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Price Gouging in the Time of COVID-19: How U.S. Anti-Price Gouging Laws Fail Consumers

SPENCER WARKENTIN[†]

I. INTRODUCTION

Anti-price gouging laws, which protect consumers against artificially high predatory pricing, are a vital defense against opportunistic retailers and bad actors in times of crisis and emergency.¹ Currently, domestic anti-price gouging laws are ill equipped to deal with the market impacts of a global pandemic. Formulated in the wake of hurricanes, earthquakes and oil shortages, the contemporary framework of anti-price gouging legislation is failing consumers. Additionally, current anti-price gouging regulation fails to adequately address the power of firms with dominant market positions, such as Amazon.²

The lack of effective national price-gouging law leaves states to devise their own remedies and punishments for bad actors, with many states having no protections at all. This patchwork of laws which varies in substance, approach and application is to the detriment of consumers. For example, at the beginning of the COVID-19

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1. Emily Bae, *Are Anti-Price Gouging Legislations Effective Against Sellers During Disasters?*, 4 *ENTREPRENEURIAL BUS. L.J.* 79, 79 (2009).

2. See Lina M. Khan, *Amazon's Antitrust Paradox*, 126 *YALE L.J.* 710, 756 (2017) (explaining how Amazon's business practices and sheer scale have enabled it to achieve market dominance).

outbreak, goods such as hand sanitizer and disinfectant were being sold at markups nearing 400%.³ With grocery stores linked to the growing spread of the virus, even canned goods such as beans saw price increases of nearly 30%.⁴

This paper will discuss the impact of COVID-19 on the economy and the background of price gouging regulation in both the United States and European Union. I will then contextualize the intersection of the economic impacts of price gouging and its legal implications through a discussion of *McQueen v. Amazon*,⁵ a California class action filed against Amazon for price gouging at the outset of the pandemic. Next, I will discuss potential solutions to the inefficacy of current price gouging legislation, looking to the EU and other foreign jurisdictions for inspiration. Finally, I will uniquely suggest the Federal government, using both administrative agencies and antitrust law should draw on certain aspects of European competition law to create a centralized body of anti-price gouging law and enforcement and assess the likelihood of any new legislation actually being passed.

II. FACTUAL BACKGROUND

A. Price Gouging

Like many issues in both law and economics, what exactly constitutes price gouging, or whether it is even an issue, is a matter of contention. To followers of classical law and economics theories, “price gouging” is simply a negatively framed colloquialism for “market equilibrium.”⁶ To others, especially consumers, price gouging is a predatory business practice by which unscrupulous companies abuse their power to extract excess money from consumers in times of duress, emergency and disaster.⁷ Regardless of the school of thought, it is clear price gouging occurs, and that the popular support necessary to make comprehensive price gouging

3. See *infra* Section III.B.

4. See *infra* Section III.B.

5. *McQueen, et al. v. Amazon.com, Inc.*, No. 4:20-CV-02782 (N.D. Cal. Apr. 21, 2020).

6. See Geoffrey C. Rapp, *Gouging: Terrorist Attacks, Hurricanes, and the Legal and Economic Aspects of Post-Disaster Price Regulation*, 94 KY. L.J. 535, 536 (2006) (explaining that beyond simply loathing price controls, subscribers to law and economics strongly believe “gouging” is simply a natural outcome of shifts in supply and demand curves).

7. See *id.* at 536–37 (discussing public’s reaction to raised gasoline prices following 9/11 and Hurricane Katrina where citizen complaints were in the thousands).

legislation politically expedient exists.⁸

In times of relative tranquility and normalcy, anti-price gouging legislation is seldom thought of and almost never used. However, in the wake of natural disasters, instances of price gouging arise and so do discussions about what, if anything, should be done to stop it. While the first line of defense against price gouging is antitrust law, namely the Sherman Act, antitrust law has rarely been seen as an appropriate means by which to go after post-disaster price gougers.⁹

The Sherman Antitrust Act, passed in 1890, was a reaction to concerns over the increasing presence and influence of monopolies in the late 19th century.¹⁰ While the Sherman Act is well equipped to address price gouging behavior, antitrust jurisprudence has made it clear that antitrust law should be used primarily to combat the use of collusive arrangements to create artificial scarcity.¹¹ Price gouging, on the other hand, implicates issues of natural scarcity brought on by disaster or other uncontrollable occurrence. Therefore, while promising in the abstract, the Sherman Act has not actually been used to prevent or punish price gouging.¹²

In lieu of appropriate federal law, over half of the states have taken it upon themselves to protect consumers from price gouging by passing their own anti-gouging laws.¹³ This patchwork of laws,¹⁴ inconsistent even in jurisdictions that have chosen to pass them, is entirely inadequate to deal with price gouging in the context of a

8. *See id.* (explaining after Hurricane Katrina led to rampant gasoline price gouging, “seventy-two percent of respondents felt that oil companies were gouging, and eight in ten faulted the federal governments’ response to oil companies’ tactics.”).

9. *Id.* at 540 (“Despite its power to prevent cooperative price increases following natural or man-made disasters, antitrust law likely plays a limited role in these settings. Concerted activity rarely seems to be the source of post-disaster spikes in ‘hot button’ commodities.” (citing Cary A. Deck & Bart J. Wilson, *Economics at the Pump: Does “Anti-Price Gouging” Legislation Really Help Gasoline Consumers?*, 27 REGUL. 1, 22 (2004))).

10. 21 CONG. REC. S2457.

11. Michael Brewer, *Planning Disaster: Price Gouging Statutes and the Shortages They Create*, 72 BROOK. L. REV. 1101, 1111 (2007).

12. *Id.*

13. Mike Sunnucks, *AG: State Has No Tools to Slow Skyrocketing Gas Prices*, THE BUS. J. OF PHX. (Sept. 2, 2005), available at <http://www.bizjournals.com/phoenix/stories/2005/08/29/daily61.html> (“More than half of U.S. states have some sort of anti-gouging law.”).

