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COMMENTS OF ITIF

to the

Department of Justice

Washington, D.C.

In the Matter of:	)	
Request for Information on State Laws Having Significant Adverse Effects on the National Economy or Significant Adverse Effects on Interstate Commerce	)	Docket ID: OLP182

September 15, 2025

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INTRODUCTION AND SUMMARY

The Information Technology and Innovation Foundation (ITIF) is pleased to submit these comments in response to the Department of Justice's (DOJ) request for public comment concerning its Request for Information on State Laws Having Significant Adverse Effects on the National Economy or Significant Adverse Effects on Interstate Commerce.[1] ITIF is a nonprofit, non-partisan public policy think tank based in Washington, D.C., committed to articulating and advancing pro-productivity, pro-innovation, and pro-technology public policy agendas around the world that spur growth, prosperity, and progress.

[1] Federal Register, "Request for Information on State Laws Having Significant Adverse Effects on the National Economy or Significant Adverse Effects on Interstate Commerce," August 15, 2025, https://www.federalregister.gov/documents/2025/08/15/2025-15604/request-for-information-on-state-laws-having-significant-adverse-effects-on-the-national-economy-or.

Technology has transformed virtually every aspect of American life since the country's founding. Americans work, learn, shop, communicate, entertain themselves, and so much more in fundamentally different—and more convenient—ways from the norms of nearly 250 years ago. Despite these differences, the principles laid out in the Constitution have endured in today's connected world. The Founders recognized the importance of unimpeded interstate commerce, which led them to include the Commerce Clause in the Constitution, giving Congress the power to regulate commerce with foreign nations and among the states. By giving every business, from multinational corporations to local mom-and-pop shops, the ability to sell products and services online and across borders, the Internet has made the Commerce Clause more relevant than ever.

There are many technology policy issues where states have created a patchwork of regulation that impose duplicative costs on businesses, cause confusion for consumers, and act as a drain on the U.S. economy. In order to address these issues, federal preemption would streamline regulation and decrease costs and confusion.

SIGNIFICANT DIGITAL POLICY BARRIERS

States have passed, or are considering passing, a variety of laws that can pose barriers to digital commerce. These laws impose duplicative, conflicting, or otherwise problematic requirements on businesses and consumers operating in the digital economy. Federal preemption in areas including data privacy, artificial intelligence (AI), and children's online safety is crucial to make progress toward a U.S. digital single market.

Data Breach Notification

While a growing number of states have passed comprehensive data privacy legislation, all 50 of them have data breach notification laws, which require organizations to notify users of data breaches involving their personal information.[2] These laws vary from state to state on a number of factors, including which entities the laws applies to, how the laws define personal information and what constitutes a data breach, whom organizations must notify in the event of a breach, and how and when organizations must notify these individuals.

When a data breach affects an organization with users in multiple states, complying with each state's laws becomes a complicated process. Additionally, different states' laws afford consumers different protections. For example, some data breach notification laws only apply to unencrypted data, while others apply to both unencrypted and encrypted data. Some data breach notification laws only apply to unauthorized acquisition of personal data while others apply both to unauthorized acquisition and unauthorized use of personal data, protecting consumers in the case of data misuse.

In order to create a uniform standard that applies to all data breaches of personal information, Congress has considered data breach notification legislation both as standalone bills and as provisions within

[2] "H.R.1770 - Data Security and Breach Notification Act of 2015," Congress.gov, accessed December 15, 2023, https://www.congress.gov/bill/114th-congress/house-bill/1770; "S.744 - Data Care Act of 2023," Congress.gov, accessed December 15, 2023, https://www.congress.gov/bill/118th-congress/senate-bill/744.

comprehensive data privacy bills, but none of these bills have passed.[3] Congress should correct this, ideally by including a data breach notification provision in comprehensive data privacy legislation that preempts state laws.

