

PRICE GOUGING, THE PANDEMIC, AND WHAT COMES NEXT

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Abstract: Whenever there is a disaster, there are complaints of price gouging—that is, of people selling critical goods at grossly inflated prices. Over the last half-century, states and territories have increasingly responded by adopting anti-gouging laws that limit how much sellers can increase prices on at least some goods and services during an emergency. An overwhelming majority of jurisdictions now have such laws, which share a few common characteristics. The laws vary considerably across jurisdictions, however, by what products, services, and sellers they cover, how long they last, and how strictly they limit price increases.

This Article assesses how the states changed their laws during, and in response to, the unprecedented challenges of the COVID-19 pandemic. It surveys fifty-six state and territorial jurisdictions, and finds that more than one-third made changes to their anti-gouging laws between 2020 and 2022, mostly to adopt new laws or strengthen existing regimes. Although the state laws faced the same challenges in responding to the unique circumstances of COVID-19, there was no marked trend toward convergence on a single best approach to regulating price gouging. Instead, the laws are increasingly diverse, which provides both opportunities for policy learning and more pressure for a uniform standard.

Although the states and territories overwhelmingly favor anti-gouging regulation, economists oppose them nearly as consistently. Critics blast the laws as unnecessary at best (because many businesses voluntarily freeze prices), and as harmful at worst, triggering and worsening consumer shortages and derailing important market forces that can speed up disaster recovery. This Article explores the criticism and support of anti-gouging regulation from both economic and moral perspectives. It concludes that critics and supporters alike have overlooked a potentially important impact of anti-gouging regulation: the possibility that such rules can help equalize the risk between wealthier and poorer communities that people will face unjustified price hikes in the event of an emergency.

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INTRODUCTION

Following nearly every disaster, you can find news articles recounting incidents of “price gouging” in the affected community—that is, people selling important goods like water and gas (or, more recently, masks) at grossly inflated prices.¹ In most American states and territories, there are laws designed to protect people from emergency profiteering or “price gouging.” These laws aim to protect the public from sellers who unjustifiably increase prices, often on essential or scarce goods and services, in response to some emergency or disaster.²

To assess the current state of anti-gouging laws, I looked at fifty-six jurisdictions: the fifty states, plus the District of Columbia, Puerto Rico, Guam, the U.S. Virgin Islands, American Samoa, and the Northern Mariana Islands. I reviewed the current state of their anti-gouging laws, along with whether and how those rules changed between February 1, 2020 and July 31, 2022. During this period of the pandemic, forty-six of the fifty-six surveyed states and territories had an anti-gouging law in place, at least temporarily.³

These laws have been actively enforced nationwide over the course of the pandemic. A few cases made national headlines, and state attorneys general and other enforcers fielded tens of thousands of complaints nationwide⁴ and

¹ See, e.g., 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/P2L6-LF2M>] (listing examples of inflated prices for masks, toilet paper, and food items during the COVID-19 pandemic); Justin Sablich, ‘Price Gouging’ and Hurricane Irma: What Happened and What to Do, N.Y. TIMES (Sept. 17, 2017), <https://www.nytimes.com/2017/09/17/travel/price-gouging-hurricane-irma-airlines.html> [<https://perma.cc/2NZX-KVBE>] (describing inflated flight prices for people trying to leave the area in the aftermath of Hurricane Irma); Joseph B. Treaster, *Hurricane Charley: The Economics; With Storm Gone, Floridians Are Hit with Price Gouging*, N.Y. TIMES, <https://www.nytimes.com/2004/08/18/us/hurricane-charley-economics-with-storm-gone-floridians-are-hit-with-price.html> [<https://perma.cc/B5GE-33MK>] (Aug. 19, 2004) (describing examples of price gouging in Florida after Hurricane Charley); Steve Lohr, *Lessons from a Hurricane: It Pays Not to Gouge*, N.Y. TIMES (Sept. 22, 1992), <https://www.nytimes.com/1992/09/22/business/lessons-from-a-hurricane-it-pays-not-to-gouge.html> [<https://perma.cc/Y4L2-F26N>] (describing one chain’s pricing strategy of selling plywood at cost from suppliers, which had increased, but not realizing a profit on the item, following Hurricane Andrew in Florida).

² See Christopher Buccafusco, Daniel Hemel & Eric Talley, *The Price of Fairness*, 84 OHIO ST. L.J. 389, 398–402 (2023) (providing common arguments in favor of price-gouging laws).

³ See Appendix A (displaying states’ price-gouging statutes in effect at one point during the pandemic).

⁴ See Attorney General’s Office Handling Over 2,500 Complaints of Price Gouging During Pandemic, KXAN (Mar. 28, 2020), <https://www.kxan.com/news/coronavirus/attorney-generals-office-handling-over-2500-complaints-of-price-gouging-during-pandemic/> [<https://perma.cc/49XW-3MRB>] (noting that Texas received more than 2,500 price-gouging complaints by March 28, 2020); Brian Roche, *Pennsylvania Attorney General Receives Nearly 2,900 Price Gouging Complaints*, WGAL, <https://www.wgal.com/article/pennsylvania-attorney-general-receives-nearly-2900-price-gouging-complaints/31956774#> [<https://perma.cc/PPE3-LTUV>] (Mar. 27, 2020) (reporting that Pennsylvania

took hundreds of actions in response to allegations of unlawfully inflated prices. The anti-gouging laws that the attorneys general enforce also underwent a pandemic transformation in many places, through temporary or permanent legislation or regulation changes.⁵ Multiple states adopted wholly new price-gouging legislation during the pandemic;⁶ others added or adapted anti-gouging measures through gubernatorial emergency orders.⁷ Overall, about one third of states and territories added or adapted an anti-gouging law between February 2020 and mid-2022, and nearly every change expanded or strengthened those laws, at least temporarily.

was inundated with almost 2,900 complaints related to price gouging in the COVID-19 pandemic). New York City's consumer affairs agency fielded more than twelve thousand complaints about price gouging between March and November 2020. *8 Months and 10,000+ Complaints Later: Department of Consumer and Worker Protection Analysis Shows Price Gouging Preys on Vulnerable New Yorkers*, N.Y.C. DEP'T CONSUMER & WORKER PROT. (Nov. 9, 2020) [hereinafter *8 Months*], <https://www1.nyc.gov/site/dca/media/pr110920-Price-Gouging-Analysis.page> [<https://perma.cc/E49F-DDB5>]. By June 2020, the New York Attorney General had received more than seven thousand complaints, and by the following December, sent more than 1,900 cease-and-desist letters. Press Release, Letitia James, New York State Attorney General, Consumer Alert: Attorney General James Asks Consumers to Report Price Gouging of At-Home COVID-19 Testing Kits and Other In-Demand Items (Dec. 21, 2021), <https://ag.ny.gov/press-release/2021/consumer-alert-attorney-general-james-asks-consumers-report-price-gouging-home> [<https://perma.cc/NAG9-U3K6>]; Press Release, Letitia James, New York State Attorney General, Attorney General James' Price Gouging Authority Strengthened After Governor Cuomo Signs New Bill into Law (June 6, 2020), <https://ag.ny.gov/press-release/2020/attorney-general-james-price-gouging-authority-strengthened-after-governor-cuomo> [<https://perma.cc/UAT8-BGXA>]. New Jersey sent 1,586 cease-and-desist letters by June 7, 2020. Jeff Goldman, *Coronavirus Price-Gouging Complaints Still Pouring in Across N.J.*, NJ.COM (June 7, 2020), <https://www.nj.com/coronavirus/2020/06/coronavirus-price-gouging-complaints-still-pouring-in-across-nj.html> [<https://perma.cc/Z72E-MA9M>]; see also Patricia A. Connors, *Price Gouging & the Pandemic: State Attorneys General Enforcement Trends and Developments*, PUB. LAW., Summer 2022, at 2, 5 (discussing Florida's complaints and enforcement efforts).

⁵ See, e.g., COLO. REV. STAT. § 6-1-730 (2023) (adopting a price-gouging statute for the first time in Colorado); N.Y. GEN. BUS. LAW § 396-r (McKinney 2023), amended by Act of June 6, 2020, 2020 N.Y. Laws 773 (adding coverage for "essential medical supplies and services used for the care, cure, mitigation, treatment or prevention of any illness or disease, and . . . any other essential goods and services" to New York's longstanding price-gouging law); 940 MASS. CODE REGS. 3.18 (2023) (putting in place a broad price-gouging regulation). See generally 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?*, CONCURRENCES REV. 1–2 (Apr. 2020), <https://www.jonesday.com/en/insights/2020/04/usa-does-a-federal-price-gouging-law-even-make-sense> [<https://perma.cc/7J3J-NT3W>] (noting that because states make their own decisions on price-gouging laws, the laws vary widely in scope).

⁶ See, e.g., Act of June 2, 2021, 2021 Nev. Stat. 1341 (adopting a price-gouging statute); COLO. REV. STAT. § 6-1-730 (adding a price-gouging statute); Act of Apr. 9, 2020, 2020 Alaska Sess. Laws ch. 10, § 26 (adding a temporary price-gouging statute).

⁷ See, e.g., Minn. Exec. Order No. 20-10 (Mar. 20, 2020) (prohibiting, pursuant to MINN. STAT. § 12.21(3)(1) (2019), without other price-gouging legislation, "selling, offering to sell, or causing to sell in this state any essential consumer goods or services for an amount that represents an unconscionably excessive price"). I do not treat anti-gouging provisions in executive orders as anti-gouging laws generally in this Article, unless the emergency powers statute clearly refers to gouging or price control.

Although COVID-19 is not gone, the declarations of emergency in many states are over—as of January 2023, fewer than ten states had active COVID-19 states of emergency.⁸ With the end of those emergency orders, most states’ anti-gouging laws also went out of effect. This makes the current moment particularly ripe for assessing these various anti-gouging statutes, their effects and limits, and possibilities for future anti-gouging regulation.

This Article takes on some of this work. In Part I, I explain the basic idea of price gouging and present some of the various anti-gouging laws across the country.⁹ In Part II, I examine some of the ways in which the pandemic highlighted limitations in states’ differing approaches to anti-gouging regulation, including the strengths and weaknesses of different regulatory choices in coverage, timing, and flexibility.¹⁰ In Part III, I turn to the national picture of anti-gouging legislation, examining points of convergence and divergence, and the pressure this puts on efforts to set a uniform standard across jurisdictions.¹¹ In Part IV, I detail some of the most pervasive critiques of anti-gouging laws—those from economists.¹² And in Part V, I consider some of what the economic critiques might miss in accounting for the popularity and potential importance of anti-gouging legislation, and lay out avenues for future research.¹³

I. PRICE GOUGING AND THE ANTI-GOUGING LAWS

“A hardware store has been selling snow shovels for \$15. The morning after a large snowstorm, the store raises the price to \$20.”¹⁴

Is this price increase fair? This example, based on a classic behavioral economics study, offers the kind of emergency-related price increase that tends to trigger a negative reaction in consumers, eliciting a sense that the business has unfairly taken advantage of its customers in an emergency.

There is no single, agreed-upon standard for what constitutes price gouging; the general idea, however, is that gouging includes major spikes in the price of a relevant consumer good, in response to an emergency-related shortage or need, that is made without adequate justification (for example, where

⁸ *State Emergency Health Orders During the Coronavirus (COVID-19) Pandemic, 2021–2023*, BALLOTPEDIA, [https://ballotpedia.org/State_emergency_health_orders_during_the_coronavirus_\(COVID-19\)_pandemic_2021-2022#Active_COVID-19_emergency_orders_by_state](https://ballotpedia.org/State_emergency_health_orders_during_the_coronavirus_(COVID-19)_pandemic_2021-2022#Active_COVID-19_emergency_orders_by_state) [https://perma.cc/9CCJ-6V68] (Aug. 14, 2023).

⁹ See *infra* notes 14–44 and accompanying text.

¹⁰ See *infra* notes 45–134 and accompanying text.

¹¹ See *infra* notes 135–184 and accompanying text.

¹² See *infra* notes 185–234 and accompanying text.

¹³ See *infra* notes 235–256 and accompanying text.

¹⁴ Daniel Kahneman, Jack L. Knetsch & Richard Thaler, *Fairness as a Constraint on Profit Seeking: Entitlements in the Market*, 76 AM. ECON. REV. 728, 729 (1986).

the seller did not experience any significant increase in supply costs).¹⁵ Particularly after a disaster, some level of price increase—the \$15 gallon of water, the \$79 bottle of Purell, or the \$900 chainsaw that typically sells for \$200—hits the news and is met with public outrage and disgust.¹⁶ This is the kind of behavior, broadly speaking, that anti-gouging laws and regulations target, though each jurisdiction may define gouging differently (if they define it much at all). The lack of a single definition makes the frequency of gouging behavior difficult to assess; it appears, however, both to be a persistent problem and to comprise only a small fraction of post-disaster commercial conduct.¹⁷

Just as there is no uniform definition of price gouging, there is no uniform anti-gouging law. In this Article, I focus on state laws, as that is largely where the action is. There is currently no general federal law regulating consumer price gouging.¹⁸ During the COVID-19 pandemic, the federal government used

¹⁵ See *infra* notes 36–38 (demonstrating the many different ways state statutes define price gouging). Although many of these statutes also apply to services, and some to housing, this Article focuses mainly on goods. I further focus on consumer, not government, purchasers. For a discussion of the pandemic’s impact on False Claims Act claims of gouging the government, see Gavin A. Bell & W. Stacy Miller, II, *Fraud in the Pandemic: How COVID-19 Affects Qui Tam Whistleblowers and the False Claims Act*, 43 CAMPBELL L. REV. 273, 296–97, 303–04 (2021).

¹⁶ See Joseph B. Treaster, *After the Storm; Rising Complaints of Price Gouging*, N.Y. TIMES (Aug. 30, 1992), <https://www.nytimes.com/1992/08/30/us/after-the-storm-rising-complaints-of-price-gouging.html> [<https://perma.cc/CRF3-TJUJ>] (describing complaints of price gouging on necessities after Hurricane Andrew, including a gallon of water priced at \$15); Tamar Lapin, Alex Taylor & Laura Italiano, *Liquid Gold: Purell Selling for \$79 in Manhattan Hardware Store*, N.Y. POST, <https://nypost.com/2020/03/06/liquid-gold-purell-selling-for-79-in-manhattan-hardware-store/> [<https://perma.cc/N62H-MBMV>] (Mar. 10, 2020) (describing incidents of price gouging hand sanitizer during the COVID-19 pandemic).

¹⁷ See Max N. Helveston, *Regulating Economic Opportunism in Post-Disaster Markets*, 102 N.C. L. REV. (forthcoming Mar. 2024) (manuscript at 20–30) (SSRN) (documenting state and federal enforcement efforts, and noting the difficulty in assessing the frequency of price-gouging behavior); Debra Wilson, *Price Gouging, Construction Cartels or Repair Monopolies? Competition Law Issues Following Natural Disasters*, 20 CANTERBURY L. REV. 53, 55–56 (2014) (arguing, largely on economic grounds, that anti-gouging laws are unnecessary because “[a]ctual examples are rare, and when they do exist, often appear to be short term responses to supply interruption, which are arguably justified in the changing post-disaster environment”). However, the difference between the rates of consumer complaints to state attorneys general and the enforcement actions actually brought suggests that consumers perceive price-gouging behavior substantially more often than investigators find unlawful conduct, probably due to many price increases being attributable to businesses passing on increases in cost. See Lisa Grow Sun, *Disaster Mythology and the Law*, 96 CORNELL L. REV. 1131, 1138, 1190 & n.255 (2011) (noting that price gouging is hard to quantify due to varying definitions, and suggesting that it may reflect and reinforce a broader myth of widespread antisocial behavior after a disaster); cf. Wilson, *supra*, at 65–69 (discussing the trend of fewer prosecutions of price gouging, compared to growing complaints).

¹⁸ See 15 U.S.C. § 45(a)(1) (prohibiting, as part of the Federal Trade Commission Act, “unfair or deceptive acts or practices in or affecting commerce”). The Federal Trade Commission (FTC) has long criticized anti-gouging regulation, however, and so has generally not used this authority to reach price gouging outside the antitrust context. When asked about potential federal petroleum anti-gouging legislation, then-FTC Chair Deborah Platt Majoras told the Senate: “[P]rice gouging laws that have the effect of

executive orders and agency actions grounded in pre-existing federal law to attempt to limit hoarding and price-gouging behavior for specified critical supplies, including personal protective equipment and other medical supplies.¹⁹ For example, the Defense Production Act, which then-President Trump invoked in March 2020 in Executive Order 13910,²⁰ allows the President to identify items as scarce or threatened by hoarding. Once an item is so identified, people may not “accumulate [it] (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.”²¹ The ability to use this power to control prices generally, however, or to control the general distribution of items in civilian markets, is explicitly limited by statute.²² Although both broad and narrow federal anti-price-gouging legislation was introduced in multiple recent congressional terms, none became law.²³ I consider some of these federal proposals further in Part III.²⁴

controlling prices likely will do consumers more harm than good.” *Market Forces, Competitive Dynamics, and Gasoline Prices: FTC Initiatives to Protect Competitive Markets: Hearing Before the Comm. on Com., Sci. & Transp. & the Comm. on Energy & Nat. Res.*, 109th Cong. 7 (2005) (prepared statement of Deborah Platt Majoras, Chair, FTC) [hereinafter *Hearing*], https://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-committee-commerce-science-and-transportation-and/051109gaspricetest3.pdf [<https://perma.cc/CPN2-B8J7>]. On February 1, 2022, however, the Director of the FTC’s Bureau of Consumer Protection testified before the Senate Subcommittee on Consumer Protection, Product Safety, and Data Security, and seemed open to the idea of Congress granting the FTC additional power to combat price gouging. *Subcommittee: Stopping COVID-19 Fraud and Price Gouging*, U.S. S. COMM. ON COM., SCI. & TRANSP., at 1:27:40 (Feb. 1, 2022), <https://www.commerce.senate.gov/2022/2/commerce-committee-announces-subcommittee-hearing-on-february-1-2022> [<https://perma.cc/HQA7-ML5B>]. Although the FTC received additional powers in temporary COVID legislation, they were limited to prohibiting “deceptive act[s] or practice[s].” Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182 (2020), div. FF, tit. XIV, § 1401(b).

¹⁹ Marissa Rydzewski, *Price Gouging During a Pandemic: The Federal Government’s Response*, 48 DOCUMENTS TO PEOPLE 33, 34 (2020).

²⁰ Exec. Order No. 13910, 85 Fed. Reg. 17001 (Mar. 26, 2020).

²¹ 50 U.S.C. § 4512.

²² See *id.* § 4514(a) (limiting price controls in general); *id.* § 4511(b) (limiting control of distribution in civilian markets).

²³ See Stop Gas Price Gouging Tax and Rebate Act, H.R. 7099, 117th Cong. (2022); Gas Price Gouging Prevention Act, H.R. 7463, 117th Cong. § 2 (2022); Gas Price Gouging Prevention Act, S. 3920, 117th Cong. § 2 (2022); Consumer Fuel Price Gouging Prevention Act, H.R. 7688, 117th Cong. § 2 (2022); Price Gouging Prevention Act of 2022, S. 4214, 117th Cong. § 3 (2022); Price Gouging Prevention Act of 2022, H.R. 7736, 117th Cong. § 3 (2022); Disaster and Emergency Pricing Abuse Prevention Act, S. 3839, 117th Cong. § 3 (2022); Disaster and Emergency Pricing Abuse Prevention Act, H.R. 9284, 117th Cong. § 3 (2022); COVID-19 Price Gouging Prevention Act, H.R. 675, 117th Cong. § 2 (2021); Price Gouging Prevention Act, S. 3853, 116th Cong. § 3 (2020); COVID-19 Price Gouging Prevention Act, H.R. 6472, 116th Cong. § 2 (2020). As of March 2023, three narrower gouging-related bills have been introduced in the new 118th Congress. See Federal Price Gouging Prevention Act, S. 355, 118th Cong. § 2 (2023) (prohibiting sales of petroleum products at unconscionable prices); Fair and Transparent Gas Prices Act of 2023, S. 67, 118th Cong. § 2 (2023) (requiring the

Given this limited federal authority, anti-gouging regulation and enforcement regarding the broad run of consumer goods and services are mainly handled at the state or local level. These regulations take two main forms: bans on unfair business practices generally, or on price gouging specifically. As to the first, each state has a general consumer protection law that prohibits some combination of unfair, unconscionable, or deceptive business practices—these are often called Unfair and Deceptive Acts and Practices (UDAP) laws.²⁵ UDAP laws may well reach substantial amounts of price-gouging behavior, as described in greater detail below. They do so, however, by treating an unwarranted major price hike as an unfair, unconscionable, or abusive commercial practice, as state-by-state case law has developed those terms.²⁶

In addition to those general UDAP laws, most states now also have more specific statutes and regulations that deal explicitly with price gouging in an emergency. These laws date back to 1979, when New York adopted a law “to prevent merchants from taking unfair advantage of consumers during abnormal disruptions of the market” in response to a heating oil shortage.²⁷ In the intervening years, more states have gradually adopted their own price-gouging regulations to protect consumers in the event of a natural disaster or other major emergency. States often adopt these laws after a disaster or emergency; at least six states added such laws in the wake of the attacks on September 11, 2001, for example, and several others added such laws following Hurricane Katrina.²⁸ At the start of the pandemic, at least thirty-six states, territories, and dis-

FTC to study oil and gas pricing); HOME Act of 2023, H.R. 702, 118th Cong. § 2 (2023) (prohibiting selling or renting single-family homes at unconscionable prices).

²⁴ See *infra* notes 135–184 and accompanying text.

²⁵ See, e.g., CAL. BUS. & PROF. CODE § 17200 (West 2023) (prohibiting “unlawful, unfair or fraudulent business act[s]”); N.J. STAT. ANN. § 56:8-2 (West 2023) (prohibiting, *inter alia*, “unconscionable” commercial practices); ME. STAT. tit. 5, § 207 (2023) (prohibiting any “unfair or deceptive acts or practices in the conduct of any trade or commerce”). The broad language in these laws is amenable to price-gouging protections, but case law varies by state.

²⁶ See, e.g., Complaint at 7–8, *State v. Big Brother Sec. Programs Inc.*, No. 326-4-20 (Vt. Super. Ct. Apr. 13, 2020) [hereinafter *Complaint, Big Brother*] (using a state’s general UDAP statute to go after price gougers); Complaint, *State v. Aune*, No. 3AN-20-05758CI (Alaska Super. Ct. Apr. 1, 2020) [hereinafter *Complaint, Aune*] (bringing an unconscionable pricing claim under the general Unfair Trade Practices Act for, essentially, price gouging on personal protective equipment through online sales).

²⁷ Act of Nov. 5, ch. 730, 1979, 1979 N.Y. Laws 1 (codified as amended at N.Y. GEN. BUS. LAW § 396-r (McKinney 2023)); Cale Wren Davis, An Analysis of the Enactment of Anti-Price Gouging Laws 35–39 (Jan. 2008) (M.A. thesis, Montana State University), <https://scholarworks.montana.edu/xmlui/bitstream/handle/1/1145/DavisC0508.pdf?sequence=1> [<https://perma.cc/NR9G-76UJ>] (discussing the legislative history and enforcement of New York’s anti-price-gouging law); see also Michael Giberson, *The Problem with Price Gouging Laws: Is Optimal Pricing During an Emergency Unethical?*, 34 REGULATION 48, 50 (2011) (providing a history of some states’ anti-gouging laws).

²⁸ See Davis, *supra* note 27, at 32–34 (noting that although the September 11 attacks and Hurricane Katrina directly affected only a few states, both events impacted gas prices nationwide and

tricts already had some specific anti-gouging statute or regulation in place.²⁹ That figure reached above forty-five during the pandemic, including temporary measures.³⁰

There is a good deal of variation in these specific anti-gouging laws across jurisdictions, including what goods are covered, what price increases are allowed, whether private citizens can enforce them, and what penalties violators may face.³¹ But there are also commonalities among them.

