IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO. 2009-TS-00052

JIM HOOD, ATTORNEY GENERAL OF THE
STATE OF MISSISSIPPI, EX REL.
THE STATE OF MISSISSIPPI

Appellants

VERSUS

LOUISVILLE TIRE CENTER, INC.
D/B/A FAIR OIL COMPANY

Appellees

BRIEF OF APPELLANT/ CROSS-APPELLEE, JIM HOOD
ATTORNEY GENERAL OF MISSISSIPPI

On Appeal from the Chancery Court of the Sixth Judicial
District of Winston County, the Honorable J. Max Kilpatrick

Oral Argument Requested

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D. The trial court erred when it failed to require Fair Oil to meet its burden of proof that the price gouging statute was unconstitutional beyond a reasonable doubt.

II. STATEMENT OF THE ISSUE ON CROSS-APPEAL

Whether the trial court was correct to dismiss fair oil's motion for summary judgement challenging the price gouging statute's use of "the prices ordinarily charged in the same market area" as unconstitutionally vague.

III. STATEMENT OF THE CASE

The State incorporates and adopts the Statement of the Case submitted at page 2 of the Appeal Brief filed by the State of Mississippi, ex. rel Jim Hood, Attorney General ("the State"). The State would also add the following to its Statement of Facts.

On August 26, 2005, Governor Haley Barbour issued a Proclamation stating that "current predictions... demonstrate the potential for the entire State of Mississippi to be severely affected by Hurricane Katrina, beginning on August 27, 2005. (Emphasis added) (R. 11). John Fair, the President of Fair Oil, stated that it took steps to "prevent its margins from increasing during the state of emergency." (R. 189). Yet, Fair Oil failed to keep any information concerning: its actual pricing or actual daily prices; changes to prices for both before and after the declaration of a State of Emergency; and/or steps taken to comply with the price gouging statute. (R. 438).

Having received consumer reports about the potential increase in the retail price at some of Fair Oil's retail stores, the State requested information concerning Fair Oil's costs and prices for the months of August through December, 2005. (R. 195-203). Upon receiving Fair Oil's responses, the State noted that Fair Oil set its prices at each location in a manner that incorporated the prices "being charged by the competition in the area". (R. 437). The State then reviewed it and found increased prices above those in affect "at or immediately" before the Governor's proclamation. Miss. Code Ann. 75-24-25. However, the State noted that Fair Oil failed to include actual price change information; instead providing only weekly average information. (R. 438). Unlike its gasoline investigations for price gouging subsequent to September 11 ("9/11"), the State did not have an actual price for the day of - or the day before - the Proclamation. Thus, the State was required to use averaged price information in its investigation.

Fair Oil's "proxy" price for August 26 was an averaged price which included

August 27 and August 28, two days after the proclamation. (R. 372, 377). Still, the Attorney General noted that Fair Oil had increased its prices and margins above its "proxy" price and margin on 77 different occasions. (R. 372 - 380). As Fair Oil had not provided sufficient information showing other "necessary costs" to explain these increases, the State filed the instant cause. As discussed previously by the State, the trial court granted Fair Oil's motion for summary judgement and this appeal and cross-appeal ensued.

IV. SUMMARY OF THE ARGUMENT

A. Summary of the State's Rebuttal Argument on Direct Appeal

Contrary to Fair Oil's assertions set forth in its Brief filed on January 29, 2010 ("Fair Oil Brief"), Fair Oil had notice as concerning that its margins, along with its prices, would be analyzed in relation to the "at or immediate before" provision" in Miss. Code Ann. § 75-24-25(2) to determine whether it complied with the statute during the state of emergency. Fair Oil was also on notice that the State would be required to use averaged pricing information in its investigation, as that was the only type of data that Fair Oil provided to the State. Furthermore, as Fair Oil's pricing information was incomplete, the State was required to analyze its margins on all days to get a more accurate picture of Fair Oil's actual pricing behavior. However, the State did not charge Fair Oil with price gouging for days in which its price was lower than its "proxy" price "at or immediately before" the state of emergency. Even using its proxy price information, Fair Oil violated the statute on 77 different occasions as can be seen in a review of the record. However, the trial court failed to review Fair Oil's actions in its analysis. Instead, the trial court followed Fair Oil's inaccurate application of law which misapplied the relevant tests to an "as applied" vagueness challenge to an economic regulation, such as the price gouging statute. Fair Oil did not satisfy its burden of proof under the applicable vagueness test and, thus, its summary judgement should have not been granted by the trial court.

B. Summary of the State's Reply Argument on Cross-Appeal

The term "same market area" in Miss. Code Ann. § 75-24-25(2) clearly provides Fair Oil notice that its prices charged at a location before the state of emergency could be used to determine if its prices at that same location increased during the state of emergency. Fair Oil had a common understanding in what "market area" each of its locations operated and made it a priority to know the prices charged by its competitors in each of these market areas on a daily basis. Market area prices were, thus, implicitly accounted for in Fair Oil's own pricing. Finally, the statute's language clearly puts Fair Oil on notice that its own price may be the sole comparison used in determining a violation. Thus, Fair Oil's constitutional challenge to the statute for vagueness must fail as Fair Oil fell short in meeting its requisite burden

V. THE STATE'S REBUTTAL ARGUMENT ON DIRECT APPEAL

On appeal, the State showed that the trial court erred in granting Fair Oil's summary judgement for a number of reasons, including that it did not consider Fair Oil's clearly violative conduct. (State Brief 10). In response, Fair Oil claims that it did not have sufficient notice that the State would apply the statute by reviewing margins, and not prices, when applying the statute to it. (Fair Oil 13). Fair Oil's claim that it lack notice is unfounded for two reasons. First, the State did review Fair Oil's prices; and it found that on at least seventy-seven occasions Fair Oil's prices during the state of emergency exceeded the price Fair Oil provided as its price in effect "at or immediately before". (R. 372- 380.) Secondly, Fair Oil's insufficient notice claim is unsound as the statute clearly requires that margins are to be considered, and Fair Oil's president John Fair acknowledges such notice in his affidavit. (*See* R. 189) (John Fair stating that "Fair Oil sought to prevent its margins from increasing during the state of emergency.")

At the time of Hurricane Katrina, §75-24-25(2) at issue, read as follows.

> Whenever, under the Mississippi Emergency Management Law, Sections 33-15-1 through 33-15-49, a state of emergency or a local emergency is declared to exist in this state, then the value received for all goods and services sold within the designated emergency area shall not exceed the prices ordinarily charged for comparable goods or services in the same market area at or immediately before the declaration of a state of emergency or local emergency. However, the value received may include: any expenses, the costs of the goods and services which are necessarily incurred in procuring such goods and services during a state of emergency or local emergency. The prices ordinarily charged for comparable goods or services in the same market area does not necessarily mean a single provider of goods or services.

Miss. Code Ann. § 75-24-25(2).

The statute contemplates that the State, in conducting a price gouging investigation, would do so in two steps. First, the State would review prices during a state of emergency to see if they exceeded the actual price "at or immediately" before the declaration ("baseline" price). Second, the State would take the difference of an "increased price" day's price and the "necessarily incurred" costs associated with the gasoline sold at that price – increased price minus "necessary costs". The State would then compare the increased-day's difference (or margin) to the difference between the baseline price and the"necessarily incurred" costs associated with the gasoline sold at that price – baseline price minus "necessary costs" ("baseline margin"). If the increased-price day's margin exceeds the baseline day's margin, then the vendor has price gouged on that day.

