

DORMANT NO MORE: HOW THE SUPREME COURT'S SHARPENED *PIKE* IN *NPPC V. ROSS* SIGNALS A PATH TO OVERTURNING STATE DEALER FRANCHISE LAWS

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ABSTRACT

For decades, state dealer franchise laws have enjoyed a regulatory slumber, shielded from robust constitutional challenges by courts' reluctance to rigorously scrutinize these protectionist regimes under the Dormant Commerce Clause. This Article includes a survey of these laws, which insulate in-state auto dealers from competition by restricting the ability of manufacturers and retailers to sell directly to consumers, and clearly burden and discriminate against interstate automobile commerce. Their extraterritorial effects also project a patchwork of disparate state regimes onto what should be a unified national market. This Article argues that the dissenting opinions in the recent Supreme Court case National Pork Producers Council v. Ross (NPPC) have sparked a potential awakening that could disrupt this longstanding judicial deference. In NPPC, a fractured decision that generated multiple opinions, a majority of Justices seemed ready to call for the revival of the Dormant Commerce Clause balancing test as outlined in Pike v. Bruce Church as a robust check on state laws that impose a substantial burden against interstate commerce. Criticizing the majority opinion for allowing California's humane pork production law to effectively dictate national standards, a different majority argued that courts can weigh the costs and benefits of state laws that impose substantial burdens on interstate commerce. The Article argues that the NPPC dissents could breathe new life into Dormant Commerce Clause challenges against state dealer franchise laws in the automotive industry and outlines a roadmap to do so.

"Texas's outright prohibition on retail competition from out-of-state auto manufacturers is about as negative toward interstate commerce as legislative action can get. . . . It should be obvious that the flow of interstate goods is diminished when barriers to entry totally prevent fair competition by a class of potential distributors: the favored local distributors' price and

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service incentives become less keenly competitive, prices rise, and overall sales will decline from the free-market equilibrium point. Since this Texas statute appears to reflect a genre of state laws favoring local automobile dealers over out-of-state manufacturers, perhaps the Supreme Court will give us further guidance." Ford Motor Co. v. Tex. Dep't of Transp., 264 F.3d 493, 512 (5th Cir. 2001) (Jones, J., concurring).

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I. INTRODUCTION

Manufacturers of consumer goods have many options when it comes to distributing those goods to consumers. In many contexts, it makes sense to sell to retailers, who can then bundle those goods together in a convenient place for consumers to shop.¹ Consider groceries, for example—it hardly makes sense for a consumer to go to a cereal manufacturer to purchase cereal, then to the milk producer to purchase milk, then to the egg farmer to purchase eggs, then to the toothpaste manufacturer to purchase toothpaste.² Instead, grocery stores do a good job of purchasing the goods a typical household needs and aim to package them into a retail experience that is pleasant and enjoyable for consumers.³ Thus, retailers play a crucial role in market development and allow producers to focus on the product itself, improving product features and reducing costs to remain competitive.⁴

Retailing, of course, adds costs because the retailer will raise the price of the goods they purchased in order to cover associated costs (physical plant, labor, IT, compliance, marketing and advertising), as well as a reasonable profit margin.⁵ The advent of e-commerce in the 1990s greatly expanded an existing distribution channel to the manufacturer's mix, allowing them to cut the retailer margin which they could then either capture themselves or use to reduce their selling price.⁶ Perhaps no other company best exemplified the potential of this business model than Dell, which revolutionized manufacturing and retailing when it brought made-to-order and internet ordering to the PC business, driving down the cost of PCs to mass affordability.⁷ Today, marketers call this model Direct to Consumer (DTC), which allows companies to have more control over their brand experience, customer data, and margins.⁸ Consumers today can purchase their Apple iPhones directly from Apple online, have it serviced by an Apple retail store, and obtain product support from an Apple employee.⁹ Consumers can purchase Nike athletic clothing from Nike, eyeglasses directly from Warby

1. See James P. Cairns, *Suppliers, Retailers, and Shelf Space*, 26 J. MKTG. 34, 34 (1962).

2. THE REINVESTMENT FUND, FINANCING HEALTHY FOOD OPTIONS: IMPLEMENTATION HANDBOOK 3 (2011), https://www.cdfifund.gov/sites/cdfi/files/documents/understanding-grocery-industry_for-fund_102411.pdf (explaining how grocery stores have large quantities of goods available for consumers).

3. *Id.*

4. See *Cassidy v. China Vitamins, LLC*, 120 N.E.3d 959, 968 (Ill. 2018).

5. See Perry Bliss, *Price Determination at the Department Store Level*, J. MKTG. 37, 39 (1952).

6. See Ali Hurtacsy & Chad Syverson, *The Ongoing Evolution of US Retail: A Format Tug-of-War*, 296 J. ECON. PERSP. 89 (2015). See generally Byron Menchion, *Dell's Direct Philosophy: A Strategic Marketing Perspective*, 2 FLA. ST. U. BUS. REV. 33, 34, 39 (2001) (providing an example of Dell effectively utilizing online systems to direct consumer sales).

7. Menchion, *supra* note 6.

8. See V. Kasturi et al., *How Direct-to-Consumer Brands Can Continue to Grow*, HARV. BUS. REV. (Dec. 2021), <https://hbr.org/2021/11/how-direct-to-consumer-brands-can-continue-to-grow>.

9. See APPLE, <https://www.apple.com> (last visited Feb. 3, 2025) (providing links to direct sales for Apple products and direct consumer support).

Parker, home furnishings directly from Burrow, mattresses directly from Casper, beauty products directly from Glossier, luggage directly from Away, razors and grooming products directly from Dollar Shave Club, coffee directly from Nespresso, meal kits directly from Blue Apron, and fitness equipment directly from Peloton and Bowflex.¹⁰ In 2024, it is even possible to buy prescription drugs directly from the manufacturer, as Eli Lilly demonstrated with its DTC model, LillyDirect.¹¹

One important consumer good, however, has struggled to gain traction in the DTC model, in spite of the promise of the DTC model to lower costs and improve service while strengthening competition.¹² The sale of motor vehicles remains subject to a patchwork of state dealer franchise laws that protect local dealers, who have tremendous political power with state legislatures, that in many cases restrict or outright prohibit the DTC model.¹³ Despite multiple legal challenges, these dealer franchise laws have never been held unconstitutional under the U.S. Constitution. A recent Supreme Court decision involving the sale of pork in California, *National Pork Producers Council v. Ross (NPPC)*,¹⁴ however, may finally change this decades-old landscape.

This Article argues that the DTC model should be available to auto retailing just as it does to numerous other consumer goods.¹⁵ Automaker Tesla has been a leader in challenging these laws due to its early mover advantage and scale, but other carmakers are pursuing the strategy as well.¹⁶ These include Rivian, Lucid Motors, NIO, Byton, and Bollinger, although at least one startup, Fisker, is eschewing the strategy in favor of traditional franchised dealers.¹⁷ These companies prefer DTC to control the customer

10. See NIKE, <https://www.nike.com> (last visited Jan. 28, 2025); WARBY PARKER, <https://www.warby.com> (last visited Jan. 28, 2025); BURROW, <https://www.burrow.com> (last visited Jan. 28, 2025); CASPER, <https://www.casper.com> (last visited Jan. 28, 2025); GLOSSIER, <https://www.glossier.com> (last visited Jan. 28, 2025); AMWAY, <https://www.amwaytravel.com> (last visited Jan. 28, 2025); DOLLAR SHAVE CLUB, <https://us.dollarhaveclub.com> (last visited Jan. 28, 2025); NESPRESSO, <https://www.nespresso.com> (last visited Jan. 28, 2025); BLUE APRON, <https://www.blueapron.com> (last visited Jan. 28, 2025); PELOTON, <https://www.onepeloton.com> (last visited Jan. 28, 2025); BOWFLEX, <https://www.bowflex.com> (last visited Jan. 28, 2025).

11. Peter Loftus, *You Can Now Get Weight-Loss Drugs Right from Eli Lilly*, WALL ST. J. (Jan. 4, 2024, 11:43 AM), <https://www.wsj.com/health/pharma/you-can-now-get-weight-loss-drugs-right-from-eli-lilly-56fe76f9>.

12. Daniel Crane, *Tesla Dealer Franchise Laws, and the Politics of Crony Capitalism*, 101 IOWA L. REV. 573, 574, 594-95 (2016).

13. See discussion *infra* Parts I & III (providing an analysis of dealer franchise law and covering each state's dealer franchise laws).

