Price Gouging, the Amazon Marketplace, and the Dormant Commerce Clause

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This Note argues that states can regulate price gouging on the Amazon Marketplace without offending the dormant commerce clause. Part I provides an overview of state price gouging statutes and enforcement efforts. Part II examines the reported price gouging, including on the Amazon Marketplace, in connection with the COVID-19 pandemic. Part III explains the dormant commerce clause jurisprudence, with a particular emphasis on the doctrine's application to state laws governing internet activities. Part IV considers the dormant commerce clause implications of regulating price gouging on the Amazon Marketplace and concludes that state price gouging laws can be enforced against both Amazon and its third-party sellers without violating the dormant commerce clause. Part IV also places the two enforcement targets in an optimal deterrence framework and identifies Amazon as the ideal regulatory target to effectuate robust enforcement of price gouging prohibitions.

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INTRODUCTION

As COVID-19 swept across the globe in early 2020, soaring prices of health-related products commanded national attention—$40 for a package of disposable face masks; $35 for a single bottle of hand sanitizer.[1] Responding to public outrage, state law enforcement officials vowed to investigate and prosecute the unscrupulous sellers engaged in price gouging in both brick-and-mortar and online storefronts.[2] Prices remained stubbornly high for months, including and especially on the Amazon Marketplace.[3]

Price gouging, the unlawful raising of prices during an emergency or other market disruption, has long been the province of state regulatory authority.[4] The diversity of state approaches to addressing price gouging has produced a regulatory patchwork with significant jurisdictional variation.[5] All jurisdictions, though, provide ineffective mechanisms for enforcement—a phenomenon that was brought to the fore during the COVID-19 pandemic.[6]

Recent underenforcement problems may be attributable to constitutional concerns. In June 2020, a federal district court enjoined the state of Kentucky from enforcing its price gouging laws against in-state third-party sellers on the Amazon Marketplace, holding that such an application violates the dormant commerce clause.[7] Although the decision was vacated on appeal by the Sixth Circuit, the district court decision sent shock waves across the states and led some to fear that the court's

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1. *See* PUBLIC CITIZEN, PRIME GOUGING: HOW AMAZON RAISED PRICES TO PROFIT FROM THE PANDEMIC 12–13 (Sept. 9, 2020), https://www.citizen.org/article/prime-gouging/ [https://perma.cc/E6UQ-U6B8] [hereinafter "PUBLIC CITIZEN"].

2. *See* Alina Selyukh, *'Stop Price Gouging,' 33 Attorneys General Tell Amazon, Walmart, Others*, NPR (Mar. 25, 2020), https://www.npr.org/sections/coronavirus-live-updates/2020/03/25/821513190/stop-price-gouging-33-attorneys-general-tell-amazon-walmart-others [https://perma.cc/DTY5-YDXZ].

3. *See* PUBLIC CITIZEN, *supra* note 1. Amazon both sells products directly (as an online retailer) and functions as a marketplace for third-party sellers. *See* Sophia Spiridakis, *What Is Amazon Marketplace? Everything You Need to Know About the Platform*, SELLER'S CHOICE (Mar. 20, 2020), https://www.sellerschoice.digital/blog/what-amazon-marketplace [https://perma.cc/W8K9-7Z2N].

4. *See generally* Note, Caitlin E. Ball, *Sticker Shock at the Pump: An Evaluation of the Massachusetts Petroleum Price-Gouging Regulation*, 44 SUFFOLK U. L. REV. 907, 912 (2011); *see also* Note, Emily Bae, *Are Anti-Price Gouging Legislations Effective Against Sellers During Disasters?*, 4 ENTREPRENEURIAL BUS. L.J. 79 (2009).

5. *See* Bae, *supra* note 4, at 83.

6. *Id.*

7. Online Merchs. Guild v. Cameron, 468 F. Supp. 3d 883, 901 (E.D. Ky. 2020), *vacated*, 995 F.3d 540 (6th Cir. 2021).

reasoning could sound the death knell for robust, or indeed *any*, regulation of price gouging on online retail platforms.[8]

The purpose of this Note is to deflate the concerns that the dormant commerce clause prevents states from regulating price gouging on the Amazon Marketplace.[9] Further, this Note argues that state price gouging laws can be enforced against out-of-state third-party sellers—and against Amazon itself—without violating the dormant commerce clause.

This Note proceeds in four Parts. Part I surveys the landscape of state price gouging laws. Part II examines the Amazon Marketplace: its architecture and role in price gouging during the COVID-19 pandemic. Part III explains the dormant commerce clause doctrine, a notoriously convoluted area of constitutional law. It first introduces the dominant analytical framework established by the Supreme Court. It then explores the complicating factor of the extraterritoriality principle and the application of this principle to state regulation of internet activity. In so doing, Part III reconciles the various threads of the dormant commerce clause doctrine and argues that the doctrine, properly understood, presents no categorical bar to state regulation of online price gouging. Finally, Part IV analyzes the application of state price gouging laws to third-party sellers and to Amazon directly, and concludes that the dormant commerce clause is not violated by either application. Drawing on optimal deterrence

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8. *See* PUBLIC CITIZEN, *supra* note 1, at 10 ("[T]he court held that the Kentucky price gouging law is likely unconstitutional because it attempts to regulate prices outside of Kentucky. This decision ultimately could prevent any state price gouging law from applying to online sales platforms such as Amazon.").

9. *Id.* at 11 (explaining that the dormant commerce clause "could prevent any state price gouging law from applying to online sales platforms such as Amazon"; arguing that *Online Merchants Guild* highlights the need for a federal, rather than state, approach to price gouging regulations); JONES DAY, WHITE PAPER: AVOIDING PRICE-GOUGING PITFALLS WHILE NAVIGATING PRICE INCREASES IN THE ERA OF COVID-19 at 9 (Aug. 2020), https://www.jonesday.com/-/media/files/publications/2020/08/avoiding-price-gouging-pitfalls-while-navigating-price-increases-in-the-era-of-covid19/files/avoiding-pricegouging-pitfalls/fileattachment/avoiding-pricegouging-pitfalls.pdf [https://perma.cc/M4GA-PYAQ] (citing *Online Merchants Guild* in noting that "the extraterritorial application of a price-gouging statute has raised constitutional issues in past cases and may render the entire statute void"); WILMERHALE, COVID-19: STATE AND LOCAL LAW ENFORCEMENT TARGETS PRICE-GOUGING PRACTICES (Mar. 31, 2020), https://www.wilmerhale.com/-/media/files/shared_content/editorial/publications/wh_publications/client_alert_pdfs/20200331-covid-19-state-and-local-law-enforcement-targets-price-gouging-practices.pdf [https://perma.cc/L2Y6-ZSU4] (noting the Fourth Circuit's determination that the dormant commerce clause is a constitutional bar to some state price gouging regulations).

theory, this Part identifies Amazon as the ideal enforcement target for efficacious regulation of online price gouging.

I. PRICE GOUGING REGULATIONS AND ENFORCEMENT

Price gouging is regulated at the state level.[10] States regulate price gouging through specific anti-price gouging statutes, broader consumer protection laws, and executive orders.[11] In most states, price gouging laws come into effect when they are "trigged" by a state authority's declaration of emergency.[12] An increase in price in non-emergency contexts is, of course, perfectly lawful—but an otherwise lawful price increase can become unlawful price gouging during a state of emergency.

Statutory definitions of price gouging, which vary across jurisdictions, fall into three broad categories: the "unconscionable increase" bans, the "percentage increase" caps, and the "outright" bans.[13] Most state price gouging laws fall within the "unconscionable increase" category, wherein an increase in price constitutes unlawful price gouging if it is "unconscionable."[14] Some states have attempted to clarify the meaning of "unconscionable," either by defining the term as a "gross disparity" between the original and increased prices before and after the declaration of an emergency or by providing that a specific percentage increase in price constitutes prima facie evidence of unconscionability.[15] The

10. *See* Bae, *supra* note 4, at 83.

11. *See, e.g.*, CAL. PENAL CODE § 396 (West 2022) (specific price gouging statute); DEL. CODE ANN. tit. 6, § 2513 (2020) (broader consumer protection law); MINN. EXEC. ORDER 20-10 (Mar. 20, 2020), https://www.leg.mn.gov/archive/execorders/20-10.pdf [https://perma.cc/2VRV-MABG] (executive order).

12. *See COVID-19 Survey of Federal and State Price Gouging Laws*, KING & SPALDING (last visited Mar. 4, 2021), https://www.kslaw.com/pages/covid-19-survey-of-federal-and-state-price-gouging-laws [https://perma.cc/8Y3V-5BH2]. Note that Michigan is the only state with a price gouging law that is not conditioned on a declaration of emergency. *See* MICH. COMP. LAWS § 445.903 (2021).

13. *See* Bae, *supra* note 4, at 83.

14. *See* KING & SPALDING, *supra* note 12. This "unconscionable" language has been expanded upon by a number of states, including Alabama, Colorado, Florida, Idaho, Illinois, Indiana, Iowa, Maine (rebuttable presumption that a price is unconscionable if it exceeds, by more than 15%, the pre-disaster prices factoring in any higher costs), Massachusetts, Missouri, New Mexico (under unfair practices act price gouging is "unreasonably increasing" the price from pre-emergency to post-emergency), New York (gross disparity), North Carolina (considerations for unconscionable increase include any increase, akin to an outright ban), Ohio, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, and Wisconsin. *Id.*

15. *See, e.g.*, ALA. CODE § 8-31-4 (2021) (25% price increase constitutes prima facie evidence of unconscionability); 73 PA. CONS. STAT. § 232.4 (2022) (20% price increase

second category—"percentage increase" caps—define price gouging as a percentage increase in price during an emergency relative to the pre-disaster price.[16] These percentage increases range from 10% to 15%, depending on the state.[17] Finally, some state price gouging laws are "outright bans" that bar any increase in price following an emergency declaration.[18] Moreover, considerable variation exists within each definitional category as to the goods and services covered by the law; some laws are narrowly tailored to specific products, while others apply indiscriminately to transactions of any good or service within the emergency area.[19]

All state prices gouging laws compare the price charged during the emergency to the price charged before the emergency; however, there is no universal standard by which states determine a product's pre-emergency price.[20] Some states define the pre-emergency price as "immediately" prior to the emergency declaration, while other states use the price charged seven, ten, or even thirty days prior to the declaration.[21] These temporal differences can be significant because the market often responds to a forecasted event before a state's price gouging laws are

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constitutes prima facie evidence of unconscionability). Note that this definition of "unconscionable" brings these "unconscionable increase" laws closer to the "percentage increase cap" model.

16. *See* Bae, *supra* note 4, at 83.

17. *See, e.g.*, CAL. PENAL CODE § 396 (West 2022) ("Upon the proclamation of a state of emergency . . . it is unlawful . . . to sell . . . for a price of more than 10 percent greater than the price charged . . . immediately prior to the proclamation or declaration of emergency."); ARK. CODE ANN. § 4-88-303(A)(1) (2021) (10% cap); KY. REV. STAT. ANN. §§ 367.372–367.378 (West 2022) (10% cap); ME. STAT. tit. 10, § 1105(3) (2021); N.J. STAT. ANN. § 56:8-108 (West 2021) (10% cap); OKLA. STAT. tit. 15, § 777.4(A) (2021) (10% cap); OR. REV. STAT. § 401.965(3) (2021) (15% cap); W. VA. CODE § 46a-6j-3(A)–(B) (2022) (10% cap).

18. *See* Bae, *supra* note 4, at 90. Hawaii, Connecticut, Georgia, Louisiana, and Mississippi all have "outright ban" laws. *Id.*

19. *See generally* Matt Zwolinski, *The Ethics of Price Gouging*, 18 BUS. ETHICS Q. 347, 349 (2008) (outlining the various formulations of price gouging in state statutes). *Compare* LA. REV. STAT. ANN. § 29:732(A) (2019) (applies to "goods and services sold within the designated emergency area"), *with* ALA. CODE § 8-31-4 (2021) (applies to goods and services "necessary for consumption or use as a direct result of the emergency").

