NONE QUIET ON THE MICHIGAN FRONT: THE CONSTITUTION & MICHIGAN'S WAR ON TESLA

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I. INTRODUCTION

Most vehicles in the United States are powered by an internal combustion engine ("ICE") or are electric vehicles ("EVs"). ICEs comprise the lion's share of vehicles on the road, but viable EVs are quickly coming into vogue.[1] Experts expect EV sales to grow in popularity amid environmental concerns.[2] Although heritage car makers like General Motors have dabbled in EV technology in the past, Tesla is one of the first companies to successfully dedicate its *entire* business to EV manufacturing.[3] As of 2020, Tesla is by far the single largest manufacturer of EVs relative to the United States market.[4]

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[1] *Global EV Outlook 2020*, IEA (June 2020), https://www.iea.org/reports/global-ev-outlook-2020.

[2] See Earl J. Ritchie, *What's Happened To US Electric Vehicle Sales?*, FORBES, https://www.forbes.com/sites/uhenergy/2019/11/18/whats-happened-to-us-electric-vehicle-sales/#291f7d577909 (last visited Jan. 30, 2022) for a discussion on the growth of EV sales, and *Alt. Fuels Data Ctr., Emissions from Hybrid and Plug-In Electric Vehicles*, AFDC.ENERGY.GOV, https://afdc.energy.gov/vehicles/electric_emissions.html (last visited Jan. 30, 2022) for a discussion on the environmental impact of electric vehicles.

[3] *Timeline: History of the Electric Car*, ENERGY, https://www.energy.gov/timeline/timeline-history-electric-car (last visited Jan. 30, 2022).

[4] For example, Tesla sold 192,250 EVs in 2019, the next closest manufacturer, Chevrolet, sold 16,418 EVs the same year. Isabel Wagner, *Estimated U.S. Battery*

In addition to competing with heritage manufacturers, Tesla is a different kind of automaker in two significant respects. First, whereas traditional manufacturers spend massive sums of money to defend their patents, Tesla is committed to the "advancement of electric vehicle technology" through the open-source movement.[5] This commitment to the open-source movement means that Tesla will not "initiate patent lawsuits against anyone whom, in good faith, wants to use [its] technology."[6] Second, whereas traditional car sales are two-step transactions (a manufacturer sells to a dealer who then sells to the consumer), Tesla exclusively practices direct-to-consumer sales.[7] In pursuing this direct-to-consumer strategy, Tesla conducts sales over the internet and through "galleries."[8] This direct-to-consumer model has spawned considerable litigation and forceful lobbying efforts in which Tesla has clashed with traditional dealers and manufacturers.[9] This Comment seeks to shed light on these "Tesla

Electric Vehicle Sales in 2019, By Brand, STATISTA, https://www.statista.com/statistics/698414/sales-of-all-electric-vehicles-in-the-us-by-brand/ (last visited Jan. 30, 2022). It is important to note, however, that many heritage makers expect to exclusively sell EVs by some fixed date in the future. *See, e.g.*, Jim Motavalli, *Every Automaker's EV Plans Through 2035 and Beyond*, FORBES, https://www.forbes.com/wheels/news/automaker-ev-plans/ (last visited Jan. 30, 2022) ("[General Motors] plans to stop selling gas and diesel vehicles by 2035").

[5] *Compare* Bill Robinson, *The Future of High Tech Patent Litigation in the Auto Industry*, AUTOMOTIVEWORLD, https://www.automotiveworld.com/articles/future-high-tech-patent-litigation-auto-industry/ (last visited Jan. 30, 2022) (describing the frequency and scope of patent litigation in the auto industry), *with* Elon Musk, *All Our Patent Are Belong To You*, TESLA BLOG (June 12, 2014), https://www.tesla.com/blog/all-our-patent-are-belong-you (explaining that Tesla will not pursue patent litigation against "good faith" users of its technology).

[6] Musk, *supra*, note 5; *but see* Nicholas Collura, *A Closer Look at Tesla's Open-Source Patent Pledge*, LEXOLOGY, https://www.lexology.com/library/detail.aspx?g=ca6c332f-2cc5-401b-b80d-36473d0754c7 (last visited March 8, 2022) (discussing the limitations of Tesla's open-source policy).

[7] Mohit Gupta & Neeraj Maurya, *Tesla's Direct to Consumer Retail Model*, INGENIOUS E-BRAIN, https://www.iebrain.com/wp-content/uploads/2017/08/Tesla-direct-Retail.pdf (last visited Jan. 30, 2022).

[8] TESLA, https://www.tesla.com/models/design#payment (last visited Jan. 30, 2022). Tesla's website allows consumers to customize their vehicle before proceeding to a "checkout" screen, similar to that used by sellers of consumer-packaged goods. *Id.* But for state laws forbidding the practice, this website would allow customers to buy and receive a Tesla without ever having to leave their home to visit a dealer, showroom, or gallery.

[9] *Cf.* Lora Koldony, *Tesla Launches Social Platform to Spur Owners to Take Political Action on Its Behalf*, CNBC, https://www.cnbc.com/2021/03/05/tesla-engage-

Wars."

More specifically, this Comment will explore dealer protection laws—laws originally passed to protect dealers from manufacturers—but will focus on Michigan's dealer protection scheme. Michigan is unique among the states because it is home to Detroit, the "Motor City," Which houses the "Big Three" American car manufacturers.[10] Because of this, Michigan is perhaps the most important battleground of the Tesla Wars. Part II of this Comment will overview the history of dealer protection laws with a focus on the language and relevant history of Michigan's Motor Vehicle Franchise Act ("MVFA"). Part III explores Tesla's legal skirmishes in Michigan so far: its lawsuit challenging the MVFA, the settlement that it produced, and the legislative actions that followed. Part IV examines the merits of Tesla's Michigan lawsuit.

Overall, this Comment aims to contribute to the greater conversation surrounding dealer protection laws and forecast how future litigants—both in Michigan and elsewhere—might challenge these regimes and win the opportunity to sell direct-to-consumer. Although Michigan and Tesla reached a settlement, it is still worthwhile to analyze the substance of the Tesla suit for several reasons. First, every state has some species of dealer protection laws on the books.[11] Although Tesla may sell direct-to-consumer in Michigan, similar battles are bound to erupt elsewhere, future litigants will likely advance similar arguments, and legislators ought to draft laws that avoid constitutional doubt.[12] Second, although this settlement works uniquely in Tesla's favor, other companies in Michigan have not been so fortunate.[13] Thus,

asks-owners-to-take-political-action-on-companys-behalf.html (last visited March 8, 2022) ("[Tesla] is urging residents to push state legislators to change laws that bar Tesla and others from selling vehicles directly to consumers. . . . They have even provided a quick way for fans to submit public comments on legislation . . . or to contact the appropriate committee members.").

[10] "Big Three" refers to Fiat-Chrysler, Ford, and General Motors. Elizabeth Blessing, *Big Three Automakers*, INVESTOPEDIA (Jan. 13, 2021), https://www.investopedia.com/terms/b/bigthree.asp.

[11] *See generally Franchise Laws: By State*, DEALER NEWS, https://www.dealernews.com/DN-Academy/Management/post/franchise-laws-by-state/2016-11-29 (last visited Jan. 30, 2022) [hereinafter DEALER NEWS].

[12] *See* discussion *infra* Part II.A.

[13] Gabrielle Coppola, *Rivian Faces Ban From Michigan Car Dealers in Direct-*

although Tesla managed to secure a fragile "win," the substantive problems in Michigan still loom large. Third, since the settlement, Michigan lawmakers have proposed legislation that would "close the door" behind Tesla in an attempt to prevent other manufacturers from seeking similar accommodations.[14] Further, several Michigan lawmakers have expressed support for a bill that would renege on the Tesla settlement itself.[15] Accordingly, it is worthwhile to scrutinize such laws, both to understand their effects in the Wolverine State *and* on the national market for direct-to-consumer EV sales.