14. Nat'l Pork Producers Council v. Ross, 598 U.S. 356 (2023).

15. See discussion *infra* Part IV (explaining that dealer franchise laws are both unlawful under the Dormant Commerce Clause and harmful to consumers).

16. Jonathan Stempel, *Tesla Can Challenge Louisiana Direct Sales Ban, US Appeal Court Rules*, REUTERS (Aug. 26, 2024, 5:30 PM), <https://www.reuters.com/business/autos-transportation/tesla-can-challenge-louisiana-direct-sales-ban-us-appeals-court-rules-2024-08-26/>.

17. James C. McGrath & William F. Benson, *Court Rules That Rivian and Lucid May Sell Vehicles Direct To Consumers in Illinois*, SEYFARTH (Jan. 3, 2023), <https://www.seyfarth.com/news-insights/court>

experience, from order to delivery to after-sales service.¹⁸ This approach allows for closer customer relationships, faster innovation cycles, and a more transparent pricing structure, addressing many of the common complaints consumers report about traditional auto-franchised dealerships.¹⁹

This Article makes contributions in three important ways.²⁰ First, it comprehensively reviews the existing landscape of state dealer franchise laws, and categorizes them into four broad categories or groupings.²¹ Second, it argues that the Supreme Court, as currently composed, is more ready and eager to tackle the issues raised by dealer franchise laws than many may realize.²² Third, it provides a roadmap to making the argument for the support *NPPC* provides in overturning state dealer franchise laws in current federal litigation.²³ This litigation in Texas and Louisiana is discussed in Part IV of this Article.²⁴

Part I of this Article outlines the fractured legal landscape of auto retailing in the United States, tracing the history of dealer franchise laws up to today's patchwork of regulatory regimes.²⁵ It includes a review of the existing literature on this topic and demonstrates that so far, no one has made the argument that *NPPC* provides a path to overturning state dealer franchise laws.²⁶ Part II explores why DTC sales are increasing in popularity and would likely grow significantly but for the dealer franchise laws in place.²⁷ Part III

-rules-that-rivian-and-lucid-may-sell-vehicles-direct-to-consumers-in-illinois.html; Emma Hai, *NIO Achieves a New Milestone with Production of 500,000th High-End EV in China*, NIO (May 9, 2024), <https://www.nio.com/news/500000th-mass-produced-vehicle>; Sean McLain, *EV Startup Fisker Ditches Tesla-Style Direct Sales Model*, WALL ST. J. (Jan 4, 2024, 5:30 AM), <https://www.wsj.com/business/autos/fisker-ditches-tesla-style-direct-sales-model-in-favor-of-dealerships-31dd71c0>. Fisker spent 2023 trying to build out a network of stores and service centers. *Id.* The company then calculated the cost of real estate, salaries, and the financial cost of carrying unsold vehicles as a liability on its balance sheets and concluded that it was more cost-effective to give a dealer a margin than to attempt DTC. *Id.* EV startups VinFast and Polestar are also pursuing the franchise dealership model. *See id.*

18. *See* Autobody News Staff, *Rivian CEO: Dealer Laws Block Consumer Choice*, AUTOBODY NEWS (Nov. 25, 2024), <https://www.autobodynews.com/news/rivian-ceo-dealer-laws-block-consumer-choice> (explaining that fewer dealer franchise laws “make it really hard for us to interact directly with the consumer”).

19. *Id.* *See* Crane, *supra* note 12, at 580 (explaining that “[t]here is often an important relationship between products innovation and innovation in distribution”); *see also* Robert H. Lande & Howard P. Marvel, *The Three Types of Collusion: Fixing Prices, Rivals, and Rules*, 2000 WIS. L. REV. 941, 977 (2000) (explaining how auto dealers offer different prices to different customers).

20. *See* discussion *infra* Parts III & V (reviewing current dealer franchise laws and explaining how recent Supreme Court cases provide an opportunity to reverse dealer franchise laws).

21. *See* discussion *infra* Part III (reviewing current dealer franchise laws).

22. *See* discussion *infra* Part V (explaining how recent Supreme Court cases indicate a willingness to address issues raised by dealer franchise laws).

23. *See* discussion *infra* Part V (providing an argument as to how recent Supreme Court cases should result in the reversal of dealer franchise laws).

24. *See* discussion *infra* Part IV (discussing current litigation about dealer franchise laws).

25. *See* discussion *infra* Part I (explaining the history and current state of dealer franchise laws).

26. *See* discussion *infra* Part I (describing what is lacking in current dealer franchise laws).

27. *See* discussion *infra* Part II (discussing the current growth of DTC sales and how dealer franchise laws impose further growth).

includes a fifty-state survey of dealer franchise laws and summarizes the patchwork of state laws among major categories such as which states allow DTC and which states only allow Tesla to engage in DTC.²⁸

Part IV examines the legal challenges to state franchise laws thus far and why they have largely failed to convince reluctant courts to overturn legislative will in most cases.²⁹ To date, only one federal court of appeals has tackled this issue.³⁰ That 2001 decision involving Ford Motor Company (discussed in Section IV.A) and its attempt to sell used cars in Texas is now twenty-three years old, and the question has become even more important than ever.³¹ Tesla started as a low volume, high-price manufacturer, capturing a small slice of the U.S. new vehicle market.³² This is no longer the case, as in 2023, Tesla produced nearly 2 million vehicles.³³ In addition, new car entrants such as Lucid and Rivian are setting up DTC models.³⁴ The time has come to resolve this question, and it is a question that the courts can answer. Part V examines the *NPPC* decision in detail and argues that the decision provides an opening for a renewed constitutional challenge to state franchise laws based on the Dormant Commerce Clause, thus providing a roadmap for courts that may answer this question.³⁵

II. DEALER PROTECTIONS

In the United States, the regulatory landscape that affects the DTC sales model for auto manufacturers involves a patchwork of state laws. These laws were originally established to protect dealerships from potentially unfair practices by manufacturers, ensuring a separation between making and selling cars.³⁶ Typically, state dealer franchise laws prevent manufacturers from unjust termination of a franchise in order to protect the large capital investments dealers typically have to make.³⁷ They also protect dealers from manufacturers choosing to appoint competing dealers or from price discrimination.³⁸ Don Hall, president of a dealer association lobby group in

28. See discussion *infra* Part III (explaining the current state of dealer franchise laws in every state).

29. See discussion *infra* Part IV (providing the future of legal efforts to overrule dealer franchise laws).

30. Ford Motor Co. v. Tex. Dep't of Transp., 264 F.3d 493 (5th Cir. 2001).

31. *Id.* at 498.

32. Barbara A. Schreiber et al., *Tesla, Inc.*, BRITANNICA MONEY (Jan. 28, 2025), <https://www.britannica.com/money/Tesla-Motors>.

33. Press Release, Tesla, Tesla Vehicle Production & Deliveries and Date for Financial Results & Webcast for Fourth Quarter 2023 (Jan. 2, 2024), <https://ir.tesla.com/press-release/tesla-vehicle-production-deliveries-and-date-financial-results-webcast-fourth-quarter-2023>.

34. McGrath & Benson, *supra* note 17.

35. See discussion *infra* Part IV (providing a roadmap for utilizing *NPPC* to overrule dealer franchise laws).

36. See James Surowiecki, *Dealer's Choices*, NEW YORKER (Aug. 27, 2006), <https://www.newyorker.com/magazine/2006/09/04/dealers-choice-2>.

37. TEX. OCC. CODE ANN. § 2301.453(a).

38. *Id.*

Virginia, said in 2023, “When you have one person who controls all the marbles, you get marbles when they want to give it to you There are rules in place for a reason.”³⁹ This Section traces the history of these regulations and outlines the current state of dealer franchise laws impacting the DTC sales model.