Most of the specific anti-gouging laws are triggered when the U.S. President, Governor, or certain local officials declare a state of emergency.³² A few are triggered, instead or in addition, by a declaration of “abnormal market dis-

prompted the adoption of several anti-gouging laws); Michael Steven Tarrant, *The Effects of Anti-Price Gouging Laws in the Wake of a Hurricane 16* (Apr. 2015) (M.A. thesis, Montana State University) (on file with author) (listing the years in which different states passed anti-price-gouging laws). *See generally* John A. Creasy, Jr., *Commerce and Trade: Selling and Other Trade Practices: Allow Price Controls During a State of Emergency; Provide for Exceptions; Permit County and Municipal Authorities to Require Registration of Certain Businesses During a State of Emergency*, 12 GA. ST. U. L. REV. 31 (1995) (recounting the adoption of Georgia’s price-control law).

²⁹ Steve Parsons, *An Examination of Anti Price Gouging Laws and Shortages During COVID-19*, 22 LOY. J. PUB. INT. L. 37, 41 (2020).

³⁰ *See, e.g.*, Act of Apr. 9, 2020, 2020 Alaska Sess. Laws ch. 10, § 26 (adding temporary price-gouging prohibitions); Act of July 23, 2020, ch. 267, 82 Del. Laws 1 (2019) (codified at DEL. CODE ANN. tit. 6, § 2513A (repealed 2023)) (creating a temporary prohibition of price gouging during the COVID-19 emergency); Act of July 23, 2021, ch. 85, 83 Del. Laws 1 (2021) (adding a permanent “unfair practice” ban to the state’s UDAP law to address price gouging); Act of Oct. 26, 2020, No. 8386, 2020 V.I. Sess. Laws 205–07 (adding a price-gouging prohibition to the statutory code); Act of June 2, 2021, 2021 Nev. Stat. 1341 (adopting a price-gouging statute). Some states also added protections through executive orders. *See, e.g.*, Minn. Exec. Order No. 20-10 (Mar. 20, 2020) (prohibiting, under the emergency powers statute, MINN. STAT. § 12.21(3)(1) (2019), “selling, offering to sell, or causing to sell in this state any essential consumer goods or services for an amount that represents an unconscionably excessive price”). In 2021, on a citizen initiative, Michigan repealed the Governor’s emergency power laws, under which she had issued a price-gouging executive order, after the Michigan Supreme Court ruled that the statute violated the separation of powers. Act of Sept. 9, 2021, No. 77, 2021 Mich. Pub. Acts 1 (codified at MICH. COMP. LAWS § 10.31–.33 (repealed 2022)), *declared unconstitutional* by Midwest Inst. of Health, PLLC v. Governor of Mich., 958 N.W.2d 1, 6 (Mich. 2020).

³¹ Buccafusco et al., *supra* note 2, at 405–09, 472–82 (listing and comparing the price-gouging laws in different states). California, for example, is among about fifteen surveyed jurisdictions that impose criminal penalties for at least some instances of price gouging, often along with broader civil prohibitions. *See, e.g.*, CAL. PENAL CODE § 396(h) (West 2023) (creating the potential for jail time as a punishment for price gouging); ARK. CODE ANN. § 4-88-304(a)(1)(2) (2023) (noting that criminal penalties are available for price gouging); MISS. CODE ANN. § 75-24-25(3) (2023) (making price gouging a felony); *see also* Helveston, *supra* note 17, at 13–15 (highlighting state differences in terms of private and public enforcement of anti-gouging laws and possible penalties).

³² Not every law has a particular trigger; for example, Michigan’s UDAP statute prohibits “[c]harging the consumer a price that is grossly in excess of the price at which similar property or services are sold.” MICH. COMP. LAWS § 445.903(z) (2023). Ohio law is similar, prohibiting vendors from charging a price that they know is “substantially in excess of the price at which similar property or services” are sold. OHIO REV. CODE ANN. § 1345.03(B)(2) (West 2023).

ruptions” or severe weather warnings.³³ The laws tend to stay in effect for the duration of the state of emergency, although some stay in effect for a set period of time (say, thirty or sixty days) once an emergency is declared.³⁴

Once in effect, the anti-gouging laws limit, in some fashion, the amount that the prices of covered goods and services may increase. Different states, however, have approached setting these limits differently. The laws can generally be sorted into three major groups, according to how they limit price increases:³⁵ (1) those that prohibit price increases almost entirely,³⁶ (2) those that prohibit price increases above a certain percentage of the pre-disaster price,³⁷ and (3) those that simply prohibit pricing that is “unconscionably high,” “unreasonably excessive,” or some similar standard.³⁸ Some anti-gouging laws

³³ See, e.g., HAW. REV. STAT. § 127A-30 (2023) (noting that extreme weather can trigger price-gouging laws); N.Y. GEN. BUS. LAW § 396-r(2) (McKinney 2023) (making abnormal market disruption resulting in a declaration of emergency a trigger for price-gouging laws); N.C. GEN. STAT. § 75-38(d) (2023) (making an “abnormal market disruption” a trigger for price-gouging laws); KY. REV. STAT. ANN. § 367.372(13) (West 2023) (making a “Condition Red” declaration from the U.S. Department of Homeland Security a trigger for price-gouging laws); ME. STAT. tit. 10, § 1105(3) (2023) (making an “abnormal market disruption” a trigger for price-gouging laws); OR. REV. STAT. §§ 401.960(1), 401.965(2) (2023) (prohibiting price gouging during an “abnormal disruption of the market,” which is defined as “any emergency that prevents ready availability of essential consumer goods or services”); TENN. CODE ANN. § 47-18-5103(a)(1) (2023) (making “an abnormal economic disruption” trigger price-gouging laws); cf. Anita Ramasastry, *Assessing Anti-Price-Gouging Statutes in the Wake of Hurricane Katrina: Why They’re Necessary in Emergencies, but Need to Be Rewritten*, FINDLAW (Sept. 16, 2005), <https://supreme.findlaw.com/legal-commentary/assessing-anti-price-gouging-statutes-in-the-wake-of-hurricane-katrina.html> [<https://perma.cc/3QFU-L5YZ>] (arguing that anti-gouging laws should be limited to natural disasters or other emergencies that directly impact a given state).

³⁴ See *infra* notes 94–97 and accompanying text (providing examples of different lengths of time that emergency declarations, and thus price-gouging statutes, remain in effect).

³⁵ See, e.g., Emily Bae, Note, *Are Anti-Price Gouging Legislations Effective Against Sellers During Disasters?*, 4 ENTREPRENEURIAL BUS. L.J. 79, 83 (2009); Michael Brewer, Note, *Planning Disaster: Price Gouging Statutes and the Shortages They Create*, 72 BROOK. L. REV. 1101, 1113–14 (2007); Geoffrey C. Rapp, *Gouging: Terrorist Attacks, Hurricanes, and the Legal and Economic Aspects of Post-Disaster Price Regulation*, 94 KY. L.J. 535, 543 (2005); Richard M. Hynes & John F. Duffy, *Crisis Pricing* 16 (Feb. 21, 2022) (unpublished manuscript) (on file with author).

³⁶ See, e.g., GA. CODE ANN. § 10-1-393.4(a)–(b) (2023) (prohibiting any price increase, with exceptions for cost increases and maintaining prior markup); CONN. GEN. STAT. § 42-230 (2023) (prohibiting any price increase in a disaster area until the emergency declaration ends); HAW. REV. STAT. § 127A-30(a)(1), (b) (prohibiting price increases, with an exception for increased costs). The Northern Mariana Islands appear to prohibit price increases absolutely, but only those that are solely due to a shortage in supply. 4 N. MAR. I. CODE § 5105(y) (2023).

³⁷ See, e.g., ALA. CODE § 8-31-4 (2023) (declaring that it is prima facie proof of an unconscionable price if a good is sold at 25% above its reference price); D.C. CODE §§ 28-4101(2)(A), 28-4102 (2023) (limiting price increases on services to 10% above the reference price from the prior ninety days); ARK. CODE ANN. § 4-88-303(a)(1) (2023) (limiting price increases to 10%); N.J. STAT. ANN. § 56:8-108(1)–(2) (West 2023) (limiting price increases to 10% above the reference price, or if there are increased costs, 10% above the reference markup).

³⁸ See, e.g., 6 R.I. GEN. LAWS § 6-13-21(a) (2023) (prohibiting “unconscionably high price[s]” during a declared emergency); TENN. CODE ANN. § 47-18-5103(a)(1) (prohibiting selling certain

limit price increases on a specified list of items, others apply to “necessities” or similarly broad language, and still others apply to essentially all consumer goods and services.³⁹

Most anti-gouging laws also have some limitations and defenses, although not always expressly set out in the statute or regulation. Nearly every state, by statute or case law, either allows a defense that increased prices are due to increased costs incurred by the seller, or puts the burden on the enforcer to show, as part of the *prima facie* case, that the increased price is *not* due to increased costs.⁴⁰ Some jurisdictions afford other defenses and limitations. For example, some jurisdictions exclude farmers and growers from the laws.⁴¹ Others include the defense that a government agency approved the price increase,⁴² that the spike was an ordinary seasonal price increase,⁴³ or that a

goods “grossly in excess of the” normal price during a market emergency); N.Y. GEN. BUS. LAW § 396-r(2) (prohibiting “unconscionably excessive price[s]”); N.C. GEN. STAT. § 75-38(a) (prohibiting the charging of “unreasonably excessive” prices); VT. STAT. ANN. tit. 9, § 2461d(b) (2023) (prohibiting the selling of fuel products in an emergency at “an unconscionably high price”); *cf.* Behrang Kianzad, *The Giant Awakens: Law and Economics of Excessive Pricing During the COVID-19 Crisis*, in LAW AND ECONOMICS OF THE CORONAVIRUS CRISIS 123, 138 (Klaus Mathis & Avishalom Tor eds., 2022) (discussing a similar standard in the laws of the European Union). *See generally* Edward J. Page & Min K. Cho, *Price Gouging 101: A Call to Florida Lawmakers to Perfect Florida’s Price Gouging Law*, 80 FLA. BAR J. 49 (2006) (critiquing Florida’s open-ended price-gouging standard).

³⁹ *See, e.g.*, TENN. CODE ANN. § 47-18-5103(a)(1) (listing specific categories of goods for which a seller cannot price gouge consumers); N.C. GEN. STAT. § 75-38(a) (prohibiting price gouging on items used to help during the emergency); OHIO REV. CODE ANN. § 1345.03(B)(2) (West 2023) (prohibiting price gouging on goods generally).

⁴⁰ *See, e.g.*, ALA. CODE § 8-31-4 (requiring *prima facie* proof that increased prices were not attributable to the seller’s increased costs); FLA. STAT. § 501.160(1)(b) (2023) (creating a *prima facie* case for price gouging only if the increase charged is not connected to extra costs to the seller); 940 MASS. CODE REGS. 3.18(2)(b), (4)(b) (2023) (defining unconscionable prices as those whose excess is not related to additional costs passed on from the seller’s suppliers); N.J. STAT. ANN. § 56:8-108(1) (considering whether the seller’s costs caused the high price); N.C. GEN. STAT. § 75-38(a)(1) (considering whether extra costs were imposed on the seller when determining if a price is excessive); 6 R.I. GEN. LAWS § 6-13-21(b)(1) (stating that a price will not be deemed excessive if the upcharge is caused by suppliers passing along the cost to sellers); TENN. CODE ANN. § 47-18-5103(b)(3) (carving out from the definition of a “grossly excessive” price costs imposed on sellers by their suppliers); VT. STAT. ANN. tit. 9, § 2461d(c)(2) (stating that a price is not “unconscionably high” if product suppliers raised costs on sellers). *See generally* Bae, *supra* note 35, at 85 (summarizing critiques of laws that allow sellers to pass along price increases from their suppliers without the ability to go after the supplier); Fischer & Lipscomb-Jackson, *supra* note 5, at 3, 5–6 (describing the variation among which costs are taken into account to trigger price-gouging laws). *But see* Matt Zwolinski, *The Ethics of Price Gouging*, 18 BUS. ETHICS Q. 347, 351 (2008) (arguing that the kinds of costs that are allowed to be passed on are arbitrarily narrow and should also include considerations such as opportunity cost and risk); accord Brian Skarbek & David Skarbek, *The Price is Right!: Regulation, Reputation, and Recovery*, 6 DARTMOUTH L.J. 235, 251–52 (2008) (emphasizing the importance of considering opportunity costs for solving the lack of supply after an emergency).

⁴¹ *See, e.g.*, OKLA. STAT. tit. 15, § 777.4(D) (2023).

⁴² *See, e.g.*, FLA. STAT. § 501.160(3).

price increase was attributable to “regional [or] national . . . market trends” or something similar.⁴⁴

Within this broad taxonomy, impressive interjurisdictional variation and ongoing experimentation exist. I consider the pressure that this variety creates in greater detail in Part III, below.

II. THE PANDEMIC AS A UNIQUE TEST OF PRICE-GOUGING LAWS

At the risk of understatement, the COVID-19 pandemic has been an unusual kind of emergency: it affected essentially every community worldwide, though at different times and in different intensities, and was characterized by widely dispersed illness and death rather than the narrowly concentrated death and destruction often caused by natural disasters.⁴⁵ Further, the COVID-19 emergency grew slowly and lasted an excruciatingly long time.⁴⁶ These differences have also made the pandemic a peculiarly economic kind of national disaster—few other disasters require entire swaths of the economy to pause for months.⁴⁷

Unsurprisingly, these features posed challenges for laws that were largely designed to respond to very different disasters. Older anti-gouging laws, by and large, were not designed with a global health pandemic in mind. As noted above, many were passed in response to specific incidents like hurricanes, tornados, or floods.⁴⁸ The slowly emerging, widespread public health disaster presented by the COVID-19 pandemic created application and enforcement challenges in numerous states—to the point that many states amended their anti-gouging laws in response.⁴⁹

The pandemic has also presented a unique test of these laws in a different way. Although the pandemic affected different states with varying intensities at different times, the former President and a myriad of governors declared states of

⁴³ See, e.g., S.C. CODE ANN. § 39-5-145(H) (2023); VA. CODE ANN. § 59.1-527(4) (2023); KY. REV. STAT. ANN. § 367.374(1)(c)(4) (West 2023).

⁴⁴ FLA. STAT. § 501.160(1)(b)(1); see, e.g., OKLA. STAT. tit. 15, § 777.4(A)(1); KY. REV. STAT. ANN. § 367.374(1)(c)(4); S.C. CODE ANN. § 39-5-145(A)(5)(a)(i).

⁴⁵ See Parsons, *supra* note 29, at 72 (noting that the COVID-19 pandemic had a much wider geographical reach than other past emergencies).

⁴⁶ See *id.* at 70 (noting that the pandemic would last longer than most emergencies that the United States has faced).

⁴⁷ See Derrick Bryson Taylor, *A Timeline of the Coronavirus Pandemic*, N.Y. TIMES (Mar. 17, 2021), <https://www.nytimes.com/article/coronavirus-timeline.html> [<https://perma.cc/PXR6-326L>] (detailing the drawn-out spread of the COVID-19 virus over months, including increasing death rates and lockdowns across the country and world).

⁴⁸ See, e.g., Creasy, *supra* note 28, at 31–33 (explaining that Georgia started the process of implementing an anti-gouging statute after a series of natural disasters).

⁴⁹ See *infra* notes 156–159 and accompanying text (providing examples of states that implemented anti-gouging laws during the pandemic).

emergency that activated the anti-gouging laws of most states at nearly the same time. It is unprecedented to have so many state and territorial anti-gouging laws active all at once, triggered almost simultaneously and in response to the same event, thus making the COVID-19 pandemic a rare chance to examine the differences in state responses to similar emergency pressures.⁵⁰

In this Part, I highlight three ways in which the unusual circumstances of the pandemic exposed or highlighted limitations of the various anti-gouging laws. In Section A, I examine the slow-growing nature of the emergency, or at least the awareness of its risks.⁵¹ In Section B, I focus on the length of the emergency.⁵² Finally, in Section C, I discuss the ready ability of so many disaster profiteers to engage in disaster arbitrage on a national scale.⁵³

A. Limits Exposed by the Slow-growing Emergency

In *The Sun Also Rises*, when asked how he went bankrupt, Mike Campbell answers: “Two ways . . . Gradually and then suddenly.”⁵⁴ His answer fairly describes early responses to the COVID-19 pandemic.⁵⁵ In early 2020, there was a relatively slow-growing awareness of, and concern about, the risk that the novel virus would substantially impact American life, punctuated by a rapid cascade of federal, state, and local declarations of emergency. To give some sense of the rapid response, the U.S. Department of Health and Human Services declared a public health emergency on January 31, 2020,⁵⁶ followed by a presidential emergency declaration on March 13.⁵⁷ Most state declarations

⁵⁰ See Samuel Wonacott, *All 50 States Have Active Declared Emergencies Related to the Coronavirus Pandemic*, BALLOTPEDIA NEWS (July 29, 2020), <https://news.ballotpedia.org/2020/07/29/all-50-states-have-active-declared-emergencies-related-to-the-coronavirus-pandemic/> [<https://perma.cc/Y73V-4B6Z>] (reporting that every state had implemented emergency declarations because of the COVID-19 pandemic); Taylor, *supra* note 47 (describing the spread of COVID-19 in the United States).

⁵¹ See *infra* notes 54–81 and accompanying text.

⁵² See *infra* notes 82–111 and accompanying text.

⁵³ See *infra* notes 113–134 and accompanying text.

⁵⁴ ERNEST HEMINGWAY, *THE SUN ALSO RISES* 141 (P.F. Collier & Son 1926).

⁵⁵ Mike Stevens, *Gradually, Then Suddenly: Post Pandemic Growth in the Research Industry*, INSIGHT PLATFORMS, <https://www.insightplatforms.com/gradually-then-suddenly-post-pandemic-growth-research-industry/> [<https://perma.cc/TH9X-385L>]; Raymond Zhong & Amy Chang Chien, ‘This Day Was Bound to Come’: Taiwan Confronts a Covid Flare-Up, N.Y. TIMES, <https://www.nytimes.com/2021/05/20/world/asia/taiwan-covid-outbreak.html> [<https://perma.cc/Q7XN-JZSV>] (Oct. 14, 2021).

⁵⁶ Alex M. Azar II, *Determination That a Public Health Emergency Exists*, U.S. DEP’T HEALTH & HUM. SERVS. (Jan. 31, 2020), <https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx> [<https://perma.cc/X36B-RFBA>].

⁵⁷ Proclamation No. 9994, 85 Fed. Reg. 15337 (Mar. 13, 2020).

of emergency followed quickly throughout March and into April 2020.⁵⁸ Between December and March, concern about the virus and interest in purchasing countermeasures like hand sanitizer and masks increased, as (often) did their prices.⁵⁹

This is not how many natural disasters work—including those that prompted the adoption of most state anti-gouging laws.⁶⁰ Earthquakes and tornados notoriously do not give much warning, and even with modern technology, hurricanes may have only a few days' notice. It is not surprising, then, that so many of the state and territorial price-gouging laws are triggered by some kind of emergency declaration that often comes contemporaneously with or after a disaster.⁶¹ Nor is it surprising that emergency declarations often use a simple reference price to determine whether a seller is gouging: the cost of a given item immediately or shortly before the declaration.⁶²

This framework, and the way the COVID-19 pandemic gradually entered American consumers' awareness, created opportunities for prices on COVID-critical items to increase before emergencies were declared, and even before the window that some state laws consider identifying the price "prior to" the

⁵⁸ Wonacott, *supra* note 50. For a complete list of the COVID-19 emergency declaration executive orders, see *2020–2021 Executive Orders*, COUNCIL ST. GOV'TS, <https://web.csg.org/covid19/executive-orders/> [<https://perma.cc/XL9M-VURB>].

⁵⁹ See *Analysis: Coronavirus Spike Most Surgical Mask, Sanitizer Prices at Least 50% on Amazon*, U.S. PIRG EDUC. FUND (Mar. 11, 2020), <https://uspirgedfund.org/resources/usf/analysis-coronavirus-spike-most-surgical-mask-sanitizer-prices-least-50-amazon> [<https://perma.cc/7BZQ-DA86>] (analyzing the price spikes on items sold on Amazon); Dawson White, *Face Mask Prices Are Skyrocketing on Amazon. Do They Protect You from Coronavirus?*, SACRAMENTO BEE, <https://www.sacbee.com/news/nation-world/national/article240687961.html> [<https://perma.cc/5WCH-SMSQ>] (Mar. 3, 2020) (describing the price spikes of many pandemic-related items sold on Amazon).

⁶⁰ See Giberson, *supra* note 27, at 50 (explaining that New York's original price-gouging law was adopted in response to a heating oil shortage, not a specific natural disaster).

⁶¹ See Buccafusco et al., *supra* note 2, at 472–73 (showing that a majority of states effectuate a price-gouging statute after an emergency is declared). Most gouging laws are triggered by a declaration of emergency, but some also use "abnormal market disruption" as a trigger, sometimes without much clarity about what constitutes one. *Id.* at 474.

⁶² Some states simply use the reference price "prior to" the emergency, whereas others have a specific lookback period of seven to ninety days. See, e.g., ALA. CODE § 8-31-4 (2023) (using "[thirty] days immediately prior to the declared state of emergency" as the benchmark for the reference price); D.C. CODE § 28-4101(2) (2023) (using ninety days as the benchmark); GA. CODE ANN. § 10-1-393.4(a) (2023) (using "immediately prior to" an emergency declaration as the benchmark); ILL. ADMIN. CODE tit. 14, § 465.30(b)(1)(A) (2023) (same); N.Y. GEN. BUS. LAW § 396-r(3)(b)(i) (McKinney 2023) (same); 73 PA. CONS. STAT. § 232.4(b) (2023) (making the reference price "seven days immediately prior to the declared state of emergency"). There are multiple ways of calculating a reference price, which are discussed at greater length below. See Skarbek & Skarbek, *supra* note 40, at 249 (describing two options for calculating pre-disaster prices); cf. Jeremy Snyder, *What's the Matter with Price Gouging?*, 19 BUS. ETHICS Q. 275, 284–85 (2009) (arguing that pre-disaster prices are not a valid benchmark to assess the morality of later pricing if pre-disaster prices prevent poorer community members from meeting their basic needs).

emergency.⁶³ For COVID-19 and other slow-building disasters, this delay between when prices increase and when emergencies are declared diminishes the effectiveness of anti-gouging laws. If unjustified price spikes begin before an official emergency declaration triggers the anti-gouging law, for example, the statute may provide no remedy. And the law may also be less effective against later price increases: if prices have been rising for some time, the reference price for many laws will be inflated, making later increases appear less severe than how local buyers actually experience them. Let's consider each of these challenges in turn.

1. Lookback Windows and Creeping Prices

If prices have been rising for some time before an anti-gouging law is triggered by an emergency declaration,⁶⁴ the reference price for any law with a short lookback window will already be inflated relative to "normal" consumer prices. This will make later increases appear less severe. Indeed, the later prices may not violate an explicit percentage-increase cap despite being a substantial increase relative to the actual "normal" price.

Because of that effect, some economists have noted that anti-gouging laws may give businesses the opposite incentive to what lawmakers might wish: by capping post-disaster or post-declaration prices, anti-gouging laws might push businesses to raise prices more quickly when faced with a potential emergency.⁶⁵ By raising prices before the anti-gouging laws lock in prices, businesses may hope to limit the impact on profitability from the most stringent anti-gouging laws. Businesses may also hope that the increased prices pass with less consumer scrutiny, protecting the seller from being labeled a disaster profiteer.

States address this issue differently. Some, like Colorado, choose not to specify a particular lookback period, leaving some latitude to argue in individual cases what the appropriate reference price should be.⁶⁶ The drawbacks of this approach are clear, however; any state that chooses not to specify a date

⁶³ See Spencer Warkentin, Comment, *Price Gouging in the Time of COVID-19: How U.S. Anti-Price Gouging Laws Fail Consumers*, 36 MD. J. INT'L L. 78, 87 (2021) (noting allegations that prices on COVID-19-related items had already increased by 20% in February 2020).

