

Sticker Shock at the Pump: An Evaluation of the Massachusetts Petroleum Price-Gouging Regulation

“[D]uring any abnormal disruption of the market for consumer goods and services vital and necessary for the health, safety, and welfare of consumers resulting from stress of weather, convulsion of nature, failure or shortage of electric power or other source of energy, strike, civil disorder, war, military action, national or local emergency, or other cause of an abnormal disruption of the market which results in the declaration of a state of emergency by the governor, no party within the chain of distribution of such consumer goods or services or both may sell or offer to sell any such goods or services or both for an amount which represents an unconscionably excessive price.”¹

“Apparently, bicycles are the way to go on Martha’s Vineyard.”²

I. INTRODUCTION

On August 29, 2005, Hurricane Katrina struck the Gulf Coast of the United States.³ The storm became the costliest as well as one of the deadliest natural disasters in American history.⁴ By damaging oil drilling platforms, petroleum pipelines, and refineries, Hurricane Katrina disabled roughly 95% of the Gulf Coast’s offshore crude oil processing mechanisms, which at the time represented 27% of the total crude oil production in the United States.⁵ Following Hurricane Katrina, gasoline prices rapidly increased by more than \$.45 per gallon above the average pre-storm retail price, and extreme price fluctuations continued for weeks after.⁶ Due to the swift and seemingly

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1. 21 N.Y. JUR. 2D CONSUMER AND BORROWER PROTECTION § 518 (2010).

2. Paul Lamoureux, *No Gas Price Gouging on Vineyard*, THE DOCKET (Feb. 21, 2011), <http://masslawyersweekly.com/the-docket-blog/2011/02/21/no-gas-price-gouging-on-vineyard>.

3. See AXEL GRAUMANN ET AL., U.S. DEP’T OF COMMERCE, NAT’L OCEANIC & ATMOSPHERIC ADMIN., HURRICANE KATRINA: A CLIMATOLOGICAL PERSPECTIVE 1 (2005) (identifying region affected by Hurricane Katrina), available at <http://www.ncdc.noaa.gov/oa/reports/tech-report-200501z.pdf>.

4. See *id.* (setting forth damage statistics attributable to Katrina).

5. See FED. TRADE COMM’N, INVESTIGATION OF GASOLINE PRICE MANIPULATION AND POST-KATRINA GASOLINE PRICE INCREASES 62-63 (2006) [hereinafter FTC REPORT], available at <http://www.ftc.gov/reports/060518PublicGasolinePricesInvestigationReportFinal.pdf> (discussing Katrina’s effect on United States petroleum industry).

6. See *id.* at i (summarizing nationwide increase in gasoline prices following Hurricane Katrina). The

excessive rise in gasoline prices, many consumers speculated that the price hikes were a result of price gouging on the part of sellers seeking a windfall in profits, as opposed to a reflection of actual petroleum shortages.⁷

Economists define “price gouging” as the practice of pricing goods above a reasonable market rate resulting in a surplus of revenue for the seller.⁸ The federal government has not passed legislation regulating price gouging, leaving the matter for determination by the individual states.⁹ Price gouging of petroleum products has emerged as an especially contentious issue.¹⁰ While many argue that gouging is a form of “profiteering” at the expense of vulnerable consumers, and therefore should be prohibited, opponents of anti-price-gouging laws contend that these statutes actually serve to hinder petroleum markets by artificially constraining the price of gasoline, resulting in

average price per gallon of gasoline in the United States in September 2005 was \$2.95, representing a 16.7% increase over the average price of gasoline in August 2005. *Id.* at 67. On September 3, 2005, the average price of regular unleaded gasoline in Massachusetts was \$3.23 per gallon, an increase of \$.65 per gallon from the pre-Katrina price. See Lucas Wall, *State Checks Gasoline Pumps for Signs of Gas Price Gouging*, BOS. GLOBE, Sept. 4, 2005, at B5 (noting immediate and significant rise in gasoline pricing in Massachusetts following Hurricane Katrina); Editorial, *In Praise of ‘Gouging’*, WALL ST. J., Sept. 7, 2005, at A16 (discussing impact of Hurricane Katrina on consumer access to oil).

7. See FTC REPORT, *supra* note 5, at i (describing concerns of gouging stemming from rapid rise in gasoline prices). After Hurricane Katrina, sizeable disparities existed in rates charged in different regions as well as in rates charged by various stations within the same city. See *id.* (noting discrepancies in local and regional gasoline prices spurred allegations of price gouging); see also Wall, *supra* note 6 (noting hundreds of price-gouging complaints reported in Massachusetts in week following Hurricane Katrina).

8. See Matt Zwolinski, *The Ethics of Price Gouging*, 18 BUS. ETHICS Q. 347, 349 (2008) (defining price gouging). Zwolinski states, “price gouging [is] a practice in which prices on certain kinds of necessary items are raised in the wake of an emergency to what appear to be unfair or exploitatively high levels.” *Id.*; see also Jeremy Snyder, *What’s the Matter with Price Gouging?*, 19 BUS. ETHICS Q. 275, 275 (2009) (defining price gouging as “unfairly taking advantage of others’ needs”). In the aftermath of Hurricane Katrina, Congress stated that price gouging existed when “the average price of gasoline available for sale to the public in September, 2005, or thereafter . . . exceeded the average price of such gasoline in that area for the month of August, 2005, unless . . . the increase is substantially attributable to additional costs.” See FTC REPORT, *supra* note 5, at iii (quoting Science, State, Justice, Commerce, and Related Agencies Appropriations Act, 2006, Pub. L. No. 109-108, § 632, 119 Stat. 2290, 2344-45 (2005)) (recognizing distinction between acceptable price increases and price gouging).

9. See U.S. CONST. amend. X (reserving states’ rights to legislate on matters not addressed by federal government); Federal Price Gouging Prevention Act, H.R. 1252, 110th Cong. (2007) (setting forth proposed but unenacted federal bill barring price gouging); Zwolinski, *supra* note 8, at 370-71 (surveying state anti-gouging laws).

10. See John R. Lott, Jr. & Sonya D. Jones, *Politicians in Need of Economics 101: Raising Prices at the Gas Pumps Before a Fuel Shortage Means We’ll Pay Less Overall, a Notion Lost on Officials Outraged by ‘Price Gouging’*, NEWSDAY, Sept. 5, 2005, at A33, available at <http://www.newsday.com/opinion/politicians-in-need-of-economics-101-1.699951> (reviewing various politicians’ positions on gasoline price gouging after Hurricane Katrina). After Hurricane Katrina, President George W. Bush, as well as other politicians, advocated a “zero tolerance” policy for gas station owners who engaged in price gouging in response to the public’s outrage regarding high fuel prices. See *id.* But see W. David Montgomery et al., *Potential Effects of Proposed Price Gouging Legislation on the Cost and Severity of Gasoline Supply Interruptions*, 3 J. COMPETITION L. & ECON. 357, 358-59 (2007) (predicting negative consequences of anti-price-gouging laws on petroleum industry).

long-term price escalations.¹¹

The Massachusetts anti-price-gouging regulation prohibits unconscionable pricing of petroleum products during a market emergency.¹² In *White v. R.M. Packer Co.*,¹³ the United States Court of Appeals for the First Circuit (First Circuit) provided guidance for applying and interpreting the regulation by devising a scheme for analyzing gross disparities in petroleum pricing.¹⁴ In construing the statute, the First Circuit analyzed the plain language of the anti-gouging regulation as well as applicable contract jurisprudence.¹⁵ Going forward, it will also be important for Massachusetts courts to address the views of economists who have evaluated restrictions on price gouging and their economic impact, while refining the existing framework for evaluating violations of the anti-gouging regulation.¹⁶

This Note will first discuss the origin and meaning of “price gouging” and the impetus for states to enact anti-gouging legislation.¹⁷ This Note will then discuss the existing types of anti-gouging laws implemented by the states as well as review the positions of opponents and proponents of price restrictions.¹⁸ This Note will proceed to consider the history and judicial interpretation of the Massachusetts anti-price-gouging regulation.¹⁹ This Note will go on to analyze the First Circuit’s use of contract law and the statute’s plain meaning in the *White* decision, as well as the possible economic effects of statutory price constraints in light of the court’s decision.²⁰ The Note will conclude by proposing recommendations for Massachusetts courts to consider when

11. See Gregory R. Kirsch, Note, *Hurricanes and Windfalls: Takings and Price Controls in Emergencies*, 79 VA. L. REV. 1235, 1258 (1993) (discussing counterproductive effects of price controls). Price increases actually encourage production of goods, whereas price controls can lead to shortages and further market disruptions. See Snyder, *supra* note 8, at 275-76 (discussing issues with disturbing market equilibriums by implementation of anti-gouging laws). But see Geoffrey C. Rapp, *Gouging: Terrorist Attacks, Hurricanes, and the Legal and Economic Aspects of Post-Disaster Price Regulation*, 94 KY. L.J. 535, 536-67 (2005) (addressing public resentment of price gouging).

12. See 940 MASS. CODE REGS. 3.18 (LexisNexis 2010) (providing Massachusetts anti-price-gouging regulation); *infra* notes 80-81 and accompanying text (defining “market emergency” and “unconscionable”); see also Rapp, *supra* note 11, at 544-46 (describing state laws defining price gouging as sale of goods at “unconscionably high prices”).

13. 635 F.3d 571 (1st Cir. 2011).

14. See *id.* at 587-88 (requiring showing of disparity in price before issue of gross margin disparity reached); *White v. R.M. Packer Co.*, No. 07-11601, slip op. at 12 (D. Mass. Jan. 6, 2010) (defining gross disparity as extremely significant price increase, apart from average market fluctuation); *infra* Part II.B.2 (discussing singular case regarding Massachusetts anti-gouging regulation and its judicial interpretation).

15. See *White*, 635 F.3d at 588-89 (providing First Circuit’s analysis).

16. See Snyder, *supra* note 8, at 278-79 (suggesting anti-gouging statutes place burdens on market).

17. See *infra* Part II.A.1 (identifying elements of price gouging); Part II.A.2 (summarizing types of anti-gouging statutes).

18. See *infra* Part II.A.2.b (discussing variables associated with anti-gouging statutes); Part II.A.3 (propounding various opinions regarding gasoline price controls).

19. See *infra* Part II.B (outlining history, motivation, and judicial interpretation of Massachusetts anti-gouging regulation).