"Margin", as used by the State, is merely short-hand to describe the difference between the vendor's price and its costs "necessary to procure the goods and services." Miss. Code Ann. §75-24-25(2). The price gouging statute requires such an analysis to ensure that a vendor is not charged for price gouging when it is merely attempting to recoup its necessary costs to bring that good or service to market.

By way of simple example, in a scenario where a vendor's price of gasoline was $3.00 at the time of declaration, and the vendor's "necessary costs" were $2.50; the vendor would be price gouging if it raised its price to $3.50 during the state of emergency, where its "necessary costs" were still $2.50. Both its price and margin had increased. However, if a vendor had raised its price to $3.50 during the state of emergency because of a $.50 increase in its "necessary costs" (going from $2.50 to $3.00), then it would not be price gouging. While its price went up, it did so only to cover the additional "necessary costs" incurred to procure the gasoline, as allowed under the statute.

Fair Oil contends that the State only reviewed margins and failed to analyze Fair Oil's prices. Fair Oil's recollection is factually incorrect, as can be seen in a review of the record. (*See e.g.*, R. 8, para. 15 - 16) (State charging for increase in prices without associated "necessary costs"); R. 104 (State stating prices gouging statute restricts prices charged for goods and services). However, in contrast to the simple price gouging analysis *supra* at 6-7, Fair Oil complicated the investigation by submitting weekly averages as "proxy" daily prices instead of providing its actual daily prices. According to Fair Oil, actual prices were not kept; instead it retained only average weekly information. (R. 438.)

Fair Oil's weekly averages are not the same as actual daily prices. Weekly averages reduce the magnitude of high-priced days by combining them with lower-priced days. The magnitude of Fair Oil's violations, therefore, were artificially lowered by the averaged proxy prices during the state of emergency. For example, the State received numerous consumer calls during the state of emergency surrounding Katrina stating that Fair Oil's prices on September 1 was $3.29 at its Starkville store. (R. 535, 536, 537, 539) Fair Oil's "proxy price" (i.e., its averaged weekly price for Sept. 29 - Sept. 4) for its Starkville store on September 1 was $2.52. (R. 377). Both of these assertions could be correct; a price of $3.29 could have been obscured by averaging them with days in which

Fair Oil's prices were lower than $2.52.[1]

Even with its obfuscation of actual prices, the State still did not charge Fair Oil for days where "proxy prices" were actually lower than on the date of the proclamation.[2] Instead, it focused on the 77 days that Fair Oil's proxy prices and associated margins were above those in effect on August 26, the day the declaration was proclaimed [3] (R. 372-380.)

By way of illustration, a review of Fair Oil's data during September 5 - 11 at its Starkville location shows the application of the two step price gouging analysis; and Fair Oil's clear violation. Fair Oil provides that its price on August 26 was $2.58 (*i.e.*, its proxy "baseline price"). During September 5 -11, it raised its prices to $2.9865; an increase of $.4065 for each gallon sold on those days. Clearly, as Fair Oil's price is in excess of its baseline price, the statute would then require a review of its margins (price minus "necessary costs"). From September 5 - September 11, its costs were $2.4904 and, thus, its margin (price minus necessary costs) was $.4964. In other words, Fair Oil increased its price, above its "necessary costs" by $.4964 for each gallon it sold on each of those days.

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[1]For example, if Fair Oil's price was $2.39 on Aug. 29 - Aug. 31, increased to $3.29 for Sept. 1 and dropped back down to $2.38 for Sept. 2 - Sept. 4; its average weekly price would be $2.5143.

[2]As discussed below, Fair Oil did not provide actual daily prices but instead provided a proxy daily price resulting from a weekly average of its prices. (R. 438 - 439)

[3]The 77 days accounts for Fair Oil's violations at two of its retail locations; 42 days at its West Point and 35 days at Starkville.

However, the analysis is not complete yet. The statute allows a vendor to include the additional "costs necessarily incurred in procuring the gasoline" into the "value received" for a gallon of gasoline. Miss. Code Ann. §75-24-25(2). Thus, this margin during the state of emergency must be compared to the margin on August 26 to see if it is in excess of the necessary costs. On August 26, Fair Oil was getting $.2835 above its necessary costs (*i.e.*, margin) for each gallon sold at its Starkville location. Thus, Fair Oil increased "the value received" for a gallon of gasoline an additional $.2129 over the amount allowable under the statute.[4] As can be seen in this illustration, the State's prosecution of Fair Oil for price gouging is not based on days in which its "proxy prices" are lower then its baseline price.

However, Fair Oil's proxy prices are a distortion of what actually occurred with regard to Fair Oil's actual daily prices and corresponding margins. Thus, the State includes a detailed review of Fair Oil's margins on all days during the investigation as it is particularly relevant to the State's case against Fair Oil. Even on days where its "proxy price" does not indicate a violation, Fair Oil's higher margins illustrate its above-average revenue during the state of emergency to pay any additional costs. These increased margins are also relevant to prove Fair Oil's intent to price gouge after Katrina. Had Fair Oil provided actual cost information, the State would have had no reason to pay such

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[4]This scenario is in the light most favorable to Fair Oil. As explained below, the State does not believe that these are Fair Oil's actual and accurate prices during the State of Emergency; nor does the State believe that Fair Oil's proxy information for August 26 is an accurate depiction of what price (and margin) was actually in effect on that day.

close attention to Fair Oil's margins; such attention is necessary, however, when actual cost data is not available.

While it lacks the peaks and troughs which could be platted on a line graph of daily prices, Fair Oil's artificially flattened data still illustrates Fair Oil's significant violations. However, the trial court did not review Fair Oil's actions to determine if it violated "the plain meaning" of the statute. The trial court found that the plain meaning of the statute's "at or immediately before" language provides businessmen with notice that it should prevent "its margins from increasing from those in effect when the state of emergency was declared." (R. 305). Notwithstanding this determination, the trial court did not consider whether Fair Oil's actions were in conformity with this plain meaning and, thus, did not review the instances in which the record illustrated Fair Oil's violations. Fair Oil had clear and sufficient notice of the prohibition in the statute, chose to violate it, and is now attempting to avoid the consequences of its deliberate actions.[5]

A. The Price Gouging Statute is Constitutionally Applied to Fair Oil and Its Violations Are Apparent Under Any Reasonable Interpretation of the Price Gouging Statute

On appeal, the State illustrated that Fair Oil had violated the price gouging statute under any reasonable interpretation of the "at or immediately before" provision; including

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[5]In its argument responding to Appellant's brief, Fair Oil refers to its argument on Cross-Appeal (that it "could not have know that the Attorney General would evaluate pricing based upon a single location when the statute requires an analysis of the prices charged in the "market area.") (Fair Oil 13). As discussed herein below, Fair Oil clearly could have foreseen the use of its own price as the baseline to determine whether it raised its price at that same retail location.

applying Fair Oil's own interpretation and using its own formulated data. In response, Fair Oil redundantly claims that the State did not review Fair Oil's prices; and that the State modified its interpretation of the statute. Fair Oil's argument is factually wrong because, as explained above *supra* at 8 - 9, the State did review its prices; and, contrary to Fair Oil's assertions, the State did not change its interpretation of the statute. Instead, the State used a flexible application which was both foreseen and reasonable.

1. <u>The State specifically evaluated Fair Oil's prices and found significant violations of the price gouging statute after Hurricane Katrina.</u>

Counter to Fair Oil's protestations, the State evaluated Fair Oil's prices. As detailed above *supra* at 8-9, the State did exactly as the statute provides, it analyzed data provided by Fair Oil to determine which days during Katrina's aftermath were Fair Oil's "proxy" prices higher then its proxy baseline price. The State then reviewed the data to determine if the increased prices were solely based on increased necessary costs required to procure the gasoline.

