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REVUE DES DROITS DE LA CONCURRENCE | COMPETITION LAW REVIEW

USA: Does a federal price gouging law even make sense — and, if so, what should it look like?

International | Concurrences N° 4-2020

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ABSTRACT

As COVID-19 continues to impact communities across the United States—causing many state and local authorities to extend (or reinstate) emergency orders and other state-specific pricing restrictions—the idea of federal price gouging legislation has become a hot topic of conversation in the U.S. Congress, as well as in the business community. But, while numerous federal bills have been introduced, none seems to address three critical questions: what, if any, issues arise from the current state-by-state price gouging enforcement regime; can federal price gouging legislation address any of these issues; and how should a federal price gouging law be crafted to improve, instead of further complicate, price gouging laws in the United States? This article seeks to answer these questions, and includes a comprehensive discussion of the current state of play at both the state and federal levels.

Alors que la COVID-19 continue d'impacter les communautés à travers les États-Unis – poussant de nombreux États et autorités locales à étendre (ou à rétablir) les commandes d'urgence et autres restrictions de prix spécifiques aux États – l'idée d'une législation fédérale sur les prix abusifs est devenue un sujet de conversation brûlant au Congrès américain, ainsi que dans le monde des affaires. Mais, bien que de nombreux projets de loi fédéraux aient été présentés, aucun ne semble répondre à trois questions essentielles : quels sont les problèmes, le cas échéant, découlant du régime actuel d'application des prix abusifs État par État ; la législation fédérale sur les prix abusifs peut-elle répondre à l'une de ces questions ; et comment une loi fédérale sur les prix abusifs devrait-elle être élaborée pour améliorer, au lieu de compliquer davantage, les lois sur les prix abusifs aux États-Unis ? Cet article cherche à répondre à ces questions et comprend une discussion approfondie de l'état actuel des choses au niveau des États et au niveau fédéral.

*The views and opinions set forth herein are the personal views or opinions of the authors; they do not necessarily reflect views or opinions of the law firm with which they are associated. The authors wish to express their sincere appreciation to associates Alexandra Schill, Stephanie Kortkrax, and Margaret Toohey, and summer associates Rachel Gurley, Susanna Savage, Rylee Snively, and Tim Will for their invaluable contributions to this article.

USA: Does a federal price gouging law even make sense—and, if so, what should it look like?

1. It is said that tragedy brings out the best in people, and that is often true. Think 9/11 or the countless volunteers now making masks (often for free) to help protect the selfless healthcare workers on the front lines of the COVID-19 pandemic, or elderly citizens handing out water and hand sanitizer to protestors marching for social justice. But there are two sides to every coin, and tragedy is no exception. In some, tragedy brings out the worst: predatory instincts employed to capitalize on the fears, and exploit the weaknesses, of those least able to protect themselves. State price gouging legislation—laws passed to prevent, or at least curb and punish, those who sell essential goods and services at excessive prices when disaster strikes—are designed to punish the predators, but too often also sweep up well-intentioned companies seeking to ensure that essential products and services get to those in need but without losing money on every sale.

2. Price gouging laws are supposed to prevent exploitative profiteering, but those currently enacted are so riddled with ambiguities and inconsistencies, and so lacking in economic rationality, that they typically only exacerbate the problem they were ostensibly designed to fix. And while the current clamor for federal price gouging legislation is substantial, any such law will only add to the problem unless it is properly designed and applied to bring clarity and uniformity to the legal landscape in a way that proscribes and punishes only true profiteering. To that end, this article outlines the present legal landscape, the hurdles and concerns that a federal price gouging law, if any, must overcome, and the characteristics it should possess to be part of a solution that is both legally and economically rational.

I. The current state of play—the checkerboard approach

3. 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,¹ while the vast majority of states (37) and the

¹ These are Arizona, North Dakota, South Dakota, and Wyoming.

District of Columbia have express price gouging laws (including some recently enacted in response to the pandemic²), as do five territories.³ Other states and territories (at least 7) 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,⁴ 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.

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

5. 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 (which ones?), services (which ones?), etc.—by the statute? Some statutes, like Idaho’s,⁵ which applies only to “*consumer fuel or food, pharmaceuticals, or water for human consumption,*” are limited in scope.⁶ Others have much broader application—for example, Georgia’s statute applies to any “*goods or services.*”⁷

6. 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,⁸ while others—like that in the District of Columbia⁹—appear to limit application to sales at retail to consumers.¹⁰

7. Triggers. With one exception (Michigan),¹¹ 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.¹² 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.¹³

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 42-234; 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 On September 3, 2020, the Virginia House of Delegates passed legislation aimed at increasing support for the Commonwealth’s COVID-19 response. HB 5047 would broaden Virginia’s price gouging statute to prohibit any manufacturer or distributor from selling necessary goods or services at an unconscionable price during a declared state of emergency. The current statute does not apply to a manufacturer or distributor unless it advertises its goods or services to consumers. On October 1, 2020, the Senate of Virginia passed the bill with minor amendments, adding language that a manufacturer or distributor of *agricultural* goods and services shall still not be considered a “supplier” under the statute unless the manufacturer or distributor “advertises” the agricultural goods or services. The House of Delegates passed the amended legislation on October 2, 2020. *2020 Special Session 1: HB 5047 Virginia Post-Disaster Anti-Price Gouging Act; Manufacturers and Distributors, VA.’S LEGIS. INFO. SYS., <https://lis.virginia.gov/cgi-bin/legp604.exe?202+sum+HB5047> (last visited Oct. 7, 2020); *see also* Va. Code Ann. §§ 59.1-526 to -527.*

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. Admin. Code ATCP § 106.02 (same).

8. 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,¹⁴ grant the state attorneys general or other state authority the sole authority to police price gouging, while others (e.g., Oklahoma and West Virginia)¹⁵ 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,¹⁶ in other circumstances (Virginia, to name one),¹⁷ attorneys general can only seek 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).¹⁸ 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.¹⁹

9. 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.”²⁰ And then there are states that merely prohibit “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.²¹

10. Additional complexity and diversity exists with regard to potential defenses. A type of cost-based defense is the most common one identified by price gouging statutes,²² 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 costs defense to “replacement costs, taxes, and transportation costs incurred by the retailer.”²³ Several of these cost defenses also permit a company to include its typical markup.²⁴ Still other statutes, e.g., Michigan and Texas,²⁵ apply a strict liability-type standard, with no potential defenses identified.

