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Too Blunt An Instrument: The Void for Vagueness Doctrine Applied to Criminal Price Gouging Under the Defense Production Act

James M. Hirschhorn, Esq. and Mark S. Olinsky, Esq.[1]

Introduction

The COVID-19 outbreak that was recognized in March 2020, and the resulting lockdown, caused major disruption to the American economy. Panic buying and broken supply chains led to shortages of consumer goods from toilet paper to hand sanitizer. More seriously, the upsurge in need and the impact on supply meant shortages of critical medical equipment, from mechanical ventilators to masks, gowns and other personal protective equipment ("PPE"). Desperate buyers bid up prices, and opportunistic sellers were there to take advantage.[2] Although price gouging enforcement has traditionally been left to the states, the federal government has come to play an important role in prosecuting price gouging violations in the wake of COVID-19.[3] While no general federal law deals specifically with price gouging, § 102 of the Defense Production Act (hereinafter "DPA" or "Act") can be applied to prosecute some cases involving goods covered by the DPA.[4] However, § 102 is loosely drafted, and it is not a good fit for the manner in which the government has chosen to apply the DPA to the medical equipment shortage. Thus far, only egregious cases of raised prices have been singled out for prosecution, and the language of the statute is vulnerable to challenge.

[1] Mr. Hirschhorn and Mr. Olinsky are members of the firm of Sills Cummis & Gross P.C.

[2] 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.

[3] Brian Desmarais, Christopher Holding, Paul Jin, and Andrea Murino, *Price Gouging: U.S. Enforcement Agencies Actively Monitoring for Violations*, JDSupra (Apr. 29, 2020), https://www.jdsupra.com/legalnews/price-gouging-u-s-enforcement-agencies-99436/.

[4] Eleanor Tyler, *Analysis: Feds Seize PPE Using Unlitigated Hoarding Statute*, Bloomberg L. (Apr. 22, 2020, 12:02 PM), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-feds-seize-ppe-using-unlitigated-hoarding-statute; Karen Hoffman Lent &Kenneth Schwartz, *Anti-Price-Gouging Enforcement in the Age of COVID-19*, Law.com (Apr. 13, 2020), https://www.law.com/newyorklawjournal/2020/04/13/anti-price-gouging-enforcement-in-the-age-of-COVID-19/.

James M. Hirschhorn, Esq
Member
Sills Cummis & Gross P.C.
jhirschhorn@sillscummis.com
(973) 643-5288

Mark S. Olinsky, Esq.
Member
Sills Cummis & Gross P.C.
molinsky@sillscummis.com
(973) 643-5402

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The Defense Production Act and Its Enforcement

Congress passed the DPA in 1950 in response to the Korean War.[5] It reenacted some of the provisions of the World War II vintage First and Second War Powers Acts, which gave the federal government broad authority to direct the national economy to produce supplies for the war effort. The DPA, as amended, confers upon the "President broad authority to act in the interest of national defense."[6] In particular DPA § 101(a) authorizes the President or his delegate to require private manufacturers to accept and give priority to the manufacture of goods "which he deems necessary or appropriate to promote the national defense."[7] Subsection 101(b) authorizes him to control the distribution of materials in the civilian market if he finds that they are "scarce and critical to national defense" and that the requirements for national defense cannot be met without severely dislocating the normal market and creating "appreciable hardship."[8] Over time, Congress has broadened the scope of the DPA's authority by expanding the meaning of national defense as defined in the DPA to include supporting "domestic preparedness, response and recovery from natural hazards, terrorist attacks, and other national emergencies."[9]

As discussed below, DPA §§ 102-03 criminalize the hoarding of designated materials or charging in excess of prevailing prices for them. In addition, DPA § 706 authorizes the courts to enjoin violations of the Act.[10] In Executive Order 10109 (Mar. 18, 2020), the President delegated to the Secretary of Health and Human Services authority under DPA § 101 to designate medical equipment and supplies as critical to the national defense.[11] On March 25, 2020, the Secretary designated a broad range of equipment and supplies, from mechanical ventilators to face masks, under this authority.[12]