20. See *infra* Part III.A (evaluating First Circuit’s interpretation of Massachusetts regulation).

analyzing a gouging claim in the future.²¹

II. HISTORY

A. A Price Gouging Primer

1. Origins and Characteristics of Price Gouging as Applied to Petroleum Markets

Medieval philosophers and theologians maintained that the exchange of goods for money, services, or other effects should be determined by a “just price” derived from the customary value of the goods or by the item’s natural worth.²² Modern economists have rejected the “just price” hypothesis, and instead delineate the widely accepted theory of supply and demand, whereby prices are set by the interaction of the two factors in the marketplace.²³ Even so, when prices markedly exceed what an average consumer would consider typical, particularly after a market emergency caused by a natural disaster, consumers, politicians, and the media frequently condemn these price increases as gouging.²⁴

Price gouging is defined as a process by which a seller prices a product above its market value when no alternative is easily available to consumers.²⁵ The term also refers to a merchant charging an unreasonably high rate for his merchandise to create a windfall of profits.²⁶ Because price gouging typically follows an emergency or disaster and usually involves a necessary and inelastic good that is limited due to natural constraints or production restrictions,

21. See *infra* Part III.B (providing suggestions to assist in future interpretation of Massachusetts anti-gouging regulation).

22. See MICHAEL J. SANDEL, JUSTICE: WHAT’S THE RIGHT THING TO DO? 4 (2009) (describing historical price-setting theory).

23. See Emily Bae, Article, *Are Anti-Price Gouging Legislations Effective Against Sellers During Disasters?*, 4 ENTREPRENEURIAL BUS. L.J. 83, 85 (2009) (explaining prevailing theory of supply and demand). The demand for a product is compared against the amount of the product in a seller’s supply, and a figure emerges as the price at which buyers are willing to pay and sellers can adequately vend. *Id.*

24. See SANDEL, *supra* note 22, at 4 (identifying situations leading to price-gouging allegations). Many consumers view price gouging as immoral, but may not necessarily understand the economic mechanics. See Cale Wren Davis, An Analysis of the Enactment of Anti-Price Gouging Laws 13 (Jan. 2008) (unpublished M.S. thesis, Montana State University) (on file with the Montana State University Library), <http://etd.lib.montana.edu/etd/2008/davis/DavisC0508.pdf> (discussing morality implications associated with gouging). Pursuant to consumer outrage, politicians react by enacting ineffectual anti-gouging legislation, usually while lauding their own abilities to react to their constituents’ needs. See *id.* at 13-14 (explaining possible political intentions behind enactment of anti-price-gouging laws).

25. See DAVID W. MEYER, STAFF ECONOMIST, FED. TRADE COMM’N, BUREAU OF ECONOMICS, THE VIRTUES OF “PRICE GOUGING” 1, available at <http://www.ftc.gov/be/meyergouging.pdf> (defining price gouging and attendant consequences).

26. See Kirsch, *supra* note 11, at 1235-36 (describing gouging as behavior of opportunistic and avaricious merchants).

consumers become particularly susceptible to its effects as they are most exposed.²⁷ Therefore, unlike justifiable price increases due to heightened costs or attempts to stimulate profit, gouging carries the stigma of wrongdoing as it is frequently associated with greed on the part of sellers in tandem with consumer vulnerability.²⁸

Price gouging in the petroleum market occurs when gasoline retailers charge consumers unconscionable or excessively high prices during, or shortly after, a market emergency.²⁹ A “market emergency” is defined as a period of economic unrest following a disaster when supply levels of gasoline are unstable.³⁰ Although the precise meaning of “excessively high prices” varies by jurisdiction, it generally involves pricing at a level that is unreasonable when compared to prior rates, as determined through an examination of the seller’s retail price and gross margin of profit before and after the emergency.³¹

27. See Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1513 (1998) (demonstrating prevalence of anti-gouging laws in states frequently experiencing natural disasters). Nineteen states have enacted laws that bar price gouging in the wake of a disaster, the impetus of which originated from concerns of unilateral post-disaster price increases. See Rapp, *supra* note 11, at 541-52 (explaining occurrence of natural disasters prompt legislation prohibiting gouging). The demand for inelastic goods remains relatively constant regardless of the item’s price. See Snyder, *supra* note 8, at 277 (listing examples of essential goods); Bae, *supra* note 23, at 83-84 (suggesting gouging statutes focus on vital consumer items with inelastic demand).

28. See Snyder, *supra* note 8, at 275 (asserting price gouging implies moral wrongdoing). Price gouging laws in Arkansas and California are prefaced with the policy goals of the statute—to prevent sellers from taking “unfair advantage” of buyers in times of crisis. See Zwolinski, *supra* note 8, at 349 (noting fairness consideration present in certain anti-gouging statutes). “[P]rice levels that you happen to be used to are not morally sacrosanct. They are no more special or fair than other prices that market conditions . . . may bring about.” SANDEL, *supra* note 22, at 4 (internal quotation marks omitted) (criticizing presumption of fairness attached to average prices).

29. See Bae, *supra* note 23, at 83-84 (defining elements of price gouging in context of petroleum markets). Politicians have attempted to clarify the definition of price gouging as it pertains to the sale of gasoline, but those explanations often serve to confound the topic. See Michael A. Salinger, Dir., Bureau of Econ., Fed. Trade Comm’n, Address to Antitrust Committee of Boston Bar Association: *Moneyball* and Price Gouging 2 (Feb. 27, 2006) (transcript available at <http://www.ftc.gov/speeches/salinger/060227MoneyballandPriceGouging.pdf>) (noting difficulty in articulating distinct definition of gouging). For example, “[g]ouging might be defined by reference to margin between price and some measure of cost” or as a pre-established percentage increase in price. See *id.* While some definitions utilize the term “unconscionable,” it remains unclear as to how unreasonable a price must be to reach that level. See *id.* Despite definitional imprecision, price gouging exceeds some undefined price ceiling retailers may charge for gasoline. See *id.* at 3.

30. See Bae, *supra* note 23, at 83-84 (explaining effect of disasters on product supply and demand). Economic turmoil commonly occurs after a disaster when consumers stock up on emergency supplies, and these supplies are limited because it is both difficult and costly for the seller to replenish its supply. See *id.* at 85 (linking shifts in market equilibriums to post-disaster changes in supply and demand). For example, after Hurricane Katrina temporarily disabled much of the petroleum producing infrastructure in the United States, the supply of gasoline to retailer stations was precarious, resulting in sharp increases of gasoline prices. See Montgomery et al., *supra* note 10, at 357-58 (describing unstable petroleum market post-Hurricane Katrina).

31. See MEYER, *supra* note 25, at 5 (explaining unconscionability in relation to gasoline price increases). Nevertheless, problems arise when a price hike is categorized as unconscionable because there are no clear meanings associated with the term in light of gasoline sales. See *id.*; Zwolinski, *supra* note 8, at 349 (explaining difficulty pinpointing exact meaning of “unconscionable”). Gross margins are calculated by subtracting the wholesale price per gallon of the gasoline paid by the retailer from the average price per gallon

In discussing the difference between price gouging and acceptable price hikes, the Federal Trade Commission (FTC) found it permissible for stations to raise prices due to heightened wholesale expenses and transportation charges.³² Nevertheless, while retailers' expenses, such as rent, labor, and electricity, may ultimately affect the ultimate price of gasoline, the FTC determined that the impact of those costs do not radically drive up prices, and therefore increases in those expenditures would probably not constitute a viable defense to gouging.³³

2. Price Gouging Codified

Currently, there is no federal statute prohibiting price gouging of petroleum or otherwise.³⁴ Congress has considered several proposed bills, although none so far have been passed into law.³⁵ In the absence of federal legislation, many states have created and implemented their own price-gouging laws.³⁶ At present, thirty-four states have enacted some form of an anti-gouging regulation, some encompassing all commodities and others specifically targeting petroleum.³⁷ Three types of anti-gouging statutes have emerged: the price percentage cap model, which bars price increases over a set percentage after the declaration of a state of emergency; unconscionability laws, which prohibit the sale of goods at grossly excessive prices during a market

of gasoline sold by the retailer after the natural disaster. See FTC REPORT, *supra* note 5, at 151 n.54 (articulating analysis of gross margins).

32. See FTC REPORT, *supra* note 5, at 71-75, 93 (affirming certain price hikes as acceptable). The FTC conducted an inquiry into allegations of petroleum price gouging after Hurricanes Katrina and Rita when gasoline prices were marked by rapid and significant price increases. See *id.* at iv-v. The FTC found that the price increases seen on the East Coast following Katrina were attributable to increased costs associated with the use of trucks and barges rather than pipelines for supplying the fuel to the retailers, as well as importation costs from foreign products. See *id.*

33. See *id.* at 151-52 & n.54 (noting petroleum retailers incur many costs, only some of which affect gasoline prices).

34. See Snyder, *supra* note 8, at 276 (identifying proposed, but yet unenacted, federal anti-gouging legislation). Although no specific federal law exists prohibiting gouging, the FTC does track fuel prices in the course of investigating antitrust violations in the petroleum industry. See ADAM VANN, CONG. RESEARCH SERV., GASOLINE PRICE INCREASES: FEDERAL AND STATE AUTHORITY TO LIMIT 'PRICE GOUGING' 4 (2007), available at <http://crs.ncseonline.org/NLE/CRSreports/07Jul/RS22236.pdf> (articulating FTC monitoring of gasoline pricing).

35. See Montgomery et al., *supra* note 10, at 360-62 (noting Congress's consideration of anti-price-gouging legislation proposals). An anti-price-gouging bill came before Congress in 2007 and proposed mandating price controls during a market emergency. See Federal Price Gouging Prevention Act, H.R. 1252, 110th Cong. (2007). A failed bill before Congress in 2008 sought to make selling gasoline at unconscionably excessive prices after an energy emergency unlawful. See Federal Price Gouging Prevention Act, H.R. 6346, 110th Cong. (2008).

36. See Snyder, *supra* note 8, at 276 (reiterating anti-gouging under state control due to absence of federal law). Pursuant to the Tenth Amendment, states have the power to legislate on issues if they are not solely designated to or already preempted by the federal government. See U.S. CONST. amend. X (asserting powers of regulation not controlled by federal government retained by states).