11. 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);²⁶ exclusion of certain providers, like growers;²⁷ and safe harbors for sellers who unintentionally violate the statute once certain conditions are met.²⁸

14 Ind. 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); Wis. 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 penalties up to \$10,000 per violation; criminal penalties for misdemeanor (up to \$1,000 and 6 months in jail) to felony (1 to 5 yrs. 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 and 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 guidance 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 for 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).

12. 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),²⁹ some may allow for extraterritorial application (e.g., New York),³⁰ and some can be in effect only in certain counties or regions (such as the declared “disaster area”) rather than statewide (e.g., Missouri).³¹

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

II. Seems like the states have this covered, so what’s the problem? There are at least eight

14. Unfortunately, as is so often the case, quantity does not mean quality. And so it is with price gouging law. States not only currently apply differing rules, regulations and standards, but do so in a way that makes conducting business in interstate commerce—i.e., the manner in which businesses operate every day—exceedingly difficult and expensive, and without clearly defining the different standards and rules to which sellers are subject.

15. For example, while, 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,³² others simply prohibit prices that are “excessive” or “unconscionably high”—without defining those terms—as compared to some pre-emergency prices.

16. 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.³³ 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,³⁴ 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.³⁵

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.”). Though outside the scope of this article, it is worth noting that the extraterritorial application of a price gouging statute has raised serious 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) (court held Maryland 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 could also 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, shortly before publication of this article, a district court in Kentucky enjoined the Kentucky attorney general from applying Kentucky’s price gouging statute to merchants that sell products on Amazon because to do so would violate the Dormant Commerce Clause. *Online Merchs. Guild v. Cameron*, Case 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”). But thereafter, on September 23, 2020, a coalition of more than 30 Attorneys General from across the country submitted an amicus brief urging the U.S. Court of Appeals for the Sixth Circuit to unblock the Kentucky AG’s investigation into Amazon third-party merchants suspected of price gouging, arguing that state price gouging rules are a vital consumer protection tool amid the COVID-19 pandemic that do not unconstitutionally interfere with the merchants’ right to set prices across state lines under the Dormant Commerce Clause. The AGs argue that the Dormant Commerce Clause should not apply to price gouging rules that are “a valid, non-protectionist exercise of state police powers that is designed to aid vulnerable consumers during emergencies.” The AGs assert that, “[u]nlike other regulations that have been struck down under the extraterritoriality doctrine, price gouging laws like Kentucky’s affect only the price of goods within the State, without dictating the price for out-of-state sales.” Brief of Amici Curiae In Support of Defendant-Appellant and Reversal at 15, *Online Merchants Guild v. Cameron*, No. 20-5723 (6th Cir. Sept. 23, 2020). 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, § 60-8.030(1)(B)-(C) (2020) (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 75-38; 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).

17. 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 7-day period prior to the emergency (or 30, 60 or 90 days prior)³⁶) but other states, such as Arkansas, Delaware, Georgia, and Louisiana, merely compare post-emergency prices to those in effect “*immediately preceding*” the declaration.³⁷ What does “*immediately preceding*” even mean?

18. 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?³⁸ 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.³⁹ 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?⁴⁰ Would the answer change if the out-of-state purchase was made by a Kentucky resident?

36 See, e.g., Ala. Code § 8-31-1 et seq. (30 days); D.C. § 28-4101 et seq. (90 days); Fla. (30 days); Ind. (7 days); Ky. (1 day prior); N.C. (60 days); Pa. (7 days); R.I. (30 days); Utah (30 days); Vt. (7 days); Va. (10 days); W. Va. (the 10th day prior); Wis. Admin. Code § ATCP 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 and territories that do not define what “*immediately before*” (or similar) means include: 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); VI. Code tit. 23, § 1001 et seq.; S.B. 699, 66th Leg. (Wash. 2020).

38 Most states and territories 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); VI. 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. Admin. Code ATCP § 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.

19. A fourth issue the current statutes often do not adequately address is the permissible price of new products launched after an emergency declaration. California (as of September 30, 2020), Kentucky, Maine, North Carolina, and Utah are among the few states that specifically deal with the issue.⁴¹ 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.⁴² Even ignoring the ambiguity of the term “*area*,” why does it make sense to assume that 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 well be the case for prices above store-level prices).

20. Although Utah’s statute attempts to set clear rules for new sellers, it, too, appears incomplete. Specifically, for products that were not sold by a given seller in the last 30 days before an emergency, Utah’s statute makes clear that a price is not excessive if it is not more than 30% above the seller’s total cost of obtaining the good or providing the service. By its terms, the statute appears to address only resellers of goods, as opposed to manufacturers of goods—a hole that must be filled, at least for manufacturers who sell directly to Utah consumers.

21. A fifth problem relates to the absence 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,⁴³ some, like Texas,⁴⁴ do not.⁴⁵ 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 adequately reflect the range of costs that businesses incur. Arkansas’ 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

41 Cal. Penal Code § 396(b); 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).

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. § 27.0903 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. Admin. Code ATCP § 106.02.

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

45 Other states and territories 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), VI. Code tit. 23, § 1001 et seq.

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, however, that the price still may not be more than 10% above the total cost to the seller plus its usual markup.⁴⁶ 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.⁴⁷ Other states, like Alaska, have statutes to similar effect.⁴⁸ 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’ approach?

22. 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.⁴⁹

National sellers can take little solace in Kentucky’s defenses, however, because the trio will not be available in most other states.

23. 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 creates an environment hospitable to price gouging.⁵⁰

24. 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 who legitimately pass through those costs, may nevertheless face costs associated with defending against a price gouging charge.

25. Although these flaws add to the general dissatisfaction with current price gouging laws, one additional point cannot be overstated: even if all the state price gouging statutes were unambiguous and contained defenses, they would still vary widely from state to state, continuing to make compliance both difficult and costly.