The DPA as drafted contemplates the federal government as the sole customer for and allocator of defense equipment and necessary raw materials, so that the armed services do not compete against each other for priority of defense production capacity. However, the federal government decided not to use that model in the COVID-19 crisis, instead choosing to leave state governments and private buyers to compete for critical medical equipment and supplies in the market.[13] In Executive Order 13910 (Mar. 23, 2020), the President delegated to the Secretary of Health and Human Services the authority under DPA § 102 to "prevent hoarding of health and medical resources necessary to respond to

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[5] Ana Daily, Elizabeth Lindquist, & Patrick Otlewski, *Criminal and Civil Enforcement of the Defense Production Act*, JDSupra (June 8, 2020), https://www.jdsupra.com/legalnews/criminal-and-civil-enforcement-of-the-68994/.

[6] *Id.*

[7] 50 U.S.C. § 4511.

[8] *Id.*

[9] *The Defense Production Act of 1950: History, Authorities, and Considerations for Congress*, Cong. Rsch. Serv., https://fas.org/sgp/crs/natsec/R43767.pdf (last updated Mar. 2, 2020).

[10] 50 U.S.C. § 4556.

[11] *Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of COVID-19*, Fed. Reg., https://www.federalregister.gov/documents/2020/03/23/2020-06161/prioritizing-and-allocating-health-and-medical-resources-to-respond-to-the-spread-of-COVID-19 (last visited June 24, 2019).

[12] 85 Fed. Reg. 17529 (Mar. 30, 2020).

[13] *Remarks by President Trump, Vice President Pence, and Members of the Coronavirus Task Force in Press Briefing*, White House (Mar. 19, 2020), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-briefing-6/ (President Trump stated "[G]overnors are supposed to be doing a lot of this work, and they are doing a lot of this work. The federal government is not supposed to be out there buying vast amounts of items and then shipping. You know, we're not a shipping clerk. The governors are supposed to be — as with testing, the governors are supposed — are supposed to be doing it.").

the spread of COVID-19."[14] Rather than displacing the market with government-controlled production and allocation, the Administration chose to let the market operate subject to criminal prosecution for hoarding of scarce materials.

> Section 102 of the DPA provides:
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> "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."[15]

Under § 103 of the DPA, those found in violation of the conduct prohibited by §102 are subject to a $10,000 fine and/or one year of imprisonment.[16]

Much remains unclear about the kind of behavior covered by the DPA's hoarding and price control provisions and their applicability in the wake of COVID-19. Before COVID-19, the DPA had not been invoked for public health emergencies.[17] Critically, the DPA does not define what constitutes "prevailing market prices," at what relevant point in time, or how much of a markup is "excess." Nor is there any case law construing the language. Further adding to the confusion is the lack of articulable standards within the government's prosecution and charging strategy that could have the potential to put retailers or manufacturers on notice of the kind of behavior that is prohibited under DPA § 102. The position is complicated further by the fact that DPA § 104 prohibits the President from using the DPA to impose price controls without express authorization by Congress.[18] This forecloses the option of the Secretary fixing a benchmark date for prevailing market prices or prescribing an allowable markup under the rulemaking authority delegated in E.O. 10109 and 10110.

The criminal complaints that sellers of PPE have violated DPA § 102 have been unclear and inconsistent as to what constitutes "in excess of prevailing market prices." While some complaints define the prevailing market price with reference to 3M's and other manufacturers' benchmark prices,[19] others defined the prevailing market price by reference

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[14] *Prioritization and Allocation of Certain Scarce or Threatened Health and Medical Resources for Domestic Use*, Fed. Reg., https://www.federalregister.gov/documents/2020/04/10/2020-07659/prioritization-and-allocation-of-certain-scarce-or-threatened-health-and-medical-resources-for (last visited June 19, 2020).

[15] 50 U.S.C. § 4512.

[16] 50 U.S.C. § 4513.

[17] *The Defense Production Act (DPA) and COVID-19: Key Authorities and Policy Considerations*, Cong. Rsch. Serv., https://crsreports.congress.gov/product/pdf/IN/IN11231 (Mar. 18, 2020) ("As the DPA's definition of national defense encompasses homeland security issues, DPA authorities extend to public health emergencies—prior to the COVID-19 pandemic, however, they had not been employed for such purposes.").