II. DEALER PROTECTION LAWS

A. *Dealer Protection Laws Generally*

Although many EV makers would like to sell direct-to-consumer, every state has some law that either restricts or utterly prohibits such sales.[16] While this Comment analyzes the history and legal merit of state dealer franchise laws, it does not speculate on their social utility. Regardless of whether one is a staunch supporter or opponent of dealer protection laws, it is important to understand the historical context in which these laws were passed to have an informed opinion on either side of the debate.

In the early days of the American auto industry, manufacturers sold directly to consumers.[17] At the time, there were relatively few automakers in the United States, and what manufacturers did exist lacked the requisite capital to build pure production facilities.[18] With manufacturers spreading scarce

Sales Fight, BLOOMBERG, https://www.bloomberg.com/news/articles/2020-09-21/rivian-faces-ban-from-michigan-car-dealers-in-direct-sales-fight?sref=voktyKaT (last visited Jan. 30, 2022).

[14] Fred Lambert, *Michigan Is Closing the Door Behind Tesla on Direct Sale, Leaving Rivian, Lucid, and More Behind*, ELECTREK (Sept. 22, 2020, 6:08 AM), https://electrek.co/2020/09/22/michigan-closing-door-behind-tesla-direct-sale-leaving-rivian-lucid/.

[15] *See generally* H.B. 6233, 100th Leg., Reg. Sess. (Mich. 2019), http://www.legislature.mi.gov/documents/2019-2020/billintroduced/House/pdf/2020-HIB-6233.pdf.

[16] *See generally* DEALER NEWS, *supra*, note 11.

[17] Gary M. Brown, *State Motor Vehicle Franchise Legislation: A Survey and Due Process Challenge to Board Composition*, 33 VAND. L. REV. 385, 387 (1980).

[18] *Id.*

resources across both production *and* distribution, both aspects of the auto market suffered.[19] Sales departments have long recognized that consumers demand exceptional customer service; potential customers demand a heightened degree of service in order to embrace an unfamiliar technology.[20] At a time when cars were a novel technology, consumers sought guidance in making their purchases—more guidance than a single entity (manufacturer-seller) could provide.[21] In response, manufacturers developed "independent distribution systems," selling cars to independent franchisees (dealerships), who sold these cars to customers.[22] Early franchise agreements typically designated the franchisee-dealer as an "exclusive agent" of the manufacturer.[23] This principal-agent relationship exposed manufacturers to significant liability because manufacturers could not meaningfully supervise and control their dealer-agents.[24] Manufacturers of the time were routinely sued (being deep-pocketed institutional entities in contrast to "mom and pop" dealers) for the unilateral and downstream acts of dealer-agents.[25] To insulate themselves from this newfound liability, manufacturers sought to avoid creating an agency relationship by designating franchisees as mere "vendees," rather than "agents."[26] These attempts proved largely unsuccessful.[27]

Having failed to limit liability through principles of agency, manufacturers sought to limit their liability by flexing their

19 *Id.* at 387 ("The consumer demanded services that the manufacturer was not in a position to render.").

20 *See generally* COMM. ON OVERCOMING BARRIERS TO ELECTRIC-VEHICLE DEPLOYMENT ET AL., NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES, OVERCOMING BARRIER TO DEPLOYMENT OF PLUG-IN ELECTRIC VEHICLES 37–46 (2015), https://www.nap.edu/read/21725/chapter/5.

21 Brown, *supra* note 17, at 387.

22 Brown, *supra* note 17, at 387.

23 Brown, *supra* note 17, at 387.

24 Brown, *supra* note 17, at 387.

25 *See, e.g.*, Joslyn v. Cadillac Auto Co., 177 F. 863 (6th Cir. 1910) (lawsuit against manufacturer for misrepresentation); Columbia Motors Co. v. Williams, 96 So. 900 (Ala. 1923) (lawsuit against manufacturer for breach of warranty).

26 *See, e.g.*, MacPherson v. Buick Motor Co., 217 N.Y. 382 (N.Y. 1916) (refusing to apply the traditional "privity" test to hold a dealer liable, and instead applying a foreseeability test).

27 *Id.*

superior bargaining positions.[28] For the most part, franchise agreements of the time were drafted by the manufacturer's lawyer.[29] These contracts inadequately defined the rights and duties of the parties, and stipulated terms that favored manufacturers.[30] Especially problematic for dealers of the time were: (1) the manufacturer's ability to "force" dealerships to purchase inventory during times of low demand; (2) threats to terminate franchise agreements at will; and (3) the manufacturer's unfettered right to compete with their own franchisees.[31]

When dealers tried to challenge these contracts of adhesion in court, they found little success based on the common law of contracts.[32] In addition to troubles in court, dealer appeals to Congress likewise fell flat as the Supreme Court struck down New Deal legislation that might have mitigated the situation.[33] Today, most dealer protection occurs at the state level.[34]

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[28] Brown, *supra* note 17, at 388.

[29] Brown, *supra* note 17, at 388 n.28.

[30] Brown, *supra* note 17, at 388. These agreements often allowed manufacturers to set sales quotas for dealers and terminate the franchise at will. Because opening and running a dealership require substantial investment, and manufacturers could terminate the agreement at will, dealers often purchased more cars than they could sell at a given time, simply to avoid the manufacturer terminating the agreement at a substantial loss to the dealer. *See id.*

[31] For example, in 1921, Ford Motor Company had about $70 million in liabilities come due. Unfortunately for Ford, these liabilities came due in the midst of a recession which stifled demand for new cars and reduced prices nationwide. To make ends meet, Ford flexed its ability to enforce minimum quotas on dealers and forced dealers to purchase more inventory than the market demanded. Such predatory practices have been largely outlawed and modern statutory regimes seek to ensure fairness in business transactions between related parties. *See generally* STEWART MACAULAY, LAW AND THE BALANCE OF POWER: THE AUTOMOBILE MANUFACTURERS AND THEIR DEALERS 13 (Russell Sage Found. 1966).

[32] *See, e.g.*, Bushwick-Decatur Motors, Inc. v. Ford Motor Co., 116 F.2d 675, 677 (2d Cir. 1940).

[33] *See, e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 553 (1935) (striking down part of the National Industrial Recovery Act 48 Stat. 195 (1933)); *but see* John H. Pavloff, *Hope Yet for the Automobile Dealers' Day in Court Act: Marquis v. Chrysler Corp.*, 1979 DUKE L. J. 1185, 1185 (1979) ("The Automobile Dealers' Day in Court Act . . . enacted in 1956 created a new cause of action for automobile dealers . . . to sue manufacturers in federal court for damages caused by the manufacturers' failure to act in 'good faith' in complying with terms of franchise agreements, or in terminating or not renewing their dealers' franchises.").

[34] *See* DEALER NEWS, *supra* note 11.

B. *Michigan's Dealer Protection Law and Tesla's Reasonable Reading*

Michigan enacted its first substantial dealer protection law, the MVFA, in 1981.[35] Of the law's many provisions, relevant to the Michigan litigation was Section 445.1574 and the amendments that followed. Section 445.1574 originally provided that "[a] manufacturer, importer, or distributor shall not . . . [s]ell any new motor vehicle directly to a retail customer other than through *its* franchised dealers."[36] As originally written, this law would have allowed Tesla to sell direct-to-consumer. The possessive "its" should be read as limiting Section 445.1574's prohibition on direct-to-consumer sales to those manufacturers which *have* franchised dealers.[37] Tesla does not have *any* franchised dealers, such that the MVFA would not have precluded *its* direct-to-consumer sales. This was Tesla's position in the Michigan lawsuit.[38] As will be addressed below, this result stems from a fair reading of the statute, is consistent with the conclusions of other courts facing similar laws, and follows logically from the historical backdrop against which dealer protection laws have emerged. Because dealer protection laws arose at a time when franchised dealers were the victims of manufacturers, it would make little sense for the law to protect franchisees who do not exist from manufacturers who, *a priori*, can neither compete with, nor harm them.[39]

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[35] Mich. Comp. Laws Ann. § 445, Refs & Annos.

[36] Mich. Comp. Laws Ann. § 445.1574.

