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October 30, 2024

The Honorable Mike Johnson
Speaker of the House
568 Cannon House Office Bldg.
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The Honorable Hakeem Jeffries
House Minority Leader
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The Honorable Chuck Schumer
Senate Majority Leader
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Washington, D.C. 20510

The Honorable Mitch McConnell
Senate Minority Leader
317 Russell Senate Office Bldg.
Washington, D.C. 20510

RE: Endorsement of Federal Price Gouging Legislation

Dear Congressmen Johnson and Jeffries and Senators Schumer and McConnell:

We, the Attorneys General of New York, California, Connecticut, Delaware, the District of Columbia, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Oregon, New Jersey, New Mexico, Pennsylvania, and Vermont write in support of proposals for a federal prohibition on price gouging.

Over 40 states across the country make price gouging unlawful, reflecting the widespread national consensus that exists, across ideological and regional differences, that in the immediate run-up to and aftermath of a crisis, it is unfair – and harmful to our economy long-term – to reap higher profits for selling goods and services people need to survive. Despite that consensus, there is currently no federal price gouging prohibition—and individual states face heightened challenges when protecting consumers from price gouging when so many product supply chains are nationwide. A federal price gouging prohibition would provide critical partnership to state enforcement and protect consumers and small businesses alike.

At the outset, it's important to dispel one false criticism of prohibitions on price gouging: price gouging prohibitions are not price caps. Price gouging prohibitions place temporary limits on a business's ability to raise their profits on essential goods in a crisis. Rather than the price "ceilings" like those adopted in the 1970s and 80s that put a flat cap on gas prices, price gouging prohibitions let business raise prices to cover costs—just not raise prices to increase their profits. This is an important difference, because without the ability to raise prices to cover higher costs, businesses would be discouraged from selling essential products (or from increasing supply to meet higher demand) during crises because they would be doing so at a loss. Existing state prohibitions on price gouging address this issue, by allowing companies to pass on higher costs and maintain profit margins during a crisis and merely limit excess profit taking during these temporary disruptions.

Without a federal prohibition, however, consumer-facing retailers—often small businesses—bear the brunt of the reputational and legal consequences of crisis-induced higher prices, even when the most significant price gouging activity may be happening up the supply chain—outside the jurisdictional reach of a particular state's price gouging enforcement. Our states saw this up close as we received complaint after complaint from consumers about price gouging during the COVID-19 pandemic. Those consumers were angry about retailers jacking up the price of essential goods like household disinfectants.

Similarly, as war in Ukraine disrupted global markets for oil and gas, we received a spike in complaints about price gouging at the pump. In both instances, we learned from investigations of retailers that they were often time the victims not the perpetrators of illegal price gouging. They were merely passing along higher costs outside of their control, reflecting price gouging further up the supply chain.

Some states have successfully held up-chain distributors and manufacturers accountable for the harm they caused both to consumers and small businesses. But without a national prohibition in place, states face resource challenges and additional litigation uncertainty when pursuing upstream, out-of-state producers and sellers. Those gaps incentivize businesses to push price gouging activity up the supply chain in order to complicate price gouging enforcement by individual states. A complementary federal ban on price gouging would eliminate such perverse incentives.

<u>Price Gouging Laws Have Several Key Benefits that Strengthen the Economy and Address Market Failures</u>

There are several key benefits to price gouging prohibitions that animate the 40-State consensus that exists in support of state price gouging prohibitions. A federal price gouging prohibition would yield the same benefits nationally and without jurisdictional gaps.

The ***first*** and most important benefit of price gouging prohibitions is that they act like "circuit breakers" in a stock market: they put a pause on panic-driven price changes and give everyone a chance to make sure they are making the right pricing choices for the long-term. In normal times, price changes balance supply and demand, with higher prices encouraging production. But in a crisis, new forces kick in. Skyrocketing prices set off by a crisis don't lead to increases in production, because producers know they won't be able to ramp up production in enough time to take advantage of the higher prices.