[18] 50 U.S.C. § 4514; Sills Cummis & Gross P.C., *Sellers Beware – The COVID-19 Pandemic Has Opened the "Price-Gouging" Pandora's Box*, Nat'l L. Rev. (May 12, 2020), https://www.natlawreview.com/article/sellers-beware-COVID-19-pandemic-has-opened-price-gouging-pandora-s-box.

[19] Complaint, *United States v. Kent Bulloch and William Young*, No. 20-MJ-327 (E.D.N.Y. Apr. 27, 2020), *available at* https://www.justice.gov/usao-edny/press-release/file/1271741/download ("The 3M Representative stated that prior to COVID-19 pandemic, 3M did not import or sell any KN95 Masks in the United States. As such, a historic pricing comparison for the KN95 Mask prior to the pandemic is difficult.… The representative further indicated 3M has designated benchmark prices that are being used to value the price for which 3M KN95 Masks should sell.... The representative further indicated that the benchmark prices for various models of KN95 Masks provided by 3M were within the range of $0.61 - $0.84 per mask (or less)."); Complaint, *United States v. Richard Schirripa*, 20 MAG 5275 (S.D.N.Y. May 26, 2020), *available at* https://www.justice.gov/usao-sdny/press-release/file/1278736/download (The complaint contained an interview with a 3M representative who stated what they believe the end-user should pay for the N95 1860 or an N95 1860S face mask.); Complaint, *United States v. Ronald Romano*, 20 MAG 5276 (S.D.N.Y. May 26, 2020), *available at* https://www.justice.gov/usao-sdny/press-release/file/1278731/download (The defendants list price "represent[ed] a more than 400% markup from the 3M list price and the price at which Romano and others attempted to acquire the respirators for resale, during late March and early April of this year.).

to how much markup the defendant took.[20] No set percentage was put forward to determine what constitutes an excess of prevailing market prices.[21]

The Void for Vagueness Doctrine

The lack of clarity within § 102 could result in the application of the void for vagueness doctrine as a defense because the statute fails to provide fair advance notice of what is prohibited and allows scope for arbitrary enforcement discretion. The void for vagueness doctrine stems from the provision of the Due Process Clause of the Fifth Amendment that no person may be deprived of "life, liberty, or property, without due process of law."[22] The test for determining if a law is unconstitutionally vague consists of two prongs: either (1) "a failure to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," or (2) the "encouragement of arbitrary and erratic arrests and convictions."[23] Under the modern test, a statute need only fail one of the two prongs to be held unconstitutionally vague.[24]

Under the first prong, the "courts look for 'reasonably clear lines between the kinds of' conduct that are permitted and those that are not."[25] Two cases that represent the Court's most recent exegesis of the void for vagueness doctrine are *Skilling v. United States*[26] and *Holder v. Humanitarian Law Project*.[27] However, the Supreme Court has held that a clear scienter requirement may alleviate notice concerns. While *Skilling* narrowed the statute prior to engaging in the fair notice analysis, *Humanitarian Law Project* held that, as applied to the plaintiffs and their conduct, the statute was not unconstitutionally vague. In each of these cases, however, the court relied on the scienter requirement in the statutes at issue to conclude that sufficient notice was provided.[28] Yet, the presence of a scienter element "does not guarantee

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[20] Complaint, *United States v. Singh*, No. 20-MJ-326 (E.D.N.Y. Apr. 24, 2020), *available at* https://www.justice.gov/usao-edny/press-release/file/1271156/download ("Singh obtained N-95 respirator face masks for a per-unit cost of $2.50. At the Retail Premises, Singh resold these masks for a per-unit price of between $3.99 and $4.99—a markup of approximately 59% to 99%.").

[21] Complaint, *United States v. Richard Schirripa*, 20 MAG 5275 (S.D.N.Y. May 26, 2020), *available at* https://www.justice.gov/usao-sdny/press-release/file/1278736/download (The complaint simply alleged that the defendant "charged his customers severely inflated prices" without reference to a certain percentage of what constitutes a severely inflated price.).

[22] U.S. Const. Amend. V.

[23] Emily M. Snoddon, *Clarifying Vagueness: Rethinking the Supreme Court's Vagueness Doctrine*, 86 U. Chi. L. Rev. 2301, 2307-2308 (2019).

