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Regulating Economic Opportunism in Postdisaster Markets

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REGULATING ECONOMIC OPPORTUNISM IN POSTDISASTER MARKETS*

MAX N. HELVESTON**

Markets often falter during crises. Recently, the COVID-19 pandemic and the massive power grid collapse in Texas have caused market failures concerning medical supplies, paper goods, gasoline, electricity, and other necessities. By disrupting standard market conditions, disasters commonly lead to the supply of necessities being outpaced by demand. Some vendors seek to exploit this dynamic, increasing their prices exponentially and shamelessly engaging in disaster profiteering. While nearly every state has enacted anti-price gouging laws that proscribe such practices, these laws differ substantially from each other in what they prohibit and in how vigorously they have been enforced.

While anti-price gouging statutes have existed for decades, the scale of the market disruptions witnessed in the past few years have put them into the public consciousness like never before. While this publicity has led to coverage in popular media and a surge of interest from scholars, these laws have been severely undertheorized within the legal academy.

This Article addresses this gap. It begins by analyzing how states, the federal government, and other nations have regulated price gouging. It then reviews the types of exploitative conduct commercial actors have engaged in during recent disasters and the results of governmental enforcement actions. After reviewing the traditional legal and economic objections to anti-price gouging laws, it establishes the flaws in these arguments. Not only are these arguments shown to be theoretically unsound, but they are also demonstrably undermined by recent qualitative data. This Article concludes by arguing that the adoption of specific reforms to anti-price gouging laws would help them protect consumers from exploitation while minimizing negative externalities.

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INTRODUCTION

The global COVID-19 pandemic may well go down as the largest market-disrupting event in the modern era. As the virus spread across the globe throughout 2020, most consumers in the United States encountered greater difficulties in obtaining goods and services than they had ever experienced before.[1] Faced with drastic price increases, most individuals began suspecting that commercial entities were using the crisis as an excuse to exploit them.[2] Consumer groups successfully lobbied governmental bodies to take action and crack down on firms.[3] When doing so, state and federal officials primarily relied on a specific type of statute—anti-price gouging laws—to police commercial exploitation.

The story of Matt and Noah Colvin, two brothers who attempted to sell hand sanitizer online in the early months of the pandemic, provides an illustrative example of price gouging and state efforts to stop it. As COVID-19 began spreading across the United States, the Colvins noticed that demand for hand sanitizer and antibacterial wipes was high and that consumers were struggling to find retailers selling these products.[4] Identifying an economic opportunity, the brothers decided to go on a 1,300-mile shopping spree. One brother drove from town to town across Tennessee and Kentucky, stopping at any store that sold these products and purchasing their entire stock.[5] The other brother created listings for these goods on Amazon.[6] They asked for prices that were multiple times higher than their acquisition costs.[7] Despite this price increase, the first batch of hand sanitizer that they listed sold out immediately.[8]

1. *See, e.g.*, Jaana Remes & Sajal Kohli, *Shortages of Everyday Products Have Become the New Normal. Why They Won't End Soon.*, BARRON'S (Aug. 4, 2021, 5:00 AM), https://www.barrons.com/articles/shortages-of-everyday-products-have-become-the-new-normal-why-they-wont-end-soon-51628017580 [https://perma.cc/2J6A-YR4Q (staff-uploaded, dark archive)].

2. Michael Levenson, *Price Gouging Complaints Surge amid Coronavirus Pandemic*, N.Y. TIMES (Mar. 27, 2020), https://www.nytimes.com/2020/03/27/us/coronavirus-price-gouging-hand-sanitizer-masks-wipes.html [https://perma.cc/P78A-ZLNU (staff-uploaded, dark archive)].

3. Jennifer Dixon, *Price Gouging in Michigan AG's Sights After 1,600 Complaints from Consumers*, DET. FREE PRESS, https://www.freep.com/story/news/local/michigan/2020/03/24/coronavirus-covid-19-price-gouging-scams-michigan/2906986001/ [https://perma.cc/XYP8-FQ3M] (last updated Mar. 24, 2020, 6:46 PM).

4. Jack Nicas, *He Has 17,700 Bottles of Hand Sanitizer and Nowhere To Sell Them*, N.Y. TIMES, https://www.nytimes.com/2020/03/14/technology/coronavirus-purell-wipes-amazon-sellers.html [https://perma.cc/7FZQ-3RFC (staff-uploaded, dark archive)] (last updated Mar. 15, 2020).

5. Neil Vigdor, *Tennessee Brothers Who Hoarded Hand Sanitizer Settle To Avoid Price-Gouging Fine*, N.Y. TIMES, https://www.nytimes.com/2020/04/22/us/hand-sanitizer-matt-colvin-noah-coronavirus.html [https://perma.cc/YB4T-Q47N (staff-uploaded, dark archive)] (last updated June 22, 2020).

6. *Id.*

7. *Id.*

8. *Id.*

Their economic success, however, was fleeting. Amazon—who would be accused of facilitating price gouging by state attorneys general weeks later[9]—pulled the Colvins' listings the next day, leaving them without an avenue to sell the goods they had amassed.[10] Shortly afterwards, the Tennessee Attorney General's Office began an investigation into whether the brothers' conduct violated the state's anti-price gouging law.[11] Eventually the Colvins entered into a settlement with the State that absolved them of legal liability but required them to donate their remaining stock of cleaning supplies and promise to forbear from future price-gouging conduct.[12]

State actors' use of anti-price gouging laws in the COVID-19 pandemic is interesting for a number of reasons. First, invoking these laws during a pandemic constituted a novel use case for statutes that have predominantly been used to police market conduct after disasters that resulted in large-scale physical destruction like hurricanes and earthquakes.[13] Similarly, whereas the emergencies triggering price-gouging protections had previously been confined to smaller geographic areas, the global scope of the pandemic meant that the entire country was experiencing similar market disruptions.[14] Finally, the centrality of pandemic-related news meant that states' enforcement actions received unprecedented amounts of attention.[15] In a very short time, these laws went from relative obscurity to being front and center in the public's consciousness.

Anti-price gouging laws, despite occupying a unique position in the world of consumer protection, have been undertheorized by the legal academy. Many of the core statutes and regulations in this field—such as the Fair Credit Reporting Act, the Fair Debt Collection Practices Act, and the Truth in Lending Act—exist at the federal level. Prohibitions on price gouging, like laws against unfair and deceptive commercial practices, are matters of state law.[16] Even among state-based consumer protection laws, price-gouging regulations are distinctive in the degree to which their content varies from one state to

9. Alina Selyukh, *'Stop Price Gouging,' 33 Attorneys General Tell Amazon, Walmart, Others*, NPR (Mar. 25, 2020, 4:27 PM), https://www.npr.org/sections/coronavirus-live-updates/2020/03/25/821513190/stop-price-gouging-33-attorneys-general-tell-amazon-walmart-others [https://perma.cc/2A3K-3ZD6].

10. Vigdor, *supra* note 5.

11. *Id.*

12. Press Release, Herbert Slatery III, Tenn. Att'y Gen., AG Slatery Reaches Settlement with Colvin Brothers (Apr. 21, 2020, 8:59 AM), https://www.tn.gov/attorneygeneral/news/2020/4/21/pr20-13.html [https://perma.cc/73T2-8YBR] [hereinafter Press Release, AG Slatery Reaches Settlement].

13. *See* Michael Brewer, *Planning Disaster: Price Gouging Statutes and the Shortages They Create*, 72 BROOK. L. REV. 1101, 1101 (2007).

14. *See* Steve Parsons, *An Examination of Anti Price Gouging Laws and Shortages During COVID-19*, 22 LOY. J. PUB. INT. L. 37, 72–73 (2020).

15. *See, e.g.*, Selyukh, *supra* note 9.

16. The main exception to this—the Defense Production Act—is discussed *infra* Section I.B.

another.[17] Because prohibitions on price gouging were organically developed by different legislatures (as opposed to being based around a model law), there is a vast diversity in their substance.[18] For instance, state laws differ on what kind of pricing behavior constitutes gouging, what types of transactions fall within the law's scope, when the law's protections are triggered, the availability of civil and criminal punishments for violations, and more.[19]

While the idiosyncratic nature of states' anti-price gouging laws is noteworthy, perhaps their most distinctive characteristic is the extent to which these laws have remained popular despite seemingly unanimous opposition by economists and commercial entities.[20] From the enactment of the first anti-price gouging law to today, members of the academy and the private sector have lobbied against any form of pricing regulation.[21] Their primary arguments against price controls are that they create economic distortions that are harmful to consumers and that laissez-faire approaches yield better results for individuals.[22]

Anti-price gouging laws have also been attacked on legal and practical grounds. Commercial entities have challenged the constitutionality of applying a state's law to transactions that occur outside of its boundaries.[23] Commentators have argued that compliance with the different requirements imposed in states' laws is difficult or impossible.[24] Innovations in how firms

17. State prohibitions on unfair and deceptive practices, for instance, vary from one another in sometimes significant ways, but the core language of each is modeled off of the Federal Trade Commission Act. *See* CAROLYN L. CARTER, NAT'L CONSUMER L. CTR., CONSUMER PROTECTION IN THE STATES 9–10 (2018), https://www.nclc.org/resources/how-well-do-states-protect-consumers/ [https://perma.cc/X55L-YA7S (staff-uploaded archive)].

18. *See* discussion *infra* Part I.

19. *See* discussion *infra* Section I.A.

20. *See* Dwight R. Lee, *Making the Case Against "Price Gouging" Laws: A Challenge and an Opportunity*, 19 INDEP. REV. 583, 583 (2015) ("The general public's view is clearly reflected in the almost complete lack of political support for allowing prices to be determined by market forces after a natural disaster. Public opposition to 'price gouging' is highly emotional and clearly unites politicians.").

21. *See, e.g.*, Andrew Ross Sorkin, *Hurricane Price Gouging Is Despicable, Right? Not to Some Economists*, N.Y. TIMES (Sept. 11, 2017), https://www.nytimes.com/2017/09/11/business/hurricane-price-gouging.html [https://perma.cc/GA26-6RQB (staff-uploaded, dark archive)].

22. *See, e.g.*, Michael Giberson, *The Problem with Price Gouging Laws*, REGULATION, Spring 2011, at 48, 49, https://www.cato.org/sites/cato.org/files/serials/files/regulation/2011/4/regv34n1-1.pdf [https://perma.cc/3H7R-NA8M (staff-uploaded archive)].

23. *See, e.g.*, Online Merchs. Guild v. Cameron, 995 F.3d 540, 544 (6th Cir. 2021).

24. *See generally* MICHELLE K. FISCHER & TIFFANY D. LIPSCOMB-JACKSON, JONES DAY, AVOIDING PRICE-GOUGING PITFALLS WHILE NAVIGATING PRICE INCREASES IN THE ERA OF COVID-19 (2020), https://www.jonesday.com/-/media/files/publications/2020/08/avoiding-price-gouging-pitfalls-while-navigating-price-increases-in-the-era-of-covid19/files/avoiding-pricegouging-pitfalls/fileattachment/avoiding-pricegouging-pitfalls.pdf [https://perma.cc/B77Z-4E2C (staff-uploaded archive)] (seeking to help companies with the "difficult" task of adhering to the many anti-price gouging state statutes).

price and sell their goods have raised difficult questions about the compliance standards set forth in some states' laws.[25]

Despite these issues and a generally hostile climate for commercial regulation, the popularity of these laws has increased over time. Spurred on by the pandemic and other recent disasters, an increasing number of states have enacted new price-gouging protections for consumers or expanded their existing laws.[26] State attorneys general have also been more active in enforcing these laws against those engaging in exploitative conduct.[27]

Because of the massive economic disruption caused by the pandemic and high public interest in states' efforts to police the conduct of businesses, there has never been a better time to fully assess anti-price gouging laws. A number of questions immediately come to the forefront: (1) What, if anything, can recent experiences tell us about the impact these laws have in practice? (2) Have states that actively enforced their rules experienced the negative consequences forecast by economists? (3) Should our laws handle national or global market disruptions differently than more narrowly geographically restricted issues? (4) How, if at all, should state laws change to address the criticisms that have been levied at them?

There is a gap in the academic literature when it comes to anti-price gouging laws. Prior efforts have done an insufficient job of digging into the substance of these statutes and rarely considered whether empirical data supports their arguments. This Article fills this void. It provides a full account of the diversity present in states' laws, engages with the objections to these laws that others have raised, and proposes a set of reforms that would improve upon the status quo. Part I categorizes the different types of anti-price gouging statutes currently in effect in the United States and other nations. Part II then discusses how commercial actors have engaged in postdisaster price gouging and provides an overview of how states have enforced these laws in the modern era. Part III revisits and refutes the traditional legal and economic criticisms of anti-price gouging regulations. Finally, Part IV concludes by bringing together the insights developed in the earlier parts to describe the reforms that should be made to existing anti-price gouging laws. While existing laws do protect important consumer interests, there are modifications that could improve their effectiveness and minimize the risk of undue market disruptions.

25. Spencer Williams, Algorithmic Price Gouging 1–2 (2022) (unpublished manuscript) (on file with the North Carolina Law Review).

26. *See, e.g.*, COLO. REV. STAT. § 6-1-730 (LEXIS through all legislation from the 2023 Reg. Sess. effective as of June 30, 2023); 44 N.Y. Reg. 23 (Mar. 9, 2022).

27. *See* Mansee Khurana, *States Push Price-Gouging Measures as Coronavirus Fuels Consumer Fears*, NBC NEWS (Mar. 20, 2020, 4:30 PM), https://www.nbcnews.com/politics/politics-news/states-push-price-gouging-measures-coronavirus-fuels-consumer-fears-n1163846 [https://perma.cc/7G4B-CM86].

I. THE STATUS QUO OF PRICE-GOUGING REGULATION

Attempting to provide a blanket evaluation of states' anti-price gouging statutes—as if they were a highly uniform set of laws—is a mistaken endeavor. State prohibitions of predatory pricing vary across many dimensions, making it nearly impossible to make accurate generalizations about them. Despite this, existing commentary sometimes discusses them as if they were a monolith, with only minor deviations across different laws.[28]

This part remedies this deficit in the literature. It provides a more comprehensive discussion of states' anti-price gouging laws, drawing attention to their diversity. Drawing from the author's review of each state's anti-price gouging statutes, as well as federal law, this part identifies the axes of variation that differentiate regulatory approaches and provides illustrative examples of how these laws have been enforced. This survey, in conjunction with Part II's coverage of how these laws have actually been used, provides the foundation needed for the normative discussions found in Parts III and IV. In addition to reviewing state laws, the mechanisms by which the federal government and other nations have attempted to discourage this type of economic opportunism are described.

A. *Regulation of Price Gouging by State Governments*

Post-emergency price gouging is directly prohibited by statute in the majority of states.[29] Additionally, a handful of states police this type of conduct through consumer protection laws that are not specifically focused on price

28. *See generally* Donald 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 [https://perma.cc/PM3U-4BMZ (dark archive)] (arguing in support of price-gouging laws as a single group); Lee, *supra* note 20 (arguing against price-gouging laws as a single group); Matt Zwolinski, *The Ethics of Price Gouging*, 18 BUS. ETHICS Q. 347, 348–49 (2008) (describing laws in thirty-four states as generally defining gouging in three terms); Giberson, *supra* note 22, at 50 ("More typically, however, 'price gouging' claims involve three factors . . . ."); Emily Bae, *Are Anti-Price Gouging Legislations Effective Against Sellers During Disasters?*, 4 ENTREPRENEURIAL BUS. L.J. 79, 83 (2009) ("There are three types of anti-gouging laws in the US . . . ."). *But see* Kaitlin Caruso, *Price Gouging, the Pandemic, and What Comes Next*, 64 B.C. L. REV. 1797, 1829–30 (2023) ("Apart from the fact that states virtually never cut back their anti-gouging laws, there is no single direction in which states' anti-gouging laws have evolved."); Brian Skarbek & David Skarbek, *The Price Is Right!: Regulation, Reputation, and Recovery*, 6 DART. L.J. 235, 247 (2008) (describing the aspects of legislation "aimed at prohibiting or mitigating price gouging in the wake of a disaster" as "vary[ing] greatly from state to state").

29. *Price Gouging State Statutes*, NAT'L CONF. STATE LEGS., https://www.ncsl.org/financial-services/price-gouging-state-statutes [https://perma.cc/76BA-J42A] (last updated Mar. 10, 2022) [hereinafter *Price Gouging State Statutes*]. It should be noted that two of the thirty-seven state laws referenced by the National Conference of State Legislatures—Michigan and Ohio—are actually generic consumer protection statutes and would not qualify as an anti-price gouging statute as defined in this Article. *See id.*

gouging.[30] Some of these states have provisions in their general consumer protection laws that explicitly forbid price gouging;[31] others do not.[32] A third subset of jurisdictions have attempted to protect consumers exclusively through emergency protective orders.[33] Finally, there are states where price gouging is not prohibited and state actors have been unwilling to apply general consumer protection safeguards to such conduct.[34]

While some states' anti-price gouging statutes bear strong resemblances to one another, these laws are more idiosyncratic than uniform. The primary aspects where jurisdictions' laws vary include: (1) the sectors of commerce the law applies to, (2) the definition of what constitutes price gouging, (3) what triggers anti-price gouging protections, (4) the duration of these protections, (5) who has enforcement authority, (6) the penalties for violations, and (7) defenses to liability. The remainder of this section examines each of these characteristics, highlighting the different ways that state laws address these issues.

1. Sectors of Commerce

Even though anti-price gouging laws are commonly discussed as if they apply to all commercial transactions involving consumers, this is not the case in

30. Every state has laws—generally referred to as Unfair and Deceptive Trade Practices acts—that generally prohibit exploitative conduct in the course of commerce. CARTER, *supra* note 17, at 6. Some states without specific anti-price gouging statutes have brought actions against firms under these laws. *See* discussion *infra* Section II.A.

31. *See, e.g.*, TEX. BUS. & COM. CODE ANN. § 17.46(b)(27) (Westlaw through legislation effective July 1, 2023, of the 2023 Reg. Sess. of the 88th Leg.) (defining price gouging during a declared disaster to be a violation of the state's prohibition on deceptive trade practices); NEV. REV. STAT. § 598.09235 (2023) (same).