III. Even if drafted clearly, do price gouging laws help or exacerbate the problem?

26. Much has been written—and said—about price gouging laws, and the outcome of the debate over whether price gouging laws help or hurt is far from clear. Which side of the argument you hear will likely depend, in large part, on whether the speaker is a politician or an economist.

1. The case for price gouging laws

27. Many politicians vehemently support price gouging laws and are advocates for the enactment of a federal price gouging law. Against the backdrop of the current coronavirus pandemic, senators and representatives alike have called for such a law to prohibit price gouging following a disaster, whether that disaster be natural or man-made. A common rationale is that such a law would protect consumers by preventing companies from (or at least punishing companies for) taking advantage of desperate citizens in times of need.

28. Political figures have not been bashful about morally condemning price gouging. Senator Klobuchar, joined by Senators Blumenthal, Hirono, and Cortez Masto, introduced the Disaster and Emergency Pricing Abuse Prevention Act in March 2020. In a press release, Senator Blumenthal described those who raise prices in times of an emergency as “*selfish*” and “*bottom-feeding*.”⁵¹ In that same release, Senator Hirono described raising prices in the wake of a disaster as “*simply unacceptable*,”

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 creates 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, healthcare 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, <https://www.fns.usda.gov/wic/about-wic>. Although an important topic, is it beyond the scope of this article.

51 Press Release, Senator Amy Klobuchar, Klobuchar, Blumenthal, Hirono, Cortez Masto Introduce Bill to Prohibit Price Gouging During Crises (Mar. 25, 2020) (on file with author).

while Senator Cortez Masto argued that the government “can’t let a small number of unscrupulous businesses take advantage of people in need.”⁵²

29. In the House, in April 2020, Representatives Neguse and Lieu introduced the Price Gouging Prevention Act in response to sellers “taking advantage of” the coronavirus pandemic to “prey on consumers.”⁵³ Congressman Lieu described those setting high prices as “opportunistic merchants” trying to capitalize on the situation.⁵⁴ One week later, Senator Warren, with Senator Harris co-sponsoring, introduced the Price Gouging Prevention Act’s companion in the Senate.⁵⁵ Senator Warren described price gouging as “squeeze[ing]” consumers, while Senator Harris labeled the practice as “shameful.”⁵⁶ These are just a handful of examples; other members of Congress likewise have expressed a willingness to support federal price gouging legislation for similar reasons,⁵⁷ and not just in response to the current crisis.⁵⁸

30. In addition to preventing and punishing “unfair,” “selfish” or “shameful” pricing, proponents of a federal price gouging law argue that such a law would deter the bad apples—those increasing prices beyond what is necessary to cover costs. In a recent blog post, Amazon’s Brian Huseman, a former Federal Trade Commission consumer protection attorney, voiced Amazon’s stance on the issue, calling for federal legislation to prevent and punish price gouging.⁵⁹ Huseman highlighted that legislation would “send a clear and strong message” that bad apples would be punished. Proponents of such a deterrence argument point to rational choice theory for support. According to the theory, if the benefits of charging high prices (making money) outweigh the costs (paying a civil fine or serving jail time), then a rational supplier would choose to price gouge in the absence of a law with penalties.⁶⁰

52 Ibid.

53 Press Release, Congressman Joe Neguse, Congressmen Neguse and Lieu Introduce Legislation to End Price Gouging in the Wake of the COVID-19 Pandemic (Apr. 3, 2020) (on file with author).

54 Ibid.

55 Press Release, Senator Elizabeth Warren, Warren Unveils Senate Companion Bill to Stop Price Gouging During the COVID-19 Pandemic (Apr. 10, 2020) (on file with author).

56 Ibid.

57 See, e.g., Press Release, Congressman Joe Neguse, Neguse, Cicilline, Nadler, Sensenbrenner Urge Federal Action on Price Gouging Amidst Coronavirus (Mar. 18, 2020) (on file with author).

58 See, e.g., Press Release, Senator Maria Cantwell, Commerce Dems Call for Senate Investigation of Post-Katrina Gas Price Gouging (Sept. 27, 2005) (on file with author).

59 B. Huseman, It’s Time for Congress to Establish a Federal Price Gouging Law, Amazon: Day One: The Amazon Blog (May 13, 2020), <https://blog.aboutamazon.com/policy/its-time-for-congress-to-establish-a-federal-price-gouging-law>.

60 E. Bae, Are Anti-Price Gouging Legislations Effective Against Sellers During Disasters?, 4 *Entrepreneurial Bus. L. J.* 79, 94 (2009). We note, however, that the price gouging literature does raise a counterargument to this deterrence rationale. Specifically, opponents argue that, in the event price gouging is punished, suppliers may be hesitant to raise prices at all out of a fear of civil or criminal violations. Such an outcome could be problematic because, if suppliers face sales at a loss, they may choose not to sell at all, and a shortage problem could result. Proponents of price gouging laws likely would respond that, with an unambiguous law (i.e., setting a percentage above which prices cannot be raised), suppliers would be well informed as to whether and how much they could raise their prices without risking violation. But, of course, artificial ceilings—unambiguous or not—may also fail to cover costs, resulting in the same shortage problem.

31. Some also argue that a federal price gouging law would remedy the current checkerboard approach of the states. As noted above, states differ in their approach to price gouging, and such differences make it difficult for companies selling across state lines to set their prices. A federal law that preempts the disparate state laws (discussed further below) could aid in efficient enforcement.⁶¹

32. Others argue that price gouging legislation would increase, rather than decrease, total surplus.⁶² According to Robert Fleck, a professor of economics at Clemson University, such laws emphasize that there may be a shortage of an item in the future,⁶³ which incentivizes consumers to plan ahead and stock up on an item before the days arrive when they are unlikely to find that item on store shelves.⁶⁴ Without such a law, Fleck argued, consumers might be more likely to wait to purchase the item until the demand for it has spiked.⁶⁵

33. Finally, while, as discussed in greater detail below, many economists argue that higher prices prompt production, economist Amitrajeet Batabyal highlights a potential flaw with this logic: because, after a disaster, businesses are not sure how long increased production will be necessary,⁶⁶ they will hesitate to increase production too much, given the risk that the demand will decrease sooner than expected, resulting in a failure to recoup all of their upfront production costs.⁶⁷ Prestige Ameritech, a respirator and surgical face mask manufacturer, has said it faced this problem. In a move the company’s executive vice president describes as “a really big mistake,” the company took to buying new machines amidst the Swine Flu outbreak in order to assemble more masks in light of the heightened demand.⁶⁸ By the time the machines were built and ready to produce masks in greater volume, demand had “vaporized”; the company nearly went bankrupt.⁶⁹

61 See Bae, *supra* note 60, at 99 (“[T]he greatest avenue for improvement is in establishing national anti-price gouging legislation.”); Huseman, *supra* note 58 (“[A] federal price gouging law would ensure that there are no gaps in protection for consumers.”).