Americans got a sharp reminder of this phenomenon in 2022, when Russia invaded Ukraine and global gas and diesel prices spiked. If prices behaved in crises like they do in traditional economic theories, we should have seen refineries and oil producers respond by increasing supply. They didn't. In fact, they limited investment in new exploration and drilling or refineries despite significantly higher short-term prices because they understood that any short-term profits would be undone by long-term losses once prices returned to normal.[1] So prices rose, hurting working families, with no benefit to anyone but the companies' shareholders.

Price gouging prohibitions can actually encourage production increases because they allow businesses to increase their gross profits but not their profit margins. The only way a business can profit from a crisis, then, is to sell *more* products, not sell the same amount at a higher price. But without a federal price gouging law, the perverse forces that push up prices and not production prevail, as we saw in the 2022 Ukraine crisis.

Second, price gouging prohibitions prevent inefficient pricing overreactions in the heat of a crisis. Recent research shows that in a crisis price setters risk overreacting and setting prices too high for their long-term benefit,[2] damaging their reputation,[3] and harming overall profitability.[4] This may be why some of the United States' most successful retail businesses actually freeze their prices during times of crisis.[5]

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[1] *See* Kevin Crowley & Laura Hurst, *Big Oil Spends on Investors, Not Output, Prolonging Crude Crunch*, BLOOMBERG (May 7, 2022), https://www.bloomberg.com/news/articles/2022-05-07/big-oil-spends-on-investors-not-output-prolonging-crude-crunch; Goldman Sachs, *Why Oil Prices Are Surging but Investment Is Drying Up*, BRIEFINGS (Jan. 20, 2022), https://www.goldmansachs.com/insights/pages/from-briefings-20-january-2022.html; Evan Halper, *Oil Refineries Are Making a Windfall. Why Do They Keep Closing?*, WASH. POST (June 20, 2022), https://www.washingtonpost.com/business/2022/06/20/refineries-profit-gas-prices/; Christopher Helman, *As ConocoPhillips Spins off Refining Assets, Think Twice Before Buying the New Phillips 66*, FORBES (Apr. 30, 2012), https://www.forbes.com/sites/christopherhelman/2012/04/30/as-conocophillips-spins-off-refining-assets-should-you-own-the-new-phillips-66/?sh=69ea68084eb7.

[2] *See, e.g.*, Kaitlin Ainsworth Caruso, *Price Gouging, the Pandemic, and What Comes Next*, 64 B.C. L. REV. 1797, 1843 (2023) (describing actual firm behavior).

[3] *See* Eric T. Anderson & Duncan I. Simester, *Price Stickiness and Customer Antagonism*, 125 Q. J. ECON 729, 763 (2010) (finding robust evidence that consumers punish firms for price increases if the same firm then lowers prices on that good in the future); Luis Cabral & Lei Xu, *Seller reputation and price gouging: Evidence from the COVID-19 pandemic*, 59 ECON INQ. 867 (2021) (finding that seller reputation at least partially restrains price increases even without price gouging laws).

[4] Geoffrey C. Rapp, *Gouging: Terrorist Attacks, Hurricanes, and the Legal and Economic Aspects of Post-Disaster Price Regulation*, 94 KY. L.J. 535, 558 (2006); *see also* Michael A. Salinger, Dir., Bureau of Econ., FTC, *Address to Antitrust Committee of Boston Bar Association: Moneyball and Price Gouging* 6 (Feb. 27, 2006), https://www.ftc.gov/sites/default/files/documents/public_statements/moneyball-and-price-gouging/060227moneyballandpricegouging_0.pdf (describing "sticky" price phenomenon).