Fair Oil complains that it could not have foreseen the use of averages in determining the baseline price (i.e., the price "at or immediately before"). This is clearly nonsensical given that Fair Oil's own actions (both its failure to keep its actual daily price data and/or its choice of data included in discovery) required the State to rely on averages. Fair Oil was on notice that averages would be used for actual prices the moment it chose to discard actual pricing information and provide only averages to the State.

Fair Oil argues for a narrow interpretation of the statute's flexible "at or immediately before" provision. However, conspicuously absent from Fair Oil's brief is an explanation as to why it did not act in conformity with its own interpretation of the statute. Fair Oil admits having notice that the statute prohibits price increases above "the prices in existence at the time the state of emergency was declared." (R. 169). Similarly, Fair Oil concedes that "at or immediately before" is plain and unambiguous in allowing a vendor of goods to maintain the same prices that were in effect on the date of the [state of emergency's declaration.]" (R. 38). Yet Fair Oil did not keep any data evidencing its actual pricing information "at or immediately before" the declaration. (R. 438). Similarly, Fair Oil fails to explain why it chose only to keep averaged weekly information as proof of compliance with the price gouging statute. Yet, inconsistent with its actions during the state of emergency, Fair Oil now espouses that only an actual daily price at the time of the declaration will comply with the statute's "at or immediately before" provision.

Fair Oil's stringent interpretation of the word "immediately" is simply not warranted. In State v. Wyoming Mfg.Company, this Court held, "we do not think that the word "immediately" is to be given a restricted and mandatory meaning. . . . The word immediately in each place in the section is a word of <u>indefinite meaning as is disclosed by the context. It does not mean instantaneously, but is to have a practical interpretation, and means as early as practical</u>." *State v. Wyoming Mfg. Company*, 138 Miss. 249, 274, 103 So. 11, 12 (1925).

Fair Oil asserts that it had no notice of the State's interpretation and application of the statute's prohibition. (Fair Oil 17). This is a strawman argument. Fair Oil knew that it could not legally raise its price above that price in effect when the state of emergency was declared without a corresponding cost increase. (R. 169.) Yet, in conflict with its self-expressed reading of the statute's mandate, it failed to keep any evidence of its actual prices, including its price on August 26 . (R. 438 - 439.)

Fair Oil now argues that the statute's phrase "at or immediately before" provided it notice only that it must maintain its price at the actual daily price on the day of the declaration; thereby, binding the State to use only an actual daily price for its baseline price (and, thus, its corresponding baseline margin). Fair Oil's argument rests on an inference that evidence of daily prices, information it failed to keep, would show its innocence.

The instant case can be analogized to the spoliation rule of evidence, which prohibits an inference in favor of someone who intentionally destroyed important evidence. This Court has applied the spoliation rule in Mississippi cases, concluding that evidence destroyed by a party raises the presumption that the missing evidence would be unfavorable. *Tolbert v. State*, 511 So.2d 1368, 1372-73 (Miss.1987); *Washington v. State*, 478 So.2d 1028, 1032-33 (Miss.1985)). *See also Hillman v. Weatherly*, 14 So.3d 721, 729 (Miss.2009) (disallowing party to benefit when she had personal responsibility for spoliation of evidence). Specifically, this Court has stated that "[w]hen evidence is lost or destroyed by one party (the "spoliator"), thus hindering the other party's ability to prove his case, a presumption is raised that the missing evidence would have been unfavorable to the party responsible for its loss." *Thomas v. Isle of Capri Casino*, 781 So.2d 125, 133(¶ 37) (Miss.2001) (*"Isle of Capri"*). In *Isle of Capri* case, this Court also provides that:

> A finding of spoliation may be supported by intentional or negligent destruction of evidence by the spoliator. For example, the negligent breach of a statutory duty to maintain medical records has been found to create a presumption that the lost records would have been unfavorable to the spoliator. Id. Additionally, the presumption of unfavorability created by a finding of spoliation allows the fact-finder to draw a general negative inference from the fact of spoliation.

Id.

2. <u>The State evaluated and found that Fair Oil's prices violated the statute under all reasonable interpretations</u>

Fair Oil's inability to provide actual daily pricing information not only required a proxy prices to be used for the baseline price (the "at or immediately before" price), it also dictated using a proxy price for each day that Fair Oil price gouged. This averaged weekly proxy price reduced the magnitude of high-price days by combining them with lower-priced days and, quite possibly, reduced the number of violations, as shown herein above *supra* at 7 - 8. For example, Fair Oil's data shows that Louisville's weekly averaged price is $.02 less a gallon ($2.5492 as opposed to $2.5611) then its proxy baseline price from October 24 - 30; but its "proxy" margins for those days were $.11 higher a gallon than on August 26. (R. 372, 374). Clearly, Fair Oil could have had days over $2.5611 during that week; yet they are hidden by the averaging. In short, Fair Oil's averaging falsely reduced the extent to which Fair Oil violated the statute and, most likely reduced the number of days it price gouged.

Significant daily increases in gas prices are not unusual in retail gasoline, even under normal conditions in this volatile industry. (R. 31). Hurricane Katrina's impact exacerbated these spikes. Fair Oil intentionally provided weekly averages, thereby masking the most obvious spikes that would have been evident by its actual high-price days. Likewise, the true picture of its actual daily margins (price minus "necessary costs") was obscured for these days. In keeping with its normal practice, Fair Oil did not determine daily price merely based on its costs, but rather on its competition and "wholesale market trends and expectations for the region." (R. 437). Thus, its prices changed significantly more than its "necessary costs." In other words, on the days Fair Oil price gouged, it actually had higher prices and margins than its data reveals.

By obscuring the volatility in its prices after Katrina's landfall, Fair Oil lessened the magnitude of its apparent violations. Yet, its use of "weekly" averaging still provided Fair Oil with the benefit of increased margins that gasoline retailers enjoy in anticipation of a hurricane. It's proxy baseline still reflects the higher prices associated with an incoming hurricane. In the time right before a hurricane's landfall, many speculate on its impacts and increase consumers' fears about the resulting lack of supplies. In anticipation of the "worst case scenario", many consumers buy what they believe is essential, including filling up every car they have. This is not only in preparation to flee, but also to off set problems of accessing supplies during a state of emergency. Aware of this scenario, retail gasoline vendor's increase their prices to benefit from the increased demand fanned by the public's fright.

As shown above, during this time, Fair Oil enjoyed significantly higher profit margins. In this manner, Fair Oil's data allowed Fair Oil to account for the spike in prices and profits before Katrina's landfall; yet, the data does not clearly account for the increased volatility in Fair Oil's prices (and profit) during the state of emergency. Fair Oil's data obscures the magnitude of its violations by blunting the magnitude of spikes; flattening out one day's high costs over a week.

a. <u>30 day average</u>

Fair Oil is correct; the State realized that it must use an average of days to determine Fair Oil's pre-Katrina allowable margin profitability only after its investigation of Fair Oil was underway. The State could not have known that Fair Oil would not provide complete data, including the actual price information; such information was given in previous price gouging investigations of the gasoline industry, such as after "9/11".

