50</sup>

*Finally*, a number of state price-gouging statutes regulate only *consumer* transactions. If a retailer faces higher input costs

due to a supplier's (or the supplier's suppliers') price increases, the retailer may be able to pass through those costs in a state where the cost defense applies, and thus not face price-gouging liability. The consumer-transaction focus of many price-gouging statutes means that upstream businesses that increase price (for whatever the reason, benign or otherwise) are not likely to face scrutiny, but retailers that legitimately pass through those costs may nevertheless face costs associated with defending against a price-gouging charge.

## HOW TO AVOID A PRICE-GOUGING MISHAP

So how can you best position your company to navigate this varied landscape and avoid the price-gouging potholes? Although not a complete roadmap, here are a few guideposts to help chart your course:

### Understand the Law

Although obvious, this can be a daunting task when a company is considering increasing prices on an item that is sold across the country. But, as explained above, getting on the wrong side of price-gouging statutes can lead to costly consequences (both monetary and reputational), so understanding the relevant price-gouging statutes is a recommended part of any price-increase consideration. Whether this task is accomplished by in-house or outside counsel, an ounce of preparation is worth (more than) a pound of defense costs.

### Stay Up to Date on Emergency Orders

For the vast majority of express price-gouging statutes, the effective period of a price-gouging statute is tied to the issuance or extension of some sort of emergency order (be it local, state, or federal).

### If You Must Increase Prices, Keep Price Increases Under 10% (In Most States)

Although there are a few statutes that appear to have a strict "no price increase" standard, most require that a price increase

reach a certain magnitude before it can trigger a price-gouging claim. As a general rule of thumb, a price increase of less than 10% is unlikely to trigger most price-gouging statutes.

### Keep Copious Records Evidencing Your Increased Costs, and Limit Price Increases to the Amount of Those Cost Increases

A number of price-gouging statutes provide for some type of cost-based defense. But, as a defense, the burden will be on the defendant to make its cost case. To do this, a company is best served by keeping clear, organized, and verifiable information on costs that can be tied to (and are no greater than) any price increase it implements. This work also may help the company explain the need for price increases to its customers. Although some states allow for a "normal markup" on cost-driven price increases, not all do, so the safest, "national" solution is to increase price by no more than costs have increased. And even in those states that do not expressly provide for a cost defense, a company negotiating with a state attorney general, or telling its story in front of a jury in a private action, will undoubtedly try to establish that a price increase was driven by costs to help minimize ultimate liability.

### Reevaluate Pre-Emergency Delayed Pricing Decisions

A price-gouging statute will apply to a price-increase decision made before a declaration of emergency triggered the statute if the increase does not go into effect until after the price-gouging statute is in effect. Accordingly, any price increases (even those that are part of a long-term plan) should be evaluated anew and in the context of the applicable price-gouging statute(s) before the company implements the change.

### Consider Limiting Per-Visit Purchases of Critical Items

Subject to contractual or legal obligations preventing you from doing so, consider imposing limits on the number of items (e.g., hand sanitizer, sanitizing wipes, etc.) that a consumer may purchase on any given store visit. Such limitations should help reduce the risk of hoarding and shortages—both key contributors to price gouging.