32. *See, e.g.*, Owen Masters, Nicollette R. Moser, Jennifer Tarr, John R. Ingrassia & Christopher E. Ondeck, *No Country for Price Gouging: States Can Punish Price Gouging Without Price Gouging-Specific Laws*, PROSKAUER: MINDING YOUR BUSINESS (May 11, 2020), https://www.mindingyourbusinesslitigation.com/2020/05/no-country-for-price-gouging-states-can-punish-price-gouging-without-price-gouging-specific-laws/ [https://perma.cc/8VV7-GHK4] (stating that the Montana Attorney General declared price gouging prohibited under the state's general prohibition on unfair business practices); *Price Gouging State Statutes*, *supra* note 29.

33. *See, e.g.*, Declaration of a State of Emergency for the State of Delaware Due to a Public Health Threat (Mar. 12, 2020), https://governor.delaware.gov/wp-content/uploads/sites/24/2020/03/State-of-Emergency_03122020.pdf [https://perma.cc/H44V-C79P]; Minn. Exec. Order No. 20-10 (Mar. 20, 2020), https://mn.gov/governor/assets/FINAL_EO-20-10_EO%2020-10%20Price%20Gouging%20%28002%29_tcm1055-424358.pdf [https://perma.cc/8V93-KRGC]; Md. Exec. Order No. 20-03-30-03 (Mar. 23, 2020), https://mbon.maryland.gov/Documents/covid-19-executive-orders/202003233-Gov-Hogan-Price-Gouging.pdf [https://perma.cc/V7H8-QPYR].

34. *See, e.g.*, Howard Fischer, *State Lacks Price Gouging Laws During Crises*, ARIZ. CAPITOL TIMES (Mar. 14, 2020), https://azcapitoltimes.com/news/2020/03/14/state-lacks-price-gouging-laws-during-crises/ [https://perma.cc/H95M-99ZP] (statement from attorney general); Beth Warden, *South Dakota Gasoline Price Questions: No Laws Against Price Gouging*, DAKOTA NEWS NOW (Dec. 7, 2022, 2:17 PM), https://www.dakotanewsnow.com/2022/12/07/south-dakota-gasoline-questions-no-laws-against-price-gouging/ [https://perma.cc/ND6E-LVEC] (statement from attorney general).

most jurisdictions. Instead, a closer look at these laws reveals large variances in the types of commercial activity that are targeted in different states. To the extent that they can be meaningfully grouped, the scope of state laws can be categorized as being broad, sector limited, or delegated.

A majority of state laws do not limit their application to transactions involving a specified set of goods and services.[35] Instead, they apply to consumer transactions broadly. Examples of the type of language used in this group of statutes include "essential consumer goods and services,"[36] "necessities,"[37] and basic goods and services including "medical supplies."[38] Functionally, once statutory protections have been triggered, these laws will govern most transactions between individuals and firms.[39]

A smaller number of state anti-price gouging laws have sector-limited scopes. The laws in states like Illinois and Indiana are quite limited and only apply to consumer transactions involving gas, fuel, or other forms of petroleum products.[40] In addition, there are a few state laws with limited, but not exclusively fuel-focused, scopes like Alabama (housing)[41] and Idaho (fuel, food, pharmaceutical, and water).[42] Other states in this group have more expansive lists. For instance, Tennessee's law applies to transactions involving consumer food items; repair or construction services; emergency supplies; medical supplies; building materials; gasoline; transportation, freight, and storage services; and housing.[43]

The last group contains statutes from four states, all of which delegate the responsibility of defining the scope of price-gouging protections to an executive branch official. These laws grant the state's governor (or another designated executive branch official) the ability to specify the types of transactions the law

35. *See Price Gouging State Statutes*, *supra* note 29.

36. ARK. CODE ANN. § 4-88-301 (LEXIS through all legislation of the 2023 Reg. Sess.).

37. ME. REV. STAT. ANN. tit. 10, § 1105 (Westlaw through the 2023 First Reg. Sess. and emergency legislation through chapter 441 of the First Spec. Sess. of the 131st Leg.).

38. CAL. PENAL CODE § 396 (Westlaw through Chapter 888 of the 2023 Reg. Sess.).

39. In the context of this Article, the term "firm" refers to any individual or business entity that sells a good or service. Thus, the Colvin brothers mentioned in the introduction constitute a firm, as would a gas station or mainstream retailers of home goods.

40. ILL. ADMIN. CODE tit. 14, §§ 465.10–.30 (2023) (petroleum products, such as fuel); IND. CODE § 4-6-9.1-2 (2023) (fuel); 940 MASS. CODE REGS. § 3.18 (2023) (petroleum products); VT. STAT. ANN. tit. 9, § 2461d (LEXIS through all legislation from the 2023 Reg. Sess.) (petroleum products and heating fuel products). Some of these states, like Illinois and Massachusetts, have expanded the scope of their laws through executive or administrative action. *See* Ill. Proclamation 2020-40, 44 Ill. Reg. 6201, 6203–04 (Apr. 1, 2020); 940 MASS. CODE REGS. § 3.18 (2020).

41. ALA. CODE § 8-31-3 (Westlaw through the end of the 2023 First Spec., Reg., and Second Spec. Sess.).

42. IDAHO CODE § 48-603 (LEXIS through all legislation from the 2023 Reg. Sess. and effective before July 1, 2023).

43. TENN. CODE ANN. § 47-18-5103 (LEXIS through the 2023 Reg. Sess.).

will apply to as part of a public declaration of emergency.[44] For example, a recent executive order issued by the governor of Georgia in response to a hurricane extended these protections to "goods and services necessary for preparation, response, and recovery activities for this State of Emergency, including motor fuel, diesel fuel, and other petroleum products."[45]

One other notable point of difference between state laws is whether they apply to sales between firms or just to firm-consumer sales. While most statutes simply state that their rules apply to *all* transactions occurring within the emergency zone, the laws of some states address this issue directly. For example, North Carolina's anti-price gouging law specifies that it governs "all parties in the chain of distribution, including . . . a manufacturer, supplier, wholesaler, distributor, or retail seller of goods or services."[46] A few other states' laws contain similar language.[47]

2. Definitions of Price Gouging

Perhaps the most regularly acknowledged way in which state anti-price gouging laws vary is in how they define exploitative conduct. Statutes have taken three different approaches. First, some have set percentage-based limits on the price increases that firms can impose following a disaster. Others have eschewed numerical standards and flatly prohibit firms from increasing prices altogether. Finally, some jurisdictions rely on common-law contract doctrines like unconscionability to determine whether a sale constitutes price gouging.

Many states have statutes that prohibit firms from increasing the prices on their products above a set percentage threshold.[48] These laws usually set the base price at the amount the good or service was sold at prior to the declaration that triggered the protections. For example, Oklahoma's law prohibits an increase in price "which is more than ten percent above the rate or price charged by the person for the same or similar goods . . . immediately prior to the

44. CONN. GEN. STAT. § 42-231 (2023); GA. CODE ANN. § 10-1-393.4 (LEXIS through 2023 Reg. Sess.); ME. REV. STAT. ANN. tit. 10, § 1105(2)(A)(2) (Westlaw through the 2023 First Reg. Sess. and emergency legislation through chapter 441 of the First Spec. Sess. of the 131st Leg.); W. VA. CODE § 46A-6J-3(d) (2023).

45. Ga. Exec. Order No. 09.27.22.01 (Sept. 27, 2022), https://gov.georgia.gov/document/2022-executive-orders/09272201/download [https://perma.cc/7TZ2-NMWB].

46. N.C. GEN. STAT. § 75-38(a) (LEXIS through Sess. Laws 2023-111 of the 2023 Reg. Sess. of the Gen. Assemb.).

47. *See* 73 PA. CONS. STAT. §§ 232.2, 232.4(a) (2023); N.Y. GEN. BUS. LAW § 396-r(1) (McKinney 2023).

48. *See* Parsons, *supra* note 14, at 43.

declaration of emergency."[49] The percentage threshold set by these laws ranges from 5% to 25%.[50]

One issue that laws utilizing this measure have encountered is how their limit applies to firms that are selling a product for the first time. While many statutes are silent on the issue, some set forth alternative standards. California, for instance, caps prices at "50 percent greater than the cost . . . to the vendor" for firms that did not charge a price for the goods or services "immediately prior to the onset of the state of emergency."[51] Others require that the local market price for the good prior to the emergency be used for new vendors.[52]

As an alternative to limiting price increases, some states prohibit *any* increase in the price of consumer goods and services. The reference price that the law looks to for determining if there has been an increase is set in one of two ways. Some statutes look to the prices that the same vendor charged before the disaster occurred. Georgia's law, for instance, bars the sale of products "at a price higher than the price . . . [they] were . . . offered [at] prior to the declaration of a state of emergency."[53] Other statutes look at the prevailing pre-emergency market price for the particular product. Mississippi's law utilizes this approach by requiring that prices "not exceed the prices ordinary charged for comparable goods or services in the same market area."[54]

The third category of laws consists of those that use concepts from the common law of contracts and equity to define impermissible market behaviors. There is a large amount of heterogeneity in the terms that statutes in this group use. Some states bar firms from charging "unconscionable" prices.[55] Beyond (or, sometimes, in addition to) unconscionability, anti-price gouging laws also reference concepts like excessiveness, exorbitance, or gross disparities. Idaho, for instance, prohibits "exorbitant or excessive" prices.[56] Similarly, Kentucky

49. OKLA. STAT. ANN. tit. 15, § 777.4(A) (Westlaw through legislation of the First Reg. Sess. of the 59th Leg. (2023) and the First Extraordinary Sess. of the 59th Leg. (2023) effective as of October 1, 2023).

50. NEV. REV. STAT. § 598.09235(3)(b) (2023) (5–15%); ALA. CODE § 8-31-4 (Westlaw through the end of the 2023 First Spec., Reg., and Second Spec. Sess.) (25%).

51. CAL. PENAL CODE § 396(b) (Westlaw through Chapter 888 of the 2023 Reg. Sess.). This provision of the statute was amended after the start of the COVID-19 pandemic to address the statute's applicability to new sellers and other issues. *See* Leo Caseria, *Amended California Price Gouging Law Closes Potential Loopholes*, NAT'L L. REV. (Jan. 7, 2021), https://www.natlawreview.com/article/amended-california-price-gouging-law-closes-potential-loopholes [https://perma.cc/DMW3-6WD5].

52. *See* VA. CODE ANN. § 59.1-527.2 (LEXIS through the 2023 Reg. Sess.).

53. GA. CODE ANN. § 10-1-393.4 (LEXIS through 2023 Reg. Sess.).

54. MISS. CODE ANN. § 75-24-25(2) (LEXIS through 2023 Reg. Sess. legislation effective July 1, 2023).

55. *See* ILL. ADMIN. CODE tit. 14, §§ 465.10 to .30(a)–(b) (2023); 940 MASS. CODE REGS. § 3.18(1)–(2) (2023).

56. IDAHO CODE § 48-603(19)(a) (LEXIS through all legislation from the 2023 Reg. Sess. and effective before July 1, 2023).

and Michigan prohibit sales at prices that are "grossly in excess" of previous prices.[57]

A number of states' statutes use a combination of these approaches to define exploitative conduct. This is particularly prevalent in states that define violations using common law concepts, but then include additional language indicating types of conduct that constitute a violation of those standards.[58] Alabama law employs a combination, barring "unconscionable" prices and then stating that a price increase "equal to or in excess of twenty-five percent" constitutes prima facie evidence of unconscionability.[59]

3. Anti-Price Gouging Protections Triggers

An aspect of anti-price gouging laws that is often overlooked is the extent to which they only place limits on commercial activity under certain circumstances. As will be discussed further in Part II, these statutes are intended to operate exclusively when extraordinary forces have disrupted consumer markets.[60] An unappreciated, but important, node of differentiation across these statutes is what must occur for their protections to be triggered. There is also considerable variation in the default duration of these market interventions.

Nearly every state's anti-price gouging law sets a governmental declaration of emergency as the primary mechanism for triggering price regulation. These statutes typically recognize the governor of the state as the position authorized to make such a declaration.[61] Some states, however, recognize declarations made by other entities. California's law recognizes declarations of emergency made by its governor, as well as by the President of the United States and declarations

57. KY. REV. STAT. ANN. § 367.374(1)(b) (Westlaw through the 2023 Reg. Sess. and the Nov. 8, 2022, election); MICH. COMP. LAWS § 445.903(1)(z) (2023).

58. *See* KAN. STAT. ANN. § 50-6,106(a)–(b)(1) (Westlaw through laws enacted during the 2023 Reg. Sess. of the Kansas Leg. effective on June 8, 2023); ME. REV. STAT. ANN. tit. 10, § 1105 (Westlaw through the 2023 First Reg. Sess. and emergency legislation through chapter 441 of the First Spec. Sess. of the 131st Leg.).

59. ALA. CODE § 8-31-4 (Westlaw through the end of the 2023 First Spec., Reg., and Second Spec. Sess.).

60. *See* discussion *infra* Sections II.A, II.B.

61. *See* ARK. CODE ANN. § 4-88-302(L)(1) (LEXIS through all legislation of the 2023 Reg. Sess.) ("'State of emergency' means a natural or man-made disaster or emergency resulting from a tornado, earthquake, flood, fire, riot, storm, act of war, threat of war, military action, or the time of instability following a terrorist attack for which a state of emergency has been declared by the President of the United States or the Governor."); KY. REV. STAT. ANN. § 367.374(1)(a) (stating that the state governor has the ability to trigger, terminate, or limit protections); ME. REV. STAT. ANN. tit. 10, § 1105(2) ("[T]he governor may, in the governor's sole discretion . . . declare an abnormal market disruption."); NEV. REV. STAT. § 598.09235(1), (6)(a) (2023) (instructing that the Governor or Legislature can institute a state of emergency or declaration of disaster necessary to trigger the statute); TENN. CODE ANN. § 47-18-5103(a)(1) (LEXIS through the 2023 Reg. Sess.) (stating that price protections are triggered by a gubernatorial declaration of emergency); WIS. STAT. § 100.305(2) (2022) (identifying a declaration by the governor as the trigger for protections).

of "local emergenc[ies] by an official, board, or other governing body vested with authority to make that declaration in any county, city or city and county."[62] South Carolina recognizes declarations made by its governor, the state's attorney general, or the President of the United States.[63] In addition to declarations made by its governor, Kentucky's price-gouging protections are triggered "[w]hen a Condition Red has been declared by the United States Department of Homeland Security under the Homeland Security Advisory System, [or] the Secretary of the Department of Health and Human Services, under Section 319 of the Public Health Service Act."[64]

The duration that each statute's protections are in effect also varies. At one end of the spectrum are states like West Virginia, where price restrictions remain in place for 180 days following a declaration of emergency.[65] In contrast, Kentucky's law is only in effect for 15 days following a declaration.[66] The statutes in many states do not designate a specific period of time, but impose price restrictions for the entirety of the duration of the declared emergency.[67] Further complicating matters, some states vary the duration depending on how the statute was triggered[68] or set different durations for different types of commercial services.[69] A number of states, for instance, protect prices for repair services for an extended period of time after an emergency.[70] Finally, at least one state has imposed statutory limits on the executive branch's ability to extend the duration that protections are in place.[71]

In contrast to the states with independent statutes, price-gouging prohibitions are always in effect in the jurisdictions that rely on general consumer protection laws. Michigan's law prohibits charging prices that are "grossly in excess" of the market price at all times, irrespective of whether there

62. CAL. PENAL CODE § 396(b) (Westlaw through Chapter 888 of the 2023 Reg. Sess.); *see also* UTAH CODE ANN. § 13-41-102(9) (LEXIS through the 2023 Second Spec. Sess. of the 65th Leg.).

63. S.C. CODE ANN. § 39-5-145 (A)(3), (B)(1), (C)(1) (Westlaw through 2023 Act No. 102, subject to final approval by the Legis. Council, technical revisions by the Code Commissioner, and publication in the Official Code of Laws).

64. KY. REV. STAT. ANN. § 367.374(1)(a).

65. W. VA. CODE § 46A-6J-3(b) (2023).

66. KY. REV. STAT. ANN. § 367.374(1)(a).

67. *See* 940 MASS. CODE REGS. § 3.18(1) (2023); 6 R.I. GEN. LAWS § 6-13-21(a) (LEXIS through Chapter 398 of the 2023 Sess.); S.C. CODE ANN. § 39-5-145(B)(2), (C)(2).

68. *See* UTAH CODE ANN. § 13-41-201(1) (LEXIS through the 2023 Second Spec. Sess. of the 65th Leg.).

69. *Compare* W. VA. CODE § 46A-6J-3(a), *with id.* § 46A-6J-3(b).

70. *See* CAL. PENAL CODE § 396(c) (Westlaw through Chapter 888 of 2023 Reg. Sess.); OKLA. STAT. ANN. tit. 15, § 777.4(B) (Westlaw through legislation of the First Reg. Sess. of the 59th Leg. (2023) and the First Extraordinary Sess. of the 59th Leg. (2023) effective as of October 1, 2023); ARK. CODE ANN. § 4-88-303(b)(1) (LEXIS through all legislation of the 2023 Reg. Sess.).

71. *See* KY. REV. STAT. ANN. §367.374(2).

has been a market disrupting event or declaration of emergency.[72] Laws in Kansas, Missouri, and Wisconsin operate in a similar fashion.[73]

4. Enforcement Authority and Penalties

Every state with anti-price gouging protections authorizes the state to enforce its provisions. The laws in a few states, however, also explicitly create private rights of action, allowing consumers to sue firms for violations of the law.[74] Creation of a novel statutory claim, however, is not common, with some statutes explicitly stating that no such claim exists.[75] Georgia's Act allows private enforcement, stating that "[a]ny person who suffers damage or injury as a result of a disaster related violation shall have a cause of action to recover actual damages, punitive damages, if appropriate, and reasonable attorney's fees."[76] Many of the laws that permit consumers to sue designate a violation of the price-gouging law to be a violation of the state's privately enforceable general consumer protection act.[77]

There is a large degree of variation when it comes to the penalties that firms face for price gouging in different states. First, many states that have an independent anti-price gouging statute directly adopt the penalty provisions set forth in their general consumer protection acts.[78] Among those that do not do so, the most common remedies are statutory damages, criminal liability, and equitable remedies.