20. See JONES DAY, *supra* note 9, at 2; *see also* Bae, *supra* note 4, at 85.

21. *See, e.g.*, VT. STAT. ANN. tit. 9, § 2461d(b) (2022) (referring to price charged in the "usual course of business immediately prior to the market emergency"); ARK. CODE ANN. § 4-88-303(d) (2021) (referring to price charged "immediately prior to the proclamation of the emergency"); VA. CODE ANN. § 59.1-527(1) (2022) (referring to the price charged during the ten days immediately prior to the disaster); 73 PA. CONS. STAT. § 232.3 (2022) (referring to price charged during the seven days immediately prior to the state of disaster or emergency); FLA. STAT. § 501.160(1)(b) (2021) (referring to price charged during the thirty days immediately prior to the state of emergency).

activated by the declaration of a state of emergency by the appropriate authority.[22] For example, steep price increases for essential goods on the Amazon Marketplace began as COVID-19 spread in other countries—well before the first declaration of a state of emergency in the United States.[23] These price increases did not constitute unlawful price gouging because they occurred prior to the declaration of emergency in the regulating jurisdiction.

State price gouging statutes also differ in the amount of time that they are in effect. Some statutes provide that the pricing restrictions will remain in effect for a limited period of time after the emergency declaration, subject to extensions by the state's governor or legislative body.[24] Other price gouging laws are coterminous with the length of the state of emergency.[25] Still others apply during the state of emergency and for a statutorily defined period of time thereafter.[26]

Additionally, the geographical scope of a state's price gouging law depends on the nature of the declared emergency.[27] The COVID-19 pandemic is unique because the virus triggered emergency declarations throughout the country—all fifty states and the District of Columbia issued declarations.[28] But usually a state's declaration of emergency responds to particular conditions

22. *See* KING & SPALDING, *supra* note 12.

23. *See* U.S. PUB. INT. RSCH. GRP. EDUC. FUND (finding that the average price of surgical masks and hand sanitizer in February 2020 was 18.5% higher than the previous three-month average, even before the first state of emergency in the U.S. was declared in March).

24. For example, the governor of Illinois declared a state of emergency on March 9, 2020 that was effective through April 30 of that year. Ill. Gubernatorial Disaster Proclamation (Mar. 9, 2020), https://www2.illinois.gov/sites/gov/Documents/CoronavirusDisasterProc-3-12-2020.pdf [https://perma.cc/4C8A-ELLK]. The governor issued subsequent proclamations extending the state of emergency in thirty-day increments. Ill. Exec. Order No. 2022-07 (Mar. 4, 2022), https://www.illinois.gov/government/executive-orders/executive-order.executive-order-number-07.2022.html [https://perma.cc/XBF9-46S9]. The Arkansas price gouging provision applies for thirty days after the declaration of emergency—a period that can be extended for additional thirty-day periods by the legislative body governing the affected area. ARK. CODE ANN. § 4-88-303(a), (c) (2021).

25. *See* KAN. STAT. ANN. § 50-6, 106(b)(2) (2021).

26. *See, e.g.*, N.J. STAT. ANN. § 56:8-109 (West 2021) (price gouging prohibition remains in effect for duration of the state of emergency and for thirty days after the emergency has ended).

27. *See* JONES DAY, *supra* note 9.

28. *See States' COVID-19 Public Health Emergency Declarations and Mask Requirements*, NATIONAL ACADEMY FOR STATE HEALTH POLICY (last visited Mar. 25, 2022), https://www.nashp.org/governors-prioritize-health-for-all/ [https://perma.cc/B9V3-X4DR].

only affecting a part or the whole of the state and may be accompanied by similar declarations in nearby states.[29]

Despite the variation across states, these price gouging laws share the common goal of consumer protection.[30] States prohibit price gouging in order to protect consumers from sellers that see disaster as an opportunity to charge excessive prices for essential goods and services during a state of emergency.[31] The regulations also effectuate an equitable allocation of essential goods between high- and low-income consumers during periods of disasters.[32]

Whereas jurisdictional approaches to statutory proscribing price gouging are varied, state enforcement mechanisms are largely uniform. Consumers are the first level of the enforcement process.[33] Consumers submit complaints of price gouging through telephone hotlines or online portals.[34] The state attorney general

29. For example, widespread fires and extreme weather conditions in California in late 2020 prompted Governor Newsom to declare a statewide emergency and issue more tailored proclamations of emergency for the areas that saw substantial burning. *See* Press Release, Gavin Newsom, Governor of California, Governor Newsom Declares State of Emergency in Napa, Sonoma and Shasta Counties, Requests Presidential Major Disaster Declaration to Bolster Response to Fires Across State (Sept. 28, 2020), https://www.gov.ca.gov/2020/09/28/governor-newsom-declares-state-of-emergency-in-napa-sonoma-and-shasta-counties-requests-presidential-major-disaster-declaration-to-bolster-response-to-fires-across-state/ [https://perma.cc/GH3G-M4XQ]. Contrast this state-specific disaster with the multistate disaster of Hurricane Katrina in 2005. The states of Alabama, Mississippi, and Louisiana all issued declarations of emergency in advance of Hurricane Katrina's landfall. SELECT BIPARTISAN COMM. TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA, 109TH CONG., A FAILURE OF INITIATIVE: FINAL REPORT OF THE SELECT BIPARTISAN COMMITTEE TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA 59, 62–63 (Comm. Print 2006), https://www.nrc.gov/docs/ML1209/ML12093A081.pdf [https://perma.cc/TP7D-LGL4]. After Hurricane Katrina's landfall, forty-four states declared emergencies in order to access federal funding to cover those states' expenses associated with sheltering the hundreds of thousands of evacuees. *Id.* at 311.

30. *See* Michael Brewer, *Planning Disaster Price Gouging Statutes and the Shortages They Create*, 72 BROOK. L. REV. 1101, 1112–15 (2007).

31. *Id.* at 1112.

32. *See* Bae, *supra* note 4, at 81 n.13; *see also* News Release, Amy Klobuchar, Senator, Klobuchar, Blumenthal, Hirono, Cortez Masto Introduce Bill to Prohibit Price Gouging During Crises (Mar. 25, 2020), https://www.klobuchar.senate.gov/public/index.cfm/news-releases?ID=543F0E36-672E-46CF-937B-02C4AFD19BB9 [https://perma.cc/GS9Z-WLK4]. In fact, many states enacted their price gouging laws in the wake of natural disasters that led to price gouging. For example, California enacted its price gouging statute in 1994, following rampant price gouging in the aftermath of the 1993 Northridge earthquake. *See* Bae, *supra* note 4, at 83–84. Similarly, Georgia passed its first price gouging statute in 1995—after record-breaking floods led to widespread price gouging. *Id.* at 91.

33. *See, e.g.*, Gary E. Lehman, *Price Gouging: Application of Florida's Deceptive and Unfair Trade Practices Act in the Aftermath of Hurricane Andrew*, 17 NOVA L. REV. 1029, 1034 (1993); *see also* Bae, *supra* note 4, at 84.

34. Widespread price gouging during COVID-19 prompted many states to establish online portals for consumer complaints. *See, e.g.*, Press Release, Andrew M. Cuomo, Governor of New York, At Novel Coronavirus Briefing, Governor Cuomo Declares State of

then investigates the complaints, though most complaints are dismissed prior to any investigation for lack of sufficient information.[35] During an investigation, if the suspected price gouger can produce evidence showing that the increase in price is the direct result of a cost increase, the price increase does not qualify as unlawful price gouging.[36] Those few investigations that do produce a cognizable claim are often settled without further legal action by a "Voluntary Assurance of Compliance," in which the alleged price gouger agrees to comply with the law and to repay consumers without admitting guilt.[37] These enforcement practices involve resource intensive, *post hoc* investigatory efforts that result in little to no penalty imposed on the alleged price gouger.

Indeed, the history of price gouging in the United States is replete with noncompliance and ineffectual enforcement. Massachusetts' repeated, failed attempts to crack down on price gouging of gasoline in the wake of Hurricane Katrina highlight the structural flaws in price gouging laws and enforcement mechanisms.[38] In August 2005, gasoline prices increased nationwide in the immediate aftermath Hurricane Katrina.[39] Massachusetts in particular experienced a rapid and significant rise in state-wide gasoline prices, which led to concerns of price gouging among state consumers.[40] The Massachusetts Office of Consumer Affairs responded "aggressively" to enforce the anti-

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Emergency to Contain Spread of Virus (Mar. 7, 2020), https://www.governor.ny.gov/news/novel-coronavirus-briefing-governor-cuomo-declares-state-emergency-contain-spread-virus [https://perma.cc/7XTP-8KPN].

35. *See* Press Release, Dana Nessel, Attorney General of Michigan, AG Nessel Continues Consumer Protection Work with Price-Gouging Enforcement (May 26, 2020), https://www.michigan.gov/ag/0,4534,7-359-92297_47203-530050--,00.html [https://perma.cc/VM7A-GWMV] ("Since early March . . . [Michigan Attorney General's Office] has received more than 4,200 complaints about businesses and individuals who are price-gouging consumers during this crisis, but . . . unfortunately, many do not contain enough information to verify the complaints as legitimate.").

36. *See* Lehman, *supra* note 33, at 1036; *see also* Bae, *supra* note 4, at 84.

37. *See* Bae, *supra* note 4, at 88.

38. *Id.* at 86–87; *see also* Ball, *supra* note 4, at 919–20.

39. *See* Ball, *supra* note 4, at 907 n.6. Hurricane Katrina caused the immediate loss of a substantial amount of the U.S. crude oil production and refining capacity. *Id.* at 907–08. Gas prices rose nationwide, which led states, such as Massachusetts, to trigger price gouging laws applied solely to the sale of petroleum products. See Cale Wren Davis, *An Analysis of the Enactment of Anti-Price Gouging Laws* 46–47 (Jan. 2008) (M.S. thesis, Montana State University) (on file with the Montana State University Library), https://scholarworks.montana.edu/xmlui/bitstream/handle/1/1145/DavisC0508.pdf [https://perma.cc/JZM8-L6V2].

40. Ball, *supra* note 4, at 907 n.6, 908 n.7.

price gouging laws.[41] The Office established a telephone hotline for consumers to report price gouging and received hundreds of complaints in the first two days alone.[42] Although the Office reported using "significant resources" to investigate consumer complaints, the Massachusetts Attorney General failed to bring even one price gouging enforcement action.[43] Massachusetts' ineffectual response to price gouging in 2005 epitomizes the problems and inefficiencies plaguing the entire anti-price gouging regulatory framework today: enforcement actions require massive regulatory resources, but rarely result in legal action or meaningful deterrence.[44]

II. THE AMAZON MARKETPLACE

As the previous Part has shown, current anti-price gouging enforcement practices are resource-intensive and inefficacious. A change in strategy may well be in order. One potential strategic change is to seek to induce compliance, rather than to focus exclusively on *post hoc* enforcement action that, as has been explained, provides limited deterrent value. Amazon is uniquely well-positioned to comply with the patchwork of state price gouging laws because the Amazon Marketplace is centralized and tightly controlled. Despite this capacity for compliance, Amazon has exploited enforcement inefficiencies and enabled price gouging to run rampant on its Marketplace.

This Part will explore the Amazon Marketplace: how it functions and how it has condoned price gouging during the coronavirus pandemic. Part II.A explains the structure and operation of the Amazon Marketplace. Part II.B surveys the systemic price gouging on the Amazon Marketplace during the COVID-19 pandemic. Finally, Part II.C describes the efforts of states to regulate price gouging on the Amazon Marketplace and evaluates the success of such efforts.

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41. *Id.* at 919.
42. *Id.* at 920.
43. Davis, *supra* note 39, at 47.
44. A similar high cost, low benefit enforcement pattern is evident in Missouri's post-Katrina price gouging enforcement. There, the state Attorney General received 350 complaints of gasoline price gouging, investigated fifty gas stations, and filed charges against just one station that had engaged in especially egregious price gouging. Indeed, the station netted a 400% profit margin increase after the hurricane. Nine other stations entered Voluntary Assurances of Compliance and paid fines ranging from $500 to $2,500. *Id.* at 62. *See also* Bae, *supra* note 4, at 88.