A. Vehicle Retailing in the United States

Before the advent of mass production of automobiles, manufacturers used a “wide variety of distribution methods, including dealer franchising, direct distribution through factory-owned stores and traveling salesmen, and distribution through wholesalers, retail department stores, and consignment arrangements.”⁴⁰ As sales volume grew, manufacturers moved to a franchised dealer model in order to focus on their core business of vehicle manufacturing.⁴¹ Even in the early years of automotive retailing, dealers understood the power of collective lobbying—in 1917, faced with the prospect of car factories being turned into wartime production facilities based on the status of automobiles as “luxury” items, a group of thirty Chicago dealers went before Congress to lobby to exempt automobiles from a luxury classification.⁴² They won, received a 40% cut in the luxury tax, and went on to form the National Automobile Dealers Association (NADA)—the main lobbying group for dealers nationwide.⁴³

Today, the landscape for purchasing vehicles has shifted dramatically from those early days. Before the advent of instant information brought by the Internet, it arguably made sense for consumers to seek out information from a knowledgeable salesperson on product features at a dealership, perhaps test drive a vehicle, seek out the dealership’s help in obtaining a loan, and eventually return to the dealership for routine maintenance or warranty service if things unexpectedly went wrong.⁴⁴ For the manufacturers, the dealership model provided tremendous advantages too, such as allowing manufacturers to avoid the cost of owning vast tracts of land across the country to build showrooms, avoiding the cost of employing thousands of salespeople, and critically important, booking the sale of a vehicle the moment it was produced at the factory to avoid the liability of carrying

39. Sean McLain, *The Man from Rivian Who Wants to Change How We Buy Cars*, WALL ST. J. (Sept. 17, 2022, 12:03 AM), <https://www.wsj.com/articles/the-man-from-rivian-who-wants-to-change-how-we-buy-cars-11663387409> (quoting Don Hall and Mike Stanton).

40. Crane, *supra* note 12, at 577.

41. *Id.*

42. Alexander Sammon, *Want to Stare into the Republican Soul in 2023?*, SLATE (May 30, 2023, 5:52 AM), <https://slate.com/news-and-politics/2023/05/rich-republicans-party-car-dealers-2024-desantis.html>.

43. *Id.*

44. Jared Allen, *Franchise System*, NADA, <https://www.nada.org/nada/issues/franchise-system> (last visited Feb. 3, 2025).

costs.⁴⁵ Local dealerships also understood the competitive dynamics of a local market and ran advertising that worked better than any national approach could.⁴⁶ Tesla founder Elon Musk conceded in 2012 that “[i]n many respects, it would be easier to pursue the traditional franchise dealership model, as we could save a lot of money on construction and gain widespread distribution overnight.”⁴⁷

The advent of the Internet, however, has disrupted this decades-old paradigm. It is now possible (and in many cases, probable) for consumers to do all their research about which vehicles they are most interested in online, and to seek out price quotes from multiple dealers without setting one foot on a dealership.⁴⁸ The COVID pandemic pushed much of the car buying process online and dealers adapted to the new reality brought by tech-savvy customers.⁴⁹ As the business reasons for the dealership model are gradually eroded, the temptation for manufacturers to “skip the middle man” and the attendant markup margin have been too great, and the DTC model therefore became more important and prevalent than ever.⁵⁰ Tesla also argues that electric cars are different and require more education from non-commissioned salespeople, and that state franchise laws protect existing dealers of which the company has none.⁵¹ “We think that it’s absolutely critical that we have a direct relationship with our customers,” Tesla’s General Counsel said to a reporter in 2018.⁵² “We look at our stores as educational centers. There are all these questions people have; we view our salespeople as teachers who can patiently answer them.”⁵³ Dealers may also see an existential threat to their profitable service centers, since electric vehicles tend to require far less maintenance and repair than their gasoline engine counterparts.⁵⁴ In 2014, Elon Musk argued that “auto dealers have a fundamental conflict of interest between promoting gasoline cars, which constitute virtually all of their revenue, and electric cars, which constitute virtually none.”⁵⁵ He also argued that dealers make money on servicing

45. *Id.*

46. Elizabeth Blair, *Auto Ads Decline in Step with Industry Woes*, NPR (Apr. 28, 2009, 2:40 PM), <https://www.npr.org/2009/04/28/103578652/auto-ads-decline-in-step-with-industry-woes>.

47. Elon Musk, *The Tesla Approach to Distributing and Servicing Cars*, TECH INSIDER (Oct. 22, 2012), <https://www.tech-insider.org/electric-vehicles/research/2012/1022.html>.

48. Benjamin Preston, *How to Buy a Car Online*, CONSUMER PREP. (May 9, 2024), <https://www.consumerreports.org/cars/buying-a-car/how-to-buy-a-car-online-a1069163767/>.

49. Nora Naughton, *The Pandemic Has Pushed Car Buying Online. It’s Expected to Stick*, WALL ST. J. (June 20, 2020, 9:00 AM), <https://www.wsj.com/articles/the-pandemic-has-pushed-car-buying-online-its-expected-to-stick-11592658001>.

50. David Pogue, *Why You Can’t Buy a Tesla in These States*, YAHOO! FIN. (Oct. 15, 2018), <https://finance.yahoo.com/news/cant-buy-tesla-states-161318245.html>.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. Jay Yarow, *Elon Musk Writes a Blistering Takedown of Chris Christie and New Jersey’s Decision to Ban Tesla’s Sales Model*, BUS. INSIDER (Mar. 14, 2014), <https://www.businessinsider.com/>

gasoline cars, and Tesla chose DTC to “never attempt to make servicing a profit center.”⁵⁶ Of course, the advent of the Internet and consumer acceptance of online shopping means even Tesla is shifting course and moving all sales online⁵⁷ in an attempt to sidestep the bulk of dealer objections by arguing that the buy/sell transaction happens virtually.⁵⁸

Besides alcohol, tobacco, guns, and prescription drugs, the new vehicle industry may be the only consumer product that consumers are prohibited from buying directly from the manufacturer in the United States.⁵⁹ This has led to an extraordinary situation in Georgia, for example, where electric vehicle manufacturer Rivian announced a \$5 billion investment in 2021 to build a new production facility that will create 7,500 jobs and produce 400,000 vehicles a year.⁶⁰ In 2015, Georgia blocked electric vehicle (EV)-only manufacturers from direct sales, adding EV manufacturers without an existing dealer network to a long-lasting ban on manufacturers engaging in direct sales while creating a five-store exemption for Tesla only.⁶¹ Rivian argued that two-thirds of U.S. sales of EVs were via direct sales, and insisted that direct sales were necessary for EVs because customers needed greater education about EVs; it offers price transparency, avoids using service as a profit center, and ensures vehicles are built to order.⁶² Rivian also argued that traditional dealerships have been slow to embrace EVs and pointed out that the Federal Trade Commission (FTC) received 100,000 customer complaints about car dealerships every year with hundreds of enforcement actions.⁶³ Similarly, Tesla built a giant factory in Texas, but Tesla vehicles sold to Texas residents must leave the state before they can be sold in Texas.⁶⁴ According to consulting firm McKinsey, consumer discontent with the car buying process is especially evident among EV buyers who are unhappy with the traditional model due to the lack of price

tesla-blog-post-on-new-jersey-2014-3.

56. *Id.*

57. Tim Higgins & Adrienne Roberts, *Tesla Shifts to Online Sales Model*, WALL ST. J. (Feb. 28, 2019), <https://www.wsj.com/articles/tesla-says-it-has-started-taking-orders-for-35-000-version-of-model-3-11551392059>.

58. *Id.*

59. Daniel A. Crane, *Reforming Michigan Direct Sales Laws*, CATD INST. (Summer 2021), <https://www.cato.org/regulation/summer-2021/reforming-michigan-vehicle-direct-sales-laws>.

60. Rivian Automotive, *Ga. & Direct Sales* 1, 4 (Sept. 2022), https://www.senate.ga.gov/committees/Documents/Rivian_Automotive_presentation.pdf.

61. *Id.* at 5.

62. *Id.* at 7.

63. *Id.* In response, the FTC administers the Combating Auto Retail Scams (CARS) Rule, imposing a number of regulations on dealers about misrepresentations, negotiating, pricing, and charging for add-ons. See *FTC CARS Rule: Combating Auto Retail Scams – A Dealers Guide*, FED. TRADE COMM’N, <https://www.ftc.gov/business-guidance/resources/ftc-cars-rule-combating-auto-retail-scams-dealers-guide> (last updated Jan. 24, 2024).