14. David Nitkin, *Sticker-Shocked Maryland Drivers Voice Suspicions of Price Gouging*, BALT. SUN (Sept. 1, 2005), <https://www.baltimoresun.com/news/bs-xpm-2005-09-01-0509010039-story.html> (explaining many states that do not regularly experience natural disasters, including Maryland, do not have anti-price gouging statutes); *see infra* Section III.A.

global pandemic.¹⁵

B. COVID-19 Pandemic¹⁶

COVID-19 is a deadly pandemic that has infected more than thirty-eight million people and killed one million globally, including over 460,000 in the United States.¹⁷ Originating in late 2019, likely in Hubei Province, China, the respiratory virus quickly spread to the United States.¹⁸ While COVID-19 has since spread through the entire United States, California was the first state to experience widespread infection.¹⁹ On February 26, 2020 the virus spread took a new and concerning turn, with the CDC reporting the first case of “community spread” in California.²⁰

Shortly after community spread was confirmed in California, state officials took action. On February 3, 2020, Santa Clara County officials declared a State of Emergency.²¹ On March 4, 2020, following a slew of local emergency declarations, and the first confirmed COVID-19 death in California, Governor Gavin Newsom declared a state-wide State of Emergency.²² Shortly thereafter, the World Health Organization declared COVID-19 a pandemic.²³ On

15. *Price Gouging Frequently Asked Questions*, https://www.marylandattorneygeneral.gov/Pages/CPD/price_gouging_faq.aspx (last visited Nov. 10, 2020) (explaining in the wake of the COVID pandemic, some states have enacted anti-price gouging rules via executive order).

16. In this paper, the spread of COVID-19 is looked at mainly in terms of its impact in California. The reason being is that the case through which this paper discusses price gouging, *McQueen, et al. v. Amazon.com, Inc.*, No. 4:20-CV-02782 (N.D. Cal. Apr. 21, 2020), focuses on price gouging occurring in California around the onset of the pandemic. This case can be found at <https://news.bloomberglaw.com/product-liability-and-toxics-law/amazon-accused-of-price-gouging-during-covid-19-emergency>.

17. *COVID-19 Dashboard by the Center for Systems Science and Engineering (CSSE) at Johns Hopkins University*, JOHNS HOPKINS UNIV. (Oct. 13, 2020, 1:17 PM), <https://coronavirus.jhu.edu/map.html> (showing that the death toll in the US continues to rise).

18. Class Action Compl. and Demand for Jury Trial at 9, ¶ 20, *McQueen, et al. v. Amazon.com, Inc.*, No. 4:20-CV-02782 (N.D. Cal. Apr. 21, 2020), ECF No. 1.

19. *See id.* at ¶ 21 (explaining two of the three busiest airports for Chinese flights are located in California, at one point almost half the confirmed cases in the U.S. were in California, and characterizing California as the front-line of the crisis in the U.S.).

20. *CDC Confirms Possible Instance of Community Spread of Covid-19 in U.S.*, CTR. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/media/releases/2020/s0226-Covid-19-spread.html> (last visited Oct. 20, 2020) (explaining “community spread” is “spread of an illness for which the source is unknown” which raises the prospect of uncontrolled and untraceable spread through a population).

21. Class Action Compl. and Demand for Jury Trial, *supra* note 18, at 10, ¶ 26.

22. *Id.* at 11, ¶ 26.

23. *A Timeline of COVID-19 Developments in 2020*, AM. J. OF MANAGED CARE, <https://www.ajmc.com/view/a-timeline-of-covid19-developments-in-2020> (last visited Oct.

March 13, 2020, President Trump declared COVID-19 a national emergency in the United States.²⁴

While the virus was spreading surreptitiously across the United States., a similar timeline was playing-out in Europe. On January 24, 2020, both France and Germany reported COVID-19 cases with traceable travel history to China.²⁵ By February 22, 2020, Italian officials reported clusters of cases in multiple regions around the country. By March 8, 2020, many European countries had installed strict social distancing measures and lockdowns in efforts to quell the spread.²⁶ Just six weeks later the number of confirmed COVID-19 cases in EU member states surpassed one million.²⁷

III. LEGAL BACKGROUND

A. *Domestic Anti-Price Gouging Statutes*

As the first wave of the virus crashed onto American shores, so too did a sense of panic – and with it, panic buying.²⁸ While the number of infected individuals rose, along with it rose the prices of critical consumer goods such as toilet paper,²⁹ hand sanitizers³⁰ and canned foods.³¹ Astronomical price increases in goods necessary to safely handle the pandemic immediately raised concerns of price gouging with complaints flooding the inboxes of Attorney Generals nationwide.³² Many state Attorney Generals were left scrambling to figure out how to stop unscrupulous retailers.³³

There is currently no federal anti-price gouging regulation in the

20, 2020) (“March 11 – WHO Declares COVID-19 a pandemic.”).

24. *Id.* (“March 13 - Trump Declares COVID-19 a National Emergency.”).

25. *Timeline of ECDC's Response to Covid-19*, EUR. CTR. FOR DISEASE CONTROL AND PREVENTION, <https://www.ecdc.europa.eu/en/covid-19/timeline-ecdc-response> (last visited Oct. 22, 2020).

26. *Id.*

27. *Id.*

28. Class Action Compl. and Demand for Jury Trial, *supra* note 17, at 14, ¶ 32.

29. *Id.* at 22–23, ¶ 53 (alleging Amazon itself engaged in price gouging with its own brand of toilet paper posted for sale for \$72 per 4 rolls).

30. *Id.* at 25, ¶ 54 (alleging air purifier and sanitizer prices increased approximately 45% following State of Emergency declaration).

31. *Id.* (alleging canned bean prices increased approximately 166% following State of Emergency declaration).

32. 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>.

33. *Id.*

United States.³⁴ While many price-gouging allegations could theoretically be prosecuted under federal antitrust law, as discussed above, antitrust law is not used to prosecute price gouging.³⁵ Followers of traditional law and economics theory condemn anti-price gouging laws for their negative impacts on “shortages, rationing, and inefficiency.”³⁶ However, spurred mainly by popular consumer support,³⁷ thirty states have passed bans on price-gouging.³⁸ Amongst the thirty states that have enacted price-gouging legislation, the bans fall into three broad categories: “(1) a ‘percentage increase cap’ limit, which fixes post-disaster prices based on pre-disaster prices;³⁹ (2) a ban on ‘unconscionable’ price increases;⁴⁰ (3) and an ‘outright ban’⁴¹ on any increase in price above what is necessary.”⁴² The majority of these state-level bans have stemmed from consumer complaints, mainly over increased gas prices, raised in the wake of localized natural disasters.⁴³ Critics have argued that all three styles of price-gouging statutes are either counterproductive or inadequate.⁴⁴

1. Percentage Increase Cap Bans

While there is some variation in “percentage increase cap” regulations, the statutes mainly follow the formula first promulgated by California after the 1993 Northridge Earthquake.⁴⁵ In California,

34. See Bae, *supra* note 1, at 99 (explaining 2008 anti-price gouging bill failed by vote of 267 to 146, likely because of the influence of oil lobbyists).