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## APPENDIX A: OVERVIEW OF STATE PRICE-GOUGING LAWS

State/Territory	Express Price-Gouging Law	Consumer Protection or DTPA Law Covering Price Gouging
Alabama	Ala. Code § 8-31-1, <i>et seq.</i>	
Alaska	2020 Alaska Sess. Laws Ch. 10, § 26	Alaska St. § 45.50.471, <i>et seq.</i>
American Samoa	Am. Samoa Code Ann. §§ 27.0903, <i>et seq.</i>	
Arizona		
Arkansas	Ark. Code Ann. § 4-88-303	
California	Cal. Penal Code § 396; S.B. 1196, 2019–2020 Reg. Sess. (Cal. 2020) (pending legislation)	
Colorado	Colo. Rev. Stat. Ann. § 6-1-730	Colo. Rev. Stat. Ann. § 6-1-101 <i>et seq.</i>
Connecticut	Conn. Gen. Stat. § 42-230; 42-232; 42-234	
Delaware		
District of Columbia	D.C. Code § 28-4101 <i>et seq.</i>	
Florida	Fla. Stat. § 501.160 <i>et seq.</i>	
Georgia	Ga. Code Ann. §§ 10-1-393.4; 10-1-438	
Guam	Guam Code tit. 5, § 32201(c)(21)	
Hawaii	Haw. Rev. Stat. § 127A-30	
Idaho	Idaho Code Ann. § 48-603(19)	
Illinois	20 ILCS § 3305/7(14); Ill. Admin. Code tit. 14, § 465.30	815 ILCS § 505/2
Indiana	Ind. Code § 4-6-91-2	
Iowa	Iowa Code § 714.16; Iowa Admin. Code § 61-31.1(714)	
Kansas	Kan. Stat. Ann. §§ 50-627; 50-6,106	
Kentucky	Ky. Rev. Stat. Ann. § 367.372 <i>et seq.</i>	
Louisiana	La. Rev. Stat. Ann. § 29:732	
Maine	Me. Stat. tit. 10, § 1105	
Maryland	Chapters 13 and 14, Laws of Maryland 2020	
Massachusetts	Mass. Gen. Laws Ch. 93A, § 2(c) and Ch. 23 § 9H; 940 Mass. Code Reg. 3.18	
Michigan	Mich. Comp. Laws § 445.903 <i>et seq.</i>	
Minnesota		
Mississippi	Miss. Code Ann. § 75-24-25	
Missouri	Mo. Code Regs. Ann. tit. 15, § 60-8.010 and -8.030	
Montana		Mont. Code Ann. § 30-14-103
Nebraska		Neb. Rev. Stat. § 87-303.01
Nevada		Nev. Rev. Stat. § 598 <i>et seq.</i>
New Hampshire	S.B. 688, 2020 Reg. Sess. (N.H. 2020) (pending legislation)	N.H. Rev. Stat. Ann. § 358-A
New Jersey	N.J. Stat. Ann. § 56:8-108	
New Mexico		N.M. Stat. Ann. § 57-12-1 <i>et seq.</i>
New York	N.Y. Gen. Bus. Law § 396-r	N.Y. Gen. Bus. Law § 349
North Carolina	N.C. Gen. Stat. §§ 75-37 to -38; § 166A-19.23	
North Dakota		
Northern Mariana Islands	N. Mar. I. Code tit. 4, §§ 5105(y); 5142(c).	
Ohio	H.B. 590 & S.B. 301, 133rd Gen. Assemb. (Ohio 2020) (pending legislation)	Ohio Rev. Code § 1345.03



State/Territory	Express Price-Gouging Law	Consumer Protection or DTPA Law Covering Price Gouging
Oklahoma	Okla. Stat. tit. 15, § 777.1 et seq.	
Oregon	Or. Rev. Stat. §§ 401.962; 401.965	
Pennsylvania	73 Pa. Stat. § 232.1 et seq.	
Puerto Rico	P.R. Laws Ann. tit 23, § 703-46	
Rhode Island	R.I. Gen. Laws §§ 6-13-21; § 30-15-9(e)(12)	
South Carolina	S.C. Code Ann. § 39-5-145	
South Dakota		
Tennessee	Tenn. Code Ann. § 47-18-5103	Tenn. Code Ann. § 47-18-104
Texas	Tex. Bus. & Com. Code Ann. § 17.46(b)(27)	
U.S. Virgin Islands	V.I. Code tit. 23, § 1001 et seq.	
Utah	Utah Code Ann. § 13-41-201	
Vermont	Vt. Stat. Ann. tit. 9, § 2461d	
Virginia	Va. Code Ann. § 59.1-526 et seq.	
Washington	S.B. 699, 66th Leg. (Wash. 2020) (pending legislation)	Wash. Rev. Code Ann. § 19.86.020 et seq.
West Virginia	W. Va. Code Ann. § 46A-6J-1 et seq.	
Wisconsin	Wis. Adm. Code ATCP § 106.02	
Wyoming		