In its appeal brief, the State explained how it found it necessary to use a 30 day average in order to gain a better picture of the magnitude of Fair Oil's price gouging violations. In response, Fair Oil counters that the State continuously modified the statute during the investigation and the settlement negotiations. Fair Oil's analysis is significantly flawed as it fails to address the 77 days in which its proxy daily price exceeded its proxy baseline price.[6] (R. 372- 380.) Furthermore, Fair Oil's characterization of the State's actions as evidence of "reinterpretation" are simply wrong. The State requested - and would have greatly preferred - actual daily prices. Bound by Fair Oil's documentation, however, the State reviewed Fair Oil's data consisting of weekly price averages and noted the substantial violations as described herein above *supra* at 8.

The State knew, however, that the magnitude of Fair Oil's violations was artificially lowered by the averaged proxy prices during the state of emergency. Thus, the State applied a 30 day average of Fair Oil's margin to assess the applicable amount to use in the second step of a price gouging analysis. This was done to see how much gross profit was allowable after Fair Oil covered its "necessary costs" to procure the gasoline. This was done to counter the false effects that averaging had on Fair Oil's data.

Like Fair Oil, the State views this statute as a price gouging statute, requiring Fair Oil to maintain its prices in effect at the time of Katrina, except to cover necessary costs to procure the gasoline it sold (and thereby maintaining the same margin profitability per gallon.) Highlighting other relevant points derived from Fair Oil's incomplete data, including providing a more accurate picture of the magnitude of Fair Oil's violations by using a 30 day margin, was not in contradiction to this interpretation.

The use of this 30 day average to determine allowable profit amount was not a

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[6]The 77 days accounts for Fair Oil's violations at two of its retail locations; 42 days at its West Point and 35 days at Starkville.

modification to the interpretation of the statute, but rather an attempt to gain a more accurate depiction of Fair Oil's actual price gouging violations. For example, in Starkville, Fair Oil's 30 day average gross profit for August was $.1476 a gallon; its average weekly profit for August 22 - August 28 (the week including the day of the declaration) was $.2835 a gallon. (R. 377.) This demonstrates an increase in profit $.1359 more per gallon during that week then its monthly average for that entire month. (Id.) In fact, Fair Oil more than doubled its weekly average gross profit during the week including August 26 ($.2835) than what it made in gross profits just the week prior, August 15 - 21 ($.1049). (Id.) The State did not shift its interpretation of the statute by incorporating a review of Fair Oil's 30 day margin in August. Rather, the State used evidence provided by Fair Oil to focus more clearly on what had actually occurred.

The State understood the inaccuracies inherent in Fair Oil's proxy prices and the leveling effect accompanying averages. In the absence of actual prices to provide the true picture, the State looked for methods to more accurately reflect Fair Oil's true pricing spikes. The State determined that a 30 day average of its margins, as opposed to Fair Oil's use of a week-average margins, would be a more accurate indicator of Fair Oil's allowable profit margin.[7] A thirty day average would provide the State with a more accurate depiction of what Fair Oil's usual margin would have been absent the emergency

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[7]Other states with significant experience in enforcing its price gouging statute after hurricanes addressed the characteristics of the fuel market surrounding hurricanes by determining the applicable baseline using a 30 day average. For example, Florida and Alabama both provide for a 30 days prior to a state of emergency to determine the margin against which violations are measured.

situation. However, contrary to Fair Oil's averments, the State had already verified that Fair Oil violated the statute using the evidence in the light most favorable to Fair Oil (the week's average at the time of the declaration). Plainly stated, the State did not use the 30 day average to establish price gouging, but rather to establish how much Fair Oil price gouged.

The need for a flexible approach does not render a statute unconstitutionally vague. *See, e.g., Meeks v. Tallahatchie County*, 513 So.2d 563 (Miss. 1987) (addressing election process and recognizing that general standards such as those used in the context of negligence, unconscionability, and fraud are not unconstitutionally vague); *Rogers v. The Mississippi Bar*, 731 So.2d 1158 (Miss. 1999) (noting that, in the context of a challenge to rules of professional conduct, preciseness depends on the subject matter). Although the price gouging prohibitions may not "satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest." *Jones v. City of Meridian*, 552 So.2d 820, 825 (1989) *(quoting Broadrick v. Oklahoma*, 413 U.S. 601, 608 (1973)). Like most laws, the price gouging statute "must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions." *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 552-553 (5th Cir. 2008) ("*Roark*") *citing Boyce Motor Lines v. United States*, 342 U.S. 337, 340 (1952).

b. Settlement Negotiations

As set forth in its Appeal Brief, the State did not deviate from its application during its investigation. Fair Oil contends in response that the State's settlement offer of a 10 day average evidences a modification of the State's interpretation of what constitutes a prohibition. Once again, Fair Oil is mistaken. The State's modification of a settlement offer is merely that; a part of negotiation. The most practical method to vary the settlement offer was by changing the days which were included in an average for the baseline margin (i.e., the amount between the "value received" and the "necessary costs to procure the services). Miss. Code Ann. §75-24-25(2). The effect of reducing the days used in this average modified the magnitude of Fair Oil's violation, and the corresponding amount of restitution and penalties.

In a good faith effort to reach settlement, the State modified its review of the magnitude of Fair Oil's violations and reduced the days averaged (and the magnitude), nothing more. These settlement positions do not evidence varying interpretations of the statute's prohibition, but rather show settlement negotiation strategies used to attempt to resolve a case.[8]

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[8]To allow Fair Oil to use settlement negotiations is contrary to the public policy that favors out-of-court compromises and settlements identified in Comments to Rule 408. Courts have stricken allegations in a complaint that detail settlement negotiations. *Philadelphia's Church of Our Savior v. Concord Twp.*, 2004 WL 1824356, at *2 (E.D. Pa. 2004); *United States ex. rel. Alsaker v. CentraCare Health Sys, Inc.* 2002 WL 1285089 at 2* (D. Minn. 2002). R. 110.

c. Application after 9/11

Similarly, Fair Oil's recollection is myopic as regarding the price gouging investigations after September 11. After the 9/11 tragedies, the national fuel industry was extremely concerned that the price of fuel would dramatically increase. Therefore, many of the national oil companies "began issuing information to wholesalers [or distributors and/or retailers] with whom they had contracts indicating imminent price increases . . ." (R. 588). This anticipated price increase was ultimately - and instantly - passed along to consumers at the pump. However, after national oil company leaders digested the aftermath of 9/11, they rescinded the quoted price increases and, thus, these additional costs never ensued to distributors and/or retailers. *(Id.)* "The end result of such rescissions" was no cost increase to the sellers of fuel after 9/11. (*Id.*) Yet, sellers of fuel did increase costs and, accordingly, consumers paid a greater price then they should have during a state of emergency. (*Id.*) In this manner, Mississippi's sellers of fuel increased their "margin" (retail price minus necessary costs) during the state of emergency post-9/11.

Subsequently, the Attorney General's Office set up a "voluntary refund" process in which Mississippi distributors/retailers paid the specific amounts of increased margin made due to the anticipated, but unrealized, increases in costs. Id. In order to properly determine the amount tied to the "anticipated increase," the Attorney General asked for specific information on ". . . the number of gallons sold, the pre-increase price, and the post-increase price. (R. 589) The refund would be based on the difference between these two prices multiplied by the number of gallons sold. (R. 588 - 589) The requested information and the refund amount was a fair and efficient application of the law's wording "the costs at or immediately before" and the best method to determine the magnitude of the violation.