35. Rapp, *supra* note 6, at 540 (explaining antitrust law is poorly adapted to price-gouging violations due to the difficulty in proving horizontal collusion or price fixing in the wake of natural disasters).

36. *Id.* at 536.

37. *Id.* (recounting post-Hurricane Katrina public outrage at fuel prices which elicited response from President Bush on national television where the President likened price-gouging to “looting”).

38. Bae, *supra* note 1, at 83–90 (2009) (categorizing states that have enacted bans by which type of price-gouging ban they have enacted).

39. States that use a “percentage increase cap limit” are Arkansas, California, Maine, New Jersey, Oklahoma, Oregon and West Virginia. *Id.* at 83.

40. States that use an “unconscionable price limit” standard are Alabama, Florida, Idaho, Indiana, Iowa, Massachusetts, Missouri, New York, North Carolina, Pennsylvania, South Carolina, Tennessee, Texas, Vermont, Virginia and Wisconsin. *Id.* at 85.

41. States that use an “outright ban” on price-gouging are Connecticut, Georgia, Hawaii, Kentucky, Louisiana, Mississippi and Utah. *Id.* at 90.

42. *Id.* at 83.

43. Rapp, *supra* note 6, at 542 (“[M]any anti-gouging laws were enacted after particular disasters.”).

44. See generally Bae, *supra* note 1.

45. *Id.* at 83 (explaining one of the main variations between “percentage increase cap” statutes is the percentage increase allowed over pre-disaster prices, which ranges from 10-25%).

anti-price gouging statutes take effect only after a State of Emergency has been officially declared.⁴⁶ The California statute penalizes price increases over 10% of pre-disaster costs which are not “directly attributable to additional costs.”⁴⁷ Violations are punishable by up to one year in prison, a fine not exceeding \$10,000, or both.⁴⁸ In spite of its popular support amongst consumers when it was passed, California’s anti-price gouging statute has rarely been used to prosecute violators. Additionally, the statute has faced criticism for failing to address the root causes of price gouging in times of emergency,⁴⁹ as well as for being “impractical, difficult to enforce, and applicable only to retail providers rather than wholesale suppliers.”⁵⁰

2. Unconscionable Price Increase Bans

States that use an “unconscionable price increase” standard experience variability in the scope and applicability of their price-gouging statutes due to divergence in the definition of “unconscionable.”⁵¹ Vague unconscionable language and a failure to provide clear guidance on punishments has been a hinderance in states such as Massachusetts, where prosecution of price-gouging statutes has been largely unsuccessful.⁵² However, “unconscionable price increase” statutes have been used to great effect in jurisdictions willing to pursue and prosecute violators.⁵³

In the early 2000s, Missouri brought successful legal actions against gas stations following both the terrorist attacks of September 11, 2001 and Hurricane Katrina in 2005.⁵⁴ Missouri’s anti-price

46. CAL. PENAL CODE § 396(b) (West 2009).

47. *Id.*

48. CAL. PENAL CODE § 396(h) (West 2009).

49. Bae, *supra* note 1, at 85 (quoting California Attorney General Bill Lockyer’s concern that “the current law allows us to investigate the corner gas station but not the refinery” in reference to shortcomings in the laws ability to curb price-gouging at gas stations).

50. Rapp, *supra* note 6, at 544.

51. Bae, *supra* note 1 at 86 *Exploitative Pricing in the Time of Coronavirus – The Response of EU Competition Law and the Prospect of Price Regulation* 90 (explaining that differences in the definition of “unconscionable” include referencing the disparity between pre and post-disaster prices, the disparity between average pre-disaster and actual post-disaster prices, and looking to similar goods for sale in jurisdictions outside of the disaster zone to determine if price-gouging has occurred).

52. *Id.* at 86 (explaining that in the aftermath of Hurricane Katrina in spite of there being 46 complaints of gas station price gouging, none resulted in filed lawsuits).

53. *Id.* at 87.

54. *Id.*

gouging statute states that price gouging occurs when a seller charges an excessive price for a necessity either within a disaster area, or that the seller has reason to know is likely to be provided to consumers in a disaster area.⁵⁵ After the terror attacks of September 11, 2001, the Missouri Attorney General successfully brought price gouging charges against forty-eight gasoline stations.⁵⁶ All of the charges were settled for a total of \$60,000.⁵⁷

In New York, a 2020 anti-price gouging statute instructs courts to look to three factors when determining if a price increase rises to the level of unconscionability. The three factors courts look to are “(i) that the amount of the price increase is unconscionably extreme; (ii) that there was an exercise of unfair leverage or unconscionable means; and (iii) a combination of the first two factors.”⁵⁸ Violators may be fined up to \$25,000 “per violation or three times the gross receipts for the relevant goods or services, whichever is greater.”⁵⁹ This concrete formula for determining unconscionability has led to findings of unconscionable price increases both in instances where the price increase was unconscionably extreme,⁶⁰ and where unfair leverage resulting from a disaster was exercised to demand higher prices from consumers.⁶¹

3. Outright Bans

The strictest level of anti-price gouging regulation is the outright ban. Outright ban anti-price gouging statutes are exactly what they sound like; outright bans on price increases for goods in times of emergency.⁶² In spite of their strictness, there is no evidence that outright ban states prosecuted a higher number of violators, or imposed steeper punishments than states utilizing either of the other

55. *Id.*

56. *Id.*

57. *Id.*

58. N.Y. GEN. BUS. LAW § 396-r (3) (a) (McKinney 2020).

59. *Id.* at § 396 (4).

60. *People v. Beach Boys Equip. Co.*, 709 N.Y.S. 2d 729, 731 (N.Y. App. Div. 4th Dep’t 2000) (holding 100% markup of generator prices relative to local competitor prices was unconscionable).

61. *People v. Two Wheel Corp.*, 525 N.E.2d 692, 699 (N.Y. 1988) (holding price increase of forty to sixty-seven percent for generators in the wake of a hurricane was result of newfound bargaining power incidental to the hurricane and therefore prima facie unconscionable).