## ENDNOTES

- 1 These are Arizona, North Dakota, South Dakota, and Wyoming.
- 2 New York, for example, recently enacted emergency legislation expanding the state's price-gouging law to cover personal protective equipment and medical supplies, in addition to its prior application to consumer goods and services. See N.Y. S.B. 8189, 2019-2020 Leg. Sess. (N.Y. 2020) (signed by Gov. Cuomo on June 6, 2020); see also Alaska Sess. Laws Ch. 10, § 26 (recently enacted price-gouging prohibitions tied to the COVID-19 emergency declaration); Ch. 13 and 14, Laws of Md. 2020 (emergency legislation enacted in Maryland in response to the COVID-19 crisis). On July 14, 2020, Colorado state legislators enacted into law a bill making clear that a person engages in an unfair or unconscionable act or practice amounting to price gouging if such person increases the cost of certain necessary goods or services by an excessive amount during a declared disaster. The law exempts increases in prices directly attributable to additional costs imposed by the seller's suppliers or other direct costs of providing the good or service. Colo. Rev. Stat. Ann. § 6-1-730.
- 3 See accompanying chart at Appendix A.
- 4 In response to the COVID-19 pandemic, several states have enacted executive orders or related provisions to address price gouging during the crisis. See Cal. Exec. Order N-44-20; Del. Mar. 12, 2020 Emergency Dec.; Ill. Mar. 9, 2020 Disaster Proc.; Md. Exec. Order 20-03-23-03; Addendum to Mass. Sec'y of State Regulation Filing Form 940 Mass. Code Reg. CMR 3:18; Mich. Exec. Order 2020-18; Minn. Exec. Order 20-10; Mar. 12, 2020 Dec. of Emergency; N.H. Exec. Order 2020-13; Ohio Exec. Order 2020-01D; Or. Exec. Orders 2020-03 and 2020-06; R.I. Exec. Order 20-02.
- 5 Idaho Code Ann. § 48-603(19).
- 6 See, e.g., Ill. Admin. Code tit. 14, § 465.30 (petroleum products); Ind. Code § 4-6-9.1-2 (fuel); N.J. Stat. Ann. § 56:8-107 *et seq.* (merchandise used as a direct result of an emergency); Or. Rev. Stat. § 401.962 (essential consumer goods or services); P.R. Laws Ann. tit. 23, § 703-46 ("staple commodity"); Vt. Stat. Ann. tit. 9, § 2461d (petroleum or heating fuel products).
- 7 Ga. Code Ann. § 10-1-393.4; see also, e.g., Ala. Code § 8-31-1, *et seq.* (any commodity); D.C. § 28-4101 *et seq.* (merchandise or service); Haw. Rev. Stat. § 127A-30 (any retail or wholesale commodity); La. Rev. Stat. Ann. § 29:732 (goods or services); Miss. Code Ann. § 75-24-25 (same); Okla. Stat. tit. 15 § 777.1 *et seq.* (same).
- 8 Ala. Code § 8-31-1, *et seq.*; see also 2020 Alaska Sess. Laws 2350, Ark. Code Ann. § 4-88-301 *et seq.*; Cal. Penal Code § 396; Conn. Gen. Stat. §§ 42-232 and -234; Fla. Stat. § 501.160 *et seq.*; Haw. Rev. Stat. § 127A-30; Ill. Admin. Code tit. 14, § 465.30; Iowa Admin. Code § 61-31.1(714); Ky. Rev. Stat. Ann. § 367.374; Me. Stat. tit. 10, § 1105; 940 Mass. Code Reg. 3.18; Mich. Comp. Laws § 445.903 *et seq.*; Mo. Code Regs. Ann. tit. 15, § 60-8.010; N.J. Stat. Ann. § 56:8-108; N.Y. Gen. Bus. Law § 396-r; N.C. Gen. Stat. §§ 75-38; Okla. Stat. tit. 15, § 777.4; Or. Rev. Stat. § 401.965; 73 Pa. Stat. § 232.4; P.R. Laws Ann. Tit. 23, § 703-46; S.C. Code Ann. § 39-5-145; Tenn. Code Ann. § 47-18-5103; Tex. Bus. & Com. Code Ann. § 17.46(b)(27); V.I. Code tit. 23, § 1001 *et seq.*; Va. Code Ann. § 59.1-527; Vt. Stat. Ann. tit. 9, § 2461d; W. Va. Code Ann. § 46A-6J-3; Wis. Admin. Code ATCP § 106.02.
- 9 D.C. Code § 28-4101 *et seq.*; see also Conn. Gen. Stat. § 42-230; Ga. Code Ann. § 10-1-393.4; Idaho Code Ann. § 48-603(19); Ind. Code § 4-6-9.1-2; Kan. Stat. Ann. § 50-627; Md. Exec. Order 20-03-23-03; Mich. Comp. Laws § 445.903 *et seq.*; R.I. Gen. Laws § 6-13-21 and § 30-15-9(e)(12).
- 10 Related to the question of scope is whether sales to government entities (such as municipalities or states) are covered by price-gouging statutes. Although no statute expressly addresses this point, a few exempt certain transactions that suggest government purchases could be covered by the statute. See Fla. Stat. § 501.160 *et seq.* (exempts sales by "religious, charitable, fraternal, civic, educational, or social organizations"); Me. Stat. tit. 10, § 1105 (does not apply to goods or services sold by "[n]onprofit hospitals, medical service organizations or health maintenance organizations authorized to transact business within the State"); Ohio Rev. Code § 1345.03 (exempts transactions involving public utilities and residential mortgages, among others); 73 Pa. Stat. § 232.4 (does not apply to goods sold pursuant to a tariff or rate approved by a federal or state agency); S.C. Code Ann. § 39-5-145 (exempts price increases approved by the government).