62 Robert K. Fleck, Can Prohibitions on “Price Gouging” Reduce Deadweight Losses?, 37 *Int’l Rev. L. & Econ.* 100 (2014).

63 Ibid. at 100. To be clear, Professor Fleck did not expressly argue that price gouging laws should be enacted. See generally *ibid.*

64 Ibid.

65 Ibid. at 102.

66 A. A. Batabyal, Why Economists Who Have No Problem with Price Gouging Are Wrong, *The Globe Post* (May 5, 2020), <https://theglobepost.com/2020/05/05/price-gouging>.

67 Ibid.

68 Y. Noguchi, Not Enough Face Masks are Made in America to Deal with Coronavirus, NPR (Mar. 5, 2020, 5:06 AM), https://www.npr.org/sections/healthshots/2020/03/05/811387424/face-masks-not-enough-are-made-in-america-to-deal-with-coronavirus?sm_aui=iVVj1WkJoqssN66KKNcK38H6pC0.

69 Ibid.

2. The case against price gouging laws

34. While some argue that price gouging is “unfair,” and that legislation is a logical step to protect the American consumer, many economists argue that price gouging laws would exacerbate the price-gouging and/or shortage problems, not solve them. They assert that the very consumers price gouging laws are aimed at protecting will end up being hurt by the legislation due to the law of supply and demand.

35. In short, when disaster strikes, demand for certain essential products will almost certainly increase. For example, following a hurricane, victims often are in need of essentials like drinking water, batteries, and building materials, causing demand for those products in afflicted areas to spike. Currently, in the midst of the coronavirus pandemic, demand for masks, sanitizing products, and other personal protective equipment has increased exponentially. As a result, at least initially, the supply of these necessary items will often be inadequate compared to the demand, as Americans have witnessed first-hand. In turn, the prices of essential goods have risen. Many economists argue that such an increase in prices indicates the free market working exactly as it should.⁷⁰ That is, when the price of an item rises, it sends an important message to consumers.⁷¹ This message encourages the rationing of the item by the consumer.⁷² In other words, if the price of a mask during the coronavirus pandemic is high, the consumer will be unlikely to buy more masks than he or she needs. If a price gouging law kept the price of a necessary item, such as a mask, at an artificially low level, consumers would not be prompted to exercise caution in regard to their use of the item. Thus, a consumer may purchase two or three boxes of masks, storing the extras away for use some time in the future, with the result that overall supply is reduced by artificially low prices, causing shortages of necessary items.⁷³ Those consumers not rationing items—the people storing masks at their home for some future use—are preventing the hospital and other healthcare workers who need masks from being able to obtain them. Thus, according to many economists, such a law would work to make necessary items unavailable to those with the most dire need for them.

70 See, e.g., M. Brewer, Planning Disaster: Price Gouging Statutes and the Shortages They Create, 72 *Brook. L. Rev.* 1101, 1120 (2007) (“Markets are notable for their ability to respond to changed circumstances and, based on those circumstances, to rationally allocate goods to their most valued users.”); D. Culpepper and W. Block, Price Gouging in Katrina Aftermath: Free Markets at Work, 35 *Int’l J. Soc. Econ.* 512, 514 (2008) (“The increase in price as a result of shifts in supply and demand is the market’s way to allocate scarce resources.”).

71 D. J. Boudreaux, ‘Price Gouging’ After a Disaster is Good for the Public, *Wall St. J.* (Oct. 3, 2017, 6:57 PM), https://www.wsj.com/articles/price-gouging-after-a-disaster-is-good-for-the-public-1507071457?_sm_au_=iVVdV0J6VvD0W5TPKKNcK38H6pC0 (“[P]rice hikes are a response to scarcity, and signals that reveal the true severity of scarcity are critical during storms and other crises.”).

72 *Ibid.*; see also *supra* note 70, M. Brewer, Planning Disaster: Price Gouging Statutes and the Shortages They Create, at 1129 (high prices... “encourage (...) efficient use of existing supplies”).

73 Boudreaux, *supra* note 71.

36. An item’s price likewise sends a message to suppliers.⁷⁴ A high price informs suppliers that there is a high demand for particular items and that the current supply is inadequate to meet that demand in a particular area. If forced to sell items at an artificially low price mandated by a price gouging law, outside suppliers may not be incentivized to sell the needed items in the affected area.⁷⁵ It would be naïve to assume that suppliers would be willing to sell items at a breakeven point, let alone for a loss in the long run.⁷⁶ Thus, economists argue that allowing prices to increase (even to “gouging” levels) will incentivize outside suppliers to sell within an affected area, which will in turn both bring down prices and ensure that citizens have access to desperately needed items.