[24] *Id.* at 2308.

[25] Michelle M. Mello & Rebecca E. Wolitz, *Legal Strategies for Reining in "Unconscionable" Prices for Prescription Drugs*, 114 Nw. U. L. Rev. (forthcoming 2020) (manuscript at 22), https://petrieflom.law.harvard.edu/assets/publications/Mello_Wolitz_Reining_in_Unconscionable_Prices_for_Prescription_Drugs.pdf.

[26] 561 U.S. 358 (2010).

[27] 561 U.S. 1 (2010).

[28] *Skilling* involved a vagueness challenge to 18 U.S.C. § 1346, which defines a "scheme or artifice to defraud" under the mail and wire fraud statutes to include a scheme "to deprive another of the intangible right to honest services." It narrowed the statute to criminalize only schemes to defraud involving bribery or kickbacks, which were the "core applications" of the honest-services doctrine that predated the statute and excluded self-dealing and undisclosed conflicts of interest. So narrowed, the statute satisfied both prongs of the vagueness test. 561 U.S. at 408-13. The statute at issue in *Humanitarian Law Project*, 18 U.S.C. § 2339B, prohibits "knowingly provid[ing] material support or resources to a foreign terrorist organization." The *Humanitarian Law Project* court upheld the statute, reasoning that, as applied to the plaintiffs, 18 U.S.C. § 2339A was not unconstitutionally vague since the conduct the plaintiffs engaged in clearly fell within the language of the statute. "[A] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." 561 U.S. at 18-19. *See generally* Cristina D. Lockwood, *Creating Ambiguity in the Void for Vagueness Doctrine by Avoiding a Vagueness Determination in Review of Federal Laws*, 65 Syracuse L. Rev. 395 (2015).

the wording of a law provides fair notice."[29]

The court added the second prong with *Papachristou v. City of Jacksonville*,[30] and reaffirmed it in *Smith v. Goguen*,[31] holding in both cases that the vague statutory language permitted excessive enforcement discretion on class, racial or political grounds. Under the second prong, the Court has not required actual evidence of arbitrary or discriminatory enforcement, instead conducting a textual analysis of the statute to reach a conclusion as to whether the law allows for arbitrary or discriminatory enforcement.[32] However, there exist inconsistencies of what standard to apply when evaluating the second prong of the void for vagueness doctrine. Under *Skilling*, a law is void for vagueness when it "encourage[s] arbitrary and discriminatory enforcement."[33] Two cases that illustrate this standard are *Kolender v. Lawson* and *City of Chicago v. Morales*, both of which involved loitering statutes that, like the vagrancy statute in *Papachristou*, facilitated arbitrary police harassment in poor communities. *Kolender* held that a criminal statute that required persons who loiter or wander on the streets to provide a "credible and reliable" identification and to account for their presence when requested by a peace officer[34] was unconstitutionally vague because it failed to define what constitutes "credible and reliable" identification, and, as a result provided law enforcement officers with "close to complete discretion when determining whether a suspect has satisfied the statute."[35] *Morales* involved a city ordinance that criminalized loitering in a public place in the company of a criminal gang member.[36] Unlike in *Kolender*, the ordinance defined loitering as "to remain in any one place with no apparent purpose," and there were internal police guidelines for enforcement.[37] *Morales* nonetheless struck down the ordinance as being void for vagueness and, as in *Kolender*, concluded that "the ordinance's broad sweep violates the requirement that a legislature establish minimal guidelines to govern law enforcement."[38] A second standard for fair enforcement was articulated in *Humanitarian Law Project* and *Fox Television*.[39] The Court in both cases stated that a law may not be "so standardless that it authorizes or encourages seriously discriminatory enforcement."[40] However, the courts in *Humanitarian Law Project* and *Fox Television* did not apply the fair enforcement standard they brought forward, as the decisions instead focused exclusively on analyzing the fair notice prong.

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[29] Lockwood, *supra* note 29, at 406; *Screws v. United States*, 325 U.S. 91, 105 (1945) ("The requirement that the act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain."); *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010); *Skilling v. United States*, 561 U.S. 358 (2010).