[37] Compl. for Declaratory and Injunctive Relief ¶ 33, Tesla Motors, Inc. v. Johnson, 1:16-cv-01158 (W.D. Mich. Sept. 22, 2016) ("[b]y using the possessive 'its,' the legislature limited the direct-sale prohibition to manufacturers that actually had franchised dealers."); *see* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 107, 140 (2012) (discussing the negative-implication canon and grammar cannons of construction).

[38] Compl., *supra* note 37, at ¶ 33; Elon Musk (@elonmusk), TWITTER (Aug. 23, 2017, 5:16 PM), https://twitter.com/elonmusk/status/900466867659198464?lang=en.

[39] Indeed, dealer protection laws, at the outset, were enacted to protect dealers from manufacturers. Will Zerhouni, *Tesla Takes on Michigan* (Cato Inst., Policy Analysis No. 834, 2018), https://www.cato.org/publications/policy-analysis/tesla-takes-michigan, explaining that

> as cars became more plentiful and demand began to flatten in the 1920's, most manufacturers likewise turned to the dealership model as the primary means of distribution . . . and demand-

Even if Tesla could have sold direct-to-consumer under the original MVFA, the law was amended as part of a larger bill, H.B. 5606, to remove the word "its."[40] The bill itself is largely unimportant for purposes of this Comment, but the amendment potentially changed the entire meaning of Section 445.1574.[41] As amended, the law reads "[a] manufacturer shall not . . . [s]ell any new motor vehicle directly to a retail customer other than through ~~its~~ franchised dealers."[42]

Michigan is not alone in passing a law to protect dealers from their brand manufacturers and Tesla is not alone in reading such statutes as limited to manufacturers *with* franchised dealers. Indeed, Tesla was a party to a similar case in Massachusetts where the Supreme Judicial Court offered an analogous reading of a Massachusetts dealer protection law. In *State Auto Dealers Ass'n, Inc. v. Tesla Motors MA, Inc.*,[43] a group of car dealers brought an action to enforce a Massachusetts law making it unlawful for a manufacturer to "own or operate, either directly or indirectly . . . a motor vehicle dealership located in the commonwealth of the same line make as any of the vehicles manufactured, assembled or distributed by the manufacturer or distributor."[44] The statute also created "a private right of action for dealers injured by statutory violations."[45] At the time, Tesla's wholly-owned subsidiary, Tesla Motors MA, operated a "gallery," similar to that which the

> creation bec[ame] critically important. . . . [Dealers] feared that manufacturers would . . . open company dealerships in their territory, competing with them directly . . . in response, the dealers banded together and lobbied their state legislatures for protection.

40 2014 Mich. Legis. Serv. P.A. 354 (H.B. 5606).

41 *Cf.* SCALIA & GARNER, *supra* note 37, at 56 ("When deciding an issue governed by the text of a legal instrument, the careful lawyer or judge trusts neither memory nor paraphrase but examines the very words of the instrument. As Justinian's *Digest* put it: *A verbis legis non est recedendum* ('Do not depart from the words of the law')").

42 *Compare* Mich. Comp. Laws Ann. § 445.1574 (effective Aug. 4, 2010 to Oct. 20, 2014), *with* Mich. Comp. Laws Ann. § 445.1574 (effective Oct. 21, 2014 to Mar. 27, 2019) (strikethrough maintained for emphasis).

43 Massachusetts State Auto. Dealers Ass'n, Inc. v. Tesla Motors MA, Inc., 15 N.E.3d 1152, 1156 (2014).

44 Mass. Gen. Laws Ann. ch. 93B, § 4 (2021).

45 *Mass. St. Auto. Dealers Ass'n*, 15 N.E.3d at 1156; MASS. GEN. LAWS ch. 93B, § 15(a)(2021).

Michigan settlement purports to allow.[46] The Massachusetts State Automobile Dealers Association, Inc. ("MSADA") and two Massachusetts auto dealers brought suit under the private right of action created by chapter 93B, Section 15(a) of the Massachusetts General Laws, seeking declaratory relief, a temporary restraining order, and injunctive relief to prevent Tesla from owning the "gallery" in Massachusetts.[47] Although the court dismissed the case for lack of standing, it first questioned whether the law even applied to Tesla.[48] Because chapter 93B, Section 4(c)(10) prohibited manufacturers from owning or operating a dealership in Massachusetts, the court questioned whether Tesla was indeed operating a "motor vehicle dealership."[49] Chapter 93B of Massachusetts General Law, Section 1 defines "dealer," "motor vehicle dealer," and "dealership" as a person who "in the ordinary course of its business, is engaged in . . . selling new motor vehicles to consumers . . . pursuant to a franchise agreement."[50] Because neither Tesla nor Tesla Motors MA was engaged in selling new automobiles *pursuant to a franchise agreement*, the court was unsure whether the statute applied to Tesla at all.[51] The court concluded that the statute was "intended and understood only to prohibit manufacturer-owned dealerships when, unlike Tesla, the manufacturer *already* had an affiliated dealer or dealers in Massachusetts."[52] The court reasoned that the law was enacted to "protect motor vehicle dealers from a host of unfair acts and practices historically directed at them by their own brand manufacturers and distributors," and concluded that the law has routinely been understood as protecting dealers from "having to

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[46] Joint Stipulation and Mot. for Entry of Dismissal ¶ e [hereinafter Joint Stipulation]; Tesla, Inc. v. Benson, No. 1:16-cv-01158 (W.D. Mich. Jan. 22, 2020) ("[no] provision of Michigan law prohibits Tesla from operating one or more galleries in the State.").

[47] *Mass. St. Auto. Dealers Ass'n*, 15 N.E.3d at 1155.

[48] *Id.* at 1157 ("although the parties do not address this point, it is not entirely clear that the plain language of [the statute] applies to the defendants' conduct and renders it unlawful.").

[49] *Id.*

[50] MASS. GEN. LAWS. ch. 93B, § 1 (2021) (defining "dealer," "motor vehicle dealer," and "dealership").

[51] *Mass. St. Auto. Dealers Ass'n*, 15 N.E.3d at 1157 (questioning if Tesla MA was a dealer, motor vehicle dealer, or dealership engaged in a franchise agreement).

[52] *Id.* at 1162.

compete with their affiliated manufacturers for sales within a defined geographical area."[53]

Although the Massachusetts decision has no binding effect in Michigan, the two laws share a common history, and the Massachusetts court's reasoning lends support to Tesla's interpretation of Section 445.1574, before and after its amendments.

III. THE TESLA SUIT AND SETTLEMENT

In 2016, Tesla formally filed its complaint, challenging the MVFA as amended by HB 5606.[54] Tesla argued that the amendment changed the meaning of the MVFA as to render Section 445.1574 unconstitutional.[55] Whereas the original law suggested that Section 445.1574 would preclude only those manufacturers with franchised dealers from selling directly to consumers—allowing Tesla and similarly integrated companies to do so—the amended law seemed to prohibit *all* manufacturers from selling direct-to-consumer.

Tesla took further issue with the procedural backdrop against which this amendment was passed. This amendment was not the product of significant deliberation by the Michigan legislature, but rather, it was added to a larger bill less than forty-eight hours before being passed.[56] Indeed, Michigan lawmakers claim to have been unaware of the amendment's "anti-Tesla" bend as the full bill containing the amendment was initially crafted to "determine whether automakers could stop affiliated franchised dealers from charging customers certain types of fees."[57] Still, the then-Michigan Senator who added the midnight amendment, Joe Hune, is married to a registered lobbyist whose firm serves the

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53 *Id.* at 1160.

54 *See* Compl., *supra* note 37.

55 Compl., *supra* note 37, at ¶ 50–64.

56 Zerhouni, *supra* note 39 (explaining "[t]he . . . amendment was added on October 1, 2014, at the dusk of that year's legislative session. . . . [and] passed without comment or debate the next day.").

57 Vince Bond, *Anti-Tesla Bill Reaches Michigan Governor's Desk*, AUTOMOTIVE NEWS (Oct. 15, 2014), https://www.autonews.com/article/20141015/RETAIL07/141019925/anti-tesla-bill-reaches-michigan-governor-s-desk).