- 11 Mich. Comp. Laws § 445.903 *et seq.*
- 12 W. Va. Code § 46A-6J-3; see also, e.g., Ala. Code § 8-31-4 (60 days following proclamation); Cal. Penal Code § 396 (30 days following declaration); D.C. Code § 28-4101 *et seq.* (same); Ky. Rev. Stat. Ann. § 367.374 (15 days); Or. Rev. Stat. § 401.965 (30 days); Tenn. Code Ann. § 47-18-5103 (15 days).
- 13 Utah Code Ann. § 13-41-201 *et seq.*; see also, e.g., 940 Mass. Code Reg. 3.18 (in effect during any declared statewide or national emergency); Mich. Comp. Laws § 445.903 *et seq.* (in effect whenever a state of emergency is declared); R.I. Gen. Laws § 6-13-21 (in effect until declaration terminates); S.C. Code Ann. § 39-5-145 (same); Wis. Adm. Code ATCP § 106.02 (same).
- 14 Indiana Code § 4-6-9.1 *et seq.* (Attorney General); Minn. Exec. Order 20-10 (Attorney General); see also Utah Code Ann. § 13-41-201 *et seq.* (Utah Division of Consumer Protection); Wisc. Stat. Ann. § 100.305 (Wisconsin Department of Agriculture, Trade and Consumer Protection or Wisconsin Department of Justice).
- 15 Okla. Stat. tit. 15 § 777.1 *et seq.*; W. Va. Code Ann. § 46A-6J-1 *et seq.*; see also Ala. Code § 8-31-1, *et seq.*; Colo. Rev. Stat. Ann. § 6-1-101 *et seq.*; Ga. Code Ann. § 10-1-393.4; Ill. Admin. Code tit. 14, § 465.30; Kan. Stat. Ann. § 50-627; Mich. Comp. Laws § 445.903 *et seq.*; N.C. Gen. Stat. §§ 75-38; Or. Rev. Stat. § 401.965; S.C. Code Ann. § 39-5-145; Tenn. Code Ann. § 47-18-5103 *et seq.*; Tex. Bus. & Com. Code Ann. § 17.46(b)(27); Vt. Stat. Ann. tit. 9, § 2461d.
- 16 See, e.g., Miss. Code Ann. § 75-24-25 (providing for civil penalty of up to \$10,000 per violation); criminal penalties for misdemeanor (up to \$1,000 and six months' jail) to felony (one to five years in prison and/or fine of up to \$5,000).
- 17 Va. Code Ann. § 59.1-206(A) & (C) (providing for civil penalties of \$2,500 per violation and additional penalties up to \$1,000 for investigation costs).
- 18 73 Pa. Stat. § 232.1 *et seq.* (providing for \$10,000 in civil penalties per violation in addition to injunctive relief and restitution).
- 19 N.J. Stat. Ann. § 56:8-107 *et seq.*; Mo. Code Regs. Ann. tit. 15, § 60-8.010 *et seq.*; see also, e.g., Colo. Rev. Stat. § 6-1-101 *et seq.* (providing civil penalties up to \$20,000 per violation but up to \$50,000 if an elderly person is involved).
- 20 Or. Rev. Stat. § 401.965; see also, e.g., Ala. Code § 8-31-1, *et seq.* (25%); Me. Stat. tit. 10, § 1105 (15%); Minn. Exec. Order 20-10 (20%); N.J. Stat. Ann. § 56:8-108 (10%); 73 Pa. Stat. § 232.4 (20%); W. Va. Code Ann. § 46A-6J-1 *et seq.* (10%).
- 21 States that have no percentage threshold and do not define "grossly in excess" or "excessive pricing" include: Conn. Gen. Stat. §§ 42-230, § 42-232; Mich. Comp. Laws § 445.903 *et seq.*; P.R. Laws Ann. tit. 23, § 703-46 (absolute prohibition); Tex. Bus. & Com. Code Ann. § 17.46(b)(27). States that have no percentage threshold, but provide some other explanation include: Conn. Gen. Stat. § 42-234; Fla. Stat. § 501.160 *et seq.*; Ga. Code Ann. § 10-1-393.4; Haw. Rev. Stat. § 127A-30; Idaho Code Ann. § 48-603(19); Ill. Admin. Code tit. 14, § 465.30; Ind. Code § 4-6-9.1-2; Iowa Admin. Code § 61-31.1(714); La. Rev. Stat. Ann. § 29:732; 940 Mass. Code Reg. 3.18; Mich. Exec. Order 2020-18 (20% per order); Miss. Code Ann. § 75-24-25; Mo. Code Regs. Ann. tit. 15, § 60-8.010; N.Y. Gen. Bus. Law § 396-r; N.C. Gen. Stat. §§ 75-38; R.I. Gen. Laws § 6-13-21; S.C. Code Ann. § 39-5-145; Tenn. Code Ann. § 47-18-5103; V.I. Code tit. 23, § 1001 *et seq.*; Vt. Stat. Ann. tit. 9, § 2461d; Va. Code Ann. § 59.1-527.
- 22 For example, Georgia permits a price increase if it "accurately reflects an increase in costs of the goods or services" to the seller. Ga. Code Ann. § 10-1-393.4. Other examples include Ill. Admin. Code § 465.30 (defense if increase is "substantially attributable" to