62. *See* GA. CODE ANN. § 10-1-393.4 (West 2008). Georgia’s anti-price gouging statute states “it shall be an unlawful, unfair, and deceptive trade practice . . . in any area in which a state of emergency . . . has been declared . . . to sell or offer at retail . . . at a price higher than the price at which such goods were sold” before the emergency declaration. *Id.*

types of statutes.⁶³

B. Mcqueen v. Amazon

By way of legislative design, violations of Cal. Penal Code § 396 are rare.⁶⁴ Since its inception, § 396 has only been litigated twice, with neither case achieving a conviction on § 396 grounds.⁶⁵ However, there is reason to believe the uniqueness of the COVID-19 pandemic, combined with recent shifts to online shopping, could result in a surge in § 396 and similar claims across the country.⁶⁶ One such case with landmark potential is *Mcqueen v. Amazon*.⁶⁷

Mcqueen v. Amazon, filed in the Northern District of California, alleges e-commerce giant Amazon violated California Penal Code § 396 when it either sold, or allowed to be sold, goods with price mark-ups as high as 674%.⁶⁸ Plaintiffs contend these price increases are clear violations of § 396 and, as such, constitute “unlawful business practice and an act of unfair competition within the meaning of Section 17200 of the Business and Professions Code.”⁶⁹ Indeed, it seems the practices alleged are exactly the sort of “unfair advantage” the statute’s drafters had in mind when seeking to protect consumers in the wake of disaster.⁷⁰

California Penal Code § 396(b) states that, after the proclamation of a state of emergency by “the President of the United States or the Governor, or upon the declaration of a local emergency by an official” retailers are forbidden from selling “any consumer food items or goods...[or] medical supplies...for a price of more than 10 percent greater than the price charged by that person for those goods...immediately prior to the proclamation.”⁷¹ On March 4, 2020

63. Bae, *supra* note 1, at 92.

64. See Samantha E. Dorey & James C. Truxaw, *Anticipated Litigation in the Wake of Covid-19: Price Gouging Claims*, 62 JUN ORANGE COUNTY LAW. 36, 36 (2020) (explaining that, because § 396 is only triggered by national, state, or local declarations of emergency, it is rarely used).

65. *Id.* (explaining both cases, *Madrid v. Perot Systems Corp.*, 30 Cal. Rptr. 3d 210 (2005) and *Wholesale Electricity Antitrust Cases I & II*, 55 Cal. Rptr. 3d 253 (2007), failed to secure convictions on anti-competitive claims because of federal preemption in energy pricing).

66. *Id.* (“If price gouging occurs on a large enough scale . . . then we may see a wave of unfair competition class actions in the near future.”).

67. Class Action Compl. and Demand for Jury Trial, *supra* note 18, at 4, ¶ 5.

68. *Id.*

69. *Id.* at 20, ¶ 46.

70. Dorey, *supra* note 64, at 36.

71. CAL. PENAL CODE § 396(b) (West 2021).

California Governor Gavin Newsom declared a State of Emergency in the state of California, triggering the price gouging protections of § 396.⁷² Bolstering the State of Emergency proclamation, between March 16 and March 20, 2020 local California governments issued “stay-at-home” and “shelter-in-place” directives which applied to almost 20 million residents.⁷³

Prior to the “stay-at-home” and “shelter-in-place” orders taking effect, hoarding and retail scarcity had already become a problem. Anxiety over COVID-19 saw retail sales of certain medical supplies and highly sought sanitary products, such as hand sanitizer, rise as much as 20% in early February.⁷⁴ Fueled by rising COVID-19 cases, reports of person-to-person transmission and local reporting of bare store shelves, the situation reached a fevered pitch in early March.⁷⁵ Sales of necessities such as rice and beans rose around 30%,⁷⁶ while sales of hand sanitizer and disinfectants rose 470% and 385% respectively.⁷⁷

Faced with empty shelves and fears of contracting a deadly virus, consumers increasingly turned to online retailers. By mid-March, one-quarter of consumers said they planned to either shop online more often or for the first time.⁷⁸ In the two weeks preceding March 21, at least 35% more people shopped online for consumer-packaged goods, such as toilet paper and hand sanitizer, when compared with a regular week.⁷⁹ Unsurprisingly, a large amount of this increased online consumer activity flowed to Amazon.

Amazon is the world’s largest online retailer, controlling approximately half of all e-commerce in the United States and dominating all competitors in market share.⁸⁰ This dominant position, of course, has its benefits. In an economy that was largely closed,

72. Class Action Compl. and Demand for Jury Trial, *supra* note 18, at 11, ¶ 27.

73. *Id.* at 12, ¶ 28.

74. *Id.* at 13, ¶ 30–31.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 15, ¶ 34.

79. *Id.* Additionally, the complaint contains a graphical representation of changing consumer behavior purporting the week ending 3/14/20 saw a 91% increase in dollars spent online shopping compared to the same period one year ago. *Id.*

80. See Lina M. Khan, *Amazon’s Antitrust Paradox*, 126 YALE L.J. 710, 755 (2017) (“Amazon now controls 46% of all e-commerce in the United States”); see also Class Action Compl. and Demand for Jury Trial, *supra* note 18, at 16, ¶ 35 (explaining that while Amazon controls nearly half the domestic e-commerce market its nine largest competitors control only 1.1 to 6.6 percent of the market respectively).

shuttering thousands of businesses across the country and sending unemployment numbers to historic highs,⁸¹ Amazon flourished.⁸² Financial data firm Facteus reports by mid-April Amazon sales increased 44%.⁸³ Through the same period, Amazon hired 100,000 more employees to deal with increased demand.⁸⁴

Beyond being convenient and safe, Amazon has other inherent advantages over its brick-and-mortar competition in times of Emergency – namely its ability to ship over 12 million unique goods and provide access to goods that may be scarce in physical stores.⁸⁵ Amazon’s ability to source and ship almost any good imaginable is not an accident, it is the product of years of business and logistics planning that has made Amazon the go-to platform not only for shoppers, but also for sellers.⁸⁶

C. *European Anti-Price Gouging Measures*

While EU member states are free to impose their own anti-price gouging measures, much like individual states within the United States, the European Commission (EC)⁸⁷ has its own mandate to investigate and prosecute price gouging cases across Europe.⁸⁸ The tools accessible to the EC in pursuit of price gouging, and the power with which to pursue bad actors, comes from the Treaty on the Functioning of the European Union (TFEU).⁸⁹ Actions pursuant to Article 102 of the TFEU can be brought either by the EC or National Competition Authorities (NCAs).⁹⁰

Article 102 addresses predatory and excessive pricing. Specifically, article 102 prohibits “any abuse by one or more

81. *43 States at Historically High Unemployment Rates in April 2020*, BUREAU OF LABOR STATISTICS (May 28, 2020), <https://www.bls.gov/opub/ted/2020/43-states-at-historically-high-unemployment-rates-in-april-2020.htm>.