[30] 405 U.S. 156, 165-69 (1972) (vagrancy statute).

[31] 415 U.S. 566, 575 (1974) (flag desecration statute).

[32] Lockwood, *supra* note 29, at 415-16.

[33] 561 U.S. at 403.

[34] *Kolender v. Lawson*, 461 U.S. 352 (1983); Steve I. Friedland, Quick Review of Criminal Law (6th ed. 2018).

[35] *Kolender*, 461 U.S. at 358-60.

[36] *City of Chicago v. Morales*, 527 U.S. 41 (1999); *Procedural Due Process Civil*, Justia, https://law.justia.com/constitution/us/amendment-14/05-procedural-due-process-civil.html#30 (last visited June 9, 2019).

[37] 527 U.S. at 47.

[38] 527 U.S. at 60.

[39] *FCC v. Fox TV Stations, Inc*., 567 U.S. 239 (2012). *Fox* involved the enforcement of 18 U.S.C. § 1464, which prohibits the broadcast of "any obscene, indecent or profane language." It held that the statute was unconstitutionally vague when applied to isolated instances of profane speech, and that the FCC's publication of new regulatory guidance that "fleeting expletives and momentary nudity could be found actionably indecent" did not save the statute when applied to content that had already been broadcast. In order to satisfy due process, fair notice needed to be provided prior to the enforcement of the new regulation. 567 U.S. at 258-59.

[40] *Fox*, 527 U.S. at 253; *Humanitarian Law Project*, 561 U.S. at 18.

The Void for Vagueness Doctrine and Price Controls

On February 28, 1921, the Supreme Court issued five rulings in cases that involved the Lever Act, a World War I price control statute.[41] The Lever Act made it a crime to exact "any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries" and "excessive prices for any necessaries."[42] However, it clarified neither what constituted an unjust or unreasonable rate nor what factors ought to be considered in assessing unreasonableness.[43] One of these five rulings was *United States v. L. Cohen Grocery Co*.[44] In *Cohen Grocery*, the Court held that the Lever Act was in fact unconstitutionally vague as the "section forbids no specific or definite act.... It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against."[45] In particular, *Cohen Grocery* pointed out that the vagueness of the statutory language would criminalize "all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury,"[46] a subjective standard that invited discriminatory enforcement. *Cohen Grocery* thus foreshadowed both the "fair notice" and the "discriminatory enforcement" prongs that would be developed in the void for vagueness doctrine.

Cohen Grocery was limited and distinguished by *United States v. National Dairy Prods. Corp*.[47] *National Dairy* was not a price control case. It involved the Robinson-Patman Act provision that criminalized the sale of goods at "unreasonably low prices for the purpose of destroying competition or eliminating a competitor."[48] The Court upheld the statute, focusing on the notice prong of the void for vagueness analysis. It stressed the statute's requirement of a predatory intent to drive the competitor out of business element provided clear notice of what was prohibited.[49] It distinguished *Cohen Grocery* on the ground that the Lever Act had lacked "an accepted and fairly reasonable commercial standard," whereas the Robinson-Patman Act dealt with the specific business practice of intentionally underselling a competitor to drive it out of business.[50]

Application to the Defense Production Act

DPA § 102 arguably violates the void for vagueness doctrine on both fair notice and discriminatory enforcement grounds. Section 102 does not provide clear notice because it does not define what constitutes the prevailing market price, at what point in time, or how much of a margin over that benchmark price is considered excessive. Nor does it determine whether or at what degree a middleman that is passing on higher prices from its own supplier is in violation. Sellers are left to guess whether the prevailing market price is the one that existed before the COVID-19 crisis, or whether it reflects the increased demand and disrupted supply chains created by the pandemic.

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[41] Mello & Wolitz, *supra* note 26, at 23...

[42] Act Oct. 22, 1919, tit. 1, c. 80, § 2, 41 Stat. 297.

[43] Carissa Byrne Hessick, *Vagueness Principles*, 48 Ariz. St. L.J. 1137, 1160 (2016).

[44] *United States v. L. Cohen Grocery Co.*, 255 U.S. 81 (1921).

[45] *Id.* at 89. The court took notice of the differences in interpretation of the term "unreasonable prices" among lower courts. *Id.* at 90 n. 1.