However, it was impossible to adopt this application to the investigation of Fair Oil after Hurricane Katrina. The actual pricing information did not exist, according to Fair Oil. (R. 438 - 439.) Fair Oil misstates the State's position, providing that the Attorney General has "never taken the position that his predecessor took - a one day analysis." (Fair Oil 17.) Instead, the State's position is that the "at or immediately" provision does not hold the statute's enforcement to a one day analysis (or actual pricing data) when such information is unavailable; especially under circumstances where Fair Oil chose to discard its actual daily price information. (R. 438 - 439.)

It is precisely for this reason that the Legislature provided the "or immediately before" alternative to allow calculation when the price "at the time of the declaration" is undeterminable. Without such flexibility provided in the statute, obvious price gouging, such as in the instant case, would go unenforced, even if violations were evident without actual pricing data.

Fair Oil attempts to use a narrow interpretation of the statute to excuse its price gouging altogether. While it attempts to hide behind an interpretation of the statute requiring daily prices, Fair Oil provides no excuses for its dereliction in documentation except to attempt to shift blame to the State. It is not necessary that each and every law provide exacting standards, guidelines or regulations to overcome a vagueness challenge. *Roark*, F.3d 533 at 551-552.

B. Fair Oil's Challenge to the Statute Mixes a Facial and an "As Applied" Challenge and It Fails to Prove Vagueness in Both Instances.

On appeal, the State pointed out how the trial court, following Fair Oil's analysis, misapplied the correct vagueness test to the instant case.[9] (State 16) On appeal, Fair Oil maintains that his challenge is strictly "as applied." (Fair Oil 17) However, as set forth below, Fair Oil continues to intertwine the two types of vagueness challenges and, thus, misapplies the appropriate law and precedent.

Fair Oil claims that its challenge is only an "as applied", and that it has suffered significant harm due to the price gouging investigation. (Fair Oil 18). However, the real victims in this case are the consumers of whom Fair Oil took advantage in the wake of Katrina. During a time of significant vulnerability in this State, Fair Oil's customers were price gouged, at a minimum, on 42 days in West Point and on 35 days in Starkville. (R. 372 - 380). This is precisely the harm the Legislature specifically intended to stop by adopting the price gouging statute.

Precedent included in the State's appeal brief stands for the maxim that a person "will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in situations not before the Court." *Mississippi Bd of*

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[9]Rather than first analyzing Fair Oil's conduct in this case, the trial court went straight to a determination of whether the price gouging statute provided adequate notice for "potential violators." (R. 302, 308.) *Meeks v. Tallahatchie County*, 513 So.2d 563 (Miss. 1987)

Nursing v. Belk, 481 So.2d 826, 831 (Miss. 1985) (*quoting Broadrick v. Oklahoma*, 413 U.S. 601 (1973)). The State then provided an illustration showing Fair Oil's "clearly prohibited conduct" during the state of emergency. *Id.* Fair Oil posits three bases to argue against the State's evidence: insufficient evidence and consideration of intent, expense information and "market place" (which is addressed in the State's Reply to Fair Oil's Cross Appeal);[10] "illogical requirement" of a trial before the statute's meaning can be ascertained; and the State's reliance on a "one day" analysis to show Fair Oil's prohibited conduct. (Fair Oil 18). These bases are groundless as set forth below.

1. A less than robust record does not bolster Fair Oil's challenge of vagueness

Without indicating any real evidence to refute the State, Fair Oil argues that the evidence is insufficient to show intent; and that the State did not adequately review its "expense information (Fair Oil 18.) However, the record does include evidence showing both intent and increase in price over Fair Oil's additional necessary expenses. Significantly increased margins is relevant to both of these issues. A significant increase in margins/ gross profit margin is relevant to show Fair Oil's knowledge of its actions and its intent to profit from the emergency situation. Similarly, the significance of Fair Oil's margins shows its ability to cover significantly more "necessary costs" then even those which are currently in the record. Finally, the State will put prepared to put forth more

[10]Fair Oil also argues that there is insufficient evidence to address the "same market area" prices" which concerns its cross-appeal. As stated herein below in its response to Cross-Appellant's argument, the statute clearly provides Fair Oil with notice that its own prices could be used to determine the price "in the same market area."

complete evidence as to these two points at the time of trial.

Furthermore, Fair Oil's questioning as to the sufficiency of the record (Fair Oil 18), begs the question as to whether the price gouging statute "as applied" is even ripe for review at this time; if it is not, then Fair Oil's challenge should not be allowed. To the extent that records are insufficient to review "as applied" challenges, courts have dismissed them. *See Georgia Outdoor Network, Inc. v. Marion County*, Ga., 652 F.Supp.2d 1355, M.D.Ga., August 17, 2009 (NO. 4:08-CV-108 (CDL)) (declining to exercise jurisdiction on as-applied challenge and dismissing facial challenge); *U.S. v. Coronado*, 461 F.Supp.2d 1209, 1218 (S.D.Cal.,2006) (declining to review "as applied" constitutional vagueness challenge as would be speculative without factual development at trial); *Pactiv Corp. v. Chester*, 455 F.Supp.2d 680, 693 - 694 (E.D.Mich.,2006) (dismissing constitutional challenge in summary judgment motion as greater factual development is required).

The 11th Circuit Court of Appeals summarizes the importance of developing a factual record before considering an "as applied" challenge:

> Because the question of ripeness depends on the timing of the adjudication of a particular issue, see Atlanta Gas Light Co. v. Fed. Energy Regulatory Comm'n, 140 F.3d 1392, 1403-04 (11th Cir.1998), it applies differently to facial and as-applied challenges. A facial challenge asserts that a law "always operates unconstitutionally," BLACK'S LAW DICTIONARY 223 (7th ed.1999) (emphasis added); therefore, a facial challenge will succeed only if the statute "could never be applied in a constitutional manner." DA Mortgage, Inc. v. City of Miami Beach, 486 F.3d 1254, 1262 (11th Cir.2007). In the context of a facial challenge, a purely legal claim is

> presumptively ripe for judicial review because it does not require a developed factual record. See Nat'l Treasury Employees Union v. Chertoff, 452 F.3d 839, 854-55 (D.C.Cir.2006); Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250, 1274 (11th Cir.2005); Roe No. 2 v. Ogden, 253 F.3d 1225, 1232 (10th Cir.2001). An as-applied challenge, by contrast, addresses whether "a statute is unconstitutional on the facts of a particular case or to a particular party." BLACK'S LAW DICTIONARY at 223. Because such a challenge asserts that a statute cannot be constitutionally applied in particular circumstances, it necessarily requires the development of a factual record for the court to consider. See Siegel v. LePore, 234 F.3d 1163, 1171 (11th Cir.2000).

Harris v. Mexican Specialty Foods, Inc., 564 F.3d 1301, 1308 (11th Cir. 2009).

Finally, to the extent that the record contains information relevant to the issues of "intent" and "necessary costs", the facts must be taken in a light most favorable to the State in reviewing a motion for summary judgement, *Moore v. Bailey* --- So.3d ----, 2010 WL 1292732 (Miss. App.2010.) (*citing Russell v. Orr*, 700 So.2d 619, 622 (Miss.1997)); *A.B., a Minor, through her Mother, C.D. v. Stone County School District*, 14 So.3d 794, 796 (Miss. App. 2009) *citing McMillan v. Rodriguez*, 823 So. 2d 1173, 1176-77 (Miss. 2002) (citations omitted)

This Court consistently has held that a complainant's conduct should first be analyzed before granting its challenge of a statute's constitutionality. *Harris v. Mississippi Real Estate Comm'n*, 500 So.2d 958, 965 (Miss. 1987) *(citing Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982)). While Fair Oil's claims that he is merely challenging the statute's application to it, this is a fiction. In fact, Fair Oil's claim is based on an scenario in which a vendor provides the

State with complete and actual pricing data. As explained in detail above *supra* at 7 - 10, this is simply not the case with Fair Oil.