Auto Dealers of Michigan.[58] Before the settlement was reached, U.S. Magistrate Judge Ellen Carmody denied bids by Hune and other legislators to quash Tesla subpoenas seeking to gather information regarding the legislators' involvement with the Detroit auto industry.[59] While the discovery materials are largely confidential between the then-litigants, Tesla further alleged animus from specific Michigan legislators.[60]

In early 2020, Tesla settled the lawsuit and celebrated it as a "win."[61] The settlement purported to allow Tesla to sell direct-to-consumer by clarifying that existing law does not prohibit wholly-owned Tesla subsidiaries from "owning or operating one or more service or repair facilities" or "performing warranty, recall, service, or repair work."[62] The settlement further clarified that existing Michigan law does not prohibit Tesla from "delivering vehicles to Michigan residents in Michigan (whether directly, through a subsidiary, using an independent carrier, or otherwise) . . . so long as legal title for any vehicles sold by Tesla transfers outside the state of Michigan."[63] Lastly, the settlement allows Tesla to open "galleries" in Michigan that perform essentially the same function as traditional dealerships, so long as the directly owned galleries do not, themselves, transfer legal title to vehicles.[64] The galleries could also perform other traditional functions of a dealer, such as conducting test drives and discussing prices, but they may only "facilitat[e] ordering and purchase of a vehicle for which legal title transfers out-of-state."[65] It is important to note that this settlement was enacted under the Michigan Department of State's authority

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58 Paul Egan, *Federal Judge In Tesla Case: Lawmakers Must Turn Over Records To Electric Automaker*, DETROIT FREE PRESS (Aug. 21, 2017), https://www.freep.com/story/news/local/michigan/2017/08/21/tesla-lawsuit-subpoenas-lawmaker-records-hune-sheppard/586676001; *Marcia Hune,* GSCI, https://www.gcsionline.com/the-gcsi-edge/marcia-hune/ (last visited Jan. 30, 2022).

59 Egan, *supra* note 58.

60 *See* Zerhouni, *supra* note 39 (quoting Michigan state legislator, Jason Sheppard as saying, "[t]he Michigan dealers do not want you here. The local manufacturers do not want you here. So you're not going to be here.").

61 Elon Musk (@elonmusk), TWITTER (Jan. 21, 2020, 6:30 PM), https://twitter.com/elonmusk/status/1219764212278464512.

62 Joint Stipulation, *supra* note 46, at ¶ b.

63 Joint Stipulation, *supra* note 46, at ¶ c.

64 Joint Stipulation, *supra* note 46, at ¶ e.

65 Joint Stipulation, *supra* note 46, at ¶ e.

to administer and enforce Section 445.1501 et seq., and M.C.L. Section 257.1.[66] Thus, this settlement does not actually alter, overrule, or abridge the statutes themselves. For practical purposes, it is more proper to regard the settlement as an agreement to not enforce Section 445.1574 as written against Tesla.[67] Indeed, the settlement ends in a "covenant" to only enforce Michigan law against Tesla in accordance with the terms of the settlement and to take no enforcement action that is inconsistent with the interpretation of law set forth in the settlement.[68] The covenant ends with the defendants stating that the interpretations of the law set forth in the settlement are not policy choices, but are simply an "objective" reading of the statute.[69] Thus, the settlement did not actually change the law—it merely codified one interpretation as to Tesla. As of this publication, the law as written is still utterly enforceable as to all parties but "Tesla and its subsidiary or successor."[70]

Although the settlement has the practical effect of allowing Tesla to sell vehicles directly to consumers (establishing a wholly-owned subsidiary to transfer title out-of-state is a relatively easy task for a large corporation), this "loophole," by its own terms, applies only to Tesla.[71] Because Tesla is the lone beneficiary of this settlement, the legal community has no clear guidance from the courts with respect to Tesla's substantive constitutional challenges. The remainder of this Comment seeks to shine light on the merits of these claims, had the suit gone forward.

Despite the settlement, the Tesla Wars are still raging behind closed doors in Lansing. In September 2020, Michigan Representative Jason Sheppard introduced legislation, HB 6233,[72] that would "shut the door" behind Tesla, allowing the Palo Alto manufacturer to be the sole manufacturer-dealer in the state.[73] HB 6233 would have amended the MVFA to add a section exempting Tesla from the statute's otherwise broad prohibition on direct-to-

66 Joint Stipulation, *supra* note 46, at ¶ a.
67 Joint Stipulation, *supra* note 46, at ¶ b.
68 Joint Stipulation, *supra* note 46, at ¶ b.
69 Joint Stipulation, *supra* note 46, at ¶ c.
70 Joint Stipulation, *supra* note 46, at ¶ b.
71 Joint Stipulation, *supra* note 46, at ¶ a.
72 H.B. 6233, *supra* note 15.
73 *See* Lambert, *supra* note 14.

consumer sales. Indeed, the bill would have amended Section 445.1574 to read in relevant part:

> *[E]xcept as otherwise provided under* [S]*ection 17d.* a manufacturer shall not do any of the following: . . . (h) Directly or indirectly own, operate, or control a new motor vehicle dealer . . . [or] (i) Sell any new motor vehicle directly to a retail customer other than through franchised dealers.[74]

The new section, Section 17d, would have established two conditions for a manufacturer being allowed to:

> (a) own a subsidiary that owns or operates . . . repair facilities . . . (b) Perform warranty, recall, service, or repair work . . . (c) Deliver new motor vehicles to residents [of Michigan] either directly or through a subsidiary . . . as long as the sale and passing of title for any new motor vehicle sold by the manufacturer are transferred to the buyer outside of [Michigan] . . . [and] (d) Own or operate . . . facilities in [Michigan] that educate customers and facilitate transactions.[75]

The two conditions that must be met for Section 17d to apply are: (1) the "manufacturer [must have] entered into a joint stipulation and motion for entry of dismissal on January 22, 2020, in Tesla, Inc. v. Jocelyn Benson, et al"; and (2) the manufacturer [must] have "not sold a single new motor vehicle through any franchised new motor vehicle dealer [in Michigan]."[76] Because Tesla is the only manufacturer that entered into the joint stipulation and motion for entry of dismissal on January 22, 2020, in *Tesla, Inc. v. Jocelyn Benson, et al*, it is the only manufacturer to whom Section 17d's exemptions from Section 445.1574 would apply.

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74 H.B. 6233, *supra*, note 15 (new language in italic).

75 H.B. 6233, *supra*, note 15, at § 17d.

76 H.B. 6233, *supra*, note 15.

On December 2, 2020, HB 6233 was significantly altered before being passed by the Michigan House to remove the Tesla carveout in what has been described as a feat of "impressive political backstabbing."[77] While HB 6233 has not passed the Michigan Senate and been signed into law, it has the potential to close the very loophole that *Tesla v. Johnson* opened and the original HB 6233 sought to preserve. Thus, if the current version of HB 6233 ever becomes law—banning *all* direct-to-consumer auto sales—EV makers such as Rivian and Lucid (who were not parties to the settlement), may find an ally in the fight for direct-to-consumer auto sales in the Wolverine State: Tesla, Inc.

IV. SUBSTANTIVE ARGUMENTS AGAINST DEALER PROTECTION LAWS

In its complaint, Tesla raised three grounds on which the amended Section 445.1574 violated its constitutional rights: (1) the Due Process Clause of the Fourteenth Amendment; (2) the Equal Protection Clause of the Fourteenth Amendment; and (3) the Commerce Clause of Article I.[78] This Comment will overview the viability of the Equal Protection and Commerce Clause challenges. The due process theory is beyond the scope of this paper.

[77] H.B. 6233, *supra*, note 15 (removing the Tesla carveout from Representative Sheppard's original bill); Fred Lambert, *Tesla Loophole for Direct Sales in Michigan is Getting Shut with Impressive Political Backstabbing*, ELECTREK (Dec. 3, 2020, 12:35 PM), https://electrek.co/2020/12/03/tesla-loophole-direct-sales-in-michigan-is-getting-shut-political-backstabbing/.