37. See Zwolinski, *supra* note 8, at 370-71 (listing goods covered, allowable price increases, and penalties under each state's anti-gouging law); see also VANN, *supra* note 34, at 2-4 (noting characteristics of various state anti-gouging laws).

emergency; and no-increase laws, which forbid any price increase beyond the amount required by the higher costs of the operation in the post-emergency market.³⁸

a. The Three Major Models of Anti-Price-Gouging Statutes

Price percentage cap statutes prohibit price increases during a declared state of emergency over a certain percentage of the good's pre-emergency price.³⁹ Percentage caps range from 10% to 25% above pre-emergency prices.⁴⁰ For example, California's price cap law bars merchants from selling goods, food, or services at a rate of more than 10% the item's price prior to the declared emergency.⁴¹ Under the California law, sellers able to demonstrate a rise in production or acquisition costs may receive an exemption from the price restrictions.⁴²

Anti-price-gouging laws under the unconscionability model bar the sale of goods at unconscionable or grossly excessive prices following a proclaimed emergency.⁴³ The statutes may define the products or services affected broadly, such as the New York and Virginia laws that pertain to "essential consumer goods," or narrowly, such as the Massachusetts and Indiana regulations that exclusively concern petroleum products.⁴⁴ The evaluation of

38. See Rapp, *supra* note 11, at 543-50 (describing types of gouging statutes). For states that experience a heightened number of natural disasters, the occurrence of a disaster is usually the trigger for application of the anti-gouging law. See VANN, *supra* note 34, at 2-3 (suggesting propensity to gouge common after natural disasters due to diminished supply). Notably, many states established their anti-gouging laws in the aftermath of notable disasters. See Rapp, *supra* note 11, at 542 (suggesting post-disaster gouging necessitated state legislature's attention and action). For example, Florida enacted its law prohibiting price gouging in response to a state of emergency after Hurricane Andrew, and Virginia passed its law barring gouging following natural disasters in the wake of Hurricane Isabel. See *id.*

39. See Rapp, *supra* note 11, at 543 (explaining price cap model).

40. See Bae, *supra* note 23, at 87 (delineating range of price caps percentages established by various jurisdictions).

41. See CAL. PENAL CODE § 396 (Deering 2010) (setting forth California anti-price-gouging law). California promulgated its anti-gouging statute in response to various allegations of gouging after the Northridge earthquake, including claims that retailers priced milk at eight dollars per gallon and plywood at two-hundred dollars per sheet. See Bae, *supra* note 23, at 87-88 (describing origin and scope of California's anti-gouging law).

42. See CAL. PENAL CODE § 396(b) (Deering 2010) (delineating exception to California's anti-gouging law).

43. See Bae, *supra* note 23, at 89-90 (reviewing type of anti-gouging law prohibiting extreme price increases post-disaster).

44. See Rapp, *supra* note 11, at 544-45 (reviewing scope of various anti-gouging statutes). The New York statute encompasses goods purchased mainly for personal or household reasons. See N.Y. GEN. BUS. LAW § 396-r (Consol. 2010) (protecting "consumer goods and services vital and necessary for the health, safety and welfare of consumers" from price gouging). Necessary goods and services under Virginia's anti-gouging law include items for which demand usually increases as a result of an emergency, such as food, medical supplies, lodging, transportation, and motor fuel. See VA. CODE ANN. § 59.1-526 (2010) (listing goods protected from price gouging by Virginia statute); see also IND. CODE ANN. § 4-6-9.1-2 (LexisNexis 2009) (defining gouging as charging unconscionable price for fuel only); 940 MASS. CODE REGS. 3.18 (LexisNexis 2010) (restricting application of anti-gouging law to sale of petroleum products).

unconscionable pricing also varies by jurisdiction.⁴⁵ The New York statute requires a broad examination of the gross disparity in pricing by comparing the price differences during an unspecified period of time before and after the emergency, whereas Indiana is more precise in that it identifies a price as unconscionable when it grossly exceeds the average price of the product seven days prior to the emergency.⁴⁶ Nevertheless, many state anti-gouging laws permit sellers to charge higher prices after an emergency if the increases are due to heightened seller costs.⁴⁷

The no-increase method is the most restrictive of the price-gouging laws because it prohibits raising the price of goods or services beyond any amount associated with the higher costs of doing business due to the market emergency.⁴⁸ The states that have chosen to adopt this type of anti-gouging law tend to sustain a significant amount of natural disasters.⁴⁹ The goods covered under the no-increase laws vary: the Georgia no-increase law applies only to essential consumer goods, whereas the Louisiana statute includes all goods and services sold during an acknowledged emergency or named tropical storm or hurricane.⁵⁰ The Connecticut no-increase statute is unique in that the price-gouging provision is only triggered by certain emergencies, namely those stemming from energy and supply crises.⁵¹

b. The Political Impetus Behind Anti-Gouging Laws

Although natural disasters often provide motivation for instituting anti-gouging legislation, politicians frequently argue such laws are necessary to

45. See *infra* note 46 (discussing various jurisdictions' definitions of "unconscionable").

46. See N.Y. GEN. BUS. LAW § 396-r(3)(b)(i)-(ii) (Consol. 2010) (stipulating New York law compares pre- and post-emergency pricing to determine unconscionability). Under the New York anti-gouging statute, proof that the price of the good after the emergency "grossly exceed[s]" the price charged before the emergency constitutes a prima facie violation of the statute. See *id.* The Indiana anti-gouging law compares the price of fuel after the emergency with the average price of fuel in a seller's area prior to the emergency, as opposed to the seller's own price, in order to determine whether the price is unconscionable. See IND. CODE ANN. § 4-6-9.1-2 (LexisNexis 2009).

47. See Rapp, *supra* note 11, at 545-46 (noting certain price increases not relevant for determination of unconscionable pricing); see also, e.g., IND. CODE ANN. § 4-6-9.1-2 (LexisNexis 2009) (permitting price increases if attributed to retailer's extra costs); VA. CODE ANN. § 59.1-527(3) (2010) (allowing price escalation if solely resulting from additional costs stemming from emergency); 940 MASS. CODE REGS. 3.18 (LexisNexis 2010) (excluding increased costs due to abnormal market disruption from evaluation of unconscionable pricing).

48. See Rapp, *supra* note 11, at 548 (classifying no increase as harshest form of price-gouging laws).

49. See VANN, *supra* note 34, at 2-3 (noting states subject to frequent natural disasters have no-increase laws).

50. See GA. CODE ANN. § 10-1-393.4 (2009) (forbidding price gouging of goods vital to welfare and safety of citizens). Louisiana's statute barring price gouging is much broader, including all goods and services sold during an emergency. See LA. REV. STAT. ANN. § 29:732(A) (2010) (detailing generous sweep of commodities covered under anti-gouging statute).

51. See CONN. GEN. STAT. § 42-232 (2010) (stating statute triggered by declaration of specific type of emergency situation).

protect societal welfare in general.⁵² Proponents of anti-gouging regulations assert that the government has an obligation to protect against unfair or deceptive practices that adversely affect the consumer.⁵³ Those who cannot afford a price increase of an essential good may be excluded from purchasing and suffer hardship as a result, while a wealthier individual may be merely inconvenienced by the increased price.⁵⁴ Lawmakers argue this discrepancy only deepens the schism between the rich and the poor, resulting in an ongoing lack of access to necessities for the poorest members of society.⁵⁵

Furthermore, legislators support anti-gouging legislation by rejecting the assumption that the free market always functions as intended.⁵⁶ Some lawmakers contend that in certain circumstances, especially when supplies are dwindling due to a market emergency, buyers are unable pursue optimal transactions with merchants.⁵⁷ As a result, buyers are forced to obtain a product—frequently a necessity—at an inflated price because there is no alternative.⁵⁸ Gougers, therefore, pervert the marketplace by raising the price of goods not in response to changing market equilibriums, but rather based on a desire to accumulate profit, which some politicians find reaches a level of offensiveness that warrants regulation.⁵⁹

52. See SANDEL, *supra* note 22, at 5 (describing opinion of proponents of anti-gouging laws).

53. See *id.* at 6-7 (reasoning support for price-gouging legislation based on concern for societal welfare and morality). Anti-gougers contend it is simply not fair that sellers may earn a surplus of profits when raising prices in disaster situations, thereby taking advantage of consumers' desperation. See Rapp, *supra* note 11, at 538 (identifying fairness argument as part of greater ethical debate surrounding price gouging).

54. See SANDEL, *supra* note 22, at 6 (examining economic and societal inequities associated with purchasing gouged commodities). Although proponents of anti-gouging legislation assert that price limits will ensure every individual has equal access to necessities, opponents argue this equality may actually result in scarcity because the laws interfere with market signals that normally would resolve the shortage. See Snyder, *supra* note 8, at 277-78 (describing possible adverse effect of instituting price-gouging laws).

55. See Bae, *supra* note 23, at 86 (explaining effect of price gouging on economic-inequality gap). To justify anti-gouging statutes, some rely on the argument that price limitations permit access to the product regardless of income. See *id.* (opining anti-gouging legislation ameliorates disparity between rich and poor's attainment of goods).

56. See SANDEL, *supra* note 22, at 7 (stating purchases made under duress not reflective of free market principles); Snyder, *supra* note 8, at 281 (observing free markets, while working toward efficiency, do not always permit equitable access). Free markets allocate scarce resources through pricing, which results in a willingness of those who desire the good the most to pay more for it than those who want the item less. See Montgomery et al., *supra* note 10, at 358-59 (describing allocative function of free markets).

57. See SANDEL, *supra* note 22, at 7 (asserting markets distorted by emergencies provide fewer opportunities for voluntary exchanges with vendor).

58. See Rapp, *supra* note 11, at 557 (suggesting post-disaster economies do not function under normal market equilibriums). Although increased demand and supply complications are features of a post-disaster economy, a seller may also fear extensive supply outages and dwindling inventory, and therefore raise his prices beyond what is necessary. See *id.* at 557-58. Thus, by limiting the amount a price can be raised, anti-gouging laws may serve to prevent overreaction and maintain prices at an optimal level for consumers. See *id.* at 558.

59. See SANDEL, *supra* note 22, at 6-7 (discussing buyers' dearth of options in marketplace during emergency). Nevertheless, if both the buyer and the seller benefit from a transaction, even if the seller accumulates a larger than normal profit, then the transaction should not be viewed as harmful because the customer has increased her overall well-being by gaining a potentially lifesaving good. See Snyder, *supra* note

Lawmakers are also influenced by consumer anger toward purported price gougers.⁶⁰ These consumers, outraged by sellers who allegedly profit from the vulnerability of buyers in times of emergency, regularly demand the prohibition of gouging.⁶¹ Although these individuals may misunderstand the actual economics of price shifts, consumer anti-gouging protests have been so pervasive as to spur politicians to actively promote statutory price regulation.⁶² Politicians also tend to support anti-gouging legislation as a means to garner support for their campaigns, as these laws serve to appease the anti-gouging cries of their constituents, while allowing the politician to appear actively concerned with society's economic welfare.⁶³

3. Gasoline Price Gouging Through an Economic Lens

While consumers and politicians generally support anti-gouging statutes, economists view price gouging as a natural feature of a functioning market.⁶⁴ Economists theorize that price controls create issues within the market such as inefficient allocation of resources, underinvestment in the supply chain, and

8, at 277-78.

60. See Rapp, *supra* note 11, at 536-37 (examining public angst regarding "skyrocketing" gasoline prices and politicians' reactions). After Hurricane Katrina, more than five thousand outraged consumers contacted the United States Department of Energy, complaining about rampant gasoline price gouging. *Thousands Complain to Feds on Gas Gouging*, MSNBC.COM, Sept. 2, 2005, <http://msnbc.msn.com/id/9170150/41529779>. Furthermore, 72% of people polled by The Washington Post and ABC News regarding gasoline price increases after Katrina attributed the fee escalations to gouging, and 80% faulted the government's ineffective regulation of oil companies. See Rapp, *supra* note 11, at 536-37.