Statutory damages for violating price-gouging laws range from a low of $99 to a high of $40,000 per violation.[79] The most common provisions impose

72. MICH. COMP. LAWS § 445.903(1)(z) (2023).

73. KAN. STAT. ANN. § 50-627(b)(2) (Westlaw through laws enacted during the 2023 Reg. Sess. of the Kansas Leg. effective on June 8, 2023); MO. CODE REGS. ANN. tit. 15, § 60-8.030 (2023); OHIO REV. CODE ANN. § 1345.03(A), (B)(2)–(3) (LEXIS through File 12 of the 135th Gen. Assemb. (2023–2024)).

74. *See, e.g.*, GA. CODE. ANN. § 10-1-438(c) (LEXIS through the 2023 Reg. Sess. of the Gen. Assemb.); HAW. REV. STAT. § 127A-30(e) (2023).

75. *See, e.g.*, IDAHO CODE § 48-603(19)(b) (LEXIS through all legislation from the 2023 Reg. Sess.); LA. STAT. ANN. § 29:732(G) (Westlaw through the 2023 First Extraordinary, Reg., and Veto Sess.); VA. CODE ANN. § 59.1-529 (LEXIS through the 2023 Reg. Sess.).

76. GA. CODE ANN. § 10-1-438(c).

77. *See, e.g.*, HAW. REV. STAT. § 127A-30(e); MISS. CODE ANN. § 75-24-25(6) (LEXIS through 2023 Reg. Sess. legislation effective July 1, 2023). Some acts that make this designation, however, explicitly state that private actions to enforce these violations is not allowed. *See, e.g.*, VA. CODE ANN. § 59.1-529.

78. *See, e.g.*, HAW. REV. STAT. § 127A-30(e); CONN. GEN. STAT. § 42-230 (2023). For scope reasons, this Article will not be discussing the remedies provided under states' unfair and deceptive practices laws. The National Consumer Law Center published a summary of these laws. CARTER, *supra* note 17, at 1.

79. CONN. GEN. STAT. § 42-230 ($99); IOWA CODE § 714.16(7) (2023) ($40,000).

fines up to either $1,000 per violation[80] or $10,000 per violation.[81] While some statutes state that each sale at an illegal price constitutes a separate violation of the statute, most do not expressly address this issue.[82] Additionally, a handful of states impose a $25,000-per-day ceiling on the amount a firm can be fined.[83] Finally, a few states specify unique methodologies for calculating fines—New York's law allows for a fine of up to "three times the gross receipts" of the violating transactions, and Utah's statute limits fines to two times the total amount the firm charged above the price limit.[84]

Many states' statutes also impose potential criminal liability on firms convicted of price gouging. Most commonly, violating the law constitutes a misdemeanor, carrying the possibility of up to a year of imprisonment and a fine.[85] In three jurisdictions, however, it can constitute a felony if the firm's violation is determined to be willful or exceeds certain monetary thresholds.[86]

Most anti-price gouging laws also contain provisions that allow courts to award injunctive relief, costs, and other equitable remedies. While most statutes accomplish this by incorporating the remedies provision of their state's general consumer protection acts, others explicitly authorize them.[87] Specific equitable remedies mentioned include "restitution"[88] and "disgorgement of profits."[89]

5. Defenses to Liability

A final major differentiating quality among anti-price gouging laws are express defenses to liability. Most laws recognize that not all price increases constitute sanctionable conduct and provide firms with the opportunity to show that they qualify for immunity. The most ubiquitous statutorily recognized justification is the "increased costs" defense, which excuses firms from liability if they can show that increases in their prices were due to additional costs the

80. *See, e.g.*, 6 R.I. GEN. LAWS § 6-13-21(e)(1) (LEXIS through Chapter 398 of the 2023 Sess.); ALA. CODE § 8-31-5(a) (Westlaw through the end of the 2023 First Spec., Reg., and Second Spec. Sess.); FLA. STAT. § 501.164 (2023); IND. CODE § 4-6-9.1-5 (2023).

81. *See, e.g.*, CAL. PENAL CODE § 396(h) (Westlaw through Chapter 888 of the 2023 Reg. Sess.); 73 PA. CONS. STAT. § 232.5(a) (2023).

82. *See, e.g.*, LA. STAT. ANN. § 29:732(C) (Westlaw through the 2023 First Extraordinary, Reg., and Veto Sess.); CONN. GEN. STAT. § 42-235(g).

83. *See, e.g.*, 6 R.I. GEN. LAWS § 6-13-21(e)(1); ALA. CODE § 8-31-5(a); FLA. STAT. § 501.164.

84. N.Y. GEN. BUS. LAW § 396-r(4) (McKinney 2023); UTAH CODE ANN. § 13-41-202(5)(b) (LEXIS through the 2023 Second Spec. Sess. of the 65th Leg.).

85. *See, e.g.*, CAL. PENAL CODE § 396(h).

86. MISS. CODE ANN. § 75-24-25(3) (LEXIS through 2023 Reg. Sess. legislation effective July 1, 2023) (willful and over $500 = felony); NEV. REV. STAT. § 598.0999(3) (2023) (willful and over $1,200 = felony); MO. ANN. STAT. § 407.020(3) (Westlaw through the end of the 2023 First Regular Session of the 102d Gen. Assemb.) (willful = felony). Note that all three of these states prosecute price gouging through their general consumer protection law.

87. *See, e.g.*, IND. CODE § 4-6-9.1-3 (2023); LA. STAT. ANN. § 29:732(D).

88. *See, e.g.*, N.Y. GEN. BUS. LAW § 396-r(4); 73 PA. CONS. STAT. § 232.5(a) (2023).

89. 6 R.I. GEN. LAWS § 6-13-21(e)(3) (LEXIS through Chapter 398 of the 2023 Sess.).

firm incurred.[90] The only states that do not include language to this effect either use a general consumer protection law to police gouging[91] or have an alternative mechanism for excusing firms from liability.[92]

One less-common defense excuses firms if they can demonstrate that they did not intend to violate the law. South Carolina's statute, for example, states that an individual may avoid criminal liability for violating the statute by "present[ing] evidence relating to . . . his knowledge or intent when committing" the underlying act.[93] Similarly, Hawai'i's statute recognizes a defense for firms that can show that their violation of the statute was unintentional and that they took remedial actions upon becoming aware of the law's requirements.[94]

Finally, some states allow firms to escape liability by showing that their prices were the result of seasonality or preexisting contractual requirements. Virginia's law allows a firm to escape liability altogether if it can show that the amount charged "was attributable solely to a regular seasonal or holiday adjustment in the price charged."[95] California is one of a few states that permits sales that would otherwise constitute gouging if the company can show that increases were the result of "previously contracted rates."[96]

B. *Regulation of Price Gouging by the Federal Government*

No federal law directly bans price gouging in the wake of an emergency. The Defense Production Act and the Sherman Act, however, provide avenues for federal actors to police such conduct.[97] Each statute prohibits behavior that is substantially coextensive with the price-gouging behaviors that state laws target.

First, the Defense Production Act provides a statutory basis for federal action when an executive order authorizes action. Section 4512 of the Act prohibits individuals from accumulating

90. *See, e.g.*, ALA. CODE § 8-31-4 (Westlaw through the end of the 2023 First Spec., Reg., and Second Spec. Sess.); FLA. STAT. § 501.160(1)(b) (2023).

91. *See, e.g.*, MICH. COMP. LAWS § 445.903 (2023).

92. *See, e.g.*, CONN. GEN. STAT. § 42-233 (2023); MASS. GEN. LAWS ANN. ch. 23, § 9H (Westlaw through chapter 6 of the 2023 1st Ann. Sess.); WIS. STAT. § 100.305(3) (2021–22).

93. S.C. CODE ANN. § 39-5-145 (Westlaw through 2023 Act No. 102, subject to final approval by the Legis. Council, technical revisions by the Code Commissioner, and publication in the Official Code of Laws).

94. HAW. REV. STAT. § 127A-30(d) (2023).

95. VA. CODE ANN. § 59.1-527(4) (LEXIS through the 2023 Reg. Sess.).

96. CAL. PENAL CODE § 396(d)–(e) (Westlaw through Chapter 888 of the 2023 Reg. Sess.); *see also* KY. REV. STAT. ANN. § 367.374(1)(c)(5) (Westlaw through the 2023 Reg. Sess. and the Nov. 8, 2022, election); NEV. REV. STAT. § 598.09235(3)(e) (2023).

97. Defense Production Act of 1950, ch. 932, 64 Stat. 798 (codified as amended at 50 U.S.C. §§ 4501–4568); Sherman Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1–7).

> (1) in excess of the reasonable demands of business, personal, or home consumption, or (2) for the purpose of resale at prices in excess of prevailing market prices, materials which have been designated by the President as scarce materials or materials the supply of which would be threatened by such accumulation.[98]

On its face, this provision's primary focus is on barring individuals from hoarding goods, not on prohibiting exploitative price increases. However, because the statute defines hoarding as including any procurement of an item for the purpose of resale at excess prices, it applies to any firm that attempts to arbitrage scarce goods.

This provision of the Defense Production Act has been used to combat price gouging in the wake of the COVID-19 pandemic. On March 23, 2020, the President of the United States issued an executive order that designated certain health and medical resources as scarce materials.[99] This designation was updated several times throughout the pandemic and led the Department of Justice to create a COVID-19 Hoarding and Price Gouging Task Force.[100] Federal prosecutors have brought charges under the Defense Production Act against commercial actors, often in conjunction with state authorities.[101]

Second, the Sherman Act prohibits any agreement among competitors to fix prices or engage in any other anticompetitive conduct.[102] While the prototypical incident of price gouging involves a single firm acting independently, the market dynamics that incentivize this type of advantage

98. 50 U.S.C. § 4512.

99. Exec. Order No. 13,910, 85 Fed. Reg. 17001 (Mar. 23, 2020); *see also* Statement on the Defense Production Act of 1950, 2020 DAILY COMP. PRES. DOC. 236 (Apr. 3, 2020).

100. *See* Extension of Designation of Scarce Materials or Threatened Materials Subject to COVID-19 Hoarding Prevention Measures Under Executive Order 13910 and Section 102 of the Defense Production Act of 1950, 85 Fed. Reg. 45895, 45895–96 (July 30, 2020); Extension of Designation of Scarce Materials or Threatened Materials Subject to COVID-19 Hoarding Prevention Measures, 86 Fed. Reg. 7731, 7731–32 (Feb. 1, 2021); Extension of Designation of Scarce Materials or Threatened Materials Subject to COVID-19 Hoarding Prevention Measures, 86 Fed. Reg. 35810, 35810 (July 7, 2021); Memorandum from William Barr, Att'y Gen., Dep't of Just. COVID-19 Hoarding and Price Gouging Task Force (Mar. 24, 2020).

101. *See, e.g.*, Press Release, U.S. Att'y Office, E.D.N.Y., Two Individuals Arrested for Conspiring To Violate the Defense Production Act (Apr. 28, 2020), https://www.justice.gov/usao-edny/pr/two-individuals-arrested-conspiring-violate-defense-production-act [https://perma.cc/V38G-8722] [hereinafter Press Release, Two Individuals Arrested]; Press Release, U.S. Att'y Office, N.D. Ga., Georgia Businessman Charged with Hoarding and Price Gouging Face Masks in Violation of Defense Production Act (Aug. 6, 2020), https://www.justice.gov/usao-ndga/pr/georgia-businessman-charged-hoarding-and-price-gouging-face-masks-violation-defense [https://perma.cc/8MJV-4N5W]; Craig Carpenito & Nicholas Grippo, *An Inside Look at DOJ Fight Against COVID-19 Price-Gouging*, LAW360 (June 24, 2020, 5:44 PM), https://www.law360.com/articles/1285498/an-inside-look-at-doj-fight-against-covid-19-price-gouging [https://perma.cc/4ABZ-QLZY (staff-uploaded, dark archive)].

102. 15 U.S.C. § 1. For further discussion of the use of antitrust law to police price gouging, see Ramsi A. Woodcock, *Towards a* Per Se *Rule Against Price Gouging*, CPI ANTITRUST CHRON., Sept. 2020, at 49, 49.

taking apply to groups as well as individuals. Despite the potential applicability of antitrust laws, however, it appears that it is unlikely that price gouging will be policed under their authority. There are several potential reasons as to why federal actors have resisted pursuing antitrust claims. Most significantly, antitrust actions that target price fixing generally concern market conduct that occurred over extended periods of time. Similarly, many other characteristics found in these types of antitrust suits—concerted action across multiple firms and market consolidation with the intent to increase price control—are not present in the typical emergency-related case. Regardless of the specific justification, it seems clear that federal actors are only interested in using the Defense Production Act, rather than antitrust laws, to police firms' conduct in postdisaster markets.[103]

C. *International Perspectives on Price-Gouging Laws*

How do the various approaches used in the United States compare to anti-price gouging measures in other countries? A quick survey of other countries' efforts reveals that there has been little consensus on the best way to protect consumers in emergency-disrupted markets. While each nation has its own idiosyncratic set of rules, echoes of different aspects of the United States' systems can be found in their approaches.

First, some regulatory schemes strongly resemble federal antitrust laws, such as the one enacted by the European Union. Under the Treaty on the Functioning of the European Union, the European Commission and EU member states are authorized to bring suit against price-gouging firms.[104] The agreement prohibits firms from using a dominant market position to impose unfair prices on consumers.[105] This bar is not dependent on the existence of a crisis, but emergency conditions have been recognized as making it substantially easier for regulators to prove that a firm occupied a dominant position in the market.[106] There is no set standard under the Treaty for determining whether a particular price was excessive.[107] South Africa typically uses a similar antitrust-centered framework,[108] although it supplemented this approach with specific rules prohibiting price increases on essential goods during the COVID-19 pandemic.[109]

103. *See* Carpenito & Grippo, *supra* note 101.

104. Penelope Giosa, *Exploitative Pricing in the Time of Coronavirus—The Response of EU Competition Law and the Prospect of Price Regulation*, 11 J. EUR. COMPETITION L. & PRAC. 499, 500 (2020).

105. *Id.* at 501.

106. *Id.* at 502.

107. *Id.*

108. John Oxenham, Michael-James Currie & Charl van der Merwe, *COVID-19 Price Gouging Cases in South Africa: Short-Term Market Dynamics with Long-Term Implications for Excessive Pricing Cases*, 11 J. EUR. COMPETITION L. & PRAC. 524, 524 (2020).

109. *Id.* at 525.

Second, some nations' rules are similar to state anti-price gouging laws in requiring a formal declaration of an emergency or crisis. France, in addition to regulating price gouging through the Treaty on the Functioning of the European Union, has a law that enables the nation to impose price controls in exceptional cases.[110] The country's highest administrative court and a consumer protection administrative body determine whether emergency conditions exist that are sufficient to trigger this law.[111] The French government activated these protections in reaction to the COVID-19 pandemic, limiting prices for hand sanitizer.[112]

Finally, there are countries that resemble the United States by having nonfederal governmental bodies as the primary regulators of price gouging. In Canada, there is not a federal prohibition against price gouging and its authority to act in this area is extremely limited.[113] Unlike many countries, Canada's antitrust laws do not provide grounds for taking action against this type of exploitative conduct as their laws do not prohibit excessive pricing.[114] Provincial governments have filled this regulatory void. Each of the provinces has taken a unique approach to this issue, with some mirroring different aspects of the state laws discussed earlier.[115]

II. CONSUMER EXPLOITATION IN POSTDISASTER MARKETS AND PUBLIC ENFORCEMENT ACTIONS

Before attempting to critique existing laws or prescribe reforms, it is important to get as complete of an understanding as possible of how price-gouging regulation occurs in the real world. The previous part's survey of state laws provides a significant foundation for this, but it is insufficient on its own. While knowing the content of existing laws is important, it is equally important to understand the types of price-gouging behaviors firms have *actually* engaged in and how states have *actually* enforced their laws.

The degree to which governmental actions targeting postdisaster price gouging receive popular support creates an interesting political dynamic for state regulators. Despite the hyperpartisanship of modern politics, it appears that individuals across the political spectrum approve of these types of market

110. REED SMITH LLP, GLOBAL PRICE GOUGING LAWS 9–14 (2020), https://online.fliphtml5.com/fvqbe/nifu/#p=1 [https://perma.cc/A5EJ-A3K2].

111. *Id.*

112. Sam Schechner, *France To Cap Hand Sanitizer Prices After Gouging Incidents*, WALL ST. J., https://www.wsj.com/livecoverage/coronavirus/card/8CDUaZRGBnPcRCUYGHru [https://perma.cc/T8FQ-AFNW (staff-uploaded, dark archive)] (last updated Mar. 4, 2020, 6:40 PM).

113. Anthony Baldanza, Noah Boudreau & Justine Reisler, *Price Gouging Prohibitions Across Canada*, COMPETITION CHRON. (July 7, 2020), https://www.competitionchronicle.com/2020/07/price-gouging-prohibitions-across-canada/ [https://perma.cc/CH9M-69RB].

114. *Id.*

115. *Id.*

controls.[116] This dynamic has created an environment that encourages state actors to enforce their laws and ensure that the public is aware of their efforts. Indeed, it has become common for state attorneys general to broadcast information about each of their price-gouging actions to their constituencies.[117]

Unlike previous academic discussions on this topic, this part directly addresses both of these issues.[118] Analyzing actual market and regulator conduct provides a number of insights that will play a crucial role in Part III's rebuttal of the criticisms leveled at anti-price gouging laws. Among the most important of these observations are the regularity with which firms attempt to price gouge in postdisaster markets, the fact that regulators stop most price-gouging behaviors without involvement of the judiciary (for example, via cease-and-desist letters), and that the majority of individuals that are formally sued end up resolving the claims through a settlement agreement.

Two limitations, however, need to be acknowledged. First, the lack of a singular definition of price gouging complicates attempts to discuss instances of it occurring at a national scale. Similarly, empirical limitations make it hard to determine just how frequently firms are acting in ways that violate these laws. Despite these issues, it is possible to get a sense of how firms have acted in emergency markets and how laws have been enforced through media reports, statements from public enforcement authorities, and judicial records.