[78] Compl., *supra*, note 37, at ¶ 50–64.

A. *Equal Protection*

Tesla alleged that the amended MVFA violated its Fourteenth Amendment right to equal protection.[79] Tesla claimed that Michigan unlawfully distinguished between entities in two ways: first, "between (a) manufacturer-owned dealerships, such as Tesla, and (b) franchised dealerships that are not owned by manufacturers, which are similarly situated in all material respects"; and second, "between (a) non-Michigan based manufacturers like Tesla, which do not use franchised dealerships as part of their sales model, and (b) Michigan-based manufacturers like General Motors, which do."[80] Tesla claimed that Michigan had no legitimate purpose for such differential treatment and that the "irrational" classifications "exist solely for the purpose of protecting two discrete Michigan-based interest groups—Michigan's franchised auto dealers and Michigan-based manufacturers—from economic competition."[81]

Generally, when a law is challenged on equal protection grounds, the law is only subjected to "rational basis" review.[82] A law will be subject to heightened review, either strict or intermediate scrutiny,[83] if it discriminates against a suspect or

79 Compl., *supra*, note 37, at ¶ 54.

80 Compl., *supra*, note 37, at ¶ 56.

81 Compl., *supra*, note 37, at ¶ 56.

82 *But see* United States v. Carolene Prod. Co., 304 U.S. 144, 153 n.4 (1938) ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution"); Loesel v. City of Frankenmuth, 692 F.3d 452, 461 (6th Cir. 2012) (quoting Rondigo, L.L.C. v. Twp. of Richmond, 641 F.3d 673, 681–82 (6th Cir. 2011)) ("The Equal Protection Clause prohibits discrimination by government which either burdens a fundamental right, targets a suspect class, or intentionally treats one differently than others similarly situated without any rational basis for the difference.").

83 *See* Nancy M. Reininger, *City of Cleburne v. Cleburne Living Center: Rational Basis with a Bite*, 20 U.S.F. L. REV. 927 (1986) (discussing varying degrees of scrutiny in detail).

quasi-suspect classification[84] or abridges a "fundamental" right.[85] If a law does not discriminate against such classifications or abridge fundamental rights, it is subject to rational basis review.[86] Under rational basis review, a law will be upheld so long as it bears some rational relationship to a legitimate government purpose.[87] The challenger bears the burden of proving that the law either furthers no conceivable legitimate government purpose or that the means chosen to pursue such purpose are not rationally related to the purpose itself.[88]

Here, there appear to be a few alternatives regarding Tesla's equal protection challenge to Section 445.1574. Before addressing the viable theories, we can rule out a few entirely. First and foremost, Tesla is a corporation, and even assuming that it is being "discriminated against," it does not belong to a suspect or quasi-suspect class. Thus, Tesla's only hope for review under strict or intermediate scrutiny rests on the law at issue infringing upon one of its fundamental rights. There seems to be no fundamental right implicated here.[89] Thus, Section 445.1574 would likely be subject to rational basis review.[90] To prevail under this standard, Tesla will need to establish that it, or the non-suspect class to which it belongs, is indeed being treated differently from similarly

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84 *See, e.g.,* Graham v. Richardson, 403 U.S. 365, 372 (1971) (explaining suspect classifications) ("classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny"); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) (explaining quasi-suspect classifications) ("the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an 'exceedingly persuasive justification' for the classification").

85 *Carolene Prod. Co.,* 304 U.S. at 153 ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution.").

86 *See* Reininger, *supra*, note 83.

87 *See* Reininger, *supra* note 83 (discussing "rational basis review" at length).

88 *See* Reininger, *supra* note 83.

89 *See generally* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (interferences with the "freedom of contract" are no longer subjected to strict scrutiny).

90 There is, however, precedent to suggest that the Court will apply heightened review as it sees fit, notwithstanding the lack of "fundamental rights" or "suspect" classifications being implicated. The Court has said that it would "not be faithful to [its] obligations under the Fourteenth Amendment if [it] applied so deferential a standard to every classification." *See* Plyler v. Doe, 457 U.S. 202, 216 (1982) (applying heightened scrutiny to a law that did not abridge fundamental rights or discriminate against a suspect (or quasi-suspect) classification).

situated entities *and* that the government lacks a legitimate purpose for such disparate treatment.[91]

Tesla did not claim to be part of a suspect or quasi-suspect class, nor could it. It is also not obvious that Tesla belongs to any "class" at all, given the lack of "manufacturer-owned" dealerships in Michigan.[92] Indeed, Tesla seems to be putting forward that *it* was discriminated against more than any "class."[93] Thus, Tesla's argument evokes a "class of one" claim. The Supreme Court has explained that a plaintiff may bring an equal protection claim, notwithstanding lack of membership in any class, because the Equal Protection Clause exists to "secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents."[94]

The paradigm class of one claim is where: "(1) the plaintiff alleges that he has been intentionally treated differently from others similarly situated and (2) that there is no rational basis for the difference in treatment or the cause of the differential treatment is a 'totally illegitimate animus' toward the plaintiff by the defendant."[95]

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91 TriHealth, Inc. v. Bd. of Comm'rs, 430 F.3d 783, 790 (6th Cir. 2005) ("[D]isparate treatment of persons is reasonably justified if they are dissimilar in some material respect.").

92 *See* Compl., *supra* note 37, at ¶ 31. Tesla also alleged that the Detroit manufacturers support Section 445.1574. *See id.*

93 Compl., *supra* note 37, at ¶ 31 ("Section 445.1574 and the Anti-Tesla Amendment").

94 Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (quoting Sioux City Bridge Co. v. Dakota City., 260 U.S. 441, 445 (1923)).

95 McDonald v. Vill. of Winnetka, 371 F.3d 992, 1001 (7th Cir. 2004); *Vill. of Willowbrook*, 528 U.S. at 564 (holding for the plaintiff "where the plaintiff did not allege membership in a class or group."); *see also* Michael D. Bersani, *"Class of One" Equal Protection Claims: Confusion and Uncertainty Post Olech and Engquist*, HCB ATT'YS, http://www.hcbattorneys.com/wp-content/uploads/2016/07/13.-HCC-2012-Class-of-One-Equal-Prot.-Claims.pdf (overviewing the approach various circuits take to "class of one" claims).

1. Similarly Situated

In the Sixth Circuit, where Tesla filed suit, a class of one plaintiff must demonstrate that he was treated differently than others "who were similarly situated in all material respects."[96] To be similarly situated, a plaintiff and those with whom he claims to be similarly situated ("comparators") need not be identical, and not all differences between the plaintiff and his comparators are material.[97] Thus, the relevant inquiry for the litigants would be the degree to which manufacturer-dealers and franchised dealers are similarly situated. Only after Tesla can establish that these two groups are indeed "similarly situated" does it become relevant that the two groups are being treated differently such that the government must have a basis for the disparity.[98] The question of whether a plaintiff and comparator are similarly situated is generally one for a jury, and thus a claim under this theory should survive summary judgment.[99] Here, Tesla could make a compelling case that manufacturer-dealers are similarly situated to franchised dealers for the purposes of Section 445.1574. Given that not all differences between a plaintiff and his comparators are

96 Loesel v. City of Frankenmuth, 692 F.3d 452, 462 (6th Cir. 2012) (citing *TriHealth,* 430 F.3d at 790 ("Materiality is an integral element of the rational basis inquiry. . . . [D]isparate treatment of persons is reasonably justified if they are dissimilar in some material respect.")); *see also* Schellenberg v. Twp. of Bingham*,* 436 F. App'x 587, 591 (6th Cir. 2011) (holding that "plaintiffs must allege that they and other individuals who were treated differently were similarly situated in all material respects.") (internal citations omitted).

97 *Loesel*, 692 F.3d at 463 ("[The City] has not explained how any differences between the products to be sold by Wal-Mart and those sold by either Bronner's or Kroger is relevant and material to the enactment of a size-cap and the equal protection analysis.").