61. See SANDEL, *supra* note 22, at 7 (recognizing consumer outrage at sellers who exploit buyers in times of emergency). At a 2005 public hearing before several Senate Committees regarding accusations of oil and gasoline gouging post-Hurricane Katrina, Senator Pete Domenici of New Mexico stated, "Most Americans and most of the polls show that our people have a growing suspicion that the oil companies are taking unfair advantage of the current market conditions to line their coffers with excess profits." GEORGE ORWEL, *BLACK GOLD: THE NEW FRONTIER IN OIL FOR INVESTORS* 118 (2006) (internal quotation marks omitted) (demonstrating public's adverse opinion of alleged gasoline gougers).

62. See Cary A. Deck & Bart J. Wilson, *Economics at the Pump*, REGULATION, Spring 2004, at 22 (highlighting exceptional outrage regarding gasoline price hikes). In response to skyrocketing gasoline prices following Hurricane Katrina, President Bush appeared on an early morning talk show and likened price gougers to looters. See Rapp, *supra* note 11, at 536 (exemplifying politicians' public outrage toward alleged price gougers).

63. See Lott & Jones, *supra* note 10, at A33 (noting anger of media and politicians regarding alleged price gouging). "Price gouging" seems to be politicians' favorite phrase these days." *Id.* (describing tendency of politicians to adopt anti-gouging platforms favored by constituents).

64. See Rapp, *supra* note 11, at 536 (portraying economists' objections to price controls and subsequent ill effects of same upon markets). Economists challenge price controls as a means of perverting supply and demand, and argue that sellers should be able to sell their wares at the price consumers are willing to pay. See Snyder, *supra* note 8, at 277-78 (explaining market equalizes pricing naturally and price controls manipulate prices to detriment of consumer); see also John Chapman, *In Defense of Price Gouging*, REAL CLEAR MARKETS (Oct. 3, 2008), http://www.realclearmarkets.com/articles/2008/10/in_defense_of_price_gouging.html (proffering price controls distort free market mechanism, resulting in inefficient price setting). *But see* Thomas Grillo, *Gas Prices Soar at Pump, Big Demand Moves by OPEC Fuel Rise*, BOS. GLOBE, Aug. 28, 1999, at A1 (arguing price setting influenced by retailers' cost).

price confusion.⁶⁵ If markets are not permitted to self-correct free from restrictive regulations, economists fear consumers will be more heavily burdened in the long run.⁶⁶

The basic supply and demand model illustrates the inefficiencies caused by price-gouging laws aimed at petroleum products.⁶⁷ In an efficient market, supply and demand equilibriums exclude some individuals from the market, which lessens demand, causing the item to become less valuable and accordingly more plentiful, which thereby grants access to those who were once excluded.⁶⁸ Legislators often institute price-gouging laws to ameliorate this problem in the aftermath of market emergencies—a solution economists find impractical as the laws create artificially low gasoline prices.⁶⁹ The low prices drive demand to levels production cannot meet, causing widespread fuel shortages.⁷⁰ Economists prefer to permit the price of gasoline to rise naturally when a market emergency is pending so that gasoline is better rationed and allocated, allowing consumers to purchase the amount of fuel they need or are financially able to obtain.⁷¹

Economists assert that lawmakers are enacting anti-gouging laws to combat pricing behavior that is not actually gouging, but rather represents a normal

65. See Montgomery et al., *supra* note 10, at 359 (outlining various arguments against anti-gouging laws in post-Katrina context); Salinger, *supra* note 29, at 4-6 (comparing various views by opponents of price gouging). “[E]conomists predict that [price controls] will have undesirable, even counterproductive, effects. Holding prices below their free market level negates the stimulative effect of potential profit that would otherwise rapidly attract additional supplies to the market.” Kirsch, *supra* note 11, at 1258 (proposing negative consequences of anti-gouging statutes).

66. See Rapp, *supra* note 11, at 550-52 (describing ill effects of gouging laws). Because penalties for gouging are severe and statutory definitions remain vague, sellers fearful of gouging allegations may keep prices artificially low, causing supply shortages and additional suffering for consumers. See Ben Lieberman, *Gasoline Price Gouging Laws Will Not Benefit Consumers*, HERITAGE FOUND. (May 23, 2007), available at <http://www.heritage.org/Research/EnergyandEnvironment/wm1469.cfm> (suggesting liability for gouging deters exercise of normal market fluctuations, thereby exacerbating supply deficiencies).

67. See Davis, *supra* note 24, at 4-5 (discussing supply and demand generally). Essentially, the supply and demand theory states that when supply increases, demand decreases, and when supply decreases, demand increases. See Bae, *supra* note 23, at 85. These fluctuations allow the market to regulate how commodities should be priced, based on how valuable they are in the market. *Id.*; see also *infra* notes 68-75 and accompanying text (reviewing economic consequences of gasoline price-gouging statutes).

68. See Salinger, *supra* note 29, at 4 (propounding theory of resource allocation by competitive markets).

69. See Davis, *supra* note 24, at 26-28 (explaining effect of poorly reasoned legislation enacted in response to price-gouging concerns). Price controls “may interfere with the natural corrective mechanisms of the market,” because retailers who keep prices artificially low in the midst of a rapidly decreasing supply force those who would pay more for the product to wait until the supply is replenished. See Rapp, *supra* note 11, at 551-52; see also Richard W. Rahn, *Price-Gouging?*, WASH. TIMES, Sept. 29, 2005, at A20 (arguing price controls interfere with efficient functioning of markets).

70. See Montgomery et al., *supra* note 10, at 376 (advocating application of efficient allocation theory). Individuals willing to pay more for gasoline would not have to wait to purchase if the price was allowed to increase, which would deter others from purchasing, resulting in a surplus supply. See Rapp, *supra* note 11, at 551-52 (explaining supply and demand’s effect on product production and retention levels).

71. See Montgomery et al., *supra* note 10, at 358-59 (portraying economists’ favored method to ensure proper allocation of resources in marketplace).

functioning market.⁷² An increase in the price of crude oil triggers an immediate rise in the cost of retail fuel products; however, decreases in crude oil prices do not elicit a corresponding and instantaneous drop in gasoline prices.⁷³ This phenomenon motivates consumer accusations of gouging, but is actually a nonmanipulative and predictable feature of the petroleum market.⁷⁴ As there is no definitive indicator of gouging, economists instead urge lawmakers to avoid instituting gasoline price limitations through anti-gouging laws as such laws burden a healthy market rather than deter misbehavior.⁷⁵

B. The History and Interpretation of the Massachusetts Anti-Gouging Regulation

1. The Enactment of the Massachusetts Anti-Gouging Regulation

The Massachusetts regulation barring price gouging is remarkable as it was not promulgated by the Massachusetts state legislature.⁷⁶ Rather, the Massachusetts Attorney General's Office enacted the regulation pursuant to its duty to enforce chapter 93A of the Massachusetts General Laws—the Massachusetts Consumer Protection Statute.⁷⁷ The Massachusetts regulation

72. See Austan Goolsbee, *Pump It Up: Don't Worry about Price Gouging Now. Worry Later*, SLATE (Sept. 7, 2005, 1:18 PM), <http://www.slate.com/id/2125814> (arguing vaguely drafted gouging statutes confuse price increases with true gouging). Judge Posner commented on the ambiguity of price-gouging definitions, stating that “more than half the states have laws forbidding ‘price gouging,’ often defined with unpardonable vagueness as charging ‘unconscionably’ high prices.” See Richard Posner, *Should Price Gouging in the Aftermath of Catastrophes Be Punished*, BECKER-POSNER BLOG (Oct. 23, 2005, 5:30 PM), <http://www.becker-posner-blog.com/2005/10/should-price-gouging-in-the-aftermath-of-catastrophes-be-punished—posner.html> (criticizing definitional inadequacies of anti-gouging statutes).

73. See Rapp, *supra* note 11, at 559 (examining wholesale and retail price shifts in petroleum market). The petroleum market's intrinsic curative system that brings the market back into equilibrium is asymmetrical in nature as price decreases tend to lag behind decreases in supply costs. See *id.* (describing petroleum market's unique balancing features).

74. See Montgomery et al., *supra* note 10, at 357-58 (differentiating normal market-based price increases from overt accusations of price gouging). When price shifts occur pursuant to a failure of supply mechanisms or natural disasters, consumers frequently charge sellers with gouging. See MEYER, *supra* note 25, at 2 (emphasizing allegations of gouging typical regardless of merit). See generally Nathan S. Balke et al., *Crude Oil and Gasoline Prices: An Asymmetric Relationship?*, FED. RESERVE BANK OF DALLAS, ECON. REV., First Quarter 1998, at 2, available at http://stat.pitt.edu/stoffer/tsa2/oil_gas.pdf (noting gasoline prices return to equilibrium at slower pace than other commodities); Severin Borenstein et al., *Do Gasoline Prices Respond Asymmetrically to Crude Oil Price Changes?*, 112 Q.J. ECON. 305 (1997) (demonstrating distribution models of gasoline and effect of industry synergies on retail sellers).

75. See Salinger, *supra* note 29, at 4-7 (explaining why price-gouging legislation heightens fallout from market catastrophe). Economists have called price gouging an “emotionally powerful but economically meaningless expression that most economists pay no attention to, because it seems too confused to bother with.” See SANDEL, *supra* note 22, at 4 (concluding price-gouging laws resist effective application).

76. See 940 MASS. CODE REGS. 3.18 (LexisNexis 2010) (setting forth Massachusetts anti-price-gouging regulation); Bae, *supra* note 23, at 90 (describing origin of Massachusetts anti-gouging regulation). The Massachusetts Attorney General enacted the regulation as an emergency measure in 1990, and later established it as a permanent regulation. See Davis, *supra* note 24, at 46.

77. See MASS. GEN. LAWS ch. 93A, § 2(a) (2009) (prohibiting unfair or deceptive trade acts); see also *id.*

only prohibits price gouging of petroleum products, unlike many other state regulations that outlaw gouging of all essential consumer goods and services.⁷⁸

To establish a claim for price gouging under the Massachusetts regulation, a claimant must prove that during a market emergency, a gasoline vendor offered to sell or did sell its product at an unconscionable price.⁷⁹ A market emergency occurs when there is an abnormal disruption in the market due to a shortage in gasoline supply or a significant increase in the price of petroleum products due to a natural disaster, war, or other catastrophic circumstances.⁸⁰ A price will be identified as unconscionable when:

(a) the amount charged represents a gross disparity between the price of the petroleum product and

1. the price at which the same product was sold or offered for sale by the petroleum-related business in the usual course of business immediately prior to the onset of the market emergency, or

2. the price at which the same or similar petroleum product is readily obtainable by other buyers in the trade area; and

(b) the disparity is not substantially attributable to increased prices charged by the petroleum-related business suppliers or increased costs due to an abnormal market disruption.⁸¹

In response to consumer concerns regarding price gouging and, in part, fueled by media speculation following Hurricane Katrina, the Commonwealth acted aggressively to identify alleged gougers and stop the practice pursuant to the anti-gouging regulation.⁸² Massachusetts dispatched state inspectors to investigate gasoline prices and evaluate whether the price of fuel constituted an exorbitant increase over pre-Katrina levels.⁸³ Additionally, the Massachusetts

§ 2(c) (authorizing Attorney General to create rules and regulations in furtherance of statute). “[T]he Legislature has, by G.L. c. 93A, § 2(c), delegated to the Attorney General the power to promulgate rules and regulations defining with specificity acts and practices which violate G.L. c. 93A, §2(a).” *Purity Supreme, Inc. v. Attorney Gen.*, 407 N.E.2d 297, 306 (Mass. 1980) (confirming power of Attorney General to promulgate regulations where and when statutorily authorized).