⁶⁴ See, e.g., Adam Garber, *Price Gouging on Amazon During the Coronavirus Outbreak*, U.S. PIRG EDUC. FUND, <https://publicinterestnetwork.org/wp-content/uploads/2020/07/Revised-US-PIRG-Coronavirus-Price-Gouging-Factsheet-1.pdf> [<https://perma.cc/KZZ4-Z8EW>] (noting price spikes in surgical masks during February 2020).

⁶⁵ See, e.g., Brewer, *supra* note 35, at 1114; Skarbek & Skarbek, *supra* note, 40, at 249.

⁶⁶ See COLO. REV. STAT. § 6-1-730(2) (2023) (lacking any reference price for determining what constitutes unlawful price gouging).

for the reference price creates uncertainty unless and until courts step in to establish some clearer benchmark.

Nearly half of the surveyed jurisdictions simply compare post-disaster price increases to the price “before” or “immediately prior to” the disaster or declaration that triggered the application of the law.⁶⁷ Although language like “before” arguably affords more latitude than “immediately before,” both phrases seem likely to create a similarly short lookback period.⁶⁸ If a longer lookback period is needed to more accurately capture normal market prices, the laws that refer to prices “immediately before” the disaster cannot meaningfully respond, and those that refer simply to the price “before” the disaster are unlikely to do much better.

Even among those laws that are more precise about when to assess the relevant “before” price, those of only fourteen states and territories specify that they look back seven days or more before the triggering event, and only ten have a specified lookback period of more than ten days.⁶⁹ The laws that speci-

⁶⁷ See, e.g., Act of Apr. 9, 2020, 2020 Alaska Sess. Laws ch. 10, § 26 (defining the reference price as that “before” the COVID-19 pandemic); ARK. CODE ANN. § 4-88-303(a)(1) (2023) (using price “immediately prior to” an emergency as the reference price); DEL. CODE ANN. tit. 6, § 2513A(b)(2) (repealed 2023) (using the price “immediately before” the COVID-19 emergency); GA. CODE ANN. § 10-1-393.4(a) (referring to the price “immediately prior to” the emergency); IDAHO CODE § 48-603(19)(a)(i) (2023) (taking into account the price “before and after” the emergency declaration); ILL. ADMIN. CODE tit. 14, § 465.30(b)(1)(A) (using the price “immediately prior to” the emergency); IOWA ADMIN. CODE r. 61-31.1(714) (2023) (using the price “immediately prior to” the emergency); KAN. STAT. ANN. § 50-6,106(b)(1)(A) (2023) (using “the business day before the disaster” as a reference price); KY. REV. STAT. ANN. § 367.372(10) (West 2023) (using the reference price from “the day before” the emergency declaration); LA. STAT. ANN. § 29:732(A) (2023) (using the reference price “at or immediately before” the declared emergency); ME. STAT. tit. 10, § 1105(1)(D)(1) (2023) (using the reference price of “immediately prior to” the market change); 940 MASS. CODE REGS. 3.18(4)(a)(1) (2023) (using the reference price of “immediately prior to” the start of a declared emergency); MISS. CODE ANN. § 75-24-25(2) (2023) (using the reference price “at or immediately before the declaration of” emergency); N.J. STAT. ANN. § 56:8-108 (West 2023) (using the preference price “immediately prior to” a declared emergency); N.Y. GEN. BUS. LAW § 396-r(3)(b)(i) (using the price “immediately prior to” the emergency as a reference price); OKLA. STAT. tit. 15, § 777.4(A) (2023) (establishing the price “immediately prior to” the emergency declaration as the reference); OR. REV. STAT. § 401.965(3)(a) (2023) (using the reference price of “immediately prior to or during” the declared market shock); 5 GUAM CODE ANN. § 32201(c)(21)(C) (2023) (using the reference price of “the day before the disaster”); 4 N. MAR. I. CODE § 5142(b) (2023) (freezing prices at the time of the emergency declaration).

⁶⁸ Cf. *People v. Quality King Distribs., Inc.*, 173 N.Y.S.3d 221, 234 (App. Div. 2022) (noting that in New York, “immediately prior” is given “a reasonable, not rigid construction”). The price-gouging claims against the corporation later settled. Consent Order and Judgment at 2, *Quality King*, 173 N.Y.S.3d 221 (2023) (No. 451296).

⁶⁹ See ALA. CODE § 8-31-4 (2023) (using thirty days); D.C. CODE § 28-4101(2) (2023) (using ninety days); FLA. STAT. § 501.160(1)(b) (2023) (using thirty days); IND. CODE § 4-6-9.1-2(1) (2023) (using seven days); 73 PA. CONS. STAT. § 232.4(b) (2023) (using seven days); NEV. REV. STAT. § 598.09235(2) (2023) (using thirty days); N.C. GEN. STAT. § 75-38(a)(2) (2023) (using sixty days); 6 R.I. GEN. LAWS § 6-13-21(b)(1) (2023) (using thirty days); S.C. CODE ANN. § 39-5-145(A)(5)(a)(ii)

fy lookback periods of seven to ten days are only marginally better situated to respond to slowly rising prices than are state laws that use the price “before” the disaster is declared. Businesses subject to specific lookback periods do at least have the advantage of some clarity in being able to plan how much their prices may increase once an emergency is declared.

A fourth approach is to set an explicit, long lookback period, such as sixty or ninety days.⁷⁰ This gives the state more control over sellers’ ability to significantly raise prices in the run-up to a declaration of emergency. It is difficult to know whether a longer lookback period will be enough to control the impulse to increase prices. Coupled with overall market pressures to keep prices on staple or essential items low, a longer lookback period might head off at least the most egregious pre-declaration price increases, even in a slow-growing emergency. This approach, however, has complications of its own. For example, prices might fluctuate seasonally on certain products in the ordinary course of business,⁷¹ or they might have increased in the meantime, independent of the emergency. Moreover, requiring businesses (particularly smaller, less sophisticated businesses) to revert to prices from several months prior could be rather burdensome. Given these complexities, adopting a long lookback requirement for *all* emergencies may be a significant overcorrection, given that the most common use of these laws will likely be for natural disasters and other acute emergencies.

California’s 2020 changes to its anti-gouging law exemplify a final option: California changed the reference price for most goods or services to the price “immediately prior to the proclamation or declaration of emergency, *or prior to a date set in the proclamation or declaration.*”⁷² This allows the declaration itself, in appropriate cases, to take explicit account of a slow-building

(2023) (using thirty days); UTAH CODE ANN. § 13-41-102(4) (West 2023) (using thirty days); VA. CODE ANN. § 59.1-527(1)–(2) (2023) (using ten days); W. VA. CODE § 46A-6J-3(a)–(b) (2023) (using ten days); WIS. STAT. § 100.305(3) (2023) (permitting state agencies to promulgate rules for establishing a lookback period); WIS. ADMIN. CODE ATPC § 106.02(1) (2023) (using sixty days). The U.S. Virgin Islands’ prior price-freeze authority set prices at the level they were “immediately prior to” the declaration. V.I. CODE ANN. tit. 23, § 1005(g)(10) (2023). Its new anti-gouging law, however, has a thirty-day lookback period. *Id.* § 1017(c).

⁷⁰ See, e.g., D.C. CODE § 28-4101(2) (using a ninety-day lookback period); N.C. GEN. STAT. § 75-38(a)(2) (using the average price over the prior sixty days as a reference price); NEV. REV. STAT. § 598.09235(2) (using a lookback period of thirty days); V.I. CODE ANN. tit. 23, § 1017(c) (using a lookback period of thirty days); WIS. ADMIN. CODE ATPC § 106.02(1) (using a lookback period of sixty days).

⁷¹ See Joshua Sherman, *Can State Price Gouging Laws Be Practically Applied to Long-Run Events?*, PRICE POINT (Am. Bar Ass’n, Chicago, Ill.), Feb. 2022, at 3, <https://media.crai.com/wp-content/uploads/2022/02/25090809/ABA-Price-Point-Feb-20022Sherman-Price-Gouging.pdf> [<https://perma.cc/R5DX-9TCJ>] (noting that seasonal price changes could be misattributed to price gouging, and that this misattribution is sometimes taken into account when writing legislation).

⁷² CAL. PENAL CODE § 396(b) (West 2023) (emphasis added).

disaster and accompanying pricing behavior. It also allows the state a good deal of flexibility in calibrating its response to a given emergency. Additionally, it provides businesses clarity about the appropriate date for their reference price—at least once the emergency has been declared. But it does not offer businesses much in the way of forward-looking predictability in the days or weeks leading up to an emergency, and may force businesses to reverse, somewhat awkwardly, price increases that occurred in the interim and that were lawful at the time they were made. All in all, however, California’s approach seems to be the best approach in terms of balancing policy—allowing a short, predictable lookback period for the “ordinary” emergency or disaster, while building flexibility into the law to address unusual circumstances like those presented by the COVID-19 pandemic.

2. The Lawfulness of Pre-declaration Sales

The challenge of the slow-building disaster also raises a related question: in states with explicit anti-gouging laws that are triggered by a declaration of emergency, is every pre-declaration price increase, regardless of magnitude, lawful?

Considering the overarching context of state consumer protection law, the answer should usually be no. Every state and territory assessed here has some form of UDAP law.⁷³ Those laws that broadly prohibit “unfair” or “unconscionable” business practices should be sufficient to reach at least egregious gouging conduct that occurs before the more specific anti-gouging statute takes effect.⁷⁴ Alaska offers an interesting, if imperfect, point of comparison: it had no specific anti-gouging law until May 2020, and in April 2020, before the anti-gouging statute was passed, the Attorney General brought a price-gouging

⁷³ See CAROLYN CARTER, NAT’L CONSUMER L. CTR., CONSUMER PROTECTION IN THE UNITED STATES: A 50-STATE EVALUATION OF UNFAIR AND DECEPTIVE PRACTICES LAWS 1–8 (2018), https://www.nclc.org/wp-content/uploads/2022/09/UDAP_rpt.pdf [<https://perma.cc/DNE7-CRNZ>] (summarizing and depicting the strength of states’ UDAP laws).

⁷⁴ See, e.g., Davis, *supra* note 27, at 67 (describing the Texas Attorney General’s intent to pursue price gouging under Texas’s UDAP law after Hurricane Katrina when no emergency had been officially declared). But cf. 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/E5PU-ZSAN>] (recounting a public dispute between the Governor of Arizona, who claimed that the state UDAP law could reach price gouging, and the state Attorney General, who maintained that it could not); Creasy, *supra* note 28, at 34 (identifying problematic precedent for pursuing price gouging under Georgia’s general UDAP law); Mark Giancaspro, *Perilous Fires, Pandemics and Price Gouging: The Need to Protect Consumers from Unfair Pricing Practices During Times of Crisis*, 44 UNSW L.J. 1458, 1462–65 (2021) (discussing the possibilities of pursuing price gouging under two “unconscionability” prohibitions in Australian law).

enforcement action under the State's general UDAP powers.⁷⁵ Somewhat analogously, Vermont, whose anti-gouging law applies only to petroleum products,⁷⁶ has used its general UDAP authority to pursue a price-gouging case about mask sales.⁷⁷

The question, however, is hardly free from doubt. A business may argue, and a court might conclude, that when there is a specific anti-gouging law in place, a general state UDAP law should not be used to expand its scope, either substantively or temporally.

Unless a particular statute's legislative text or history clearly supports such an interpretation, however, this position should not carry the day.⁷⁸ After all, in adopting anti-gouging laws, state legislatures generally intend to protect consumers against egregious price increases. They are typically not trying to bless conduct outside the law's scope that is nonetheless unfair or abusive toward consumers. Interestingly, this argument may be more persuasive in states whose anti-gouging laws are more detailed or specific; for example, it is relatively easy to see why a statute that prohibits price increases of more than 20% after a declaration of disaster should not be read to authorize a 300% increase in prices ten days earlier. It may be more difficult for a court to see, where the anti-gouging law prohibits only "grossly excessive" price increases or some-

⁷⁵ See generally Complaint, Aune, *supra* note 26 (bringing an unconscionable pricing claim under Alaska's UDAP law for, essentially, price gouging PPE through online sales). The matter was dismissed by stipulation following the filing of cross-motions for summary judgment in 2021, but there is little public information available about any settlement. 3AN-20-05758CI State of Alaska vs. Aune, Juan Lyle UG, COURTVIEW, <https://records.courts.alaska.gov/eaccess/searchresults.page?x=pOfytlzdJuhVK3XmVSUWFngGxyeuq7gmrS3oY4eugccPOaqObGVQItHlIzR7zxWPpts67WL-zC-kBVW32YLM1Q> [https://perma.cc/ZL9X-GVG7].

⁷⁶ VT. STAT. ANN. tit. 9, § 2461d (2023).

⁷⁷ See Complaint, Big Brother, at 7–8, *supra* note 26 (using the unfairness prong of Vermont's UDAP statute to pursue a case about price gouging face masks). The litigation later settled in December 2020, following a preliminary injunction ruling in favor of the State. See Olivia Lyons, *State Settles with Vt. Man Accused of Price Gouging Hospitals*, WCAX, <https://www.wcax.com/2020/12/21/state-settles-with-vt-man-accused-of-price-gouging/> [https://perma.cc/9NK5-ASBY] (Dec. 21, 2020) (reporting that the lawsuit Vermont brought against a person accused of selling masks at inflated prices settled); State v. Big Brother Sec. Programs, No. 326-4-20, 2020 WL 11232105, at *8 (Vt. Super. Ct. Apr. 26, 2020) (granting a preliminary injunction to Vermont to prevent the accused from selling face masks at inflated prices).

⁷⁸ Cf. ILL. ADMIN. CODE tit. 14, § 465.10 (2023) (declaring that the statute "shall not be construed to limit the ability of the Attorney General or the courts to determine that acts and practices other than those described in this Part are unfair or deceptive acts of price gouging in the absence of market emergencies"). There may be specific legislative text or history indicating that a given statute was intended to displace general UDAP authority in the area of price gouging. Courts may also be persuaded where, for example, an enforcement agency has repeatedly, consistently, and publicly declared that its UDAP authority *does not* reach price gouging. In such cases, absent a legislative change, rulemaking process, or notice of change in position, a state may be limited in its ability to bring a gouging claim under a UDAP statute.

thing similar, why that should not be read as effectively supplanting the broader UDAP statute in the realm of disaster-pricing behavior.

Even so, considering price-gouging cases under these broader UDAP standards can present challenges for all sides. After all, it is rarely clear precisely what a court will consider unconscionable,⁷⁹ and courts may be averse to setting broad pricing standards through case law. Thus, state attorneys general have an incentive to bring only the most egregious cases, if they bring any at all, when facing the risk of creating bad precedent.⁸⁰ On the other side, even if a business genuinely believes that an anti-gouging law has supplanted general UDAP authority in its state, it will face additional compliance costs and must operate in the face of that uncertainty until the matter is settled by precedent.⁸¹ In many states, this uncertainty will be mainly one of timing rather than substance. Applying the broad standard of unfairness or unconscionability from state UDAP laws to price-gouging behavior may not provide more certainty about what prices are allowed than applying the subset of anti-gouging laws that rely on broad, general standards to prohibit “unconscionably excessive” price increases.

B. Limits Exposed by the Long-running Disaster

Most disasters that trigger a declaration of emergency by the President, a governor, or a local official are acute and relatively short-lived, though the period of rebuilding may be substantial.⁸² Emergency declarations by federal, state, or local officials carry with them all kinds of consequences, including giving certain officials emergency powers and unlocking emergency funding sources.⁸³ Thus, sometimes the need to activate anti-gouging protections will

⁷⁹ See, e.g., *People v. Quality King Distribs., Inc.*, 173 N.Y.S.3d 221, 235–36, 237 (App. Div. 2022) (reversing the lower court’s order upon concluding that the price increases, ranging from roughly 30% to 100%, were prima facie evidence of unconscionably excessive increases).

⁸⁰ Private litigants can also create bad precedent; if consumers first bring UDAP cases for relatively minor price increases, courts may overcorrect and rule that the UDAP law does not cover price-gouging behavior. This incentivizes state attorneys general to consider an active intervention or amicus practice to share their interpretation of their state laws.

⁸¹ See *Parsons*, *supra* note 29, at 43 (arguing that vague terms like “unconscionable” are hard for businesses to comprehend, and that “such vague terms increase risk and uncertainty for suppliers”); *Zwolinski*, *supra* note 40, at 350 (explaining the difficulty of interpreting terms like “unconscionable” or “unreasonable” in statutory language); *Giancaspro*, *supra* note 74, at 1475 (noting how challenging it is to define vague words like “unconscionable”).

⁸² See *Skarbek & Skarbek*, *supra* note 40, at 264–66 (discussing the various stages of post-disaster recovery, including rebuilding, which can sometimes take years).

⁸³ See *id.* at 253–54 (explaining that after emergencies are declared, federal funding often becomes available to local municipalities).

be front of mind for the official making the emergency declaration;⁸⁴ other times, perhaps less so. But in any event, emergency declarations during more typical, acute disasters will only be in effect for a limited period—and in many jurisdictions, anti-gouging protections are triggered, and then expire, in lock-step with the declaration.

The COVID-19 pandemic, however, continues to claim lives in 2023.⁸⁵ As of early 2023, emergency orders remained in fewer than ten states,⁸⁶ although more than twenty orders lasted well into 2022.⁸⁷ Even in those jurisdictions whose emergency orders ended substantially earlier, many were in place for more than a year.⁸⁸ COVID-19 may highlight good reasons, such as public safety or availability of government resources, to extend an emergency declaration beyond the point when the protections of anti-gouging laws, particularly those with strict price caps, are most needed.

Early in the pandemic, there were widespread reports of shortages, and correlative price gouging, on basic consumer staples like toilet paper. These shortages were caused or exacerbated by hoarding and overbuying (as discussed at greater length below), by logistical challenges in distribution, and by production and supply chain mismatches—for example, the need for *consumer* toilet paper sold at grocery stores increased while the demand for *commercial* toilet paper used in offices dipped.⁸⁹ Regardless of the cause, those initial shortages and mismatches were resolved relatively early in the pandemic, as supply caught up to changing demand and panic-buying decreased.⁹⁰ But then, shortages and corresponding price hikes for other items, like at-home COVID-

⁸⁴ See Davis, *supra* note 27, at 44, 55, 65, 84 (noting instances of governors declaring an emergency specifically to activate their states' anti-gouging laws, and also describing consequences of declaring an emergency, unrelated to price gouging).

⁸⁵ See Lazaro Gamio, Eleanor Luz & Albert Sun, *As Emergency Ends, a Look at Covid's U.S. Death Toll*, N.Y. TIMES (May 11, 2023), <https://www.nytimes.com/interactive/2023/05/11/us/covid-deaths-us.html> [<https://perma.cc/78M7-5EFF>] (reporting that although the death toll has decreased in 2023, COVID-19 still killed, on average, over one thousand people each week as of May 2023).

⁸⁶ *State Emergency Health Orders During the Coronavirus (COVID-19) Pandemic, 2021–2023*, *supra* note 8.

⁸⁷ *Id.*; *States' COVID-19 Public Health Emergency Declarations*, NAT'L ACAD. FOR ST. HEALTH POL'Y [hereinafter *Declarations*], <https://www.nashp.org/governors-prioritize-health-for-all/> [<https://perma.cc/FFD3-JLT7>] (June 13, 2023).

⁸⁸ *State Emergency Health Orders During the Coronavirus (COVID-19) Pandemic, 2021–2023*, *supra* note 8; *Declarations*, *supra* note 87.

⁸⁹ Andrew Moore, *How the Coronavirus Created a Toilet Paper Shortage*, N.C. ST. UNIV. (May 19, 2020), <https://cnr.ncsu.edu/news/2020/05/coronavirus-toilet-paper-shortage/> [<https://perma.cc/MC84-SW8J>]; see also SEC'Y-GEN., ORG. FOR ECON. COOP. & DEV., *EXPLOITATIVE PRICING IN THE TIME OF COVID-19*, at 2 (2020), <https://www.oecd.org/competition/Exploitative-pricing-in-the-time-of-COVID-19.pdf> [<https://perma.cc/X6UE-HL8X>] (describing the different causes of product shortages).

⁹⁰ See Sherman, *supra* note 71, at 2 (noting that the scarcity of staple consumer items, such as toilet paper, had ceased by 2021).

19 tests, arose and recurred periodically, often in response to new medical guidance or a change in public safety regulations.⁹¹

For states that closely tie how long their anti-gouging law applies to the duration of a declared emergency, anti-gouging protections and price limitations may have remained in effect during months when there was relatively little reported gouging to combat.⁹² At the same time, the protections may have ended well before later rounds of shortages and price increases. Written largely for acute shock-type disasters, many anti-gouging laws may not be well-built to respond to long-term emergencies where shortages and gouging behavior may ebb and flow repeatedly over the course of many months.⁹³

1. State Approaches to the Duration of Anti-gouging Laws

In numerous surveyed jurisdictions, price-gouging laws are in effect for precisely as long as the triggering declaration, with no provision either for extending beyond the declaration or ending price controls before the emergency declaration expires.⁹⁴ Other jurisdictions set clearer, often shorter, limits on how long anti-gouging protections last. For example, Nevada has a “shortest-of” provision, making anti-gouging protections apply when a declared state of emergency has been in effect for seventy-five or fewer days.⁹⁵ In other states, the duration of anti-gouging protections is specified by statute and not simply

⁹¹ See Maria Cramer, *Covid-19 Tests Are in Short Supply. Should You Still Get One?*, N.Y. TIMES (July 31, 2020), <https://www.nytimes.com/2020/07/31/health/coronavirus-covid-testing.html> [<https://perma.cc/MN6Q-MZKU>] (reporting that the supply of COVID-19 tests was strained during the early months of the pandemic).

⁹² See Sherman, *supra* note 71, at 2 (describing that consumer product scarcity had been resolved well before emergency orders had been lifted).

⁹³ See *id.* at 1–2 (questioning whether price-gouging laws are appropriate for market shocks that can last a long time while fluctuating in intensity); see also Connors, *supra* note 4, at 2, 4–5 (explaining that the COVID-19 pandemic changed the way price-gouging laws are used because of the length of the emergency).

⁹⁴ See, e.g., 940 MASS. CODE REGS. 3.18 (2023) (containing no provision for extending the anti-price gouging effect beyond the declaration); S.C. CODE ANN. § 39-5-145(B)(2) (2023) (specifying that gouging restrictions were effective until the Governor declared the end of the emergency); *id.* § 39-5-145(C)(2) (stating that prohibitions of price gouging cannot be terminated before a presidential emergency declaration ends); *id.* § 39-5-145(E) (allowing greater temporal flexibility for notices of “abnormal disruption of the market” issued by the Attorney General). Virginia is something of a hybrid, as it has an expiration within thirty days of the disaster, but only if a state of emergency is not extended or renewed within that thirty-day window. See VA. CODE ANN. § 59.1-526 (2023) (defining “time of disaster”). See generally Skarbek & Skarbek, *supra* note 40, at 255–56 (providing an overview of different approaches to the duration of anti-gouging laws).

⁹⁵ NEV. REV. STAT. § 598.09235(1) (2023). Guam has also limited the Governor’s ability to freeze prices following certain specific kinds of emergencies, tailored to how long each freeze may last, and further specified that they may not be extended. See 5 GUAM CODE ANN. § 32201(c)(21)(A) (prohibiting merchants and landlords from “increas[ing] the price of any goods, services, or dwelling rentals on the basis of shortage anticipated or caused by any disaster”).

tied to the duration of the declared emergency. Colorado, for example, adopted its anti-gouging statute for the first time in 2020, providing that anti-gouging protections remain in place for a fixed length of 180 days.⁹⁶

Some jurisdictions take a hybrid approach, varying how long an anti-gouging law applies depending on the circumstances. For example, South Carolina's law applies for different durations depending on the type of incident, lasting fifteen days after a declared abnormal market disruption, but also lasting as long as a declared emergency stays in effect.⁹⁷

Still other jurisdictions build in flexibility for the government to extend or shorten the application of the anti-gouging law.⁹⁸ For example, Louisiana's anti-gouging law is in effect for thirty days after the declaration of a state of emergency, unless the Governor specifically refers to it in any renewal of the declaration of emergency.⁹⁹ Kentucky's law lasts only fifteen days following the declaration, but allows for fifteen-day extensions up to three times, and also allows the Governor to "terminate or limit the scope of the order at any time."¹⁰⁰ A few states' laws allow even more tailoring on price as well as on duration. For example, as amended, California's law allows for its protections to be extended "as needed, by a local legislative body, local official, the Governor, or the Legislature," and also allows such an extension to "authorize specified price increases that exceed the amount that would" otherwise be permitted.¹⁰¹ The Virgin Islands' new law applies throughout a state of emergency, including any extensions, but allows the Department of Licensing and Consumer Affairs to approve price increases during that time.¹⁰²

⁹⁶ COLO. REV. STAT. § 6-1-730(5)(f) (2023).