This part gives an account of ways that firms have engaged in price-gouging behaviors over the last twenty years. It also describes the actions that state and federal enforcement authorities have taken to enforce their laws. It begins by considering incidents that occurred during the COVID-19 pandemic,

116. *See* Casey Klofstad & Joseph Uscinski, *Expert Opinions and Negative Externalities Do Not Decrease Support for Anti-Price Gouging Policies*, 10 RSCH. & POL. art. no. 10.1177/20531680231194805, at 5. *See generally* MORNING CONSULT & POLITICO, NATIONAL TRACKING POLL #2205143 (2022), https://assets.morningconsult.com/wp-uploads/2022/05/24132604/2205143_crosstabs_POLITICO_RVs_v2_SH_05-25-22.pdf [https://perma.cc/2BA2-96AC] (establishing broad support for anti-price gouging laws in national polls).

117. *See, e.g.*, Press Release, Steve Marshall, Ala. Att'y Gen., Attorney General Steve Marshall Warns Against Price Gouging as Alabama Under State of Emergency in Advance of Hurricane Sally (Sept. 15, 2020), https://www.alabamaag.gov/attorney-general-steve-marshall-warns-against-price-gouging-as-alabama-under-state-of-emergency-in-advance-of-hurricane-sally/ [https://perma.cc/SN49-DTUL]; Press Release, Mark Herring, Va. Att'y Gen., Attorney General Herring Takes Further Action Against Covid-Related Price Gouging (Mar. 11, 2021), https://www.oag.state.va.us/consumer-protection/index.php/news/465-march-11-2021-herring-takes-further-action-against-covid-related-price-gouging [https://perma.cc/UM7W-BTMP].

118. For examples of past discussions that do not directly address both issues, see generally Dreda Culpepper & Walter Block, *Price Gouging in the Katrina Aftermath: Free Markets at Work*, 35 INT'L. J. SOC. ECON. 512 (2008) (critiquing anti-price gouging laws without discussing how authorities have enforced them); Zwolinski, *supra* note 28, at 348; W. David Montgomery, Robert A. Baron & Mary K. Weisskopf, *Potential Effects of Proposed Price Gouging Legislation on the Cost and Severity of Gasoline Supply Interruptions*, 3 J. COMP. L. & ECON. 357 (2007) (drawing broad conclusion on the basis of an FTC study of alleged price gouging of a single product after Hurricane Katrina).

then discusses those that took place during previous market-disrupting emergencies.

A. *Price Gouging During the COVID-19 Pandemic*

The COVID-19 pandemic witnessed a surge in instances of price gouging that went far beyond prior disasters. Just three weeks after the President's declaration of a national emergency, consumer protection agencies and attorneys general were inundated with complaints about firms engaging in illegal practices. Michigan's Office of the Attorney General, for example, received over 1,600 price-gouging complaints by the end of March.[119] Similarly, Kentucky officials received over 1,500 consumer reports in the same period.[120] Even in states that experienced less drastic increases, the number of complaints was unprecedented.[121]

Public outcry concerning firms' attempts to take economic advantage of the pandemic spurred public officials into action. Within a month of the declaration, state attorneys general had begun efforts to spread awareness of prohibitions on price gouging and investigate firms. For instance, during this period of time, Virginia reported sending over 150 investigative letters to firms[122] and New York issued 550 violation notices.[123]

As their investigations revealed that some firms were clearly violating the law, enforcement authorities turned to a variety of different measures to enforce their laws. Michigan's attorney general stated that her office attempted to resolve all matters informally through notifications and cease-and-desist letters, but later filed suit against businesses that repeatedly failed to comply with the law.[124] Similarly, the Office of the Attorney General of New York sent cease-and-desist letters to companies accused of price gouging before pursuing formal claims.[125] This "informal measures first" approach appears to be representative

119. Dixon, *supra* note 3.

120. Levenson, *supra* note 2.

121. *Id.*

122. Press Release, Mark Herring, Va. Att'y Gen., Attorney General Herring Files Price Gouging Lawsuit (Aug 13, 2021), https://www.oag.state.va.us/consumer-protection/index.php/news/489-august-13-2021-herring-files-price-gouging-lawsuit [https://perma.cc/NVA6-B7KJ] [hereinafter Press Release, Virginia Attorney General Files Suit].

123. Associated Press, *Price-Gouging Reaching Unconscionable Levels*, COURTHOUSE NEWS SERV. (Mar. 20, 2020), https://www.courthousenews.com/price-gouging-reaching-unconscionable-levels/ [https://perma.cc/7UZU-EXW6].

124. Dixon, *supra* note 3.

125. Press Release, Letitia James, N.Y. Att'y Gen., AG James: Price Gouging Will Not Be Tolerated (Mar. 10, 2020), https://ag.ny.gov/press-release/2020/ag-james-price-gouging-will-not-be-tolerated [https://perma.cc/FNW6-7H39]; Cease & Desist Letter from Jane M. Azia, Bureau Chief, Off. of N.Y. Att'y Gen., to Scheman & Grant Hardware (Mar. 9, 2020), https://ag.ny.gov/sites/default/files/2020.03.09_scheman_grant_hardware_cease_desist_0.pdf [https://perma.cc/5QP6-8S9P].

of most other states' efforts and is in line with how state officials have enforced their general consumer protection statutes.[126] As showcased throughout the profiles on specific violations discussed below, many violations were resolved through some type of presuit settlement agreement between the state and the seller. Pennsylvania's attorney general, for instance, reported extensively on his office's use of Assurances of Voluntary Compliance agreements to resolve consumer complaints about firms charging excessive prices.[127]

1. Sales of Face Masks and Personal Protective Equipment

A large percentage of reported price-gouging incidents involved firms selling face masks and other personal protective equipment ("PPE"). In California, a pharmacist became the first person charged with violating the state's price-gouging law during the pandemic.[128] After an initial investigation, the state's Department of Justice issued a warning to the pharmacist about the illegality of selling face masks at prices more than 10% higher than their pre-emergency price.[129] Despite agreeing to comply with the law's requirements, the pharmacist continued selling the masks at the same rate, leading to the State bringing misdemeanor charges against her.[130]

In Colorado, allegations concerning the illegal sale of masks and other PPE led to the State's first settlement under its newly enacted anti-price gouging law.[131] The state's attorney general filed charges against Nationwide Expos, a corporation that was created after the beginning of the pandemic and primarily existed to arbitrage PPE and supplies.[132] Among other claims, the complaint alleged that the business violated the Colorado Consumer Protection Act's prohibition on charging "excessive" prices during a declared emergency by increasing prices on these goods to around 250% over their cost of acquisition.[133]

126. Press Release, Virginia Attorney General Files Suit, *supra* note 122.

127. Press Release, Josh Shapiro, Pa. Att'y Gen., AG Shapiro Stops Price Gouging at Two Northeastern Pennsylvania Medical Supply Companies (Aug. 3, 2020), https://www.attorneygeneral.gov/taking-action/ag-shapiro-stops-price-gouging-at-two-northeastern-pennsylvania-medical-supply-companies/ [https://perma.cc/LM6B-ZAMC].

128. Press Release, Xavier Becerra, Cal. Att'y Gen., Attorney General Becerra: Charges Filed Against Los Angeles County Pharmacist for Price Gouging on Masks (June 18, 2020), https://oag.ca.gov/news/press-releases/attorney-general-becerra-charges-filed-against-los-angeles-county-pharmacist [https://perma.cc/QLP5-Q87U].

129. *Id.*

130. *Id.*

131. Marianne Goodland, *Colorado Attorney General Weiser Obtains Settlement on Price-Gouging of PPE*, GAZETTE (Jan. 25, 2021), https://gazette.com/colorado_politics/colorado-attorney-general-weiser-obtains-settlement-on-price-gouging-of-ppe/article_9b31cd3d-cbe6-5534-93ac-3c6fbfe25c2d.html [https://perma.cc/6CRA-TEUH (staff-uploaded, dark archive)].

132. Assurance of Discontinuance, Philip Weiser, Colo. Att'y Gen., In the Matter of Nationwide Medical Supply Inc. (Jan. 17, 2021), https://coag.gov/app/uploads/2021/01/Nationwide-Assurance.pdf [https://perma.cc/C834-Y8JA]; *see also* Goodland, *supra* note 131.

133. Assurance of Discontinuance, *supra* note 132.

Under the terms of the settlement, the company agreed to make extensive revisions to its business practices, submit to regular auditing, and pay $70,000 to the State in restitution and to cover its attorneys' fees.[134]

Public concern about the affordability of masks was large enough to motivate states that do not have a history of policing prices to take action. Alaska sued an individual that was arbitraging thousands of protective masks through online marketplaces.[135] The State's complaint alleged that he sold these masks at an average price that was over four times the rate the masks sold for prior to the pandemic.[136] Given the state's lack of any price-gouging laws, it had to allege that the individual's pricing decisions constituted "unfair trade acts or practices" that violated Alaska's Unfair Trade Practices Act.[137] Because the State had to bring claims under this more general law, the defendant's liability would depend on a determination of whether their conduct was "unfair," rather than whether they violated the more specific statutory requirements that anti-price gouging laws typically contain.

The commercial entities targeted by state enforcement entities varied wildly with regard to firm size, the number of masks sold, and the degree of markup. On one end of this spectrum is a suit brought by the Attorney General of North Carolina against a New Jersey company in connection with offers it made to sell seven million N95 masks to health care entities at twice the retail rate.[138] The company ended up entering into a consent agreement that required it to pay $150,000 in civil penalties and to comply with legal requirements going forward.[139]

On the other end of the spectrum is a suit brought by the Attorney General of Ohio against an individual selling masks through a popular online marketplace. The State alleged that the individual hoarded approximately 1,200 N95 masks and sold them online for almost eighteen times their standard retail price.[140] In settling the claims, the seller agreed to refund $15,000 to his previous customers, pay the State for its investigation costs, and donate 570 masks to

134. *Id.*

135. Press Release, Kevin G. Clarkson, Alaska Att'y Gen., Attorney General Files Price Gouging Lawsuit Against Online Seller (Apr. 1, 2020), https://law.alaska.gov/press/releases/2020/040120-Aune.html [https://perma.cc/8LJT-AXKH].

136. *Id.*

137. *Id.*

138. Press Release, Josh Stein, N.C. Att'y Gen., Attorney General Josh Stein Wins $150,000 in PPE Price Gouging Judgment (Oct. 29, 2020), https://ncdoj.gov/attorney-general-josh-stein-wins-150000-in-ppe-price-gouging-judgment/ [https://perma.cc/L6HD-57XX].

139. *Id.*

140. Press Release, Dave Yost, Ohio Att'y Gen., Yost Files Suit Against PPE Price Gougers Who Sold N95 Masks for Nearly 18 Times the Retail Price (Apr. 14, 2020), https://www.ohioattorneygeneral.gov/Media/News-Releases/April-2020/Yost-Files-Suit-Against-PPE-Price-Gougers-Who-Sold [https://perma.cc/7H2T-KRJF].

health care providers.[141] Texas brought similar claims against an individual who, despite warnings from state officials, ran an online auction for N95 masks.[142]

Suits filed in two other states provide two additional examples of the variety of claims brought against entities selling masks. State officials in Missouri filed suit against a large retailer of homeopathic goods alleging that it was selling masks at four or five times their normal retail prices through the business's website.[143] Vermont settled price-gouging claims that it brought against a "public and private transportation" firm in connection with its sale of protective masks at twenty-five times its cost of acquisition.[144] Under the terms of the settlement, the firm had to provide nearly 90,000 units of PPE to a health care provider and the State, and agree that it would no longer sell medical goods at exorbitant prices.[145]

2. Sales of Hand Sanitizer and Cleaning Products

Cleaning products were the other major group of goods that firms attempted to sell at illegal prices. As reflected in the following snapshots, those charged in connection with the sale of these goods tended to be smaller retail operations or individuals reselling goods through online marketplaces. Most of the accused firms settled the claims against them, either prior to the suit being filed or shortly afterwards.

The most well-known instance of attempted price gouging of cleaning products is likely the incident involving the Colvin brothers referenced in the introduction.[146] In the early days of the pandemic, the two brothers hoarded and tried to resell cleaning products.[147] As profiled in The New York Times, the duo went on a three-day, 1,300-mile road trip wherein they purchased all of the bottles of hand sanitizer and packages of antibacterial wipes they could find.[148] They intended to mark up and sell these items (as well as additional supplies

141. Jonathan Walsh, *Man Settles Lawsuit Accusing Him of Price Gouging N95 Masks, but Doesn't Admit Liability*, ABC NEWS CLEVELAND, https://www.news5cleveland.com/rebound/coronavirus-investigations/man-settles-lawsuit-accusing-him-of-price-gouging-n95-masks-but-doesnt-admit-liability [https://perma.cc/AVY2-LMF4] (last updated Apr. 23, 2020, 6:05 PM).

142. Press Release, Ken Paxton, Tex. Att'y Gen., AG Paxton Files Lawsuit To Halt Price Gouging at Auctions Unlimited LLC (Mar. 26, 2020), https://www.texasattorneygeneral.gov/news/releases/ag-paxton-files-lawsuit-halt-price-gouging-auctions-unlimited-llc [https://perma.cc/LFM8-QU2Z].

143. Ashley RK Smith, *AG Schmitt Files Lawsuit Against Branson-Area Business for Inflated Mask Prices, Deceptive Sales Practices*, KFVS12, https://www.kfvs12.com/2020/05/21/ag-schmitt-files-lawsuit-against-branson-area-business-inflated-mask-prices-deceptive-sales-practices/ [https://perma.cc/TTA6-2U9W] (last updated May 21, 2020, 5:57 PM).

144. Press Release, T.J. Donovan, Vt. Att'y Gen., Attorney General Donovan Resolves Price-Gouging Case (Dec. 21, 2020), https://ago.vermont.gov/blog/2020/12/21/attorney-general-donovan-resolves-price-gouging-case/ [https://perma.cc/URT8-JJX4].

145. *Id.*

146. *See supra* notes 4–12 and accompanying text.

147. Nicas, *supra* note 4.

148. *Id.*

they had ordered from other vendors online) through online marketplaces.[149] Their plans were scuttled when the online marketplaces pulled the listings for their products.[150] The attorney general began an expedited investigation into the brothers' conduct and notified them that their actions had violated the state's prohibition on charging prices "grossly in excess" of pre-emergency prices.[151] Before charges were filed, the brothers agreed to surrender all of their supplies to a nonprofit organization and to not violate the state's anti-price gouging law in the future.[152]

A similar incident occurred in Iowa, where the first person to be sued for price gouging under the Iowa Consumer Fraud Act was an individual who had listed 272 different paper and cleaning goods for sale at marked-up prices on online marketplaces.[153] Prior to being sued, the man had repeatedly ignored warnings that the state's attorney general had sent that notified him that his prices were excessive and in violation of state law.[154] The parties eventually settled the claims, with the individual promising to refrain from reselling consumer items online and paying a $3,000 fine.[155] Later that year, the State filed suit and settled claims against the man's sister for engaging in similar conduct.[156] Similarly, Ohio's attorney general brought claims against a couple that sold hundreds of bottles of hand sanitizer online for eleven times the normal retail price.[157]

Attempting to sell cleaning products at extortionate rates was not exclusively the domain of individuals. Washington, D.C.'s attorney general filed its first pandemic-related suit against a convenience store that was selling

149. *Id.*

150. *Id.*

151. Press Release, AG Slatery Reaches Settlement, *supra* note 12.

152. Vigdor, *supra* note 5.

153. Nick Hytrek, *Orange City Man Accused of Price-Gouging Agrees To Stop Online Sales*, SIOUX CITY J. (Jan. 26, 2021), https://siouxcityjournal.com/news/local/crime-and-courts/orange-city-man-accused-of-price-gouging-agrees-to-stop-online-sales/article_4e5a386d-fbb3-539d-850c-85899bf9dc81.html [https://perma.cc/3XT6-8WYT (dark archive)].

154. Linh Ta, *Iowa AG Accuses Orange City Man of Price Gouging*, IOWA CAP. DISPATCH (Apr. 27, 2020), https://iowacapitaldispatch.com/briefs/iowa-ag-accuses-orange-city-man-of-price-gouging/ [https://perma.cc/QDQ8-7YCD].

155. Hytrek, *supra* note 153.

156. Maya C. Miller, *Iowa Attorney General Tom Miller Sues Second Alleged eBay Price Gouger During Pandemic*, DES MOINES REG. (Aug. 5, 2020, 5:09 PM), https://www.desmoinesregister.com/story/news/crime-and-courts/2020/08/05/iowa-ag-miller-sues-second-orange-city-resident-ebay-price-gouging/3302949001/ [https://perma.cc/YJU6-ZVLH (dark archive)].

157. Press Release, Dave Yost, Ohio Att'y Gen., AG Yost Sues Price Gougers Who Inflated Hand Sanitizer Prices on Amazon (June 18, 2020), https://www.ohioattorneygeneral.gov/Media/News-Releases/June-2020/AG-Yost-Sues-Price-Gougers-Who-Inflated-Hand-Sanit [https://perma.cc/42EY-6WFD].

cleaning products, like bleach, at a 200% markup.[158] Like the Iowan reseller, the retailer first received a cease-and-desist letter from the State and was only sued after it continued to violate the law.[159] Officials in New York fined a small hardware store for engaging in similar conduct.[160] Not all offenders were small firms though. In Michigan, a national "big box" retailer was issued a cease-and-desist order in connection to accusations that it had raised prices on cleaning products.[161]

3. Other Goods and Services

In addition to policing sales of masks and cleaning supplies, many states leveled price-gouging accusations against firms that sold things with less obvious connections to the pandemic. Presumably, these states' actions were motivated by a belief that the pandemic's economic disruptions were severe enough to undermine competitive market forces generally, not just with regard to goods experiencing higher demand. There does not appear to be any strong pattern or consistency across jurisdictions concerning the types of transactions or business entities that states acted against.