Data Privacy

States have begun creating a patchwork of data privacy laws. California passed the first comprehensive state data privacy law, the California Consumer Privacy Act, in 2018, which opened the floodgates of state privacy legislation. Since then, 19 states have passed comprehensive data privacy laws, with many of the remaining 31 states also introducing bills.[4]

Not only does the current state-by-state approach to data privacy confuse consumers, whose privacy rights vary depending on where they live, it has an enormous negative impact on businesses, which must comply with the privacy laws of every state where their users reside. This is an expensive process, including the costs of coming into compliance with all these laws and paying any legal fees associated with violations, sometimes for trivial instances of noncompliance. ITIF estimated in 2022 that if all 50 states passed their own comprehensive privacy laws, businesses would pay out-of-state costs between $98 billion and $112 billion per year.[5]

In addition to these comprehensive privacy laws, some states also have targeted legislation to address privacy issues related to specific technologies, such as biometrics. Seven states—Colorado, Illinois, Maryland, New York, Oregon, Texas, and Washington—have biometric privacy laws and more have proposed such legislation.[6] Illinois was the first, passing in 2008 the Biometric Information Privacy Act, which requires written, informed consent for the collection and use of any biometric data. This law created a wave of expensive lawsuits that deterred some companies from operating or offering certain services in Illinois.[7]

To address the skyrocketing costs from state privacy laws, Congress should pass comprehensive federal data privacy legislation that preempts state laws, while taking a light-touch approach that addresses actual privacy harms while reducing costs that hinder productivity and innovation. Compared to the cost of 50 different state privacy laws, a targeted but effective federal privacy law would cost only $6 billion per year, causing a significantly smaller impact on the American economy.[8]

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[3] Daniel Castro and Gillian Diebold, "The Looming Cost of a Patchwork of State Privacy Laws" (ITIF, January 2022), https://itif.org/publications/2022/01/24/looming-cost-patchwork-state-privacy-laws/.

[4] Andrew Folks, "US State Privacy Legislation Tracker," International Association of Privacy Professionals, updated July 7, 2025, https://iapp.org/resources/article/us-state-privacy-legislation-tracker/.

[5] Castro and Diebold, "The Looming Cost."

[6] Amy de La Lama and Lauren J. Caisman, "U.S. biometric laws & pending legislation tracker," Bryan Cave Leighton Paisner, updated March 2025, https://www.bclplaw.com/en-US/events-insights-news/us-biometric-laws-and-pending-legislation-tracker.html.

[7] Ashley Johnson and Daniel Castro, "Maintaining a Light-Touch Approach to Data Protection in the United States" (ITIF, August 2022), https://itif.org/publications/2022/08/08/maintaining-a-light-touch-approach-to-data-protection-in-the-united-states/.

[8] Ibid.

Artificial Intelligence

Some states have also passed or considered targeted legislation to regulate AI. California, Texas, Utah, and Colorado have all passed laws creating rules for AI, imposing obligations on the developers and deployers of AI systems.[9] Such legislation would create a similar patchwork to that which already exists for data privacy, creating a major setback for U.S. leadership in AI. The United States is in a global race with China, which is pursuing a coordinated national strategy to dominate AI. For America to compete and win, it must harness its talent, data, technology, and businesses—not shackle its AI companies with a patchwork of conflicting state regulations.

Congress nearly took steps to address this looming issue with its proposed 10-year moratorium on state AI laws in the "One Big Beautiful Bill"; however, since legislators ultimately stripped the moratorium from the bill, the issue remains.[10] Congress should revisit this proposal as a standalone measure. Inconsistent state AI laws distort the market, reduce scale, and threaten the quality and availability of AI tools. A national moratorium on state AI laws wouldn't eliminate oversight; it would give Congress the space to craft a single, consistent framework that protects consumers while enabling innovation. Allowing 50 different sets of rules only increases costs, confusion, and compliance burdens for companies building the technology of the future.

Children's Online Safety

Several states have passed laws attempting to address safety concerns facing children online. Thus far, these laws have fallen into two categories: age-appropriate design codes, which establish standards online services must follow to make their services safe for children, and age verification requirements, which gatekeep certain online services from users under a certain age either entirely or without parental consent.

States' gatekeeping access to certain online services comes with serious implications for these services and their users. In order to verify users' ages, these services may have to collect and retain information from government-issued forms of identification, which include not only an individual's date of birth but other sensitive personal data such as their full name and address. In order to obtain parental consent, online services will have to collect additional sensitive personal data to verify the relationship between parent and child.

This data collection effort poses privacy risks and may deter some users from using certain online services. For example, some users may not be comfortable with Chinese-owned TikTok having a copy of their government ID, and many users would not be comfortable with adult websites knowing their identity. Additionally, adults without a form of government-issued identification would lose access to social media and adult online services.