⁹⁷ S.C. CODE ANN. § 39-5-145(B), (E). Utah's law applies for thirty days after a presidential declaration of emergency, but also for as long as a gubernatorial declaration of emergency lasts. UTAH CODE ANN. § 13-41-201(1) (West 2023). In California, the duration of the anti-gouging protections varies by the type of product or service, lasting longer for goods and services related to rebuilding than for food and water. CAL. PENAL CODE § 396(a)–(f) (West 2023). California, however, has also built flexibility into its application period, as discussed below. *See id.* § 396(g) (allowing for extensions of the emergency declaration for up to thirty days at a time).

⁹⁸ *See, e.g.*, KY. REV. STAT. ANN. § 367.374(2) (West 2023) (allowing for fifteen-day extensions of the anti-gouging law at the discretion of the Governor, but not explicitly providing the ability to terminate the law's application earlier than the default thirty days); 4 N. MAR. I. CODE § 5142(a) (2023) (authorizing the Governor to freeze prices during a state of emergency, which lasts until the declaration is terminated or the Governor revokes the price freeze).

⁹⁹ LA. STAT. ANN. § 29:732(B) (2023).

¹⁰⁰ KY. REV. STAT. ANN. § 367.374(1)(a), (2). Tennessee similarly has a fifteen-day application period, subject to extension by subsequent declarations of abnormal market disruption. TENN. CODE ANN. § 47-18-5103(a)(1) (2023).

¹⁰¹ CAL. PENAL CODE § 396(g).

¹⁰² Act of Oct. 26, 2020, No. 8386, 2020 V.I. Sess. Laws 206.

2. The COVID-19 Pandemic and the Value of Flexibility

One need not entirely reject the value of anti-gouging laws to see that in a long-running emergency like the pandemic, there are advantages to state laws whose effective periods are not simply in lockstep with the duration of a declared emergency.¹⁰³

Depending on the circumstances, price-gouging protections may not be needed for all covered goods for the full duration of a long emergency. The protections might be especially relevant in response to early shortages that may reflect consumer panic-buying, but may be less necessary as consumers and the market adapt to a new normal.¹⁰⁴ For example, it is not clear whether anti-gouging laws were needed to control the price of toilet paper into 2021, once the most stringent lockdowns had ended and both consumers and markets adapted to many people spending more time at home.¹⁰⁵

Independent of panic-buying, controlling price changes early in an emergency may still be important for protecting long-term consumer interests. Prices that rise sharply in immediate response to the market uncertainty of an emergency may decrease much more slowly—an effect that one Federal Trade Commission (FTC) official described as “rockets and feathers.”¹⁰⁶ Even if perceived as initially unfair, these early-hiked prices could eventually become normalized for consumers.¹⁰⁷ Thus, there may be a particular need to protect consumers’ long-term interests by imposing anti-gouging protections in the early stages of even a long-running emergency, but it is not clear how long this intervention would be warranted.

¹⁰³ *But cf.* Skarbek & Skarbek, *supra* note 40, at 255–56 (arguing that laws with flexible or ambiguous durations will hamper recovery efforts).

¹⁰⁴ *See* Moore, *supra* note 89 (explaining that the toilet paper shortage was in part caused by panicked consumers purchasing more than they needed, and that it would take a few weeks for supply and demand to find equilibrium again).

¹⁰⁵ *See* Sherman, *supra* note 71, at 2 (providing examples of states whose emergency declarations for COVID-19 expired in 2021, and noting that in Oregon, the toilet paper shortage was over before the emergency declaration ended).

¹⁰⁶ *See* Michael A. Salinger, Dir., Bureau of Econ., FTC, Address to Antitrust Committee of Boston Bar Association: Moneyball and Price Gouging 6 (Feb. 27, 2006), https://www.ftc.gov/sites/default/files/documents/public_statements/moneyball-and-price-gouging/060227moneyballandpricegouging_0.pdf [<https://perma.cc/M2Q3-UXSA>] (describing the phenomenon in the context of petroleum products, but noting that “it appears to be a very general phenomenon” that “is not econ 101”); *see also* N. Gregory Mankiw, *New Keynesian Economics*, ECONLIB, <https://www.econlib.org/library/Enc/NewKeynesianEconomics.html> [<https://perma.cc/7MXD-RZH9>] (explaining that although neoclassical economists assume that prices change quickly, new Keynesian economists note that price changes have costs, making them “sticky,” with significant economic consequences).

¹⁰⁷ *See, e.g.*, Kahneman et al., *supra* note 14, at 730–31 (“Psychological studies of adaptation suggest that any stable state of affairs tends to become accepted eventually . . . Terms of exchange that are initially seen as unfair may in time acquire the status of a reference transaction.”).

At the same time, the potential downsides of anti-gouging laws may be exacerbated if they are left in place too long.¹⁰⁸ If there are significant market consequences to imposing price-gouging limitations, those market consequences could be exacerbated the longer the law is in force.¹⁰⁹ I address the neoclassical economic critiques of anti-gouging laws at length in Part IV, but one point bears noting here. Many economists note that for the market to respond to increased demand by ramping up supply, suppliers may need assurance that the prices they can get for the product will justify their costs for beginning production and entering the market.¹¹⁰ Particularly in an emergency like COVID-19, where the necessary market responses included long-term increases in production of existing products like masks, as well as the mass production and distribution of new products like home-testing kits, the consequences to the market of the long-term, broad-based application of the most rigid anti-gouging rules may be too blunt of a tool to allow policymakers to respond to a changing market situation over time.

Of course, many executive officials have broad emergency powers, established by statute or common law, to modify or suspend the application of certain laws during an emergency.¹¹¹ Some of these emergency powers may enable the government to tailor the application of an anti-gouging law as needed, even if the anti-gouging statute itself does not so specify.¹¹² Where the offi-

¹⁰⁸ See Sherman, *supra* note 71, at 2 (noting that extended periods of price controls may disincentivize sellers to increase supply, which would worsen the problem).

¹⁰⁹ See Parsons, *supra* note 29, at 70 (arguing that “the strongest economic justification for an [anti-gouging law] is that supply is less elastic in the short-run The longer an emergency lasts, the more elastic supply becomes . . . the greater the welfare loss from a price control and the weaker the economic justification”); see also Zwolinski, *supra* note 40, at 364–66 (arguing that longer-term emergencies demand ordinary market responses). See generally Steve G. Parsons, *Anti-Price Gouging Laws: Why a Pandemic Is Different from Other ‘Emergencies,’* REGULATION, Summer 2022, at 8, 9 [hereinafter Parsons, *Different*], <https://www.cato.org/regulation/summer-2022/anti-price-gouging-laws-why-pandemic-different-other-emergencies> [<https://perma.cc/SP4Q-QU9K>] (arguing against anti-gouging laws generally, and especially for situations like the COVID-19 pandemic, which is a long-tail event); Timothy Snail & Mary Beth Savio, *Price Gouging in a Time of Sea Change*, COMPETITION POL’Y INT’L ANTITRUST CHRON., Sept. 2020, at 1, 4–6 (highlighting complications for price-gouging laws during long emergencies like the COVID-19 pandemic).

¹¹⁰ See, e.g., Parsons, *supra* note 29, at 70. Parsons also notes that the negative economic impact of COVID-19 may be particularly harsh, as the primary damage has been loss of life and economic constraints. *Id.* at 74.

¹¹¹ See, e.g., ME. STAT. tit. 37-B, § 741(3) (2023) (giving broad authority to the Governor to handle emergencies); *id.* § 742(1)(C)(1) (granting the Governor authority to suspend some laws concerning business conduct during an emergency).

¹¹² See, e.g., Haw. Proclamation Relating to School Bus Services, at 5–6 (Aug. 17, 2023), <https://governor.hawaii.gov/wp-content/uploads/2023/08/2308043-1.pdf> [<https://perma.cc/RKN6-RYFZ>] (suspending the application of the anti-gouging law, HAW. REV. STAT. § 127A-30, in every county except the one impacted by the fire disaster); Haw. Proclamation Relating to Wildfires, at 4–5 (Aug. 8, 2023), https://governor.hawaii.gov/wp-content/uploads/2023/08/2307199-1.pdf#new_tab [<https://perma.cc/8F8K-8F8K>].

cial's ability to do so is not currently clear from either the text of the anti-gouging law or other legislation concerning emergency powers, however, there may be a substantial advantage in incorporating that flexibility as a tool for potential future long-running emergencies to avoid uncertainty in a time of crisis and provide some assurance to affected businesses.

C. Limitations Exposed by the Current Ease and Prevalence of Disaster Arbitrage

The pandemic certainly is not the first time that people who normally don't sell consumer goods decided to go into business to sell critical goods to their fellow citizens during a crisis. Indeed, every disaster brings reports of some enterprising person selling necessities at inflated prices from the side of the road or the back of a truck.¹¹³ The circumstances of the pandemic, however, made this kind of disaster arbitrage easier for more people to do while also making the scale of the behavior more visible.

The growing popularity of online sales and online shopping, and in particular the ease of becoming an individual or third-party seller on sales platforms like Amazon or eBay, made it easier to engage in disaster arbitrage. One need not buy a product, rent a truck, drive to the disaster area, and stay there to sell their goods; instead, one could become a drop-shipper from home, or source products locally and sell them online. This was particularly exacerbated because COVID-19, unlike many natural disasters, did not wipe out necessary infrastructure (like postal services, electricity, or internet), and because the pandemic specifically pushed people to stay home and do whatever business they could online.¹¹⁴ Moreover, online disaster arbitrage is particularly profitable—you don't have to risk driving into a single area, hoping that water has not been restored by the time you arrive. Rather, you can sell online to *whoever, nationwide*, is willing to pay your prices for masks or hand sanitizer.¹¹⁵

perma.cc/89QB-3464] (suspending the automatic invocation of the anti-gouging law for that disaster, finding that "the automatic invocation of this provision is not needed for this emergency").

¹¹³ See, e.g., Ihosvani Rodriguez, *State Files Price-Gouging Lawsuit Over Generator Sales*, S. FLA. SUNSENTINEL, <https://www.sun-sentinel.com/news/fl-xpm-2005-11-08-0511070390-story.html> [<https://perma.cc/TK8Y-DZ7C>] (Sept. 27, 2021) (describing a suit against a man who bought generators in North Carolina and sold them from a truck in Miami-Dade County following Hurricane Wilma for a roughly 100% markup).

¹¹⁴ See Parsons, *supra* note 29, at 71 (noting the lack of actual physical demolition that COVID-19 caused, compared to natural disasters).

¹¹⁵ See Press Release, William Tong, Attorney General of Connecticut, Attorney General Tong Announces Price Gouging Investigation into Five Amazon Retailers (Apr. 21, 2020), <https://portal.ct.gov/AG/Press-Releases/2020-Press-Releases/Attorney-General-Tong-Announces-Price-Gouging-Investigation-Into-Five-Amazon-Retailers> [<https://perma.cc/4NP9-Q5JR>] (detailing the Connecticut Attorney General's investigation into multiple Connecticut-based Amazon storefronts for price gouging during the pandemic).

This increased ease and prevalence of disaster arbitrage created several challenges for various states' anti-gouging laws. Do the laws even apply to sellers who are not ordinarily merchants? If so, how do you tell what their prices should have been?

In general, state price-gouging laws clearly apply to retailers who already sold covered consumer goods in the ordinary course of their business prior to the emergency.¹¹⁶ The laws' application beyond that, however, may be unclear or limited, seriously undermining their ability to reach this kind of entrepreneurial price-gouging behavior. In particular, some laws appear to apply only to merchants who sell in the ordinary course of business, and not to casual, one-off sellers; relatedly, many laws set the reference price as the seller's own price prior to the emergency, leaving it unclear whether or how the law applies to new entrants into the market.¹¹⁷ This is of particular concern because there is some empirical evidence that new market entrants tend to increase their prices in response to scarcity by substantially greater margins than incumbents, including in online sales during the COVID-19 pandemic.¹¹⁸

1. Application to Merchants

Some state anti-gouging laws expressly apply to merchants, not one-off sellers.¹¹⁹ Others are unclear—for example, they may apply to “any person,” but then use terminology that seems to apply most comfortably to commercial merchants, such as discussions of the price that a seller uses “in the usual course of business.”¹²⁰ As remedial statutes intended to protect the public in a

¹¹⁶ Luís Cabral & Lei Xu, *Seller Reputation and Price Gouging: Evidence from the COVID-19 Pandemic*, 59 ECON. INQUIRY 867, 868 (2021).

¹¹⁷ See, e.g., N.J. STAT. ANN. § 56:8-108 (West 2023) (defining an “[e]xcessive price increase” as, *inter alia*, “a price that is excessive as compared to the price at which the consumer good or service was sold or offered for sale by the seller in the usual course of business immediately prior to the state of emergency”). See generally Fischer & Lipscomb-Jackson, *supra* note 5, at 5 (considering the issue of new market entrants after an emergency).

¹¹⁸ See, e.g., Cabral & Xu, *supra* note 116, at 868. This study focused on online retailers, but appears consistent with prior work indicating that large national chains were less likely to substantially raise prices in a crisis than smaller independent providers. See *infra* note 249 and accompanying text (comparing post-emergency pricing trends in large nationwide retailers and smaller businesses).

¹¹⁹ See, e.g., OR. REV. STAT. § 401.965(2) (2023) (covering “[a] merchant or wholesaler”); see also Hynes & Duffy, *supra* note 35, at 19 (considering the impacts of anti-gouging laws that are limited to merchants); Skarbek & Skarbek, *supra* note 40, at 252–53 (noting variation in how far different anti-gouging laws reach up the supply chain).

¹²⁰ See, e.g., N.J. STAT. ANN. § 56:8-108 (using a reference price of “the price at which the consumer good or service was sold or offered for sale by the seller in the usual course of business immediately prior to the state of emergency”); GA. CODE ANN. § 10-1-393.4(a) (2023) (making it unlawful “for any person, firm, or corporation *doing business* in any area in which a state of emergency . . . has been declared . . . to sell or offer for sale *at retail*” covered goods or services for an increased price (emphasis added)); CONN. GEN. STAT. § 42-230 (2023) (using the phrase “normal course of busi-

time of emergency, these statutes should be construed broadly; indeed, several contain explicit, broad canons of construction in their text.¹²¹ Accordingly, one would expect that in an individual enforcement action, these laws would be liberally construed consistent with legislative intent, and thus broadly apply to non-merchant sellers except where the statute clearly provides otherwise. Moreover, insofar as these laws are intended to reflect community condemnation of price-gouging behavior and fairness norms, recent empirical work suggests that, to the extent the public differentiates between merchants and non-merchants, it objects *more* strongly to price-inflated sales by non-merchants.¹²²

There are thus good textual and policy reasons for interpreting many of the ambiguous laws broadly to cover non-merchant sellers. Until the matter is addressed through litigation, however, there will remain unhelpful uncertainty about the laws' scope on all sides, and sellers must take on both the costs of risk and compliance until they clearly know whether their conduct will be reached by the statute.

As noted above, the problem of one-off sellers, and thus the issue of whether anti-gouging laws apply to them, is not new. There has always been, and likely will always be, some amount of black-market private resale of goods that run short during an emergency.¹²³ The scope and acceleration of e-commerce described above (and the pandemic-era importance of avoiding crowded stores), however, both highlighted and exacerbated the problems posed by this limitation. It is easier than ever for any individual, anywhere in the country, to engage in price arbitrage that qualifies as price gouging in their state or the buyer's. This greatly expanded universe of potential individual sellers is unlikely to shrink meaningfully in the future. Accordingly, the issue of merchant-only statutes being significantly underinclusive seems likely to worsen in the future and to merit legislative attention.

2. Reference to the Seller's Own Past Price

Relatedly, how many state anti-gouging laws define their reference prices creates ambiguity about to whom and what they apply. Many states do not ex-

ness"); Hynes & Duffy, *supra* note 35, at 19 (noting that individuals may think they are not subject to price-gouging laws).

¹²¹ See ARK. CODE ANN. § 4-88-301 (2023) (stating that "the intent of the General Assembly [is] that this section be liberally construed so that its beneficial purposes may be served"); W. VA. CODE § 46A-6J-1 (2023) (similar).

¹²² See Buccafusco et al., *supra* note 2, at 450 (finding no "significant difference in respondents' attitudes when" sellers were non-merchants, but noting that, for moderate price increases, "respondents were mildly *more* (not less) inclined to consider price increases by a non-merchant to be unfair").

¹²³ See Parsons, *supra* note 29, at 51 (noting that black markets often form when price caps are implemented—even back in antiquity).

PLICITLY deal with the situation where either a business did not exist prior to the emergency or a seller did not previously sell the particular product in question (e.g., a gas station may have sold bottled water and hand sanitizer before the pandemic, but not face masks).¹²⁴ This becomes an issue if the statute makes the reference price the seller's own prior price; if no such prior price exists and there is no other way of calculating a reference price, it is unclear how the law would apply to such a seller.¹²⁵

At least eight states handle the issue of new entrants into the market explicitly.¹²⁶ In California, the law sets a separate reference price for new market entrants, allowing them to mark up their price by up to fifty percent of their costs.¹²⁷ The legislative history specifically notes that the prior law kept "law enforcement from prosecuting new sellers who opportunistically enter into a market during an emergency for profit."¹²⁸ Utah's change to its anti-gouging law also set a specific reference price for new entrants, but in contrast to California (and to nearly every other change to a state anti-gouging law during the pandemic), Utah amended its prior statute by *increasing* the margin that new entrants were allowed to charge above cost, from thirty to one hundred percent.¹²⁹ Thus Utah, very unusually, narrowed the scope of potential transactions that its anti-gouging law covers.

Rather than taking the cost-plus approach of Utah and California, other states have tried to establish a local-market-based price cap for new market entrants. Kentucky, for example, uses "the price at which a good or service was

¹²⁴ See, e.g., Warkentin, *supra* note 63, at 92 (discussing such issues with Maryland's new anti-gouging law).

¹²⁵ See, e.g., N.J. STAT. ANN. § 56:8-108 (lacking a specific approach for new market entrants).

¹²⁶ See, e.g., Act of Apr. 9, 2020, 2020 Alaska Sess. Laws ch. 10, § 26 (stating that "[t]his section applies regardless of whether the person was in the business of selling supplies before March 11, 2020"); CAL. PENAL CODE § 396(b) (West 2023) (capping the amount a new seller may charge for a product based on the seller's acquisition costs); Act of July 23, 2020, ch. 267, § 2(a)(7), 82 Del. Laws 2 (2020) (using a product's general market price as a reference price for new market entrants); KY. REV. STAT. ANN. § 367.374(4) (West 2023) (same); ME. STAT. tit. 10, § 1105(1)(D) (2023) (same); N.C. GEN. STAT. § 75-38(a)(2) (2023) (similar); NEV. REV. STAT. § 598.09235(6)(b) (2023) (similar); UTAH CODE ANN. § 13-41-102(4)(b) (West 2023) (using the seller's acquisition costs as a reference price). Alaska and Delaware's laws were temporary. See 2020 Alaska Sess. Laws ch. 10, § 37 (repealing the law on March 11, 2021); ch. 267, § 4, 82 Del. Laws 3 (noting that the law will expire sixty-one days after the end of the COVID-19 emergency).

¹²⁷ See CAL. PENAL CODE § 396(b) (stating that "[i]f the person, contractor, business, or other entity did not charge a price for the goods or services immediately prior to the proclamation or declaration of emergency, it may not charge a price that is more than 50[%] greater than the cost thereof").

¹²⁸ S. 1196, 2020 S. Rules Comm., Reg. Sess., at 5 (Cal. 2020), https://leginfo.ca.gov/faces/billAnalysisClient.xhtml?bill_id=20190200SB1196 [https://perma.cc/RA62-P5B9].

¹²⁹ Act of May 5, 2021, 2021 Utah Laws 1435-36. Utah's law previously specified how to deal with new market entrants, but allowed them only a 30% markup above cost. *Id.* at 1436. Now, the law bars new entrants from charging "more than twice the person's total cost for the good or service," where total cost is defined in a limited fashion. UTAH CODE ANN. § 13-41-102(4), (10).

generally available in the area” as the baseline for determining whether a new market entrant’s price violates the statute.¹³⁰ Maine, Nevada, and North Carolina similarly factor in the going rate for a good in the community before the emergency, at least for new market entrants.¹³¹ This more closely tracks the recommendations of some economists for improving how price-gouging regulations handle new market entrants: effectively tying their pricing to that of incumbents who face greater reputational pressures not to price gouge.¹³²

Such regional-market approaches, however, have their own challenges. For example, they create uncertainty about what to do regarding products that were not generally available (or in demand) in the area before the emergency. Or, if there had been a local preexisting market for a given product, it may be difficult for an online seller to take reasonable *ex ante* steps to avoid price gouging in that jurisdiction, even if an attorney general can later ascertain that regional price. This may pose a particular challenge if a given sales platform chooses not to allow price tailoring, or availability tailoring, by state.¹³³ Finally, such an approach may make it less likely that new market entrants will choose to offer goods at all if they cannot make a sufficient return.¹³⁴

III. PRICE-GOUGING LAWS IN THE PANDEMIC: A STORY OF CONVERGENCE AND DISSENSUS

The history of anti-gouging laws shows that they are often adopted, and adapted, in response to a major disaster.¹³⁵ As the foregoing discussion shows, that is certainly true of the COVID-19 pandemic; more price-gouging laws emerged than ever before, and many existing laws were amended to respond to the needs of the COVID emergency. Looking closely at these changes, two simultaneous trends in state anti-gouging laws emerge: (1) increasing popularity of price-gouging-specific statutes and a tendency to strengthen and expand

¹³⁰ KY. REV. STAT. ANN. § 367.374(4).

¹³¹ See ME. STAT. tit. 10, § 1105(1)(D)(1) (setting the reference “price at which similar goods . . . were offered” before the emergency); NEV. REV. STAT. § 598.09235(6)(b) (defining “[u]sual price” differently for incumbent sellers and new market entrants); N.C. GEN. STAT. § 75-38(a)(2) (defining the reference price differently for new sellers).

¹³² See Cabral & Xu, *supra* note 116, at 878 (suggesting that one way for Amazon to restrain price gouging on its platform, per the request from over thirty Attorneys General, would be to limit new sellers to the prices of incumbent sellers); Parsons, *supra* note 29, at 82 (urging, absent an ability to eliminate anti-gouging laws, consideration of Cabral & Xu’s proposal, limited to retailers).

¹³³ See *Online Merchs. Guild v. Cameron*, 995 F.3d 540, 553–55 (6th Cir. 2021) (discussing such limitations on Amazon’s platform, in the context of an extraterritoriality challenge to Kentucky’s anti-gouging law).

¹³⁴ Parsons, *Different*, *supra* note 109, at 8–9.

¹³⁵ See, e.g., 2015 N. Mar. I. Pub. L. 19-3 § 2 (noting the need to strengthen the Price Freeze Act in the immediate aftermath of Typhoon Soudelor).

those laws, which I will discuss in Section A of this Part,¹³⁶ and (2) an increasing diversity in the precise provisions and coverage of each jurisdiction's laws, which I will discuss in Section B.¹³⁷ I conclude this Part in Section C with a discussion of the impact of this convergence and dissensus on the potential pressure for uniformity among the laws.¹³⁸

A. High-level Convergence: More Laws and More Robust Laws

Over the last forty-plus years, the clear trend in state anti-gouging laws has been one of expansion: more states have adopted explicit anti-gouging statutes or regulations, and most changes to those laws have expanded their coverage, strengthened enforcement, or increased the available penalties.¹³⁹ The trend is unusually bipartisan; the adoption of an anti-gouging statute seems better predicted by a state's frequency of extreme weather events and its neighbors' laws than by its dominant political party or culture.¹⁴⁰ Moreover, state attorneys general from both major political parties have been vocal about enforcing these laws.¹⁴¹ There are few examples of states limiting their anti-gouging laws over time, even in the highly politicized context of the COVID-19 pandemic.¹⁴²

¹³⁶ See *infra* notes 139–151 and accompanying text.