64. Mitchell Clark, *Teslas Made in Texas Will Likely Have to Leave the State Before Texans Can Buy Them*, VERGE (May 30, 2021, 9:00 AM), <https://www.theverge.com/2021/5/30/22457455/tesla-texas-factory-law-ship-out-of-state-direct-sale-legislation>.

transparency, vehicle availability, and process complexity.⁶⁵ Rivian’s model, where vehicles are sold online in transactions processed in Illinois and then shipped to the buyer, adding transportation costs and long lead times, add to that consumer unhappiness and slow Rivian’s earnings growth.⁶⁶

B. Dealer Franchise Protection Laws—Origins

When mass production began, manufacturers settled on dealership franchises as the best distribution model.⁶⁷ Initially, there were dozens of vehicle manufacturers.⁶⁸ Eventually, by the 1920s, the “manufacturing industry consolidated into a handful of major producers . . . [and] some dealership franchises [began worrying] that large [automakers] might use their market power to [treat] small dealerships [unfairly].”⁶⁹ In turn, “[s]tates began passing laws to protect [car dealers, and] [t]oday, all [fifty] states have dealership-friendly franchise regulations.”⁷⁰ Some provide for territorial exclusivity, while others provide encroachment protections from competition.⁷¹ In Michigan, home of the U.S. auto industry, a state law has protected dealers from having to work on Sundays since 1953.⁷²

The main purpose for these laws was to protect small family-owned independent dealerships from contractual strong-arming by the manufacturers.⁷³ In the early twentieth century, Ford and GM could have decided to engage in DTC rather than franchised dealers.⁷⁴ They chose franchising because of the cost savings that the model brought and the ability to reach every corner of a vast country with myriad local differences to account for.⁷⁵ In those early days, the automakers were not always good partners for the dealers.⁷⁶ In 1920, during a deep recession, Ford kept its factories running by forcing thousands of Ford dealers to buy new cars they

65. Thomas Furcher et al., *Electric-Vehicle Buyers Demand New Experiences*, MCKINSEY & CO. (July 28, 2023), <https://www.mckinsey.com/industries/automotive-and-assembly/our-insights/electric-vehicle-buyers-demand-new-experiences>.

66. See McLain, *supra* note 17.

67. Liam Sigaud, *Laws in All 50 States Benefit Car Dealerships at the Expense of Consumers*, WASH. EXAM’R (Dec. 20, 2018, 3:30 PM), <https://www.washingtonexaminer.com/opinion/2407733/laws-in-all-50-states-benefit-car-dealerships-at-the-expense-of-consumers/>.

68. See *id.*

69. *Id.*

70. *Id.*

71. See *id.*

72. MICH. COMP. LAWS § 435.251 (1953).

73. Thomas B. Leary, Former Comm’r, Public Statement at the International Franchise Association 34th Annual Legal Symposium: State Auto Dealer Regulation: One Man’s Preliminary View (May 8, 2001).

74. *Id.*

75. *Id.*

76. See James Surowiecki, *Dealer’s Choice*, NEW YORKER (Aug. 27, 2006), <https://www.newyorker.com/magazine/2006/09/04/dealers-choice-2>.

had little chance of selling soon.⁷⁷ The dealers accepted the inventory in order to preserve the relationship.⁷⁸ During the Great Depression, Ford and GM used the same strategy to keep production lines running.⁷⁹

These tactics led the dealers to lobby state governments for help.⁸⁰ The laws they began passing—the first in 1937—sought to equalize bargaining power between the franchisee and the manufacturer.⁸¹ They sought to spell out specific restrictions on manufacturer behavior, such as arbitrarily closing dealerships—this is what makes closing a whole brand, like GM’s Oldsmobile and Pontiac, so expensive.⁸² This dynamic continues to this day; for example, in 2018, Alaska updated its dealer franchise law to make it harder to close dealerships in response to a wave of dealer closures that cost jobs.⁸³

For decades, car dealers have contributed to political campaigns to help them pass state dealer franchise laws.⁸⁴ NADA “spent a record \$7 million on federal lobbying in 2022, . . . and \$25 million in 2020 just on federal elections, mostly to Republicans.”⁸⁵ The NADA Political Action Committee spent another \$5 million.⁸⁶ At the state and local level, dealers play an outsized role in communities, strengthening a social network that is very useful during political campaigns.⁸⁷ It’s easy to understand why: being a car dealer in America is a very lucrative business. Since 2019, average gross profits of car dealers are up 180%.⁸⁸ “Auto dealers are one of the five most common professions among the top 0.1 percent of American earners.”⁸⁹ “Car dealers, gas station owners, and building contractors . . . make up the majority of the country’s 140,000 Americans who earn more than \$1.58 million per year.”⁹⁰ Twenty percent of car dealerships in the United States have owners who make more than \$1.5 million a year.⁹¹

77. *Id.*

78. *Id.*

79. *Id.*

80. See Sammon, *supra* note 42 (explaining the history of car dealerships in American politics).

81. *Id.*

82. *Id.*

83. *Governor Walker Signs Legislation Updating Alaska’s Auto Dealer Franchise Laws*, ALASKA HOUSE MAJORITY COAL. (July 2, 2018), <https://akhouse.org/2018/07/02/governor-walker-signs-legislation-updating-alaskas-auto-dealer-franchise-laws/>.

84. Elaine Povich, *For Tesla, a Fight to Sell in Some States*, STATELINE (Dec. 16, 2015, 12:00 AM), <https://stateline.org/2015/12/16/for-tesla-a-fight-to-sell-in-some-states/>.

85. Sammon, *supra* note 42.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

C. Existing Literature

Since Tesla started selling its vehicles in 2012 and running into the buzzsaw of dealers opposed to DTC, several legal commentators have weighed in on state dealer franchise laws.⁹² Daniel Crane's 2016 article analyzes the policy arguments over state dealer franchise laws, and convincingly demonstrates none of the arguments against DTC are "remotely sustainable" and the state dealer franchise laws can only be seen as "capitulation to the dealers' demands for protection from competition."⁹³ He describes modern dealer franchise laws as "all about protecting dealers in franchise relationships from the exigencies of superior manufacturer bargaining power."⁹⁴ Crane also reviews the legal arguments against state franchise laws, and while *Ford* sets a difficult precedent, he predicted a newfound willingness in federal appellate courts to "require more than boilerplate assertion from states defending statutes that seem, at first blush, nakedly protectionist."⁹⁵

Thomas Sperber's 2017 article provides an in-depth analysis of the substantive due process arguments against DTC prohibitions as applied to Tesla.⁹⁶ He places particular focus on what happened in Michigan, where a legislator removed one word from state law to prevent Tesla from engaging in DTC.⁹⁷ He outlines a possible strategy to convince the Supreme Court to find substantive due process violations against Tesla.⁹⁸

On the Dormant Commerce Clause as it relates to state dealer franchise laws, Stephen Fox's 2016 article is probably the most comprehensive work to date.⁹⁹ In it, Fox meticulously reviews the current state of Dormant Commerce Clause jurisprudence, its purpose, and the *Pike* test (discussed in Section V, *infra*).¹⁰⁰ Fox argues that the *Pike* test "requires close examination, because complete deference would permit legislators to cloak essentially protectionist laws in the garb of legitimate interests."¹⁰¹ He argues that the

92. Crane, *supra* note 12, at 575.

93. *Id.* at 576.

94. *Id.* at 579.

95. *Id.* at 603; *see* discussion *infra* Section IV.A (discussing the *Ford* precedent).

96. *See generally* Thomas Sperber, *Letting the Electrics Slide: A Constitutional Challenge To State Dealer-Franchise Laws Prohibiting Direct-To-Consumer Car Sales*, 86 *FORDHAM L. REV.* 1433 (2017) (discussing the limited ability for Tesla to sell cars directly to consumers because of state laws, claiming that such dealer franchise laws violate Tesla's rights to substantive due process and equal protection).

97. *Id.* at 1450; *see* discussion *infra* Section III.A.4 (explaining changes to Michigan's DTC law).

98. Sperber, *supra* note 96, at 1453.

99. *See generally* Stephen Fox, *Two Roads Diverged: Tesla, Interruption, and the Commerce Clause*, 22 *B.U. J. SCI. & TECH L.* 153 (2016) (discussing how prohibiting DTC sales violates the Dormant Commerce Clause).

100. *Id.* at 166; *see* discussion *infra* Part V (discussing the *Pike* test).