[5] *See, e.g.*, Jeremy Pelzer, *Major Retailers Have Frozen Prices During Coronavirus Threat, AG Dave Yost Says*, CLEVELAND.COM (Mar. 12, 2020), https://www.cleveland.com/coronavirus/2020/03/majorretailers-have-frozen-prices-during-coronavirus-threat-ag-dave-yost-says.html (discussing voluntary price freezes in Ohio by Walmart, Target, Walgreens, Rite Aid, and others); Rafi Mohammed, *Why Businesses Should Lower Prices During Natural Disasters*, HARV. BUS. REV. (Sept. 11, 2017), https://hbr.org/2017/09/why-businesses-should-lower-prices-during-natural-disasters (describing freezes from JetBlue, Airbnb AT&T, Sprint, T-Mobile, and Verizon in response to hurricanes); Sarah Nassauer, *Home-Improvement Retailers Scamble to Restock in Florida*, WALL ST. J (Sept 11, 2017), https://www.wsj.com/articles/home-improvement-retailers-scramble-to-restock-in-florida-1505145492 (Lowes and Home Depot both claim to freeze prices during crises).

Price gouging prohibitions apply this insight to the entire economy. By limiting businesses to same level of *per-unit profits* on essential products they achieved before the crisis, while allowing them to raise prices as needed to cover bona fide cost increases, price gouging prohibitions stop knee-jerk, unjustified price increases that don't increase supplies of vital goods or long-term profits. This preserves incentives to expand supply, because every unit sold is extra gross profit at the same profit margins that existed before the crisis. Here too, a federal price gouging prohibition is a keystone in the economic arch, because it ensures businesses within a particular state apply the same practices to their in-state prices as they do out-of-state prices.

Third, price gouging prohibitions help to prevent hoarding. It's well known that crises prompt hoarding of essential products—panic from a crisis leads to irrational over-consumption. But it turns out that sharp price increases don't stop hoarding. For example, during the rice price crisis of 2008, hoarding *increased* as prices rose. Instead of dampening demand, the higher the price, the more hoarding occurred in anticipation of still further price increases.[6] All that high prices changed was who was doing the hoarding, with the rich hoarding even more than the poor.[7]

Price gouging prohibitions can change these perverse behaviors by encouraging businesses to directly limit inefficient over-consumption. If a business cannot reap an increased per-unit profit in a crisis, it has little incentive to over-supply a hoarder at a high price, because the business's per-unit profits are the same either way. Instead, businesses have an incentive to implement fairer anti-hoarding measures like per-purchaser limits.[8] And there is reason to believe that older economic literature estimating the economic costs of these kinds of limits no longer matches modern society, where these kinds of limits can be implemented much more efficiently online.[9]

The American people agree: in a recent survey, over 97% of those surveyed said rationing essential products using per-person limits during a crisis was fair, but less than 20%

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[6] *See* NATHAN CHILDS & JAMES KIAWU, U.S. DEP'T OF AG., FACTORS BEHIND THE RISE IN GLOBAL RICE PRICES IN 2008 3 (May 2009), https://www.ers.usda.gov/webdocs/outlooks/38489/13518_rcs09d01_1_.pdf?v=576.4 ("The sharp increase in rice prices led to panic buying by importers, who feared even higher prices in the future . . . .").

[7] Harrison Hong et al., *Hoard Behavior and Commodity Bubbles* 4, (Nat'l Bureau of Econ. Rsch., Working Paper No. 20974, Feb. 2015), https://www.nber.org/system/files/working_papers/w20974/w20974.pdf ("Rice is easy to store, thus it is easy to understand why lower-income households for whom rice is a staple might panic and hoard if prices were rising as quickly as they did during early 2008. What is interesting in our context is that most of the households are fairly rich, which makes our findings regarding hoard behavior more surprising.").

[8] *See* Jihwan Moon & Steven Shugan, *The Profitability of Purchase Limits During Shortages*, 59 J. OF MARKETING RES. 1197 (2022) (concluding that purchase limits may in fact increase profits more than price increases); *see also* Robert K. Fleck, *Can Prohibitions on "Price Gouging" Reduce Deadweight Losses?*, 37 INT'L REV. L. & ECON. 100 (2014) (arguing that even if it is true that limits on price gouging cause hoarding, that might in fact be economically beneficial because knowing in advance that hoarding will happen when a crisis occurs encourages efficient pre-crisis stockpiling of essential products, giving the example of flu vaccines).