A. UNDERSTANDING THE AMAZON MARKETPLACE

Millions of Americans use Amazon every day to purchase household goods, personal care products, groceries, furniture, and more.[45] Over one hundred million U.S. customers pay subscription fees to access Amazon Prime benefits, like free two-day shipping.[46] Although Amazon occupies an increasingly central role in daily life, most consumers know little about how Amazon works under the hood.[47]

Amazon is both a seller and a marketplace. As a seller, Amazon sells its products directly to consumers, retaining all of the profits.[48] Amazon also provides a platform for third-parties to their sell products, taking a cut of the sales—this is the Amazon Marketplace.[49] Third-party sellers can choose to manage their own shipping, fulfillment, and customer communications, or they can opt into the Fulfilled by Amazon (FBA) program, in which Amazon handles all aspects of fulfillment, including storing, packing, and shipping.[50]

Amazon incentivizes third-party sellers to use its FBA service. Three incentives are especially significant. First, Amazon Prime members get free two-day shipping on all Amazon-fulfilled products.[51] Second, Amazon's search algorithm prioritizes, among other factors, Amazon Prime eligibility.[52] A product that is Prime-eligible is ranked above otherwise identical listings.[53] Third, the

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45. *Reach Millions of Business Customers*, AMAZON, https://sell.amazon.com/programs/amazon-business.html [https://perma.cc/AR7A-VR8R] (last visited Mar. 1, 2021).

46. Fareeha Ali, *Amazon Prime Has 126 Million Members in the US*, DIGITAL COM. 360 (Oct. 26, 2020), https://www.digitalcommerce360.com/article/amazon-prime-membership/ [https://perma.cc/L9GE-8MYW].

47. *See* Alexandra Berzon et al., *Amazon Has Ceded Control of Its Site. The Result: Thousands of Banned, Unsafe or Mislabeled Products*, WALL ST. J. (Aug. 23, 2019), https://www.wsj. com/articles/amazon-has-ceded-control-of-its-site-the-result-thousands-of-banned-unsafe-or-mislabeled-products-11566564990 [https://perma.cc/6SMH-A4TY] ("Many of the millions of people who shop on Amazon.com see it as if it were an American big-box store. . . . In practice, Amazon has increasingly evolved like a flea market. It exercises limited oversight over . . . millions of third-party sellers.").

48. *See* Spiridakis, *supra* note 3.

49. *Id.*

50. *Id.*

51. *Id.*

52. Julia Angwin & Surya Mattu, *Amazon Says It Puts Customers First. But Its Pricing Algorithm Doesn't*, PROPUBLICA (Sept. 20, 2016), https://www.propublica.org/article/amazon-says-it-puts-customers-first-but-its-pricing-algorithm-doesnt [https://perma.cc/F5M2-5WAV].

53. *7 Ways to Boost your Amazon Sales Rank in 2021*, EDESK, https://www.edesk.com/blog/amazon-sales-rank/ [https://perma.cc/Z73S-NUSM].

most desirable placement for a product is the so-called "buy box" that appears at the top of the page as a suggested purchase,[54] which almost always features an Amazon-sold or Amazon-fulfilled product, even when there are "substantially cheaper offers available from others."[55]

Amazon rigorously controls and monitors pricing of all products on the Amazon Marketplace. Dynamic pricing algorithms automatically adjust prices on its products: pricing is so dynamic that the average product on Amazon changes price every ten minutes.[56] Amazon also allows third-party sellers to set their own dynamic prices through the platform's tools for pricing automation.[57] Amazon's pricing automation tools allow third-party sellers to automate price increases without any price ceiling, which is how one otherwise unremarkable book listed on Amazon ended up priced at almost $24 million.[58] Sellers can also define automated pricing rules based on the consumer's shipping location.[59]

The above description of the Amazon Marketplace shows that Amazon determines the placement of products in customer search results based, in part, on the customer's shipping address; employs sophisticated algorithmic pricing tools to automatically increase prices *ad infinitum*; and tailors pricing based on the customer's region.[60] Amazon wields substantial control over the entire selling and buying experience, including by algorithmically setting pricing based on a number of factors, most significantly the physical

54. Angwin & Mattu, *supra* note 52.

55. *Id.*

56. Neel Mehta et al., *Amazon Changes Prices on Its Products about Every 10 Minutes—Here's How and Why They Do It*, BUS. INSIDER (Aug. 10, 2018), https://www.businessinsider.com/amazon-price-changes-2018-8 [https://perma.cc/V9B2-K9WS].

57. *Create a Pricing Rule*, AMAZON SELLER CTR., https://sellercentral.amazon.com/gp/help/external/help.html?itemID=201995750&language=en_US&ref=efph_201995750_cont_201994820 [https://perma.cc/A2X6-VTAK] (last visited Mar. 5, 2021).

58. David Z. Morris, *What Causes Crazy-High Prices on Wayfair and Amazon?*, FORTUNE (July 14, 2020), https://fortune.com/2020/07/14/wayfair-cabinet-conspiracy-algorithm-amazon-pricing-ecommerce/ [https://perma.cc/98X2-NRBF]. Though Amazon does not require it, sellers can choose to set minimum or maximum thresholds. *See also supra* note 57.

59. *Manage SKUs in Business Pricing Rules Using Regional Automate Pricing File*, AMAZON SELLER CTR., https://sellercentral.amazon.com/gp/help/external/help.html?itemID=K6MARDVE75B2WXM&language=en_US&ref=efph_K6MARDVE75B2WXM_relt_201995750 [https://perma.cc/L9M7-CVVB] (last visited Mar. 5, 2021); *see also supra* note 57.

60. These structural elements of the Amazon Marketplace bear on the potential effect to interstate commerce that would result from directly regulating Amazon for price gouging violations. *See infra* Part II.B.

location of the customer. This model allows for Amazon and third-party sellers to quickly and easily increase prices during emergencies, as was the case during the COVID-19 pandemic. Significantly, Amazon's practice of tailoring product prices based on the customer's location is relevant for enforcement of price gouging laws because of the state-specific nature of those regulations.

B. PRICE GOUGING ON AMAZON DURING THE COVID-19 PANDEMIC

News reports during the COVID-19 pandemic made clear that price gouging flourished on online retail platforms, including and especially on the Amazon Marketplace.[61] In response to overwhelming reports of price gouging on the Marketplace, Amazon proclaimed that the company had a "zero tolerance policy for price gouging" and pointed to its existing Fair Pricing Policy as an example of how the company is "working vigorously to combat price gouging."[62]

Compared to the measures taken by other online retailers, Amazon's response was downright anemic. Online retailer eBay, for example, blocked all posts of hand sanitizer or disinfectant sales.[63] Amazon, by contrast, shifted the blame to its third-party sellers who, as the company repeatedly emphasized, set their own prices and provide more than half of the products available on the

61. *See* Selyukh, *supra* note 2 (reporting that thirty-three states' attorneys general penned an open letter to e-commerce sites in response to widespread price gouging on online platforms).

62. *Price Gouging Has No Place in Our Stores*, AMAZON (Mar. 23, 2020), https://www.aboutamazon.com/news/company-news/price-gouging-has-no-place-in-our-stores [https://perma.cc/93GY-M2S8].

63. *See* Bailey Miller & Steve Nielsen, *Panic Buying Continues Amidst Coronavirus Outbreak as Stores Impose Purchase Limits*, FOX 10 PHX., (Mar. 9, 2020), https://www.fox10phoenix.com/news/panic-buying-continues-amidst-coronavirus-outbreak-as-stores-impose-purchase-limits [https://perma.cc/5EYJ-MBMX]. Kroger limited the number of cleaning products to five per order on its e-commerce site. *See* Jessica Guynn et al., *Coronavirus Fears Spark 'Panic Buying' of Toilet Paper, Water, Hand Sanitizer. Here's Why We All Need to Calm Down*, USA TODAY (Mar. 2, 2020), https://www.usatoday.com/story/money/2020/03/02/coronavirus-toilet-paper-shortage-stores-selling-out/4930420002/ [https://perma.cc/V8Q5-KGZC]. Brick-and-mortar retailers acted even more quickly to address scarcity of goods amid panic buying. Images of empty store shelves pervaded the news and social media and many brick-and-mortar retailers, including Target, Costco, and Walmart, imposed new limits on the quantity of certain items that could be purchased by customers in a single visit. *Id.*

Marketplace.[64] Although Amazon announced the suspension of thousands of third-party sellers who violated the company's pricing policies, the response was reactive.[65] That is, Amazon pursued an ineffective "whack a mole" approach that included delisting price gouged items as they were brought to the company's attention and deflecting responsibility for the prices set by its third-party sellers.[66] Amazon employed this reactive response even though it was well-positioned to *prevent* the price gouging with its existing pricing models and tools.[67]

Despite Amazon's rhetoric, however, third-party sellers were not the sole culprit: the prices of Amazon-sold products also steeply increased during the pandemic. A study by the consumer protection group Public Citizen tracked prices on ten products listed as "sold by Amazon" and likely to be deemed "essential" under existing price gouging statutes.[68] The study found that disposable face masks offered for sale by Amazon during the period from April to August 2020 saw price increases of 1,000% as compared to the pre-pandemic prices.[69] Amazon sold a disinfectant spray product for over five years at $6.99, which was increased to $13.04 as of March 19, 2020—an 87% increase in price.[70] Excessive price gouging on the Amazon Marketplace was not, therefore, limited to products sold by third-party sellers but rather extended to Amazon-sold products as well.

Amazon profited from increased sales, including of price gouged products, during the pandemic. In 2020, the company reported net sales 38% higher than in the previous year—a whopping $105.6

64. *See supra* note 62.

65. *See* Brian Huseman, Opinion, *How Amazon is Fighting Against Price Gouging Amid Coronavirus Pandemic*, TENNESSEAN (Apr. 20, 2020), https://www.tennessean.com/story/opinion/2020/04/20/coronavirus-amazon-fighting-price-gouging/5168526002/ [https://perma.cc/P6DK-E2DQ] (guest column written by Amazon's Vice President for Public Policy).

66. This criticism was first levied at Amazon in a letter signed by thirty-three state attorneys general to Jeff Bezos, founder and then-CEO of Amazon. *See* Lauren Feiner & Scott Zamost, *State AGs Call on Amazon, Facebook and Others to Crack Down on Coronavirus Price Gouging*, CNBC (Mar. 25, 2020), https://www.cnbc.com/2020/03/25/state-ags-call-on-amazon-and-others-to-prevent-coronavirus-price-gouging.html [https://perma.cc/JZA7-TL7U].

67. *See* discussion *supra* Part II.A. Amazon exerts a high level of control and customization in pricing decisions, which highlights one simple truth—Amazon is in the best position to prevent price gouging on Amazon.

68. *See* PUBLIC CITIZEN, *supra* note 1, at 12.

69. *Id.*

70. *Id.* at 12, 14.

billion increase to a total of $386.1 billion.[71] Amazon also benefited from the widespread turn to e-commerce spurred by state and local stay-at-home orders. In the two fiscal quarters preceding the pandemic, Amazon's online sales exhibited year over year growth of 15% and 25%, respectively.[72] That growth skyrocketed to 49% in the second quarter of 2020, fueled by the massive shift in consumer behavior as a result of the pandemic.[73] Third-party sellers played a role in Amazon's growth, too. In the fourth quarter of 2019 and the first quarter of 2020, Amazon's sales from third-party-seller services grew at a steady rate of 31%.[74] Amazon's sales from third-party-seller services grew at over 50% in each of the second, third, and fourth quarters of 2020.[75] In short, the pandemic delivered a windfall to Amazon while customers dealt with egregious price gouging on essential household items.

C. ANTI-PRICE GOUGING ENFORCEMENT DURING THE COVID-19 PANDEMIC

In response to the widespread and exorbitant price increases on the Amazon Marketplace during the pandemic, state attorneys general released information on their price gouging enforcement efforts. This data revealed not only the extent to which the number of anti-price gouging enforcement actions varied state-to-state, but also how even the most vigorous enforcement efforts fell woefully short of the tsunami of consumer complaints.[76] From March to May 2020, for example, the Michigan Attorney General received over 4,200 complaints of price gouging, but ultimately pursued enforcement actions against just eight third-party sellers, all of

71. *Amazon.com Announces Financial Results and CEO Transition,* AMAZON (Feb. 2, 2021), https://s2.q4cdn.com/299287126/files/doc_financials/2020/q4/Amazon-Q4-2020-Earnings-Release.pdf [https://perma.cc/4PE5-FCX3].

72. *Id.*

73. *Id.* The third and fourth quarter of 2020 saw year over year growth in online sales of 37% and 43%, respectively.

74. *Id.* Third-party-seller services include commissions, and fulfillment and shipping fees, among others. *Id.*

75. *Id.* (53%, 53%, and 54% in the second, third, and fourth quarters of 2020, respectively).