101. Fox, *supra* note 99, at 169.

Exxon case was misapplied by subsequent courts, including the Fifth Circuit Court of Appeals, when it upheld Texas's ban on DTC in 2001.¹⁰²

Yale economist Fiona Morton has written about Tesla and vertical relationships in automotive retailing, with a particular focus on Tesla's battle in Virginia.¹⁰³ Together with Michigan economist Francine Lafontaine, Morton also examined the impact of franchise laws on manufacturer volumes, finding that without franchise laws protecting dealers, the market for new cars would behave more rationally and efficiently.¹⁰⁴

III. AUTOMOTIVE RETAIL EVOLVES—CONSUMERS DRIVE SHIFT TO DTC

The shift to e-commerce, accelerated by the pandemic, has changed the way customers buy vehicles.¹⁰⁵ The actual process of buying a car hasn't changed—customers typically start by first doing some research on what cars they like and can afford, and then decide to test drive a few models.¹⁰⁶ Along the way, they learn more about the vehicles and features and narrow the list.¹⁰⁷ Finally, they sign a purchase agreement and either pay the entire amount or finance some portion of the purchase price through a loan agreement.¹⁰⁸ If the vehicle is sold by a manufacturer engaged in DTC, the process is more complicated.¹⁰⁹ In states where direct sales are restricted, state regulations impact how manufacturers can interact with customers.¹¹⁰ In some cases, manufacturers may open showrooms or galleries where customers can view vehicles and learn about them but must complete the purchase process online or in a state where direct sales are permitted.¹¹¹ In some states, employees are not allowed to discuss pricing at all, and in at least one state, Louisiana, the manufacturer is not even allowed to provide warranty service on the vehicle.¹¹²

Technological advances, changing consumer preferences, and the rise of EVs have driven the evolution of automotive retail. Consumers now want involvement in every aspect of the car purchasing process, from doing

102. *Id.* at 172; see discussion *infra* Section V.A (discussing the *Exxon* case).

103. Fiona Scott Morton & Ann McDermott, *Case 17: Retail Auto Sales: Tesla v. State Vehicle Franchise Laws*, ANTITRUST REVOLUTION (2017), <https://media.clemson.edu/economics/web/425/Tesla%20v%20State%20Vehicle%20Franchise%20Laws.pdf>.

104. Francine Lafontaine & Fiona Scott Morton, *State Franchise Laws, Dealer Terminations, and the Auto Crisis*, 24 J. ECON. PERSP. 233, 248 (2010).

105. Naughton, *supra* note 49.

106. Kristen Hall-Gleiser, *How to Buy a Car Online*, U.S. NEWS (Nov. 14, 2024, 12:00 PM), <https://cars.usnews.com/cars-trucks/advice/how-to-buy-a-car-online>.

107. *Id.*

108. *Id.*

109. *Direct To Consumer Auto Sales*, EASY AUTOSHIP (Jan. 20, 2024), <https://diytransport.com/direct-to-consumer-auto-sales-pro-cons-brands-involved-laws-future/>.

110. *Id.*

111. *Id.*

112. See discussion *infra* Section III.A.5.vii (discussing Louisiana dealer franchise laws).

research, to selecting a model, to financing the purchase, to being as online as possible.¹¹³ Along the way, they've indicated a strong aversion to being ripped off and no-haggle pricing.¹¹⁴ This Section explores these shifting consumer tastes.

A. Carmakers Adapt, For Now

Traditional carmakers, with franchised dealers, are cautiously moving into online sales. Ford CEO Jim Farley declared in 2022, "We've got to go non-negotiated price. We've got to go to 100% online."¹¹⁵ Hakan Samuelsson, Volvo's CEO, says the carmaker will also move all car sales online.¹¹⁶ Online retail giant Amazon, meanwhile, has for years dabbled with the idea of selling cars through its website.¹¹⁷

As discussed in Part III, in most states where traditional automakers have a network of franchised dealers, state law prohibits these manufacturers from undertaking DTC, even if those states are willing to consider granting dealer licenses to automakers without franchised dealers.¹¹⁸ Seeing Tesla's success with DTC, some traditional automakers are looking for ways to carve out a DTC-like experience without eliminating the dealer completely.¹¹⁹ For example, General Motors only ships Hummer electric pickup trucks that have been ordered through GMC's website to dealers.¹²⁰ This approach means transaction price is determined between the customer and the automaker, leaving the dealer with a pre-determined contractual profit.¹²¹ General Motors believes its new digital sales platform will cut \$2000 from a vehicle's selling costs by shifting inventories from dealer lots throughout the country to centralized manufacturer hubs.¹²² This move has sparked concerns among

113. Arthur Michalik, *The Evolution of Automotive Retail: From Showrooms To Online Marketplaces*, CBT NEWS (Aug. 22, 2024), <https://www.cbnews.com/the-evolution-of-automotive-retail-from-showrooms-to-online-marketplaces/>.

114. *Id.*

115. Sean Tucker, *Ford CEO Wants Future of Online Sales, Fixed Car Prices*, KELLEY BLUE BOOK (June 3, 2022, 8:45 AM), <https://www.kbb.com/car-news/ford-ceo-wants-future-of-online-sales-fixed-car-prices/>.

116. Anmar Frangoul, *Volvo Says It Will Be 'Fully Electric' by 2030 and Move Car Sales Online*, CNBC.COM (Mar. 2, 2021), <https://www.cnbc.com/2021/03/02/volvo-says-it-will-be-fully-electric-by-2030-move-car-sales-online.html>.

117. *See, e.g.*, Tom McParland, *Here Is Why a 'One Click' Car Purchase from Amazon Won't Happen Anytime Soon*, JALOPNIK (Aug. 26, 2016), <https://jalopnik.com/here-is-why-a-one-click-car-purchase-from-amazon-wont-1785772574>.

118. *See* discussion *infra* Part III (discussing states that prohibit DTC).

119. *See* Mike Colias, *Tesla Set the Model for Selling EVs; Ford, VW and Others Want to Follow*, WALL ST. J. (Mar. 11, 2022, 8:03 AM), <https://www.wsj.com/articles/tesla-set-the-model-for-selling-evs-ford-vw-and-others-want-to-follow-11647003781>.

120. *Id.*

121. *See id.*

122. Stephen Wilmot & Jinjoo Lee, *Less Hagglng, More Upselling: How EVs Will Change How You Buy a Car*, WALL ST. J. (June 3, 2023, 5:30 AM), <https://www.wsj.com/articles/less-hagglng-more-upselling-how-evs-will-change-how-you-buy-a-car-5018a245>.

dealer lobby groups.¹²³ In another example, rather than attempt to cut the dealer out of the transaction completely, Ford aims to reduce transaction costs by eliminating the need for dealers to carry any inventory.¹²⁴ Customers would order their vehicles online and then go to a dealer for delivery and service after their vehicle was produced.¹²⁵ This way, dealers would still maintain a small margin on the sale of a vehicle and be able to capture value in after-sales service.¹²⁶ For now, it appears dealers and consumers will settle into a hybrid approach where some sales will happen online, and most sales start online and finish in a dealer showroom.¹²⁷ Although demand for EVs appears to be slowing, the industry shift to online sales and electrification seems all but inevitable.¹²⁸

B. The New Front: Subscriptions

Faced with the growing popularity of Tesla, Rivian, and Lucid, and the direct sales model employed by these companies, dealers are ramping up their legislative battles in many states.¹²⁹ A 2023 McKinsey study found that 29% of consumers want to buy their next new car entirely online.¹³⁰ Along with this willingness to transact completely online, the survey also found that consumers are attracted to the idea of subscribing to a car rather than buying it outright.¹³¹ As electric vehicles proliferate and grow in popularity, a feature of electric vehicles, subscriptions, is starting to take hold.¹³² Vehicle subscriptions could take the form of “subscribing” to a vehicle for one monthly price, or it could take the form of subscribing to a service for a vehicle already owned by a consumer.¹³³ The idea behind vehicle subscriptions is that as driverless cars become a reality, consumers would not want to purchase a car (the second-most expensive purchase for most people)

123. Colias, *supra* note 119.

124. John Rosevear, *Ford CEO Offers More Clues About Automaker's Ambitious Electric Vehicle Plans*, CNBC (July 31, 2022, 8:00 AM), <https://www.cnbc.com/2022/07/31/ford-ceo-farley-outlined-plans-for-automakers-electric-vehicle-shift.html>.

125. *Id.*

126. *Id.*

127. Jose Rodriguez, Jr., *Buying Cars in America Is Going Online, But Dealers Are Here to Stay*, JALOPNIK (Feb. 28, 2023), <https://jalopnik.com/buying-cars-in-america-is-going-online-but-dealers-are-1850168776>.

128. Mike Colias, *The Six Months That Short-Circuited the Electric-Vehicle Revolution*, WALL ST. J. (Feb. 14, 2024, 12:01 AM), <https://www.wsj.com/business/autos/ev-electric-vehicle-slowdown-ford-gm-tesla-b20a748e>.

129. Jose Rodriguez, Jr., *A Legislative Battle Is Brewing Between Car Dealers and Automakers in the U.S.*, JALOPNIK (Mar. 5, 2023), <https://jalopnik.com/a-legislative-battle-is-brewing-between-dealers-and-car-1850184697>.