82. Class Action Compl. and Demand for Jury Trial, *supra* note 18, at 16, ¶ 35.

83. *Id.* at ¶ 36.

84. *Id.*

85. *Id.* at ¶ 37.

86. Khan, *supra* note 80, at 774 (explaining how Amazon leveraged its size and influence over shipping companies to gain a competitive pricing advantage which it then used to entice third-party sellers to join its Fulfillment-by-Amazon program).

87. The European Commission promotes the general interest of the EU by proposing and enforcing legislation. *Overview*, EUR. UNION, https://europa.eu/european-union/about-eu/institutions-bodies/european-commission_en, (last visited Dec. 17, 2020).

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

89. *Id.*

90. *Id.*

undertakings of a dominant position within the internal market or in a substantial part of it.”⁹¹ The Article’s definition of abuse is enumerated and includes “directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions.”⁹² While Article 102 seems like the perfect weapon for assailing price gougers, there are certain conceptual difficulties to successfully bringing a price gouging case under the Article.

First, the EC must prove that the firm engaging in excessive pricing held a collective dominant position in the market-place.⁹³ Traditionally, for a company to be deemed “dominant” in the context of Article 102, the company must control upwards of 40% of the market in the specific good.⁹⁴ This 40% threshold creates issues in pursuing price gouging cases in post-disaster scenarios as oftentimes the perpetrators are small businesses and not large corporations.⁹⁵ However, the EC has previously overcome the issue of proving traditional dominance by arguing a firm attained “transitory market power.” Transitory market power is the idea that, through uncontrollable circumstances, firms that do not fit the traditional definition of “dominance” can be temporarily placed in a dominant position in respect to their customers.⁹⁶ This designation of temporary dominance thus places their actions within the scope of Article 102 enforcement.⁹⁷ As such, the transitory market power theory of establishing dominance can be used to circumvent the difficulties in establishing traditional market dominance.

Second, the Commission must prove the price at issue was indeed excessive.⁹⁸ In *United Brands v. Commission*, the European Court of Justice determined a price is excessive when “it has no reasonable relation to the price of the product.”⁹⁹ To determine whether a price meets the threshold of excessive, the European Court of Justice (ECJ) employs a two-prong test. The first prong compares

91. *Id.*

92. *Id.* at 501.

93. *Id.* at 502.

94. *Id.* (explaining assessing dominance requires defining the relevant product and geographic market before determining any single company’s share of market control).

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 502–03.

99. Case 27/76, *United Brands v. Comm’n*, 1978 E.C.R. 207 (holding price is unfair when there is no reasonable relationship between the price of the product and its economic value).

the “actual price” of the good with its “actual cost.”¹⁰⁰ The second prong considers whether the price is either unfair outright, or unfair when compared to competing products in the same market, prices of similar goods in different markets, and prices of the particular good over time.¹⁰¹ This analysis raises issues in the context of COVID-19 price gouging because of the difficulties associated with accurately determining producers’ costs, the efficiency of independent firms and how much profit margin should be acceptable.¹⁰²

D. South African Anti-Price Gouging Measures

South Africa, like many countries in 2020, has dealt with a myriad of price gouging complaints. Price gouging complaints in South Africa are handled under the Competition Amendment Act (Competition Act).¹⁰³ The below discussion will outline the elements of a price-gouging claim brought under the Competition Amendment Act.

Prior to bringing a claim under the Competition Act, firm dominance must be established. Under the Competition Act, the bar for dominance is low: any firm with more than 45% market share is irrefutably presumed to have dominance while any firm controlling more than 35% of a market is rebuttably presumed to have dominance.¹⁰⁴ Further, firms with less than 35% market share can be found dominant if they possess “market power” – defined as “the power of a firm to control prices, to exclude competition, or to behave to an appreciable extent independent of its competitors, customers, or suppliers.”¹⁰⁵

Finally, in the context of COVID-19, the South African Competition Tribunal (Tribunal) clarified their position that the Tribunal has the power, in public health emergencies, to strictly monitor prices of essential and life-saving goods.¹⁰⁶ The power, while not expressly codified in the Competition Act, appears to go unchallenged in recent litigation over COVID-19 related price

100. Giosa, *supra* note 88, at 502–03.

101. *Id.*

102. *Id.*

103. John Oxenham et al., *COVID-19 Price Gouging Cases in South Africa: Short-term Market Dynamics with Long-term Implications for Excessive Pricing Cases*, 11 J. OF EUR. COMPETITION L. & PRAC. 524, 524 (2020).

104. *Id.*

105. *Id.*

106. *Id.*

gouging.¹⁰⁷

IV. ANALYSIS OF ISSUES

State-by-state price gouging legislation is inadequate in dealing with price gouging during a pandemic. The breadth of price-gouging on Amazon's platform throughout the COVID-19 pandemic is indicative of the failure of current anti-price gouging regulation.¹⁰⁸ In just the first few weeks of the pandemic, state Attorney Generals across the country struggled to keep pace with the inundation of price gouging complaints.¹⁰⁹ In many cases, the most Attorney Generals can do to assuage the flood of unscrupulous sellers on Amazon, and similar platforms, is plead with the e-commerce giants to enforce their own rules against price gougers.¹¹⁰

The inability of states to effectively police price gougers is not surprising when anti-price gouging statutes are analyzed in the context of COVID-19. As previously discussed, current price gouging regulation was mostly passed in the context of natural disasters.¹¹¹ Traditionally these statutes have been used primarily to threaten gas stations that raise prices in the wake of classical natural disasters such as hurricanes, tornadoes and winter storms.¹¹² This historic use case exposes two flaws in the application of current price gouging regulations in the context of COVID-19. First, it exposes that states that do not regularly experience natural disasters or extreme weather are less likely to have codified anti-price gouging measures, leaving them unprepared to deal with price gouging in the context of COVID-19. Second, this historic use case exposes that, even in jurisdictions with existing anti-price gouging laws, current iterations of anti-price gouging law are inadequate deterrents for companies such as Amazon.