76. KING & SPALDING, *supra* note 12; Michael Levenson, *Price Gouging Complaints Surge Amid Coronavirus Pandemic*, N.Y. TIMES (Mar. 27, 2020), https://www.nytimes.com/2020/03/27/us/coronavirus-price-gouging-hand-sanitizer-masks-wipes.html [https://perma.cc/MZ38-E95V].

whom signed voluntary compliance forms.[77] During roughly that same period, the Arkansas Attorney General's Office received 2,025 complaints, 411 of which involved online sellers.[78] In response to these complaints, the state issued just seventy-nine warning letters to online sellers.[79] Illinois provides yet another example: as of August 2020, the Illinois Attorney General had received 1,800 complaints of price gouging, but had taken zero enforcement actions.[80] Many states acknowledge receiving hundreds or even thousands of price gouging complaints, but pursuing no legal action.[81]

In May 2020, the Online Merchants Guild, a trade association for online sellers, filed suit against the Kentucky Attorney General in the United States District Court for the Eastern District of Kentucky, alleging that application of the state's price gouging laws to third-party sellers on the Amazon Marketplace violated the dormant commerce clause.[82] The district court granted the Guild's motion for a preliminary injunction, concluding that the plaintiff had a likelihood of succeeding on the merits of its dormant commerce clause claim.[83] Government officials and consumer advocacy groups decried the decision, which was vacated ten months later by the Sixth Circuit in a narrow holding that did not address the other dormant commerce clause arguments raised, but

77. *See* Nessel, *supra* note 35 (listing third-party sellers who signed Assurances of Voluntary Compliance to resolve price gouging allegations).

78. *See* ATT'Y GEN. LESLIE RUTLEDGE, ATTORNEY GENERAL'S COVID-19 ACTIVITY REPORT: MARCH 11–JUNE 10, 2020, at 1, https://www.arkansasag.gov/site/assets/files/90175/ag_covid-19_report.pdf [https://perma.cc/X2VH-A3LE].

79. *Id.*

80. John O'Connor, *No Action from Pritzker's COVID-19 Price Gouging Pursuit*, ASSOCIATED PRESS (Aug. 31, 2020), https://apnews.com/article/f0c224e25e352647c987d2dbd1806f4d [https://perma.cc/Z458-QY4M].

81. For example, in testimony before the state legislature, the Connecticut Attorney General said investigators responded to 750 complaints of price gouging in 2020, but were unable to bring a single enforcement action. *Hearing on H. B. 5307: An Act Concerning Price Gouging*, 2021 Leg. Sess. (Ct. 2021) (statement of William Tong, Attorney General, Connecticut), https://portal.ct.gov/-/media/AG/Press_Releases/2019/Price-Gougin g-Testimony-HB-5307.pdf [https://perma.cc/WYH8-VQV4]. The Maine Attorney General received 83 complaints of price gouging as of April 2020; the few complaints that "appeared to have merit" were resolved by voluntary compliance agreements. *See* Randy Billings, *Maine Attorney General Fielding Dozens of Price-Gouging Complaints During Crisis*, PORTLAND PRESS HERALD (Apr. 2, 2020), https://www.pressherald.com/2020/04/02/maine-ag-receives-dozens-of-price-gouging-complaints/ [https://perma.cc/LWY3-PQ5X].

82. Online Merchs. Guild v. Cameron, 468 F. Supp. 3d 883, 889 (E.D. Ky. 2020), *vacated*, 995 F.3d 540 (6th Cir. 2021).

83. *Id.* at 902–03.

not fully briefed, before the district court.[84] The narrowness of the Sixth Circuit decision, combined with the incoherence of the dormant commerce clause doctrine, has raised questions as to whether other federal courts will uphold similar dormant commerce clause challenges to state regulations of online price gouging.[85] Nevertheless, as the next Part will show, reports of the death of regulating online price gouging have been greatly exaggerated.

III. THE DORMANT COMMERCE CLAUSE

This Part describes the dormant commerce clause doctrine and evaluates the extent to which the doctrine is implicated by the application of state price gouging laws to online sellers.

Article I of the U.S. Constitution grants Congress the power "[t]o regulate Commerce . . . among the several States."[86] The Supreme Court has long held that the Commerce Clause's affirmative grant of power to Congress impliedly constrains state power over interstate commerce.[87] A judicially-created doctrine, the so-called "dormant" commerce clause embodies the "central concern of the Framers . . . that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization."[88] Consistent with this principle, the dormant commerce clause forbids state regulations that discriminate against or excessively burden interstate commerce.[89]

The Supreme Court has articulated a two-tiered approach to analyzing state regulations under the dormant commerce clause.[90]

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84. *Online Merchs. Guild v. Cameron*, 995 F.3d 540 (6th Cir. 2021).

85. *See e.g.*, Stephen L. Carter, *Price-Gouging Laws Create a Headache for Amazon*, BLOOMBERG (May 19, 2021), https://www.bloomberg.com/opinion/articles/2021-05-19/price-gouging-laws-create-a-headache-for-amazon [https://perma.cc/M53M-RNLY] ("Still, not every federal court would reach the result the 6th Circuit. . . . At some [point] either the U.S. Supreme Court or the Congress will have to settle the matter.").

86. U.S. CONST. art. I, § 8, cl. 3.

87. The doctrine traces back to Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) and Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851).

88. Hughes v. Oklahoma, 441 U.S. 322, 325 (1979). More broadly, the dormant commerce clause doctrine reflects principles of horizontal federalism. *See* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2090 (2018) ("[T]he doctrine . . . accommodate[s] the necessary balance between state and federal power.").

89. Abutting the two tiers of review is the principle against extraterritoriality. *See infra* Part III.B.

90. *See* Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 578–79 (1986) ("This Court has adopted what amounts to a two-tiered approach to analyzing state economic regulation under the Commerce Clause.").

Under the first tier, state laws that discriminate against interstate commerce are "virtually *per se* invalid."[91] Under the second tier, state laws that "regulate[ ] even-handedly to effectuate a legitimate local public interest" with "only incidental" effects on interstate commerce are reviewed under the deferential balancing standard announced in *Pike v. Bruce Church, Inc.*, and are upheld if the burden to interstate commerce is not "clearly excessive in relation to the putative local benefits."[92] These two tiers comprise the core of the dormant commerce clause doctrine.[93]

The elegance of the two-tiered framework belies the murkiness of the doctrine; this Part seeks to provide clarity. Part III.A discusses the development and application of the two-tiered approach. Part III.B explores the complicating factor of the extraterritoriality principle and its prominence in lower federal court decisions invalidating state regulation of internet activity.

A. THE TWO-TIERED APPROACH TO ANALYZING STATE LAWS UNDER THE DORMANT COMMERCE CLAUSE

1. *The First Tier: State Laws that Discriminate Against Interstate Commerce*

Under the first tier, state laws that discriminate against interstate commerce are subject to a "virtually *per se* rule of invalidity."[94] Discrimination can appear on the face of the state law. The axiomatic facially discriminatory state law "overtly blocks the flow of interstate commerce at [the] border;" an example is the New Jersey law prohibiting the importation of waste

91. Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 575 (1997) (quoting Fulton Corp. v. Faulkner, 516 U.S. 325, 331 (1996)).

92. 397 U.S. 137, 142 (1970).

93. *See generally* Brannon P. Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 WM. & MARY L. REV. 417, 418–23 (2008) (tracing the development of the two tiers of review). The Supreme Court's most recent explanation of the dormant commerce clause doctrine did not use the word "tiers," but described "two principles [that] guide the courts in adjudicating cases challenging state laws under the Commerce Clause." *Wayfair*, 138 S. Ct. at 2091.

94. Oregon Waste Sys., Inc. v. Dep't of Env't Quality of Or., 511 U.S. 93, 100 (1994). Discriminatory laws may still be upheld if the state shows that it "has no other means to advance a legitimate local purpose." United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 338–39 (2007). In practice, though, the Court has only once upheld a discriminatory state law. *See* Maine v. Taylor, 477 U.S. 131, 143 (1986) (declining to invalidate a state import ban where the record showed "less discriminatory means . . . [were] unavailable").

collected out of state, which the Court struck down as unconstitutionally discriminatory in *City of Philadelphia v. New Jersey*.[95] Facial discrimination can also mean merely "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."[96] For example, in *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, the Court invalidated as discriminatory a Maine tax exemption available to in-state summer camps serving predominately in-state campers, but unavailable to in-state summer camps serving predominately out-of-state campers.[97]

A state law that is neutral on its face may nonetheless constitute impermissible discrimination in its practical effect.[98] The leading case on facially neutral discrimination is *Hunt v. Washington State Apple Advertising Commission*.[99] In *Hunt*, the Court invalidated North Carolina's mandate that all containers of apples sold in the state bear either a U.S. Department of Agriculture (USDA) stamped grade or no grade at all.[100] The Court held that the law, though facially neutral, nonetheless discriminated against interstate commerce in its practical effect because in-state apple producers already used USDA stamped grades, whereas most out-of-state producers used state-specific grades; accordingly, the Court concluded that the law imposed significant costs on out-of-state producers to the advantage of in-state producers.[101]

The Court distinguished *Hunt* one year later in *Exxon Corp. v. Governor of Maryland* to uphold a Maryland law prohibiting oil producers from operating retail gas stations in the state—a prohibition that affected only out-of-state oil producers because there were no oil producers located in Maryland.[102] The Court explained that "since there are no local producers or refiners, such

95. 437 U.S. 617, 624 (1978).
96. *United Haulers Ass'n*, 550 U.S. at 338–39.
97. 520 U.S. 564, 576 (1997).
98. *See* C & A Carbone, Inc. v. Clarkstown, 511 U.S. 383, 394–95 (1994); Hughes v. Oklahoma, 441 U.S. 322, 336 (1979).
99. 432 U.S. 333 (1977).
100. *Id.* at 337.
101. *Id.* at 351–52. The Court seemed skeptical about the non-protectionist motives for the law offered by North Carolina, but ultimately determined that "we need not ascribe an economic protection motive to the North Carolina Legislature to resolve this case" because the law was unconstitutionally discriminatory "even if enacted for the declared purpose of protecting consumers from deception and fraud in the marketplace." *Id.* at 352–53.
102. 437 U.S. 117 (1978).

claims of disparate treatment between interstate and local commerce would be meritless."[103] Taken together, *Hunt* and *Exxon* stand for the principle that the first tier's "virtually *per se* rule of invalidity" does not apply to a facially neutral law affecting solely out-of-state economic entities, as long as there are no similarly situated in-state entities that stand to benefit from the regulation.[104]

2. *The Second Tier: State Laws with "Only Incidental" Effects on Interstate Commerce*

The second tier of state laws are those that "regulate[ ] even-handedly to effectuate a legitimate local public interest."[105] These laws face the deferential *Pike* balancing standard and "will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[106] State laws in the second tier almost always survive judicial review: the Court has not invalidated a state law under *Pike* in over thirty-five years.[107]

Moreover, when the Court does apply *Pike* balancing, its actual analysis of benefits and burdens is often cursory. Consider *United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority*, where the Court upheld county ordinances requiring waste haulers to use a publicly owned disposal and processing facility.[108] In a perfunctory application of the *Pike* balancing standard, the Court deemed it "unnecessary to decide

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103. *Id.* at 125.

104. Circuit courts have relied on *Exxon* to hold that the "virtually *per se* rule of invalidity" does not apply to a state law prohibiting automakers from operating in-state retail dealerships and a state law banning contact lens manufacturers from setting minimum prices on in-state retail sales, where there were no automakers or contact lens manufacturers in the regulating state that would benefit from the laws. *See* Johnson & Johnson Vision Care, Inc. v. Reyes, 665 F. App'x 736 (10th Cir. 2016) (upholding Utah law prohibiting contact lens manufacturers from setting minimum prices for in-state retail sales); Ford Motor Co. v. Tex. Dep't of Transp., 264 F.3d 493 (5th Cir. 2001) (upholding Texas law preventing car manufacturers from engaging in retail sales in the state).

105. *Pike v. Bruce Church, Inc.*, 397 U. S. 137, 142 (1970).

106. *Id.*

107. *See* Daniel Francis, *The Decline of the Dormant Commerce Clause*, 94 DENV. L. REV. 255, 301 (2017) (identifying *CTS Corps. v. Dynamics Corp of America* as the last decision where the Court used the undue burden balancing approach to invalidate a state law).