130. Max Flötotto et al., *Online Sales and Subscriptions Will Shape Tomorrow's Car Financing Journey*, MCKINSEY (Mar. 24, 2023), <https://www.mckinsey.com/industries/automotive-and-assembly/our-insights/online-sales-and-subscriptions-will-shape-tomorrows-car-financing-journey>.

131. *See id.*

132. *See id.*

133. *See id.*

that sits idle most of the time while it depreciates and requires regular expensive maintenance.¹³⁴ Instead, consumers would subscribe to a service and order a vehicle whenever they need one.¹³⁵ “Since no one would actually buy cars, people would subscribe to use them, essentially ending car ownership as we currently know it.”¹³⁶ After some initial interest, today only two subscription services are offered by automakers in the United States—Care by Volvo and Porsche Drive.¹³⁷ The Volvo program provides a monthly price for a vehicle, maintenance, roadside assistance, and insurance.¹³⁸ Care is available in all states except Hawaii, Mississippi, North Carolina, North Dakota, and South Dakota.¹³⁹ In 2020, Volvo dealers in California successfully argued to the DMV that Care is a DTC sales program that cuts out the dealer, a violation of California vehicle franchise laws.¹⁴⁰ After reworking the program to include the dealer, Volvo reintroduced the program in California in 2023.¹⁴¹ Porsche Drive, meanwhile, is only available in ten U.S. states.¹⁴² At least two non-automaker startups, FreshCar¹⁴³ and Borrow,¹⁴⁴ are attempting to expand the subscription market.¹⁴⁵

The other type of subscriptions, service subscriptions, are not an entirely new idea. GM sold its “OnStar” concierge service for years, and satellite radio provider SiriusXM continues to sell its service for a monthly fee after most vehicles equipped with satellite radio expire after a free trial period.¹⁴⁶

134. *See id.*

135. Lawrence Hodge, *Once Hailed as the Next Evolution in Car Buying, Car Subscription Services Are All But Gone*, JALOPNIK (Apr. 15, 2001), <https://jalopnik.com/once-hailed-as-the-next-evolution-in-car-buying-car-su-1846667638>.

136. *Id.*

137. *Id.*

138. *See, e.g., Care by Volvo Frequently Asked Questions*, VOLVO, <https://www.crestvolvocars.com/faq/care-by-volvo.htm> (last visited Feb. 27, 2025) (providing an example of a Texas-specific dealership that offers a monthly subscription option).

139. *Id.*

140. Jenny Dudikoff, *Illegal Care by Volvo Program Halted in California as Result of Dealer Association Petition* (July 14, 2020), <https://www.cncda.org/news/illegal-care-by-volvo-program-halted-in-california-as-result-of-dealer-association-petition/>. After an investigation, California concluded that the first iteration of the program violated California’s dealer franchise laws by creating manufacturer competition with dealers. *See Report of Investigation: Volvo Group North America, LLC, Volvo Car USA, Care by Volvo*, CAL. DEP’T OF MOTOR VEHICLES, INVESTIGS. DIV. (Feb. 11, 2020), https://www.nmvb.ca.gov/publications/p460/P-460-19_Report_of_Investigation.pdf.

141. Suzanne McElligott, *Volvo Brings Subscription Service Back to California Customers*, U.S. NEWS & WORLD REP. (Jan. 31, 2023, 3:56 PM), <https://cars.usnews.com/cars-trucks/features/volvo-brings-subscription-service-back>.

142. *See Porsche Drive Master Services Agreement*, PORSCHE, <https://www.porsche.com/usa/accessoriesandservices/porschedrive/agreement-us/> (last visited Feb. 27, 2025). For \$4000 per month, customers can drive any Porsche model for up to 2000 miles per month, inclusive of insurance, roadside assistance, vehicle maintenance, and delivery and pickup of the vehicle. *See id.*

143. *See FRESHCAR*, <https://www.cbinsights.com/company/freshcar> (last visited Feb. 27, 2025).

144. *See BORROW*, <https://joinborrow.com/> (last visited Feb. 27, 2025).

145. *See id.*; FRESHCAR, *supra* note 143.

146. *See* Trey Hawkins, *GM Now Offering 3-Year SiriusXM Subscription on 2025 Models*, GM AUTH. (Sept. 6, 2024), <https://gmauthority.com/blog/2024/09/gm-now-offering-3-year-siriusxm-subscrip>

Tesla, however, pushed the idea of subscriptions to a new level with its “Full Self Driving” feature, available for \$15,000 per year.¹⁴⁷ BMW is considering a paid subscription for remote engine start (\$10 per month), dashcam recording (\$39 per year), driving assistant plus (\$20 per month), or advanced parking assistant (\$5 per month).¹⁴⁸ Subscriptions, regardless whether they are of the whole-vehicle or service feature type, are DTC sales.¹⁴⁹ For now, they avoid running afoul of dealer franchise laws, but dealer lobbies are gearing up to push state legislation to require subscriptions be sold through franchised dealers rather than through DTC.¹⁵⁰ But what if automakers adopted an inkjet printer approach to vehicles and sold cars through dealers for a nominal amount, with a separate subscription to actually operate the car? These hypotheticals illustrate the absurdity of the dealer franchise laws and how technology may eventually outpace their usefulness.

IV. DEALER FRANCHISE LAWS: A SURVEY

The patchwork history of dealer franchise laws means that the states have broadly varying approaches to protecting dealers from DTC.¹⁵¹ Some states allow DTC sales with few or no restrictions.¹⁵² Some states allow DTC for all manufacturers, but only if there aren’t any competing dealers in the area or state.¹⁵³ California, the nation’s largest economy and most populous state, notably follows this model.¹⁵⁴ Other states have created specific DTC exceptions for EV manufacturers.¹⁵⁵ In one group of states, DTC is allowed only for Tesla and no other company.¹⁵⁶ Finally, there is a group of states that prohibit DTC completely, for all manufacturers.¹⁵⁷

A. A Fifty-State Approach To Dealer Franchise Laws

This Section outlines the approach taken by each state, broadly grouped. For most states, an examination of both franchise laws as well as those

tion-on-2025-models/; *Onstar & Connected Services*, GEN. MOTORS, <https://www.gm.com/onstar> (last visited Feb. 27, 2025) (showing how Onstar and Sirius XM offer monthly subscription services).

147. Wilmot & Lee, *supra* note 122.

148. Lawrence Hodge, *BMW Goes Ahead with Offering Feature Subscriptions in the U.S.*, JALOPNIK (Jan. 6, 2023), <https://jalopnik.com/bmw-goes-ahead-with-offering-feature-subscriptions-in-t-18499594>

149. Sperber, *supra* note 96.

150. Rodriguez, Jr., *supra* note 129.

151. See discussion *infra* Sections III.A.1–5 (discussing the five different approaches states take to DTC).

152. See discussion *infra* Section III.A.1 (discussing the five states with the fewest restrictions).

153. See discussion *infra* Section III.A.2 (discussing that states allow DTC if there are not competing dealers).

154. See discussion *infra* Section III.A.2 (discussing how California regulates DTC).

155. See discussion *infra* Section III.A.3 (discussing the EV exceptions).

156. See discussion *infra* Section III.A.4 (discussing the Tesla exceptions).

157. See discussion *infra* Section III.A.5 (discussing the states that prohibit DTC).

regulating the issuance of dealer licenses are necessary to understand the legal landscape. It is also important to distinguish between stores, where buy/sell transactions can take place, and galleries, which display, educate, and in some cases deliver and provide service without doing any buying or selling on site.¹⁵⁸ In examining the laws of all fifty states, some broad categorizations emerge. These can be summarized in the following categories, ranging from most permissive to most restrictive.¹⁵⁹

1. DTC Available

The following states do not impose any meaningful restrictions on DTC. Auto manufacturers, whether with franchised dealers or startups, can generally engage in DTC.¹⁶⁰

i. Alaska. Alaska's franchise law does not prohibit DTC sales.¹⁶¹

ii. Hawaii. Hawaii's franchise law prohibits manufacturers from discriminating against dealers or treating dealers unfairly but does not explicitly prohibit DTC sales.¹⁶²

iii. Idaho. Idaho law does not prohibit DTC sales.¹⁶³ In 2015, the Idaho Automobile Dealers Association proposed legislation to restrict DTC sales,¹⁶⁴ but the effort was unsuccessful.¹⁶⁵

iv. Illinois. Illinois law provides that all persons must be licensed to sell new motor vehicles, and a license cannot be issued unless a person has a written contract with a manufacturer to sell vehicles.¹⁶⁶ In 2019, the Illinois Automobile Dealers Association challenged the issuance of a dealer license to Tesla, arguing that it could not be issued a dealer license.¹⁶⁷ The case settled with an administrative consent order allowing Tesla to operate thirteen stores in Illinois.¹⁶⁸ Dealers pressed legislators to pass House Bill 2587 which would prohibit DTC sales, but the bill died in committee in 2021.¹⁶⁹ In 2021, the Secretary of State granted dealer licenses to Rivian and Lucid to engage in DTC sales.¹⁷⁰ This prompted a lawsuit from the Dealers Association in

158. See discussion *infra* Section III.A.4 (discussing states like Idaho and other gallery states).

159. See discussion *infra* Section III.A.1–5 (discussing the chart and different approaches).

160. See, e.g., ALASKA STAT. § 45.25.300 (explaining that Alaska has no limits on DTC).

161. *Id.*

162. HAW. REV. STAT. § 437-1 et seq. (2024).

163. IDAHO CODE § 49-1601 et seq. (2024).

164. Dustin Hurst, *Anti-Tesla Auto Dealer Protection Bill Hits the Idaho Capitol*, IDAHO FREEDOM FOUND. (Feb. 25, 2015), <https://idahofreedom.org/idahon-anti-tesla/>.