¹³⁷ See *infra* notes 152–166 and accompanying text.

¹³⁸ See *infra* notes 167–184 and accompanying text.

¹³⁹ See, e.g., *People v. Quality King Distribs., Inc.*, 173 N.Y.S.3d 221, 224 n.1 (App. Div. 2022) (recounting the amendment history of New York's law and noting the strengthening trend); Davis, *supra* note 27, at 30–31, 45–46, 53, 57 (discussing amendments to states' anti-gouging laws through 2008, and identifying some proposed strengthening legislation that was not adopted); Giberson, *supra* note 27, at 50 (explaining that price-gouging laws, when amended, tend to become more strict and punitive).

¹⁴⁰ Davis, *supra* note 27, at 2–3, 123–24, 127. Davis also notes that, at least where voting records are available, these laws have passed almost unanimously, with only a few exceptions. *Id.* at 29–30.

¹⁴¹ See, e.g., Press Release, Rob Bonta, Attorney General of California, Attorney General Bonta Issues Consumer Alert on Price Gouging Following State of Emergency Declarations in Siskiyou, Nevada, and Placer Counties Due to Fires (Aug. 6, 2021), <https://oag.ca.gov/news/press-releases/attorney-general-bonta-issues-consumer-alert-price-gouging-following-state-1> [<https://perma.cc/TS8R-U7VR>] (quoting the California Attorney General reminding the public about price-gouging laws); Press Release, Ken Paxton, Attorney General of Texas, AG Paxton Sues La Quinta BCB for Price Gouging During 2021 Winter Storm (Mar. 18, 2021), [<https://perma.cc/PPV6-Q4S2>] (quoting the Texas Attorney General's warning that price gougers will be prosecuted); Press Release, Ken Paxton, Attorney General of Texas, AG Paxton Warns of Price Gouging as Texans Prepare to Prevent the Spread of Coronavirus (Mar. 13, 2020), <https://www.texasattorneygeneral.gov/news/releases/ag-paxton-warns-price-gouging-texans-prepare-prevent-spread-coronavirus> [<https://perma.cc/CJ6Z-DYX5>] (quoting the Texas Attorney General reminding people that price-gouging laws are in effect).

¹⁴² See Giberson, *supra* note 27, at 50 (identifying Utah, Georgia, and Connecticut as states that narrowed their anti-gouging laws in different ways). Utah has repeatedly narrowed its anti-gouging law over the years, for example, by specifying that the offending conduct must take place in Utah, and raising the amount that prices may rise in an emergency. See *id.*; 2021 Utah Laws 1435. In Michigan, a citizen-initiated law repealed the Governor's emergency powers, which had been used to impose

Let's start with a short overview of the pandemic changes. At the beginning of the pandemic, forty-two of the fifty-six jurisdictions had a specific anti-gouging statute or regulation.¹⁴³ During the pandemic, five jurisdictions added new laws or regulations to address price gouging¹⁴⁴ (not counting the requirements imposed by executive orders),¹⁴⁵ three of which included permanent changes.¹⁴⁶ If you include among the price-gouging laws the executive orders that explicitly imposed price-gouging limitations,¹⁴⁷ only Arizona, Montana, Nebraska, New Hampshire, North Dakota, South Dakota, Washington, and Wyoming never had specific price-gouging protections.¹⁴⁸ Among these

anti-gouging standards by executive order. *Midwest Inst. of Health, PLLC v. Governor of Mich.*, 958 N.W.2d 1, 6 (Mich. 2020); Act of Sept. 9, 2021, No. 77, 2021 Mich. Pub. Acts 1.

¹⁴³ *Price Gouging Laws by State*, FINDLAW, <https://www.findlaw.com/consumer/consumer-transactions/price-gouging-laws-by-state.html> [<https://perma.cc/H2YA-FSTP>] (Mar. 24, 2020). Note that this site incorrectly lists Puerto Rico as having had no such law in place and also omits several territories. *Id.*; see, e.g., Guam Pub. L. 22-034:1 (1993) (prohibiting price gouging in the wake of an emergency); 2015 N. Mariana I. Pub. L. 19-03 §§ 3–6 (allowing the Governor to freeze prices after a disaster); 2018 V.I. Sess. Laws 8128 (allowing the Governor to extend an emergency order).

¹⁴⁴ The five states are Alaska, Colorado, Delaware, Maryland, and Nevada. Act of Apr. 9, 2020, 2020 Alaska Sess. Laws ch. 10, § 26; COLO. REV. STAT. § 6-1-730(1)(b) (2023); Act of July 23, 2021, ch. 85, 83 Del. Laws 1 (2021); Act of Mar. 19, 2020, 2020 Md. Laws 94; NEV. REV. STAT. § 598.09235 (2023).

¹⁴⁵ See Connors, *supra* note 4, at 2 (discussing executive orders in Delaware, Minnesota, and Illinois).

¹⁴⁶ Alaska and Maryland's laws were temporary; Delaware made both temporary and permanent changes to its law during the pandemic. Act of July 23, 2020, ch. 267, 82 Del. Laws 1 (2020); Act of July 23, 2021, ch. 85, 83 Del. Laws 1. The permanent change added a prohibition against "unfair" practices to Delaware's general UDAP law. Act of July 23, 2021, ch. 85, 83 Del. Laws 1. Although I would ordinarily not treat this as a price-gouging change, the legislative history and explanations of the change make clear that the change was intended to make the law cover price gouging. See *Unfair Business Practices, Price Gouging Bill Headed to Governor's Desk*, DEL. BUS. NOW (June 15, 2021), <https://delawarebusinessnow.com/2021/06/unfair-business-practices-price-gouging-bill-headed-to-governors-desk/> [<https://perma.cc/4VZH-TW3W>] (noting that House Bill 91 would make price gouging illegal); *House Bill 91, 151st General Assembly (2021–2022)*, DEL. GEN. ASSEMBLY, <https://legis.delaware.gov/BillDetail?LegislationId=48352> [<https://perma.cc/SLC6-5DMB>] (describing the law as protecting against price gouging). Colorado's new anti-gouging law is styled as a clarification of its general UDAP law to make clear what constitutes prohibited price gouging. COLO. REV. STAT. § 6-1-730(1)(b) (making explicit that price gouging is a prohibited unconscionable practice).

¹⁴⁷ See, e.g., Minn. Exec. Order No. 20-10 (Mar. 20, 2020) (prohibiting price gouging). Arizona's Governor issued an executive order directing regulatory boards to prohibit price gouging in the healthcare setting and broadly directed the Attorney General to pursue instances of consumer fraud. Ariz. Exec. Order No. 2020-07 (Mar. 11, 2020). The Arizona Attorney General, however, asserted that there was no statutory basis to pursue price-gouging cases. See Fischer, *supra* note 74 (discussing this dispute).

¹⁴⁸ See Davis, *supra* note 27, at 95–98 (noting that, in many of these states, anti-gouging laws have been proposed one or more times, but have not been enacted).

outliers, nearly all claim that their general UDAP laws cover price gouging; several have brought enforcement actions to that effect.¹⁴⁹

Overall, this means that only about twelve percent of the jurisdictions surveyed either had no anti-gouging law in place or relied exclusively on their UDAP statutes to target price-gouging activity—about half of what it was prior to the pandemic. And more than one third of the surveyed jurisdictions either changed their anti-gouging laws or added new ones during the pandemic.¹⁵⁰ All but one of these laws predominantly expanded the anti-gouging law.¹⁵¹ Thus, we see indications of a high-level convergence among the states: in times of crisis, it is seen as beneficial to have a specific anti-gouging law in place. And when states change their laws, they have a strong tendency to do so in the direction of strengthening the laws' scope, enforceability, or penalties. One might expect this trend to continue, although there remain only a few holdout jurisdictions as it is.

B. Fine-Grained Dissensus: No Convergence on a Single Approach

Although the story of state anti-gouging laws is one of consensus at that very high level, it is not one of convergence. 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. More jurisdictions are adopting and adapting these laws, but as they do so, there are only marginal trends toward convergence; as a whole, the state laws have become more diverse. It has

¹⁴⁹ See Letter from 33 State Attorneys General to Jeff Bezos, CEO, Amazon (Mar. 25, 2020), <https://www.mass.gov/doc/amazon/download> [<https://perma.cc/GN43-GWLA>] (urging online platforms to do more to prevent price gouging). Indeed, the Attorneys General of Delaware, Nebraska, Nevada, New Hampshire, North Dakota, Minnesota, Montana, Washington, and Wyoming signed group letters to several online platforms in March 2020, despite their states' lack of a specific price-gouging law or regulation beyond the general UDAP laws in place at the time. *Id.* at 4–6.

¹⁵⁰ Rhode Island also amended enforcement and penalty provisions that apply to its price-gouging and other consumer protection provisions. 6 R.I. GEN. LAWS § 6-13-21 (2023); Act of July 9, 2021, 2021 R.I. Pub. Laws 1446–48.

¹⁵¹ *Cf.* Act of May 5, 2021, 2021 Utah Laws 1435 (expanding Utah's law to specify that it protects those seeking to acquire goods, not just those who successfully do so). The amendment, however, was predominantly restrictive: it imposed a heightened standard of proof for anti-gouging violations, increased the maximum price that could be charged for covered goods in some circumstances, limited public disclosure of entities investigated under the law, and enacted a list of enforcement considerations that appear designed to discourage broad enforcement and the imposition of fines. *Id.* at 1434–37. The COVID pandemic was the first time Utah had used this law since passing it in 2005. Taylor Stevens, *Proposal to Repeal Utah's Price Gouging Protections Stalls in Senate Committee*, SALT LAKE TRIB. (Jan. 26, 2021), <https://www.sltrib.com/news/politics/2021/01/26/proposal-repeal-utahs/> [<https://perma.cc/7JBP-DJCR>]. In Michigan, following a citizen initiative and adverse rulings in litigation, the State repealed the provision that granted emergency powers to the Governor. Act of Sept. 9, 2021, No. 77, 2021 Mich. Pub. Acts 1. Michigan, however, also has a separate, permanent prohibition on charging “grossly” excessive prices. MICH. COMP. LAWS § 445.903(1)(z) (2023).

long been true that, for example, different state anti-gouging laws cover different products and allow different price increases during emergencies.¹⁵² But now, the laws also increasingly vary in terms of how far up the consumer supply chain they reach, what kinds of events and actors can trigger the protections, and how long the laws are in effect.¹⁵³ The trend is thus consensus on the utility of specific anti-gouging protection, but dissensus on the best approach to regulation.

Just consider some differences among the anti-gouging laws that were changed during the pandemic. These laws generally mirrored the few nearly universal elements of existing anti-gouging laws, such as allowing sellers to pass increased costs to consumers,¹⁵⁴ but varied along most other essential elements.

1. Explicit Price Cap Versus Unconscionable Pricing

The newly adopted laws were mixed in terms of whether they specified an amount that prices could rise, used a less clearly defined standard such as “unconscionably excessive” pricing, or implemented some combination of the two.¹⁵⁵ Among the new laws, Maryland and Alaska imposed a fixed cap on price

¹⁵² See Snyder, *supra* note 62, at 277 (discussing varying product coverage).

¹⁵³ See Conners, *supra* note 4, at 4 (noting that some anti-gouging laws apply to “any party in the supply chain,” and highlighting three different triggers for various laws).

¹⁵⁴ See Act of Apr. 9, 2020, 2020 Alaska Sess. Laws ch. 10, § 26 (permitting sellers to pass supply costs onto consumers); COLO. REV. STAT. § 6-1-730(3) (2023) (similar); NEV. REV. STAT. § 598.09235(3)(a) (2023) (similar); Act of Mar. 19, 2020, 2020 Md. Laws 94 (temporarily prohibiting price increases “that increase[] the retailer’s value of profit by more than 10%”). Minnesota, in its anti-gouging executive order, did likewise. Minn. Exec. Order No. 20-10 (Mar. 20, 2020). Delaware’s temporary law explicitly stated that a *prima facie* case of price gouging requires proof that price increases are not attributable to increased costs. DEL. CODE ANN. tit. 6, § 2513A(b)(2)(b) (repealed 2023) (allowing the seller to pass on increased supply costs to the consumer); see also ALA. CODE § 8-31-4 (2023) (including the absence of a cost increase as part of the *prima facie* case for price gouging). In contrast, New York’s statute does not require the absence of increased costs for a *prima facie* case, but rather makes increased costs a defense. N.Y. GEN. BUS. LAW § 396-r (3)(b), (c) (McKinney 2023). Whether to make increased costs a defense or part of the *prima facie* case for a violation of price-gouging laws seriously affects the amount and type of enforcement that a state attorney general or others can do. For example, if the plaintiff must prove an absence-of-cost increase, no enforcement action can be filed before there is substantial investigative work, likely including subpoenas to the business. This means that each enforcement action requires more pre-filing time and resources, which limits the number of cases that will be brought quickly following an emergency. See, e.g., Warkentin, *supra* note 63, at 98 (describing the benefits of putting the onus on the seller-defendant to demonstrate that the prices charged are reasonable). That result may be a feature or a bug, depending on the legislature’s intended level of enforcement. See Tarrant, *supra* note 28, at 8–9 (noting the difficulty of accounting for enforcement limitations and the variation in assessing the impacts of anti-gouging laws).

¹⁵⁵ See 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. COMPETITION L. & ECON. 357, 360–64 (2007) (critiquing as vague proposed “unconscionably excessive” standards); Skarbek & Skarbek, *supra* note 40, at 248 (highlighting the greater ambiguity in

or profit increases,¹⁵⁶ Nevada enacted a variety of standards, including specified allowable increases scaled to the cost of the item,¹⁵⁷ Colorado used a broader standard,¹⁵⁸ and Delaware used a specific percentage increase as a *prima facie* case to show a prohibited an excessive increase in prices.¹⁵⁹ Among the fourteen states and territories that amended their laws during the pandemic, all but one kept the same kind of standard it had previously. Only the Virgin Islands, which previously had a price-freezing regulation that firmly capped prices, added a price-gouging law prohibiting “a gross disparity” from pre-disaster prices.¹⁶⁰

Thus, although the brand new laws tended to have hard caps—or at least a specified increase that constitutes a *prima facie* case of price gouging—the subset of existing laws that were amended had no such tendency. Any trend toward greater specificity, therefore, appears limited.¹⁶¹

2. How Long the Anti-gouging Law Applies

As described above, the surveyed jurisdictions take a variety of approaches to how closely the applicability of their anti-gouging law is tied to the duration of the declared emergency. Some track the protections to however long the declaration is in effect, others apply it for a set period, and still others build in flexibility or adopt a hybrid of these approaches.

laws prohibiting “unconscionable increase[s]” than those specifying a permissible increase); Richard Posner, *Should Price Gouging in the Aftermath of Catastrophes Be Punished?*, BECKER-POSNER BLOG (Oct. 23, 2005), <https://www.becker-posner-blog.com/2005/10/should-price-gouging-in-the-aftermath-of-catastrophes-be-punished--posner.html> [<https://perma.cc/W2A4-FVWP>] (arguing against vague laws that prohibit “unconscionably” high prices).

¹⁵⁶ Act of Mar. 19, 2020, 2020 Md. Laws 94 (temporarily limiting sellers to a 10% profit increase); Act of Apr. 9, 2020, 2020 Alaska Sess. Laws ch. 10, § 26 (similar).

¹⁵⁷ See NEV. REV. STAT. § 598.09235(1), (3) (prohibiting “a price that is grossly in excess of the usual price for that good or service,” and then providing several price safe harbors). Minnesota’s price-gouging executive order also used a mix of specified allowable increases and broad standards. Minn. Exec. Order No. 20-10 (Mar. 20, 2020).

¹⁵⁸ COLO. REV. STAT. § 6-1-730(2) (prohibiting sales at an undefined “price so excessive as to amount to price gouging”).

¹⁵⁹ DEL. CODE ANN. tit. 6, § 2513A(b)(2) (repealed 2023) (setting the *prima facie* limit at 10%).

¹⁶⁰ Act of Oct. 26, 2020, No. 8386, 2020 V.I. Sess. Laws 206. The states and territories that kept their price caps the same are California, the District of Columbia, Florida, Guam, Idaho, Kentucky, Maine, Massachusetts, New York, Utah (though it increased the actual amount that prices could increase), Virginia, and West Virginia.

¹⁶¹ See Davis, *supra* note 27, at 31–32, 39–40 (concluding that as of 2008, there was no statistical trend toward specific caps over general standards, and noting a failed proposal to specify a cap in New York’s law); cf. Giancaspro, *supra* note 74, at 1474–75 (advocating that Australia adopt an unconscionability-type standard); Parsons, *Different*, *supra* note 109, at 9 (arguing that if anti-gouging laws must exist at all, caps should be specific and above 0%, rather than contain vague language).

In the laws changed or adopted during the pandemic, most of the changes did not affect how long the laws were in force. Of those that did, however, the changes tended to favor more flexibility to tailor the law's application, even extending it beyond the state of emergency.¹⁶² For example, Florida and California adapted their laws to add flexibility regarding when and how to extend anti-gouging protections.¹⁶³ West Virginia's law continues to apply only during the declared emergency and also requires the Governor to review the law's application every fifteen days to determine whether price restrictions should continue for any or all covered goods.¹⁶⁴

Among the newly adopted laws, however, there is no clear pattern in how long they apply, except to eschew extremely short application windows. For example, Colorado's new law applies for 180 days, Nevada's law applies for the duration of a state of emergency that has been in effect for seventy-five or fewer days, and the laws of the Virgin Islands and Maryland both appear to apply as long as the state of emergency is in effect.¹⁶⁵ Delaware and the Virgin Islands, like California and West Virginia, offer flexibility for executive officials to end protections earlier than the statute provides, at least for some products.¹⁶⁶

¹⁶² This tendency comports in part with advice from the Organisation for Economic Co-operation and Development (OECD). SEC'Y GEN., *supra* note 89, at 12 (advising that emergency-related regulation of prices "should only be adopted extraordinarily, be limited to essential products affected by the market failures caused by this crisis, and last only for as long as strictly necessary").

¹⁶³ See CAL. PENAL CODE § 396(g) (West 2023) (allowing price caps to be extended for thirty days at a time); Act of Sept. 30, 2020, 2020 Cal. Stat. 3826 (allowing official price increases when price-gouging prohibitions are extended). For a detailed breakdown of the changes of California's amendment, see generally S. 1196, 2020 S. Rules Comm., Reg. Sess. (Cal. 2020), https://leginfo.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200SB1196 [<https://perma.cc/RA62-P5B9>]. In Florida, there is a sixty-day limit (unless extended by the Governor) on the anti-gouging protection for "[a]ny dwelling unit or self-storage facility that is necessary for habitation or use as a direct result of the emergency," which was amended to allow gubernatorial extensions by executive order, not just by renewal of the state of emergency. FLA. STAT. § 501.160(2)(b) (2023) (effective June 30, 2021). Although Alabama did not amend its anti-gouging statute during the 2020–2022 period examined here, it is worth noting that it has since adopted a law allowing for tailoring both the time and areas in which its anti-gouging law applies. ALA. CODE §§ 8-31-3, 8-31-4 (2023) (effective Aug. 1, 2023).

¹⁶⁴ W. VA. CODE § 46A-6J-3(a), (e) (2023); Act of Mar. 25, 2020, 2020 W. Va. Acts 546–48.

¹⁶⁵ COLO. REV. STAT. § 6-1-730(5)(f) (2023) (effective July 14, 2020); NEV. REV. STAT. § 598.09235(1) (2023); V.I. CODE ANN. tit. 23, § 1017(a) (2023); Act of Mar. 19, 2020, 2020 Md. Laws 93. Delaware's temporary law applied only in the "COVID-19 recovery period" of sixty-one days after a declaration of emergency ends. Act of July 23, 2020, ch. 267, 82 Del. Laws 2 (2020). It continued anti-gouging law protections, but specifically allowed the Governor to ratchet them back or end them early as appropriate. *Id.*; DEL. CODE ANN. tit. 6, § 2513A(e)(1) (repealed 2023).

¹⁶⁶ See DEL. CODE ANN. tit. 6, § 2513A(e)(1) (granting the Governor temporary authority to end an emergency declaration); V.I. CODE ANN. tit. 23, § 1017(d) (giving the Department of Licensing and Consumer Affairs the ability to approve increased prices).

C. Effect of This Convergence and Dissensus: Increased Pressure for Uniformity?

As the prior discussion shows, although state anti-gouging laws have certain core commonalities, the states' policy choices remain highly diverse. As more of these statutes come into existence—and as they become broader and more powerful—we might expect the diversity of these laws to increase the pressure to impose some uniformity.¹⁶⁷ This uniformity might come about in one of several ways. I consider two such possibilities below: (1) federal legislation,¹⁶⁸ and (2) the actions of groups like the Uniform Law Commission (ULC), which recommend model legislation to the states.¹⁶⁹

1. Potential and Proposed Federal Legislation

In the current and previous congressional terms, several federal anti-gouging bills have been introduced—both before and after the Senate hearing in February 2022, where the FTC was accused of doing too little to combat price gouging. Some of these proposals were specific to COVID-19¹⁷⁰ or price increases in fuel and petroleum products.¹⁷¹ Others were broader and more closely resembled the states' anti-gouging legislation.¹⁷² These federal proposals do not appear to have the same kind of bipartisan appeal that anti-gouging statutes seem to enjoy at the state level; all, to date, are Democratic efforts.¹⁷³

¹⁶⁷ See, e.g., Warkentin, *supra* note 63, at 80–81, 88–90, 97–99 (arguing that an incomplete “patchwork” of state laws “is entirely inadequate to deal with price gouging in the context of a global pandemic,” and advocating for centralized anti-gouging regulation under the auspices of the FTC).

¹⁶⁸ See, e.g., ALEX HARMAN, PUB. CITIZEN, PRIME GOUGING: HOW AMAZON RAISED PRICES TO PROFIT FROM THE PANDEMIC 10–11, 29 (2020), <https://www.citizen.org/article/prime-gouging/> [<https://perma.cc/77G6-VVWR>] (noting that by May 2020, Amazon was publicly calling for the adoption of narrower federal anti-gouging legislation, and concluding by recommending the adoption of broad federal anti-gouging legislation).

¹⁶⁹ See *infra* notes 180–184 and accompanying text.

¹⁷⁰ COVID–19 Price Gouging Prevention Act, H.R. 675, 117th Cong. (2021); COVID–19 Price Gouging Prevention Act, H.R. 6472, 116th Cong. (2020); see also Rydzewski, *supra* note 19, at 34–35 (discussing pending price-gouging legislation in 2020).

¹⁷¹ Federal Price Gouging Prevention Act, S. 355, 118th Cong. (2023); Fair and Transparent Gas Prices Act of 2023, S. 67, 118th Cong. (2023); Stop Gas Price Gouging Tax and Rebate Act, H.R. 7099, 117th Cong. (2022); Gas Price Gouging Prevention Act, H.R. 7463, 117th Cong. (2022); Stop Price Gouging Prevention Act, S. 3920, 117th Cong. (2022); Consumer Fuel Price Gouging Prevention Act, H.R. 7688, 117th Cong. (2022).

¹⁷² Price Gouging Prevention Act of 2022, S. 4214, 117th Cong. (2022); Price Gouging Prevention Act of 2022, H.R. 7736, 117th Cong. (2022); Disaster and Emergency Pricing Abuse Prevention Act, S. 3839, 117th Cong. (2022); Disaster and Emergency Pricing Abuse Prevention Act, H.R. 9284, 117th Cong. (2022); Price Gouging Prevention Act, S. 3853, 116th Cong. (2020); Price Gouging Prevention Act, H.R. 6450, 116th Cong. (2020).

¹⁷³ See, e.g., H.R. 6472 (indicating that the bill sponsor was a Democrat).