Of course, gatekeeping access to adult-oriented online services, where the majority of content is inappropriate for minors, is different from gatekeeping access to social media, where only some content is inappropriate for

[9] "US State AI Governance Legislation Tracker," IAPP, July 15, 2025, https://iapp.org/resources/article/us-state-ai-governance-legislation-tracker/.

[10] Daniel Castro, "Loss of AI Moratorium Means No Guardrails Against Costly State AI Laws, Says Center for Data Innovation," (ITIF, July 1, 2025), https://itif.org/publications/2025/07/01/loss-of-ai-moratorium-means-no-guardrails-against-costly-state-ai-laws/.

minors. But both approaches carry free speech implications, as adults have a right to access legal content, including sexually explicit content. Indeed, many state age verification laws have faced lawsuits over First Amendment concerns.[11]

To protect children while safeguarding free speech, Congress should pass legislation preempting state children's online safety laws. To address child safety online, Congress should require device operating systems to create an opt-in "trustworthy child flag" for user accounts, available when first setting up a device and later in a device's settings, that signals to apps and websites that a user is underage and require apps and websites that serve age-restricted content to check for this signal for their users and block those users from this content.[12]

ANTITRUST

The wayward and overbroad enforcement of state antitrust laws is another area that increasingly poses a threat to the national economy. For example, in the long-running *Epic v. Apple* litigation, although Apple was found to have not violated federal antitrust laws, its policy of limiting developers' ability to link to outside payment methods as a way to circumvent Apple's commission was found to violate California's Unfair Competition Law and is now being used as a pretext for a nationwide injunction preventing Apple from charging a commission on iOS-derived transactions made off-app.[13] Although states have the right to enforce their antitrust and unfair competition laws, the DOJ should consider advising Congress on policy proposals as to how nationwide injunctions for state antitrust violations can be prevented, not least when they are used to fundamentally upend the business model of one of America's most successful companies.

California presents another instance of the risks posed by state antitrust enforcement, and in particular efforts to expand state antitrust laws well beyond corresponding federal standards and instead import more interventionist European competition policy frameworks. For example, in the area of unilateral conduct, the California Law Review Commission has proposed moving to a European-style abuse of dominance standard in lieu of the Sherman Act's monopolization framework, which risks saddling numerous firms with additional antitrust liability, albeit with limited benefits in terms of mitigating false negatives.[14] And, with mergers, California is considering the adoption of an "appreciable risk" standard that would make it considerably easier to challenge deals relative to the current "likelihood" test under the Clayton Act that is rooted in decades of

[11] "Litigation Center," NetChoice, accessed September 9, 2025, https://netchoice.org/litigation/; "Lawsuit Status," Free Speech Coalition, accessed September 9, 2025, https://action.freespeechcoalition.com/age-verification-resources/av-lawsuits/.

[12] Ash Johnson, "How to Address Children's Online Safety in the United States" (ITIF, June 2024), https://itif.org/publications/2024/06/03/how-to-address-childrens-online-safety-in-united-states/.

[13] Information Technology and Innovation Foundation, "Amicus Brief to the US Court of Appeals for the Ninth Circuit in Support of the Appellant in Epic Games v. Apple" (ITIF, June 2025), https://itif.org/publications/2025/06/30/amicus-brief-re-epic-games-v-apple-ninth-circuit/.

[14] Joseph Van Coniglio and Trelysa Long, "A Strange Vibration: A New Antitrust Explanation for Markets in Motion?" (ITIF, May 2024), https://www2.itif.org/2024-california-single-firm-conduct.pdf.

legal precedent and agency experience.[15] The DOJ should use all possible competition advocacy tools to prevent this sort of substantial deviation between key federal and state antitrust standards.

Finally, in addition to these possible substantive reforms to merger review, California and other states are considering the adoption of their own merger control regimes that would require companies that make Hart-Scott-Rodino (HSR) filings to also send their filings to the state attorney general for review if applicable state-specific criteria are met. Indeed, earlier this year, Washington became the first state to enact such a law and in so doing radically expanded the scope of transactions it will review relative to its previous focus on the healthcare space. The promulgation of such statutes poses a significant risk of fragmentation for the merger control process throughout the national economy, and potentially substantial increases in transaction costs and uncertainty for businesses. As such, the DOJ should reaffirm its longstanding commitment to work with states to evaluate transactions that may raise specific anticompetitive concerns in their region as a way to make clear that state specific merger control regimes are an unnecessary allocation of valuable state antitrust resources.