107. *Id.* at 527 (claiming “material price increases of life essential items such as surgical masks, even in the short run, in a health disaster such as the Covid-19 outbreak, warrants [the Tribunal’s] intervention”).

108. *See infra* Section III.B.

109. Levenson, *supra* note 32.

110. *Id.* (stating “more than 30 state attorneys general sent letters to Facebook, Amazon, Craigslist, Ebay, and Walmart urging them to crack down on price gouging”).

111. *See infra* Section III.A.

112. *See infra* Section III.A.

A. *Shortcomings of anti-price gouging law in states that do not regularly experience natural disasters or extreme weather*

States that do not regularly experience natural disasters or extreme weather are less likely to have codified anti-price gouging measures, leaving them unprepared to deal with price gouging. Since anti-price gouging regulation adoption closely tracks states that regularly experience natural disasters, many states that do not regularly face such disasters do not have anti-price gouging regulation.¹¹³ When COVID-19 initially started to spread through the United States, Attorney Generals in states such as Maryland and Arizona had no means by which to protect consumers or deter bad actors.

In recognition of the situation's propensity for price gouging, some states that did not have pre-existing anti-price gouging regulations passed emergency price gouging bills.¹¹⁴ However, even these last-ditch efforts to quell price gouging are cumbersome and difficult to apply. By Maryland's Attorney General's own admission, the emergency price gouging law that was enacted, a percentage increase cap measure that caps allowable increases at a 10% increase in profits, is difficult to enforce because of issues in determining how much a price increase relates to a parallel increase in profits.¹¹⁵ Additionally, COVID-19 has resulted in retailers selling goods they previously never sold, making a comparison of pre and post COVID-19 prices impossible, and creating a perverse incentive to initiate sales of new goods at exorbitant prices.¹¹⁶

B. *Current anti-price gouging law fails to deter companies like Amazon.*

Even in jurisdictions with anti-price gouging law, the current price gouging regulation is a poor deterrent for companies such as Amazon. The State-level regulation written to deter mom-and-pop stores and local gas stations from gouging consumers during natural disasters, predominately hurricanes and earthquakes, fails to consider the unique incentives and scale of companies like Amazon.¹¹⁷ While

113. Rapp, *supra* note 6, at 542.

114. Danielle E. Gaines, *AG's Office Pursuing Hundreds of Price-Gouging Complaints*, MD. MATTERS (Apr. 15, 2020), <https://www.marylandmatters.org/blog/ags-office-pursuing-hundreds-of-price-gouging-complaints/>.

115. *Id.*

116. *Id.*

117. Rapp, *supra* note 6, at 542 (explaining the origins of most anti-price gouging

the current regulation is inadequate for multiple reasons, a primary reason is that the punishment available under most anti-price gouging law is likely not enough to deter companies like Amazon from price gouging.¹¹⁸ The potential deterrent effects of anti-price gouging legislation on Amazon can be looked at in two ways: (1) the deterrent impact on Amazon as a seller of its own goods and; (2) the deterrent impact on Amazon as a platform for third-party sellers.

1. Anti-price gouging regulation fails to deter Amazon from price gouging in its capacity as a seller of its own goods.

The first inquiry is to examine the deterrent impact of anti-price gouging regulation on Amazon acting in its capacity as a seller of its own goods.¹¹⁹ In addition to being concerned with profit, Amazon is interested in branding, fostering good-will and continuing to benefit from business-friendly state regulation.¹²⁰ Therefore, Amazon's potential reward is equal to its profit from gouging.¹²¹ The potential profit must be weighed against the cost of gouging. The cost of gouging is equal to the potential for loss of goodwill, fines, negative public image and penalties.¹²² For many companies the cost would likely outweigh the potential benefits. However, Amazon's actions throughout COVID-19, coupled with the sheer size of its profits, indicate it has not been deterred by current regulation.

To understand just how insufficient a deterrent the monetary penalties incurred under current anti-price gouging are in deterring Amazon, it is helpful to look at the numbers. Under California's anti-price gouging statute, each violation carries a maximum penalty of \$10,000.¹²³ In 2019, Amazon made approximately \$638 million *per day*.¹²⁴ Amazon would have to be subject to the maximum penalty for price gouging violations 63,800 times to negate one day's worth of business.

statutes lie in physical natural disasters, not deadly pandemics).

118. Bae, *supra* note 1, at 96 (explaining if the costs of getting caught price gouging do not outweigh the financial benefits of price gouging companies will continue to price gouge).

119. Class Action Compl. and Demand for Jury Trial, *supra* note 18, at 5, ¶ 6 (explaining that Amazon supplies and sells its own goods in addition to acting as an online marketplace for third-party sellers).

120. Bae, *supra* note 1, at 95.

121. *Id.* at 94.

122. *Id.*

123. CAL. PENAL CODE § 396(h) (West).

124. Dave Hamrick, *How Much Does Amazon Make in a Year?*, JUNGLESCOUT (Sept. 25, 2019) <https://www.junglescout.com/blog/how-much-does-amazon-make-in-a-year/>.

3. Anti-price gouging regulation fails to deter Amazon from allowing, or participating in, third-party price gouging on its platform.

The second inquiry is to examine the deterrent impact of price gouging legislation on Amazon acting in its capacity as an intermediary for third-party sellers.¹²⁵ In this capacity, Amazon is the “functional seller” of goods supplied by third-parties.¹²⁶ Amazon both controls and profits from these sales in spite of the goods themselves being sourced by third-parties.¹²⁷ In this role, it is relevant to examine the deterrent impact on third party sellers who are acting analogous to independent retailers.¹²⁸ The potential reward for a third-party is its potential profit from price gouging.¹²⁹ This reward is weighed against the likelihood of getting caught and the associated costs.¹³⁰

Since there are no considerations of garnering goodwill or fostering business friendly regulatory environments for third parties, the likelihood of the benefits of price-gouging outweighing the costs are significantly higher.¹³¹ The cost-benefit analysis becomes even more lopsided when one considers that individual third parties are unlikely to attract regulatory attention, with Amazon itself being the much likelier target for regulators and private lawsuits alike. Therefore, current anti-price gouging regulation is also unlikely to deter third-party sellers. More worryingly, this failure to deter price gouging will have a disproportionate impact on already vulnerable populations.