[9] *See* Ramsi Woodcock, *The Efficient Queue and the Case Against Dynamic Pricing*, 105 IOWA L. REV. 1759, 1762 (2020) (arguing that virtual queuing substantially reduces economic waste).

believed that rationing indirectly by raising prices was fair.[10] Federal law already plays a key anti-hoarding role: the Defense Production Act directly outlaws hoarding and was applied to great effect during the COVID-19 emergency.[11] A federal price gouging prohibition would complement existing protections by enhancing the economic incentives for businesses to support anti-hoarding efforts.

Fourth, price gouging prohibitions can restrain inefficiently high prices for products where there is very little competition. If consumers have no choice but to buy an essential product from a particular seller, then other forces that would keep prices low in a competitive market (like a need to avoid consumer anger or being undercut by rivals' prices) stop applying, causing prices to rise still further.[12] Congress has already heard testimony showing that consolidation facilitated crisis profiteering during the COVID-19 emergency.[13] Here too a federal price gouging prohibition dovetails with existing competition laws to protect consumers from higher prices that provide no benefits other than monopoly profits.

We Need a Federal Ban on Price Gouging to Complement Existing State Laws

To be sure, there are many price gouging schemes that can be effectively deterred by state enforcement actions. During the COVID-19 pandemic, for example, many unscrupulous

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[10] Christopher Buccafusco et al., *The Price of Fairness*, 84 OHIO ST. L.J. 389, 396 (2023).

[11] 50 U.S.C. § 4512 ("In order to prevent hoarding, no person shall accumulate (1) in excess of the reasonable demands of business, personal, or home consumption, or (2) for the purpose of resale at prices in excess of prevailing market prices, materials which have been designated by the President as scarce materials or materials the supply of which would be threatened by such accumulation."). For recent enforcement actions, all involving hoarding personal protective equipment during the COVID-19 national emergency, *see, e.g.*, *United States v. Bulloch*, 615 F. Supp. 3d 175 (E.D.N.Y. 2022); *United States v. Ritchey*, 604 F. Supp. 3d 397 (S.D. Miss. 2022); *United States v. Leal-Matos*, No. CR-21-150 (SCC), 2022 WL 575192 (D.P.R. Feb. 24, 2022); *United States v. Topouzian*, No. 20-CR-721, 2021 WL 5882204 (N.D. Ill. Dec. 13, 2021).

[12] *See* Isabella M. Weber & Evan Wasner, *Sellers' Inflation, Profits and Conflict: Why Can Large Firms Hike Prices in an Emergency?*, 11 REV. KEYNESIAN ECON. 183, 191 (2023) ("[F]irms [in a concentrated market] facing input shortages due to a supply-side bottleneck can be more aggressive about raising prices and thus may not only protect profit margins but expand them."); Piero Sraffa, *The Laws of Returns Under Competitive Conditions*, 36 ECON. J., 535, 545 (1926) ("[W]ithin its own market and under the protection of its own barrier each [firm] enjoys a privileged position whereby it obtains advantages which—if not in extent, at least in their nature—are equal to those enjoyed by the ordinary monopolist.").

[13] *See Pandemic Profiteers: Legislation to Stop Corporate Price Gouging: Hearing Before the Subcomm. on Consumer Protection and Com. of the H. Comm. on Energy*, 117th Cong. 9 (2022) (statement of Rakeen Mabud, Managing Director of Policy and Research and Chief Economist, Groundwork Collaborative) ("It is clear that corporate consolidation has helped facilitate the pandemic profiteering we are seeing today."); *The Inflation Equation: Corporate Profiteering, Supply Chain Bottlenecks, and COVID-19: Hearing Before the H. Comm. on Fin. Servs*, 117th Cong. 6 (2022) (statement of Sandeep Vaheesan, Legal Director, Open Markets Institute) ("In highly concentrated markets, firms do not even need to conspire . . . to collusively raise prices. Instead, they can engage in tacit forms of collusion, in which one firm initiates a price increase and expects or encourages others to follow."); Jonathan B. Baker, *Mavericks, Mergers, and Exclusion: Proving Coordinated Competitive Effects Under the Antitrust Laws*, 77 N.Y.U. L. Rev. 135, 153–55 (2002) (reviewing literature on relationship between concentration and collusion).