SPECIFIC ANTICOMPETITIVE STATE LAWS

States have enacted a number of other laws that impose barriers to interstate commerce, outside of digital policy and antitrust issues.

Three-Tier System in Liquor Distribution

State "three-tier" mandates for alcohol distribution require every bottle to pass from producer to wholesaler to retailer, and most states prohibit businesses from holding licenses in more than one tier. The U.S. Department of the Treasury's 2022 competition review found that these rules—originally meant to curb vertical monopolies—now block many small brewers, vintners, and distillers from obtaining wholesale representation and "substantially limited" direct-to-consumer (DTC) channels that could bypass the bottleneck.[16] The report noted that as distributor consolidation deepens, small suppliers faced "challenges in getting their products attention from the major distributors," while consumers, new entrants, and public commenters singled out the three-tier system itself as the "biggest barrier to entry."[17]

Opening the market to online, direct shipment is the clearest remedy. Indeed, the FTC's prior study of interstate wine sales showed that outright bans on direct to consumer shipping deprived consumers of up to 21 percent savings on many popular wines and denied access to thousands of labels unavailable locally; by contrast, states that allow interstate shipping report "few or no problems" with under-age deliveries when adult-signature safeguards are used.[18] Competition agencies should therefore urge states to permit reasonable

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[15] Joseph Van Coniglio, "Comments for the California Law Commission Study of Antitrust Law Regarding Innovation and Mergers" (ITIF, June 2024), https://www2.itif.org/2024-california-law-review.pdf.

[16] Department of the Treasury, *Competition in the Markets for Beer, Wine, and Spirits* 17 (Feb. 2022), https://home.treasury.gov/system/files/136/Competition-Report.pdf.

[17] *Ibid.* 11.

[18] Federal Trade Commission, "E-commerce Lowers Prices, Increases Choices in Wine Market," July 2003, https://www.ftc.gov/news-events/news/press-releases/2003/07/ftc-e-commerce-lowers-prices-increases-choices-wine-market.

volumes of producer-to-consumer and producer-to-retailer sales. Removing the compulsory wholesaler layer would likely expand shelf variety, lower prices, and permit digital platforms to serve consumers in the alcohol market just as they do for other goods—delivering immediate consumer-welfare gains without compromising legitimate public-health oversight.

State Car Dealer Limits on Buying Direct From Car Manufacturers

State dealer-franchise laws prohibit or severely restrict manufacturers from selling new vehicles directly to consumers in most of the country. A DOJ economic-analysis paper catalogued statutes in 45 states that bar direct sales, noting they arose long after the assembly line and now "require[e] that new cars be sold only by dealers."[19] The FTC has likewise warned state legislatures that such bans "operate as a special protection for independent motor vehicle dealers…likely harming both competition and consumers" because they foreclose alternative, more efficient distribution models.[20] Even today, litigation continues—Tesla's 2024 antitrust suit against Louisiana's direct-sales ban was recently revived on appeal—underscoring how these rules still block new entrants and stifle rivalry in electric-vehicle markets.[21]

The consumer cost is substantial. DOJ's analysis estimates that the conventional dealership channel can add up to 30 percent of a vehicle's final price.[22] In addition to lowering costs, direct sales would also let manufacturers roll software updates, servicing, and price transparency into the transaction, capabilities critical for EV startups, as Professor Daniel Crane explains, yet franchise prohibitions force buyers to haggle at brick-and-mortar lots or cross state lines for the same car.[23] The result is higher prices, less choice, and slower adoption of advanced technologies. For those reasons, competition agencies should urge states to repeal, or Congress to preempt, dealer-only mandates and allow manufacturers to sell and deliver vehicles directly online, while leaving dealers free to compete on service and price. Giving consumers the option to click "buy" on a factory website would increase competition, spur distribution innovation, and align auto retailing with the e-commerce convenience Americans already enjoy for nearly every other durable good.

Ground Transportation Policies at Airports

Everyday thousands of Americans rely on ground transportation at airports. While traditionally their needs have been serviced by taxi companies, over the past decade ride-sharing services such as Uber and Lyft have grown in popularity and regularly service airport customers. Unfortunately, and consistent with the

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[19] Gerald R. Bodisch, "Economic Effects of State Bans on Direct Manufacturer Sales to Car Buyers" *Department of Justice Antitrust Div. Economic Analysis Group Competition Advocacy Paper* 09-1 CA (May 2009), https://www.justice.gov/sites/default/files/atr/legacy/2009/05/28/246374.pdf.