[46] *Id.* at 89.

[47] 372 U.S. 29 (1963).

[48] Mello & Wolitz, *supra* note 26, at 23.

[49] 372 U.S. at 35.

[50] The Court pointed out that an "unreasonably low" price could be well understood, in light of the history of the antitrust laws, as one in which a stronger competitor subsidized below-cost pricing in the weaker competitor's market by profits from other markets where it could charge higher prices. 372 U.S. at 33-34.

The lack of notice is not saved by the statutory *scienter*, "purpose to sell at a price in excess of prevailing market prices," because it is exactly that intended result that is undefined. In *National Dairy*, a seller of common intelligence could easily know whether he intended to drive his competitor out of business by underselling him at an unreasonably low price. Under § 102, he cannot know how high a price is too high.[51] In contrast, many state price-gouging statutes specify both the benchmark date and the prohibited level of markup.[52] Unlike "unreasonably low" prices in the Robinson-Patman Act, moreover, there are no decisions defining the key terms. The government's criminal complaints alleging violation of the statute fail to articulate a clear and consistent standard.[53]

Knowing that one is increasing the price of goods in order to increase profits does not equate to knowing that one's conduct violates the law. The economic premise of price gouging and other price control statutes is that sellers receive a windfall profit by charging a price that does not increase supply because inputs are not available. On the contrary, increasing the price of goods in response to sharply increased demand can be legitimate economic activity if it brings otherwise unavailable goods into the market.[54] It has been reported that one school of thought within the administration opposed criminal enforcement of the DPA for that reason.[55]

With regard to fair notice, an argument could be made that the DPA fails under both standards that have been articulated by the courts. Under the Skilling standard, a law is held to be void for vagueness when it fails to establish a minimal standard. The undefined language "in excess of prevailing market prices" within the DPA fails to do just that, and as a result encourages arbitrary and discriminatory enforcement. This is best illustrated by the lack of consistency within the criminal complaints filed by the US government for those allegedly found in violation of the DPA; while some criminal complaints define "prevailing market prices" as constituting the prices offered by 3M or other manufacturers,

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[51] *See Federal Communications Commission v. Fox TV Stations, Inc.*, 567 US 239, 240, 254 (2012) (fair notice is lacking when the prohibited behavior is defined only after enforcement). "In the 2004 Golden Globes Order, issued after the broadcasts, the Commission changed course and held that fleeting expletives could be a statutory violation…. The Commission's lack of notice to Fox and ABC that its interpretation had changed so the fleeting moments of indecency contained in their broadcasts were a violation of § 1464 as interpreted and enforced by the agency "'fail[ed] to provide a person of ordinary intelligence fair notice of what is prohibited.'"

[52] Ala. Code § 8-31-1 - 8-31-6 (unlawful to charge 25% or more greater than the average purchase price for certain goods during the 30 days preceding the declaration of emergency); Ark. Code. Ann. § 4-88-301 - § 4-88-305 (unlawful to sell certain goods at a price more than 10% greater than the price charged immediately before the declaration of emergency); Cal. Pen. Code. PEN. CODE § 396 (unlawful to sell certain goods at a price that is more than 10% greater than the price charged immediately before the declaration of emergency); Me. Rev. Stat. Ann. tit. 10, § 1105 (unlawful to sell certain goods a price that is more than 15% greater than the sum of the pre-disruption price plus the seller's increased costs associated with the market disruption); N.J. Stat. Ann. § 56:8-109 (unlawful to sell certain merchandise at a price that exceeds the pre-emergency price of an item by more than 10%, excluding increased costs); Okla. Stat. Ann. tit. 15 § 777.1 – 777.5 (unlawful to sell certain goods for more than 10% above the rate/price charged prior to the state of emergency); Or. Rev. Stat. Ann. § 401.965 (unlawful to sell certain goods for 15% or more greater than the item's price before the market disruption, or if the amount charged is 15% or more greater than the price for similar goods/services in the same market during a declared abnormal market disruption); 73 Pa. Stat. § 232.4 (2007) (unlawful to sell certain goods for a price that exceeds the price immediately before a declared emergency by 20% or more); Utah Code Ann. § 13-41-202 (unlawful to sell certain goods for more than 10% greater than the average pre-emergency price for the same item); W. Va. Code § 46A-6J-1, 46A-6J-2 (unlawful to sell certain goods for a price that exceeds the average pre-emergency price by more than 10% during a declared emergency); Wis. Admin. Code. ATCP § 106.01 (unlawful to sell certain goods at a rate that is more than 15% greater than the highest price at which the item was sold in the 60 days leading up to the economic disruption).