78. See 940 MASS. CODE REGS. 3.18 (LexisNexis 2010) (prohibiting price gouging of petroleum products exclusively); see also *supra* Part II.A.2 (reviewing anti-price-gouging laws generally throughout United States).

79. See 940 MASS. CODE REGS. 3.18 (LexisNexis 2010) (summarizing components of colorable claim under Massachusetts petroleum price-gouging regulation).

80. See 940 MASS. CODE REGS. 3.01 (LexisNexis 2010) (enumerating assortment of circumstances constituting emergencies per se, and thereby triggering regulation).

81. 940 MASS. CODE REGS. 3.18(2) (LexisNexis 2010) (defining price unconscionability).

82. See *supra* note 7 and accompanying text (observing widespread claims of gouging following Hurricane Katrina); *infra* notes 83-84 and accompanying text (reviewing Massachusetts efforts to identify and punish ostensible gougers after Hurricane Katrina).

83. See Peter J. Howe, *Romney Warns Suppliers Against Price Gouging*, BOS. GLOBE, Sept. 3, 2005, at A10 (examining Massachusetts state officials’ efforts to inquire into and combat purported gouging). Investigators found that while most stations had increased prices, the prices reflected the rise in the wholesale price of gasoline, a practice permissible under the regulation. See *id.*

Office of Consumer Affairs and Business Regulation (Office of Consumer Affairs) launched a telephone hotline inviting consumers to relay any suspicions of price gouging in the Commonwealth.⁸⁴ The Office of Consumer Affairs presented the Attorney General with approximately forty-six complaints alleging violations of the anti-gouging regulation.⁸⁵ Nevertheless, no government agency or official has confirmed an instance of gasoline price gouging in Massachusetts.⁸⁶

2. *The Judicial Interpretation of the Massachusetts Price-Gouging Regulation*

Case law addressing the Massachusetts anti-gouging regulation is limited because to date only one matter has come before two courts in Massachusetts—the United States District Court for the District of Massachusetts (Massachusetts District Court) and the First Circuit—thereby inhibiting extensive judicial interpretation and application of the regulation.⁸⁷ In *White v. R.M. Packer Co.*,⁸⁸ plaintiffs originally brought suit in Dukes County Superior Court, which defendants removed to the Massachusetts District Court, alleging that the owners of four gasoline stations on Martha's Vineyard had engaged in price gouging in violation of the Massachusetts Consumer Protection Act and, more specifically, the anti-price-gouging regulation.⁸⁹ Plaintiffs claimed defendant station owners set gasoline prices at unconscionable levels after Hurricanes Katrina and Rita in order to achieve a windfall of profits.⁹⁰ Defendants moved for summary judgment in the summer of 2009, and on

84. See Wall, *supra* note 6 (acknowledging active role taken by state government to enforce anti-gouging laws). The hotline received 331 complaints alleging price gouging on September 2, 2005 and September 3, 2005 alone. See *id.*

85. See Charles Stein, *AG Studies Price-Gouge Claims: Consumers File 46 Complaints Over Gas Run-up After Hurricane*, BOS. GLOBE, Sept. 9, 2005, at C3 (demonstrating multiple claims of gasoline price-gouging after Hurricane Katrina).

86. See Davis, *supra* note 24, at 47 (inferring allegations failed to meet bar set by regulation). “Jesse Caplan of the Attorney General’s Office said his office used ‘significant resources’ in the price gouging investigation, but no suits were filed.” *Id.*

87. See *White v. R.M. Packer Co.*, 635 F.3d 571, 587-89 (1st Cir. 2011); *White v. R.M. Packer Co.*, No. 07-11601, slip op. at 11-14 (D. Mass. Jan. 6, 2010).

88. No. 07-11601, slip op. (D. Mass. Jan. 6, 2010).

89. See Complaint and Jury Demand at 1, *White v. R.M. Packer Co.*, No. DUCV 2007-0036 (Mass. Super. Ct. Aug. 2, 2007), removed, No. 07-11601 (D. Mass. Jan. 6, 2010), *aff’d*, 635 F.3d 571 (1st Cir. 2011) (alleging defendants charged unconscionably high prices in order to obtain profit windfall); see also Defendants, Drake Petrol. Co., Kenyon Oil Co., and Mid-Valley Oil Co.’s Notice of Removal Pursuant to 28 U.S.C. § 1453 at 1, *White v. R.M. Packer Co.*, No. 07-11601 (D. Mass. Aug. 27, 2007) (removing matter to federal court on grounds of class action claim). The fifty-six count complaint alleges price fixing through collusion and price gouging on behalf of the four station owners on Martha’s Vineyard. See Complaint and Jury Demand, *supra*, at 1; see also MASS. GEN. LAWS ch. 93A, § 2 (LexisNexis 2009) (setting forth Massachusetts consumer protection law); 940 MASS. CODE REGS. 3.18 (LexisNexis 2010) (forbidding petroleum price gouging).

90. See Complaint and Jury Demand, *supra* note 89, at 18-21 (providing plaintiffs’ claims of unconscionable pricing). The plaintiffs alleged that each of the defendant gas stations substantially increased their profit margins after Hurricane Katrina by charging exorbitant rates. See *id.*

January 6, 2010, the Massachusetts District Court granted defendants' motions and dismissed the plaintiffs' claims.⁹¹

The Massachusetts District Court acknowledged that the regulation's definition of "unconscionable," and its use of the term "gross disparity," were imprecise.⁹² Relying on the regulation's plain language and Massachusetts case law, the Massachusetts District Court found that "gross disparity" was a "term of art in Massachusetts contract law" that "exists when the difference between the value and the consideration is so substantial that the exchange is facially inadequate."⁹³ By analogy, the court defined "gross disparity" in the gasoline context as a "rise in price so significant that it is facially not a normal market fluctuation."⁹⁴

The Massachusetts District Court found that the defendants' price increases did not constitute a "gross disparity" because increases of up to 11% were consistent with normal price fluctuations of the Martha's Vineyard petroleum market, and therefore did not amount to gouging.⁹⁵ The court acknowledged data indicating that gasoline prices on Martha's Vineyard were approximately 25% higher than those on Cape Cod, but found that the divergence also did not represent a "gross disparity" and did not prove price gouging.⁹⁶ The court ultimately concluded that the four Martha's Vineyard gas stations did not engage in behavior that violated the Massachusetts anti-gouging regulation.⁹⁷

On appeal to the First Circuit, plaintiffs argued that a "gross disparity" in gasoline prices can be established through changes in profit margins, and claimed evidence existed of a gross disparity in defendants' margins sufficient

91. See *White*, No. 07-11601, slip op. at 14 (offering first ever judicial interpretation of Massachusetts anti-gouging regulation).

92. See *id.* at 11-12 (observing difficulty interpreting regulation due to unclear terms in language).

93. See *id.* at 12 (defining gross disparity pursuant to usage in contract law); *Waters v. Min Ltd.*, 587 N.E.2d 231, 233-34 (Mass. 1992) (reviewing seminal case for meaning of "gross disparity").

94. See *White v. R.M. Packer Co.*, No. 07-11601, slip op. at 12 (D. Mass. Jan. 6, 2010) (applying construction of gross disparity in contract law to anti-gouging regulation). The Massachusetts District Court noted that gasoline retailers can take advantage of consumers because gasoline is a necessary item for which there is no alternative, and therefore drive an "unjustly hard bargain," resulting in detriment to the consumer. See *id.*; see also *Bae*, *supra* note 23, at 83-84 (noting demand for gasoline relatively constant regardless of price due to nature of product).

95. See *White*, No. 07-11601, slip op. at 13-14 (declaring defendants' pricing before and after market emergency within normal limits). The court therefore found, at least in this instance, that an 11% difference between pre- and post-emergency pricing is not enough to meet the threshold to constitute a "gross disparity." See *id.*; see also 940 MASS. CODE REGS. 3.18(2)(a) (LexisNexis 2010) (using but not defining term "gross disparity").

96. See *White*, No. 07-11601, slip op. at 14 (concluding difference between defendants' prices and others' prices did not represent "gross disparity"). The court indicated that the price differentials between the Cape Cod stations and the defendants' Vineyard stations were "small shifts in relative price" and "not, as a matter of law, a gross disparity constituting price gouging." See *id.* Moreover, the increased cost of supplying gasoline to Martha's Vineyard results in gasoline prices that are always slightly higher than Cape Cod, and not reflective of petroleum prices anywhere else in Massachusetts. See *id.* (noting transportation costs affect increased prices of gasoline at pump).

97. See *id.* (concluding defendants did not engage in price gouging).

to prove gouging.⁹⁸ Plaintiffs argued that the Massachusetts District Court's interpretation of the Massachusetts anti-gouging regulation was flawed due to its lack of analysis under chapter 93A of the Massachusetts General Laws, its failure to consider guidance from the FTC, and its decision not to consider New York case law construing an almost identical price-gouging statute.⁹⁹ Defendants, however, urged the First Circuit to affirm the Massachusetts District Court decision, which examined gasoline prices—not retailer profits—when reviewing price disparities under the regulation.¹⁰⁰

The First Circuit affirmed the Massachusetts District Court's opinion, holding that the defendant retailers did not engage in petroleum price gouging after Hurricane Katrina.¹⁰¹ In its opinion, the court ruled that the Massachusetts anti-gouging regulation should be interpreted according to the plain meaning of the regulation's language as well as through reference to Massachusetts contract law.¹⁰² The court reasoned that a retailer's price, as well as its gross margins, may prove determinative in analyzing whether a gross disparity exists in the retailer's pricing before and after an emergency.¹⁰³ The court refused to adopt the FTC's methodology in determining the threshold for gouging.¹⁰⁴

In examining the regulation's language, the First Circuit determined that "[t]he language of the price-gouging regulation does not reach gross disparities in price alone. The regulation is concerned with increases in both price and cost, the two factors that determine gross margin."¹⁰⁵ While acknowledging

98. See *White v. R.M. Packer Co.*, 635 F.3d 571, 586-87 (1st Cir. 2011) (summarizing plaintiffs' argument on appeal); Plaintiffs/Appellants' Brief at 43-46, *White v. R.M. Packer Co.*, 635 F.3d 571 (1st Cir. 2011) (No. 10-1130) (discussing plaintiffs' grounds for appeal and alleging gross disparity in profit margins); see also *White*, No. 07-11601, slip op. at 12-14 (interpreting term "gross disparity" and declaring defendants' price increases did not reach "gross disparity" level).