37. A “natural experiment” that recently occurred in Italy seems to provide support for the economists who oppose price gouging legislation. On April 26, 2020, the Italian government decreed that surgical face masks must be sold at a fixed price of 50 European cents (approximately 54 U.S. cents) plus tax. It also prohibited the importation of face masks (except to the extent they were already allocated to healthcare institutions). In short, no one was permitted to import masks and sell them at whatever the market would bear. In addition, a number of Italy’s textile producers had repurposed their factories for the production of masks during Italy’s lockdown, but the artificially low price at which masks could be sold thwarted those efforts. Moreover, because Italian pharmacists could not obtain masks cheaply enough to sell them at 50 European cents, “quite a few” stopped selling them entirely. The result? Italy’s restrictions on price gouging prevented excessive mask pricing at the cost of creating a mask shortage.⁷⁷

38. **By contrast.** When COVID-19 exploded in Milan, hand sanitizer disappeared from shelves within days. Prices soared. On Feb. 26, a 250-milliliter bottle of hand sanitizer was going for €2,500 on eBay. Companies saw an opportunity. Pharmacists and distilleries started making sanitizer, and bottles reappeared on shelves at elevated prices. Now an 80-milliliter bottle sells on the internet for around €4, a few cents more than before the pandemic. Letting markets set prices produced some dramatic effects in the short run. It also guaranteed a quick return to normal.⁷⁸

39. Those opposed to price gouging laws also argue that artificially low market prices may lead to the emergence of a black market,⁷⁹ where prices likely would be higher than regular market prices, even in a market where price gouging was allowed.⁸⁰

74 Price Gouging: Hearings Before the S. Comm. on Commerce, Sci., and Transp., 109th Cong. 12 (2006) (statement of Deborah Platt Majoras, chairman, Federal Trade Commission).

75 *Ibid.*

76 Culpepper & Block, *supra* note 70, at 514.

77 A. Mingardi, Opinion, Italy’s Covid Price-Control Fiasco, *Wall Street J.* (May 18, 2020, 7:00 PM), <https://www.wsj.com/articles/italys-covid-price-control-fiasco-11589842827>.

78 *Ibid.*

79 See Hearings, *supra* note 74 (highlighting the fact that this concern has been realized in the past).

80 See Brewer, *supra* note 72, at 1128.

40. Economists also argue that, even in the absence of a black market, a good with an artificially low price actually costs the consumer more than the amount on the price tag because, when prices are artificially low, those needing the items in high-demand will spend more time waiting in lines trying to obtain the items, driving around trying to find the items (also resulting in wasted gas), and experience overall uneasiness at the thought of not finding the needed items.⁸¹ These are all additional “costs.”⁸²

41. Although proponents of price gouging laws sometimes contend that high prices could disproportionately affect the poor, some economists also argue that the poor are better served by a free market. For example, in “Making the Case Against ‘Price-Gouging’ Laws,” Dwight Lee highlights numerous reasons,⁸³ including, e.g., that incentives for outside suppliers to bring goods into the affected area will benefit the poor, and the poor are less likely to have the influence needed to secure goods when prices are low and people have not rationed.⁸⁴ Others have put forth similar arguments.⁸⁵

42. In a blog post, Richard Posner summarized—with respect to gasoline—what appears to be a commonly shared bottom-line belief among economists regarding price gouging generally: “*the social benefits of (...) ‘price gouging’ appear to exceed the social costs by a large margin.*”⁸⁶

43. The existence of numerous state price gouging laws demonstrates that, to date, the fairness and consumer protection concerns discussed above have prevailed over those who argue that price gouging laws are harmful. Assuming that policy choice holds,⁸⁷ we submit that buyers, sellers, and consumers would all benefit from price gouging laws that are uniform and informed by both experience (recall the Italian mask and sanitizer examples discussed above) and the economic arguments that have been levied against price gouging statutes.

81 D. J. Boudreaux, On Price Gouging, Found. for Econ. Educ. (Apr. 1, 2005), <https://fee.org/articles/on-price-gouging>.

82 Ibid.

83 D. R. Lee, Making the Case Against “Price-Gouging” Laws: A Challenge and an Opportunity, 19 *Indep. Rev.* 583, 594–96 (2015).

84 Ibid. at 594–95.

85 One author noted that the aid programs in place during normal times (i.e., WIC) could be expanded (or similar programs could be created) to ensure the poor have adequate access to goods during times of emergency. See Brewer, *supra* note 72, at 1132–33.

86 R. Posner, Should Price Gouging in the Aftermath of Catastrophes Be Punished?, The Becker-Posner Blog (Oct. 23, 2005), <https://www.becker-posner-blog.com/2005/10/should-price-gouging-in-the-aftermath-of-catastrophes-be-punished--posner.html>.

87 This paper does not advocate for or against those views.

IV. Would a federal price gouging law even matter?

44. As indicated above, a federal price gouging statute could add to the current slate of problems associated with price gouging laws, including for example, misallocation of resources, lack of clarity and uniformity that makes compliance costly and difficult (if not impossible), punishment of companies that are responding to increasing costs and demand, and so on. Such a law would add complexity, cost, and likely increase litigation (as has been the result of the current patchwork quilt approach to other legal issues, including resale price maintenance, non-solicitation/non-hiring (“no poach”) agreements, and indirect purchaser antitrust suits seeking money damages). However, a federal law that entirely displaces the checkerboard of disparate state price gouging laws with a clear and uniform set of rules and standards designed and enforced only to prohibit profiteering could benefit buyers, sellers, and consumers alike. But is such an approach even possible? It seems so, but only if the statute can be drafted in a way to preempt state law.

45. Congress unquestionably has the authority to preempt state price gouging laws.⁸⁸ Federal law may displace state law via one of three mechanisms: express preemption, conflict preemption, or field preemption. Here, Congress must expressly preempt state price gouging law if its aim is to create a single set of guidelines to simplify and increase compliance throughout the country.⁸⁹ The inclusion of an express preemption provision would also preclude ancillary (and expensive) litigation to determine whether the new federal price gouging law actually preempts state price gouging law.

46. If Congress declines to include an express preemption provision, federal price gouging legislation would be unlikely to simplify—and instead would further complicate—the price gouging regulatory landscape. And while the doctrines of conflict and field preemption enable federal law to displace state law even absent express preemption provisions, in this context, as explained below, neither doctrine is likely to do so.

88 The Supremacy Clause provides that federal law, if within Congress’ constitutional authority to enact, “shall be the supreme Law of the Land.” U.S. Const. art. VI, cl. 2. Congress thus has the power to preempt state law. See, e.g., *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372 (2000). We note that, consistent with the Tenth Amendment, the Supreme Court has invalidated federal laws that “commandeer” state governments (see *Printz v. United States*, 521 U.S. 898, 925 (1997)) or compel states to implement, by legislation or executive action, federal regulatory programs (ibid.; see also *New York v. United States*, 505 U.S. 144, 175 (1992)). This limitation is not applicable to federal price gouging law, assuming such law does not require state governments to adopt an enforcement role.