108. 550 U.S. 330, 346 (2007). The Court first engaged in the threshold determination of the appropriate tier of review, concluding that the ordinance was not discriminatory because the in-state entity advantaged by the ordinance was publicly owned. *Id.* at 342–46.

whether the ordinances impose any incidental burden on interstate commerce" in light of the ordinances' public benefits—namely, revenue generation and increased recycling—and concluded that the ordinances passed constitutional muster under the *Pike* test.[109] The analytical superficiality characterizing judicial application of *Pike* has provoked extensive criticism from scholars and judges alike.[110] *Pike* balancing is also regularly criticized on the grounds of institutional competence: critics contend that weighing the benefits and burdens of state regulations is an inquiry "ill-suited to the judicial function."[111]

Despite the sustained criticism, the *Pike* balancing standard has been referenced by the lower courts and the Supreme Court in almost every dormant commerce clause case in the past fifty years.[112] In fact, in its most recent dormant commerce clause decision, the Supreme Court remanded with the instruction—citing *Pike*—to apply the two-tiered standard of review.[113] The Court's recent validation of the *Pike* standard, combined with the unwavering commitment to *Pike* at the lower federal level,

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109. *Id.* at 346–47 ("The ordinances give the Counties a convenient and effective way to finance their integrated package of waste-disposal services . . . [and] increase recycling in at least two ways. . . . For these reasons, any arguable burden the ordinances impose on interstate commerce does not exceed their public benefits.").

110. *See, e.g.*, T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 976–82 (1987) (arguing that Supreme Court decisions applying *Pike* reveal that the balancing analysis is "rudimentary" and "takes place inside a black box," which "severely damage[s] the credibility of the methodology"); Donald H. Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865, 1866–67 (1987) ("[T]he *Pike* test is a red herring. It was not applied even in *Pike* itself.").

111. CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 95 (1987) (Scalia, J., concurring). A vociferous critic of the *Pike* balancing standard, Justice Scalia has observed that while the *Pike* analysis is "ordinarily called 'balancing' . . . [i]t is more like judging whether a particular line is longer than a particular rock is heavy." Bendix Autolite Corp. v. Midwesco Enter., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring). Justice Thomas, another foe of *Pike*, has criticized it for "invit[ing] us, if not compel[ling] us, to function more as legislators than as judges." Camps Newfound/Owatonna, Inc., 520 U.S. at 619 (Thomas, J., dissenting).

112. The Supreme Court has actually used the *Pike* balancing standard to strike down a state law in only a handful of cases. *See Bendix Autolite Corp.*, 486 U.S. at 888; Kassel v. Consol. Freightways Corp. of Del., 450 U.S. 662 (1981). The lower federal courts, however, regularly apply the *Pike* balancing standard. *See, e.g.*, Rosenblatt v. City of Santa Monica, 940 F.3d 439, 452 (9th Cir. 2019) (applying *Pike*); VIZIO, Inc. v. Klee, 886 F.3d 249, 260 (2d Cir. 2018) (applying *Pike*); Greater L.A. Agency on Deafness, Inc. v. Cable News Network, Inc., 742 F.3d 414, 433 (9th Cir. 2014) (applying *Pike*); N. Am. Meat Inst. v. Becerra, 420 F. Supp. 3d 1014 (C.D. Cal. 2019) (applying *Pike*), *aff'd*, 825 F. App'x 518 (9th Cir. 2020).

113. South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2091 (2018).

cements the *Pike* balancing standard as core to the dormant commerce clause doctrine.

While courts and academics broadly agree that the dormant commerce clause doctrine comprises the two tiers described above, there is substantial disagreement as to whether the doctrine also involves a third tier of analysis for state laws that regulate extraterritorially.[114]

B. THE EXTRATERRITORIALITY PRINCIPLE IN DORMANT COMMERCE CLAUSE JURISPRUDENCE

Extraterritoriality emerged as a robust, analytically independent branch of the dormant commerce clause doctrine in a series of Supreme Court decisions in the 1980s, but fell out of favor shortly thereafter.[115] The principle was revived again by the lower courts in cases involving state internet regulation. As this Part will explain, however, extraterritoriality analysis of state internet regulation is often flawed.

1. *The Rise and Fall of the Extraterritoriality Principle*

The extraterritoriality principle is an area in which "a page of history is worth a volume of logic."[116] Extraterritoriality as a component of the dormant commerce clause analysis first emerged in *Baldwin v. GAF Seelig, Inc.*, where the Court struck down a New York law that prohibited out-of-state milk producers from selling milk in New York at a price below the minimum price for milk produced in the state.[117] Writing for a unanimous Court, Justice Cardozo coined the phrase that became indelible to the dormant commerce clause doctrine's bar on so-called extraterritorial regulation: "New York has no power to *project its legislation* into Vermont by regulating the price to be paid in that state for milk acquired there."[118]

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114. *Compare* Susan Lorde Martin, *The Extraterritoriality Doctrine of the Dormant Commerce Clause is Not Dead*, 100 MARQ. L. REV. 497, 497 (2016) (asserting that the extraterritoriality principle still serves analytically distinct and important purposes in the dormant commerce clause doctrine), *with* Brannon P. Denning, *Extraterritoriality and the Dormant Commerce Clause: A Doctrinal Post-Mortem*, 73 LA. L. REV. 979, 980 (2013) (characterizing the extraterritoriality principle as "dead and unlikely to be revived").

115. *See infra* notes 116–130 and accompanying text.

116. New York Tr. Co. v. Eisner, 256 U.S. 345, 349 (1921).

117. 294 U.S. 511, 521 (1935).

118. *Id.* (emphasis added).

A half-decade later, the Court built on *Baldwin* to articulate an expansive conception of the extraterritoriality principle.[119] In *Brown-Forman Distillers Corp. v. N.Y. State Liquor Authority* and *Healy v. Beer Institute*, the Court used the extraterritoriality principle to invalidate so-called "price affirmation" statutes that required out-of-state alcohol shippers to "affirm" that the prices they charged in-state wholesalers were no higher than their prices charged to wholesalers in other states.[120] The *Healy* Court explained that, when determining if a state law violates the principle against extraterritoriality, "[t]he critical inquiry is whether the *practical effect* of the regulation is to control conduct beyond the boundaries of the State."[121] This formulation of the extraterritoriality principle is markedly more expansive than was articulated in *Baldwin*, the foundational decision on extraterritoriality.[122] Legal scholars have roundly criticized *Healy*'s conception of extraterritoriality as "clearly too broad" and "inconsistent with federalism values."[123] Developments in the dormant commerce clause jurisprudence after *Healy* suggest members of the Court may agree; today, *Healy*'s sweeping articulation of extraterritoriality is an outlier in the Court's case law and has been significantly hemmed in, if not completely repudiated, by the Court in the twenty-first century.[124]

Despite the potency of extraterritoriality in the 1980s, the Court did not again invoke the principle in a dormant commerce clause case for over a decade, until *Pharmaceutical Research and*

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119. *See* Healy v. Beer Inst., 491 U.S. 324 (1989); Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573 (1986); Edgar v. MITE Corp., 457 U.S. 624 (1982).

120. *Brown-Forman*, 476 U.S. at 579; *Healy*, 491 U.S. at 327–28.

121. *Healy*, 491 U.S. at 336 (emphasis added). The Court also indicated that analyzing a state law under the dormant commerce clause may require considering the law's "interact[ions] with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation." *Id.* *See also infra* notes 151–155 and accompanying text.

122. Indeed, the concurring and dissenting opinions in *Healy* noted as much. *Healy*, 491 U.S. at 344–45 (Scalia, J., concurring in part and dissenting in part) (declining to endorse the majority's "more expansive" extraterritoriality analysis); *id.* at 345–49 (Rehnquist, C.J., dissenting) (characterizing the majority's application of *Baldwin* as "wrong . . . both as a matter of economics and as a matter of law" and further emphasizing that the challenged Connecticut law "is markedly different from the New York statute condemned in *Baldwin*").

123. Darien Shanske, *Proportionality as Hidden (But Emerging?) Touchstone of American Federalism: Reflections on the* Wayfair *Decision*, 22 CHAP. L. REV. 73, 80 (2019); Denning, *supra* note 114, at 980; Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 790 (2001).

124. *See infra* notes 125–134 and accompanying discussion.

Manufacturers of America v. Walsh.[125] If *Healy* marked the zenith of the extraterritoriality principle's development, then *Walsh*, the "leading non-application" of the principle, may well be considered its nadir.[126] In *Walsh*, the challenged Maine law required pharmaceutical manufacturers that sold drugs through Maine's Medicaid program to enter into rebate agreements with the state or face prior authorization requirements on those sales.[127] Out-of-state drug manufacturers challenged the Maine law, claiming that the rebate agreements amounted to unconstitutional extraterritorial regulation.[128] Rejecting this argument without elaborate discussion, the Court explained that the Maine law "[is] unlike price control or price affirmation statutes . . . [and] the rule that was applied in *Baldwin* and *Healy* accordingly is not applicable."[129] The Court thus narrowed the scope of its extraterritoriality precedents and arguably limited the application of the principle to price control and price affirmation statutes. Indeed, some scholars and courts have interpreted *Walsh* as marking, if not the end of extraterritoriality, then at least a substantial cabining of the principle.[130]

Further evidence of the Court's retreat from extraterritoriality is found in the recent case of *South Dakota v. Wayfair, Inc.*, which concerned the constitutionality of a South Dakota law requiring out-of-state sellers to collect sales taxes on in-state sales made over the internet "as if the seller had a physical presence in the State."[131] The Court revisited, and ultimately overturned, its earlier precedent that a state can require an out-of-state seller to collect the state tax only if the seller actually has a physical

125. 538 U.S. 644 (2003).

126. Shanske, *supra* note 123, at 80 (describing *Walsh* as "the leading non-application" of the extraterritoriality principle).

127. *Walsh*, 538 U.S. at 654.

128. *Id.* at 669.

129. *Id.* at 670.

130. *See, e.g.*, Denning, *supra* note 114, at 1006 ("[E]xtraterritoriality is, for all intents and purposes, dead."); Shanske, *supra* note 123, at 80 ("[T]he Supreme Court . . . [has] allow[ed] the doctrine to become most dormant."); Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1172 (10th Cir. 2015) ("[The] extraterritoriality principle may be the least understood of the Court's three strands of dormant commerce clause jurisprudence. It is certainly the most dormant. . . . [The Supreme Court] has used [the] extraterritoriality principle to strike down state laws only three times."); Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1101 (9th Cir. 2013) ("In the modern era, the Supreme Court has rarely held that statutes violate the extraterritoriality doctrine.").

131. 138 S. Ct. 2080, 2089 (2018).

presence in the state.[132] The extraterritoriality principle—emphasized by *amici* in a brief supporting the respondents—is notably absent from the *Wayfair* opinion.[133] The Court's decision to remand the case to the lower court for consideration under the second tier's balancing standard may suggest that, insofar as the extraterritoriality principle exists today in the dormant commerce clause doctrine, it is properly understood as incorporated in the dominant two-tiered framework and not as a separate, analytically independent branch of the doctrine.[134]

Wayfair also suggests that the Court construes the dormant commerce clause as amenable to state regulation of at least some internet activity. Thus, the absence of the extraterritoriality principle in the *Wayfair* opinion may be significant for the constitutionality of state internet regulation because, as the next Part will explore, lower courts have invalidated numerous state internet regulations as impermissible extraterritorial regulation.

2. *The Extraterritoriality Principle and State Regulation of Internet Activity*

The *Wayfair* Court's silence as to extraterritoriality may represent a coda to a thread of lower federal court decisions striking down state internet regulations as violative of the extraterritoriality principle.[135] Judicial invalidation of state

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132. The Court explained that the physical presence rule "creates rather than resolves market distortions" and "imposes the sort of arbitrary, formalistic distinction that the Court's modern Commerce Clause precedents disavow." *Wayfair*, 138 S. Ct. at 2092. The physical presence rule was first announced in Quill Corp. v. North Dakota, 504 U.S. 298, 112 (1992).

133. *See* Brief for Nat'l Taxpayers Union Found. et al. as Amici Curiae Supporting Respondents, South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018) (No. 17-494), 2018 WL 1709085, at *6. The opinion's omission of extraterritoriality is especially notable because the amici were echoing extraterritoriality arguments made by then-attorney-now-Chief-Justice John Roberts some fifteen years earlier, in an amicus brief in *Walsh*. *See* Brief for Chamber of Commerce of the United States as Amicus Curiae Supporting Petitioner, Pharm. Rsch. & Mfrs. of Am. v. Walsh, 538 U.S. 644 (2003) (No. 01-188), 2002 WL 31120077, at *15.

134. *Wayfair*, 138 S. Ct. at 2099.