99. See Plaintiffs/Appellants' Brief, *supra* note 98, at 43-44 (summarizing plaintiffs' assignment of error).

100. See *White v. R.M. Packer Co.*, No. 07-11601, slip op. at 12 (D. Mass. Jan. 6, 2010) (examining retail price for gross disparity analysis); Defendants-Appellees' Brief at 39-40, 44, *White v. R.M. Packer Co.*, 635 F.3d 571 (1st Cir. 2011) (No. 10-1130) (urging First Circuit to affirm Massachusetts District Court decision).

101. See *White*, 635 F.3d at 588-90 (holding defendants' pricing did not violate anti-gouging regulation).

102. See *id.* at 587-89 (discussing sources utilized in interpreting regulation); *Waters v. Min Ltd.*, 587 N.E.2d 231, 234 (Mass. 1992) (providing contract law precedent relied on to construe gross disparity).

103. See *White*, 635 F.3d at 588 (stating both retail price and gross margins relevant in gouging determination).

104. See *White v. R.M. Packer Co.*, 635 F.3d 571, 589-90 (1st Cir. 2011) (concluding report inapplicable to instant action, specifically in manner plaintiffs suggest). The FTC conducted a petroleum pricing investigation in the wake of Hurricane Katrina, but utilized a definition of price gouging that was unique to the congressionally mandated inquiry, and therefore inapplicable to the instant action. See *id.* at 587 n.13. While "FTC precedent . . . [may] serve to offset the vagueness of chapter 93A . . . they are ordinarily instructive rather than conclusive." See *In re TJX Cos. Retail Sec. Breach Litig.*, 564 F.3d 489, 497 (1st Cir. 2009) (propounding occasions when FTC recommendations prove helpful to courts); *Ciardi v. F. Hoffmann-La Roche, Ltd.*, 762 N.E.2d 303, 309 (Mass. 2002) (holding use of FTC interpretations acceptable when act or practice not defined by ch. 93A). The First Circuit stated that the Attorney General had already defined price gouging under chapter 93A of the Massachusetts General Laws and its regulations, and therefore it would be inappropriate to rely exclusively on persuasive authority when the Attorney General's regulations have force of law. See *White*, 635 F.3d at 587 & n.13 (noting ch. 93A serves as source of law for defining price gouging).

105. See *White*, 635 F.3d at 588 (ruling evaluation of both price and margins important to gouging

that New York law permits post-emergency increases in gross margins to establish a claim for price gouging, the First Circuit stated that the margins should not be evaluated unless the price of the gasoline is first deemed unconscionable.¹⁰⁶ The First Circuit simply stated, “nothing in the regulation suggests that increases in gross margin alone, in the absence of any price increase and simultaneous with *declining* retail prices, can support a price-gouging claim.”¹⁰⁷

In construing “gross disparity” for the purposes of providing insight into interpreting the term “unconscionability,” the First Circuit considered the policy reasons behind the anti-gouging regulation: protecting consumers from being subjected to excessively high prices in times of emergency, particularly for basic consumer goods.¹⁰⁸ The court discussed these policy aims in light of existing Massachusetts contract law and concluded that a gross disparity exists if the consumer was unfairly and knowingly taken advantage of by the retailer.¹⁰⁹ While the court noted that the regulation’s purpose was not to require retailers to decrease their prices in direct correlation to the decline in their costs after the emergency event, it did state that retailers should not create a gross disparity in their pricing before and after an emergency.¹¹⁰

Having arrived at a definition of “gross disparity,” the First Circuit evaluated the statistical data regarding defendants’ gasoline pricing.¹¹¹ The court noted that defendants’ prices rose the week after Hurricane Katrina, as compared to

determination). Price and gross margins are interrelated. *See id.* As stated by the court, “Dramatic changes in gross margin might illustrate that a price increase is a ‘gross disparity’ in price because it reflects price increases unexplained by cost increases.” *Id.*

106. *See id.* (necessitating finding of unconscionable pricing prior to examination of gross margins). While price margins may be helpful to illustrate that a retailer’s price increase represents a gross disparity—such as when there is an extreme price increase not attributable to cost—the First Circuit stated that price margins need not be evaluated when retail prices are declining, as declining prices are by definition not unconscionable. *See id.* In reaching its conclusion, the court noted two New York cases that found price increases to be unconscionable, and therefore gouging, through an examination of gross margins. *See id.*; *People ex rel. Spitzer v. My Serv. Ctr., Inc.*, 836 N.Y.S.2d 487 (N.Y. Sup. Ct. 2007) (utilizing gross margin increases to support price gouging claim); *People ex rel. Spitzer v. Wever Petroleum, Inc.*, 827 N.Y.S.2d 813, 816 (N.Y. Sup. Ct. 2006) (holding increase in gross margins equivalent of excessive price increase).

107. *See White*, 635 F.3d at 588 (articulating interpretation of regulation through use of plain language). The crux of the court’s decision not to consider gross margins turned on the fact that the defendant stations’ prices were decreasing, therefore not signaling unconscionability. *See id.* (explaining unconscionability determination hinges on profit seeking, and decreasing price does not indicate same).

108. *See id.* at 588 (discussing political rationale for enacting anti-gouging regulation). The First Circuit noted that the policy behind the anti-gouging regulation was a factor to consider to help explain its terms. *See id.* (considering motivation for enactment of regulation in judicial interpretation).

109. *See id.* at 589 (relying on contract law for definition of “gross disparity”); *Waters v. Min Ltd.*, 587 N.E.2d 231, 234 (Mass. 1992) (describing gross disparity as seriously unfair contract, lacking adequate consideration). Such a disparity must “lead[] inevitably to the felt conclusion that knowing advantage was taken.” *Waters*, 587 N.E.2d at 234.

110. *See White v. R.M. Packer Co.*, 635 F.3d 571, 589 (1st Cir. 2011) (maintaining purpose of regulation not to dictate price for retailer, but to curb unconscionable pricing).

111. *See id.* at 587-89 (reviewing evidence of pricing discrepancies).

the week prior to Katrina, and continued to rise until early September when prices began to decline, with no station raising its price after September 7, 2005.¹¹² The court declared that these price shifts were due to “mismatches between when the stations raised their prices and when they had to pay higher costs at wholesale,” a practice not barred by the anti-gouging statute, and concluded that there was no gross disparity in defendants’ retail pricing, and therefore no gouging had occurred.¹¹³ The court also examined the numerical data concerning defendants’ gross margins, which demonstrated that there was obvious volatility in the margins; nevertheless, the First Circuit reiterated an inquiry into gross margins was inappropriate because defendants’ profit margins were highest *after* the retail price started to decrease.¹¹⁴ Therefore, the court concluded the defendants’ retail pricing of gasoline after Hurricane Katrina did not constitute price gouging because there was neither a finding of gross disparity in the defendants’ pricing nor any possibility of unconscionable pricing when the prices were decreasing amid higher post-Katrina margins.¹¹⁵

III. ANALYSIS

A. The First Circuit was Reasonable in Determining No Gouging Occurred on Martha’s Vineyard After Hurricane Katrina Pursuant to its Interpretation of 940 MASS. CODE REGS. 3.18

The Massachusetts price-gouging regulation is ambiguous due to a lack of definitions for many of its terms, but the First Circuit’s interpretation in *White* was not only successful in addressing policy and economic concerns, but provided an instructive framework for future courts addressing the regulation.¹¹⁶ In relying on Massachusetts contract law and referring to the plain language of the regulation, the court correctly clarified some of the regulation’s inherently vague terms, such as gross disparity in gasoline pricing.¹¹⁷ The court also appropriately looked at the rationale behind the regulation—to protect consumers’ access to necessary items in times of economic uncertainty—as well as retailers’ need to earn reasonable profits, and

112. *See id.* (displaying court’s inquiry regarding pricing discrepancies before and after Hurricane Katrina).

113. *See id.* at 589 (explaining holding of no disparity in defendants’ pricing). The court held that the anti-gouging regulation does not prevent retailers from raising prices when they justly anticipate future elevations in cost or when reacting to ongoing cost increases, even if the costs are in the process of decreasing. *See id.*

114. *See White*, 635 F.3d at 588-89 (demonstrating without initial finding of unconscionability in pricing, court cannot consider margins under price-gouging rule); *supra* notes 105-107 and accompanying text (setting forth gross-margin analysis).

115. *See White*, 635 F.3d at 590 (holding no violation of anti-gouging regulation).

116. *See Bae*, *supra* note 23, at 90-91 (arguing inherent flaws in Massachusetts statute limit its applicability). *See generally* *White v. R.M. Packer Co.*, 635 F.3d 571 (1st Cir. 2011) (setting forth first decision addressing Massachusetts anti-gouging regulation).

117. *See White*, 635 F.3d at 586-90 (describing substance of court’s reasoning); *supra* note 109 and accompanying text (discussing court’s construction of gross disparity).

articulated an analytical framework balancing these competing objectives.¹¹⁸

Price gouging is a complex and highly misunderstood economic phenomenon.¹¹⁹ Thus, the First Circuit's plain-meaning interpretation of the vaguely worded Massachusetts regulation was sensible as it provided a practical framework derived from terms already familiar to Massachusetts courts, without further complicating the ambiguous subject of gouging.¹²⁰ The First Circuit, in agreeing with defendants' argument, held that litigants cannot use margins alone as a proxy to measure gross disparity, and reasoned that because the regulation references "price" and "cost," those elements were determinative in evaluating the existence of a gross disparity.¹²¹ The First Circuit used the terms "price" and "cost"—presumably relying on the terms' plain meaning—in its construction of gross disparity, one of the regulation's more ambiguous terms.¹²² The court did not conduct a sophisticated mathematical analysis to determine gross disparity, but simply subtracted the average price of gasoline charged by the defendant retailers the week prior to Hurricane Katrina from the average petroleum price listed at the same stations for the week in question after Katrina.¹²³ The court's straightforward investigation into pricing through reliance on the regulation's stated terms seems appropriate and faithful to the Attorney General's intent in promulgating the regulation.¹²⁴

Construing the meaning of gross disparity by reference to other well-defined contract law terms was a wise decision by the First Circuit as it will simplify

118. See *White*, 635 F.3d at 588 (stating regulation bars unconscionable pricing, but does not demand decreased pricing in line with costs); see also SANDEL, *supra* note 22, at 5-7 (stating anti-gouging statutes provide and ensure consumer access to reasonably priced products); Snyder, *supra* note 8, at 277-78 (explaining markets set proper pricing levels, and therefore allocate profit to sellers).