89 See *Arizona v. United States*, 567 U.S. 387, 399 (2012) (explaining that Congress may preempt state law by enacting a statute containing an express preemption provision).

47. Conflict preemption occurs where a federal law conflicts with a state law, thereby preempting that state law and rendering it without effect.⁹⁰ In applying conflict preemption doctrine, courts ask whether “*compliance with both federal and state regulations is a physical impossibility*,”⁹¹ or whether the challenged state law “*stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress*.”⁹² In analyzing both questions, courts are substantially deferential to states and should “*assume that the historic police powers of the States are not superseded unless that was the clear and manifest purpose of Congress*.”⁹³

48. Courts are unlikely to find conflict preemption between federal and state price gouging law, at least in any categorical fashion. Compliance with both federal and state price gouging law would be a “physical impossibility” only in very limited circumstances. Say federal law sets the price gouging “trigger” at 15%, State A sets its trigger at 10%, and State B sets its trigger at 20%. While the federal and state laws differ, compliance with both federal and state law is not a physical impossibility. Sellers can avoid a violation if they do not raise their prices by more than the most restrictive threshold allows. But this would still require sellers to remain apprised of the law of each state and price their products accordingly to ensure compliance with those separately applicable state laws. In such a case, a federal price gouging law is merely adding an additional requirement, rather than solving the problems of inconsistency, ambiguity, and complexity. Moreover, in such circumstances, courts are unlikely to find that differences between state and federal law frustrate congressional purpose or objectives.

49. For similar reasons, field preemption is also unlikely to apply. States are precluded from regulating conduct in a field that Congress “*has determined must be regulated by its exclusive governance*.”⁹⁴ Courts rarely find field preemption, and typically only do so when the federal framework of regulation is “*so pervasive*” that Congress “*left no room for the States to supplement it*” or where there is a federal interest “*so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject*.”⁹⁵ Courts repeatedly have declined to find field preemption in the area of consumer

protection.⁹⁶ Applying field preemption doctrine to the price gouging landscape, courts necessarily would recognize that federal price gouging regulations are minimal (indeed, the pending legislation would be Congress’ first foray into the space).

50. And yet, despite the vast improvement that uniformity and clarity in the price gouging legal landscape would bring in terms of simplifying, facilitating, and reducing the cost of compliance, not one of the pending federal price gouging bills expressly preempts state price gouging law,⁹⁷ and, in fact, most of them expressly do not.⁹⁸

V. Short of a federal law, is there any way to improve the checkerboard approach?

51. Uniformity. Clarity. Economic rationality. Is there a way to achieve these three goals without a federal price gouging statute that preempts state law? In other contexts, basic (if not complete) uniformity has been obtained by use of a model code. An example that all lawyers are familiar with is the ABA Model Code of Professional Responsibility. Although not itself a binding document, it has served as the template for the state-based professional responsibility codes, with state supreme courts adopting (sometimes with slight modification) the portions of the code believed appropriate for that jurisdiction. No state is required to adopt any of the provisions, yet every state

90 See *Altria Grp. v. Good*, 555 U.S. 70 (2008).

91 *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963).

92 *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

93 *Arizona*, 567 U.S. at 400 (internal quotation marks and citation omitted).

94 *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (internal quotation marks and citation omitted).

95 *Ibid.*; see also *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98 (1992) (explaining that courts will infer an intention to preempt state law if the federal regulatory scheme is so pervasive as to “occupy the field” in that area of the law, i.e., to warrant an inference that Congress did not intend the states to supplement it).

96 See, e.g., *Am. Fin. Servs. v. FTC*, 767 F.2d 957, 989 n. 41 (D.C. Cir. 1985) (“the expansion of the FTC’s jurisdiction [over unfair and deceptive trade practices] is not intended to occupy the field or in any way preempt state or local agencies from carrying out consumer protection or other activities” (quoting legislative history of 15 U.S.C. § 45)); *Double-Eagle Lubricants, Inc. v. Texas*, 248 F. Supp. 515, 518 (N.D. Tex. 1965) (“state laws providing for regulation of unfair or deceptive practices in commerce are valid unless they conflict (...) to the extent that both cannot stand in the same area”); compare *Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 93 S. Ct. 1854, 36 L. Ed. 2d 547 (1973) (declaring that state and local laws that interfere with comprehensive federal environmental laws and regulations are invalid).

97 See COVID-19 Price Gouging Prevention Act, H.R. 6472, 116th Cong. § 2(c)(4) (2020); Disaster and Emergency Pricing Abuse Prevention Act, H.R. 6457, 116th Cong. § 5 (2020); Ending Price-Gouging During Emergencies Act, S. 3574, 116th Cong. § 6(b) (2020); The Heroes Act, H.R. 6800, 116th Cong. div. M tit. I § 130102(c)(4) (2020); Prevent Emergency and Disaster Profiteering Act of 2020, S. 3647, 116th Cong. § 4(d) (2020); Take Responsibility for Workers and Families Act, H.R. 6379, 116th Cong. div. U tit. I § 102(c)(4) (2020) (each expressly stating that the Act shall not preempt state law). See also Preventing Pandemic Profiting Act, H.R. 6264, 116th Cong. (2020); Price Gouging Prevention Act, H.R. 6450, 116th Cong. (2020) (both failing to address preemption).

98 See H.R. 6472 § 2(c)(4); H.R. 6457 § 5; S. 3574 § 6(b); H.R. 6800 div. M tit. I § 130102(c)(4) (2020); S. 3647 § 4(d); H.R. 6379 div. U tit. I § 102(c)(4) (2020) (each expressly stating that the Act shall not preempt state law).

has adopted at least part of the code.⁹⁹ This results in most states having similar (and sometimes identical) requirements. For example, 42 states that have adopted Rule 2.1 have adopted the rule exactly as it appears in the Model Code.¹⁰⁰

52. Problem solved, right? Probably not, as there are several key facts that differ between the ABA Model Code and price gouging statutes. The primary one is that the number of state laws that can apply to the sale of a good—in this day and age, it is often dozens—dwarfs the, at worst, handful of state professional laws that an attorney may need to consider to provide counsel in any given matter. When only considering two or three states, minor, or even major, differences between laws can be managed. As discussed above, that is not the case with price gouging laws, which impact products sold across the country.