[53] *See* nn. 19-21 *supra*.

[54] Michael Brewer, *Planning Disaster: Price Gouging Statutes and the Shortages They Create*, 72 Brook. L. Rev. 1101, 1120 (2007) (highlighting the exacerbation of shortages and the misallocative effects of artificially low prices. Price gouging statutes "handicap markets just when the need for a mechanism to rationally distribute goods is in greatest need."); Sills Cummis & Gross P.C., *supra* note 18.

[55] Betsy Woodruff Swam, *White House 'Free Marketers' Raised Concerns Over Coronavirus Price Gouging Crackdown*, Politico (July 3, 2020), https://www.politico.com/news/2020/07/03/white-house-coronavirus-price-gouging-348434.

other complaints look to the price the defendant paid for the item.[56] At the extreme ends are the criminal complaints filed against Singh and against Bulloch and Young, all defendants who were not previously involved in the PPE market prior to the COVID-19 outbreak.[57] The complaint against Bulloch and Young goes so far as to defer to a 3M representative to determine a hypothetical price for KN95 masks, which it did not sell in the United States prior to the pandemic.[58] On the other hand, the complaint in Singh stressed the difference between the price for which Singh bought the item and the sale price.[59] In neither of the complaints was a benchmark price date discussed. The lack of an articulable standard places discretion in the hands of enforcement officials to determine which behavior they wish to punish.

In *Kolender* and in *Morales*, the courts invalidated the ordinance or statute at issue for the possibility of arbitrary and discriminatory enforcement despite the fact that "in *Morales*, there was a detailed police order created to prevent arbitrary and discriminatory enforcement of the ordinance" and "in *Kolender*, there were state court decisions interpreting the requirement needed to satisfy the law."[60] Unlike *Morales* and *Kolender*, there are no court decisions interpreting the "in excess of prevailing market prices" language and there is no detailed police order created to prevent arbitrary and discriminatory enforcement of the statute. Therefore, the language "in excess of prevailing prices" may very well be invalidated for encouraging arbitrary enforcement. For these reasons, it can also be argued that the DPA fails to meet the standard put forward in *Fox Television* and *Humanitarian Law Project*, under which, the law may not be "so standardless that it authorizes or encourages seriously discriminatory enforcement." By failing to articulate or codify with sufficient particularity what an individual must do in order to satisfy the statute, the DPA arguably authorizes or encourages seriously discriminatory enforcement.

In response, the government might argue that it did in fact articulate a standard, as all of the alleged violators of the DPA were not previously involved in the PPE market prior to the COVID-19 outbreak and instead were attempting to capitalize on the scarcity and high demand. This amounts to a "we know it when we see it" standard that can be used to discriminate against new entrants drawn in by the emergency to protect established, supposedly reputable sellers. As in *Fox Television*, no such standard was in place beforehand; the prosecution task force is making it up as it goes along. Such after the fact standards cannot retroactively provide adequate notice of the behavior that is permissible and what is prohibited.[61]

The government could have alleviated the vagueness issue and strengthened its position by issuing safe harbor regulations. A safe harbor is "a provision in a law or regulation that affords protection from liability or penalty under specific situations, or if certain conditions are met."[62] Executive Order 13910 "delegated to the Secretary of Health

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[56] Complaint, *United States v. Singh*, No. 20-MJ-326 (E.D.N.Y. Apr. 24, 2020), *available at* https://www.justice.gov/usao-edny/press-release/file/1271156/download; Complaint, *United States v. Kent Bulloch and William Young*, No. 20-MJ-327 (E.D.N.Y. Apr. 27, 2020), *available at* https://www.justice.gov/usao-edny/press-release/file/1271741/download.

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] Lockwood, *supra* note 29, at 419-420.