These bills reflect distinctive views about what price gouging is and who does it. For example, Senator Elizabeth Warren's maximalist bill from the last Congress, Senate Bill 4214, went further in some respects than even the most aggressive state laws. The bill would have empowered the FTC to pursue those who sell any "good or service at an unconscionably excessive price during an exceptional market shock," which would include declared disasters and emergencies, as well as other market disruptions.¹⁷⁴ Unlike most states' laws, it would apply to any seller, "regardless of the person's position in a supply chain or distribution network," subject to the affirmative defense that the increase was attributable to additional costs *and* that the entity's parent company earned less than one hundred million dollars in revenue in the prior twelve months.¹⁷⁵

Even though each of these bills was introduced in the pandemic era, none of the federal proposals take full account of the changes that numerous states made to their laws during the pandemic—changes that were often meant, in substantial part, to adapt the laws to better respond to the particular challenges of a slow-growing, long-running COVID emergency.¹⁷⁶ Looking again at Senate Bill 4214, it does provide a pricing rule for new market entrants—their prices would be judged against "the average price at which the good or service was sold or offered for sale by all competing sellers in the market during the 120-day period" before the triggering shock.¹⁷⁷ It applies, however, during "any change or imminently threatened . . . change in the market for a good or service resulting from a natural disaster" or other emergency, without giving the FTC the power to tailor or limit the coverage of the law during a long-running emergency.¹⁷⁸

Interestingly, although we might expect the flourishing of diverse state anti-gouging laws to increase the pressure for federal legislation to bring uniformity to the field, none of the recent federal proposals appear designed to create a uniform body of anti-gouging law—at least not to the extent that they

¹⁷⁴ See S. 4214, § 3 (including the size and market power of the regulated entity in determining price-gouging culpability). This arguably tracks the European and other international models of competition and crisis price regulation more closely than those of most states. *Id.* See generally Willem H. Boshoff, *South African Competition Policy on Excessive Pricing and Its Relation to Price Gouging During the COVID-19 Disaster Period*, 89 S. AFRICAN J. ECON. 112 (2021) (discussing the impact of companies' market power on their ability to price gouge).

¹⁷⁵ S. 4214, § 3.

¹⁷⁶ Cf. Fischer & Lipscomb-Jackson, *supra* note 5, at 11–12 (recommending provisions for a potential federal anti-gouging law, and highlighting several points of diversion among state laws).

¹⁷⁷ S. 4214, § 3(c)(2)(A).

¹⁷⁸ *Id.* § 2(3). Previously, the FTC testified against potential federal anti-gouging legislation not on the ground that lack of uniformity was beneficial, but in part because states and local governments, being closer to individual violations, were better equipped to handle complaints and allegations of gouging. *Hearing, supra* note 18, at 9–10. The current bills, enforceable by states as well as the FTC, appear to address this concern.

would preempt the various state laws.¹⁷⁹ Whether this is because of the lopsided partisan interest in anti-gouging legislation at the federal level, because none of the proposals ever advanced far enough to be seriously negotiated, or some other reason, is difficult to discern.

2. Action by the Uniform Law Commission

Pressure for greater uniformity among the states might also trigger actions from groups like the ULC, which proposes model laws for states to adopt in the furtherance of improving uniformity in law across states.¹⁸⁰ Notably, in early 2020, a ULC Study Committee on Public Health Emergency Authorities (Committee) unanimously recommended *against* any further action by the ULC on the issue of price-gouging regulation.¹⁸¹ The Committee noted that thirty-four states and the District of Columbia already had such statutes, while other states relied on existing laws like UDAP laws to police price gouging.¹⁸² Although the Committee acknowledged that the pandemic “exposed gaps in existing legislation,” it believed that the most important gap was (their misguided understanding) that “state laws cannot reach out-of-state products.”¹⁸³ This supposed inability, in the Committee’s view, necessitated federal regulation rather than uniform state laws—federal legislation that, if adopted, “would likely completely or partially preempt state law.”¹⁸⁴ As noted above, however, the extant federal proposals have little to no preemptive effect on state laws. It will be interesting to see whether the ULC decides to revisit this question if the limitations of its time-pressured, mid-pandemic analysis are exposed by the unfolding of events in the states and at the Capitol.

¹⁷⁹ See, e.g., Disaster and Emergency Pricing Abuse Prevention Act, H.R. 9284, 117th Cong. § 5 (2022) (stating that “[n]othing in this Act preempts any State law”); S. 4214 § 3(g)–(h) (disclaiming preemption of state or local laws, and providing for state enforcement of the federal standard); see also Fischer & Lipscomb-Jackson, *supra* note 5, at 9–11 (arguing that a federal price-gouging law would improve the current patchwork of laws only if it expressly preempted state anti-gouging laws, and noting that no then-pending federal legislation would do so).

¹⁸⁰ Cf. Helveston, *supra* note 17, at 47–51 (proposing a model anti-price-gouging law for states to adopt); Fischer & Lipscomb-Jackson, *supra* note 5, at 10–11 (discussing the American Bar Association’s approach to professional responsibility and the Uniform Commercial Code as possible models for improving the uniformity of state anti-gouging laws, and rejecting both as inadequate for the task).

¹⁸¹ See Memorandum from Diane Boyer, Chair, Study Comm. on Pub. Health Emergency Auths. to Tim Berg, Comm’r, ULC 3 (July 5, 2020) (on file with author) [hereinafter Public Health Memo].

¹⁸² *Id.*

¹⁸³ *Id.* The assertion is questionable because states’ UDAP and other consumer protection laws can often reach both corporations doing business in their states and transactions involving in-state consumers, regardless of the business location, subject to case law limitations and traditional principles of personal jurisdiction. See DEE PRIDGEN & RICHARD M. ALDERMAN, CONSUMER PROTECTION AND THE LAW § 4:43 (Jolina C. Cuarema ed., 2022) (providing examples of states’ jurisdiction over out-of-state sellers).

¹⁸⁴ Public Health Memo, *supra* note 181, at 2–3.

IV. THE GAP BETWEEN THE ECONOMIC CONSENSUS AND THE LEGAL TRENDS

All this expansion and potential convergence on the value of anti-gouging regulation, if not its specifics, leaves a bit of a puzzle. As popular as anti-gouging laws are with states and consumers,¹⁸⁵ they are just as unpopular with another group: economists.¹⁸⁶ The neoclassical economic critiques of anti-gouging laws are well set out elsewhere,¹⁸⁷ and so I explain them only briefly here, in Section A.¹⁸⁸ At bottom, these critics argue that by capping prices, anti-gouging laws can cause and worsen product shortages and slow disaster recovery by affecting both consumer and producer behavior.¹⁸⁹ In Section B of this Part, I delve more deeply into behavioral economics theory and its potential application to anti-gouging laws.¹⁹⁰

¹⁸⁵ See Kianzad, *supra* note 38, at 126–27, 153–54 (noting that most OECD countries prohibit excessive pricing, and that the European Union and most of its member states similarly doubled down on their anti-gouging and excessive pricing laws in recent years, notwithstanding the economic critiques).

¹⁸⁶ See *Price Gouging*, CHI. BOOTH (May 2, 2012), <https://www.kentclarkcenter.org/surveys/price-gouging/> [<https://perma.cc/6TE5-N9U8>] (surveying economists, more than 50% of whom opposed a proposed anti-gouging law in Connecticut and 8% of whom supported it); *Price Gouging*, CHI. BOOTH (June 7, 2022), <https://www.kentclarkcenter.org/surveys/price-gouging-2/> [<https://perma.cc/K82Q-3W5L>] (finding, in a similar survey regarding possible federal anti-gouging legislation, that 65% opposed and only 5% supported); see also Parsons, *supra* note 29, at 54 (noting that anti-price-gouging laws are nearly “uniformly disfavored by economists”); Raymond Niles, *Economists’ Petition: Repeal the Anti-Price Gouging Laws to Ensure Our Health and Safety During This Coronavirus Epidemic*, GOPETITION, <https://www.gopetition.com/petitions/economists-petition-repeal-the-anti-price-gouging-laws-to-ensure-our-health-and-safety-during-this-coronavirus-epidemic.html> [<https://perma.cc/8B5R-UN7K>] (presenting a petition with nearly two hundred signatures, mainly from economists, seeking repeal of anti-gouging laws); Giberson, *supra* note 27, at 49 (explaining that economists oppose price-gouging laws because they eliminate the incentive to bring extra supplies to affected areas, harming the people the laws aim to help); cf. Kianzad, *supra* note 38, at 134–35 (attributing this skepticism to the “neoclassical, marginalist, and welfarist law and economics schools,” while noting that “Keynesian, neo-Keynesian, and the Behavioural schools allow more room for other public policy rationales beyond economic efficiency”). For more on behavioral economics insights, see *infra* notes 217–234 and accompanying text.

¹⁸⁷ See generally Parsons, *supra* note 29 (explaining economic theory that argues against anti-gouging laws); Snyder, *supra* note 62, at 277–79 (presenting the economic arguments that price gouging is efficient and sufficiently fair).

¹⁸⁸ See *infra* notes 191–216 and accompanying text.

¹⁸⁹ Giberson, *supra* note 27, at 52–54; Raymond C. Niles, *Anti-gouging Laws Can Kill*, AM. INST. FOR ECON. RSCH. (Mar. 3, 2020), <https://www.aier.org/article/anti-gouging-laws-can-kill/> [<https://perma.cc/5FG7-Y92L>] (urging Americans to “embrace price gouging and recognize it as the vital and life-saving market mechanism that ensures that supplies reach their most urgent, life-saving uses,” and to repeal all anti-gouging laws).

¹⁹⁰ See *infra* notes 217–234 and accompanying text.

A. The Neoclassical Economic Critique

To understand these critiques, remember that in neoclassical economics, markets provide products and services to consumers, but they also work to efficiently allocate those resources *among* the consumers who want them.¹⁹¹ If consumers demand more product than is available and prices are allowed to rise freely, they will; then, only those consumers who want the item enough to pay the higher price will buy the product (if they can afford it).¹⁹² Many consumers will also use less of the product, if they can, to avoid the higher price, which may reduce the strain on supply.¹⁹³ The higher price will also signal to producers of the item, and to those who would consider producing it, that more is needed and can be sold profitably.¹⁹⁴ Thus, through a free market, the price of an item aggregates information about supply, demand, and more.¹⁹⁵

Anti-gouging laws deliberately disrupt that free-market process; prices are not free to rise indefinitely. While in effect, the laws limit how much prices can rise relative to the pre-emergency reference—whether that is a 0% increase or a 25% increase, the laws still cap the price (except to the extent that increased costs or some other factor allows some price growth).¹⁹⁶

¹⁹¹ See Felix Mormann, *Climate Choice Architecture*, 64 B.C. L. REV. 1, 24 (2023) (explaining that neoclassical economic theory assumes that people transacting in the free market make rational decisions, despite the existence of cognitive biases that real people experience).

¹⁹² See Parsons, *supra* note 29, at 46–47 (illustrating that a free market left alone will naturally set a new price in reaction to a change in demand based on a market shock); Giancaspro, *supra* note 74, at 1460–61 (detailing the shift in supply and demand curves for an item after a market shock). For a more detailed discussion of the underlying dynamics according to economic theory, see Bae, *supra* note 35, at 81–82.

¹⁹³ Skarbek & Skarbek, *supra* note 40, at 245–46.

¹⁹⁴ See Gregory R. Kirsch, Note, *Hurricanes and Windfalls: Takings and Price Controls in Emergencies*, 79 VA. L. REV. 1235, 1258–59 (1993) (arguing that capping prices will discourage new suppliers from entering the market); Matt Zwolinski, *Dialogue on Price Gouging: Price Gouging, Non-worseness, and Distributive Justice*, 19 BUS. ETHICS Q. 295, 299 (2009) (explaining that higher prices signal to sellers to increase supply, which then depresses prices again).

¹⁹⁵ See Hynes & Duffy, *supra* note 35, at 9 (“Markets are valuable to society both because they can collect, aggregate, distill vast amounts of information into the manageable metric of price, and because they can transmit that distillation of information broadly.”); Parsons, *supra* note 29, at 46–47 (showing how price “sends a signal to all market participants” about supply and value); Skarbek & Skarbek, *supra* note 40, at 239–40, 242 (arguing that prices act as important information tools during times of crisis).

¹⁹⁶ See, e.g., ALA. CODE § 8-31-4 (2023) (setting a 25% price increase as *prima facie* evidence of unconscionability); CAL. PENAL CODE § 396(b)–(e) (West 2023) (setting a 10% cap on price increases under most circumstances). See generally Rapp, *supra* note 35, at 550 (stating that anti-gouging laws “limit prices based on some aspect of their pre-disaster level,” and because “the forces of supply and demand would inevitably lead to inflationary pressure for most ‘necessaries’ following a disaster, anti-gouging laws will have the same economic effect as a traditional price cap”).

Economists tend to view even laws that prohibit only “unconscionably excessive” (or similar) increases in much the same way¹⁹⁷ because the higher the price and profit margin rise, the greater the risk of price-gouging liability.¹⁹⁸ Thus, even these laws with no clear limit generate escalating friction for price increases in the form of enforcement risk. Unless it is totally ineffective, then, at some point the law will prevent a seller from selling the product at a price it otherwise could have.¹⁹⁹

So, what is the problem with a price cap? In short, neoclassical economic theory concludes that a price cap dilutes or eliminates all the useful functions that rising prices perform and will distort the market response after an emergency.²⁰⁰ For example, under a price cap:

- Without increased profit margins, there is much less incentive for suppliers to divert more product to that area or increase their production to meet demand,²⁰¹ and less incentive for new producers to enter the market for the first time.²⁰² Therefore, the overall level of supply in the area won’t increase, and a shortage will ensue or worsen.²⁰³ Everyone, whether they could pay a higher price for the item or not, will now face shortages and spend considerable time waiting in lines and hunting around for the item, or the government will need to find a way to allocate resources.²⁰⁴

¹⁹⁷ See Letter from Brendan McDonald, Assistant Att’y Gen., S.C. Off. of the Att’y Gen., to Liston Barfield, Rep., S.C. House of Reps. (Sept. 5, 2014), 2014 WL 4659411, at *1 (calling it “accurate” to describe South Carolina law as “regulating price gouging by imposing ‘a general prohibition on “unconscionable prices” during times of disaster’ rather than explicitly capping prices during and after disaster declarations”).

¹⁹⁸ See Salinger, *supra* note 106, at 3 (noting that “[n]o matter how price gouging is defined, it is a price cap. . . . [W]hat else would you call a law that a company violates by charging a price above the level defined as gouging and that it does not violate by charging a lower price?”).

¹⁹⁹ See Robert K. Fleck, *Can Prohibitions on “Price Gouging” Reduce Deadweight Losses?*, 37 INT’L REV. L. & ECON. 100, 105 (2014) (stating that “[t]he vast literature on price controls has paid little attention to the way rules against price gouging differ from generic, textbook-style price ceilings,” and considering the main difference to be the foreseeability of shortages under anti-gouging laws).

²⁰⁰ See generally Buccafusco et al., *supra* note 2, at 398–99 (explaining the argument for allowing prices to rise freely); Giberson, *supra* note 27, at 49 (arguing that price caps hurt people by discouraging conservation and stunting supply increases); Montgomery et al., *supra* note 155, at 358–59 (asserting the benefits of allowing prices to rise naturally).

²⁰¹ Salinger, *supra* note 106, at 3–4.

²⁰² Parsons, *supra* note 29, at 54–55. *But cf.* Ariel Ezrachi & David Gilo, *The Darker Side of the Moon: Assessment of Excessive Pricing and Proposal for a Post-entry Price-Cut Benchmark*, in ARTICLE 82 EC: REFLECTIONS ON ITS RECENT EVOLUTION 169, 172–73 (Ariel Ezrachi ed., 2009) (arguing that in a normal market, high prices will often not suffice to induce new market entrants).

²⁰³ Parsons, *supra* note 29, at 47–48; see Skarbek & Skarbek, *supra* note 40, at 241 (arguing that price controls cause shortages).

²⁰⁴ Parsons, *supra* note 29, at 48; Kirsch, *supra* note 194, at 1259–60.

- Consumers have less incentive to economize on the product than they would have if prices sharply increased.²⁰⁵ In fact, they may buy more, hoarding to avoid long lines or having to go without if the product continues to run short.²⁰⁶ The cap thus might create a shortage, even if there wasn't one already.²⁰⁷
- The people who want or need an item the most can't ensure that they will be able to get it just by paying more (if they have the means). Instead, the person who gets the item will be determined by who gets there first or who is willing or able to wait in line the longest.²⁰⁸ In light of shortages, some won't be able to get it at all.²⁰⁹

Thus, the basic idea is that price caps will create and worsen shortages and will also slow or stop the economic responses that would most quickly fix the shortfall.²¹⁰ That will either lead many consumers to go without, or drive those who can pay into black markets in search of goods.²¹¹ This neoclassical

²⁰⁵ Skarbek & Skarbek, *supra* note 40, at 245–46.

²⁰⁶ See, e.g., 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/L85A-3CM8>] (discussing hoarding as a downside to price-gouging laws); Gary E. Lehman, *Price Gouging: Application of Florida's Deceptive and Unfair Trade Practices Act in the Aftermath of Hurricane Andrew*, 17 NOVA L. REV. 1029, 1033 (1993) (presenting the argument that, absent price increases, consumers would hoard and buy more supplies than needed); Hynes & Duffy, *supra* note 35, at 19 (explaining that some hoarding may be logical to avoid future costs); see also Parsons, *supra* note 29, at 76 (noting that hoarding was a greater challenge in the COVID-19 emergency because goods that ran short, like toilet paper and hand sanitizer, were easier to hoard and store than goods needed in other emergencies, like perishables, gasoline, and electric generators).

²⁰⁷ Parsons, *supra* note 29, at 49, 51.

²⁰⁸ *Id.* at 50; Skarbek & Skarbek, *supra* note 40, at 244; see Richard Posner, *Price Gouging in the Wake of Hurricanes—Posner's Response to Comments*, BECKER-POSNER BLOG (Oct. 30, 2005), <https://www.becker-posner-blog.com/2005/10/price-gouging-in-the-wake-of-hurricanes--posners-response-to-comments.html> [<https://perma.cc/7VNM-SHJY>] (explaining several cost considerations in a shortage, such as time in line and the cost of going without the product).

²⁰⁹ See Antony Davies & James Harrigan, 'Price Gouging' During Crisis a Good Thing, TRIBLIVE.COM (Mar. 14, 2020), <https://triblive.com/opinion/antony-davies-james-harrigan-price-gouging-during-crisis-a-good-thing/> [<https://perma.cc/8MXE-W7YS>] (arguing that the toilet paper shortage during the COVID-19 pandemic would not have happened if prices had increased); Skarbek & Skarbek, *supra* note 40, at 242, 244 (explaining that price caps can lead to shortages that may lead people to go without even necessary products).

²¹⁰ Rapp, *supra* note 35, at 551–53; see Jeffrey Dorfman, *Price Gouging Laws Are Good Politics but Bad Economics*, FORBES (Sept. 23, 2016), <https://www.forbes.com/sites/jeffreydorfman/2016/09/23/price-gouging-laws-are-good-politics-but-bad-economics/?sh=2f0fff8d64d3> [<https://perma.cc/R747-2MT2>] (calling anti-gouging laws “anti-consumer political theater”); *Hearing*, *supra* note 18, at 7–8 (arguing that price caps could make consumers worse off by distorting market prices).

²¹¹ See Parsons, *supra* note 29, at 49 (suggesting that black markets arise to circumvent anti-gouging laws and create added costs); Skarbek & Skarbek, *supra* note 40, at 242 (claiming that black markets do not generally exist during normal market conditions because of the added cost to both consumers and sellers); J.D. Tuccille, *Price-Gouging Laws Will Do More Harm Than Good During the Coronavirus Pandemic*, REASON (Mar. 16, 2020), <https://reason.com/2020/03/16/price-gouging->

economic analysis of anti-gouging laws is not without empirical support,²¹² including in the context of the COVID-19 pandemic.²¹³ Several of the underlying assumptions, however, remain empirically and conceptually contested.²¹⁴

Although a few neoclassical economists and law-and-economics theorists have undertaken limited defenses of anti-gouging laws under certain circumstances, the narrow, tepid nature of these defenses calls to mind the phrase “damned by faint praise.”²¹⁵ All in all, neoclassical economic theory treats an-

laws-will-do-more-harm-than-good-during-the-coronavirus-pandemic/ [https://perma.cc/Z9RR-VAS2] (noting that black markets arise despite price-gouging laws). In purely neoclassical economic terms, black market participation may reduce the deadweight loss to society associated with price caps. Parsons, *supra* note 29, at 49.

²¹² See, e.g., Montgomery et al., *supra* note 155, at 374–76 (noting an example of below-market gas prices leading to long lines); Tarrant, *supra* note 28, at 56–59, 64, 74–80 (explaining that although initial estimates suggested “that [anti-gouging] laws are beneficial to [the economies of] hurricane stricken counties,” month and industry breakdowns, over a shorter time period, indicated that the presence of anti-gouging laws are temporarily detrimental to the growth of per-worker wages, primarily in the hotel industry).

²¹³ See, e.g., Cabral & Xu, *supra* note 116, at 874 (noting that, in the early months of the pandemic, Amazon and incumbent third-party sellers raised their prices for mask and hand sanitizer the least and ran out of stock earlier, whereas later market entrants raised their prices more and ran out of stock later); Rik Chakraborti & Gavin Roberts, *Learning to Hoard: The Effects of Preexisting and Surprise Price-Gouging Regulation During the COVID-19 Pandemic*, 44 J. CONSUMER POL’Y 507, 508, 527 (2021) (concluding, in a difference-in-differences examination of consumer search behavior across states, that anti-gouging regulation appeared to drive anticipatory hoarding by consumers); Fischer & Lipscomb-Jackson, *supra* note 5, at 8 (describing mask shortages due to price controls in Italy in early 2020); see also Rik Chakraborti & Gavin Roberts, *Anti-gouging Laws, Shortages, and COVID-19: Insights from Consumer Searches*, 35 J. PRIV. ENTER. 1, 1 (2020) (concluding from Google search data “that anti-gouging laws increased searches for hand sanitizer”); Rik Chakraborti & Gavin Roberts, *How Price-Gouging Regulation Undermined COVID-19 Mitigation: County-Level Evidence of Unintended Consequences*, 196 PUB. CHOICE 51, 55 (2023) [hereinafter Chakraborti & Roberts, *Unintended Consequences*] (arguing that anti-gouging laws caused increased face-to-face contact in stores as consumers searched for needed goods, which prevented people from social distancing and increased COVID-19 infection rates).

²¹⁴ Kianzad, *supra* note 38, at 172–73; see also Helveston, *supra* note 17, at 36–42 (questioning the standard critiques’ applicability to disrupted markets, the allocative fairness of free markets after a disaster, and the prevalence of companies selling their goods on the black market).