Several states brought price-gouging claims against commercial entities involved in the production and sale of food items. California officials sued a grocery store that raised prices on food items by 60% to 400% after the declaration of emergency.[162] The company eventually agreed to donate $20,000 to a local food bank in exchange for having the charges dropped.[163] Two years into the pandemic, New York issued price-gouging warnings to over thirty retailers when supply chain disruptions created a national shortage of baby formula.[164]

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158. Press Release, Karl Racine, D.C. Att'y Gen., AG Racine Files First Price Gouging Lawsuit Against Ward 7 Convenience Store (May 4, 2020), https://oag.dc.gov/release/ag-racine-files-first-price-gouging-lawsuit [https://perma.cc/V97R-CWVA].

159. *Id.*

160. Jesse McKinley, *Cuomo's Fix for Sanitizer Shortage: 100,000 Gallons Made by Prisoners*, N.Y. TIMES, https://www.nytimes.com/2020/03/09/nyregion/coronavirus-newyork-sanitizer.html [https://perma.cc/8WQ4-3Q4C (staff-uploaded, dark archive)] (last updated Mar. 10, 2020).

161. Khaleda Rahman, *Menards Accused of Price Gouging Face Masks, Bleach and Other Cleaning Products amid Coronavirus Panic*, NEWSWEEK (Mar. 18, 2020, 9:26 AM), https://www.newsweek.com/menards-accused-price-gouging-coronavirus-pandemic-1492949 [https://perma.cc/68W9-ULEX (dark archive)].

162. Don Sweeney, *Price-Gouging at California Grocery Store Included 400% Markups, Prosecutor Says*, SACRAMENTO BEE (Apr. 20, 2021, 1:13 PM), https://www.sacbee.com/news/california/article250816109.html [https://perma.cc/VKZ5-VBT8 (staff-uploaded, dark archive)].

163. *Id.*

164. Press Release, Letitia James, N.Y. Att'y Gen., Attorney General James Issues Warnings to More than 30 Retailers To Stop Overcharging for Baby Formula (May 27, 2022), https://ag.ny.gov/press-release/2022/attorney-general-james-issues-warnings-more-30-retailers-stop-overcharging-baby [https://perma.cc/6DJA-HLFV].

Three states alleged that egg producers had violated pricing protections. In Minnesota, the State claimed that a company violated the state's executive order barring excessive and opportunistic price increases on necessities.[165] The State alleged that the firm increased the price of its eggs threefold at the beginning of the pandemic, resulting in an additional $2.1 million in revenue from sales in the state.[166] Minnesota's suit echoed suits that New York and Texas had filed against other egg producers earlier in the pandemic.[167]

Finally, there were state actions that targeted transit-related firms. Idaho's attorney general brought price-gouging claims against three gas retailers for charging excessive prices during the pandemic.[168] The companies ended up settling, agreeing to comply with state law requirements and to provide consumers with $1.5 million in gasoline sale credits.[169] Virginia brought claims against a gasoline retailer that it alleged charged prices that were approximately 20–33% higher than it had prior to declaration of the emergency.[170] In North Carolina, officials accused a car towing company of illegally raising its rates, charging consumers up to $4,400 to have their vehicles released.[171]

4. Pandemic-Related Enforcement Actions Taken by Federal Actors

Firms' attempts to exploit consumers during the COVID-19 pandemic also led to federal actors policing market conduct. As discussed earlier, the provisions of the Defense Production Act prohibiting the hoarding of scarce goods for resale purposes provide an avenue for federal agents to bring claims against firms. There were too many federal enforcement actions to discuss each, but the following snapshots provide insight into the types of behaviors that have received federal attention. In general, the cases pursued at the federal level

165. Complaint at 1–2, Minnesota v. Sparboe Farms, Inc., No. 27-CV-21-10810, 2021 WL 4029209 (Minn. Dist. Ct. Sept. 3, 2021).

166. *Id.* at 9–11.

167. Press Release, Letitia James, N.Y. Att'y Gen., Attorney General James Sues One of the Nation's Largest Egg Producers for Price Gouging During the Coronavirus Pandemic (Aug. 11, 2020), https://ag.ny.gov/press-release/2020/attorney-general-james-sues-one-nations-largest-egg-producers-price-gouging [https://perma.cc/8C8T-925D]; Neil MacFarquhar, *Are You Paying Extra for Eggs? Lawsuits Accuse Producers of Price Gouging*, N.Y. TIMES, https://www.nytimes.com/2020/05/06/us/coronavirus-eggs-price-gouging-lawsuit.html [https://perma.cc/MRF2-DM68 (staff-uploaded, dark archive)] (last updated July 21, 2020).

168. Press Release, Lawrence Wasden, Idaho Att'y Gen., Wasden Announces Settlement of Gas Price Investigation (Nov. 30, 2020), https://www.ag.idaho.gov/newsroom/wasden-announces-settlement-of-gas-price-investigation/ [https://perma.cc/W69V-KU9D].

169. *Id.*

170. Press Release, Virginia Attorney General Files Suit, *supra* note 122.

171. Press Release, Josh Stein, N.C. Att'y Gen., Attorney General Josh Stein Wins Preliminary Injunction Against Towing Company in COVID-19 Price Gouging Lawsuit (May 27, 2020), https://ncdoj.gov/attorney-general-josh-stein-wins-preliminary-injunction-against-trucking-company-in-covid-19-price-gouging-lawsuit/ [https://perma.cc/4G7J-EVQF].

involved larger-scale schemes to sell scarce goods than those pursued by the states.

The first pandemic-related federal charges were filed in New York against the owner of a sneaker and apparel store that stockpiled over five tons of protective equipment and sanitizer for resale.[172] The government's complaint alleged that the businessman violated the Defense Production Act by "knowingly and intentionally accumulat[ing]" goods that the President had designated as scarce materials in a manner that exceeded the reasonable demands of business for the purpose of resale at prices exceeding prevailing market prices.[173] The parties settled the claims five months later, with the businessman agreeing to donate over $450,000 worth of goods to local health care entities.[174] In New Jersey, two import companies settled claims that they had hoarded over 11 million units of PPE for purposes of resale.[175] In exchange for deferred prosecution, the firms had to sell the PPE items at cost and disgorge over $400,000 in profits related to previous sales.[176]

Not all of the individuals facing federal charges, however, have been able to settle the claims brought against them. The owner of a medical supply company in suburban Chicago was charged with violating the Defense Production Act by amassing over 79,000 masks and selling them at rates ranging from 185% to 367% over his cost of acquisition.[177] Similarly, two individuals that took steps to line up investors that would provide them with the capital needed to purchase a million KN95 masks for resale were arrested and charged with conspiracy to engage in the accumulation of scarce goods for resale in violation of the Defense Production Act.[178]

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172. Press Release, U.S. Att'y Office, E.D.N.Y., Long Island Man Charged Under Defense Production Act with Hoarding and Price-Gouging of Scarce Personal Protective Equipment (Apr. 24, 2020), https://www.justice.gov/usao-edny/pr/long-island-man-charged-under-defense-production-act-hoarding-and-price-gouging-scarc-0 [https://perma.cc/T9H3-PPC9].

173. Complaint at 1, United States v. Singh, No. 20-MJ-326 (E.D.N.Y. Apr. 24, 2020).

174. Press Release, U.S. Att'y Office, E.D.N.Y., Long Island Man Agrees To Donate Personal Protective Equipment Valued at More Than $450,000 To Resolve Price-Gouging Case (Sept. 25, 2020), https://www.justice.gov/usao-edny/pr/long-island-man-agrees-donate-personal-protective-equipment-valued-more-450000-resolve [https://perma.cc/AQ9V-J7DV].

175. Christopher E. Ondeck, John R. Ingrassia & Nathaniel Miller, *DOJ Continues Price Gouging Enforcement Under the Defense Production Act*, PROSKAUER: MINDING YOUR BUSINESS (Apr. 12, 2021), https://www.mindingyourbusinesslitigation.com/2021/04/doj-continues-price-gouging-enforcement-under-the-defense-production-act/ [https://perma.cc/8RKS-8JEG].

176. *Id.*

177. Press Release, U.S. Att'y Office, N.D. Ill., Suburban Chicago Businessman Charged in Federal Court with Price Gouging of Personal Protective Equipment (Oct. 8, 2020), https://www.justice.gov/usao-ndil/pr/suburban-chicago-businessman-charged-federal-court-price-gouging-personal-protective [https://perma.cc/F9W8-M6CD].

178. Press Release, Two Individuals Arrested, *supra* note 101. One defendant has been dismissed from the complaint, and the other was convicted and sentenced to two years of probation. Order

B. *Price Gouging During Other Emergencies*

While the COVID-19 pandemic has brought an unprecedented amount of national attention to price-gouging activity, there are plenty of examples of business misconduct and state enforcement actions occurring in connection with other disasters. This section gives examples of the different types of attempts to gouge, enforcement measures, and settlements that past emergencies have generated. In particular, it considers actions states have brought in connection with various hurricanes, the Colonial Pipeline cyberattack, and the severe storm that overwhelmed Texas's power grid in 2021.

Hurricanes, as semiregularly occurring natural disasters, have a robust history in the context of state price-gouging actions. In the wake of Hurricane Charley in 2004, Florida's attorney general stated that his office was investigating over 1,400 complaints of price gouging.[179] Examples of the conduct complained about included vendors selling ice for multiple times the standard rate, a contractor attempting to charge $23,000 for removing two trees from a consumer's roof, and prices on power generators increasing almost tenfold.[180]

In 2009, Florida charged a firm owned by Morgan Stanley with illegally increasing the price of gasoline after the governor had declared an emergency due to Hurricane Ike.[181] The company ended up paying over $2 million to settle the claims.[182] Government officials stated that they were actively investigating numerous other firms for potential violations of Florida's price-gouging law in the wake of the disaster.[183]

Following Hurricane Harvey in 2017, Texas's attorney general received over 3,300 complaints of price gouging and filed suits against a hotel, gas stations, and others.[184] The State alleged that the hotel was charging prices that

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Dismissing Information Without Prejudice at 1, United States v. Bulloch, No. 20-cr-00181 (E.D.N.Y. July 23, 2021), ECF No. 32; Judgment in a Criminal Case at 1, United States v. Bulloch, No. 20-cr-00181 (E.D.N.Y. Jan. 12, 2023), ECF No. 85. As of January 2024, the sentence of two years' probation is under appeal. Letter at 1, United States v. Bulloch, No. 20-cr-00181 (E.D.N.Y. Jan. 31, 2024), ECF No. 97.

179. Joseph B. Treaster, *Hurricane Charley: The Economics; With Storm Gone, Floridians Are Hit with Price Gouging*, N.Y. TIMES (Aug. 18, 2004), https://www.nytimes.com/2004/08/18/us/hurricane-charley-economics-with-storm-gone-floridians-are-hit-with-price.html [https://perma.cc/7BSU-JCKY (staff-uploaded, dark archive)].

180. *Id.*

181. Brandon Larrabee, *Company To Pay Florida $2 Million in Gas Price-Gouging*, FLA. TIMES-UNION (July 14, 2009, 12:40 AM), https://www.jacksonville.com/story/business/2009/07/14/company-to-pay-florida-2-million-in-gas-price-gouging/15979571007/ [https://perma.cc/2PVU-FV4P (dark archive)].

182. *Id.*

183. *Id.*

184. Alexa Lardieri, *Texas Attorney General Accuses Businesses of Harvey Price Gouging*, U.S. NEWS & WORLD REP. (Sept. 12, 2017), https://www.usnews.com/news/politics/articles/2017-09-12/texas-attorney-general-ken-paxton-sues-businesses-for-hurricane-harvey-price-gouging [https://perma.cc/Z5T2-C6GZ (staff-uploaded, dark archive)].

were three times its usual rates.[185] Texas entered into settlement agreements with forty-eight gas stations that were alleged to have sold fuel at prices up to $8.99 per gallon, requiring the companies to pay $166,592 in restitution and agree to comply with price restrictions in the future.[186]

Similarly, North Carolina successfully settled price-gouging claims that it brought against a tree removal company and general contractor following 2019's Hurricane Florence.[187] In its complaint, the State alleged that the tree removal company attempted to charge a homeowner $19,598 for the removal of four fallen trees from their property.[188] The firm ended up agreeing to pay the State $274,000 in restitution in connection with that transaction and twenty-four others.[189] The suit against the general contractor alleged that the company price gouged three customers and was dismissed in exchange for a payment of $36,811 in restitution.[190]

After the Colonial Pipeline was shut down in response to a ransomware attack in 2021, a large number of states pursued price-gouging suits against gas stations. A fuel retailer and convenience store in Kentucky was alleged to have raised prices by 9.3% to 19.4% on gasoline.[191] The settlement required the firm to disgorge the amount in profit it made due to the price increases and agree to comply with the Kentucky Consumer Protection Act.[192] A firm in Michigan

185. Press Release, Ken Paxton, Tex. Att'y Gen., AG Paxton Files Suit Against Three Businesses for Price Gouging During Hurricane Harvey (Sept. 12, 2017), https://www.texasattorneygeneral.gov/news/releases/ag-paxton-files-suit-against-three-businesses-price-gouging-during-hurricane-harvey [https://perma.cc/5RE6-W6Q8].

186. Press Release, Ken Paxton, Tex. Att'y Gen., AG Paxton: 48 Texas Gas Stations Agree To Refund Consumers for Hurricane Harvey Price Gouging (July 5, 2018), https://www.texasattorneygeneral.gov/news/releases/ag-paxton-48-texas-gas-stations-agree-refund-consumers-hurricane-harvey-price-gouging [https://perma.cc/X7KJ-QY4T].

187. Press Release, Josh Stein, N.C. Att'y Gen., Attorney General Josh Stein Wins Three Price Gouging Lawsuits (Jan. 21, 2022), https://ncdoj.gov/attorney-general-josh-stein-wins-three-price-gouging-lawsuits/ [https://perma.cc/LXL4-MU7C] [hereinafter Press Release, Stein Wins Three Price Gouging Lawsuits].

188. Press Release, Josh Stein, N.C. Att'y Gen., Attorney General Josh Stein Gets Temporary Restraining Orders Against Two Out-of-State Price Gougers (Jan. 15, 2019), https://ncdoj.gov/attorney-general-josh-stein-gets-temporary-restrai-d1/ [https://perma.cc/LM5Z-DVUM].

189. Press Release, Josh Stein, N.C. Att'y Gen., Attorney General Josh Stein Reaches $274,000 Settlement with Hurricane Florence Price Gougers (Mar. 13, 2019), https://ncdoj.gov/attorney-general-josh-stein-reaches-274000-settl/ [https://perma.cc/2LL7-AFRJ].

190. Press Release, Stein Wins Three Price Gouging Lawsuits, *supra* note 187.

191. Press Release, Daniel Cameron, Ky. Att'y Gen., Attorney General Cameron Announces Settlement with Fuel Retailer for Unfair Business Practices Following Colonial Pipeline Shutdown (July 16, 2021), https://www.kentucky.gov/Pages/Activity-stream.aspx?n=AttorneyGeneral&prId=1090 [https://perma.cc/4QL7-AMYM].

192. *Id.*

that settled similar claims was alleged to have raised its prices approximately one dollar per gallon above those charged by its nearby competitors.[193]

Additionally, in 2021, a severe winter storm overwhelmed Texas's electrical grid, leaving millions of individuals without power. In the aftermath of the storm, the state's attorney general filed price-gouging suits against numerous firms.[194] The businesses sued included a private electric provider that had taken advantage of the state's hands-off approach to utility regulation by including demand-sensitive rates in its consumer contracts, and ended up charging some customers fifty times their normal rate during the storm.[195] The claims against the electric provider were settled in exchange for the provider agreeing to release its customers from bills incurred during the storm and allowing customers that had paid money relating to these bills to file claims in the company's bankruptcy proceedings.[196]

The State also brought suit against a hotel that tripled its room rates during the storm.[197] The attorney general alleged that the company engaged in price gouging by "charging an exorbitant or excessive price" to those seeking shelter from the storm and threatening to evict vulnerable individuals if they did not pay the increased rates.[198] The hotel also settled the claims against it.[199]

193. Press Release, Dana Nessel, Mich. Att'y Gen., AG Nessel Takes Action on Plymouth Gas Station Accused of Price Gouging (May 27, 2021), https://www.michigan.gov/ag/news/press-releases/2021/05/27/ag-nessel-takes-action-on-plymouth-gas-station-accused-of-price-gouging [https://perma.cc/4RYR-TNM3].

194. Reese Oxner, *Texas Attorney General Ken Paxton Sues Electricity Retailer Griddy over Exorbitant Bills*, TEX. TRIB. (Mar. 1, 2021, 6:00 PM), https://www.texastribune.org/2021/03/01/texas-attorney-general-ken-paxton-griddy/ [https://perma.cc/D4Z2-26DV].

195. Giulia McDonnell Nieto del Rio, Nicholas Bogel-Burroughs & Ivan Penn, *His Lights Stayed On During Texas' Storm. Now He Owes $16,752.*, N.Y. TIMES, https://www.nytimes.com/2021/02/20/us/texas-storm-electric-bills.html [https://perma.cc/5WQT-DMFC (staff-uploaded, dark archive)] (last updated Feb. 23, 2023).

196. Order (A) Approving and Authorizing Debtor to Enter into Settlement Agreement with the State of Texas and (B) Granting Related Relief, *In re* Griddy Energy LLC, No. 21-30923 (Bankr. S.D. Tex. July 7, 2021); *see also* Press Release, Ken Paxton, Tex. Att'y Gen., Paxton Announces Finalized Settlement with Griddy Energy, LLC (Aug. 30, 2021), https://www.texasattorneygeneral.gov/news/releases/paxton-announces-finalized-settlement-griddy-energy-llc [https://perma.cc/54ZX-HUM7].

197. Press Release, Ken Paxton, Tex. Att'y Gen., AG Paxton Sues La Quinta BCB for Price Gouging During 2021 Winter Storm (Mar. 18, 2021), https://www.texasattorneygeneral.gov/news/releases/ag-paxton-sues-la-quinta-bcb-price-gouging-during-2021-winter-storm [https://perma.cc/9L92-RZHY].