increased prices charged by suppliers, or increased costs); Iowa Admin. Code § 61-31.1(714) (price not excessive if “justified by the seller’s actual costs of acquiring, producing, selling, transporting, and delivering the actual product sold, plus a reasonable profit”); N.J. Stat. Ann. § 56:8-107 *et seq.* (increase may be attributable to additional costs from supplier or other costs to provide goods or services, but any markup on those costs may not exceed 10%).

- 23 Idaho Code Ann. § 48-603(19); Ind. Code § 4-6-9.1-2.
- 24 *E.g.*, Mo. Code Regs. Ann. tit. 15, § 60-8.010 (allowing “usual and customary profit margin”); Utah Code Ann. § 13-41-201 *et seq.* (price not excessive if less than 10% above the sum of price prior and the seller’s customary markup). *But see* N.Y. Gen. Bus. Law § 396-r (may rebut price gouging with evidence that additional costs not within the control of the defendant were imposed on the defendant for the goods or services).
- 25 Mich. Comp. Laws § 445.903 *et seq.*; Tex. Bus. & Com. Code Ann. § 17.46(b)(27); see *also, e.g.*, D.C. § 28-4101 *et seq.*; Md. Exec. Order 20-03-23-03; Mich. Comp. Laws § 445.903 *et seq.*; N. Mar. I. Code tit. 4, § 5105; P.R. Laws Ann. tit. 23, § 703-46; V.I. Code tit. 23, § 1001 *et seq.*
- 26 See La. Rev. Stat. Ann. § 29:732 (defense available if increase is attributable to fluctuations in “applicable commodity markets, fluctuations in applicable regional or national market trends”); Okla. Stat. tit. 15 § 777.1 *et seq.* (applicable regional, national, or international petroleum commodity markets).
- 27 Fla. Stat. § 501.160 *et seq.* (does not apply to sale by growers, producers, or processors or raw/processed food products except for direct consumer sales); Okla. Stat. tit. 15, § 777.1 *et seq.* (does not apply to “growers, producers, or processors of raw or processed food products” except retail sales to a consumer”).
- 28 Haw. Rev. Stat. § 127A-30 (safe harbor provided to sellers who prove the violation was unintentional, voluntarily roll back prices upon discovery of violation, and institute a restitution program).
- 29 S.C. Code Ann. § 39-5-145.
- 30 N.Y. Gen. Bus. Law § 396-r (“This prohibition shall apply to all parties within the chain of distribution, including any manufacturer, supplier, wholesaler, distributor or retail seller of consumer goods or services or both sold by one party to another when the product sold was located in the state prior to the sale.”). Although outside the scope of this *White Paper*, it is worth noting that the extraterritorial application of a price-gouging statute has raised constitutional issues in past cases and may render the entire statute void. Specifically, the Dormant Commerce Clause—the negative implication of Congress’s power to regulate interstate commerce—stands for the principle that a state or local law is unconstitutional if it excessively burdens interstate commerce, even if Congress has not acted. There are three analyses under the Dormant Commerce Clause, the third of which is extraterritoriality and requires that a state statute that applies to commerce *wholly outside* the state’s borders be held unconstitutional. At least one price-gouging statute that included language that could be interpreted as extraterritorial has been held unconstitutional even though it was not being applied in an extraterritorial manner in the case at issue. See *Ass’n for Accessible Medicines v. Frosh*, 887 F.3d 664, 667–74 (4th Cir. 2018), *cert. denied*, 139 S. Ct. 1168 (2019) (holding Maryland’s price-gouging statute, prohibiting a manufacturer or wholesale distributor from price gouging in the sale of essential off-patent drugs, to be in violation of the Dormant Commerce Clause).