[20] Press Release, Fed. Trade Commission, *Missouri and New Jersey Should Repeal Their Prohibitions on Direct-to-Consumer Auto Sales by Manufacturers* (May 16, 2024), https://www.ftc.gov/news-events/news/press-releases/2014/05/ftc-staff-missouri-new-jersey-should-repeal-their-prohibitions-direct-consumer-auto-sales.

[21] Jonathan Stempel, "Tesla can challenge Louisiana direct sales ban, US appeals court rules," *Reuters*, August 26, 2024, https://www.reuters.com/business/autos-transportation/tesla-can-challenge-louisiana-direct-sales-ban-us-appeals-court-rules-2024-08-26/.

[22] Bodisch, 1.

[23] Daniel Crane, "Podcast: The Future of Buying Cars, With Daniel Crane," *Innovation Files*, April 18, 2022, https://itif.org/publications/2022/04/18/podcast-future-buying-cars-daniel-crane/.

historically close relationship between taxi companies and airports, in many locations these ride sharing services are put at a disadvantage in a way that protects the taxi incumbents—a phenomenon indicative of the "capture" that not infrequently plagues regulation. Specifically, many airports charge higher ground transportation fees on ride-sharing services than taxis, as well as provide the latter access to more favorable pickup locations.[24] Such conditions constitute unnecessary barriers to expansion for dynamic ride-sharing services.

Importantly, these policies don't just harm ride-sharing competitors, they also harm consumers. Absent these rules, consumers would benefit from greater competition in the form of lower prices and increased convenience for using ride sharing services. Indeed, workers—and specifically, drivers for ride-sharing services—may also be harmed through lost business stemming from the higher fees and greater inconvenience. While airport logistics are of course complex, one solution is, at least at one level, simple: ensure that Federal Aviation Administration Guidelines preventing discrimination by airports in other areas, like aeronautical fees, apply to the terms upon which airports deal with ground transportation services. Doing so would create a level playing field that enables ride-sharing services and taxis to compete on the merits at airports and ultimately benefit consumers with lower prices and better service.

State Licensure Laws and Barriers to Telehealth

Outdated state licensure laws are a major regulatory barrier to the growth of virtual care. Under current rules, health-care providers are generally prohibited from treating patients across state lines unless they are separately licensed in each state.[25] This fragmented, state-by-state licensing system creates artificial barriers that complicate access to care—particularly for patients in rural and underserved areas—and imposes unnecessary burdens on health care providers who are otherwise fully qualified to practice.

These regulations often make little sense given that telehealth can safely and efficiently deliver high-quality care across geographic boundaries.[26] In some cases, state lines split metropolitan areas, disrupting continuity of care. The burdens on providers are significant: while core clinical standards are already nationally uniform (e.g., the U.S. Medical Licensing Examination, postgraduate training), states impose duplicative and inconsistent requirements such as additional background checks, fingerprinting, character references, or documentation of continuing medical education. The costs are also steep, with some state licenses exceeding $1,000 plus additional administrative fees.[27]

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[24] See, for example, Natalie B. Compton, "Getting an airport Uber has become an absolute obstacle course," *The Washington Post,* November 29, 2024, https://www.washingtonpost.com/travel/2024/11/29/uber-lyft-lax-laguardia-airport/.

[25] "Cross-State Licensing," CCHP, 2025, https://www.cchpca.org/topic/cross-state-licensing-professional-requirements/.

[26] Daniel Castro, Ben Miller, and Adams Nager, "Unlocking the Potential of Physician-to-Patient Telehealth Services" (ITIF, May 2014), https://www2.itif.org/2014-unlocking-potential-physician-patient-telehealth.pdf.

[27] "Licensure Fees and Requirements," Federation of State Medical Boards, 2024, https://www.fsmb.org/siteassets/advocacy/regulatory/licensure/licensure-fees-and-requirements-not-including-usmle-or-nbome-examination-fees.pdf.