135. *See, e.g.*, Online Merchs. Guild v. Cameron, 468 F. Supp. 3d 883, 901 (E.D. Ky. 2020), *vacated*, 995 F.3d 540 (6th Cir. 2021); Am. Booksellers Ass'n v. Dean, 342 F.3d 96 (2d Cir. 2003); ACLU v. Johnson, 194 F.3d 1149 (10th Cir. 1999); Am. Libraries Ass'n v. Pataki, 969 F. Supp. 160 (S.D.N.Y. 1997). Although *Wayfair* may suggest that the Court is loath to construct the dormant commerce clause as a vehicle to invalidate state internet regulations, this conclusion would be too sanguine if not qualified in two important respects. First, the Court sharply divided in *Wayfair*. Chief Justice Roberts' dissenting opinion, joined by Justices Breyer, Sotomayor, and Kagan, agreed that the physical presence rule was wrongly

internet regulations under the extraterritoriality principle began with *American Libraries Association v. Pataki*, where a federal district court held that a New York law criminalizing the use of the internet to send explicit content to minors violated the dormant commerce clause.[136] The *Pataki* court began with the empirical assumption that "no aspect of the Internet can feasibly be closed off to users from another state," and relied on this assumption to hold that New York had impermissibly regulated extraterritorially because it "deliberately imposed its legislation on the Internet and, by so doing, projected its law into other states whose citizens use the Net."[137] This reasoning—that state regulation of the internet may, due to the very nature of the internet, invariably amount to unconstitutional extraterritorial regulation—has had a profound and lasting influence.[138] Numerous federal courts have followed the *Pataki* court's reasoning to invalidate state internet regulations as violating the principle against extraterritoriality.[139]

In an influential article published in the *Yale Law Journal*, Professors Jack Goldsmith and Alan Sykes persuasively challenged the *Pataki* court's understanding of the extraterritorial implications of state internet regulation.[140] Goldsmith and Sykes argued that the *Pataki* analysis "rests on an impoverished understanding of the architecture of the Internet . . . misreads

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decided but argued that any change to that rule should be undertaken by Congress, not by the Court. *Id.* at 2103. Second, the composition of the Court has changed in the three years since *Wayfair*. The seats once held by Justice Kennedy, who wrote the majority opinion, and Justice Ginsburg, who joined that opinion, are now occupied by Justices Kavanaugh and Barrett. It remains an open question whether they share Justice Scalia's—and Justice Thomas'—hostility toward the dormant commerce clause. *See supra* note 111. Ultimately, and even with these two qualifications, *Wayfair* indicates that there is at least *some* appetite to treat the dormant commerce clause as amenable to state regulation of internet activity.

136. 969 F. Supp. 160, 169 (S.D.N.Y. 1997).

137. *Id.* at 171; *id.* at 177.

138. *See* Goldsmith & Sykes, *supra* note 123, at 787 (noting that extraterritoriality was popularly referred to as a "nuclear bomb of a legal theory" against state internet regulation); Note, Kenneth D. Bassinger, *Dormant Commerce Clause Limits on State Regulation of the Internet: The Transportation Analogy*, 32 GA. L. REV. 889, 905–25 (1998).

139. *See* Goldsmith & Sykes, *supra* note 123, at 792 (collecting cases); *see also PSINet, Inc. v. Chapman*, 362 F.3d 227, 239–40 (4th Cir. 2004) (adopting the rationale of *Pataki* to invalidate Virginia law criminalizing use of internet to send harmful content to minors); ACLU v. Johnson, 194 F.3d 1149, 1161 (10th Cir. 1999) (affirming district court decision that "largely relied" on the *Pataki* analysis to strike down a New Mexico prohibition on sending harmful content to minors over the internet); Cyberspace Commc'ns, Inc. v. Engler, 55 F. Supp. 2d 737, 741 (E.D. Mich. 1999) (relying extensively on *Pataki* factual findings with respect to "the Nature of the Internet" and dormant commerce clause analysis to invalidate a Michigan law criminalizing explicit internet communications with minors).

140. *See* Goldsmith & Sykes, *supra* note 123.

dormant Commerce Clause jurisprudence, and . . . misunderstands the economics of state regulation of transborder transactions."[141] Rejecting the *Pataki* court's assertion that the internet raises unique extraterritorial concerns, Goldsmith and Sykes concluded that a state regulation requires the same treatment under the dormant commerce clause in the internet context as in the non-internet context.[142]

Goldsmith and Sykes' argument, combined with the Court's apparent indifference to extraterritoriality in *Wayfair*, suggests that the appropriate dormant commerce clause analysis of a state internet regulation requires nothing more than evaluating the burden of the regulated internet activity on interstate commerce, as with any other state regulation.[143]

With this framework in mind, state internet regulation of the sale of tangible goods and services are less likely to violate the dormant commerce clause than regulation of purely digital or online activity.[144] This is because an out-of-state provider of a real-world good knows the physical location of the buyer.[145] Consider two cases from the Second Circuit where the out-of-state party's knowledge of the physical location of the in-state party was decisive. In *American Booksellers Association v. Dean*, the Second Circuit enjoined a Vermont law, similar to the law invalidated in *Pataki*, that prohibited using the internet to send explicit content to minors.[146] The Second Circuit held that the law violated the dormant commerce clause's extraterritoriality principle because "[a] person outside Vermont who posts information on a website or on an electronic discussion group cannot prevent people in Vermont from accessing the material."[147] Four years later, in

141. *Id.* at 787.
142. *Id.* at 798.
143. The *Wayfair* Court suggested in dicta a willingness to adjust its dormant commerce clause doctrine to accommodate technological advancements in the modern economy. The Court condemned as arbitrary and artificial the physical presence requirement, noting that the "dramatic technological and social changes of our increasingly interconnected economy mean that buyers are closer to most major retailers than ever before—regardless of how close or far the nearest storefront." Wayfair, 138 S. Ct. at 2095 (internal citation omitted). The Court further observed that "[b]etween targeted advertising and instant access to most consumers via any internet-enabled device, a business may be present in a State in a meaningful way without that presence being physical in the traditional sense of the term." *Id.*
144. *See* Goldsmith & Sykes, *supra* note 123, at 824.
145. *Id.*
146. 342 F.3d 96 (2d Cir. 2003).
147. *Id.* at 103.

SPGGC, L.L.C. v. Blumenthal, the Second Circuit distinguished *Dean* and upheld a Connecticut law regulating the sale of gift cards in the state, including sales made over the internet by out-of-state sellers.[148] The court first explained that the law in *Dean* had constituted impermissible extraterritorial regulation "[b]ecause a person outside Vermont could not effectively prevent persons inside Vermont from accessing material posted on a website [and therefore] out-of-state publishers were forced to comply with the Vermont statute or risk prosecution."[149] The *SPGGC* court then held that Connecticut's law did not regulate extraterritorially because "[there is] readily available a near-perfect means of distinguishing between online consumers . . . who reside in Connecticut and those who reside elsewhere—their credit card billing addresses."[150] Taken together, *Dean* and *SPGGC* indicate that state regulation of an internet transaction is less likely to offend the dormant commerce clause when the regulated transaction has a nexus to real-world goods and services such that there is a readily available means of identifying the geolocation of the receiving party.

Moreover, knowledge of the receiving party's physical location reduces the risk that an online transaction will be subject to inconsistent state regulations—that is, that a single transaction will be regulated by multiple states. Inconsistent state regulations often imply extraterritoriality concerns.[151] The dormant commerce clause's protection against inconsistent regulations can be traced to the Supreme Court's decision in *CTS Corp. v. Dynamics Corp. of America*.[152] Upholding the challenged Indiana law regulating the tender offers of corporations chartered in Indiana, the *CTS Corp.* Court concluded that there was no risk that corporations' tender offers would face inconsistent state regulations: "[s]o long as each State regulates voting rights only in the corporations it has created, each corporation will be subject to the law of only one State."[153] In the context of internet regulations, then, an online seller of real-world goods will not be subject to inconsistent regulations for an individual transaction when the receiving

148. 505 F.3d 183 (2d Cir. 2007).
149. *Id.* at 195 (citation omitted).
150. *Id.*
151. *See* Regan, *supra* note 110, at 1880–85.
152. 481 U.S. 69, 88 (1987).
153. *Id.* at 89.

party's real-world location is readily ascertainable.[154] State regulation of one-on-one commercial transactions on the internet thus does not raise concerns of inconsistent regulations, in sharp contrast to state regulation of "websites, bulletin-board services, and chat rooms, which can be accessed by virtually anyone, anywhere, without control by the one posting the information."[155] Geolocation techniques therefore militate against a dormant commerce clause violation by reducing the risk that a transaction will be subject to inconsistent state regulations.

At bottom, a state internet regulation is evaluated under the dormant commerce clause according to the same analytical framework that governs a non-internet regulation.[156] That analytical framework, as has been explained, considers a state law in one of two tiers.[157] Analysis of the extraterritorial effects of a law, moreover, is integrated into the two-tiered framework, even when the regulated activity takes place on the internet.[158]

IV. ENFORCING PRICE GOUGING REGULATIONS ON THE AMAZON MARKETPLACE

As Part III has explained, state internet regulations do not raise unique extraterritoriality concerns, nor do they necessarily create an elevated likelihood of violating the dormant commerce clause. This Part examines the intersection of the dormant commerce clause and state price gouging laws. Part IV.A evaluates recent decisions applying the dormant commerce clause to a state's price gouging law. Part IV.B applies the dormant commerce clause to state regulation of price gouging on the Amazon Marketplace with a focus on two possible enforcement targets—third-party sellers and Amazon itself—to conclude that the dormant commerce clause is likely not violated by either application. Part IV.C then offers proposals for statutory reforms

154. *See* Goldsmith & Sykes, *supra* note 123, at 802–10.

155. Quik Payday, Inc. v. Stork, 549 F.3d 1302 (10th Cir. 2008). In that case, the Tenth Circuit held that the Kansas law regulating payday loans issued over the internet did not regulate extraterritorially, distinguishing it from the New Mexico law prohibiting certain explicit online content that the court had invalided nine years earlier: "Regulation of one-to-one commercial exchanges via the Internet . . . is quite a different matter. The potential for multiple jurisdictions to regulate the same transaction is much more limited." *Id.* at 1312.

156. *See supra* notes 140–143 and accompanying text.

157. *See supra* notes 94–113 and accompanying text.

158. *See supra* notes 140–143 and accompanying text.

designed to strengthen the likelihood that a state regulation of price gouging on the Amazon Marketplace will survive a constitutional challenge under the dormant commerce clause.

A. CASE LAW CONCERNING PRICE GOUGING ON AMAZON

Before applying the dormant commerce clause to state price gouging regulations, an examination of on-point, if limited, case law is in order. In *Online Merchants Guild v. Cameron*, a federal district court enjoined the state of Kentucky from applying the state's price gouging laws to Kentucky-based third-party sellers on Amazon, on the grounds that such an application amounts to extraterritorial regulation in violation of the dormant commerce clause.[159] Crucial to the reasoning in *Online Merchants Guild* is the structure of the Amazon Marketplace vis-à-vis third-party sellers.[160] Specifically, third-party sellers cannot set state-specific prices, but instead must set a single price for consumers nationwide.[161] Consequently, the court reasoned, when third-party sellers seek to comply with Kentucky's price gouging regulation, the Kentucky-compliant price operates as a "national ceiling."[162] The court concluded that the Kentucky law regulated extraterritorially by "effectively dictat[ing] the price of items for sale on Amazon nationwide."[163]

On appeal, the Sixth Circuit held that the district court erred in its application of extraterritoriality.[164] The court explained that any extraterritorial regulation caused by the law's application to the Amazon Marketplace "is entirely dependent upon Amazon's independent decisionmaking with regard to the structure of its online marketplace," such that the law's application to sales made by Kentucky-based third-party sellers on Amazon to Kentucky consumers "is unlikely to offend the extraterritoriality doctrine of the dormant commerce clause.[165] The Sixth Circuit's reasoning largely accords with the dormant commerce clause jurisprudence

159. Online Merchs. Guild v. Cameron, 468 F. Supp. 3d 883, 901 (E.D. Ky. 2020), *vacated*, 995 F.3d 540 (6th Cir. 2021).
160. *Id.*
161. *Id.* at 900–02 (noting that third-party sellers "suggest" a price, subject to approval by Amazon).
162. *Id.* at 901.
163. *Id.*
164. Online Merchs. Guild v. Cameron, 995 F.3d 540 (6th Cir. 2021).
165. *Id.* at 559.