53. And, potentially, such an approach will also not achieve the goal of clarity. The Uniform Commercial Code (“UCC”) provides a cautionary tale on this front. First published in 1952, it was established with the goal of harmonizing the laws of sales and other commercial transactions across the United States through adoption by all 50 states and the District of Columbia.¹⁰¹ And while that has happened to a large degree, there have been bumps in the road. Adoption of the UCC often varies from one U.S. jurisdiction to another, with some only adopting certain articles or adopting language with variations.¹⁰² But even when two different states adopt the exact same language, because interpretation is still governed by state court, the language may be interpreted differently by different states, leading to ambiguity and lack of uniformity. For example, state courts are split over whether electricity is a “good” under the UCC and thus subject to the provisions of Article 2, which applies to transactions in goods.¹⁰³

54. Moreover, if states are allowed to modify model language, there is a potential that the changed language will not achieve uniformity. Here, too, we can learn from the UCC. In just its first 15 years, state legislatures made 775 non-uniform amendments in adopting the

UCC.¹⁰⁴ And today, non-uniform amendments are still common.¹⁰⁵ As just one example, despite a recent amendment, part 5 of UCC Article 9—which addresses filing requirements for secured transactions—is still significantly non-uniform among the states.¹⁰⁶ Another example is the inconsistent treatment of the UCC by courts in the foreclosure context; some courts use UCC Article 3, while others use Article 9, and still others do not use the UCC at all for foreclosures.¹⁰⁷ This lack of uniformity is a source of confusion and slows foreclosure proceedings.¹⁰⁸

55. So, while having a model code/UCC-type system may address some of the issues currently faced with the checkerboard approach, the vast majority of them—especially lack of clarity and differing standards—cannot be corrected unless there is one law that applies in all states. If that is truly the answer, what should that law look like?

VI. If a federal price gouging law is the “cure,” what should it look like?

56. If one assumes that a federal price gouging law is going to exist, what characteristics should the law have to address the problems afflicting the patchwork of state price gouging laws that we have today? Most obviously, the law should be uniform across the nation so as to promote, rather than encumber, commerce, while still punishing profiteering (and only profiteering). And, while not designed to change the balance of existing price gouging laws in favor of more or less scrutiny for alleged price gouging, we submit that if a federal price gouging law is passed, it should have the following features if it is to have any hope of achieving a proper balance between consumer protection and a properly functioning marketplace. It should:

- Expressly preempt state price gouging law so that businesses can design a single set of guidelines to ensure compliance throughout the country;

99 See Alphabetical List of Jurisdictions Adopting Model Rules, ABA: Model Rules of Professional Conduct, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules/ (last updated March 28, 2018); L. Laird, California Approves Major Revision to Attorney Ethics Rules, Hewing Closer to ABA Model Rules, *ABA Journal* (Oct. 2, 2018), https://www.abajournal.com/news/article/california_approves_major_revision_to_attorney_ethics_rules_hewing_closer_t#:~:text=California%20approves%20major%20revision%20to%20attorney%20ethics%20rules,closer%20to%20ABA%20Model%20Rules&text=Wikipedia.,Model%20Rules%20of%20Professional%20Conduct.

100 Jurisdictional Rules Comparison Charts, ABA: Policy & Initiatives, https://www.americanbar.org/groups/professional_responsibility/policy/rule_charts/ (last updated April 13, 2020).

101 Uniform Commercial Code, Unif. Law Comm., <https://www.uniformlaws.org/acts/ucc> (last visited June 1, 2020).

102 F. S. Knippenberg and W. J. Woodward, Uniformity and Efficiency in the Uniform Commercial Code: A Partial Research Agenda, 45 *Bus. Law.* 2519, 2520 (1990).

103 *Compare In re Pacific Gas and Electric Co.*, 271 B.R. 626, 635 (N.D. Cal. 2002) (finding that electricity is a good), with *Bowen v. Niagara Mohawk Power Corp.*, 183 A.D.2d 293, 297 (N.Y. App. Div. 1992) (finding that electricity is not a good).

104 W. A. Schnader, A Short History of the Preparation and Enactment of the Uniform Commercial Code, 22 *U. Miami L. Rev.* 1, 10 (1967).

105 Knippenberg & Woodward, *supra* note 102.

106 See P. Hodnefeld, Non-Uniform Filing Rules Will Remain Despite the 2010 Amendments to UCC Article 9, *ABA: Business Law Today* (July 31, 2013), https://www.americanbar.org/groups/business_law/publications/blt/2013/07/03_hodnefeld (identifying a sampling of significant non-uniform state departures from Article 9’s filing requirements).

107 See M. L. Weinstein, The Non-Uniform Commercial Code: The Creeping, Problematic Application of Article 9 to Determine Outcomes in Foreclosure Cases, 14 *U.N.H.L. Rev.* 267, 267 (2016).

108 *Ibid.* at 269.