²¹⁵ See *Damn*, THE OXFORD DICTIONARY OF IDIOMS (4th ed. 2020) (defining the term “damn . . . with faint praise” as to “praise someone or something so unenthusiastically as to imply condemnation”); Parsons, *supra* note 29, at 59–61 (noting that because it takes time to increase supply of a good, anti-gouging laws are at least less damaging if used for very short periods of time following some disasters). Dr. Steve Parsons also argues that anti-gouging laws should be enforced only against sellers who hoard items for later resale, not against those who increase supply. Parsons, *supra* note 29, at 63. Geoffrey Rapp has argued that anti-gouging laws are justified briefly when a disaster disrupts online payment systems and are somewhat justifiable if the “markets for some products may overreact quickly to the news of a disaster,” particularly if the new, higher price is expected to be “sticky.” Rapp, *supra* note 35, at 553–54, 558–59. Robert Fleck has argued that prohibitions on price gouging may increase total surplus in very narrow circumstances, where the goods are produced before the demand and consumption benefits society (e.g., flu vaccines at the start of flu season). Fleck, *supra* note 199, at 100; see also Gbadebo Oladosu, *Bubbles in US Gasoline Prices: Assessing the Role of Hurricanes and Anti-price Gouging Laws*, 27 J. COMMODITY MKTS., Oct. 5, 2021, at 12 (finding, in a

ti-gouging laws as economically irrational, even perverse, and suggests that these laws should, once properly understood, gradually disappear as laws grow increasingly efficient over time.²¹⁶

B. The Behavioral Economics Response

A different strand of economic research, however, has better explained the persistence and proliferation of anti-gouging laws. Behavioral economic studies show that sharp price increases in the face or wake of an emergency violate widely and deeply held public expectations about fairness in commerce.²¹⁷ Along with their co-authors, Nobel laureates Richard Thaler and Daniel Kahneman crucially highlighted that notions of fairness are important to consumers in ways that much of economic theory had missed.²¹⁸ Specifically, their experimental work in the 1980s showed both that consumers expected to be able to continue purchasing goods at the same price as previously (the reference price), and expected that sellers would maintain their prior profit margin (the reference profit).²¹⁹ When the two expectations collided, reference profits won—for example, if costs increased, the public considered it fair that the in-

study of “bubbles” in gasoline prices—which may not all reflect unlawful pricing—“that retail gasoline prices in states with [anti-gouging] laws do have an accelerated return to equilibrium or a slower rate of explosivity . . . after a shock,” and concluding that the presence of a state anti-gouging law “appears to have a moderating, albeit small, effect on the gasoline price adjustment process in general”); Skarbek & Skarbek, *supra* note 40, at 270 (noting that the limitations of contract law may mean that price-gouging laws are better at addressing certain post-disaster frauds, but that better alternatives may be available). See generally Andy C.M. Chen, *A Market-Based and Synthesised Approach to Controlling Price Gouging*, 4 INT’L J. PRIV. L. 128, 130–31 (2011) (recounting some of these limited defenses).

²¹⁶ See Davis, *supra* note 27, at 29–31 (presenting the theory that laws grow in efficiency). But cf. Kianzad, *supra* note 38, at 132–33 (objecting that many of the basic assumptions underlying the neo-classical economic critique of anti-gouging laws recur, despite “being invalidated time and again” on close, practical inspection).

²¹⁷ See Hynes & Duffy, *supra* note 35, at 4–5 (discussing these behavioral economic findings); Julio J. Rotemberg, *Behavioral Aspects of Price Setting, and Their Policy Implications* 26–29 (Nat’l Bureau of Econ. Rsch., Working Paper No. 13754, 2008), <http://www.nber.org/papers/w13754> [<https://perma.cc/ZUL8-LDZP>] (explaining that, because consumers react to price increases in an emergency according to expectations of fairness and empathy for other consumers, it is difficult to make “Pareto improvements,” where one person is better off without harming others, beyond what anti-gouging regulation offers).

²¹⁸ See Per Molander, *Popular Information*, NOBEL PRIZE, <https://www.nobelprize.org/prizes/economic-sciences/2017/popular-information/> [<https://perma.cc/J4ZQ-PUDS>] (noting that Richard Thaler won the Royal Swedish Academy of Sciences’ Sveriges Riksbank Prize in Economic Sciences in memory of Alfred Nobel in 2017). Daniel Kahneman won the same prize in 2002. *Press Release*, NOBEL PRIZE (Oct. 9, 2002), <https://www.nobelprize.org/prizes/economic-sciences/2002/press-release/> [<https://perma.cc/KJV8-ADRL>].

²¹⁹ See Kahneman et al., *supra* note 14, at 729–30 (surveying adults in Toronto and Vancouver in 1984 and 1985).

crease be passed on to customers.²²⁰ People prove quite sensitive to context²²¹ (including perceived motivation for a price increase),²²² and are willing to punish firms that they perceive to have behaved unfairly, even at some cost to themselves.²²³

Recent empirical work surveying consumers in the United States during the pandemic updated those findings for this era of greater dynamic pricing. Researchers Buccafusco, Hemel, and Talley recently found that consumers have become more tolerant of what might be called moderate price gouging (price increases of thirty-three percent) than was previously believed, and also, that it takes greater price hikes to elicit the kind of opposition Thaler and Kahneman found in the 1980s.²²⁴ Buccafusco, Hemel, and Talley also found less consumer support for government intervention in opposition to price gouging than one might expect, given the popularity of price-gouging laws,²²⁵ though the study relied on examples of government intervention that are not representative of most anti-gouging enforcement.²²⁶ Thus, they showed that the magnitude of consumer reaction has changed over time, and as it is an emo-

²²⁰ *Id.*

²²¹ *See id.* at 731–32 (noting how the same terms can appear more or less fair in a given transaction).

²²² *See, e.g.,* Margaret C. Campbell, “Why Did You Do That?” *The Important Role of Inferred Motive in Perceptions of Price Fairness*, 8 J. PROD. & BRAND MGMT. 145, 147–49 (1999) (finding, in a price fairness study conducted shortly after a local earthquake, that consumers’ sense of the fairness of a price increase for bottled water was heavily affected by contextual information suggesting motives for the increase).

²²³ *See* Kahneman et al., *supra* note 14, at 736 (noting that people rejected offers that would benefit them if they perceived them as unfair); *see also* Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Fairness and the Assumptions of Economics*, 59 J. BUS. S285, S290–91, S299 (1986) (detailing fairness enforcement experiments among college students with similar findings); *cf.* Snyder, *supra* note 62, at 279–80 (arguing that it is not unfair price increases, but rather price increases that undermine the availability of important products, that cause fears of price gouging). *But cf.* Zwolinski, *supra* note 194, at 296–98, 300 (contesting Snyder’s contentions that price gouging necessarily limits equitable access to necessities and that anti-gouging laws can ensure equitable access, and noting that gouging behavior has other virtuous effects).

²²⁴ Buccafusco et al., *supra* note 2, at 394, 434. However, the group reported a significant limitation to this finding. Unlike in Kahneman, Knetsch, and Thaler’s study, each respondent saw both a 33% price increase and a 333% price increase. Ultimately, those who saw the greater increase first appeared less inclined to find the 33% increase objectionable, which in turn affected their recommendations about the legal response to the relevant price increase. *Id.* at 463. This order effect considerably mitigated, but did not eliminate, the difference in condemnation from the original study. *Id.*

²²⁵ *See id.* at 396, 436 (noting that “the plurality (and in many cases the majority) of participants tend to prefer no action . . . in the face of no price change or even moderate (33%) price changes”).

²²⁶ *Id.* at 418. Interestingly, the researchers did find that respondents who reported that COVID-19 had affected their local community at the time of the survey were “more inclined to favor harsh punishments (even as they are less inclined to find unfairness . . .)” on a given set of price-increase facts. *Id.* at 453, 457. It is also interesting to compare the finding regarding more limited support for government intervention with the volume of complaints evidently received by state regulators during the pandemic, as described *supra* note 4 and accompanying text.

tional reaction, it is subject to many of the biases and failures of human reasoning. Even so, the broadly consistent findings of strong societal norms against price spikes helps to explain a puzzle of neoclassical economics: why firms often *don't* raise prices in response to a shortage or emergency, when economic theory suggests it would benefit both the firm and the market to do so.²²⁷ These behavioral economics studies help demonstrate concretely what many businesses already knew: if a consumer feels that they are treated unfairly, they will punish the business.²²⁸ More prosaically, no business that is worried about its reputation wants to get blown up on social media.²²⁹

Of course, this understanding doesn't change whether anti-gouging laws will negatively affect the market, say, by worsening shortages of consumer

²²⁷ See generally Rafi Mohammed, *Why Businesses Should Lower Prices During Natural Disasters*, HARV. BUS. REV. (Sept. 11, 2017), <https://hbr.org/2017/09/why-businesses-should-lower-prices-during-natural-disasters> [<https://perma.cc/3RUF-YUQQ>] ("Many managers realize that, while economists may believe it appropriate to jack up prices during a crisis, real-world customers view this practice negatively, seeing it as price gouging. As a result, long-term profits can be jeopardized if a company is viewed as taking advantage of a tragedy."); Tyler Cowen, *More on Price Gouging*, MARGINAL REVOLUTION (Sept. 4, 2003), https://marginalrevolution.com/marginalrevolution/2003/09/more_on_price_g.html [<https://perma.cc/5YRS-GH7T>] (listing possible explanations for why businesses sometimes do not price gouge, even if it would be legal).

²²⁸ See Parsons, *supra* note 29, at 55–58 (noting that many firms will voluntarily take short-term losses to avoid price gouging accusations and retain goodwill, but large scale suppliers are better able to sustain those losses).

²²⁹ See Julio J. Rotemberg, *Customer Anger at Price Increases, Changes in the Frequency of Price Adjustment and Monetary Policy*, 52 J. MONETARY ECON. 829, 835, 838, 851 (2005) [hereinafter Rotemberg, *Customer Anger*] (suggesting, in a study of scanner data from a then-one-hundred-store chain supermarket, "that firms change prices only when their subjective probability of a negative consumer reaction is low," which may relate to consumer willingness to punish price changes perceived as unfair); Julio J. Rotemberg, *Fair Pricing*, 9 J. EUR. ECON. ASS'N 952, 953–54, 971–73 (2011) (arguing that consumers punish firms perceived to be insufficiently altruistic, leading even selfish firms to behave in ways that appear altruistic); cf. Charisse Jones, *Best Buy Says \$42 Bottled Water near Houston Was a 'Big Mistake'*, USA TODAY (Aug. 30, 2017), <https://www.usatoday.com/story/money/2017/08/30/best-buy-says-42-96-bottled-water-near-houston-big-mistake/616110001/> [<https://perma.cc/U4F2-4RHY>] (reporting that "[a] case of bottled water priced at nearly \$43 at a Best Buy store outside storm-ravaged Houston was a 'big mistake,' according to the retailer, with the incident sparking a social media backlash"). The intensity of online backlash, and its risk of spreading, may be a particularly strong constraint, even if Buccafusco, Hemel, and Talley are right that fairness norms are, in the abstract, less intense than previously thought; even a substantial local minority can turn into a Twitterstorm. See generally Rotemberg, *Customer Anger*, *supra*, at 851 (noting that information about unfair price gouging spreads among consumers); Ernst Fehr & Klaus M. Schmidt, *A Theory of Fairness, Competition, and Cooperation*, 114 Q.J. ECON. 817, 818, 855–56 (1999) (discussing the effects in economic experiments on punishment for perceived unfair behavior when even a fraction of the population is averse to inequalities). Moreover, economists have long posited that large national brands have more at stake reputationally and may be particularly averse to accusations of price gouging. See, e.g., Cabral & Xu, *supra* note 116, at 868 (discussing prior findings regarding stores with national brands); Rotemberg, *Customer Anger*, *supra*, at 832–35 (evaluating data from a large chain supermarket).

goods.²³⁰ Even so, it is striking how well some state anti-gouging laws track the broad contours of what behavioral economists have found—e.g., targeting increases that seek to dramatically increase profits in a time of crisis, while allowing increased costs to be passed through to consumers.²³¹ Although Buccafusco, Hemel, and Talley suggest that some state price-gouging laws set price caps lower than consumers might tolerate,²³² the broad-scale alignment between the anti-gouging laws and the norms identified through behavioral economics research suggests a broadly stable, durable ethical norm among consumers. This ethical norm provides at least one, if not the, dominant motivator for adopting anti-gouging laws and keeping them in place despite criticism.²³³ As Thaler explained, “[a] good rule of thumb is we shouldn’t impose a set of rules that will create moral outrage, even if that moral outrage seems stupid to economists.”²³⁴

V. WHY WE DO WHAT WE DO: WHAT VALUES AND COMMUNITIES ANTI-GOUGING LAWS SERVE

The behavioral economics perspective highlights a key distinction in the motivation underlying the adoption and maintenance of anti-gouging laws: proponents view themselves as engaged in moral, not purely economic, regula-

²³⁰ See Kahneman et al., *supra* note 14, at 738 (explaining that “[w]hen excess demand in a customer market is unaccompanied by increases in suppliers’ costs, the market will fail to clear in the short run”); Michael Munger, *They Clapped: Can Price-Gouging Laws Prohibit Scarcity?*, ECONLIB (Jan. 8, 2007), <https://www.econlib.org/library/Columns/y2007/Mungergouging.html> [<https://perma.cc/CUQ6-CQK8>] (describing as paradoxical instances in which consumers support strict anti-gouging enforcement which actually aggravates consumer shortages after natural disasters).

²³¹ See Buccafusco et al., *supra* note 2, at 474 (noting that approximately half of state statutes provide an explicit affirmative defense for additional costs); see, e.g., CAL. PENAL CODE § 396(b) (West 2023) (allowing the seller to pass additional costs to the consumer); N.Y. GEN. BUS. LAW § 396-r(3)(c) (McKinney 2023) (same); ARK. CODE ANN. § 4-88-303(a)(2) (2023) (same); KAN. STAT. ANN. § 50-6,106(b)(1)(C) (2023) (same); see also Kahneman et al., *supra* note 14, at 729–34 (showing that some consumers find it justifiable for sellers to pass additional costs to consumers). This finding also roughly tracks the contours of ethical disaster pricing behavior described by Jeremy Snyder, at least concerning essential goods. See Snyder, *supra* note 62, at 290 (noting that price increases can be justified so long as they are the direct result of additional costs to the vendor); Jeremy Snyder, *Efficiency, Equity, and Price Gouging: A Response to Zwolinski*, 19 BUS. ETHICS Q. 303, 305 (2009) [hereinafter Snyder, *Response*] (similar).

²³² See Buccafusco et al., *supra* note 2, at 404–05 (suggesting that if consumers tolerate increases of 33%, for example, then 10% or 25% increase price caps are unnecessarily stringent).

²³³ See *id.* at 400–02 (considering expressive and communitarian explanations for price-gouging regulations).

²³⁴ Neil Irwin, *Why Surge Prices Make Us So Mad: What Springsteen, Home Depot and a Nobel Winner Know*, N.Y. TIMES (Oct. 14, 2017), <https://www.nytimes.com/2017/10/14/upshot/why-surge-prices-make-us-so-mad-what-springsteen-home-depot-and-a-nobel-winner-know.html> [<https://perma.cc/D7MY-KB36>] (quoting Richard Thaler).

tion.²³⁵ Accordingly, some commentators have defended anti-gouging regulations on moral grounds, even weighed against economic concerns—arguing particularly that maximizing utility to the whole community, or absolutely privileging individual choice and consent, is not sufficient to justify whatever deals the market might generate in an emergency.²³⁶ Of course, as noted above, recognizing that anti-gouging regulation is a reflection of community moral standards and expectations does not mean that the potential adverse economic impacts of these laws are illusory or irrelevant. But it does require a more complex assessment of their value than the strictly neoclassical economic argument provides.²³⁷

Some critics of anti-gouging laws directly take on that challenge, assessing the laws on their own turf by building moral (especially consequentialist and utilitarian) arguments around and on top of the key economic cri-

²³⁵ See, e.g., Giancaspro, *supra* note 74, at 1469–70 (discussing the deep historical roots of condemnation and regulation of price gouging); Chen, *supra* note 215, at 129–30 (similar); MICHAEL J. SANDEL, JUSTICE: WHAT’S THE RIGHT THING TO DO? 3–10 (2009) (explaining the moral argument for anti-gouging laws); Daniel Fridman, *Price Gouging Has Its Defenders, but They Ignore Morality*, UT NEWS (Sept. 28, 2017), <https://news.utexas.edu/2017/09/28/price-gouging-has-its-defenders-but-they-ignore-morality/> [<https://perma.cc/R3B5-AL7Q>] (“Our reaction to price gouging is not some silly knee-jerk rejection from people who don’t know enough about economics It is, rather, deeply reflective of the societal need for mechanisms other than markets.”); see also Hynes & Duffy, *supra* note 35, at 12–15 (noting other exceptions entrenched in the American legal tradition that permit suspension of normal market rules during an emergency, consistent with certain fairness norms).

²³⁶ See Snyder, *supra* note 62, at 280–81 (arguing that when price increases “undermine equitable access to the goods essential to minimal human functioning . . . [T]hey violate the norm of equal respect for persons,” even when market benefits are taken into account); Kianzad, *supra* note 38, at 132 (“What harm is associated with excessive pricing is hence dependent on the chosen theory of harm informing the analysis, the core assumptions informing the theories, and what trade-offs on the policy-level are chosen.”); SANDEL, *supra* note 235, at 112–13, 145–50, 261 (discussing Kantian morality in contracting and Rawlsian objections to the morality of free-market contracts, and more broadly noting that “[a] just society can’t be achieved simply by maximizing utility or by securing freedom of choice. . . . [W]e have to reason together about the meaning of the good life”); cf. Zwolinski, *supra* note 194, at 297–98 (arguing that because “it is the *emergency* that undermines equitable access, not whatever price gouging may occur in response,” no allocation process can produce an equitable distribution of needed goods).

²³⁷ See SANDEL, *supra* note 235, at 8–9 (describing basic economic arguments for why price gouging should be allowed, and contrasting those with difficult moral questions about whether price gouging is just); Snyder, *supra* note 62, at 279 (critiquing price gouging on moral grounds, while recognizing that “[i]n fact, a critique of price gouging will need to confront the positive moral value of the efficiencies and rationing effect created by price increases”); Snyder, *Response*, *supra* note 231, at 304 (identifying how anti-gouging laws can sacrifice efficiency); Amitrajeet A. Batabyal, *Why Economists Who Have No Problem with Price Gouging Are Wrong*, GLOBE POST (May 7, 2020), <https://theglobepost.com/2020/05/05/price-gouging/> [<https://perma.cc/9AMN-WLL6>] (providing examples about why the simple economic explanation of the benefits of price gouging does not make sense in practice).

tiques.²³⁸ They argue, for example, that the perverse economic outcomes of anti-gouging laws (e.g., worsening shortages and preventing those who need an item from getting it just by paying more) actually hurt the very people that the laws seek to protect, prohibiting mutually beneficial transactions and further harming the populations that can least afford it.²³⁹ Matt Zwolinski has explicitly made the case that proper moral consideration of behavior classified as price gouging reveals an “all-things-considered good moral reason to repeal” all anti-gouging laws.²⁴⁰

I would suggest, however, that these moral economic critiques and defenses still miss important dimensions of the community impacts of these laws, which are relevant both economically and from the perspective of preserving a just society. Although the criticisms may hold some weight when considering consumers in the aggregate, I suggest that they may miss how the laws intersect with the spatial allocation of goods and services within and across communities. That is, the people affected (positively or negatively) by anti-gouging laws are not a uniform whole. Many critics recognize—indeed, rely on—the fact that consumers are not fungible, but rather have differing individual needs for the goods in question and abilities to pay. Commentators often miss, how-

²³⁸ See, e.g., Dwight R. Lee, *The Two Moralities of Outlawing Price Gouging*, REGULATION, Spring 2014, at 28, 28, 31 [hereinafter Lee, *Two Moralities*] (acknowledging that an “intention-based” view of morality supports, or at least undergirds, anti-gouging laws, but arguing that disaster responses also need an “outcome-based” sense of morality to generate coordinated action among many strangers to properly help victims, which anti-gouging laws impair); Dwight R. Lee, *Making the Case Against “Price Gouging” Laws: A Challenge and an Opportunity*, 19 INDEP. REV. 583, 589 (2015) [hereinafter Lee, *Making the Case*] (arguing that hostility to “price gougers” reflects exclusionary and stereotyping tendencies in human cognition); see also Giberson, *supra* note 27, at 50–51 (discussing the competing ethical arguments for and against price gouging); Wilson, *supra* note 17, at 61–62 (arguing that because people freely enter into transactions, price gouging should not be compared to theft or fraud). There is empirical support for the notion that an intention-driven view materially affects how fair consumers perceive a price to be. See, e.g., Campbell, *supra* note 222, at 149 (summarizing findings).

²³⁹ See, e.g., Giberson, *supra* note 27, at 49, 52 (explaining the ways that anti-gouging laws could hurt consumers); Montgomery et al., *supra* note 155, at 380 (arguing that price caps on gasoline disproportionately hurt poorer families); Zwolinski, *supra* note 40, at 351–54, 360–62 (asserting that anti-gouging laws harmfully disincentivize rationing and prohibit mutually beneficial transactions). Zwolinski defends certain prohibited price-gouging behavior on the ground that a more efficient market will better protect many vulnerable consumers, and rejects the moral justification for anti-gouging laws. See Zwolinski, *supra* note 40, at 357 (“If *B*’s need places a claim on *A* for help, then it is puzzling how it could be worse by any moral standard . . . for *A* to provide some help [even at an inflated price] than it is for him to provide none.”); see also Tuccille, *supra* note 211 (arguing that shortages, not rising prices, are the problem, and that anti-gouging laws prevent supply from catching up to demand).

²⁴⁰ Zwolinski, *supra* note 40, at 350. Zwolinski argues both that “even if price gouging is immoral, it ought not to be prohibited by law” and that there are (mostly outcome-based) reasons to conclude that it is at least morally permissible in many circumstances. *Id.* at 369.

ever, the element of spatial differentiation among consumers and how anti-gouging laws might affect seller behavior in their immediate communities.

To see why the spatial allocation of goods and services is an important factor in assessing the impact and utility of anti-gouging laws, first remember that uncontrolled price increases in an emergency will affect individual consumers differently, depending on their ability to pay. One of the key conceits of neoclassical economic theory is that consumers who value a product the most will simply spend more money to get it.²⁴¹ That this premise is obviously flawed, considering the gross disparities in ability to pay, is not lost on most economists; even if allowing the price to rise freely might limit shortages, the product would still be available only to those who can pay high prices.²⁴² Allowing freely rising prices might create “an economic efficiency nirvana,”²⁴³ but will exclude the poorest consumers entirely. In a market without price constraints, lower-income individuals may have *even less* opportunity to acquire the product than they would in a world with capped prices and shortages—if they are priced out, they cannot improve their chances of getting access to the product by arriving first or waiting in line the longest to get whatever goods are available, say, if the seller has capped purchases to prevent hoarding.²⁴⁴ Although some policy solutions have been suggested to prevent both the mas-

²⁴¹ See Parsons, *supra* note 29, at 46 (describing the price of a good in a market as a signal of its value).

²⁴² See, e.g., Salinger, *supra* note 106, at 4 (noting this financial inability); Buccafusco et al., *supra* note 2, at 399–400 (undermining this neoclassical economics assumption); Lee, *Two Moralities*, *supra* note 238, at 31 (flagging this concern for lower-income individuals). But see Lee, *Making the Case*, *supra* note 238, at 594–96 (discussing this critique and arguing that it understates the extent to which anti-gouging laws will hurt poorer communities); Zwolinski, *supra* note 40, at 362 (noting that all other distributive options are also imperfect); Brewer, *supra* note 35, at 1130 (arguing that letting prices rise freely after a disaster is not necessarily worse for poorer people); Lehman, *supra* note 206, at 1033 (raising this argument). Of course, anti-gouging laws target price increases, but not high prices in general, and so they can go only so far in serving distributional fairness concerns. See Buccafusco et al., *supra* note 2, at 400 (noting that, for example, if a store sold a product for an above-market price before a disaster, then it could continue selling it for that price after the disaster).

²⁴³ Parsons, *supra* note 29, at 48.