98 *TriHealth*, 430 F.3d at 790 ("[D]isparate treatment of persons is reasonably justified if they are dissimilar in some material respect.").

99 *Loesel*, 692 F.3d at 463 *(*quoting Eggleston v. Bieluch, 203 F. App'x 257, 264 (11th Cir. 2006) ("[D]etermining whether individuals are similarly situated is generally a factual issue for the jury."). Summary judgment will be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56. An issue of material fact is "genuine" only if premised on evidence upon which a reasonable jury could return a verdict in favor of the non-moving party. Hedrick v. W. Rsrv. Care Sys., 355 F.3d 444, 451 (6th Cir. 2004). A fact in dispute is "material" only if its resolution could affect the outcome of the suit under the governing substantive law. *Id.*

material, the Sixth Circuit has given guidance as to what a jury could reasonably find to be a material difference.[100] This guidance indicates that the jury could find a difference immaterial (such that an equal protection suit may continue), in light of the purpose the statute purports to serve.[101]

In *Loesel v. City of Frankenmuth*, the Loesel family ("Loesels") brought a class of one equal protection challenge against a Michigan zoning ordinance precluding construction of buildings over 65,000 square feet on their land, yet permitting such buildings on other parcels.[102] The Loesels contracted to sell their land to Wal-Mart, which planned to build a store on-site, but the new city ordinance made it nearly impossible for Wal-Mart to build.[103] As a result, the superstore backed out of the sale.[104] The government attempted to justify the Loesels' disparate treatment by contending that the parcels were materially different because the Loesels' land was zoned differently from comparator parcels.[105] The Loesels' parcel was zoned "CL-PUD," a commercial designation for developments that "provide principally for sale of goods and services . . . including but not limited to grocery, department drug, and hardware stores," while the comparator's property was zoned "B-3," a "highway commercial" designation.[106] The court ruled that a jury could have reasonably found the zoning designation to be immaterial because both designations exist to encourage commercial development and, but for the new ordinance, both designations would have allowed for a Wal-Mart to be built.[107] The court concluded that despite the parcel's differences, the fact that both zoning designations served the purpose of encouraging commercial development was sufficient

100 *See, e.g., Loesel*, 692 F.3d at 462 (discussing Sixth Circuit case law).

101 *Id.* at 464 ("[A] jury could . . . have reasonably concluded that the difference in 'labels' for these commercially zoned properties is not material.").

102 *Id.* at 460–65.

103 *Id.*

104 *Id.* ("In light of the new size-cap ordinance, however, Wal-Mart declined to continue with the approval process and . . . informed the Loesels that it intended to terminate the purchase agreement pursuant to the 'feasibility' clause.").

105 *Id.* at 463.

106 *Loesel*, 692 F.3d at 456–57.

107 *Id.* at 464 ("As part of the City's Plan, however, the promotion of commercial development is encouraged on the CL-PUD properties.").

for a jury to find the difference immaterial.[108] Thus, the difference that may have been material was not the label affixed to each zoning designation but the purpose of the designations—something common among the Loesels and their comparators.

Just as the parcels in *Loesel* were indeed "different" (in zoning designation), so too are manufacturer-dealers and franchised dealers different (in ownership status). Per *Loesel*, this distinction is not fatal, lest it be deemed "material."[109] Tesla alleged that manufacturer-dealers are similarly situated to franchisee-dealers "in all material respects."[110] Whereas the *Loesel* court would have permitted a jury to find the zoning designation immaterial, considering that the two designations served the same purpose (to encourage commercial development), a reasonable jury could have found the difference between manufacturer-owned dealers and franchised dealers immaterial in light of the purpose of the MVFA. Given that the MVFA was designed to protect franchisees from manufacturers, and a manufacturer without franchisees cannot harm its franchisees, the difference between independent dealerships and manufacturer-owned dealerships seems to be immaterial—or at the very least raises a question for a jury. Having established that a jury could regard the manufacturer-owned versus franchisee-owned distinction as immaterial, the rest of the inquiry concerns the government's justification for treating the similarly situated parties differently.

2. Rational Basis

In the Sixth Circuit, "[a] 'class of one' plaintiff may demonstrate that a government action lacks a rational basis in one of two ways: either by 'negativ[ing] every conceivable basis which might support' the government action, or by demonstrating that the challenged government action was motivated by animus or ill-will."[111] The government "has no obligation to produce evidence

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108 *Id.* ("[A] jury could . . . have reasonably concluded that the difference in 'labels' for these commercially zoned properties is not material.").

109 *Id.* at 462 (explaining that materially different persons need not be treated the same).

110 Compl., *supra* note 37, at ¶ 56.

111 Warren v. City of Athens, 411 F.3d 697, 711 (6th Cir. 2005) (quoting Klimik v. Kent Cnty. Sheriff's Dep't., 91 F. App'x 396, 400 (6th Cir. 2004)).

to sustain the rationality of its action; its choice is presumptively valid and 'may be based on rational speculation unsupported by evidence or empirical data.'"[112] The government's action will not lack rational justification simply because it "is not made with mathematical nicety or because in practice it results in some inequality."[113] An equal protection claim will succeed only if the government's action is shown to be "irrational."[114] "Negativing" every conceivable basis for the government's action is an incredibly demanding standard for a plaintiff.[115]

Rather than negating every conceivable basis that might support the amended Section 445.1574, a challenger like Tesla could assert a claim under the alternative theory that the law was born of "animus or ill-will."[116] The government does not demonstrate the animus required under this theory merely because it opposes a plaintiff's business ambitions; rather, the government must have expressed animus against the plaintiff, personally.[117] A court will deduce the government's objective from "both direct and circumstantial evidence," including, but not limited to, the "historical background of the decision under challenge," the "events leading to the enactment or official policy in question," and the "legislative or administrative history," including contemporaneous statements made by members of the decisionmaking body."[118] All of these factors inform the question of discriminatory object.[119] Further, the Supreme Court seems to

112 TriHealth, Inc. v. Bd. of Comm'rs, 430 F.3d 783, 790–91 (6th Cir. 2005) (quoting F.C.C. v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993)).

113 *F.C.C.* 508 U.S. at 316 n.7 (quoting Dandridge v. Williams, 397 U.S. 471, 485 (1970)).

114 *Warren*, 411 F.3d at 710.

115 Loesel v. City of Frankenmuth, 692 F.3d 452, 461 (6th Cir. 2012) ("Class-of-one claims are generally viewed skeptically."); *TriHealth,* 430 F.3d at 791 (describing a class of one plaintiff's burden as a "heavy" burden).

116 *Id.* at 467 (explaining that either a "no conceivable basis" or an "animus" theory is sufficient to find for a plaintiff); *see also* Rondigo, L.L.C. v. Twp. of Richmond, 641 F.3d 673, 682 (6th Cir. 2011).

117 *Loesel*, 692 F.3d at 467 ("Although the Loesels presented abundant evidence showing that certain City officials, such as City Manager Graham, strongly opposed having a Wal-Mart supercenter in Frankenmuth, the animus had to be directed against the Loesels to be relevant to their claim.").

118 Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266–68 (1977).

119 Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279, n. 24 (1979).

exact laws born of animus to a more stringent form of rational basis review.[120] Indeed, the Court has recognized a difference between laws that *incidentally* burden a non-suspect class and laws that were passed with the *object* of harming a non-suspect class.[121] Commentators have sometimes termed this "rational basis with bite."[122]

Here, Tesla could point to the statements made by legislators to support the inference that HB 5606 was passed with the purpose of intentionally discriminating against Tesla and generating rents for heritage manufacturers with an undeniable presence in Michigan government.[123] This body of evidence, if properly brought into court, suggests animus. This seems like a viable strategy, and at the very least may allow Tesla to survive a motion to dismiss. Future litigants would be wise to investigate the government's motive for passing such laws because these motives inform the inquiry as to dormant commerce violations, equal protection violations, and due process violations.[124]

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[120] *Compare* City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 450 (1985) (quoting the court of appeals, "[t]he *City* never justifies its apparent view that other people can live under such 'crowded' conditions when mentally retarded persons cannot") (emphasis added), *with* Williamson v. Lee Optical of Okla. Inc., 348 U.S. 483, 487 (1955) ("[L]aw may exact a needless, wasteful requirement in many cases. But it is for the *legislature*, *not the courts*, to balance the advantages and disadvantages of the new requirement") (emphasis added).