165. Dustin Hurst, *Tesla Adds Idaho Lobbyist*, IDAHO FREEDOM FOUND. (Mar. 3, 2015), <https://idahofreedom.org/tesla-idaho-elio/>.

166. 815 ILL. COMP. STAT. § 710/4 (2024).

167. See McGrath & Benson, *supra* note 17.

168. *Id.*

169. H.B. 2587, 101st Gen. Assemb., Reg. Sess. (Ill. 2021).

170. McGrath & Benson, *supra* note 17.

Cook County.¹⁷¹ The association claimed that Illinois law prohibits DTC sales and that the Secretary of State was turning a blind eye to unlicensed sales from Rivian and Lucid.¹⁷² Rivian responded by stating “[i]t is not up to (the auto dealers) to decide which EV manufacturers can and cannot sell directly to consumers. They are not the keepers of the gate for motor vehicle dealers, and are not allowed to choose the winners and losers.”¹⁷³ The judge found in favor of the state,¹⁷⁴ holding that there was no legislative intent to exclude manufacturers from dealing vehicles.¹⁷⁵ The dealers plan an appeal,¹⁷⁶ but for now, DTC sales are legal in Illinois.

v. Minnesota. Minnesota law prohibits manufacturers from competing with a dealer and defines competing as owning a dealership stake.¹⁷⁷ The state’s dealer group attempted to amend the law in 2013 to expressly prohibit DTC, but the lobbying effort failed.¹⁷⁸ Subsequently, the Minnesota Department of Public Safety ruled that the law does not prohibit a manufacturer from becoming licensed as a dealer.¹⁷⁹

171. Madhukumar Warriar, *Lucid, Rivian Sued in Illinois Over Direct Sales Model*, YAHOO! FIN. (Mar. 30, 2021), <https://finance.yahoo.com/news/lucid-rivian-sued-illinois-over-080149284.html>.

172. Ryan Denham, *Car Dealers Sue Rivian, Secretary of State Over EV Sales*, WGLT (Mar. 26, 2021, 1:20 PM), <https://www.wglt.org/business-and-economy/2021-03-26/car-dealers-sue-rivian-secretary-of-state-over-ev-sales>; see also Michael Cantu, *Illinois Dealerships Are Suing Rivian and Lucid Over Direct Sales*, INSIDE EVS (Mar. 26, 2021, 5:45 PM), <https://insideevs.com/news/497070/illinois-dealerships-suing-rivian-lucid-direct-sales/> (showing how the Illinois Automobile Dealers Association and the Chicago Automobile Trade Association filed a lawsuit).

173. Ryan Denham, *In Fighting Dealer Lawsuit, Rivian Says Tesla Deal Is Proof It Can Sell Directly To Consumers Too*, WGLT (Oct. 27, 2021, 10:07 AM), <https://www.wglt.org/local-news/2021-10-27/in-fighting-dealer-lawsuit-rivian-says-tesla-deal-is-proof-it-can-sell-directly-to-consumers-too>.

174. Colin Valez, *Rivian and Lucid Direct Sales Model Legal in Illinois, Judge Rules*, CBT NEWS (Jan. 6, 2023), <https://www.cbtnews.com/rivian-and-lucid-direct-sales-model-legal-in-illinois-judge-rules/>; see also Richard Walker, *Court Okays Rivian to Continue to Sell Cars Directly To Customers in Illinois*, DRIVE TESLA (Jan. 6, 2023), <https://driveteslacanada.ca/news/court-okays-rivian-to-continue-to-sell-cars-directly-to-customers-in-illinois/>; McGrath & Benson, *supra* note 17 (showing how Tesla, Lucid, and Rivian can sell directly to consumers in Illinois).

175. See Ryan Denham, *Judge Rules in Rivian’s Favor in Lawsuit Over Direct Sales To Consumers*, WGLT (Jan. 5, 2023, 12:46 PM), <https://www.wglt.org/local-news/2023-01-05/judge-rules-in-rivians-favor-in-lawsuit-over-direct-sales-to-consumers>.

176. John Clark, *Illinois Car Dealers Challenge Law That Lets EV Manufacturers Sell Direct To Customers*, STATELINE (Jan. 16, 2023, 3:14 PM), <https://www.mystateline.com/news/local-news/illinois-car-dealers-challenge-law-that-lets-ev-manufacturers-bypass-them/>; see also Miranda Dunlap, *Illinois Car Dealers Appeal Direct-to-Consumer EV Sales Ruling*, CRAIN’S CHICAGO BUS. (Jan. 18, 2023, 5:26 AM), <https://www.chicagobusiness.com/manufacturing/illinois-car-dealers-appeal-direct-consumer-ev-sales-ruling> (describing how Illinois Automobile Dealers filed an appeal in Chicago challenging the ruling).

177. MINN. STAT. § 80E.13(h)(i) (2012).

178. Steve Alexander, *Minnesota Sales of Electric, Gas Cars Collide*, STAR TRIB. (Mar. 13, 2013, 7:13 AM), <https://www.startribune.com/minnesota-sales-of-electric-gas-cars-collide/197706621/>.

179. *Id.*

2. DTC Available If Not Competing with Existing Dealers

In this category are states that do not prohibit DTC, especially if they do not compete with established dealers.

i. Arizona. Arizona law states that “[a] factory shall not directly or indirectly compete with or unfairly discriminate among its dealers,” and defines unfair discrimination to include “[a] factory selling, leasing, providing or updating, or offering to sell, lease, provide or update, a vehicle or product, service or financing to any retail consumer or lead.”¹⁸⁰ DTC sales were prohibited until 2016.¹⁸¹ That year, Tesla argued successfully that the state’s franchise law does not apply because Tesla never had any franchised dealers in the state.¹⁸² The court narrowed in on the statutory language prohibiting manufacturers from competing with its own dealers in coming to this conclusion.¹⁸³ It is not clear if this exemption would also apply to other manufacturers.

ii. California. California state law prohibits manufacturers from competing with dealers who sell the same line-make in the same area.¹⁸⁴ This allows manufacturers to offer DTC as long as there are not any franchised dealers in the same area selling the same line and make.¹⁸⁵

iii. Delaware. Delaware’s franchise law prohibits manufacturers from competing unfairly with new motor vehicles selling the same line and make in the same area.¹⁸⁶ It also prohibits manufacturers from owning any interest or stake in a dealership.¹⁸⁷ Tesla operated a gallery at Christiana Mall and a service center in Newport, but sales had to happen online after the state DMV denied Tesla’s dealership license in 2019.¹⁸⁸ In 2023, Tesla sued in Delaware and won an important ruling from the Delaware Supreme Court.¹⁸⁹ The court struck down the ban on Tesla operating a full-scale dealership in the state, holding just as Arizona that the franchise law only applied to manufacturers that already had dealers in the state.¹⁹⁰

iv. Florida. Florida’s law states that a manufacturer may not own or operate a dealership for any line-make in Florida if the manufacturer has

180. ARIZ. REV. STAT. ANN. § 28-4460(A) (2017).

181. Fred Lambert, *Tesla Bets a Win on the Direct-Sale Front in Arizona*, ELECTREK (June 18, 2017, 9:37 AM), <https://electrek.co/2017/06/18/tesla-direct-sale-arizona/>.