2. <u>Sufficient facts are necessary to bring an "as applied" challenge as the statute's facial interpretation would not be in question</u>.

Fair Oil asserts that the statute "fails to provide sufficient notice of what is prohibited" (Fair Oil 18, fn 7) and to review its actions at this time "would result in an illogical requirement that courts must conduct trials to determine whether a party violated a statute even though the standard for determining whether a violation has occurred cannot meaningfully be ascertained." Id.[11] Although Fair Oil maintains that its challenge is only "as applied" to it, the language and standard of review used in its argument is clearly a facial attack. Fair Oil's argument is flawed in that, once again, it is mixing up types of challenges and misapplies their appropriate review.

Facial challenges to the constitutionality of statutes should be granted "sparingly and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). "'[A] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.'" *Roark*, 522 F.3d 533 at 547-548 (5th Cir. 2008) (citations omitted).

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[11]In another facial attack, Fair Oil avers that "there can be no determination if it violated "because the Statute does not make clear what conduct is prohibited. (Fair Oil10). Fair Oil also opines that the trial court has not yet reviewed evidence concerning its intent or its increased prices. (Fair Oil 10). Such proof is required to make the State's case in chief, not to survive a summary judgement motion.

"[I]n *Village of Hoffman Estates* the [United States] Supreme Court announced the proper procedure for analyzing a facial vagueness challenge." *Roark*, 522 F.3d 533 at 548 *citing Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95 (1982).

> To begin, the court must consider whether the [law] reaches a substantial amount of constitutionally protected conduct. . . '[A]ssuming the enactment implicates no constitutionally protected conduct, [a court] should uphold the challenge only if the enactment is impermissibly vague in all of its applications.' . . . However, '[a] [party] who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." . . . Thus, the complainant's conduct should be analyzed before the court considers other hypothetical applications of the law.

Roark, 522 F.3d 533 , 548 (citations omitted).

In addition, the U.S. Supreme Court cautions that records should, in fact, be developed prior to determinations of facial challenges. Specifically, the Supreme Court concluded that "facial adjudication carries too much promise of 'premature interpretatio[n] of statutes' on the basis of factually barebones records. *Sabri v. United States*, 541 U.S. 600, 609 (2004) It is well established law that "the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary." *Pactiv Corp. v. Chester,* 455 F.Supp.2d 680 (E.D.Mich. 2006) (*citing Hodel v. Virginia Surface Min.*, 452 U.S. 264, 294-295 (1981); *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 588 (1972), *Rescue Army v. Mun. Court*, 331 U.S. 549, 568-575, (1947), and *Ala. State Fed'n of Labor v. McAdory*, 325 U.S. 450, 461 (1945).)

The trial court erred when it found that in order for the price gouging statute to pass constitutional muster, it must "offer explicit standards for potential violators to avoid penalties." (R. 307.) Because the price gouging statute does not threaten to inhibit constitutionally protected conduct, the trial court was required to find that the law was impermissibly vague in all its applications, such that no man could know what conduct was prohibited. By its own admission, Fair Oil was on notice that the "at or immediately before" provision of the price gouging statute meant that it was required to maintain "the margins in existence at the time the state of emergency was declared." However, relying on Fair Oil's invalid argument, the trial court failed to apply the correct "vagueness test" and, therefore, improperly granted Fair Oil's motion of summary judgement.

3. A "one day" interpretation is accurate; however it is not an exclusive interpretation when events require other allowable applications.

Fair Oil asserts that the State cannot rely on an interpretation that the State "has never endorsed" to show its violations. (Fair Oil 18). The most evident fault in Fair Oil's conclusion is its reliance on the flawed premise that the State's position conflicts with a "one day" interpretation. As discussed above *supra* at 20 - 22, this is simply not true. The statute provides the baseline price to be determined "at or immediately before the declaration"; the former alternative allows enforcement under an "immediately before" price when the price "at" the time of the declaration is unavailable. Section 75-24-25(2). Fair Oil chose to discard documents evidencing actual daily prices and/or actual price changes, including those in effect at the time of the declaration. (R. 438 - 439.) It now attempts to use its dereliction in documentation to avoid review of its actions. This is true even though its own "watered down" data clearly illustrates that Fair Oil price gouged on 42 days in West Point and 35 days in Starkville. (R. 372- 380)

Fair Oil had clear notice that it was illegal to raise its actual prices during a state of emergency; it should now be held accountable for its actions in violation of this prohibition.

C. Fair Oil's Clear Violation of the Price Gouging Statute Supports the Dismissal of its Summary Judgement Motion in Favor of the State.

In its Appeal Brief, the State set forth the legal basis why the trial court should not have viewed its settlement discussions as evidence of varied applications of the statute. In response, Fair Oil contends that the State's settlement negotiations and the Attorney General's public statements evidenced "differing interpretations" of the statute's application. (Fair Oil 20-21). Fair Oil's wrongly relies on these clearly legitimate - and irrelevant actions - by the State to show "the excessively malleable nature of the Statute." (Fair Oil 20).

As discussed in detail above *supra* at 19 - 20, the State's settlement offers were simply good faith attempts to reach settlement, not varying interpretations of the statute's prohibition. Similarly, Fair Oil misreads the Attorney General's public statements, implying that they are an "acknowledgment of the statute's flaws." (Fair Oil 23). However, contrary to Fair Oil's implications, the Attorney General's willingness to "give more guidance to retailers" regarding the statute signified his desire to eliminate price gouging in Mississippi. It shows the Attorney General's commitment to work with the industry in accomplishing the result; nothing more.

Further, as explained in the State's Appeal Brief, Nautilus is directly relevant to the instant case as it explains that "the total absence of ambiguity is not semantically or practically achievable in a statute; nor is it necessary to satisfy due process in the context of a penal statute." *Nautilus Ins. Co. v. International House of Pancakes*, Inc. 622 F.Supp.2d 470, 480 (S.D.Tex., March 31, 2009) (emphasis added). Fair Oil implies that Nautilus is inapplicable because the State has applied "unforeseeable approaches." (Fair Oil 20). Fair Oil's redundant argument as to "unforeseeable" applications is addressed herein above in detail. The State has applied the law in a consistent manner, only using the flexibility of the statute to determine the statute's applicability to particular cases, such as Fair Oil's where complete data could not be obtained.

Contrary to Fair Oil's assertions, the State has not subjected it to "capricious and unforeseeable enforcement of the law." (Fair Oil 21). Rather, Fair Oil violated the law and is now attempting to forego prosecution by arguing against the use of its own data to prove its guilt. This is not a case of "shifting interpretations" as Fair Oil opines; instead, it is Fair Oil's own attempt to contort the statute's flexible language so as to avoid prosecution altogether.

D. Fair Oil Has Not Satisfied Its Burden of Proof Under the Applicable Vagueness Test.

Fair Oil contends that the State has used "a variety of standards" not articulated prior to the investigation and, thus, the statute is proven vague. (Fair Oil 21). Put simply, Fair Oil complains that the statute's language allows the State to prosecute its violations even without its actual pricing information and, therefore, it is vague.