119. See *supra* notes 25-28 and accompanying text (highlighting attempts to identify and clearly define price gouging).

120. See 940 MASS. CODE REGS. 3.18 (LexisNexis 2010) (setting forth definition of price gouging). On its face, the regulation provides only cursory definitions of its terms. See *White*, 635 F.3d at 588 (interpreting plain meaning of regulation).

121. See *White*, 635 F.3d at 588 (indicating regulation utilizes margins and price at pump in evaluating gross disparities). The court concluded that both price—the amount charged to buyers at the pump—and profit margins, which encompass both the price charged to consumers and the retailer's supply costs, were the determinative factors in evaluating price gouging. See *id.*

122. See *White v. R.M. Packer Co.*, 635 F.3d 571, 588 (1st Cir. 2011) (adopting plain meaning of "price" and "cost"). When interpreting a regulation, a court should apply the conventional and accepted meanings of the regulation's terms, as derived from legal and other sources presumably known by the drafters. See *Seidman v. City of Newton*, 895 N.E.2d 439, 444 (Mass. 2008) (providing proper method of interpreting statutory language).

123. See *White*, 635 F.3d at 587-88 (calculating gross disparity in gas stations' pricing). The court stated that it need not conduct a similar calculation with regard to the defendants' profit margin shifts, as the court had already concluded that the price variations did not "appear unconscionable." See *id.* at 588. Even so, the court examined the defendants' gross margins and held that the margins exhibited an inherent volatility that could not be characterized as gouging. See *id.* at 589-90.

124. See 940 MASS. CODE REGS. 3.18(2)(a) (LexisNexis 2010) (failing to define "gross disparity"); Bae, *supra* note 23, at 90 (noting statute lacks clear definition of unconscionability).

future litigation brought pursuant to the anti-gouging regulation.¹²⁵ Gross disparity is an inherently vague term that is difficult to define, especially in the context of petroleum markets where fluctuations in the price of gasoline result in new “normal” price levels every few months.¹²⁶ These fluctuations make it difficult to consistently apply a uniform definition of gouging.¹²⁷ The *White* court successfully patterned the definition of unconscionability on its meaning in contract law.¹²⁸ In contract law, an unconscionable gross disparity exists when there is some severe exploitation of the buyer in the transaction.¹²⁹ In the instant action, the First Circuit held that the disparity in the defendants’ petroleum pricing was not unconscionable because the data revealed that no retailer raised its prices after September 7, 2005.¹³⁰ Simply stated, if a price decreases after a prior increase, even if the gross margins are still inflated, then the price cannot be termed unconscionable because the price is not being held at an artificially high level.¹³¹ Therefore, a court cannot conclude that retailers are unfairly or deceptively taking advantage of consumers when prices are decreasing.¹³²

The First Circuit also judiciously balanced the regulation’s consumer protection goals against the economic interest of petroleum retailers.¹³³ The court recognized that the government cannot force retailers to drop their prices in tandem with decreases in their supply costs, even after the supply crisis has passed.¹³⁴ The court also acknowledged that decreases in the price of

125. See *White*, 635 F.3d at 589 (analogizing gross disparity by reference to its meaning in contract law). “Where recognized legal terms and concepts are employed in a regulation, those terms and concepts should be construed in light of their commonly accepted legal sense.” Defendants-Appellees’ Brief, *supra* note 100, at 40 (emphasizing interpretation of language based on previously construed meaning); see also *infra* notes 126-130 and accompanying text (discussing court’s reliance on contract law in statutory construction).

126. See *Davis*, *supra* note 24, at 4-5 (addressing how markets reallocate pricing based upon supply availability and demand of product).

127. See *Salinger*, *supra* note 29, at 5-6 (articulating natural market equilibriums affect price of gasoline, thus no normative price exists).

128. See *White v. R.M. Packer Co.*, 635 F.3d 571, 589 (1st Cir. 2011) (applying contract law understanding of “unconscionable” to Massachusetts anti-gouging regulation); Defendants-Appellees’ Brief, *supra* note 100, at 43-45 (urging court to rely on parallels from contract law in interpreting regulation).

129. See *Waters v. Min Ltd.*, 587 N.E.2d 231, 234 (Mass. 1992) (examining Massachusetts contract law regarding gross disparity in consideration); see also *Snyder*, *supra* note 8, at 275 (averring price gouging carries “strong negative moral valance”).

130. See *White*, 635 F.3d at 589 (stating increases in prices occurred over very short period of time during purported market emergency). The gasoline retailers were merely responding to shifts in access to products and typical market fluctuations resulting from the same. *Id.*

131. See *supra* notes 25-28 (stating gouging means pricing excessively above market rate).

132. See *supra* note 130 and accompanying text (explaining role of declining prices in gouging determination).

133. See *White*, 635 F.3d at 589 (holding decreasing prices not unconscionable); 940 MASS. CODE REGS. 3.18 (LexisNexis 2010) (providing regulation to protect consumers from unfair or deceptive petroleum pricing practices); *Bae*, *supra* note 23, at 85 (describing how market forces affect business’s price setting).

134. See *White v. R.M. Packer Co.*, 635 F.3d 571, 588 (1st Cir. 2011) (limiting scope of anti-gouging regulation and barring price setting by third parties for sellers).

wholesale fuel do not automatically trigger an instantaneous drop in prices at the pump, but result in a slow decline back to normal pricing levels.¹³⁵ In considering both of these concepts, the court correctly declared that this market phenomenon is not an excuse for retailers to create unconscionable gross disparities in pricing, thereby indicating that the regulation has a distinct, albeit narrow, purpose that is enforceable under circumstances exceeding typical market reactions or fluctuations.¹³⁶ Thus, the *White* court's reliance on an unconscionability standard serves to further elucidate the meaning of gross disparity and puts retailers on notice that there are limits on price increases for consumer goods.¹³⁷

By construing the regulation to exclude reasonable market volatility and by limiting its applicability to unconscionable instances of gross disparity in pricing, the First Circuit successfully protected Massachusetts citizens from the possibility of unfair and deceptive pricing in the petroleum industry.¹³⁸ The court encouraged markets to remain competitive, even amid supply interruptions, which is vital to the health of businesses and the economy as a whole.¹³⁹ With this framework in mind, future courts should understand this regulation is not "meant to give the government control over the setting of petroleum product prices," but to propagate normal market functions while monitoring the instances of acute price increases of basic goods following a market emergency.¹⁴⁰

135. See *id.* at 589 (holding retailers not required to immediately decrease prices in response to cost decreases); *Montgomery et al.*, *supra* note 10, at 358 (noting prices typically increase in conjunction with wholesale cost, but decrease at different rates). See generally *Balke et al.*, *supra* note 74 (discussing slow curative response of petroleum market equilibriums); *Borenstein et al.*, *supra* note 74 (reviewing distribution structures of gasoline industry and describing effects on petroleum retailers).

136. See *White*, 635 F.3d at 589 (differentiating between normal market price shifts and excessively high prices not attributable to increased costs). "Unless the resulting prices are 'unconscionably high,' the price-gouging rule does not prohibit retailers from raising their prices in reasonable anticipation of future increases in costs, or after the fact in response to actual recent increases even if costs have dropped back down again." *Id.*

137. See *id.* (interpreting gross disparity by analogy to contract law).

138. See *id.* (ruling unconscionable price indicates gouging); 940 MASS. CODE REGS. 3.18 (LexisNexis 2010) (barring only unconscionable pricing, not simply high pricing by aggressive sellers). The accounting history demonstrates price fluctuations are common on Martha's Vineyard, and therefore reflect the typical operation and function of the petroleum markets. See *Defendants-Appellees' Brief*, *supra* note 100, at 48 (suggesting volatility in market not indicative of gouging, but nature of petroleum market on Vineyard).

139. See *White*, 635 F.3d at 589 (noting gouging regulation does not restrict retailers from raising prices due to anticipated cost increases); *Montgomery et al.*, *supra* note 10, at 358-59 (summarizing functions of competitive markets). Consumers may accuse station owners of gouging, but owners often must raise prices simply for the sake of their business, or else they will be forced to shutter their doors. See *Grillo*, *supra* note 64, at A1 (recognizing price setting affected by cost of doing business); see also *supra* notes 72-75 and accompanying text (highlighting consequences of mislabeling normal market fluctuations as gouging).

140. See *White v. R.M. Packer Co.*, 635 F.3d 571, 588 (1st Cir. 2011) (restricting judicial action to cases of true gouging); *supra* notes 130, 136 and accompanying text (noting need to prohibit gouging while not inhibiting normal functions of shifting market equilibriums).

B. Proposed Recommendations for Future Application of the Massachusetts Anti-Gouging Regulation

While the First Circuit provided an enlightening framework for adjudicating alleged violations of the anti-price-gouging regulation, it may be instructive for courts to consider the ruling in light of economic factors and political implications in order to ensure a healthy balance of preserving the rights of retailers, the needs of consumers, and the pull of market equilibriums.¹⁴¹

1. Massachusetts Courts Should be Wary of Purported Violations of Price Gouging Due to Misunderstandings Regarding Its Occurrence and Popularity among Politicians

The Massachusetts regulation—which does not specifically contain a statement of legislative intent—is aimed at preventing retailers from accruing undue benefits at the expense of consumers due to market disruptions that cause volatility and confusion in pricing.¹⁴² The opinion in *White* emphasizes the important policy reasons for protecting consumers from being taken advantage of by unsavory merchants who are incentivized to overprice items to accumulate profits.¹⁴³ Nevertheless, the value of anti-gouging statutes is undermined as they are often enacted as a political attempt to curry favor with constituents who are angry about the high price of commodities in a post-disaster economy.¹⁴⁴ Therefore, courts must judiciously apply the regulation and not permit its reach to extend beyond its purpose.¹⁴⁵

Under the guise of protecting public welfare, economic and otherwise, politicians support price-gouging laws because they attempt to curb the natural exclusionary effects of supply and demand by forcing prices to remain at accessible levels for all consumers.¹⁴⁶ Some scholars contend that vendors have a moral obligation to limit price increases following a disaster to capture only the marginal costs and risks resulting therefrom, in order to prevent consumer hardship.¹⁴⁷ That contention, however, presupposes that one can ascertain the marginal costs and risks with certainty in a disaster's aftermath,

141. See generally *White*, 635 F.3d 571; *infra* Parts III.B.1-3.

142. See 940 MASS. CODE REGS. 3.18 (LexisNexis 2010) (prohibiting price gouging as part of larger regulatory scheme); Bae, *supra* note 23, at 90-91 (discussing scope and goals of Massachusetts anti-gouging regulation).

143. See *White*, 635 F.3d at 588 (emphasizing anti-gouging law intended to ensure consumer protection in gasoline markets).

144. See *supra* notes 60-63 and accompanying text (asserting politicians leverage favor with constituents by propagating anti-gouging statutes).