In theory, the rationale used by the *Frosh* Court could be used by some to apply to several states. The Court found that the *Frosh* statute impermissibly controlled the price of out-of-state transactions up the supply chain, which also could be said of statutes like those in New Mexico, New York, and Missouri. The Court also noted the substantial burden on interstate commerce that would be caused if other states passed similar statutes, as they could subject a single sale to conflicting state requirements, undercutting the Commerce Clause’s goal of a national economy. And, indeed, a district court in Kentucky recently enjoined the Kentucky Attorney General from applying Kentucky’s price-gouging statute to merchants who sell products on Amazon because to do

so would violate the Dormant Commerce Clause. *Online Merchs. Guild v. Cameron*, No. 3:20-cv-00029-GFVT, slip op. at 26 (E.D. Ky. June 23, 2020) (concluding that, while it “is sympathetic with the [state] Attorney General’s goal to protect Kentucky consumers,” the court could not “cast a blind eye to what appears to be an unconstitutional means to achieve this worthwhile end with respect to a specific class of retailers—those who use an online platform like Amazon” because of the “impermissible extraterritorial effect on interstate commerce”). This is a topic that could fill the pages of its own article, and we leave it to others to explore further.

- 31 Mo. Code Regs. Ann. tit. 15, § 60-8.010 (unlawful to “[c]harge within a disaster area an excessive price for any necessity” or to “[c]harge any person an excessive price for any necessity which the seller has reason to know is likely to be provided to consumers within a disaster area”).
- 32 Ala. Code § 8-31-1, *et seq.*; 2020 Alaska Sess. Laws 2350; Ark. Code Ann. § 4-88-301 *et seq.*
- 33 *E.g.*, Conn. Gen. Stat. § 42-234; Fla. Stat. § 501.160 *et seq.*; Ind. Code § 4-6-9.1 *et seq.*; N.C. Gen. Stat. §§ 75-37 to -38; 73 Pa. Stat. § 232.1 *et seq.*; R.I. Gen. Laws § 6-13-21; S.C. Code Ann. § 39-5-145; Utah Code Ann. § 13-41-201 *et seq.*
- 34 Miss. Code Ann. § 75-24-25 (“prices ordinarily charged for comparable goods or services in the same market area do not include temporarily discounted goods or services”); see *also* Ky. Rev. Stat. Ann. § 367.374 (if the seller offered a reduced price in the 30 days prior to the declaration, the seller’s usual price in the area is used to determine whether the statute was violated instead).
- 35 *E.g.*, Ala. Code § 8-31-4 (“average price” for same or similar during 30 days prior); Conn. Gen. Stat. § 42-234 (average price immediately before emergency onset); R.I. Gen. Laws § 6-13-21 (average price of goods readily available in local trade area in the usual course of business 30 days before the declaration).