[121] U. S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) ("desire to harm a politically unpopular group cannot constitute a legitimate governmental interest"); Romer v. Evans, 517 U.S. 620, 635 (1996) (striking down a law under rational basis review because the "immediate, continuing, and real injuries . . . outr[a]n and belie[d] any legitimate justifications that may be claimed for it").

[122] *See generally* Reininger, *supra* note 83 (discussing "rational basis with bite").

[123] Zerhouni, *supra*, note 39 (quoting Representative Jason Sheppard in a conversation with Tesla representatives: "the Michigan dealers do not want you here. The local manufacturers do not want you here. So, you're not going to be here.").

[124] *But see* SCALIA & GARNER, *supra*, note 37 at 56 ("the purpose must be derived from the text, not from extrinsic sources such as legislative history or an assumption about the legal drafter's desires").

B. *Commerce Clause*

Tesla alleged that Section 445.1574 violates the Commerce Clause of the United States Constitution.[125] Article I empowers Congress to regulate interstate commerce.[126] From this grant of power, the Supreme Court has conceived that Congress alone may enact laws with the effect of interfering with interstate commerce and that states may not do so.[127] Thus, state laws that unduly burden, discriminate against, or otherwise unduly interfere with interstate commerce may violate the Constitution's "dormant" commerce clause.[128]

In analyzing a case under the dormant commerce clause, courts regard laws that facially discriminate against interstate commerce with the utmost scrutiny, upholding such laws only if the state seeks to further a compelling interest that cannot be served by a less discriminatory means.[129] Indeed, such laws that facially discriminate against interstate commerce are essentially invalid per se.[130] Even if a law does not discriminate on its face, if the avowed purpose or effect of the law is to discriminate against interstate commerce, it will still be struck down unless an exception applies or the law is necessary to protect a legitimate state interest.[131]

While nearly any benefit to a state is a "legitimate" government interest, the Supreme Court has made clear that economic protectionism is not a legitimate interest for the purposes of the dormant commerce clause.[132] Thus, even if a law substantially works to benefit the economy of a particular locale, if

125 Compl., *supra*, note 37, at ¶ 8.

126 U.S. Const. art. I, § 8, cl. 3.

127 H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 538 (1949).

128 Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 529 (1959) (striking down a nondiscriminatory law for unduly burdening interstate commerce); Dean Milk Co. v. City of Madison, Wis., 340 U.S. 349, 354 (1951) (striking down a law for discriminating against interstate commerce); Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 354 (1977) (striking down a law for unduly interfering with interstate commerce).

129 Maine v. Taylor, 477 U.S. 131, 151 (1986); *but see* Reeves, Inc. v. Stake, 447 U.S. 429, 440 (1980) (explaining the "market participant" exception to the dormant commerce clause).

130 City of Phila. v. N.J., 437 U.S. 617, 624 (1978).

131 *See Hunt*, 432 U.S. at 354.

132 *Dean Milk*, 340 U.S. at 354.

such benefit comes at the expense of interstate commerce, the law is likely unconstitutional.[133]

Even if a law does not discriminate on its face or in purpose or effect, laws that incidentally burden interstate commerce may be struck down if the putative local benefits of the law are outweighed by the law's burden on interstate commerce.[134] Thus, depending on how the law is characterized, the litigant's respective burdens shift accordingly.

In the Michigan litigation, Tesla alleged that Section 445.1574: (1) discriminates against interstate commerce; (2) does not serve a legitimate local interest; and (3) burdens interstate commerce beyond "any conceivable local benefit."[135] Although the MVFA does not explicitly discriminate against interstate commerce, the requirement that a manufacturer employ a franchised dealer is not dissimilar to a "home processing requirement." A "home processing requirement" is a legal requirement that commerce within a state, at some point, employ a local business.[136] The Court routinely strikes down home processing requirements as impermissibly discriminating against interstate commerce.[137] This is because when a law forces those in commerce to engage with in-state businesses as a prerequisite to entering that state's markets, that state has precluded an actor from doing business with comparable out-of-state businesses to accomplish the same task.[138]

Indeed, this is essentially the argument Tesla raises in its complaint.[139] This contention has some merit, but it may fall flat. Indeed, there is nothing in Section 445.1574 that requires a manufacturer to employ a *Michigan* franchised dealer; the franchised dealer that a manufacturer sells through could be an

133 Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 277 (1984).

134 *Bibb*, 359 U.S. at 529.

135 Compl., *supra* note 37, at ¶ 59–62.

136 *See Dean Milk*, 340 U.S. at 350–51.

137 *See id.* at 354 (striking down a Wisconsin ordinance mandating that all milk to be sold in Madison, Wisconsin be pasteurized within five miles of the city).

138 Such forced engagement with in-state businesses could have been engagement had with out-of-state businesses. *See* Wyo. v. Okla., 502 U.S. 437, 455 (1992) (holding that an Oklahoma law requiring 10% of a factory's coal come from Oklahoma violated the dormant commerce clause because forcing engagement with local coal sellers discriminated against interstate commerce).

139 Compl., *supra* note 37, at ¶ 8.

out-of-state business operating in Michigan. Typically, "home processing requirements," by the terms of the law itself, require engagement with in-state business, such as by setting geographic restrictions, granting monopolies to local businesses, or overtly stating that some resource must be consumed in-state.[140] On its face, Section 445.1574 does no such thing. Even if the law was passed to protect Michigan's franchised auto-dealers and manufacturers, manufacturers can still employ non-Michigan franchised dealers to sell their cars in Michigan.[141]

Notwithstanding this lack of facial protectionism, if the MVFA treats in-state and out-of-state interests differently, the dispositive issue is whether the statute serves a legitimate state interest that cannot otherwise be met.[142] Rather than being directly on par with the "home processing" line of cases, perhaps this case falls more in line with the cases concerning facially neutral laws with the purpose or effect of safeguarding local interests at the expense of interstate commerce.[143] Indeed, if the vast majority of car dealerships in Michigan are owned by Michigan residents, such that it is all but certain that working with a franchised dealer guarantees that the dealer will be a Michigan entity, one could argue that the law has the effect of forcing interactions with Michigan businesses.[144] However, this argument is probably not a

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[140] *Dean Milk*, 340 U.S. at 356 (striking down a law that set geographic restrictions); C&A Carbone, Inc. v. Town of Clarkstown, N.Y., 511 U.S. 383, 394 (1994) ("State and local governments may not use their regulatory power to favor local enterprise by prohibiting patronage of out-of-state competitors or their facilities."); Hughes v. Okla., 441 U.S. 322, 338 (1979) (striking down an Oklahoma law prohibiting the shipment of minnows outside the state).

[141] This, of course, raises the question—to what extent is there even a "legislative intent"? For further discussion on this question, *see, e.g.*, SCALIA & GARNER, *supra* note 37, at 376 ("There is no reason to believe . . . that a 'legislative intent' ever existed.").

[142] McNeilus Truck & Mfg., Inc. v. Ohio ex rel. Montgomery, 226 F.3d 429, 442 (6th Cir. 2000) ("[when a] statute directly, in effect, or in purpose treats in-state and out-of-state interests differently, the dispositive issue will become whether the statute serves a legitimate state interest that cannot otherwise be met.").

[143] *See, e.g.,* Minn. v. Clover Leaf Creamery Co., 449 U.S. 456, 472 (1981) (upholding a Minnesota law that required all milk sold in the state be sold only in paperboard containers, rather than plastic despite the law disproportionately benefiting Minnesota's robust paper industry and disproportionately burdening the interstate plastics industry).