198. Complaint at 1, Texas v. Everyoung Hosp. LLC, No. 2021CI05023 (Tex. Dist. Ct. Mar. 18, 2021).

199. Patrick Danner, *San Antonio Hotel Paying Refunds to Guests over Alleged Price Gouging During February's Winter Storm*, SAN ANTONIO EXPRESS-NEWS, https://www.expressnews.com/business/local/article/San-Antonio-hotel-paying-refunds-to-guests-over-16524659.php [https://perma.cc/6SVK-E3GQ (staff-uploaded, dark archive)] (last updated Oct. 11, 2021, 2:54 PM).

C. *What Modern Disasters Demonstrate About Price Regulation in Emergency Markets*

The preceding review of actual instances of price gouging provide vital information about the nature of the economic exploitation that occurs in the wake of emergencies. It also demonstrates how state actors have enforced existing laws and the ways the actions they bring end up being resolved. Knowledge of these matters enables one to view the criticisms of anti-price gouging laws—as well as proposed reforms—from a more realistic perspective.

Several important insights can be derived from this survey:

> (1) It is clear that firms regularly attempt to price gouge consumers in post-emergency markets. The number of claims brought against firms and the number of complaints filed with state authorities establish that the economic exploitation of individuals in disrupted markets is far more than an imaginary bogeyman, as it is sometimes portrayed.
>
> (2) Many state enforcement authorities actively enforce their states' anti-price gouging laws.[200]
>
> (3) In a majority of situations, state authorities are able to use nonjudicial mechanisms to bring firms into compliance with the law. Statements from numerous state attorneys general confirm that sending a notice of violation or cease-and-desist order is sufficient to change companies' behaviors.
>
> (4) Nearly all of the companies facing allegations of price gouging end up settling the claims. The most common settlement terms require firms to provide restitution to consumers; cover the state's investigatory and enforcement costs; promise to comply with pricing laws; and—in the context of scarce goods during the pandemic—donate goods.
>
> (5) States' enforcement efforts focus almost exclusively on firms that simply raise prices on their existing supplies. Charges are not commonly brought against firms that are genuinely increasing the supply of scarce goods in disrupted markets.

A final important takeaway concerns the role online marketplaces play in postdisaster markets. The potential of these sites to incentivize price-gouging behaviors can be seen in the numerous attempts by individuals to hoard scarce goods and then resell them online during the pandemic. In recognition of this dynamic, thirty-three attorneys general formally requested that the largest online marketplaces institute measures to ensure that the goods sold on their

200. Given how difficult it is to know the prevalence of violations of these laws, it is unclear what percentage of transgressing firms face formal allegations.

sites comply with state pricing laws.[201] Perhaps fearful of the potentially large penalties they could face under certain state statutes, the companies quickly complied by taking measures to delist products offered at illegal prices, banning sellers who violate these laws, and providing information about sellers to state authorities.[202]

III. ASSESSING THE VALUE OF ANTI-PRICE GOUGING LAWS

Since the first anti-price gouging statute's enactment in 1979,[203] economists have rallied against them.[204] Scholars and political pundits have accused these laws of being counterproductive restraints on trade that exacerbate the very issues that they are meant to resolve. Due to the difficulty of collecting empirical evidence about the impact of anti-price gouging laws, the literature criticizing them has largely consisted of armchair projections of their theoretical economic consequences. In addition to these attacks, the legality of anti-price gouging laws has been challenged, as has their suitability for policing modern commercial practices. This part will summarize these objections and, drawing upon the empirical observations set forth in Parts I and II, distinguish valid concerns from the hyperbolic. In doing so, it will identify why these laws are valuable and the characteristics that make certain approaches to price regulation superior to others.

A. *Economic Arguments Against Anti-Price Gouging Laws*

The foundational idea behind the economic objection to price control laws is the belief that limiting the price of a good below its market price will lead to a suboptimal supply of that good in the future. Understanding the logic behind

201. Press Release, Or. Dep't of Just., 33 Attorneys General Warn Amazon, Facebook, Ebay, Craigslist: You Aren't Exempt from Price Gouging Laws (Mar. 25, 2020), https://www.doj.state.or.us/media-home/news-media-releases/33-attorneys-general-warn-amazon-facebook-ebay-craigslist-you-arent-exempt-from-price-gouging-laws/ [https://perma.cc/7HUL-3KVQ].

202. Courtney Enloe, Matt McGuire, Bill Childs, Rachelle Bastarache, Eva Mendelsohn & Cheryl Hamilton, *Shopify's and 3M's Efforts Against Price Gouging and Counterfeiting During the COVID-19 Pandemic*, AM. BAR ASS'N (Aug. 10, 2022), https://www.americanbar.org/groups/government_public/publications/public-lawyer/2022-summer/shopifys-and-3ms-efforts-against-price-gouging-and-counterfeiting-during-covid19-pandemic/ [https://perma.cc/RA4Z-M7WW (staff-uploaded, dark archive)]; *Price Gouging Has No Place in Our Stores*, AMAZON (Mar. 23, 2020), https://www.aboutamazon.com/news/company-news/price-gouging-has-no-place-in-our-stores [https://perma.cc/BV7W-UWEU].

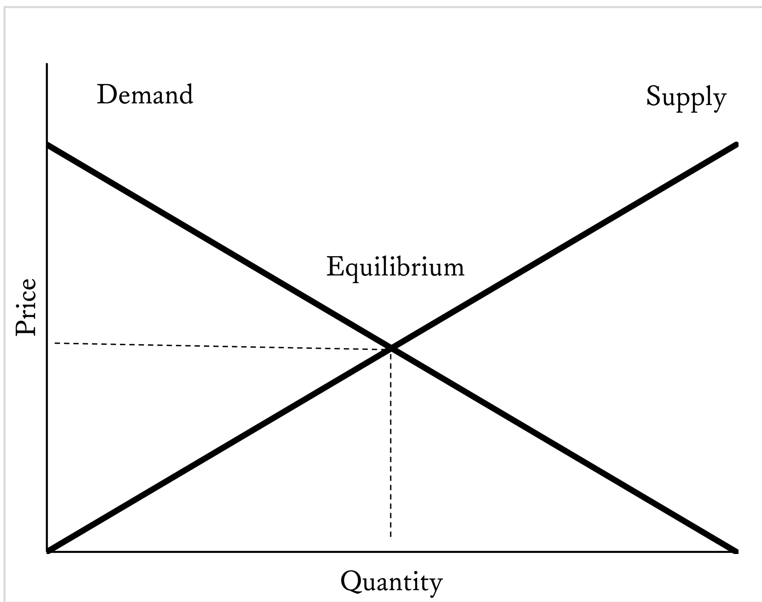
203. Giberson, *supra* note 22, at 50.

204. *See, e.g.*, Culpepper & Block, *supra* note 118, at 512; Montgomery et al., *supra* note 118, at 366; Jeffrey Dorfman, *Price Gouging Laws Are Good Politics but Bad Economics*, FORBES (Sept. 23, 2016, 9:05 AM), https://www.forbes.com/sites/jeffreydorfman/2016/09/23/price-gouging-laws-are-good-politics-but-bad-economics/?sh=162de1da64d3 [https://perma.cc/RT3P-KYN2 (dark archive)]; David Henderson, *A Poll of Economists on Price Gouging*, ECONLIB: ECONLOG (Sept. 15, 2017), https://www.econlib.org/archives/2017/09/a_poll_of_econo.html [https://perma.cc/8Y9F-3KX2]; Lee, *supra* note 20, at 583.

this belief requires knowledge of the basic economic model of how markets work. This model is based around

> a graph whose *y*-axis represents an escalating scale of price and whose *x*-axis represents an escalating scale of quantity. [It] then add[s] two lines on the graph: the upward-sloping "supply curve" (representing the correlation between the cost of a good or service and the quantity supplied) and the downward-sloping "demand curve" (representing the correlation between the cost of a good or service and the quantity demanded). The point of "equilibrium" is where both the supply and demand curves intersect. "At the equilibrium price, the quantity of the good or service that buyers are willing and able to buy exactly balances the quantity that sellers are willing and able to sell[.]"[205]

Figure 1: Market Equilibrium Graph



In this model, any change to the demand or supply of a good will affect its price and quantity in predictable ways. For instance, an increase in demand for a good will cause the demand curve to shift to the right, meaning that market equilibrium occurs at a point with higher quantity and higher prices. Similarly, a decrease in the supply of a good will cause the supply curve to shift to the left,

205. Mark Giancaspro, *Perilous Fires, Pandemics and Price Gouging: The Need To Protect Consumers from Unfair Pricing Practices During Times of Crisis*, 44 U.N.S.W. L.J. 1458, 1460 (2021).

meaning that market equilibrium occurs at a point with higher prices and lower quantity.

One can use this framework to forecast the economic consequences of events like the market disrupting disasters that trigger anti-price gouging protections. Consider, for example, the market for face masks. Prior to the COVID-19 pandemic, the price and quantity of masks sold were presumably relatively constant, indicating equilibrium had been reached. As the virus began spreading and the effectiveness of masks in preventing transmission became known, the demand for face masks increased dramatically. Under the model, this rightward shift in the demand curve would result in an increase in the price of masks as well as the quantity of masks sold on the market.

In addition to causing shifts in demand curves, market disrupting disasters can also influence supply curves. Consider the market for gasoline in a coastal city that has been struck by a severe hurricane. While the hurricane might lead to an increase in the demand for gasoline, it is likely that the market would be more substantially affected by hurricane-related changes to the supply of gasoline. Severe weather can influence the available supply of gasoline by impairing retailers' ability to restock their stores, damaging refineries, and destroying existing stock. All of these effects would cause a leftward shift in the supply curve for gasoline and result in an increase in its price and a reduction in the quantity sold.

The orthodox economics view is that, in the wake of disasters, consumers will be best off if the state adopts a laissez-faire approach to regulation.[206] The primary argument that has been put forth against intervention is that allowing a rise in the prices for scarce goods will generate desirable secondary benefits. Additionally, some have argued that policies that set price caps create negative externalities.

The first positive consequence of high prices that scholars have pointed to is a future increase in supply. Economists have argued that prices act as market signals and should be left unregulated, even during disasters, so that market forces can drive greater supply.[207] For instance, assume that a hurricane has hit a city and that gasoline prices have skyrocketed. Commercial entities that learn of the increase in gasoline prices will see the greater financial rewards of selling it in this region and be motivated to increase the amount of gasoline they sell there. If prices rise high enough, they may cause new firms to enter the market. Thus, the incentives created by high prices will result in firms acting to increase the supply of gasoline in the hurricane-ravaged area. Even if consumers suffer

206. *See* Culpepper & Block, *supra* note 118, at 512; Lee, *supra* note 20, at 583.

207. *See* Giancaspro, *supra* note 205, at 1472; Culpepper & Block, *supra* note 118, at 514; Zwolinski, *supra* note 28, at 362–63; Montgomery et al., *supra* note 118, at 366; Lee, *supra* note 20, at 587–88.

in the short term because of market-driven high prices, they will eventually benefit due to increases in supply.[208]

A second advantage that free market advocates have posited is that allowing prices to increase in an unregulated manner ensures that goods and services are allocated efficiently.[209] A basic assumption of economics is that a person's willingness to pay for something is a valid measure of the utility that would be generated by their purchase of it. As the price of a good increases following a disaster, the number of individuals willing to pay the market price for the item will decrease. Only those individuals who will benefit the most from the item will be willing to pay the higher price for it, meaning that the scarce good will be allocated to those who need it the most. Additionally, the high price of the good will help to ensure that it will not be used frivolously or otherwise wasted.[210]

Finally, some have argued that giving markets free rein to dictate the price of goods in a postdisaster environment is necessary to prevent firms from selling their scarce goods via the black market.[211] They contend that commercial entities will only remain in traditional markets if there is little to no economic incentive to sell their goods illegally. If statutes prevent them from selling their goods at the highest price possible, however, many of these firms would turn to black market sales.[212] Black market sales are alleged to be worse for most consumers, due to the inefficiencies intrinsic to nontransparent, less-accessible markets.[213]

The alleged harms generated by price caps are largely just the inverse of the advantages associated with free market approaches. Economists have argued that the restrictions imposed by anti-price gouging laws end up preventing (or reducing) the growth of additional supply of scarce goods. Lacking broad empirical proof supporting their claims, they often point to a few well-rehearsed anecdotes as evidence. For example, several articles describe people arrested for driving into disaster areas with scarce goods—increasing the supply of such goods—and selling them for prices that exceeded the state's limits.[214] Beyond

208. *See* Culpepper & Block, *supra* note 118, at 516; Giberson, *supra* note 22, at 52.

209. *See* Dorfman, *supra* note 204; Giancaspro, *supra* note 205, at 1472; Zwolinski, *supra* note 28, at 360–61; Montgomery et al., *supra* note 118, at 366.

210. *See* Culpepper & Block, *supra* note 118, at 514; Brewer, *supra* note 13, at 1128–29.

211. *See* Zwolinski, *supra* note 28, at 352 n.17; Gregory R. Kirsch, *Hurricanes and Windfalls: Takings and Price Controls in Emergencies*, 79 VA. L. REV. 1235, 1259 (1993); Brewer, *supra* note 13, at 1128.

212. In general, a black market is defined as a transaction (or multiple transactions) that occurs in a way meant to avoid compliance with legal restrictions. *See Black Market*, BRITANNICA MONEY, https://www.britannica.com/money/black-market [https://perma.cc/2X2N-96E4] (last updated Oct. 9, 2023). In the context of postdisaster markets, one could envision these types of sales occurring via in-person transactions (for example, a person selling batteries from the back of a pickup truck) or through digital mediums designed to facilitate illegal sales (for example, a darknet marketplace like Silk Road). *See id.*

213. *See* Parsons, *supra* note 14, at 49; Skarbek & Skarbek, *supra* note 28, at 243.

214. *See* Lee, *supra* note 20, at 589–90; Brewer, *supra* note 13, at 1123.

these examples, one recent article identified severe supply problems that resulted in Italy when the nation's price cap on masks exceeded the wholesale price.[215]

Those opposed to anti-price gouging laws have argued that, beyond suppressing supply, artificially low prices exacerbate distributional problems by incentivizing inefficient conduct like hoarding.[216] Without high prices to deter them, a consumer with the opportunity to purchase scarce goods is likely to purchase a much higher amount of that good than they would normally.[217] This impulse is usually due to their concern that they will not have another chance to buy the scarce good. This behavior, particularly if it is widespread, exacerbates supply shortages. Further, even if individuals do not hoard, low prices may cause some individuals to consume more of a scarce item than is strictly necessary. For example, artificially low gasoline prices might cause an individual to purchase more fuel than they absolutely need, using the excess for activities they could reasonably forego. In doing so, they may end up denying another consumer the gasoline they need.

It is worth reemphasizing that the critics of anti-price gouging laws largely rely on theoretical arguments to support their positions. While there have been some attempts to empirically gauge the impact that these laws have on markets, there has not been widely acknowledged work that has substantiated their broad claims.[218] While it is common for pieces that criticize anti-price gouging laws to highlight one or two real world events that support their conclusions, many have not seriously attempted to assess whether their projections are consistent with the qualitative data that exists.[219] In the instances where economists have attempted to empirically demonstrate that these laws are detrimental to markets, methodological limitations have severely limited their ability to measure the laws' impact on price and supply.[220]

Given the national scope of the COVID-19 pandemic and the media spotlight put on anti-price gouging laws, it seems likely that there will be attempts to empirically measure the effect these laws have on markets. Such efforts will have to find ways to resolve some of the inherent difficulties of

215. Alberto Mingardi, *Italy's Covid Price-Control Fiasco*, WALL ST. J. (May 18, 2020, 7:00 PM), https://www.wsj.com/articles/italys-covid-price-control-fiasco-11589842827 [https://perma.cc/47VM-9AAN (staff-uploaded, dark archive)].

216. *See* Culpepper & Block, *supra* note 118, at 515–16; Montgomery et al., *supra* note 118, at 376.

217. *See* Parsons, *supra* note 14, at 69.

218. *See* Culpepper & Block, *supra* note 118; Rafi Mohammed, *The Problem with Price Gouging Laws*, HARV. BUS. REV. (July 23, 2013), https://hbr.org/2013/07/the-problem-with-price-gouging-laws [https://perma.cc/TF7Q-TCWM (dark archive)]; Lee, *supra* note 20, at 589–90; Brewer, *supra* note 13, at 1123.

219. *See, e.g.*, Lee, *supra* note 20, at 589–91; Brewer, *supra* note 13, at 1122–24; Dorfman, *supra* note 204.

220. *See* Caruso, *supra* note 28, at 1829–30.

studying this issue. As set forth in Part I, anti-price gouging laws are incredibly diverse and adequately accounting for statutory variations (not to mention differences in enforcement efforts) may prove to be an insurmountable task. Further complicating these efforts is the fact that disasters have very different impacts in different settings, making it difficult to find two markets that can be fairly compared to one another.

B. *Reconciling Economic Critiques with Reality*

How compelling are the economic arguments against anti-price gouging laws? As described earlier, there are substantial barriers to obtaining empirical evidence that would corroborate (or refute) these claims. Even without data of this type, it is possible to both critique the theory underlying economic objections and consider whether their claims are in line with society's recent experiences during disasters. Doing so will accomplish two important tasks. First, it will suggest that the economic objections to these laws are subject to a bevy of conditions, many of which are not satisfied in real-world situations. Second, it will identify the types of situations where anti-price gouging laws are most needed, as well as those where they should not be implemented.

Reduced to fundamentals, the economic arguments against these laws can be reduced to three claims: (1) anti-price gouging laws inhibit increases in supply, (2) anti-price gouging laws lead to inefficient allocations of goods, and (3) anti-price gouging laws drive commercial entities to sell scarce goods on the black market. In addition to addressing these arguments, this section will identify and discuss the significance of a key benefit of anti-price gouging laws that economists regularly fail to recognize. By decreasing firms' incentives to hoard scarce goods, anti-price gouging laws can reduce the amount of time that necessities are unavailable to consumers due to being tied up in arbitrage transactions.

For the sake of argument, the proceeding discussion will assume that capping the price of a good will cause demand and supply distortions under standard market conditions.[221] The extent to which this holds true under nonstandard market conditions, however, is what matters when evaluating anti-price gouging statutes. As discussed below, there are strong reasons to believe that emergencies disrupt markets in ways that mitigate the negative consequences that normally result from price controls or otherwise make the potential downsides of price controls worth it.