[61] *See Fox Television Stations, Inc.*, 567 U.S. at 258.

[62] Jean Murray, *What is a Safe Harbor Law or Provision?*, Small Bus. (July 30, 2019), https://www.thebalancesmb.com/what-is-a-safe-harbor-law-or-provision-398457.

and Human Services (Secretary) the prioritization and allocation authority under section 101 of the Act with respect to health and medical resources needed to respond to the spread of COVID-19", including authority to "adopt and revise appropriate rules and regulations as may be necessary to implement this order."[63] The Secretary has historically promulgated safe harbor regulations to address a variety of regulatory issues.[64] As of this date, however, no safe harbor regulation has been promulgated.

Because a safe harbor regulation would specify the degree of price increase from a benchmark that will not be prosecuted, without prohibiting prices above that level, it would likely not violate DPA § 104, which prohibits the imposition of price controls without prior congressional authorization.[65] It would, on the other hand, add content to the unlawful purpose *scienter* requirement of DPA § 102 by giving a clear example of what constitutes prevailing market prices. Sufficiently precise safe harbor provisions have the potential to provide advance notice of what the government regards as permissible conduct under a statute, and thereby give implicit notice that what is not within the safe harbor is subject to enforcement.[66] Precision is necessary, however. A vague safe harbor regulation will not cure a vague statute and may itself be a trap.[67]

Conclusion

The COVID-19 pandemic has placed unprecedented stress on the hospital system and on the availability of critical medical equipment and supplies. To address the crisis, the federal government invoked the Defense Production Act, but it did not use its powers under the Act to become the sole buyer and distributor of goods in short supply. Instead, it chose to leave the market to operate, except for unprecedented criminal prosecutions for hoarding under DPA § 102. However, the statutory standard of wrongdoing, "the purpose of resale at prices in excess of prevailing market prices," does not provide an ascertainable standard of criminal liability and is vulnerable to challenge under the void for vagueness doctrine. That risk could have been mitigated either by safe harbor regulations declaring what markups are permissible, or by civil enforcement using the injunction power under DPA § 706 to first enjoin a defined violation and then enforce the injunction by civil or criminal contempt if necessary. The few existing criminal prosecutions appear to have singled out particularly egregious cases involving opportunists, but it remains to be seen whether the undefined statutory language will hold up in a criminal case.

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[63] *Preventing Hoarding of Health and Medical Resources to Respond to the Spread of COVID-19*, Fed. Reg. (Mar. 26, 2020), https://www.federalregister.gov/documents/2020/03/26/2020-06478/preventing-hoarding-of-health-and-medical-resources-to-respond-to-the-spread-of-COVID-19.

[64] For example, the Anti-Kickback Statute, 42 U.S.C. § 1320a-7b(b), broadly prohibits paying doctors to use or refer goods or services paid for by Medicare or Medicaid. The safe harbor regulations under the Anti-Kickback Statute, 42 C.F.R. § 1001.952, define payment and business practices that will not be considered unlawful kickbacks, bribes, or rebates and specify allowable financial and referral relationships between physicians or other providers and suppliers.

[65] *The Defense Production Act of 1950: History, Authorities, and Considerations for Congress, supra* note 9 ("50 U.S.C. § 4514, Section 104 of the DPA that prohibits both the imposition of wage or price controls without prior congressional authorization.").

[66] In *Fox TV Stations, Inc.*, 567 U.S. at 254-56, the Court found the FCC's new broadcast obscenity standards did not cure a vagueness challenge when applied retroactively because they had not provided fair notice at the time, while leaving open the question of whether they would be constitutional when applied prospectively.

[67] *Gentile v. State Bar of Nevada*, 501 U.S. 1048 (1991), held that a safe harbor provision permitting a criminal defense lawyer to "publicly . . . state without elaboration . . . the general nature of the defense" were void for vagueness and had misled the lawyer into thinking that he could safely give a press conference for which he was then disciplined. The Court reasoned that the terms "general" and "elaboration" were "classic terms of degree which, in this context, have no settled usage or tradition of interpretation in law, and thus a lawyer has no principle for determining when his remarks pass from the permissible to the forbidden." 501 U.S. at 1048.