as described by this Note, with two important exceptions. First, extraterritoriality is not itself a distinct doctrine, but is folded into the two-tiered framework.[166] Second, the court limited its holding to sales made by third-party sellers based in Kentucky, which misunderstands modern Supreme Court precedent.[167]

Enforcement of price gouging regulations to third-party sellers on the Amazon Marketplace does not amount to extraterritorial regulation, even if the seller is located out-of-state. Because each state's price gouging regulations apply to only in-state transactions, no single transaction is subject to regulation by multiple states.[168] Just as Indiana could validly regulate tender offers by corporations in Indiana, so too can Kentucky regulate the sale of price gouged products offered in Kentucky.[169] Put differently, Kentucky's price gouging prohibition only applies to sales made in Kentucky, just as California's only applies to those made in California, Michigan's in Michigan, and so on—regardless of whether the sale is made in-person at a brick-and-mortar store, over the telephone, on the website of a local business, or on Amazon.[170] To argue that the same transaction is subject to inconsistent regulations only when it is made through Amazon is, in effect, to argue that there exists a constitutional interest in nationwide uniformity in prices for goods sold by Amazon third-party sellers.[171]

Moreover, contrary to the holdings of the Sixth Circuit and the district court, limiting enforcement of Kentucky's law to only Kentucky-based sellers actually *increases* the likelihood of a dormant commerce clause violation. The state of Kentucky, defending the state's price gouging law challenged in *Online*

166. This has been demonstrated in the preceding Part and will be further explored in Part IV.A and IV.B.

167. Online Merchs. Guild v. Cameron, 995 F.3d 540, 559 (6th Cir. 2021) ("[T]he application of [Kentucky's price-gouging] laws to Kentucky-based third-party sellers on Amazon in connection with sales to Kentucky consumers is unlikely to offend the extraterritoriality doctrine of the dormant commerce clause.").

168. Most states limit the prohibition to only those geographic areas covered by the emergency or disaster declaration that triggered the regulation. *See supra* notes 4–44.

169. *See* CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 89 (1987).

170. *See, e.g.*, Nessel, *supra* note 35 (voluntary assurance of compliance signed with out-of-state seller covers only sales made in state).

171. *See* Regan, *supra* note 110, at 1880–84. Regan contends that judicial aversion to inconsistent state regulations is motivated by three areas of constitutional concern: first, state taxes and the risk of excessive taxation; second, a judicially protected "national interest in an efficient transportation and communications network;" and third, extraterritorial regulation, which surfaces in dormant commerce clause decisions. *Id.*

Merchants Guild, disclaimed any intent to enforce the law with respect to sales made to Kentucky consumers by out-of-state sellers.[172] Kentucky thereby sought to dispel concerns that the state would regulate extraterritorially by limiting enforcement to those businesses located in state. The district judge deemed the state's enforcement intent to carry "some weight, but not enough," and the Sixth Circuit's narrowly tailored extraterritoriality analysis and decision hinged on the district court's acceptance that Kentucky would enforce its price gouging laws only with respect to Kentucky-based sellers.[173] But consider the practical implications of this narrowed scope of enforcement: if state attorneys general pledged to enforce their price gouging laws to only to those third-party sellers located within the regulating state, third-party sellers could simply ensure their businesses are headquartered or domiciled in one of the seven states without price gouging restrictions. Enforcement based on the online seller's state of incorporation also creates perverse incentives, as sellers would be well-advised not to establish physical storefronts in multiple states for fear of falling within a state's regulatory purview. Consequently, the narrow enforcement approach offered by Kentucky and accepted by both the district court and the Sixth Circuit is contrary to the Supreme Court's repeated assertions that the dormant commerce clause doctrine seeks to "resolve[] market distortions" and "must not prefer interstate commerce only to the point where a merchant physically crosses state borders."[174]

Ultimately, in light of the decline of extraterritoriality as an analytically independent strand of the dormant commerce clause doctrine, as described in Part III.B, the extraterritorial impact of enforcing price gouging laws on the Amazon Marketplace is properly addressed within the traditional two-tiered analytical framework. To that end, the next Part analyzes the dormant commerce clause implications of applying price gouging laws to third-party sellers and to Amazon itself and concludes that neither application offends the dormant commerce clause.

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172. Online Merchs. Guild v. Cameron, 468 F. Supp. 3d 883, 902 (E.D. Ky. 2020), *vacated*, 995 F.3d 540 (6th Cir. 2021).

173. *Id.*

174. South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2094 (2018). "The [physical presence] rule also produces an incentive to avoid physical presence in multiple States. Distortions caused by the desire of businesses to avoid tax collection mean that the market may currently lack storefronts, distribution points, and employment centers that otherwise would be efficient or desirable." *Id.*

B. PRICE GOUGING REGULATIONS APPLIED TO THE AMAZON MARKETPLACE

1. *Third-Party Sellers*

The first inquiry in the dormant commerce clause analysis is one of categorization: tier one or tier two.[175] Although states have pursued a variety of regulatory approaches to price gouging, all state price gouging laws are facially neutral.[176] Moreover, state price gouging laws do not disfavor out-of-state businesses to the advantage of similarly situated in-state competitors; rather, these laws restrict pricing on entire classes of goods and services. To use a tangible example, consider California's price gouging law prohibiting the sale of emergency-related goods or services at prices more than ten percent greater than the prices charged prior to the declaration of emergency.[177] This facially neutral law is similarly neutral in its practical effect because it applies to any entity selling a covered product, irrespective of the seller's location.[178] The first tier of state laws, and its accompanying "virtually *per se* rule of invalidity," accordingly is inapplicable.[179]

Under the second tier, a state price gouging law will survive the *Pike* balancing standard if the burden to interstate commerce does not clearly exceed the local benefits. Consumer protection has long been considered a legitimate interest within the scope of a state's police powers.[180] Further, states are afforded broad exercise of their powers to ensure public health and safety.[181] Thus, price gouging laws lie at the intersection of the states' lawful police powers over consumer protection and public welfare. For such a law to be voided under the dormant commerce clause, then, the

175. *See supra* Part III.

176. *See supra* Part I.

177. CAL. PENAL CODE § 396 (West 2022) ("Upon the proclamation of a state of emergency . . . it is unlawful . . . to sell . . . for a price of more than 10 percent greater than the price charged . . . immediately prior to the proclamation or declaration of emergency.").

178. See *supra* Part III.A, for case law and discussion of the first tier of the dormant commerce clause.

179. *See* City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978).

180. *See, e.g.*, Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 150 (1963) (states have "traditional power[s] to enforce otherwise valid regulations designed for the protection of consumers").

181. *See* Maine v. Taylor, 477 U.S. 131, 151 (1986) ("As long as a State does not needlessly obstruct interstate trade or attempt to 'place itself in a position of economic isolation,' it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources.") (citation omitted).

burden imposed on interstate commerce must be "clearly excessive" to these legitimate local interests.[182]

It is useful to first consider the scenario that would impose the highest burden to interstate commerce: a state, or multiple, issue a declaration of emergency that triggers the "outright ban" price gouging regulation, prohibiting any increase in prices relative to prices charged before the emergency. A third-party seller that otherwise would raise its prices would be unable to do so on the Amazon Marketplace without violating these laws. Relatedly, before a third-party seller raised its prices, it would need to research whether any state has declared a state of emergency and triggered price gouging prohibitions, determine whether the product falls within the scope of the price gouging law, ascertain the benchmark used by the state to determine whether a price increase is unconscionable or excessive, and then, finally, increase the price consistent with those findings.[183] The seller would be forced to bear considerable compliance costs.

Query, though, whether the costs described above are particular to price gouging regulations. After all, that a business must comply with the laws of the country or state in which it operates is far from novel. A business that operates in one state need only comply with one state's laws; a business that operates in fifty states must comply with the laws of the fifty states. Indeed, this is the nature of the particular system of federalism in the United States. That a business may choose to adopt nationwide the most restrictive regulation required by a particular state does not raise the specter of the dormant commerce clause: consider, by way of analogy, the state of California's emissions standards for cars and trucks, which automakers have pledged to adopt on a nationwide scale.[184] Such a routine cost imposed on interstate commerce is unlikely to be considered "clearly excessive" in relation to the well-established local benefits of price gouging regulations.

Thus, states likely will not violate the dormant commerce clause by applying price gouging laws to Amazon Marketplace's

182. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

183. *See supra* Part II.A.

184. Juliet Eilperin & Dino Grandoni, *EPA Moves to Give California Right to Set Climate Limits on Cars, SUVs*, WASH. POST (Apr. 26, 2021), https://www.washingtonpost.com/climate-environment/2021/04/26/california-car-climate-waiver/ [https://perma.cc/Z2D7-F8HQ].

third-party sellers—located within or without the borders of the regulating state.[185] As the next Part will demonstrate, though, Amazon is a more desirable regulatory target to maximize deterrence and minimize enforcement expenditures.

2. *Price Gouging Regulations Applied to Amazon*

A constitutional challenge to a state's direct regulation of Amazon for price gouging will likely involve claims of extraterritorial regulation, discrimination against interstate commerce, and excessive burden on interstate commerce.

A state price gouging enforcement action against Amazon does not amount to extraterritorial regulation in violation of the dormant commerce clause. As described in Part III.B, the Supreme Court has displayed a willingness to construe the dormant commerce clause as capacious enough to accommodate state regulation of some internet activity.[186] Further, the regulated transaction involves real-world goods and services, rather than purely digital or online activity; it is thus especially unlikely to implicate the extraterritoriality principle because "[c]oncerns about the cross-border costs of state Internet regulation are heightened when the sale and transmission of digital goods as opposed to real-space goods are at issue."[187] Moreover, Amazon already employs precise geographical filtering based on the consumer's shipping address and, notably, uses different pricing algorithms for consumers in different regions.[188] Amazon's existing capabilities are significantly more precise and less costly than the geographical filtering techniques held by circuit courts sufficient to obviate claims of extraterritorial regulation.[189]

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185. Of course, other constitutional restrictions—including due process and jurisdictional requirements—may otherwise preclude regulation of out-of-state price gougers. These topics are beyond the scope of this Note, which focuses exclusively on the dormant commerce clause doctrine.

186. *See* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018); *see also supra* Part III.B.1.

187. See Goldsmith & Sykes, *supra* note 123, at 824.

188. *See supra* Part II.A; *see also supra* note 59; *supra* note 57.

189. A crude geographical filtering technique was sufficient for the Tenth Circuit in *Quik Payday, Inc. v. Stork* to hold that the Kansas consumer protection law regulating payday lending on the Internet did not regulate extraterritorially because it is not prohibitively burdensome for the payday lender plaintiff "simply to inquire of the customer in which state he is located while communicating with Quik Payday." 549 F.3d 1302, 1308–09 (10th Cir. 2008).

Turning to the core of the dormant commerce clause doctrine, the two-tiered approach: The first tier is readily dispensed with as inappropriate here, as price gouging laws do not discriminate against interstate commerce, facially or by effect. The first tier of the dormant commerce clause analysis, with the "virtually per se invalid" standard, is inappropriate because price gouging laws are facially neutral and not motivated by state protectionism.[190] Although Amazon could challenge the law as discriminatory if the law in practice affects only out-of-state entities,[191] the practical effect of price gouging laws is not to benefit an in-state economic interest but rather[192] to regulate price gouging *regardless* of whether the seller is in-state or out-of-state. This crucial distinction from the facts in *Hunt v. Washington State Apple Advertising Commission*, where the advantage to similarly situated in-state entities carried significant weight, indicates that the decision in *Exxon Corp. v. Governor of Maryland* would likely control here.[193] Thus, state price gouging regulations do not discriminate against interstate commerce, and therefore avoid the fatal first tier.[194]

Analyzed under the *Pike* balancing approach of the second tier, price gouging regulations as applied to Amazon do not excessively burden interstate commerce.[195] The collective operation of various state price gouging regulations introduces burdens of compliance on Amazon and other interstate e-commerce firms, not on the interstate market. But it is the interstate market, not interstate firms, that the dormant commerce clause protects.[196] Admittedly, Amazon and other sizable e-commerce sites subject to the law arguably *are* the market: Amazon alone represents over forty percent of the U.S. e-commerce retail market and is one of five retailers that together comprise over half of online sales.[197] But

190. *See* United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 338 (2007). The first tier is also inappropriate because the laws are not motivated by state protectionism. *See, e.g., City of Philadelphia*, 437 U.S. at 624.