- 36 See, *e.g.*, Ala. Code § 8-31-1, *et seq.* (30 days); D.C. § 28-4101 *et seq.* (90 days); FL (30 days); Ind. (seven days); KY (one day prior); NC (60 days); PA (seven days); RI (30 days); UT (30 days); VT (seven days); VA (10 days); W. Va. (the 10th day prior); Wis. Adm. Code § ATPC 106.01 (60 days).
- 37 Ark. Code Ann. § 4-88-301 *et seq.*; Del. Mar. 12, 2020, Executive Order; Ga. Code Ann. § 10-1-393.4; La. Rev. Stat. Ann. § 29:732. Other states that do not define what “immediately before” (or similar) means: Am. Samoa Code Ann. §§ 27.0903, *et seq.*; Conn. Gen. Stat. § 42-234; Haw. Rev. Stat. § 127A-30; Idaho Code Ann. § 48-603(19); Ill. Admin. Code tit. 14, § 465.30; Iowa Admin. Code § 61-31.1(714); Me. Stat. tit. 10, § 1105; Md. Exec. Order 20-03-23-03; 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; N.J. Stat. Ann. § 56:8-108; N.Y. Gen. Bus. Law § 396-r; H.B. 590, 133rd Gen. Assemb. (Ohio 2020); S.B. 301, 133rd Gen. Assemb. (Ohio 2020); Okla. Stat. tit. 15, § 777.4; Or. Rev. Stat. § 401.965; P.R. Laws Ann. tit. 23, § 703-46 (absolute prohibition); Tenn. Code Ann. § 47-18-5103; Tex. Bus. & Com. Code Ann. § 17.46(b)(27); V.I. Code tit. 23, § 1001 *et seq.*; S.B. 699, 66th Leg. (Wash. 2020).
- 38 Most states do not provide for a particular area in which price before and after the emergency is to be measured. See, *e.g.*, 2020 Alaska Sess. Laws Ch. 10, § 26; Ark. Code Ann. § 4-88-301 *et seq.*; Cal. Penal Code § 396; Conn. Gen. Stat. § 42-230 *et seq.*; Ga. Code Ann. § 10-1-393.4; Haw. Rev. Stat. § 127A-30; Idaho Code Ann. § 48-603(19); Iowa Admin. Code § 61-31.1(714); Me. Stat. tit. 10 § 1105; Md. Exec. Order 20-03-23-03; Mich. Comp. Laws § 445.903 *et seq.*; Minn. Exec. Order 20-10; Mo. Code Regs. Ann. tit. 15, § 60-8.010; N.J. Stat. Ann. § 56:8-107 *et seq.*; H.B. 590, 133rd Gen. Assemb. (Ohio 2020); S.B. 301, 133rd Gen. Assemb. (Ohio 2020); P.R. Laws Ann. tit. 23, § 703-46; R.I. § 30-15-9(e)(12); Tenn. Code Ann. § 47-18-5103 *et seq.*; Tex. Bus. & Com. Code Ann. § 17.46(b)(27); V.I. Code tit. 23, § 1001 *et seq.*; Utah Code Ann. § 13-41-201 *et seq.*; Vt. Stat. Ann. tit. 9, § 2461d; S.B. 699, 66th Leg. (Wash. 2020); W. Va. Code Ann. § 46A-6J-1 *et seq.*

Other states provide some delineated area (*e.g.*, “trade area” or “affected area”) but do not define the term. See, *e.g.*, Ala. Code § 8-31-4; Fla. Stat. § 501.160; Ill. Admin. Code tit. 14, § 465.30; Ind. Code

§ 4-6-9.1-2; Kan. Stat. Ann. § 50-627; Ky. Rev. Stat. Ann. § 367.374; La. Rev. Stat. Ann. § 29:732; 940 Mass. Code Reg. 3.18; Miss. Code Ann. § 75-24-25; N.Y. Gen. Bus. Law § 396-r; N.C. Gen. Stat. §§ 75-38; Okla. Stat. tit. 15, § 777.4; 73 Pa. Stat. § 232.4; R.I. Gen. Laws § 6-13-21; S.C. Code Ann. § 39-5-145; Va. Code Ann. § 59.1-527.