²⁴⁴ Buccafusco et al., *supra* note 2, at 399–400. Of course, waiting in line or searching around town for a necessary item are themselves costs. Rapp, *supra* note 35, at 551; Hynes & Duffy, *supra* note 35, at 3, 18. One might argue that wealthier individuals pay a higher cost to wait in long lines because an hour of their time is usually better compensated. Davis, *supra* note 27, at 8–10; see also Hynes & Duffy, *supra* note 35, at 20–21, 28 (discussing a study of the time-value of lines in a 1985 gas pricing incident). The cost of waiting, however, seems at least as high for the working poor; if waiting causes them to miss some amount of work, they could risk losing a job without having a cushion to fall back on or may make less and thus be unable to meet their other basic needs for the month. Hynes & Duffy, *supra* note 35, at 21; Buccafusco et al., *supra* note 2, at 399–400; Snyder, *supra* note 62, at 285–86; cf. Bae, *supra* note 35, at 82 (arguing that even if a product is available to people with fewer resources, price caps can exacerbate gaps between wealthier and poorer individuals). Waiting in line poses further risks when the emergency in question is a global pandemic caused by an easily transmitted disease. Chakraborti & Roberts, *Unintended Consequences*, *supra* note 213, at 55.

sive wealth transfer to sellers and the disparate damage to the poorest members of society, none seem terribly likely to be implemented.²⁴⁵

Second, remember that, as noted above, many businesses—particularly large ones with substantial investments in their brand reputation—choose not to raise prices (much) in the wake of an emergency, in part because they want to avoid consumer backlash.²⁴⁶ Neoclassical economic theorists have traditionally objected to these voluntary price freezes on the ground that they are unjustified and counterproductive to the market.²⁴⁷ At the same time, however, some free-market proponents have suggested that this voluntary behavior obviates

²⁴⁵ See generally, e.g., Hynes & Duffy, *supra* note 35, at 26–47 (considering taxation and rebate systems to aid poorer purchasers and avoid windfall profits to sellers while allowing prices to rise, but acknowledging that they are unlikely to be adopted); Mohammed, *supra* note 206 (proposing a “hybrid policy” in which anti-gouging laws apply during emergencies, but governments can subsidize businesses for important products).

²⁴⁶ See, e.g., Parsons, *supra* note 29, at 55–57 (noting that many firms choose to suffer short-term losses to avoid price-gouging accusations and retain goodwill, but only large-scale suppliers are better able to sustain those losses); Skarbek & Skarbek, *supra* note 40, at 271–74 (discussing findings suggesting that without price-gouging laws, a greater proportion of national retail stores, rather than local shops, will sell goods after a disaster, and that these stores will be less likely to price gouge because they have reputations to protect); see also Hynes & Duffy, *supra* note 35, at 21–22 (offering examples of self-imposed price limits); Parsons, *Different*, *supra* note 109, at 8–9 (suggesting that companies voluntarily refrain from raising prices to increase goodwill); Alex Abdelnour, Todd Babbitz & Stephen Moss, *Pricing in a Pandemic: Navigating the COVID-19 Crisis*, MCKINSEY & CO. (May 1, 2020), <https://www.mckinsey.com/capabilities/growth-marketing-and-sales/our-insights/pricing-in-a-pandemic-navigating-the-covid-19-crisis#/> [<https://perma.cc/7A2Q-JZBK>] (offering similar advice to businesses early in the pandemic); Alberto Cavallo, Eduardo Cavallo & Roberto Rigobon, *Prices and Supply Disruptions During Natural Disasters*, 60 REV. INCOME & WEALTH S449, S450–51, S470 (2014) (finding surprising price stability after earthquakes in Chile and Japan, with variation across product categories and a high degree of variability in product availability, as well as fear of “consumer anger” at work in Chile but not Japan); Etienne Gagnon & David López-Salido, *Small Price Responses to Large Demand Shocks*, 18 J. EUR. ECON. ASS’N 792, 792, 794–95, 823, 826 (2020) (noting, in a study of U.S. chain supermarkets during market shocks, that “fairness concerns” may have contributed to minimal price changes, and concluding that the minor price increases were not the result of anti-gouging laws). But cf. Warkentin, *supra* note 63, at 93 (arguing that reputational concerns were insufficient to keep Amazon from price gouging in its direct sales during the pandemic); HARMAN, *supra* note 168, at 12, 31 (noting that some increased prices on items directly sold by Amazon through mid-2020 could violate state anti-gouging laws, while Amazon publicly claimed to be fighting price gouging and blamed increasing prices on third-party sellers).

²⁴⁷ Hynes & Duffy, *supra* note 35, at 1; see Christopher Hansman, Harrison Hong, Áureo de Paula & Vishal Singh, *A Sticky-Price View of Hoarding* 3–5, 21–24 (Nat’l Bureau of Econ. Rsch., Working Paper No. 27051, rev. 2021), <http://www.nber.org/papers/w27051> [<https://perma.cc/2GY9-RS4C>] (examining the effects of retailers voluntarily delaying price increases in the wake of a rice supply shock in 2007–2008, arguing that the delay promoted hoarding, and questioning the need for price-gouging concerns during emergencies); cf. Skarbek & Skarbek, *supra* note 40, at 274 (arguing that allowing prices to increase let big firms operate because even if they don’t raise prices much, flexibility will keep the more efficient and trustworthy providers of necessary goods active in markets affected by disasters).

the need for anti-gouging laws.²⁴⁸ Unsurprisingly, it does not appear that all businesses behave alike in this regard. There is some evidence that bigger, national-brand retailers with substantial concern for their reputations may freeze their prices (or limit increases) voluntarily, but smaller, independent retailers are more likely to raise prices, particularly in ways that raise price-gouging concerns.²⁴⁹

Now, when putting this information together, remember that poorer people are not evenly geographically distributed; they are often clustered in communities that have fewer financial resources overall.²⁵⁰ Major national retailers, likewise, are not evenly distributed; although some target lower-income

²⁴⁸ Cabral & Xu, *supra* note 116, at 878; Giberson, *supra* note 27, at 52; see Gagnon & López-Salido, *supra* note 246, at 822 (concluding that anti-gouging laws had little effect on the pricing behavior of their sample of chain supermarkets).

²⁴⁹ Giberson, *supra* note 27, at 52; see *Price Gouging: Hearing Before the Comm. on Com., Sci. & Transp.*, 109th Cong. 53–54 (2006) (statement of Deborah Platt Majoras, Chair, FTC) (reporting on the FTC investigation into possible gasoline and petroleum price gouging after Hurricane Katrina that “at the retail level. . . . The folks that we found who met the price gouging definition . . . were all independent stations,” and adding other reasons that independent stations had higher prices); Parsons, *supra* note 29, at 57 (noting large businesses are better able to voluntarily freeze prices than small businesses are); San Sau Fung & Simon Roberts, *The Economics of Potential Price Gouging During Covid-19 and the Application to Complaints Received by the CMA 1* (Ctr. for Competition Pol’y, Univ. of E. Anglia, Working Paper No. 21-02, 2021), https://ideas.repec.org/p/uea/ueaccp/2021_02.html [<https://perma.cc/QSX9-4RLJ>] (considering complaint data from the United Kingdom); Garber, *supra* note 64 (noting that prices climbed for Amazon-sold COVID-related goods during the period before most states declared an emergency, but did so less than prices from third-party sellers on the platform); Jeremy Pelzer, *Major Retailers Have Frozen Prices During Coronavirus Threat*, *AG Dave Yost Says*, CLEVELAND.COM (Mar. 12, 2020), <https://www.cleveland.com/coronavirus/2020/03/major-retailers-have-frozen-prices-during-coronavirus-threat-ag-dave-yost-says.html> [<https://perma.cc/HD87-4DE4>] (discussing voluntary price freezes in Ohio by Walmart, Target, Walgreens, Rite Aid, Meijer, and others); Bae, *supra* note 35, at 94–97 (concluding, through an economic rational choice analysis of the retail gasoline industry, that large stations have more to lose through price gouging than independent stations do); Davis, *supra* note 27, at 28, 58, 61 (noting that a franchisor terminated a relationship with eight independent 7-Eleven stores following accusations that the stores engaged in earthquake-related price gouging); cf. HARMAN, *supra* note 168, at 12, 31 (stating that both Amazon-sold and third-party items experienced price spikes, while Amazon blamed price increases on third-party sellers); Timothy K.M. Beatty, Gabriel E. Lade & Jay Shimshack, *Hurricanes and Gasoline Price Gouging*, 8 J. ASS’N ENV’T & RES. ECON. 347, 370 (2021) (finding that the average gas station did not engage in price gouging in the 2004–2008 hurricane seasons, that margins fell slightly on average, and that there were no systematic patterns among the small number of gas stations that charge higher-than-normal margins after a hurricane); Warkentin, *supra* note 63, at 95 (arguing that reputational effects do not sufficiently constrain many large retailers); Linda F. Alwitt & Thomas D. Donley, *Retail Stores in Poor Urban Neighborhoods*, 31 J. CONSUMER AFFS. 139, 142, 161 (1997) (noting that smaller retail stores charge higher prices than larger stores do in the ordinary course of business, in part due to smaller stores’ ability to capitalize on their relative geographic isolation from competitors).

²⁵⁰ See Alwitt & Donley, *supra* note 249, at 145 (using data to determine which areas of Chicago contained disproportionately poor families).

communities,²⁵¹ there is evidence that many tend to locate in more affluent areas.²⁵² If major chains or national brands are more likely to voluntarily freeze their prices, there is at least the possibility that this kind of voluntary price freeze mainly benefits the communities living near those kinds of stores—namely, wealthier, and often whiter, communities. Conversely, if small, independent retailers are more prone to price hikes and they disproportionately make up available retail in poorer communities, the people who can least afford opportunistic price increases may be the ones most likely to bear them in the absence of anti-gouging legislation.²⁵³ Put differently, if big national brands are more constrained from price gouging by reputational concerns, without an anti-gouging law, wealthier areas that are better served by those large, name-brand corporations will see more limited price increases, whereas food deserts and other disadvantaged areas that rely on smaller, independent sellers could face more price gouging.²⁵⁴ If, as some studies suggest, lower-income house-

²⁵¹ See Lauren Debter, *How Dollar General Is Spreading Like Hot Gossip in Tiny Towns Across the Country*, FORBES (May 20, 2022), <https://www.forbes.com/sites/laurendebter/2022/05/20/dollar-general-opening-new-stores-across-small-town-america/?sh=4ac30e7ce5f9> [https://perma.cc/Y9LA-SWCS] (noting a trend in national brand “dollar” stores to take root in small, lower-income, and often rural communities).

²⁵² See Alicia Adiwidjaja, *The Economic Exclusivity of Trader Joe’s*, STORYMAPS (Nov. 22, 2020), <https://storymaps.arcgis.com/stories/f5b375b6e66148be98b7a7105911f680> [https://perma.cc/79RD-PE2F] (considering Trader Joe’s locations in the Los Angeles area, and concluding that Trader Joe’s stores are more likely to be found in affluent areas that do not rely much on government food subsidies); Josh McGhee & Jonah Newman, *Target Opens Stores in Younger, Wealthier, White Neighborhoods as It Pulls Out of South Side*, CHI. REP. (Nov. 20, 2018), <https://www.chicagoreporter.com/target-opens-stores-in-younger-wealthier-white-neighborhoods-as-it-pulls-out-of-south-side/> [https://perma.cc/6R4U-CANY] (reporting that Target is relocating stores from poorer neighborhoods to richer ones in Chicago); Latetia V. Moore & Ana V. Diez Roux, *Associations of Neighborhood Characteristics with the Location and Type of Food Stores*, 96 AM. J. PUB. HEALTH 325, 325, 329 (2006) (finding that “[p]redominantly White and wealthier areas . . . have more [large or chain] supermarkets than . . . predominantly minority and poorer areas In contrast, small grocery stores were more common in predominantly minority areas and in poorer areas”); Kimbriell Kelly, *Retail Runaround*, CHI. REP. (Sept. 28, 2007), <https://www.chicagoreporter.com/retail-runaround/> [https://perma.cc/AF3L-928A] (noting both wealth and race effects in the density and distribution of retailers, including grocery stores and other essential businesses, and that major retailers tend to cluster). This is not a new observation, of course. See generally Alwitt & Donley, *supra* note 249, at 139–50 (recounting studies to this effect dating back to the 1950s, and concluding from their own study of Chicago that economically and systemically disadvantaged neighborhoods had significantly fewer retail outlets and particularly fewer large retail outlets, such as grocery stores and large drug stores).

²⁵³ See 8 Months, *supra* note 4 (explaining that the communities with the most price-gouging complaints are also those who were most impacted by COVID-19, mainly minority neighborhoods with relatively low household incomes); cf. Fung & Roberts, *supra* note 249, at 20–23 (concluding that price-increase complaints came disproportionately from the most under-resourced communities in the United Kingdom).

²⁵⁴ See Alwitt & Donley, *supra* note 249, at 142, 149–50 (providing data about Chicago to demonstrate that poorer neighborhoods have fewer large retail outlets and more small businesses that charge higher prices on average). Although one might think that higher prices will go only as far as

holds are less likely to engage in hoarding behavior (perhaps due to liquidity constraints), then these households would be more likely to suffer from increased prices and less likely to suffer from the potential side effects, like hoarding, for which anti-gouging regulation is often criticized.²⁵⁵

These are, of course, empirical questions—ones that I intend to examine with greater rigor in later work. For now, however, it suffices to note that this kind of spatial effect has been systematically underconsidered in evaluating anti-gouging laws to date. Moreover, some evidence suggest that even *with* anti-gouging rules in place, there is cause for concern. For example, New York City analyzed ten thousand price-gouging complaints it received within the first year of the pandemic. In doing so, it found that the nine neighborhoods most affected by COVID-19 had also reported a disproportionate number of price-gouging complaints. As the City reported, “the neighborhoods with the most complaints [of price gouging submitted] . . . are majority Black and Hispanic, are already financially vulnerable and, with median household incomes of approximately [thirty thousand dollars], can least afford to be gouged on lifesaving items like face masks, hand sanitizer, and disinfecting wipes.”²⁵⁶

If my hypothesis is correct, anti-gouging laws may help impose some legal constraint on the different burdens that communities already challenged by corporate disinvestment face in an emergency, *even if* neoclassical economists are correct that many businesses voluntarily freeze prices in an emergency and that there is nothing inherently morally objectionable about at least some gouging behavior (a point that I do not concede). If so, anti-gouging laws may be a reasonable attempt to protect poorer communities from being disparately impacted by price increases. An imperfect attempt, with real potential consequences, to be sure—but there has been so little attention to the spatial distribution issue in the price-gouging literature to date that no alternative has been shown to be better. The differing spatial impact of these laws, therefore, is at least worth considering in assessing whether the downsides of anti-gouging laws are justified.

the local market will bear, meaning that absolute price increases may not be enormous in lower-income areas, remember that there will be predictable shortages at the national-brand stores in wealthier areas. See Tuccille, *supra* note 211 (explaining that if prices do not rise with demand, shortages will result). Those individuals, who in general have better access to transit, will be free to take advantage of their purchasing power at the independent providers as well. See Kelly, *supra* note 252 (highlighting the burden for lower-income families of shopping at large retail stores when there are none in their neighborhoods).

²⁵⁵ See Hansman et al., *supra* note 247, at 1, 2, 5 (noting that hoarding can increase when prices are capped by law).

²⁵⁶ 8 Months, *supra* note 4; see *Comparison of NYC Neighborhoods Hit Hard by COVID-19 and Price Gouging*, N.Y.C. DEP’T CONSUMER & WORKER PROT. (Sept. 2020), <https://www1.nyc.gov/assets/dca/downloads/pdf/partners/PriceGougingAnalysis.pdf> [<https://perma.cc/N6TB-H6PK>].

CONCLUSION

Many commentators note (some with regret) that anti-gouging laws seem to be here to stay. One might have expected that if any disaster would cause lawmakers to reform their laws to appease economists' continued criticism, the economic disruption of the COVID-19 pandemic would have been it. Instead, although certain U.S. states and territories revisited their laws during the pandemic, they continued the trend of adding new anti-gouging laws and broadening and strengthening those that already existed.

Although the states and territories have continued to proliferate and expand anti-gouging laws, they have shown little tendency to converge on a single approach to regulating price gouging. This is both a fascinating example of federalist policy experimentation and a source of frustration for businesses that must comply with such laws, especially firms that operate across multiple jurisdictions. This trend will continue to add pressure for the development of a more uniform approach or standard—whether through the pursuit of a uniform body of law among the states or through the adoption or imposition of a federal standard. So far, however, support for anti-gouging legislation has been far more bipartisan on the state level than on the federal level, and legislators interested in federal anti-gouging legislation seem content to allow a variety of state laws to flourish alongside a federal standard.

Neoclassical economists continue to roundly criticize anti-gouging laws as unnecessary at best, considering that many businesses choose to freeze prices in an emergency, and, at worst, as triggering and worsening consumer shortages and derailing important market forces that can speed recovery after a disaster. Even as behavioral economics research has uncovered that much anti-gouging legislation tracks a historically rooted, durable moral condemnation of price-gouging behavior among consumers, critics continue to argue for the abolition of anti-gouging laws, or seek to identify a least-worst version of anti-gouging legislation from an economic perspective. I argue, however, that both the criticism and (limited) defense of anti-gouging laws in the legal and economic literature largely overlook a potentially important dimension of anti-gouging regulation: how it might differentially affect people in lower-income communities whose neighborhoods have few big, national-brand businesses. By failing to attend to the potentially important spatial and distributional impacts of anti-gouging legislation, critics and defenders alike have neglected an important value in assessing the economic, social, and moral trade-offs reflected in the choice to regulate price gouging.

APPENDIX A: STATE AND TERRITORIAL ANTI-GOUGING LAWS

Jurisdiction	Primary Anti-gouging Law	Changed 2/1/2020-7/31/22?
Alabama	ALA. CODE § 8-31-1 to -6 (2023)	No
Alaska	2020 Alaska Sess. Laws ch. 10, § 26	Temporary law adopted
American Samoa	AM. SAMOA CODE ANN. § 27.0903 (2023)	No
Arizona	None (Whether UDAP reaches price gouging is contested)	No
Arkansas	ARK. CODE ANN. § 4-88-301 to -305 (2023)	No
California	CAL. PENAL CODE § 396 (West 2023)	Amended by ch. 339, 2020 Cal. Stat. 3824
Colorado	COLO. REV. STAT. § 6-1-730 (2023)	Newly adopted at ch. 305, 2020 Colo. Sess. Laws 1552
Connecticut	CONN. GEN. STAT. § 42-230 to -239 (2023); § 29-319 (Fuel)	No
Delaware	DEL. CODE ANN. tit. 6, § 2511 (2023) (UDAP); § 2513A (repealed 2023)	Delaware adopted a temporary price gouging law at ch. 267, 82 Del. Laws 1 (2020), and permanently amended its UDAP law to reach price gouging, at ch. 85, 83 Del. Laws 1 (2021)
District of Columbia	D.C. CODE ANN. § 28-4101 to -4103 (2023)	Amended with multiple temporary laws, including 67 D.C. Reg. 3101 (Mar. 20, 2020); 67 D.C. Reg. 7078 (June 12, 2020); 67 D.C. Reg. 7631 (June 19, 2020); 67 D.C. Reg. 8657 (July 17, 2020); 67 D.C. Reg. 10266 (Aug. 28, 2020); 68 D.C. Reg. 3134 (Mar. 26, 2021); 68 D.C. Reg. 4850 (May 7, 2021); 68 D.C. Reg. 6051 (June 11, 2021)

Florida	FLA. STAT. § 501.160 (2023)	Amended by ch. 131, 2021 Fla. Laws 1617
Georgia	GA. CODE ANN. § 10-1-393.4 (2023)	No
Guam	5 GUAM CODE ANN. § 32201 (2023)	Amended by Guam Pub. L. 35-74 (2020)
Hawaii	HAW. REV. STAT. § 127A-30 (suspended 2023)	No
Idaho	IDAHO CODE § 48-603(19) (2023)	Amended by 2021 Idaho Sess. Laws 184
Illinois	ILL. ADMIN. CODE tit. 14, § 465.10 (2023)	No
Indiana	IND. CODE § 4-6-9.1-1 to -7 (2023)	No
Iowa	IOWA ADMIN. CODE § 61-31.1(714) (2023); IOWA CODE § 714.16 (2023)	No
Kansas	KAN. STAT. ANN. § 50-6,106 (2023)	No
Kentucky	KY. REV. STAT. ANN. § 367.372–.378 (West 2023)	Amended by ch. 6, 2021 Ky. Acts 18 (not in substance, but to clarify the application of other emergency-power limitations) and ch. 110, 2022 Ky. Acts 667
Louisiana	LA. STAT. ANN. §§ 29:732, 14:329.6(A)(9) (2023)	No
Maine	ME. STAT. tit. 10, § 1105 (2023)	Amended by ch. 75, 2021 Me. Laws 393
Maryland	2020 Md. Laws 94	New temporary law in effect from Mar. 19, 2020 to Apr. 30, 2021
Massachusetts	940 MASS. CODE REGS. 3.18 (2023)	Amended by 1420 Mass. Reg. 141 (June 26, 2020) (emergency rule)

Michigan	MICH. COMP. LAWS § 445.903(z) (2023)	Michigan repealed the law regarding the Governor's emergency powers under which anti-gouging executive orders had been issued, but there remains a price-gouging protection in its UDAP law.
Minnesota	None, though price-gouging protections were adopted by executive order during the pandemic.	No ²⁵⁷
Mississippi	MISS. CODE ANN. § 75-24-25 (2023)	No
Missouri	MO. CODE REGS. ANN. tit. 15, § 60-8.030 (2023); MO. REV. STAT. § 407.020 (2023)	No (Changes to the underlying consumer protection act regarding private litigation generally, not specific to price gouging)
Montana	None (UDAP only)	No
Nebraska	None (UDAP only)	No
Nevada	NEV. REV. STAT. § 598.09235 (2023)	New law adopted by ch. 256, 2021 Nev. Stat. 1341
New Hampshire	None (UDAP only)	No
New Jersey	N.J. STAT. ANN. § 56:8-107 to -112 (West 2023)	No
New Mexico	None (UDAP only)	No
New York	N.Y. GEN. BUS. LAW § 396-r (McKinney 2023)	Amended by ch. 90, 2020 N.Y. Laws 773
North Carolina	N.C. GEN. STAT. § 75-38 (2023)	No
North Dakota	None (UDAP only)	No
Northern Mariana Islands	4 N. MAR. I. CODE §§ 5141–5144 (2023)	No

²⁵⁷ But see HF 6: *Status in the House for the 93rd Legislature (2023-2024)*, MINN. LEGISLATURE, <https://www.revisor.mn.gov/bills/bill.php?b=House&f=HF6&ssn=0&y=2023> [<https://perma.cc/GE8F-T34N>] (showing that, as of March 8, 2023, potential price-gouging legislation had passed the Minnesota House and received a second reading in the Senate).

Ohio	OHIO REV. CODE ANN. § 1345.03 (West 2023)	No
Oklahoma	OKLA. STAT. tit. 15, § 777.1–.5 (2023)	No
Oregon	OR. REV. STAT. § 401.960–.970 (2023)	No
Pennsylvania	73 PA. CONS. STAT. § 232.1–.6 (2023)	No
Puerto Rico	P.R. LAWS ANN. tit. 23, §§ 731–745 (2023)	No
Rhode Island	6 R.I. GEN. LAWS § 6-13-21 (2023)	No (ch. 21-329 § 1, 2021 R.I. Pub. Laws 985, 1446 amended provisions of the general Deceptive Trade Practices provisions regarding enforcement and remedies)
South Carolina	S.C. CODE ANN. § 39-5-145 (2023)	No
South Dakota	None (UDAP only)	No
Tennessee	TENN. CODE ANN. § 47-18-5101 to -5104 (2023); § 47-18-104(b)(34)	No (Section 47-18-104 was amended, but not in ways relevant to its price-gouging prohibition)
Texas	TEX. BUS. & COM. CODE ANN. §§ 17.46(b)(27), 17.4625 (West 2023)	No
Utah	UTAH CODE ANN. § 13-41-201 to -202 (West 2023)	Amended by ch. 226, 2021 Utah Laws 1435
Vermont	VT. STAT. ANN. tit. 9, § 2461d (2023)	No
Virgin Islands	V.I. CODE ANN. tit. 23, §§ 1017, 1005(g)(10) (2023)	Yes. Section 1017 was newly adopted by 2020 V.I. Sess. Laws 205, but the Governor already had price-freezing emergency powers under section 1005(g)(10).
Virginia	VA. CODE ANN. §§ 59.1-525 to -529.1, 59.1-200(A)(41) (2023)	Amended by ch. 16, 2020 Va. Acts 18
Washington	None (UDAP only)	No

West Virginia	W. VA. CODE § 46A-6J-1 to -6 (2023)	Amended by ch. 52, 2020 W. Va. Acts 544
Wisconsin	WIS. ADMIN. CODE ATCP § 106.01–.03 (2023); WIS. STAT. § 100.305 (2023)	No
Wyoming	None (UDAP only)	No