However, the price gouging statute provides necessary flexibility to address untold and unforeseen variations in factual situations. *Hood v. State,* 17 So.3d 548, 559 (2009) (meticulous specificity is not required.... flexibility and reasonable breadth does not render a statute unconstitutional). Such flexibility does not constitute vagueness. *See, e.g., Meeks v. Tallahatchie County*, 513 So.2d 563 (Miss. 1987) (addressing election process and recognizing that general standards such as those used in the context of negligence, unconscionability, and fraud are not unconstitutionally vague); *Rogers v. The Mississippi Bar*, 731 So.2d 1158 (Miss. 1999) (noting that, in the context of a challenge to rules of professional conduct, preciseness depends on the subject matter).

Fair Oil incorrectly maintains that the statute must be strictly construed because it imposes civil penalties. However, Fair Oil ignores that this Court has more stringently reviewed criminal statutes, not civil, in determining their constitutionality. *Nichols v. City of Gulfport*, 589 So.2d 1280 (Miss.1991). While Fair Oil relies on Nichol's for its assertion of "strict scrutiny", it provides no discussion of the dynamically different facts in that case. In *Nichols*, the parties challenging the ordinance had taken specific precautions to comply with its prohibitions.

> [They had] taken active measures to insure compliance with the ordinance by erecting a sound fence on the east side of their property to shield the adjacent apartment complex and by employing an audiologist to conduct various tests and measure noise levels on May 24, 1987.

Id. at 1281. In this instance, Fair Oil provides no evidence showing its attempts to comply with the statute. Based on its narrow reading of the statute's "immediately or before" language, any affirmative measures by Fair Oil to assure compliance with the statute would have necessitated knowledge of its actual prices charged at or immediately before the proclamation. Yet, Fair Oil failed to document any actual daily retail prices charged before or during the state of emergency.

Likewise, the instant case does not involve two key facts present in *Nichols* which require heightened scrutiny. *Nichols* involved a criminal ordinance which could impact first amendment rights. As explained by the Court,

> Generally speaking, a criminal statute is unconstitutional under the due process clause of the Fourteenth Amendment if it is so vague and uncertain that it does not inform those subject to it what acts it is their duty to avoid, or what conduct on their part will render them liable to its penalties.

Id. (*citing Cassibry v. State*, 404 So.2d 1360, 1367-68 (Miss.1981); 22 C.J.S. Criminal Law § 24(2). Similarly, in *Nichols* the Gulfport ordinance under review involved First Amendment rights and " [w]here the activity to be regulated is capable of reaching First Amendment rights, the statute or ordinance should be subjected to heightened scrutiny. *Id.* (*citing Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967)).

In sharp contrast to *Nichols*, the instant case involves an economic statute with civil penalties; and it does not implicate First Amendment rights in any manner. As such, economic regulation, such as the price gouging statute, is subject to a less strict vagueness test because its subject matter if often more narrow; and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. *Roark*, 522 F.3d 533 at 551-552 *citing Village of Hoffman Estates*, 455 U.S. at 498-499 (citations omitted).

The trial court erred when it found that in order for the price gouging statute to pass constitutional muster, it must "offer explicit standards for potential violators to avoid penalties." (R. 307.) "This high degree of language precision exceeds the constitutional requirements for upholding a statute. See Boyce Motor Lines v. United States, 342 U.S. 337, 340 (1952). ('[F]ew words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions.')."*Roark*, 522 F.3d 533 at 552 (citations omitted).

The State did not re-interpret the statute, as Fair Oil maintains; it enforced the statute when faced with evidence of clear violations and less-than-complete data. Had Fair Oil provided detailed pricing information (e.g., daily data and documents of actual price changes), no other application of the statute would have been necessary in this instance. However, Fair Oil chose to obscure actual prices by averaging them and providing such weekly averages as proxies for its daily price information. Fair Oil clearly knew the State would be required to use a vendor's own price data to review its compliance with the price gouging statute. Such was the case after 9/11 and such is the case in this instance and, most likely, in any other emergency situation. Fair Oil chose to not keep this important data but instead maintain only data showing averaged prices.

The statute provides clear notice that retailers are not to increase their prices above its necessary costs during an emergency. Fair Oil chose to ignore the statute. It should not now be allowed to avoid liability by failing to provide complete documentation and/or attacking the incomplete nature of the very documentation which it chose to provide.

Finally, as proof that it has met its high burden, Fair Oil points to the Chancellor's language acknowledging the need for deference to the legislative branch. However, such a statement does not make up for failing to review Fair Oil's actions. As discussed in the State's Appellate brief in detail, the trial court failed to use the correct legal standard and, thus, the summary judgement should be reversed.

Fair Oil rebukes the State for its use of average prices as a proxy for Fair Oil's actual price, yet it avails itself of the benefits of averaging during the investigation. Fair Oil reprimands the State for not following 9/11 investigation format and procedures, yet it obstructs such procedures to determine the extent of its violation by failing to provide detailed documentation on its price changes. Fair Oil had notice of the statute's prohibition, it just chose not to comply with it.

VI. STATE'S REPLY ARGUMENT ON CROSS-APPEAL

Fair Oil appeals the trial court's ruling as to its vagueness challenge of the price gouging statute's "same market area" provision. The trial court was correct in dismissing Fair Oil's summary judgement attack on this provision as Fair Oil fell short in meeting its requisite burden. Fair Oil's own actions illustrate its familiarity with this concept; and, accordingly, provides evidence of notice of its meaning. In absolute conformity with the application in the 9/11 investigations described above *supra* at 20 - 22, the State used the vendor's own price as the baseline to determine a violation. Absent anticompetitive characteristics in the market, or the absence of the vendor in the pre-state of emergency market, the vendor's own prices are indicative of the "prices ordinarily charged." Further, when the price gouging statute is read as a whole, common sense dictates that the alleged price gouger's own prices would be the most appropriate to determine a violation of the statute.[12]

A. The term "market area" is a term of common use and understanding and one with which Fair Oil used in its own pricing practices.

Fair Oil argues that the statute is unconstitutionally vague because it does not define what is meant by the term "in the same market area" as it relates to prices. Fair Oil further postulates that an exact definition of "the same market area" is necessary for retail gasoline marketeers to understand to which price the statute refers.

However, it is well established law that ordinary terms can be used to express ideas which find adequate interpretation in common usage and understanding. Boyce Motor

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[12]The Mississippi Petroleum Marketers and Convenience Stores Association argues in its amicus brief that those charging less in a market prior to a state of emergency's declaration should be allowed to profit from its position during the state of emergency as long as it does not rise above any gas station within that market area. (Amicus Brief 8-9). This is clearly contrary to the intent of the statute. Such a reading would allow everyone in the market to increase its prices to meet the highest cost charged prior to the declaration. This result directly conflicts with the statute's language allowing prices to increase **only** to reflect the necessary costs to procure the gasoline. Miss. Code Ann. § 75-24-25(2)

Lines v. United States, 342 U.S. 337, 340. Economic concepts of "market area" as it relates to prices is one such area. Businessmen operating in all enterprises have a common understanding of "market area" and typically make it a priority to know in which "market area" they operate.

Cross-Appellant, however, persists in its assertion that it was forced to speculate concerning what was meant by the legislature as to "the same market area." (Fair Oil 25). Fair Oil submits that concepts of prices charged in a market area have no clear, objective meaning and it would be required to speculate as to its meaning. (Fair Oil 24). Fair Oil's argument, however, is contrary to its own self-explained practice. Contrary to its averments in its brief, Fair Oil's practices illustrates both a clear understanding of the common meaning of "market place" and what its significance is to its retail gasoline business.

A seller in any industry endeavors to make its prices as competitive as possible. In doing so, the vendor will need to understand its specific geographic market area[13] and use such knowledge to gather information as to prices charged within that market area in order to remain competitive.