C. Vulnerable populations are uniquely harmed by price gouging in a pandemic.

A prominent argument as to why anti-price gouging is needed in post-disaster scenarios is that high prices of necessary goods will leave the economically vulnerable unable to obtain the goods they need.¹³² In ordinary post-disaster scenarios, there are three plausible reasons as to why this concern is unfounded: (1) sellers will maintain

125. Class Action Compl. and Demand for Jury Trial, *supra* note 18, at 5, ¶ 6.

126. *Id.*

127. *Id.* (explaining Amazon’s role in third-party sales ranges from “hands off” experience in which Amazon manages entire process from pricing to fulfillment, to less interactive role where there is no control over pricing).

128. Bae, *supra* note 1, at 95.

129. *Id.*

130. *Id.*

131. *Id.*

132. Brewer, *supra* note 11, at 1130.

low prices in an effort to accumulate good-will; (2) increased prices will lead to increased supply, keeping goods in traditional channels of commerce where the economically vulnerable are most likely to participate and; (3) disaster relief programs could provide economic aid to those in need.¹³³

While these three arguments may be valid during conventional, localized disasters, the impacts of COVID-19 leave them moot. First, as discussed in Section III.B.i., the desire to foster good-will has not deterred companies such as Amazon from price gouging. Second, unchecked price increases lead to items such as canned goods and hand sanitizer selling for markups of up to 600%,¹³⁴ leaving any discussion about whether the goods were also being sold on some less accessible black market irrelevant since the primary market prices had already increased to a level of inaccessibility. Finally, the disaster relief programs passed by Congress have been wholly inadequate to cover the increased costs of dealing in markets flouting price controls, especially for those who were economically disadvantaged before COVID-19.¹³⁵

Low-income communities in the United States need protection at all times, but the need becomes especially acute during times of pandemic. Many low-income jobs, such as those in retail and hospitality, are unable to be performed remotely and rarely offer paid sick leave.¹³⁶ In the United States, income is very closely related to health, with lower income brackets exhibiting increased risk of heart disease and diabetes, conditions known to increase COVID-19 comorbidity.¹³⁷ These truths show that, if for no other reason, price controls must be enhanced to protect economically vulnerable populations as current regulations fail to do so.

133. *Id.*

134. *See supra* Section III.B.

135. The one-time \$1200 stimulus payment by the federal government was not enough to cover most citizens immediate housing expenses, let alone allow them to purchase excessively expensive household goods. As the Washington Post noted “the median monthly rent in the nation is just over \$1,600.” Heather Long & Renae Merle, *Many American’s Biggest Worry Right Now is April 1 Rent and Mortgage Payments*, THE WASH. POST (Mar. 22, 2020, 3:32 PM), <https://www.washingtonpost.com/business/2020/03/22/april-rent-due-coronavirus/>.

136. *US: Address Impact of Covid-19 on Poor*, HUM. RTS. WATCH (Mar. 19, 2020, 5:48 PM), <https://www.hrw.org/news/2020/03/19/us-address-impact-covid-19-poor>.

137. *Id.*

V. PROPOSED SOLUTIONS

The federal government should become more involved in price gouging enforcement either through expansion of existing antitrust law, or the promulgation of new federal regulation. As e-commerce continues to grow, and scientists project pandemics such as COVID-19 will continue to occur more frequently,¹³⁸ the federal government should become more involved in deterring and prosecuting price gouging. Discussed below are two feasible means by which the federal government can become more involved in preventing price gouging. First, the issue could be solved by applying existing antitrust law to prosecute price gouging.¹³⁹ Second, price gouging could be attacked through promulgation of new regulations empowering agencies such as the Federal Trade Commission (FTC) to comprehensively police malfeasance.¹⁴⁰

A. *Courts should pursue price gouging claims using an expansive view of antitrust law.*

While this comment previously discussed shortcomings of antitrust law in price gouging scenarios, there are a number of reasons antitrust law is well suited to post-disaster price gouging violations and could be used in certain situations to prosecute price gougers. In the specific context of deterring large corporations from engaging in post-disaster price gouging, antitrust law has the unique ability to levy astonishing fines. Corporate violators of antitrust law face penalties up to \$100,000,000, while individuals can be fined up to \$1,000,000. In addition, perpetrators can face up to ten years in prison.¹⁴¹ These penalties are significantly beyond those levied by any state or local anti-price gouging law and would create a significantly stronger deterrent to large companies.

Hypothetically, antitrust law could be used to prosecute price gougers in a pandemic scenario by a showing that consumers within an emergency zone were charged a different price than those outside of the emergency zone with the intent to lessen competition.¹⁴² Unfortunately, American antitrust jurisprudence is mainly centered

138. John Hilsenrath, *Global Viral Outbreaks Like Coronavirus, Once Rare, Will Become More Common*, WALL ST. J. (Mar. 6, 2020, 5:30 AM), <https://www.wsj.com/articles/viral-outbreaks-once-rare-become-part-of-the-global-landscape-11583455309> (“The incidence of infectious disease events has more than doubled from the 1940s to 1960s.”).

139. *See infra* Section V.A.

140. *See infra* Section V.B.

141. *See Rapp, supra* note 6, at 540–41.

142. *See generally Rapp, supra* note 6, at 542.

around disbanding monopolies whose power could potentially be used to fix prices, making it a fairly ill-suited tool for demand shock situations such as a pandemic.¹⁴³ However, in an ideal world, tenets of American antitrust law combined with a “transitory market power”¹⁴⁴ style analysis for placing a firm in a dominant position for purposes of price gouging prosecution would yield an incredibly powerful tool with which to pursue price gougers.

B. Alternatively, Congress should pass federal anti-price gouging regulations that empower the FTC to prosecute price gougers.

The single largest advancement that could reasonably be made in the realm of anti-price gouging regulation would be the national promulgation of anti-price gouging laws. Below, this paper will discuss what a model statute could look like, and the benefits a nationally promulgated anti-price gouging regime would have over other possible solutions. Finally, this paper will discuss the likelihood of any meaningful legislation being passed.