145. See *White*, 635 F.3d at 589 (restricting application of regulation to cases involving unconscionably high prices).

146. See *supra* notes 52-54 and accompanying text (exploring political impetus for anti-gouging regulations).

147. See Snyder, *supra* note 8, at 277-78, 280 (discussing morality of vendor pricing behavior following disasters and other market disruptions).

and neglects the beneficial signaling effect rising prices have on consumer behavior.¹⁴⁸ Although it may appear immoral to exclude some people from the marketplace and permit sellers to reap benefits from selling necessities to desperate buyers, it is economically inefficient—and potentially disastrous—for markets to be disrupted further by anti-gouging laws.¹⁴⁹

Furthermore, anti-gouging statutes may adversely affect the market by banning and restricting economic transactions due to their ability to regulate market prices.¹⁵⁰ Artificially set prices force a seller to vend gasoline at a price lower than its market value, encouraging consumers to stockpile, and resulting in a demand the available supply cannot meet.¹⁵¹ Essentially, the gasoline does not get apportioned to the buyers who value the product the most—as indicated by their willingness to pay a higher price—and therefore all consumers suffer as supply levels drastically recede.¹⁵² With respect to gasoline especially, it appears more damage is done through attempts to ameliorate the rapid price increases than the actual price increases themselves, which historically have returned to a level of normalcy.¹⁵³

As suggested, the economic effects of anti-gouging statutes can be far more damaging than actual gouging.¹⁵⁴ Massachusetts courts should follow the First

148. See *id.* at 276-77 (pointing to “vague language” in many price gouging statutes); see also Chapman, *supra* note 64 (arguing price increases encourage conservation of necessities and prevent hardship).

149. See Jolls et al., *supra* note 27, at 1512-13 (recognizing well-functioning market equilibrium prices produce efficient, but sometimes inequitable, distributions). “Conventional economic analyses assume as a matter of course that excess demand for a good creates an opportunity for suppliers to raise prices and that the profit-seeking adjustments that clear the market are . . . ethically neutral, but the lay public does not share this indifference.” *Id.* at 1512 (quoting Daniel Kahneman et al., *Fairness as a Constraint on Profit Seeking: Entitlements in the Market*, 78 AM. ECON. REV. 728, 735 (1986)) (internal quotation marks omitted). The public effectively demands anti-gouging laws to ensure fairness, yet these statutes impair the natural market functions and create adverse effects on consumers. See *id.* at 1512-13.

150. See MEYER, *supra* note 25, at 4-5 (asserting anti-price-gouging statutes may worsen market situations). Without a specific definition of what constitutes price gouging, gasoline sellers may be forced to exit the market for fear of inadvertently violating the state’s anti-gouging laws. See *id.* at 5. This can only serve to further exacerbate shortages and cause additional price increases. See *id.*; see also Rapp, *supra* note 11, at 550-51 (describing disturbances to market resulting from anti-gouging laws).

151. See Rahn, *supra* note 69, at A20 (rejecting use of price caps to combat rising costs in emergencies). “Both economic theory and several thousand years of historical experience clearly demonstrate uncontrolled prices and markets provide more goods and services to those who really need or desire them far better than attempts at government control.” *Id.* If the government institutes price controls during market emergencies, market participants are unable to raise their prices, which may lead to shortages. See Montgomery et al., *supra* note 10, at 374-75 (discussing effects of price controls on supply inventories).

152. See Bae, *supra* note 23, at 85 (suggesting anti-gouging legislation causes shortages in supplies). Without anti-gouging regulations, the higher price will deter or prevent some buyers from purchasing the product, excluding them from the market and allowing the price to correct when supply becomes plentiful. See *id.*

153. See Chapman, *supra* note 64 (asserting anti-gouging statutes harm consumers by impairing market coordination); Rapp, *supra* note 11, at 558-59 (discussing unique qualities of gasoline industry resulting in complicated regulation).

154. See *supra* notes 60-63 and accompanying text (discussing political impetus motivating enactment of anti-price-gouging statutes); *supra* notes 151-153 and accompanying text (portraying adverse effect of anti-price-gouging laws on market equilibriums).

Circuit's maxim that "[t]hese are not regulations meant to give the government control over the setting of petroleum product prices," and permit application of the regulation only when gasoline prices are so blatantly high that the government must intervene to protect consumers at exceptionally vulnerable economic times.¹⁵⁵ Applying the regulation in such a manner will serve to balance the interests of consumers against the interests of retailers, and enrich the economy as whole by safeguarding vulnerable consumers while permitting appropriate price hikes.¹⁵⁶

2. *While Anti-Price-Gouging Laws are Useful to Curb Merchant Misbehavior, Courts Should Consider Economists' Views on Price Gouging*

The Massachusetts regulation, like many other states' laws, does not appear to consider the well-documented adverse effects of anti-gouging laws on market equilibriums.¹⁵⁷ The First Circuit's interpretation of the Massachusetts regulation does not take into account economists' criticisms that price-gouging statutes constrain the natural market equilibriums and usually result in more harm than good.¹⁵⁸ While the First Circuit did not deem the regulation inoperable because of its potential economic consequences, Massachusetts courts should be mindful of the economic consequences of regulations that restrict the market in order to promote a healthy petroleum-based economy.¹⁵⁹

Unrestricted markets respond to supply disruptions by efficiently allocating scarce resources through price adjustments.¹⁶⁰ For example, a high-priced gas station will lose price-conscious customers to lower-priced stations and thus will be forced to lower prices or lose business.¹⁶¹ According to the traditional economic view, anti-gouging statutes are unnecessary because the market will force sellers to price reasonably or else go out of business for lack of buyers willing to pay inflated prices.¹⁶²

After Hurricane Katrina, no seller could anticipate when regular delivery of gasoline would resume, and some gas stations raised prices in order to avoid a

155. See *White v. R.M. Packer Co.*, 635 F.3d 571, 588 (1st Cir. 2011) (dismissing broad application of gouging regulation by ruling violations limited to instances of unconscionability).

156. See *id.* (interpreting regulation so as to balance consumer and retailer interests).

157. See *Rapp*, *supra* note 11, at 535-36 (reasoning effect of anti-price-gouging laws on markets worse than effect of price gouging).

158. See *id.* (explaining unintended consequences caused by price controls implemented through anti-gouging statutes). See generally *White*, 635 F.3d 571 (noting lack of analysis regarding economic impact of price controls, specifically anti-price-gouging regulations).

159. See *supra* notes 64-65 and accompanying text (discussing negative repercussions of anti-gouging laws). See generally *White*, 635 F.3d 571 (observing silence of First Circuit regarding economic implications of anti-gouging statutes).

160. See *Montgomery et al.*, *supra* note 10, at 365 (explaining how competitive markets respond to shortages).

161. See *Rapp*, *supra* note 11, at 551-52 (restating traditional view regarding price controls interfering with forces of supply and demand).

162. See *id.* (characterizing anti-gouging statutes as impeding market functions).

rapid depletion of their supply.¹⁶³ The price increases led to allegations of price gouging, even as the FTC found that this activity did not constitute gouging, but rather reflected the market's response to diminished supply and increased wholesale and retail expenses.¹⁶⁴ In such situations, anti-gouging laws would hinder the market from self-correcting to a state of equilibrium.¹⁶⁵ Prices would therefore remain distorted for a longer period of time to the detriment of the consumer.¹⁶⁶

Accordingly, Massachusetts courts cannot allow the anti-gouging regulation to be applied indiscriminately, and must also consider economic factors such as changes in supply and demand equilibriums.¹⁶⁷ Courts should further refine the First Circuit's interpretation of the anti-gouging regulation by construing the terms "unconscionable" and "gross disparity" to refer only to blatantly offensive price hikes that reflect dishonest behavior by sellers, as opposed to responses to market changes.¹⁶⁸ Massachusetts courts addressing the anti-gouging regulation in the future should consider the relevant economic and political implications of anti-gouging regulations, and enforce the regulation sparingly so as to punish those who are actually engaging in price gouging while minimizing the effects on the natural movement of market equilibriums.¹⁶⁹

IV. CONCLUSION

Petroleum price gouging is difficult to define due to its amorphous and perplexing nature. Consequently, it is difficult to prohibit legislatively and challenging to adjudicate. The problems associated with successfully drafting and interpreting anti-gouging laws are due in part to the complex nature of the gasoline industry and its market fluctuations. Additionally, consumer

163. See Montgomery et al., *supra* note 10, at 357-58 (recalling rise in gasoline prices post-Katrina). Consumers cannot simply infer price gouging when there are discrepancies among different stations' prices. *See id.* at 358. Gasoline pricing levels are largely based on the inventory the station had in stock at the time of the market emergency, and subsequent adjustments to that price reflect the need to conserve an uncertain supply. *See id.*

164. See FTC REPORT, *supra* note 5, at 153-54 (setting forth conclusions of FTC investigation into gasoline price increases post-Katrina).

165. See Montgomery et al., *supra* note 10, at 358-59 (explaining market self-correction); Snyder, *supra* note 8, at 277-78 (defending price increases before, during, and after disasters).

166. See Chapman, *supra* note 64 (asserting harm of anti-gouging statutes on petroleum markets).

167. See Kirsch, *supra* note 11, at 1256-57 (explaining disasters create new price equilibrium due to higher demand and lower supply); see *supra* notes 68-70 and accompanying text (maintaining supply and demand variances spur corresponding price fluctuations).

168. See *White v. R.M. Packer Co.*, 635 F.3d 571, 589 (1st Cir. 2011) (defining gross disparity by analogy to unconscionability in contract law); see also 940 MASS. CODE REGS. 3.18 (LexisNexis 2010) (failing to define unconscionable for purpose of determining gouging). Laws involving unconscionability suffer from serious judicial interpretation issues due to the lawmakers' inability to set forth an unambiguous definition of gouging. See Bae, *supra* note 23, at 90-91 (noting difficulties in arriving at precise meaning of gouging).

169. See *White*, 635 F.3d at 589 (identifying "gross disparity" as most egregious level of pricing); *supra* notes 64-65, 75 (detailing arguments against gouging regulations).

confusion regarding the existence and impact of gouging, often encouraged by politicians, forces into existence anti-gouging laws that commonly cause inadvertent and undesirable results for consumers.

The First Circuit's examination of the Massachusetts anti-gouging regulation provides insight for Massachusetts courts and gasoline retailers as to what kind of pricing behavior can create a gross disparity and therefore constitute gouging. By appropriately relying on the plain meaning of the regulation and existing contract case law, the First Circuit set forth workable definitions for "gross disparity" and "unconscionability" for future courts to use in evaluating purported violations of the regulation. By utilizing the definitional scheme set forth by the First Circuit, Massachusetts should continue to interpret its anti-gouging regulation narrowly to ensure that it is targeting sellers who are actually gouging, rather than those pricing in response to the market's natural shifts. Massachusetts, in applying its anti-gouging regulation, must strike a balance between placing merchants on notice that gouging is impermissible, while still allowing petroleum markets to function without undo restraint.

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