retailers attempted to sell essential products like masks and sanitizer at prices hundreds of percent higher than before the start of the pandemic. Attorneys General across the country vigorously enforced their state's price gouging prohibitions to stop this exploitation, with considerable success.[14]

But a federal price gouging prohibition that complemented state prohibitions would allow federal enforcement agencies, such as the Federal Trade Commission, to identify and restrain unjustified and irrational price increases throughout the entire supply chain, unconstrained by the complications of State-by-State enforcement. It would build on successful partnerships between States and the federal government to enforce other key consumer protection laws banning deceptive and unfair conduct or abuse of monopoly power.

Such a prohibition should not preempt state laws, but complement and strengthen them by focusing federal enforcement on price gouging that cannot practicably be stopped by a single State. State laws remain essential for enforcing against price gouging that occurs in local communities or by violators active in only a single or handful of states. A complementary federal ban would allow states and the federal government to work together where national supply chains are concerned.

We recognize that there are many details about a federal price gouging prohibition that must be worked out. Our States provide many different models for how such a price gouging statute might be framed. But as crises, whether natural or human in origin, become more common and the cost of living continues to be too high for working families, we believe now is the time to work constructively in a bipartisan fashion to create federal price gouging protections to complement price gouging protections that already exist in almost every state.

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[14] *See, e.g.*, Press Release, *Attorney General Bonta Announces Settlement with smart & Final for Price Gouging Eggs During Height of the Pandemic* (April 5, 2022), https://oag.ca.gov/news/press-releases/attorney-general-bonta-announces-settlement-smart-final-price-gouging-eggs; Press Release, *California Department of Justice and Alameda County District Attorney O'Malley Announce Guilty Plea to Price Gouging Charges by Alameda County Grocery Store* (April 19, 2021), https://oag.ca.gov/news/press-releases/california-department-justice-and-alameda-county-district-attorney-o%E2%80%99malley; Press Release, *Attorney General Rosenblum Confronts Price Gouging in the Wake of the 2020 Wildfires* (Mar. 4, 2021), https://www.doj.state.or.us/media-home/news-media-releases/attorney-general-rosenblum-confronts-price-gouging-in-the-wake-of-the-2020-wildfires/; Press Release, *Attorney General Donovan Resolves Price-Gouging Case* (Dec. 21, 2020), https://ago.vermont.gov/blog/2020/12/21/attorney-general-donovan-resolves-price-gouging-case; Press Release, *Attorney General Announces Settlements in COVID-19 Consumer Protection Cases* (Nov. 17, 2020), https://www.doj.state.or.us/media-home/news-media-releases/attorney-general-announces-settlements-in-covid-19-consumer-protection-cases/; Press Release, *Attorney General James Stops Three Amazon Sellers from Price Gouging Hand Sanitizer and Recoups Funds for New Yorkers* (Nov. 17, 2020), https://ag.ny.gov/press-release/2020/attorney-general-james-stops-three-amazon-sellers-price-gouging-hand-sanitizer; Press Release, *AG Shapiro Sues Amazon Seller, Seeking $825k for Price Gouging On Hand Sanitizer* (Aug. 20, 2020), https://www.attorneygeneral.gov/taking-action/ag-shapiro-sues-amazon-seller-seeking-825k-for-price-gouging-on-hand-sanitizer/; Press Release, *Attorney General James Sues Wholesaler for Price Gouging During the Coronavirus Pandemic* (May 27, 2020), https://ag.ny.gov/press-release/2020/attorney-general-james-sues-wholesaler-price-gouging-during-coronavirus-pandemic.

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