221. *See* Parsons, *supra* note 14, at 53–54 (discussing rent control studies that support economists' models).

1. Supply-Based Arguments

There are several potent responses to the economic arguments concerning potential negative supply consequences. To start, there is an inherent tension in the attempt to use rules applicable in standard market conditions to predict economic behavior in nonstandard market conditions. Put more directly, there is something odd about arguing that because price controls reduce supply normally, they will also repress supply in emergency markets. While it certainly could be the case that markets will behave this way, it could also be the case that supply would be unaffected by price limits. For example, emergency conditions might be so severe that the general rule that higher prices drive demand down no longer operates. Considered in a purely theoretical context, there appears to be no reason to favor one of these predicted outcomes over the other.

What reasons are there for believing that the rules governing standard markets should not be used to predict emergency markets? On the demand side of the equation, it must be noted that the goods and services targeted by anti-price gouging laws are necessities.[222] Even in standard market conditions, behaviors concerning necessities differ substantially from other types of goods. While demand for nonnecessary goods can potentially reduce all the way to zero in response to high prices, there will always be a nonzero floor when it comes to demand for necessities. Individuals can indefinitely put off purchasing a luxury watch; they cannot do the same with food or water. Because most goods targeted for price controls have immutable base levels of demand (that is, demand for necessities is inelastic), the basic supply and demand model is a poor fit for predicting market behavior in post-emergency environments.

Additionally, there are large divergences between emergency markets and ideal markets when it comes to supply-related considerations. First, it is common for events causing a declaration of emergency (for example, a hurricane) to negatively impact the supply of goods. This can be due to the destruction of existing stockpiles of an item, production facilities being damaged, or loss of the infrastructure necessary to replenish stores. These types of reductions in supply are often a large part of what is responsible for the scarcity of specific goods. When price caps are instituted, it will often be in an environment where there has been an unexpected sudden reduction in supply.

Second, there are limits to how much supply can be increased in emergency-disrupted markets, regardless of the degree to which demand increases. Even under normal conditions, it takes time for market actors to bolster supply due to a surge in demand. Assume that there is a sustained increase in the demand for bottled water in a particular region. Commercial entities would be able to react to this increase by diverting bottled water supply

222. *See supra* Section I.A.

from other areas to this region within a short timeframe. Other changes would take substantially more time—new firms entering the market, firms expanding their number of storefronts, firms entering into raw component procurement contracts, etc. Unlike the ideal markets theorized by economists, real world markets experience substantial lags between demand changes and market actors' responses.[223]

The types of events that trigger anti-price gouging laws often exacerbate these delays. While it might normally take a firm a few days to reroute additional amounts of a good to a certain area, its response could take an exponentially longer amount of time if a disaster has cut off access to that area or otherwise disrupted the supply chain. Similarly, increasing the supply of a scarce good is much more complicated if the local production capacity of a good had been destroyed or substantially impaired.

The fact that market reactions do not occur instantaneously is important, as it directly undermines the claim that anti-price gouging laws inhibit increases in supply. If increases in supply are already significantly impaired because of a disaster, then any supply-impairing effect due to price controls would be marginal. For example, if a hurricane cut off all access to a city and there was no ability within the city to manufacture more of a good, then increasing the supply of that good becomes impossible. In such an environment, price caps could not suppress supply.

Finally, anti-price gouging laws do not *eliminate* market incentives for firms to increase supply of scarce goods. All price-gouging laws permit a vendor to earn their standard profits on sales—they simply prohibit firms from making their postdisaster sales *more* profitable. Presumably, the financial incentives associated with stocking and selling these goods prior to the disaster was sufficient to motivate the firm to do so. It is unclear why this same financial incentive would not be sufficient to motivate firms in postdisaster markets.[224]

The market conditions created by emergencies—impaired and inelastic supply paired with increased or steady demand—constitute the basic grounds that justify interventions like anti-price gouging laws. It very well could be the case that, under normal conditions, market forces will be optimal in providing individuals access to the goods they need. But once part of that system breaks down, alternative means for distributing goods may be superior to unregulated markets. Thus, anti-price gouging laws should only limit prices when these conditions are present.

What about all of the anecdotes illustrating anti-price gouging laws being used in ways that directly discourage firms from increasing the supply of scarce

223. *See* Parsons, *supra* note 14, at 59–61.

224. This incentive is bolstered by the fact that every anti-price gouging law allows a firm to increase prices to compensate them for increases in acquisition costs of the good. *See supra* Section I.A.

goods? It is true that such instances demonstrate how these laws can impair supply. The situations commonly referenced by economists, however, were cherry-picked for just this reason and are not representative of the bulk of price-gouging behavior. Part II of this Article established that, in the vast majority of cases, the firms attempting to exploit consumers are not increasing the supply of scarce goods.[225] Rather, these firms typically are either attempting to profit from arbitrage or increase their profits without materially bolstering supply.

At least one commentator has argued that, even if supply is not suppressed by price caps in the short term, these types of controls will have longer term detrimental effects on supply.[226] This theory posits that the extremely high prices charged for scarce goods in disaster markets are beneficial because they will incentivize firms to increase the supply of that good beyond its predisaster levels.[227] Using the carrot of high revenue during times of crisis in this way, however, will lead to an allocation of resources that is inefficient in nondisaster markets. For example, if supply equilibrium exists at 10,000 units of a good under normal conditions, then additional supply beyond this point is (by definition) inefficient. If the potential for high disaster profits causes firms to increase supply to 11,000 units, then there will be an oversupply of goods whenever there is not a crisis.

The same commentator contends that price caps also harm supply by undermining the economic incentives for firms to stockpile potentially scarce goods.[228] It is true that anti-price gouging laws decrease the financial rewards that firms can reap through building up their reserves. But it is important to note that, even with price caps, firms can profit from this type of behavior—they are just limited to recovering their standard profit margin (plus any mark-up a jurisdiction's law permits). Further, there are ways the law can encourage strategic stockpiling that is compatible with anti-price gouging laws. For instance, one legal scholar recently developed a reform that would create a stockpiling registry for necessary goods and utilize tax credits (among other benefits) to encourage firms to take steps that would mitigate disaster shortages.[229]

2. Efficient Distribution of Goods Arguments

The idea that market-determined prices will lead to the best distribution of goods in postdisaster conditions is heavily flawed. The belief that markets

225. *See supra* Part II.

226. Brewer, *supra* note 13, at 1126.

227. *Id.* at 1124.

228. *Id.* at 1126.

229. *See* Troy Rule, *Toward a More Strategic National Stockpile*, 9 TEX. A&M L. REV. 49, 96–107 (2021) (describing how changes in federal taxation rules could incentivize optimal private stockpiling of critical goods).

lead to an optimal allocation of goods relies on the idea that an individual's willingness to pay for a good is equivalent to (or a good proxy for) the utility that will be generated by that person receiving the good. While this relationship might be accurate in a purely theoretical sense, consideration of the effects that wealth disparities have on behavior demonstrate that it is not universally true.[230] Incredibly rich individuals may be willing to pay high prices for a good even if it provides a small amount of utility to them, as the expenditure is negligible compared to their overall wealth. Poor individuals, on the other hand, may be unable to pay a moderate price for a good even though it would generate an immense amount of utility. Given this, it would be possible for all of a scarce good to be purchased at a high price by rich individuals, preventing sales that would generate much more utility.

In addition to these distributive concerns, allowing price to serve as the primary allocative mechanism creates powerful incentives for behaviors that exacerbate shortages. If prices are not regulated in disaster markets, then fear of future high prices will drive individuals to hoard as much of a scarce good as they can.[231]

Similarly, the potential for price increases will drive some to purchase scarce goods for resale purposes. Part II of this Article discussed several businesses that anticipated an increase in demand for a good and then attempted to corner the market by stockpiling as much of that good as they could.[232] Without price caps, firms have strong incentives to engage in this type of conduct and create the very shortages that will enable them to sell their wares at higher prices.

Economists have argued that, despite the problems introduced by wealth differences, unregulated markets still offer the best mechanism for distributing scarce goods. They contend that, if price caps are imposed, the alternative mechanisms (like queueing) that firms would use to allocate goods will exacerbate distributional concerns.[233] It is difficult to evaluate in the abstract whether the potential drawbacks of nonprice allocation systems are worse than free market systems.[234]

230. *See* Jeremy Snyder, *What's the Matter with Price Gouging?*, 19 BUS. ETHICS J. 275, 281–82 (2009); Michael Hiltzik, *Column: Memo to Economists Defending Price Gouging in a Disaster: It's Still Wrong, Morally and Economically*, L.A. TIMES (Aug. 28, 2017, 3:00 PM), https://www.latimes.com/business/hiltzik/la-fi-hiltzik-price-gouging-harvey-20170828-story.html [https://perma.cc/PKV8-E846 (dark archive)]; Michael A. Salinger, *Price Gouging and the Covid-19 Crisis—This Time Is (a Little) Different*, CPI ANTITRUST CHRON., Sept. 2020, at 1, 4–5.

231. *See* Parsons, *supra* note 14, at 69.

232. *See supra* Part II.

233. *See* Brewer, *supra* note 13, at 1127; Montgomery et al., *supra* note 118, at 378; Lee, *supra* note 20, at 595.

234. *See* Woodcock, *supra* note 102, at 51–52.

Economists' concerns regarding the problems with nonprice modes of distribution successfully identify a flaw in most anti-price gouging laws. Individuals in the midst of an emergency tend to purchase greater amounts of necessities than they need.[235] These hoarding behaviors are driven either by consumers' concerns about their future needs or because the purchaser wishes to resell the goods at a profit. While anti-price gouging laws effectively eliminate the latter motivation, they do not address the former. Indeed, by locking prices for scarce goods at affordable levels, they actually facilitate individuals purchasing greater amounts of scarce goods than they need.

State-enforced rationing is the primary mechanism that anti-price gouging laws could use to prevent hoarding of scarce goods. Only one state has authorized imposing purchasing limits on consumers,[236] but the original version of the Defense Production Act also authorized the federal government to do so.[237] While state-imposed rationing has been extremely rare in contemporary times, privately imposed restrictions on individuals' abilities to purchase scarce goods became widespread during the pandemic. Retailers experiencing shortages in paper goods, cleaning products, and other necessities instituted their own purchase limitation rules.[238] Even with spotty enforcement of these rules, these policies served as checks against hoarding. Governmental rationing requirements could be more effective than these private efforts due to being mandatory for all vendors and coming with the potential of state enforcement actions against noncompliant firms. State-imposed rationing provides the most direct way to address the distributional problems created by price caps, even if it would come with implementation and enforcement issues.

The preceding discussion has looked at distributional concerns regarding how scarce goods are allocated among consumers. This makes sense, as this is the primary concern motivating these market interventions. The distribution of transactional surplus between consumers and firms, however, is also important, and anti-price gouging laws improve fairness on this front. In standard market conditions, competitive forces drive firms to share transactional surplus with consumers—meaning that firms have to set prices at a level where they do not capture all of the surplus created through a sales transaction. When competitive forces are reduced (due, for instance, to a hurricane impairing supply), firms will be tempted to raise prices, increasing their capture of surplus at the expense

235. *See* Montgomery et al., *supra* note 118, at 376.

236. CONN. GEN. STAT. § 42-231(a) (2023).

237. Defense Production Act of 1950, ch. 932, § 402, 64 Stat. 798, 803 (repealed). The authority of the President to ration goods was contained in Title IV of the Act. *See id.* Title IV of the Act, along with three other titles, was not reenacted by Congress and expired due to the Act's sunsetting provisions. *See* § 716, 64 Stat. at 822 (sunsetting provisions).

238. *See, e.g.*, Michael Corkery & Sapna Maheshwari, *Is There Really a Toilet Paper Shortage?*, N.Y. TIMES (Mar. 13, 2020), https://www.nytimes.com/2020/03/13/business/toilet-paper-shortage.html [https://perma.cc/7FFR-55VH (staff-uploaded, dark archive)].

of the consumers on the other side of the sale.[239] Essentially, allowing market pricing in the wake of emergencies grants firms a surplus windfall. Price control laws serve as a direct check against this and, in doing so, help preserve the allocation of surplus between consumers and firms that is present in nonexigent circumstances.[240]

3. Encouraging Black Market Sales Arguments

Another major economic objection to anti-price gouging laws—that price controls will drive firms to sell scarce goods on the black market—suffers from a lack of real-world substantiation. As a matter of theory, it is correct that capping prices below their potential market values could drive sellers to sell scarce goods in illegal manners.[241] For example, price caps could lead a vendor to avoid traditional venues when selling masks (for example, retail shops, Amazon listings) and turn towards approaches that would facilitate sales at prices above the cap (for example, word-of-mouth sales, darknet markets). As the gap between a capped price and market value increases, the incentive for firms to opt into black markets will increase proportionally. Factors other than this differential, however, will also influence firms' decisions as to whether they will violate the law—for example, the severity of punishment for violations, the extent to which policing authorities are pursuing violators, potential reputational repercussions, the likely duration of the price caps, etc.

Skeptics of anti-price gouging laws have not identified any evidence establishing that price controls implemented after a disaster have resulted in substantial black-market activity. Proponents of these laws have found themselves in a similar position with regard to proving that firms have *not* illegally skirted price controls. Given that governmental entities have not engaged in a single high-profile investigation into entities utilizing black markets in the wake of disasters, it seems likely that such conduct has been scarce or nonexistent. This conclusion is bolstered by the fact that most price-gouging investigations are resolved through informal means, with the accused vendor either continuing to sell their goods in traditional markets or giving their stockpile of goods away.[242]

There are numerous potential reasons for firms' behaviors diverging from economists' predictions in this context. Selling consumer goods on the black market has always required a firm to walk a delicate tightrope—their operations

239. *See* Woodcock, *supra* note 102, at 54.

240. Some economists have argued that these types of price controls can actually increase the total surplus generated by these transactions. *See* Robert K. Fleck, *Can Prohibitions on "Price Gouging" Reduce Deadweight Losses?*, 37 INT'L REV. L. & ECON. 100, 101 (2014) (discussing economic arguments that price gouging laws can increase total surplus).

241. *See supra* text accompanying notes 214–17.

242. *See supra* Sections II.A, II.B.

must be visible enough for consumers to be aware of them, but obscure enough to avoid detection by the state. The difficulty of achieving this balance has only increased in the modern era. The internet has become the primary mechanism that firms use to offer their goods to consumers and, in order to be seen by consumers, most vendors sell their goods through a few dominant commercial platforms. Because these large commercial platforms have begun proactively prohibiting sales that would violate anti-price gouging laws, companies have been cut off from the best means for accessing consumers. Online sales listings are much easier for governmental actors to access and, thus, police than transactions that happen offline. The strength of these dynamics can be seen in the large numbers of firms that attempted to price gouge via online marketplaces during the COVID-19 pandemic and the number of enforcement actions that state and federal agents took against them.[243] Especially since these sites began policing pricing, it has become substantially harder for firms to find venues that give them access to consumers and permit sales that violate state pricing laws.

Two additional structural factors might contribute to firms' reticence to turn to black markets. First, the digital revolution has made avoiding unwanted attention more difficult. Information can be disseminated by both traditional media sources (for example, news outlets) and informal social networks (for example, online message boards, social media accounts) at an incredible pace. Engaging in illegal sales may not seem worth it in such an environment, given the increased likelihood of detection, public shaming, and loss of goodwill. Second, investing resources into black-market sales is discouraged by the nature of the circumstances in which price-gouging protections are activated. Because of the unpredictability of emergency events and the (typically) short window in which markets are disrupted, firms considering violating these laws may view the potential returns for doing so as too speculative.

Even if one grants that there may be a price differential at which firms would abandon traditional markets, the available data does not indicate that this has ever occurred during past disasters or that it would be likely to occur during future disasters. Still, there are certain features of anti-price gouging laws that could affect the likelihood of firms engaging in black market sales. Laws that carry more severe punishments and that are robustly enforced, for instance, will serve as larger deterrents than those with more minor penalties. Similarly, firms are less likely to turn to illegal sales under statutes that curtail the duration of price restrictions versus those that create longer-lasting price ceilings.

243. *See supra* Section I.A.

C. *Constitutional Challenges to Anti-Price Gouging Laws*

Anti-price gouging statutes have also been challenged as violating the U.S. Constitution. In 2020, a trade association of online retailers selling their products through Amazon's online marketplaces filed suit against the Attorney General of Kentucky seeking to prevent him from enforcing the state's law.[244] The commercial group's request for a preliminary injunction was granted by the trial court on the basis of its claim that Kentucky's anti-price gouging statute violated the Dormant Commerce Clause.[245]

The crux of the trade association's argument was that the vendors' transactions were structured in such a way that they constituted interstate commerce and that application of Kentucky's anti-price gouging law would infringe on the U.S. Congress's authority to regulate commerce among the states.[246] The firms argued that, even for businesses operating in Kentucky, the transactional structure of Amazon's online marketplace meant that all of their sales constituted interstate commerce.[247] Companies selling products through Amazon's marketplace, they argued, are only in privity of contract with Amazon (an out-of-state entity) and not the end purchasers of their goods (who may or may not be out-of-state).[248] They alleged that Kentucky's statute, by setting a cap on the prices they could charge on sales of particular goods within the state, illegally controlled the prices they could charge in transactions occurring outside of the state.[249] The law had this effect because Amazon's marketplace requires vendors to set a national price for their products, so a price ceiling set by a particular state was essentially a national price ceiling.[250]

On interlocutory appeal, the Sixth Circuit vacated the trial court's preliminary injunction and remanded for further proceedings.[251] It held that "a state law's effect on out-of-state commerce must be direct or inevitable to be invalid under the extraterritoriality doctrine."[252] Kentucky's price-gouging law did not cross this line because its effect on out-of-state commerce "depends entirely upon Amazon's independent decisions in how it structures its online marketplace."[253] Concluding that the guild's challenge was not likely to prevail on the merits, the Sixth Circuit reiterated what it felt was obvious: "Entities doing business in multiple states must comply with those states' valid consumer

244. Online Merchs. Guild v. Cameron, 995 F.3d 540, 543–44 (6th Cir. 2021).
245. Online Merchs. Guild v. Cameron, 468 F. Supp. 3d 883, 903–04 (E.D. Ky. 2020).
246. *Online Merchs. Guild*, 995 F.3d at 558.
247. *Id.* at 544.
248. *Id.*
249. *Id.* at 554–56.
250. *Id.*
251. *Id.* at 560.
252. *Id.* at 555.
253. *Id.*

protection laws—this is nothing new, and nothing that the extraterritoriality doctrine frowns upon."[254]

D. *Anti-Price Gouging Laws' Compatibility with Modern Commercial Practices*

Finally, commentators have objected to anti-price gouging laws on the grounds that they fail to account for fundamental changes in consumer commerce. These criticisms can be grouped into two categories. First, some argue that the state-based nature of anti-price gouging laws conflicts with the increasingly national scope of most firms.[255] Due to the digitization of commerce, more firms are offering their goods to consumers across state lines, either directly or through the use of online marketplaces. They contend that forcing firms to comply with every state's anti-price gouging law would impose unacceptable burdens on commerce and overwhelm state enforcement authorities.