Only a handful of states define the particular region more clearly. These include: S.B. 1196, 2019–2020 Reg. Sess. (Cal. 2020) (by county); D.C. Code § 28-4101 *et seq.* (metro area); Mich. Exec. Order 2020-18 (state area); Or. Rev. Stat. § 401.965 (geographical area covered by the declaration); Wis. Adm. Code ATPC § 106.01 (relevant trade area includes the market area in which a seller normally sells similar goods for similar prices, which may be larger or smaller than the emergency area).

39 See Ky. Rev. Stat. Ann. § 367.374.

40 See, *supra*, note 30.

41 Ky. Rev. Stat. Ann. § 367.374(4); Me. Stat. tit. 10, § 1105; N.C. Gen. Stat. §§ 75-38; Utah Code Ann. § 13-41-201(4); see also S.B. 1196, 2019–2020 Leg., Reg. Sess. (Cal. 2020) (proposed California legislation also makes it unlawful for sellers who did not sell goods or services immediately prior to the emergency to charge more than 50% of the price paid for, or the cost of, the goods and services).

42 Ky. Rev. Stat. Ann. § 367.374(4).

43 Ala. Code § 8-31-4; 2020 Alaska Sess. Laws Ch. 10, § 26; Am. Samoa Code Ann. §§ 270903, *et seq.*; Ark. Code Ann. § 4-88-303; Cal. Penal Code § 396; Conn. Gen. Stat. § 42-23; Del. Mar. 12, 2020 Emer. Dec.; Ga. Code Ann. § 10-1-393.4; Guam Code tit. 5, § 32201(c)(21); Idaho Code Ann. § 48-603(19); Ill. Admin. Code tit. 14, § 465.30; Ind. Code § 4-6-9.1-2; Iowa Admin. Code § 61-31.1(714); Kan. Stat. Ann. § 50-627; Ky. Rev. Stat. Ann. § 367.374; Me. Stat. tit. 10, § 1105; 940 Mass. Code Reg. 3.18; Minn. Exec. Order 20-10; Miss. Code Ann. § 75-24-25; Mich. Exec. Order 2020-18; Mo. Code Regs. Ann. tit. 15, § 60-8.010; N.J. Stat. Ann. § 56:8-108; N.Y. Gen. Bus. Law § 396-r; N.C. Gen. Stat. §§ 75-38; Or. Rev. Stat. § 401.965; 73 Pa. Stat. § 232.4; R.I. Gen. Laws § 6-13-21; S.C. Code Ann. § 39-5-145; Tenn. Code Ann. § 47-18-5103; Utah Code Ann. § 13-41-201; Vt. Stat. Ann. tit. 9, § 2461d; Va. Code Ann. § 59.1-527; S.B. 699, 66th Leg. (Wash. 2020); W. Va. Code Ann. § 46A-6J-3; Wis. Adm. Code ATPC § 106.02.

44 Tex. Bus. & Com. Code Ann. § 17.46(b)(27).

45 Other states that do not provide a cost defense include: D.C. Code § 28-4101 *et seq.*; Md. Exec. Order 20-03-23-03; Mich. Comp. Laws § 445.903 *et seq.*; N. Mar. I. Code tit. 4, § 5105; P.R. Laws Ann. tit. 23, § 703-46 (but provides process for reconsideration and objection); V.I. Code tit. 23, § 1001 *et seq.*

46 Ark. Code Ann. § 4-88-303(a)(2).

47 Ala. Code § 8-31-4.

48 2020 Alaska Sess. Laws Ch. 10, § 26 (defense if the price increase over 10% is caused by an increased cost for the seller to purchase the supplies).

49 Ky. Rev. Stat. Ann. § 367.374(1)(c).

50 It also might lead to other problems, such as shortages of the limited brands and sizes of products that are available to the Special Supplemental Nutrition Program for Women, Infants, and Children (“WIC”) recipients. WIC provides federal grants to states for supplemental foods, health care referrals, and nutrition education for low-income pregnant, breastfeeding, and non-breastfeeding postpartum women, and to infants and children up to age five who are found to be at nutritional risk. See [About WIC](#), USDA Food & Nutrition Service. Although an important topic, is it beyond the scope of this *White Paper*.

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