Efforts to improve licensure portability—such as interstate compacts—have not kept pace with the growing demand for telehealth.[28] These outdated and duplicative regulations reduce competition, raise costs for patients, and limit consumer choice. A modernized, nationally consistent approach to licensing would expand access to care, reduce administrative overhead for clinicians, and foster greater innovation in the delivery of health services.

Realtors' Power Over Multiple Listing Services

ITIF has long raised concerns about a lack of competition in the real estate industry. In a 2017 report, ITIF explained how both individual brokerage firms as well as the Multiple Listing Services (MLSs), the regional organizations that maintain exclusive access to property listings on behalf of real estate agents, restrict access to data about property listings.[29] As ITIF made clear in a prior comment to the FTC and DOJ, anticompetitive behavior in this space includes "prevent[ing] certain third-parties from using current and historic listing data by creating strict data-use policies, denying access to non-brokers, or by keeping the data fragmented and unstandardized."[30]

Despite DOJ's recent settlement with the National Association of Realtors (NAR), significant barriers to competition remain. The core issue is that real estate agents must maintain NAR membership—along with local and state association memberships—to access Multiple Listing Services (MLS) data.[31]

Moreover, agents continue to engage in steering practices, directing clients away from listings offering lower compensation rates or properties sold independently without an agent. This behavior undermines the settlement's intent to increase competition and consumer choice by effectively penalizing sellers who opt for alternative fee structures or direct sales approaches.[32]

In the face of these industry dynamics, state laws prohibiting brokers from offering rebates to consumers are especially harmful in preventing consumers from enjoying lower prices. While courts have deemed these laws immune from the antitrust laws as state action, there is thus all the more reason for federal authorities to work

[28] Josh Archambault, "2025 State Policy Agenda for Telehealth Innovation" (Cicero Institute, February 6, 2025), https://ciceroinstitute.org/research/2025-state-policy-agenda-for-telehealth-innovation/.

[29] Daniel Castro and Michael Steinberg, *Blocked: Why Some Companies Restrict Data Access to Reduce Competition and How Open APIs Can Help*, ITIF Center for Data Innovation (Nov. 6, 2017), https://datainnovation.org/2017/11/blocked-why-some-companies-restrict-data-access-to-reduce-competition-and-how-open-apis-can-help/.

[30] Daniel Castro, "Comments to FTC and DOJ on Competition in the Real Estate Industry" (ITIF Center for Data Innovation, July 31, 2018), https://www2.datainnovation.org/2018-real-estate-workshop.pdf.

[31] "Michigan agents sue NAR, claim membership requirement to access MLS violates federal law," *Chicago Agent Magazine*, August 14, 2024, https://chicagoagentmagazine.com/2024/08/14/michigan-agents-sue-nar/.

[32] "Homeowners frustrated as realtors keep high commissions despite NAR settlement," *MPA Magazine*, March 17, 2025, https://www.mpamag.com/us/news/general/homeowners-frustrated-as-realtors-keep-high-commissions-despite-nar-settlement/528752.

collaboratively with the states that still have such laws and explain why these and other restrictions in the real estate space should be curtailed.[33]

Price Caps For Food Delivery Apps

As America struggled to cope with the devastating COVID-19 pandemic, a number of regulations were passed throughout the economy to help Americans manage the exceptionally difficult circumstances. These included price caps for the fees that food delivery apps, like DoorDash and Uber Eats, charge merchants for their delivery services. These fees usually take the form of a percentage commission of the customer's food order and vary depending on both the merchant and the services they are receiving. For example, merchants that take advantage of marketing and other tools may pay higher commissions, whereas some large merchants with high volume may be able to obtain discounts that drive a lower commission.

To be sure, restrictions on merchant fees may have had some justification in a world of lockdowns: consumers were not able to easily access restaurants and were forced to rely heavily on food delivery services to eat out. However, with the end of the COVID-19 pandemic, and although many cities and localities have moved away from or reduced these restrictions and returned to more market-driven price competition, some, such as Washington D.C., appear to have maintained the food delivery price caps. As studies have found, maintaining these price ceilings risks reducing the overall amount of food deliveries in a way that harms not just the consumers who would be willing to pay more for certain services (such as, for example, delivery to a more remote location that becomes cost prohibitive) but the eateries that want to serve them, many of whom are small business.[34] What's more, prolonged price caps pose a long run risk of chilling innovation by limiting the ability for food delivery apps to recoup the investments they make in their platforms to provide merchants and users with new and innovative services.