[144] Compl., *supra* note 37, at ¶ 9 (alleging that the law's "purpose is to protect two discrete Michigan groups . . . franchised and manufacturers").

winning one, as the Court has rejected similar dormant commerce clause challenges to state laws preventing manufacturers from selling direct-to-consumer.[145]

In *Exxon Corp. v. Governor of Maryland*, the Supreme Court rejected a dormant commerce challenge to a Maryland statute forbidding petroleum producers from operating retail stations within the state.[146] Section 157E of the Maryland statute, for the purposes of the dormant commerce clause, is strikingly similar to Section 445.1574 both in effect and relevant history. Prior to Section 157E, several petroleum producers owned and operated service stations in Maryland, selling their products directly to consumers.[147] Some producers sold exclusively through company-owned service stations, and some producers sold both to independent stations and directly to consumers.[148] Moreover, before the advent of dealer protection laws, car manufacturers could sell cars directly to consumers.[149] Section 157E was passed in response to a Maryland study that found petroleum producers favored their own service stations over independently owned stations such that independent stations could not compete during the oil crisis.[150] The law was "designed to correct the inequities in the distribution and pricing of gasoline [between producer-owned and independent stations] reflected by the survey."[151] As discussed *supra*, Section 445.1574 was passed, at least in part, to protect franchisees from manufacturers who could undercut dealer prices.[152] Thus, the two laws are similar enough that *Exxon* likely controls, or at the very least looms large over the Tesla litigation—unless Tesla can meaningfully differentiate Section 445.1574 from Section 157E.

This invites the question—on what grounds might Tesla differentiate Section 157E and Section 445.1574? In *Exxon*, the Court addressed Exxon's contention that Section 157E

145 *See, e.g.,* Exxon Corp. v. Governor of Md., 437 U.S. 117 (1978).

146 *Id.* at 119–20 (1978).

147 *Id.* at 121–24.

148 *Id.* at 121.

149 Brown, *supra* note 17 at 387.

150 *Exxon*, 437 U.S. at 121.

151 *Id.* (citing Governor of Md. v. Exxon Corp., 370 A.2d 1102, 1109 (Md. Ct. Spec. App. 1977)).

152 *See supra* Part II.

discriminated against interstate commerce both as to the market for gasoline production *and* the retail gasoline market.[153] The Court was quick to dispense with the argument that Section 157E discriminated against interstate producers and refiners in favor of local refiners and producers because Maryland had no local producers or refiners, and thus the law could not discriminate in favor of nonexistent locals.[154] This is a point by which Tesla may distinguish itself from Exxon. Whereas all petroleum consumed in Maryland came from out-of-state, not all cars purchased in Michigan come from out-of-state; Michigan actually produces cars. This distinction matters in the sense that the Court in *Exxon* dismissed Exxon's claim of disparate treatment as "meritless" because Maryland had no producers.[155] In the wake of *Exxon* and its quick dismissal of the discriminates-against-interstate-producers-theory, the legal community has no clear guidance as to what effect the presence of local producers has on a dormant commerce clause challenge. Indeed, Tesla seemed poised to resurrect the argument, but this go-around, the court would not be able to dismiss the argument for want of local producers.

As to Tesla's status in the market as a seller, *Exxon* again provides guidance. Exxon argued that because all the producers of petroleum (now forbidden from running a retail store by Section 157E) were out-of-state entities, the law discriminated against interstate commerce at the retail level.[156] The Court rejected this claim, holding that even though the burden of Section 157E fell solely on interstate companies, "this fact does not lead, either logically or as a practical matter, to a conclusion that the State is discriminating against interstate commerce at the retail level."[157] The Court explained that although the burdens of the law fell exclusively on interstate companies, interstate commerce *itself* was unlikely to be hampered by such asymmetric burdens.[158] In the Tesla litigation, although Section 445.1574 prohibits Tesla from selling direct-to-consumer, it does not actually exclude Tesla from

153 *Exxon*, 437 U.S. at 125.
154 *Id.* at 125.
155 *Id.*
156 *Id.*
157 *Exxon*, 437 U.S. at 125.
158 *Id.* at 127–28.

the Michigan market by virtue of its statehood. In *Exxon*, the Court undercut any such argument by pointing to the fact that interstate petroleum sellers (who do not manufacture petroleum) are not affected by the act, agnostic of statehood.[159] Although Tesla is not from Michigan, it is not being excluded from selling to consumers by virtue of its statehood any more than Exxon was being excluded from operating a retail station by virtue of its statehood. Both integrated companies were excluded from the state retail markets because of their status as manufacturers. Equally so in Maryland and Michigan may out-of-staters sell cars and petroleum to consumers, so long as the company is not vertically integrated—a constitutionally permissible result under *Exxon*. Section 445.1574, like Section 157E thus does not seem to "prohibit the flow of interstate goods, place added costs upon them, or distinguish between in-state and out-of-state companies in the retail market."[160]

At this point, it seems that the only reason Tesla is not selling cars in Michigan is because it refuses to sell in any manner other than direct-to-consumer.[161] The Commerce Clause does not care about Tesla's apprehensions. In *Exxon*, the Court recognized that the prohibition on manufacturers owning retail stations may cause some refiners to "withdraw entirely from the Maryland market," but it upheld the law, nonetheless.[162] The Court reasoned that "there is no reason to assume their share of the entire supply will not be promptly replaced by other interstate refiners."[163] Tesla could try to distinguish the effect of Section 445.1574 from the effect of Section 157E in that petroleum products are almost entirely fungible while its vehicles and those sold by franchised dealers in Michigan are not. Indeed, there seems to be a significantly greater difference between brands of cars than brands of petroleum.[164]

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159 *Id.* at 125–26 ("there are several major interstate marketers of petroleum that own and operate their own retail gasoline stations. These interstate dealers . . . are not affected by the Act").

160 *Id.* at 126.

161 *E.g.*, Compl., *supra* note 37, at ¶ 42 ("The Dealer Model is Not Viable for Tesla").

162 *Exxon*, 437 U.S. at 127.

163 *Id.*

164 *See generally* Mark Kane, *Compare EVs: Guide To Range, Specs, Pricing &*

It is plausible that prohibiting direct-to-consumer auto sales in Michigan effectively stops Teslas—an interstate good—from entering the Michigan market, whereas Section 157E prohibited only gasoline made and sold by a manufacturer from entering the market—a product immediately replaced by a nonmanufacturer, such that the market never missed it. However, any such effect is due to Tesla's stubborn refusal to abandon direct-to-consumer sales, rather than a categorical bar to entry. Because the dormant commerce clause protects the interstate market—not individual sellers—and the interstate market for Teslas, or EVs generally, would be significantly hampered by Section 445.1574's prohibition, protecting the interstate market itself beckons for judicial review of Section 445.1574. Finally, the suggestion in *Exxon* that vertically integrated petroleum sales displaced by Section 157E would be readily replaced by other manufacturers is a fair point of distinction between Exxon in Maryland and Tesla in Michigan. Tesla currently makes up such a large percentage of EV sales in the United States that other manufacturers likely cannot readily replace such sales in the way that petroleum sellers stood poised to replace their vertically integrated counterparts.[165] Thus, Tesla could make a decent argument that *Exxon* is factually distinct from the case at bar while using the central holding of the case—the dormant commerce clause protects the interstate market itself—to drive home its conclusion that Section 445.1574 impermissibly afflicts interstate commerce.

More, INSIDEEVS.COM, https://insideevs.com/reviews/344001/compare-evs/ (last visited Jan. 13, 2022).

[165] This may change as heritage manufacturers continue to increase EV production and position themselves to capture some of Tesla's market share. *See* Motavalli, *supra* note 4.

V. CONCLUSION

The Tesla Wars are still waging in the United States. In the years to come, the EV market will grow, and manufacturers will continue their quest to sell direct-to-consumer. Unfortunately, Tesla's Michigan lawsuit may have posed more questions than it answered, and the constitutional issues raised in *Tesla, Inc. v. Benson* still loom large. Unless and until states repeal their direct-to-consumer bans, manufacturers will be forced to turn to the courts for relief. In pursuing judicial remedies, future litigants will raise the same point made by Tesla—direct-to-consumer bans violate the Constitution. This Comment makes clear that such challenges, however implausible, are worthy of the judicial forum.