- Clearly define the pre-emergency price against which any post-emergency price will be measured (e.g., the average non-promotional price (including markup) charged for the product or service in a given state (or, perhaps, emergency region if smaller than an entire state) during the 30-day period preceding the emergency declaration);
- Clearly articulate that the emergency can be declared by either the president of the United States (for an area as broad as the United States) or a state’s governor (for an area no broader than the governor’s state) but, if declared for the same area by both, shall last for the longer (or shorter) of the two emergency periods, if different;
- Clearly define the products or services to be subject to the statute, accounting for the possible differing needs of different regions (for example, the items likely to be in short supply and targets of gouging in Florida after a hurricane may well differ in some respects from those susceptible to gouging in Iowa in the wake of a blizzard);
- Allow retailers to limit the maximum number of each good or service covered by the gouging provision that may be purchased at any one time;
- Specify a threshold below which price increases cannot give rise to a price gouging violation;
- For price increases above a specified threshold, allow for reasonable defenses, including:

(i) Cost defenses: Permitting price increases traceable to demonstrable increases in cost plus the seller’s normal markup (where costs permissibly may include any cost directly or indirectly related to the manufacture and/or sale of a good, provision of a service, or the operation of the seller’s business, including, without limitation, input costs, labor, manufacturing, selling and overhead costs, transportation costs, actual and anticipated replacement costs, and opportunity costs (i.e., what could X have earned if it shipped the widget to Florida rather than diverting it to Texas; or what could X have earned if it used the cloth to make T-shirts rather than facial coverings?));

“Anticipated replacement costs” should expressly include estimated spot market purchases needed to fulfill increased demand, where such demand exceeds the volumes covered by contract(s);

(ii) Market fluctuation defenses: Permitting price increases occasioned by, and consistent with, fluctuations in applicable commodity, regional, national, or international markets (plus the seller’s normal markup);

(iii) Pre-emergency agreements: Permitting price increases linked to contracts or other price- or cost-related arrangements agreed to prior to the emergency.

- Identify the types of evidence that will be sufficient to satisfy each of these defenses so that sellers can obtain and maintain appropriate documentation to support their pricing actions;

- For investigations or litigation regarding alleged price gouging of products not sold by a given seller prior to a declared emergency, use the average pre-emergency, non-discounted price (calculated over a specified time period) of a comparable good or service as a starting point/baseline, but where the new seller’s price exceeds that baseline by an amount that would suggest price gouging, allow the new seller a form of cost defense; i.e., one that permits it to show that the price at which it is offering the good or service at issue does not exceed its total costs (including manufacturing costs, as applicable) by more than its usual markup or by X%, whichever is lower;
- Require that private suits, if permitted, yield to already initiated governmental actions, whether state or federal, covering the same conduct;
- In any private action (if permitted), include a mechanism to allow the defendant to obtain early termination (e.g., an early summary judgment-type proceeding) based upon presentation of evidence demonstrating the defendant’s ability to satisfy any available defense; and
- If the federal law permits lawsuits against upstream suppliers, allow all parties in the supply chain of the finished product or service to be joined in the same proceeding.

57. None of the currently pending federal price gouging bills addresses each of these concerns; and most address, at best, only a handful of them.¹⁰⁹

VII. The finish line—well, not really, but a step in the right direction

58. Human nature being what it is, no law is likely to ever fully eradicate profiteering. But laws or amendments, at the federal or state level or both, that would bring much-needed clarity, uniformity, and economic rationality to the price gouging legal landscape—and we submit that none of the currently pending federal legislation would

¹⁰⁹ For example, only one, the Price Gouging Prevention Act, H.R. 6450, 116th Cong. (2020), provides a threshold below which price increases cannot support a price gouging claim. Similarly, only one, the Ending Price-Gouging During Emergencies Act, S. 3574, 116th Cong. (2020), expressly allows for the parties that participated in an alleged violation to be joined in the same proceeding without regard to residence. Additionally, a majority of the currently pending federal price gouging bills could create significant ambiguity at the onset of a future pandemic through their imposition of a subjective “*unconscionably excessive*” standard for determining when price gouging has occurred. See COVID-19 Price Gouging Prevention Act, H.R. 6472, 116th Cong. § 2(a)(1) (2020); Disaster and Emergency Pricing Abuse Prevention Act, H.R. 6457, 116th Cong. § 3(a) (2020); The Heroes Act, H.R. 6800, 116th Cong. div. M tit. I § 130102(a)(1) (2020); Take Responsibility for Workers and Families Act, H.R. 6379, 116th Cong. div. U tit. I § 102(a)(1) (2020) (each applying an “*unconscionably excessive*” standard, with some proposals layering on top of this standard a “*grossly excessive*” standard).

achieve that goal—would be a step forward toward facilitating, and reducing the cost of, compliance by those (and there are many) who are just trying to bring essential products and services to market without being forced to do so in a way that does not cover their costs, or puts them at legal risk if they do. Of course, it is difficult to evaluate any such law without seeing the

proposed language and, perhaps, some actual experience with the law itself. But maybe, just as the pandemic has spurred efforts to find a medical cure, or at least improve treatment, for COVID-19, it can likewise improve the (legal) treatment of one of the virus's many sinister side effects: gross profiteering on the misfortunes of others. ■

Appendix

Table 1. 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 et seq.	
Alaska	2020 Alaska Sess. Laws Ch. 10, § 26	Alaska St. § 45.50.471 et seq.
American Samoa	Am. Samoa Code Ann. § 27.0903 et seq.	
Arizona		
Arkansas	Ark. Code Ann. § 4-88-303	
California	Cal. Penal Code § 396	
Colorado	Colo. Rev. Stat. Ann. § 6-1-730	Colo. Rev. Stat. Ann. § 6-1-101 et seq.
Connecticut	Conn. Gen. Stat. §§ 42-230; 42-232; 42-234	
Delaware		
District of Columbia	D.C. Code § 28-4101 et seq.	
Florida	Fla. Stat. § 501.160 et seq.	
Georgia	Ga. Code Ann. §§ 10-1-393.4; 10-1-438	
Guam	Guam Code tit. 5, § 32201(c)(21w)	
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 § 4-6-9.1-2	
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 et seq.	
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 et seq.	
Minnesota		
Mississippi	Miss. Code Ann. § 75-24-25	
Missouri	Mo. Code Regs. Ann. tit. 15, §§ 60-8.010 and 60-8.030	
Montana		Mont. Code Ann. § 30-14-103
Nebraska		Neb. Rev. Stat. § 87-303.01
Nevada		Nev. Rev. Stat. § 598 et seq.
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 et seq.
New York	N.Y. Gen. Bus. Law § 396-r	N.Y. Gen. Bus. Law § 349
North Carolina	N.C. Gen. Stat. §§ 75-37 to 75-38; § 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
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. Admin. Code ATPC § 106.02	
Wyoming		

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