191. That is, where a state has no in-state e-commerce site that would be subject to the regulation.

192. *See supra* notes 98–104 and accompanying text.

193. Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978). *See also supra* notes 98–104.

194. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

195. *See id.*

196. *See, e.g.*, *Exxon*, 437 U.S. at 127–28.

197. *U.S. leading e-retailers 2020, by market share*, STATISTA (Nov. 30, 2020), https://www.statista.com/statistics/274255/market-share-of-the-leading-retailers-in-us-e-commerce/ [https://perma.cc/RWN9-LM66]. As of November 2020, top five online retailers

regardless of the size and centrality of Amazon in the e-commerce ecosystem, the Supreme Court has made clear that the dormant commerce clause does not protect "the particular structure or methods of operation in a retail market."[198]

The burden imposed on Amazon or other large e-commerce entities is not "clearly excessive" in relation to the local benefits.[199] As described above, Amazon already employs sophisticated techniques to identify the locations of its consumers and algorithmically control prices and display precise shipping speeds based those locations.[200] So, the only burden introduced by the regulation is the possible administrative costs for Amazon to ascertain that a state of emergency has been declared in a given market, determine the products covered by the price gouging regulation that was triggered by the emergency declaration, and adjust its existing pricing rules to ensure that these products, when made available for sale in the affected region, priced within the range permitted by the regulation. As will be discussed below, these administrative costs can be dramatically lessened by multi-state agreements on standardization and simplification practices.[201] To the regulatory and Amazon-internal factors that militate against excessively burdening interstate commerce, the deferential and rarely-failed *Pike* standard adds further assurance that state price gouging laws as applied to Amazon do not excessively burden interstate commerce.[202] This, in addition to the absence of extraterritorial regulation or discrimination, supports the conclusion that the dormant commerce clause is no barrier to states enforcing price gouging regulations against Amazon. Rather, the burden is on Amazon to comply with the laws of the states in which it exercises the privilege of conducting business activities.

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are Amazon (38.7%), Walmart (5.3%), eBay (4.7%), Apple (3.7%), and The Home Depot (1.7%).

198. *Exxon*, 437 U.S. at 127.
199. *Pike*, 397 U.S. at 142.
200. *See supra* Part II.A.
201. *See infra* Part IV.C.3.
202. *See supra* notes 107–111 and accompanying text.

C. STATUTORY REFORMS TO ENHANCE ABILITY OF STATES TO REGULATE AMAZON

Existing state price gouging laws are not a perfect fit for regulating e-commerce platforms. States should consider new statutory language and simplified enforcement regimes to better insulate against potential constitutional challenges from Amazon. A newly enacted or amended state price gouging law should take into account the considerations explored below.

1. *Amended Price Gouging Regulations Should Expand Liability to E-Commerce Platforms*

Today's price gouging statutes can be applied to products sold by Amazon, but likely require amending in order to hold Amazon liable for price gouging on sales by third-party sellers on the Amazon Marketplace. That is because current statutory language makes it unlawful to *sell* price gouged goods.[203] Because price gouging laws speak only of "sellers" of covered products, existing statutory language should be amended so that the price gouging regulations make it illegal for e-commerce platforms to, for example, "facilitate the sale of" or "make available for sale" price gouged products: this would ensure that the platform provider, like Amazon, falls within the meaning of the laws even though if it is not the "seller."

Any amended statutory language should be written with the following in mind: regulations that govern one-on-one commercial transactions of real-world goods are less likely to violate the dormant commerce clause than are those that govern one-way transmission of purely digital content.[204] So, laws that expand liability to e-commerce platforms must be sufficiently limited so that they do not sweep so broadly as to encompass websites that merely discuss or provide links to price gouged products.[205] Such broad regulation risks being challenged as extraterritorial

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203. *See, e.g.*, CAL. PENAL CODE § 396(b) (West 2022) ("[I]t is unlawful for a person, contractor, business, or other entity to sell or offer to sell . . . [price gouged consumer goods]"); COLO. REV. STAT. § 6-1-730 (2022) (making it unlawful for a "seller" to price gouge during emergencies). The Third Circuit recently held that Amazon is a "seller" for purposes of strict products liability, as that term is defined by the Second Restatement of Torts § 402A. Oberdorf v. Amazon.com Inc., 930 F.3d 136, 143 (3d Cir. 2019).

204. *See, e.g.*, Goldsmith & Sykes, *supra* note 123, at 813.

205. *See* discussion *supra* Part III.B.2.

regulation that subjects activity to inconsistent regulations and chills interstate commerce.[206] To avoid this potential challenge, statutory language should stipulate that the law applies only to those e-commerce platforms with significant control over the transaction terms. Significant control can be determined by multiple factors, such as whether the platform collects consumers' billing and shipping information, receives commission or other form of revenue from the sale, or facilitates shipping or delivery.[207]

2. *Amended Price Gouging Regulations Should Provide Safe Harbor for Companies with Limited Online Transactions to In-State Customers*

Price gouging regulations aimed at online marketplaces should apply a safe harbor to those platforms with only limited sales to in-state consumers, in keeping with the Court's helpful dicta in *Wayfair*.[208] The *Wayfair* majority opined that the challenged South Dakota tax regulation "includes several features that appear designed to prevent discrimination against or undue burdens upon interstate commerce."[209] The first such feature mentioned by the Court is that the regulation "applies only to sellers that, on an annual basis, deliver more than $100,000 of goods or services into the State or engage in 200 or more separate transactions for the delivery of goods or services into the State."[210] A similar limiting provision should be added to state price gouging laws in order to defeat any arguments that small businesses will be discouraged from entering the e-commerce market.

3. *States Should Work Together to Reduce Administrative and Compliance Costs*

The vastly disparate standards among state regulatory regimes means that "compliance on a national scale is difficult, expensive,

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206. *See* Quik Payday, Inc. v. Stork, 549 F.3d 1302, 1312 (10th Cir. 2008) (contrasting state regulations of one-on-one transactions with regulations that "govern websites, bulletin-board services, and chat rooms, which can be accessed by virtually anyone, anywhere, without control by the one posting the information").

207. This would, at a minimum, include third-party-seller products that are "fulfilled by Amazon."

208. South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2099 (2018).

209. *Id.*

210. *Id.* at 2089 (citations omitted).

and fraught."[211] High compliance costs risk a judicial determination that a state has impermissibly burdened e-commerce.[212] To protect against such a claim, states should develop uniform definitions of price gouging, standardize descriptions of covered products and services, and create a simple, centralized notification system to alert online platforms subject to the regulations when a state declaration of emergency has gone into effect.

States can find a model in the Streamlined Sales and Use Tax Agreement. That Agreement received favorable mention by the *Wayfair* Court as an aspect of the South Dakota regime designed to reduce administrative and compliance costs and thus prevent undue burden on interstate commerce.[213] Twenty-four states have adopted the Streamlined Sales and Use Tax Agreement, which "requires a single, state level tax administration, uniform definitions of products and services, simplified tax rate structures, and other uniform rules. . . . [and] provides sellers access to sales tax administration software paid for by the State."[214] A similar system should be employed by states to standardize and simplify regulation of price gouging.

D. AMAZON OFFERS UNIQUE BENEFITS AS A REGULATORY TARGET

While the dormant commerce clause does not preclude state enforcement actions against either third-party sellers or Amazon, considerations of resource allocation and enforcement strategy suggest that Amazon is the more desirable target.

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211. JONES DAY, *supra* note 9, at i.

212. This point was made by Chief Justice Roberts in dissent in *Wayfair*, though on the narrower issue of the application of the dormant commerce clause to state taxes. In particular, the Chief Justice criticized the majority for ignoring the costs that state taxation of remote sellers will impose on retailers, especially small businesses. *Wayfair*, 138 S. Ct. at 2103–04 (Roberts, C.J., dissenting) ("Correctly calculating and remitting sales taxes on all e-commerce sales will likely prove baffling for many retailers. Over 10,000 jurisdictions levy sales taxes, each with 'different tax rates, different rules governing tax-exempt goods and services, different product category definitions, and different standards for determining whether an out-of-state seller has a substantial presence.'") (citation omitted).

213. *Wayfair*, 138 S. Ct. at 2099–2100 (majority opinion).

214. *See About Us*, STREAMLINED SALES TAX GOVERNING BOARD, INC. (last visited Mar. 29, 2022), https://www.streamlinedsalestax.org/about-us/about-sstgb [https://perma.cc/7A4W-88T9].

1. *Third-party Sellers as an Enforcement Target: High Regulatory Resource Allocation and Inefficient 'Whack-a-Mole' Strategy*

The chief benefit of pursuing enforcement actions against third-party sellers is that today all states with price gouging regulations already have the statutory authority to apply the law to Amazon sellers, without amending existing statutory language. The downsides to the approach, however, likely overwhelm this first-order convenience.

First, challengers to state regulation of price gouging by third-party sellers have already tasted success with *Online Merchants Guild*. Any future enforcement efforts will surely be heavily litigated and the long-term goal will require enough successful litigations for the third-party sellers to feel that the risks of engaging in unlawful price gouging outweigh the benefits. Not only is this a lengthy endeavor, but it also requires tremendous resources. Moreover, the possible dormant commerce clause concerns, described above, are more serious in an enforcement action against third-party sellers than against Amazon. What's more, applying price gouging regulations to third-party sellers largely maintains the status quo of enforcement: *post hoc* and resource intensive.

2. *From an Optimal Deterrence Perspective, Amazon is the Ideal Enforcement Target*

To the constitutional authority of states to take enforcement actions, traditional optimal deterrence considerations add a compelling reason to do so. Optimal deterrence in the context of law enforcement considers the marginal cost of enforcement—that is, regulatory resource allocation—in relation to the marginal social benefit of preventing the unlawful conduct.[215] As detailed in Part I, each price gouging enforcement action requires an extraordinary amount of regulatory resources. It is easy enough for regulators to spot possible price gouged products on Amazon,

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215. *See* Amitai Aviram, *Allocating Regulatory Resources*, 37 J. CORP. L. 739, 743 (2012). This optimal deterrence model is associated with the law and economics school of legal scholarship. Anti-price gouging law enforcement is well suited to such an economic analysis of decision-making because benefits and costs are purely financial. *See generally* Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 207–09 (1968).

but it is the investigation that takes up the time and resources. Investigating individual third-party sellers is especially costly.[216] Treating Amazon as the centralized single target of liability dramatically reduces "regulatory spend." At the same time, Amazon is much more likely to be deterred by a regulatory action, real or threatened, because the sheer volume of price gouged products sold through the site exposes the company to significant monetary penalties, not to mention the negative publicity that would attend a widescale legal action.[217] In short, Amazon may face pressure to comply with a state's price gouging law if the cost of noncompliance is too great.[218] Consequently, targeting Amazon could produce a tectonic shift in regulation of price gouging, shifting from piecemeal *post hoc* enforcement efforts to a system of compliance that *prevents* price gouged products from appearing on Amazon Marketplace in the first place.

CONCLUSION

The COVID-19 pandemic highlighted the profound inability of state regulatory regimes to police online price gouging. Online price gouging and the ineffective regulatory responses demonstrate the need for a changed approach to enforcing price gouging laws. Concerns that the dormant commerce clause precludes states from regulating price gouging on online retail platforms like the Amazon Marketplace are misplaced given the weight of authority on the dormant commerce clause and the internet. Indeed, judicial constructions of the dormant commerce clause as adaptable enough to allow some state regulation of online activity is a trend of the past two decades and has now received approbation by the Supreme Court.

The dormant commerce clause does not categorically prohibit state regulation of price gouging by third-party sellers or by Amazon itself. Moreover, Amazon is the ideal regulatory target to *prevent* price gouging, rather than the current piecemeal, *post hoc*, ineffectual approach to enforcement. With some modifications to existing statutory language, states can better position themselves to enforce price gouging prohibitions against Amazon.

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216. *See supra* Part II.

217. *See* Bae, *supra* note 4, at 95–96.

218. *See* Alex Raskolnikov, *Probabilistic Compliance*, 34 YALE J. ON REG. 491, 496 (2017) ("[G]reater certainty . . . generally leads to greater compliance."); Robert D. Cooter, *Economic Analysis of Punitive Damages*, 56 S. CAL. L. REV. 79, 79 (1982) ("For most potential injurers, it is far cheaper to comply with the law than risk liability.").