The second set of criticisms focuses on issues related to the use of pricing algorithms in consumer markets. Many online marketplaces have begun to use algorithms to automatically set and, in response to changes in market conditions, adjust the prices of the goods that they offer. Amazon, for example, uses algorithms to set the prices of the company's products and offers access to this form of pricing to individuals selling their goods on the site.[256] Commentators have expressed concern about incompatibilities between this type of pricing innovation and the requirements articulated in states' anti-price gouging statutes.[257] They claim that it could be incredibly difficult (or impossible) for firms using algorithmic pricing to change their systems to accommodate for these types of price controls.[258]

The nation's experience during the COVID-19 pandemic undermines both types of concerns. A review of different states' enforcement actions establishes that state actors were able to successfully enforce their laws against

254. *Id.* at 558. For further discussion of anti-price gouging laws and the Dormant Commerce Clause, see generally Julia Levitan, *Price Gouging, the Amazon Marketplace, and the Dormant Commerce Clause*, 55 COLUM. J.L. & SOC. PROBS. 373 (2022).

255. Michelle K. Fischer & Tiffany D. Lipscomb-Jackson, *USA: Does a Federal Price Gouging Law Even Make Sense—And, if So, What Should It Look Like?*, 4 CONCURRENCES 1, 4 (2020) [hereinafter Fischer & Lipscomb-Jackson, *Does a Federal Price Gouging Law Even Make Sense?*]; *see* Williams, *supra* note 25, at 6–7, 13; Ann O'Brien & Brady Cummins, *The Price of Price-Gouging Laws*, ANTITRUST SOURCE, June 2020, art. no. 4, at 6–8, https://www.americanbar.org/content/dam/aba/publishing/antitrust-magazine-online/2020/june-2020/jun20_full_source.pdf [https://perma.cc/L8CG-KPY4 (staff-uploaded archive)].

256. *See* Williams, *supra* note 25, at 12–15.

257. *Id.*

258. *Id. See generally* Juan Manuel Sánchez-Cartas, Alberto Tejero & Gonzalo León, *Algorithmic Pricing and Price Gouging. Consequences of High-Impact, Low Probability Events*, 13 SUSTAINABILITY 2542 (2021) (analyzing the effect of disasters on algorithmic pricing and discussing the potential limitations of attempts to mitigate algorithm's price gouging effects).

domestic and out-of-state companies that sold goods in their territories.[259] Similarly, firms continued to sell products across the nation and the vast majority of these sales did not result in state action, indicating that it was not unduly burdensome for firms to comply with these laws. As described in the Sixth Circuit's *Online Merchants Guild* decision and supported by experiential data, the restrictions imposed by anti-price gouging laws are not categorically different or more difficult to comply with than those imposed by other state consumer protection statutes.[260]

Algorithmic pricing worries were also shown to be unfounded. After receiving warnings from a coalition of state attorneys general, Amazon and other large firms demonstrated that their pricing procedures were elastic enough to incorporate and enforce restrictions.[261] This was true even in the subset of jurisdictions where the law used a nonnumerical standard to define what type of price increase was prohibited.

The fact that firms have found ways to comply with a patchwork of state-based regulatory requirements should not be surprising, however, given that they have done so previously for other types of regulation. Yet, despite the private market's adaptability, it is worth noting that there is some degree of incompatibility between state statutes that lack a numerical standard and modern commercial practices.

IV. IMPROVING PROHIBITIONS ON POSTDISASTER PRICE GOUGING

This part will set forth the normative conclusions about regulation that can be drawn from the data discussed in Parts I and II and the arguments presented in Part III. It begins by briefly considering whether it would be preferable for anti-price gouging regulation to occur at the federal or state level. It then discusses what the optimal substantive terms for such a law would be.

A. *Should Price Gouging Be Regulated at the Federal or State Level?*

As discussed in Part I, prohibitions on exploitative pricing after a disaster are primarily found in state laws, with the Defense Production Act providing a federal mechanism for prosecuting individuals that hoard with the intent to resell.[262] In addition to debating the merits of these laws altogether, commentators have questioned whether one level of government is superior to the other when it comes to policing these practices.[263] Recent developments

259. *See supra* Section II.A.

260. *See* Online Merchs. Guild v. Cameron, 995 F.3d 540, 556–58 (6th Cir. 2021).

261. *Price Gouging Has No Place in Our Stores*, *supra* note 202.

262. *See* discussion *supra* Section II.B.

263. Spencer Warkentin, *Price Gouging in the Time of COVID-19: How U.S. Anti-Price Gouging Laws Fail Consumers*, 36 MD. J. INT'L L. 78, 97–106 (2021); Fischer & Lipscomb-Jackson, *Does a Federal Price Gouging Law Even Make Sense?*, *supra* note 255, at 9–11.

have made it clear that—even if large advantages would be gained by complete federalization of this issue—there is little chance that the U.S. Congress will enact an anti-price gouging statute. Reform at the state level provides the only realistic path forward on this issue, at least until the federal legislature experiences major changes.

There are many potential benefits to addressing price gouging at the federal level. The most obvious would be gains associated with the increased clarity and consistency that would result from having commerce throughout the nation governed by a single statutory standard. Uniformity of this type would likely reduce firms' compliance costs and decrease firms' inadvertent violations when engaging in interstate sales. These benefits would be particularly likely if the law expressly preempted state laws that vary from its standards.[264] Another advantage to a federal statute would be the extension of robust price-gouging protections to individuals that live in states that currently lack laws or have limited laws. Finally, a national law could result in more effective policing by expanding enforcement authority beyond state governmental entities and harnessing the resources of larger entities like the Federal Trade Commission.

Despite these potential advantages, it is highly unlikely that there will be any action on this front in the foreseeable future. During the pandemic, Democratic legislators proposed two federal anti-price gouging laws—the COVID-19 Price Gouging Prevention Act[265] and the Disaster and Emergency Pricing Abuse Prevention Act.[266] Despite the Democratic Party having majorities in both houses of the U.S. Congress and holding the Presidency, neither bill was able to make it out of committee and receive a vote.[267] Given that the party lost control of the House of Representatives in the subsequent election, all indications point towards federal efforts on this issue being stymied.

Because state laws are currently the primary mechanism for prohibiting price gouging, state-based reform efforts will not present a large departure from the status quo. The primary advantage of an approach focused on state laws concerns political feasibility. As discussed in the introduction, political momentum in favor of anti-price gouging laws is at perhaps the highest point it has ever been.[268] Not only did several states enact or bolster laws protecting consumers during the pandemic, but public support for such measures appears

264. *See* Fischer & Lipscomb-Jackson, *Does a Federal Price Gouging Law Even Make Sense?*, *supra* note 255, at 9; Williams, *supra* note 25, at 16–17.

265. COVID-19 Price Gouging Prevention Act, H.R. 675, 117th Cong. (2021); Price Gouging Prevention Act of 2022, S. 4214, 117th Cong. (2022).

266. Disaster and Emergency Pricing Abuse Prevention Act, S. 3839, 117th Cong. (2022).

267. S. 4214; H.R. 675; S. 3839.

268. *See supra* Introduction.

to be high as well.[269] Additionally, while state-based actions cannot offer the same uniformity advantages that a federal solution would, numerous states adopting identical rules would constitute an improvement upon the status quo.

B. *What Substantive Terms Should Anti-Price Gouging Laws Include?*

Regardless of whether reform occurs at the federal or state level, it is clear that existing laws could be improved. The survey of laws provided in Part I and the snapshots of recent enforcement efforts in Part II provide important data on the types of exploitative market conduct that has occurred, as well as the limitations of current statutes. This section will draw upon this information and the arguments set forth in Part III to describe the basic provisions that a model anti-price gouging law would contain.

Currently, state statutes vary wildly concerning the types of goods and services that are governed by price protections. While some delegate the responsibility for determining this issue to the executive branch (via declarations of emergency), others specify that only transactions involving certain types of goods (for example, gasoline) qualify for protections.[270] The COVID-19 pandemic exposed the limitations inherent in the latter group, with many of these states having to expand the scope of their laws to protect consumers.[271] Having the triggering declaration of emergency designate what goods and services are covered makes more sense—different types of emergencies can result in market shortages of different goods and services. While some might be concerned with allowing an executive body discretion to make these determinations, there have not been any instances of this being problematic in recent emergencies. Given this, the model law should adopt the approach that requires the declaration of emergency to define the scope of price protections. It should also be clear that its prohibitions are not limited to commercial retailers but extend to any firm involved in the sale of a protected good or service.

269. Julia Martinez, *As Democrats Push Price-Gouging Bill, Voters Show Bipartisan Support for Legislation That Would Bar Companies from Charging Excessively High Energy Prices*, MORNING CONSULT (May 25, 2022, 6:00 AM), https://morningconsult.com/2022/05/25/gas-price-measures-survey/ [https://perma.cc/C86G-EYGP (dark archive)] (reporting that 77% of voters support a ban on energy-related price gouging); Bryan Bennett, *Medicare Negotiation, Tackling Price Gouging, Taxing the Wealthy Seen as Effective To Fight Inflation*, NAVIGATOR RSCH. (July 6, 2022), https://navigatorresearch.org/medicare-negotiation-tackling-price-gouging-taxing-the-wealthy-seen-as-effective-to-fight-inflation/ [https://perma.cc/ZN25-RP94] (finding that most individuals support efforts to hold corporations accountable for price gouging consumers).

270. *See* discussion *supra* Section I.A.

271. *See* Press Release, Maura Healey, Mass. Att'y Gen., AG Healey Issues Emergency Regulation Prohibiting Price Gouging of Critical Goods and Services During COVID-19 Emergency (Mar. 20, 2020), https://www.mass.gov/news/ag-healey-issues-emergency-regulation-prohibiting-price-gouging-of-critical-goods-and-services-during-covid-19-emergency [https://perma.cc/5WWQ-WB2X].

As far as defining the threshold at which the sale of a protected good constitutes price gouging, rules that set a numerical standard better fit the reality of modern commerce than those that rely on common-law concepts. First, rules that set numerical standards provide firms with a high degree of certainty about the permissibility of selling scarce goods at specific prices. In doing so, these laws help ensure that concerns about potential liability do not cause firms to exit emergency markets. Additionally, a threshold that allows a slight increase in profitability would help to strike a balance between two crucial goals—giving firms a greater incentive to sell scarce goods than would exist otherwise and preventing exploitative pricing. Third, laws that set a clear limit can be easily integrated into online marketplaces' price-setting algorithms and automated compliance checks. This is particularly significant given the prevalence with which individuals attempted to use these platforms to price gouge during the COVID-19 pandemic. Finally, the model statute should make it clear that price increases that violate these standards are permitted if the firm can show that they are the direct result of increases in the firm's costs. Doing so is needed to ensure that firms facing increased business costs continue to supply scarce goods and are not driven out of the market by liability concerns.

Further, anti-price gouging laws should adopt a flexible approach with regard to determining the pre-emergency reference price for a good or service. Laws that look to the price the firm sold the good or service at before the declaration of emergency provide most firms with a high degree of clarity. But these statutes fall short when it comes to transactions involving sellers that did not previously sell these products. New sellers can be particularly prevalent in disaster markets—for example, individuals engaging in mask and cleaning product arbitrage during the pandemic. To address this shortcoming, the model law should supplement the pre-emergency price standard with one that looks to the average price of the good in the thirty-day period prior to the emergency.[272] While some have criticized the average price approach as being insufficiently definite to give firms guidance, the pandemic demonstrated how online marketplaces can facilitate efforts to determine the average prices for goods in specific markets. In the model law the prior sale metric should remain the primary rule for firms with sales histories and the average price standard should apply to firms that are new to the market.

Nearly all anti-price gouging laws agree that a declaration of emergency from the governor should serve as the triggering event for price controls. There is less unanimity about whether a similar declaration from a federal official should be recognized. This is likely an artifact of the rarity with which federal

272. Florida's statute contains language to this effect. FLA. STAT. § 501.160(b)(2) (2023) ("The amount charged grossly exceeds the average price at which the same or similar commodity was readily obtainable in the trade area during the 30 days immediately prior to a declaration of a state of emergency.").

emergencies have been declared for things like environmental disasters, pandemics, or other market-disrupting events.[273] While emergencies affecting the entire nation have been rare, the COVID-19 pandemic demonstrated that they can massively disrupt consumer markets. In consideration of this, the ideal law recognizes emergency declarations issued by the President, as well as by the state's governor.

Anti-price gouging laws should also include provisions that help ensure that price protections do not overstay their welcome. The economic objections to anti-price gouging laws are at their strongest when normal market forces are operating and increases in demand spur greater supply. As discussed earlier, the main justification for direct price regulation is that emergencies can make supply inelastic.[274] Price-gouging protections begin to do more harm than good, however, if they remain in effect after this crisis-related market disruption ends. Given this, an ideal statute would require the state to reassess the need for these protections frequently. This can most easily be achieved by having a declaration of emergency trigger only a short period of protection. Renewals of this period would require the relevant state actor to issue a determination that market interventions continue to be merited.

Given that every state's price-gouging prohibition entrusts primary enforcement authority to state officials, it makes sense for the model law to follow suit. Whether it should include a private right of action, however, is less clear. There are at least some indications that public enforcement may be enough to deter exploitative conduct and compensate injured parties. First, the incidents discussed in Part II prove that the attorneys general in many states have vigorously pursued individuals that have violated these laws. These officials have been able to quickly and efficiently stop firms from price gouging and obtain restitution for injured consumers.[275] Similarly, the scarcity of successful private enforcement suits could be viewed as an indication that there may not be a large need for these types of suits.[276] Finally, the demonstrated willingness of the largest online marketplaces to assist officials in preventing and policing illegal sales could prove to be important. Because these sites have been viewed as key facilitators of price-gouging behaviors, changes in their policies may be enough to keep the number of violations at a level where public enforcement can reliably deter firms from breaking the law.

273. Aside from the declaration made concerning the COVID-19 pandemic, there has only been one federal declaration of this type in the past fifty years. Declaration of National Emergency with Respect to the 2009 H1N1 Influenza Pandemic, Proclamation No. 8443, 74 Fed. Reg. 55439 (Oct. 28, 2009).

274. *See supra* Section III.B.1.

275. *See* discussion *supra* Part II.

276. Of course, the lack of successful private suits could be due to other factors. One plausible alternative explanation would be that firms settle such claims. Another would be that the private rights of action set forth in existing laws are flawed and overly advantage firms over consumers.

Recent enforcement actions provide valuable insights into what the penalties for price gouging should be. First, the model law should require state officials to attempt to use informal means (for example, cease-and-desist letters) to resolve price-gouging claims before filing suit. To encourage firms to settle informally, the statute should set restitution, reimbursement of the state's investigation costs, and injunctive relief as the exclusive remedies the state can seek at this stage. In the vast majority of cases, it appears as though companies are willing to settle and pay these costs.[277] If things progress to an actual lawsuit, then the statute should include the same remedies, along with substantial statutory damages per violation. Such damages will provide a strong economic incentive for firms to comply with the law. The model law should not contain a daily cap on the damages that can be assessed against a company, as these limits undermine the degree to which large firms will be deterred from violations.[278]

Finally, anti-price gouging laws should include a provision—a rationing requirement—that currently only exists in one state's laws.[279] While policymakers should not be concerned about price controls having detrimental effects on supply in post-emergency markets, measures need to be added to counteract the incentives that low prices create for hoarding of scarce goods. While it has been relatively common for firms selling scarce goods to impose purchasing limits on customers, anti-price gouging statutes should include provisions authorizing the state to institute and enforce per-person sales caps in postdisaster markets. The power vested in states parallels similar abilities that have been granted to the President under federal laws.[280] Perhaps the most elegant way for the model law to incorporate this type of provision would be to require that firms abide by any purchasing limits set forth in the triggering declaration of emergency.

CONCLUSION

Having weathered the largest and most prolonged period of emergency-disrupted markets in modern history, policymakers are in an exceptional position to reform anti-price gouging laws. As described earlier, the COVID-19 pandemic posed regulatory challenges that went beyond those present in most disasters. In doing so it provided an abundance of data about how firms and consumers operate in emergency markets, as well as how these entities react to regulation of their behaviors. As set forth in this Article, analysis of this

277. *See* discussion *supra* Sections II.A, II.B.

278. *See* Warkentin, *supra* note 263, at 93; Williams, *supra* note 25, at 14.

279. CONN. GEN. STAT. § 42-231(a) (2023).

280. 50 U.S.C. § 4515 (2022) (gasoline); James R. Conde & Michael S. Greve, Yakus *and the Administrative State*, 42 HARV. J.L. & PUB. POL'Y 807, 824 (2019) (discussing other federal statutes that authorized the federal executive branch to ration goods).

information (along with data from other recent disasters) shows that anti-price gouging laws protect consumers from exploitation and that many of the common criticisms of these rules are unfounded.

The current state of anti-price gouging restrictions, however, is far from ideal. Just as recent experiences have demonstrated the value that such laws have, they have also shown that some regulatory approaches are superior to others. Federal or state legislatures should capitalize on the public's favorable sentiment towards restraining abusive market conduct and enact reforms that will improve the law's protection of vulnerable consumers in postdisaster markets.