1. Proposed structure of a federal anti-price gouging law

While there are myriad feasible ways a national anti-price gouging law could be structured, it would make the most sense to grant authority to the FTC to track prices of certain goods in emergencies, log retailers of these goods and monitor this information for signs of price gouging. This system of national oversight could employ tactics used by the European Commission in their enforcement of Article 102.¹⁴⁵ For example, a model statute could combine traditional price capping mechanisms (such as a 10% cap over pre-emergency prices) with the ability to designate market participants as being in a position of “transitory market power.” Once an actor is deemed to be in a dominant position for purposes of the statute, the FTC could subject them to higher standards of scrutiny while under a declared state of emergency. This would allow bad actors to be prosecuted across jurisdictions at a federal level without the need for myriad state level lawsuits. Furthermore, this plan would increase both judicial efficiency and uniformity.

Additionally, a proposed statute could incorporate portions of

143. Brewer, *supra* note 11, at 1111 (explaining the issue with using antitrust in its current form to pursue price gouging is the primary inquiry in antitrust lawsuits is whether or not there was a collusive act that resulted in a price change).

144. *See supra* Section III.C.

145. *See supra* Section III.C.

the South African Competition Amendment Act. Specifically, shifting the burden to the defendant to prove that a price is reasonable once a *prima facie* finding of unreasonableness has been made would serve multiple purposes.¹⁴⁶ First, it would reduce investigation costs required to examine complex supply chains and diverse markets – instead putting the onus on the offending company to show how it reasonably arrived at the price for which it listed the product for sale. Second, this requisite defense of prices in court would incentivize offending companies either to settle quickly or risk damaging their brands defending exorbitant price increases in open court.

2. Benefits of federal regulation as opposed to state regulation

There are a multitude of structural benefits to imposing federal regulation over varied state regimes. First, federal legislation sends a clear signal that price gouging is wrong. Second, federal regulation sends a stronger deterrent message to large companies who may be unphased by the threat of state litigation. Finally, a federal level anti-price gouging regime would result in a more cohesive and centralized means by which to track offenders, likely resulting in fewer wrongdoers escaping prosecution due to oversight.

In addition to imposing liability on people for wrongdoing, laws also express the values of the societies in which they are promulgated.¹⁴⁷ Similar to hate speech laws or environmental protection regulations, the passage of federal anti-price gouging law would do as much to signify societies distaste for predatory business practices in times of emergency and economic hardship as they would to actually punish price gougers.¹⁴⁸ Federal price gouging regulation, then, would express to both retailers and consumers alike the belief that protection of consumers is more highly valued than the uninfringed functioning of the free market.

Finally, federal regulation would send a stronger deterrent message to those considering gouging and also relieve pressure from overwhelmed or underprepared municipal and state governments. While Amazon claims to be in favor of price gouging regulation, their support is limited to regulations which shield Amazon from

146. John Oxenham, et al., *COVID-19 Price Gouging Cases in South Africa: Short-term Market Dynamics with Long-term Implications for Excessive Pricing Cases*, 11 J. OF EUR. COMPETITION L. & PRAC. 524, 527 (2020).

147. Cass Sunstein, *On The Expressive Function of Law*, 144 PENN. L. REV. 2021, 2023 (1996).

148. *See generally id.*

liability for price gouging on its platform.¹⁴⁹ In spite of Amazon's claims, there will almost certainly be industry pushback against any federal effort to track and prosecute price gouging.¹⁵⁰ A national plan would immediately eliminate the issue of certain states not having their own anti-price gouging regulations, as well as concerns some state courts have raised about the application of state price gouging law to online retailers.¹⁵¹

A national regime would bring multiple other benefits. Under a national regime, individuals, states and competitors would all be able to file reports centrally with the FTC. Additionally, a national anti-price gouging regime would lend a greater sense of legitimacy to the severity of the offenses. It would also open the door to a broader array of potential punitive actions. While, as mentioned above, most states utilize small fines relative to the profits of large corporations,¹⁵² the FTC may be able to request broader injunctive relief that would act as a larger deterrent to massive corporations and smaller third-party sellers alike, possibly by borrowing penalties from current antitrust law.¹⁵³

3. Likelihood of federal legislation passing

While states have been scrambling to enforce, or come up with, their own anti-price gouging regulation, the powers-that-be in Washington have also been working on federal regulation. Currently, the most promising piece of proposed legislation is the Price Gouging Prevention Act.¹⁵⁴ The legislation, which empowers the FTC to prosecute price increases of greater than 10% from pre-emergency times,¹⁵⁵ is currently in front of the House Committee on Energy and

149. *Amazon's Pandemic Price Gouging Shows Need for New Federal Law*, PUBLIC CITIZEN (Sept. 10, 2020), <https://www.citizen.org/news/amazons-pandemic-price-gouging-shows-need-for-new-federal-law/>.

150. Bae, *supra* note 1, at 99 (explaining a large barrier to effective nationwide price gouging regulation is lobbying efforts from industries such as oil that would be harmed by the regulations).

151. *Amazon's Pandemic Price Gouging Shows Need for New Federal Law*, *supra* note 148 (explaining a June 2020 ruling in which a Kentucky judge declared price gouging statutes unconstitutional as applied to online retailers due to their attempts to regulate prices outside of the states borders).

152. *See supra* Section IV.B.i.

153. 15 U.S.C. § 13(a).

154. H.R. 6472.

155. *Warren Unveils Senate Companion Bill to Stop Price Gouging During the COVID-19 Pandemic*, ELIZABETH WARREN (Apr. 10, 2020), <https://www.warren.senate.gov/newsroom/press-releases/warren-unveils-senate-companion-bill-to-stop-price-gouging-during-the-covid-19-pandemic>; *H.R. 6472 – COVID-19 Price Gouging Prevention Act*, CONGRESS.GOV (Apr. 7, 2020),

Commerce.¹⁵⁶ While public sentiment on price gouging would point to this bill easily passing, it is not clear what the bill's fate will be.

VI. CONCLUSION

Current anti-price gouging law is inadequate to deal with large e-commerce retailers in pandemic scenarios. In states that do have anti-price gouging regulation, the regulation is not strict enough to deter companies such as Amazon from price gouging. Further, many states do not even have anti-price gouging laws leaving companies free to inflate prices after disasters such as COVID-19. In response, the Federal Government should take a new approach to anti-price gouging regulation. The Federal Government should use existing antitrust law to prosecute price gougers, or pass new federal legislation under which it can successfully track and prosecute price gouging.

<https://www.congress.gov/bill/116th-congress/house-bill/6472>.

156. *Id.*