"Price Gouging" Rules in New York

Unfortunately, not all attempts to regulate pricing are remnants of the COVID-19 pandemic. For example, some states like New York are presently considering broad rules to enforce existing statutes that prevent "price gouging," or a situation where in "an abnormal disruption of the market for an essential product, triggered by an enumerated list of causes…a seller charges an unconscionably excessive price for that product."[35] To be sure, while these types of statutes have a long history in many industries, such as caps on interest rates, rules that seek to broadly impose price-gouging prohibitions not only do not promote competition by proscribing exclusionary or collusive behavior, but are likely to result in considerable legal uncertainty in determining what actually constitutes "price-gouging," as well as harm consumers both in the form of static inefficiency and diminished innovation.

Consider ride-sharing services, an example given for where price-gouging rules could be applied: "The ride-hailing service that raises driver pay for a given ride by $X and then raises the price of that ride by $X has not

[33] See, for example, REX-Real Estate Exchange, Inc. v. Brown, No. 3:20-cv-02075=HX (D. Oregon 2021).

[34] See, for example, Zhuoxin Li & Gang Wang, "Regulating Powerful Platforms: Evidence from Commission Fee Caps," 36 *Information Systems Research* (2025), https://pubsonline.informs.org/doi/10.1287/isre.2022.0191.

[35] Office of the New York State Attorney General Letitia James, Economic Justice Division, *Price Gouging Economics and Price Volatility OAG Staff Report* (February 2025), oagpg-2502-econ-staff-report.pdf.

engaged in price gouging even if $X is a substantial sum. It is only if the increase of price increased the ride-hailing company's profit margins for that ride that the ride-hailing company has violated the price gouging statute."[36] But rules based on the conclusion that "10% or greater price changes occur overwhelmingly during times of abnormal market disruption and not in the ordinary course of business" are likely to result a substantial amount of false positives.[37] Specifically, a 10 percent threshold is likely to encompass price increases that do not reflect any "triggering event" specified in New York's price gouging law, but instances of dynamic pricing in response to increased demand and/or reduced supply driven by conditions such as a moderate but sudden weather event, or an accident that causes increased traffic. By applying such a low bar, New York's price gouging rules would thus have the effect of inefficiently reducing supply, lowering compensation for drivers, and limiting choices for consumers who would be willing to pay higher rates, as well as for consumers living in areas that lack robust public transportation.

RECOMMENDATIONS

As it continues to assess the competitive merits of various rules and regulations, ITIF offers the following general recommendations to the DOJ:

- **Regulation should address demonstrable market failures.** Regulations designed to improve economic outcomes are typically only justified as a corrective to a real and persistent market failure. This is often evinced by a highly concentrated industry that consistently demonstrates high prices, lack of dynamism, reduced output, or poor product quality. In general, regulations designed to improve economic welfare in industries that do not exhibit market failure should be reassessed so as to determine whether or not they are actually necessary.
- **Regulation should be a tool of last resort.** Even in the case of real market failure, law enforcement regimes, including antitrust and consumer protection, often provide a much more expedient and cost-effective way to correct market failures relative to regulation. When analyzing a regulation, policymakers should therefore consider whether the underlying policy goals can be achieved through already existing and more light-touch law enforcement tools.
- **Regulation should improve the status quo.** In the case of a failing market that cannot be remedied through the judicious use of law enforcement tools like antitrust and consumer protection, regulation still may not be justified if there is reason to believe that it will harm—rather than help—the status quo. In reality, regulators often have insufficient incentives or abilities to improve economic outcomes, leading to situations where regulation results in capture and/or inefficiencies as well as other costs that harm consumers and competition.

CONCLUSION

The absence of federal preemption allows states to enact conflicting technology regulations that stifle innovation and burden businesses nationwide. Large states exploit this ambiguity by imposing rules with extraterritorial reach, forcing companies to comply with the most restrictive standards regardless of where they

[36] *Ibid.* 19.

[37] *Ibid.* 37.

operate. This approach undermines democratic principles by allowing individual states to dictate policy for citizens and businesses across the country who had no voice in these decisions. States should respect constitutional boundaries and refrain from regulating beyond their borders, allowing the national market for innovative technologies to flourish without piecemeal interference. Just as state and local governments cannot restrict interstate commerce in the physical world, neither should they restrict interstate commerce in the digital one.

Thank you for your consideration.

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