In its own words, Fair Oil uses the common understanding of geographic market area ("area") as a key component in its pricing decisions for its Mississippi locations.

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[13]In cases concerning monopolization, a geographic market area is where consumers currently purchase the product and where they could practicably go for an alternative product if a competitor raises prices. *Surgical Care Center of Hammond, L.C. v. Hospital Service Dist. No.* 309 F.3d 836, 839-840 (C.A.5 (La.),2002). While the instant case does not require the specific and complex evidence to show anticompetitive behavior, the definition is nonetheless applicable.

Fair Oil explains its normal price setting practices as follows.

> Although there is no precise formula for determining the price to be charged at a particular location, the staff generally considers the following factors [in setting retail prices for gasoline and diesel]: (1) current prices being charged by the competition in the area, (2) current wholesale price, (3) wholesale market trends and expectations for the region, (4) anticipated additional costs or expenses associated with the sale or delivery of fuel, and (5) other relevant information that might be available, such as historical pricing in the area.

R. 437 [Emphasis added]. Fair Oil obviously knows its competitors in each geographic market area and compares their prices each time it makes a pricing decision. Thus, Fair Oil's pricing incorporates the pricing of its market area.

Yet, Fair Oil's argues that the State is required under the statute to perform a market study. Its position is particularly facetious in this case given the industry in which it operates. Fair Oil's industry, the retail gasoline market, enjoys significant price transparency. Contrary to the Association's assertion that its members would "have no notion" as to their relevant "market area', retail gasoline marketers make it a common practice to know its market area and to regularly survey the prices charged within it. Fair Oil's practices noted above illustrate this common routine within this market. Its prices are reflective of its market area.

Retail gasoline marketers survey competitors' prices each and every time they make a pricing decision at a retail store. The Alabama Supreme Court describes this price comparison practice as follows.

> Every time [the gas retailer] surveys its competitors' prices, it

> is considering the market as it exists for that moment in time, for that particular [retailer] or [retailer]store, for that grade of gasoline surveyed. In other words, as [retailer] considers a new set of market factors each time a survey is taken, it does, in fact, 'establish' a new price with each survey whether that new price is increased, decreased or 'confirmed' at the same level.

Young Oil Co. v. Racetrac Petroleum, Inc. 757 So.2d 380, 384 (Ala.,1999).[14] In Alabama, such surveys are so common that they have become an affirmative defense to predatory pricing allegations. Id.

The concept of a retailer store's 'market area' is not a novelty; it is quite apparent that the retail gasoline industry commonly uses this concept and understands its importance. While the retail gasoline industry provides a crystal-clear illustration of how the common concept of geographic market area is used; it is a concept familiar to participants in any competitive industry. As summarized by the trial court in the instant case, the plain meaning of the term "market area" would be clear to any businessman who wants to charge competitive prices and attract customers." (R. 304.)

B. The phrase "in the same market area" provides notice that Fair Oil's prices were indicative of the prices charged in its market area

Fair Oil and the Association assert that a retailer's own prices should not be used to show the "price normally charged in the same market area" prior to the state of emergency. (Fair Oil 26). Fair Oil contends that "the statute provides no guidance for

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[14]This is called the "meeting competition" defense, the Alabama Supreme Court highlighted this undisputed manner which gas retailers use to determine the market price in their geographic areas.

determining when the statute relates to one provider of goods and services and when it does not." (Fair Oil 24). This contention is merely a straw man argument. As explained above, retail gasoline vendors consider its competitors' prices in setting their own prices.[15] Market area prices are, thus, implicitly accounted for in a single vendor's own pricing. Fair Oil's prices were based on market area prices; a fact of which Fair Oil is fully aware and admits.[16]

Furthermore, when the Legislature enacted Section 75-24-25(2), it took care to note that "[t]he same market area does not necessarily mean a single provider of goods or services." The State respectfully asserts that the statute could not be any clearer. Prices in the "same market area" may - but "does not necessarily" mean - prices charged by a single provider of goods. Applying a reasonable reading of this provision, it provides

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[15]Such conduct is referred to as "tacit collusion", or "parallel conduct" which is "the process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions." *In re Late Fee and Over-Limit Fee Litig.*, 528 F.Supp.2d 953, 964 (N.D.Cal.2007). Price transparency can lead to such parallel conduct. *See* The Oligopolistic Pricing Problem: a Suggested Price Freeze Remedy 269, 276 (Colum. Bus. L. Rev. 2008).

[16]In contrast to Fair Oil's price gouging investigation at issue, the Attorney General's Office would have to review a greater number of prices in other cases, for example, where a seller is not a market participant prior to a state of emergency. This is perhaps best illustrated by the case of the out-of-state resident with access to a pick-up who drives down to Mississippi's affected community to sale exorbitantly-priced generators in a local parking lot. In that case, other prices in the market area would have to be reviewed for that specific type of generator in order to determine whether, and how significantly, the statute had been broken by this opportunist. Such is not the case with Fair Oil; it is a market participant that was fully aware of the market area prices for fuel and set its own retail prices accordingly

apparent notice to seller that he is prohibited from raising his own prices during times of a state of emergency. The statute also clearly puts Fair Oil on notice that its own price may be the sole comparison used in determining a violation.

Such notice is particularly apparent when it is read in the context of the statute as a whole. Fair Oil's relies heavily on *Connally v. General Const. Co.*, 269 U.S. 385 (1926) to argue that the statute provided insufficient notice that its pre-state of emergency prices would be used to measure if it raised prices during the state of emergency. However, Cross-appellant's reliance is misplaced. Unlike the challenged ordinance in *Connally*, an entity's violation under the price gouging statute is determinative on the relationship between two numeric amounts (i.e., price and cost) before and after an event (i.e., the declaration of a state of emergency.) A violation is not determined by looking at an amount set by a third party (like the "per diem wages in the locality") such as in *Connally*, but rather by looking at the prices (and margins) that a specific entity chooses by, in part, reviewing the market area into which it sells a good or service.

Connally requires that a citizen receive fair notice of unlawful conduct, not the mathematical precision for which Fair Oil argues. *State v. River Forest Development Co.*,--- S.W.3d ----, 2010 WL 987731(Tex. 2010) *See also Hood v. State*, 17 So.3d 548 at 559 (meticulous specificity is not required.... flexibility and reasonable breadth does not render a statute unconstitutional). Further, the price gouging statute regulates one narrow area of business; thus, greater leeway is allowed. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 163 (1972).

Section 75-24-25, the statute's prohibition is apparent; don't go up on prices during a state of emergency. The term "same market area" clearly provides Fair Oil notice that its prices charged at a location before the state of emergency could be used to determine if its prices at that same location increased during the state of emergency. Thus, Cross-Appellant's constitutional challenge to the statute for vagueness must fail.

VII. CONCLUSION

WHEREFORE, PREMISES CONSIDERED, the State of Mississippi, by and through Jim Hood, Attorney General for the State of Mississippi, respectfully requests that this Honorable Court reverse the trial court's judgment and render summary judgment in favor of the State; or, in the alternative, reverse the trial court's judgment and remand.

RESPECTFULLY SUBMITTED, this the 18th day of May, 2010.

JIM HOOD, ATTORNEY GENERAL

STATE OF MISSISSIPPI

By: ______________________

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CERTIFICATE OF SERVICE

THE UNDERSIGNED HEREBY certifies that she has on this, the 18th day of May, 2010, transmitted via United States Postal Services, first class, postage prepaid, a true and correct copy of the above and foregoing document to:

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