182. *Id.*

183. *Ariz. Auto. Dealers Ass’n v. Ariz. Dep’t of Transp.*, No. CV-2016-015190, 2017 WL 9753918, at *4 (Ariz. Super. Mar. 3, 2017).

184. CAL. VEH. CODE § 11713.3 (West 2024).

185. *Id.*

186. DEL. CODE ANN. tit. 6, § 4901–13 (2024).

187. *Id.*

188. Roger Morris, *Tesla Fighting for a Delaware Dealership*, DEL. BUS. TIMES (June 10, 2021), <https://delawarebusinesstimes.com/news/tesla-delaware-dealership/>.

189. *Tesla Inc. v. Del. Div. of Motor Vehicles*, 297 A.3d 625 (Del. 2023).

190. Roger Morris, *Delaware High Court Ruling Allows Tesla Dealerships*, DEL. BUS. TIMES (May 17, 2023), <https://delawarebusinesstimes.com/news/tesla-delaware-dealership-ruling/>.

distributed vehicles of any line-make which are offered for sale under a franchise agreement with an independent dealer.¹⁹¹ In July 2023, the state passed a new law that specifically prohibits established automakers such as Ford and General Motors from DTC, while allowing automakers such as Tesla and Rivian to transact DTC as long as they do not possess independent dealerships.¹⁹² An automaker industry group said the new law would make vehicle buying more cumbersome, “drags the vehicle-buying process backward and does not reflect the preferences of modern consumers that prefer to shop, customize, and have assurance that the vehicle they want will be available to purchase.”¹⁹³

v. Maine. Maine law states that manufacturers cannot compete with a dealer by operating a dealership unless there is no independent motor vehicle dealer available in the market area to own and operate a dealership.¹⁹⁴ This appears to allow DTC sales by manufacturers who do not already have dealers in the area.

vi. Massachusetts. Massachusetts law prohibits manufacturers from owning or operating a dealership.¹⁹⁵ When Tesla opened a gallery in the state, but did not transact any sales through the gallery, the Massachusetts State Automobile Dealers Association sued Tesla for operating a dealership in violation of Massachusetts law.¹⁹⁶ While the suit was pending, Tesla was granted a dealer license in late 2012 and the trial judge dismissed the suit in early 2013 due to lack of standing by the dealer association.¹⁹⁷ In 2014, the Massachusetts Supreme Judicial Court held that the franchise law “[is] aimed primarily at protecting motor vehicle dealers from injury caused by the unfair business practices of manufacturers and distributors with which they were associated, generally in a franchise relationship,” and affirmed the dismissal of the dealers’ lawsuit based on lack of standing.¹⁹⁸ DTC sales are therefore

191. FLA. STAT. § 320.645 (2024).

192. Caden DeLisa, *DeSantis Hits the Brakes on Direct-To-Consumer Auto Sales*, CAPITOLIST (June 19, 2023), <https://thecapitolist.com/desantis-hits-the-brakes-on-direct-to-consumer-auto-sales/>.

193. Khristopher J. Brooks, *Florida Bans Direct-To-Consumer Auto Sales but Leaves Carve-Out for Tesla*, WINK NEWS (June 16, 2023), <https://winknews.com/2023/06/16/florida-bans-direct-to-consumer-auto-sales-but-leaves-carve-out-for-tesla/>.

194. ME. STAT. tit. 10, § 1174(3)(K) (2024).

195. MASS. GEN. LAWS. ch. 93B, § 4(b)(10) (2024).

196. See Campbell Trial Lawyers, *The Massachusetts State Automobile Dealer Association v. Tesla Motors Inc. and Tesla Motors MA, Inc.*, CAMPBELL TRIAL LAWYERS (Oct. 2012), <https://campbelltriallawyers.com/result/the-massachusetts-state-automobile-dealer-association-v-tesla-motors-inc-and-tesla-motors-ma-inc/>.

197. Globe Newswire, *Tesla Motors Wins Lawsuit Against Auto Dealers in Mass*, TESLA PRESS RELEASES (Jan. 4, 2013), <https://ir.tesla.com/press-release/tesla-motors-wins-lawsuit-against-auto-dealers-massachusetts>; see also *Mass. Auto Dealers Lawsuit Against Tesla Dismissed*, WORCESTER BUS. J. (Jan. 7, 2013), <https://www.wbjournal.com/article/mass-auto-dealers-lawsuit-against-tesla-dismissed>.

198. *Mass. State Auto. Dealers Ass’n v. Tesla Motors MA Inc.*, 15 N.E.3d 1152, 1153 (Mass. 2014); see also Jonathan Stempel, *Tesla Prevails in Top Massachusetts Court Over Direct Sales*, REUTERS (Sept. 15, 2014, 5:03 PM), <https://www.reuters.com/article/idUSKBN0HA295/>; *Massachusetts Supreme Court Rules in Favor of Tesla*, DYKEMA (Sept. 19, 2014), <https://www.dykema.com/news-insights/massachuse>

permitted in the state as long as the manufacturer does not have any pre-existing franchised dealers and as long as the law is not changed.¹⁹⁹

vii. New Hampshire. In 2013, New Hampshire amended its dealer law to state that a manufacturer that sells vehicles and is licensed as a dealer in the state “shall not be deemed to be competing with any dealer” if no dealer sells the same line make in the state.²⁰⁰

viii. Oregon. Oregon law prohibits manufacturers from competing with franchised dealers.²⁰¹ This might mean that manufacturers without franchised dealers would be exempt from the law. Dealer association attempts to shut down DTC have so far not been successful in Oregon.²⁰²

ix. Rhode Island. Rhode Island law prohibits manufacturers from competing with new vehicle dealers.²⁰³ In 2018, the state issued a dealer license to Tesla after concluding that the law did not apply to manufacturers that did not have any franchised dealers in the state.²⁰⁴

x. Tennessee. Tennessee law prohibits manufacturers from competing with franchised dealers with the same line-make.²⁰⁵ Manufacturers without franchised dealers may thus be able to operate DTC.

xi. Wyoming. In 2017,²⁰⁶ Wyoming amended its dealer licensing statute to specifically allow for DTC sales²⁰⁷ as long as the manufacturer does not have any franchised dealers in the state.²⁰⁸

xii. Virginia. Virginia’s franchise law states that manufacturers cannot own or operate dealerships unless, after a public hearing, the state determines there is no independent dealer available in the trade area that can own and

tts-supreme-court-rules-in-favor-of-tesla.html; Mike Ramsey, *Tesla Wins Direct-Sales Court Battle in Mass.*, WALL ST. J. (Sept. 15, 2014, 3:44 PM), <https://www.wsj.com/articles/tesla-wins-direct-sales-court-battle-in-massachusetts-1410810246>.

199. See Louis Chronowski, *What Massachusetts Court’s Ruling on Tesla Means for Automakers, Dealers*, WARDS AUTO (Oct. 23, 2014), <https://www.wardsauto.com/tesla/what-massachusetts-court-s-ruling-on-tesla-means-for-automakers-dealers>.

200. N.H. REV. STAT. ANN. § 357-C:3(III)(k)(4) (2024).

201. OR. REV. STAT. § 650 et seq. (2024).

202. See Christina Williams, *Legality of Tesla Stores Under Fire in Oregon, Elsewhere*, PORTLAND BUS. J. (Oct. 15, 2022), <https://www.bizjournals.com/portland/blog/sbo/2012/10/legality-of-tesla-stores-under-fire-in.html>.

203. 31 R.I. GEN. LAWS § 31-5.1-4(c)(14) (2024).

204. Patrick Anderson, *Paving the Way*, PROVIDENCE J. (Jan. 10, 2018, 6:14 PM), <https://www.providencejournal.com/story/news/politics/government/2018/01/10/electric-car-manufacturer-tesla-granted-licenses-to-sell-direct-in-ri/16339278007/>; see also Fred Lambert, *Tesla Is Expanding in Rhode Island After Store License Is Approved*, ELECTREK (Jan. 11, 2018, 7:38 AM), <https://electrek.co/2018/01/11/tesla-expanding-rhode-island-store-license-approved/> (describing changes in Rhode Island law that now allows Tesla’s expansion into the state).

205. TENN. CODE ANN. § 55-17-114(a)(17) (2024).

206. Fred Lambert, *Tesla Takes a Win for Direct Sales in Wyoming Despite Lobbying by GM, Ford and Other Automakers*, ELECTREK (Mar. 3, 2017, 1:48 PM), <https://electrek.co/2017/03/03/tesla-takes-a-win-for-direct-sales-in-wyoming-despite-lobbying-by-gm-ford-and-other-automakers/>.

207. WYO. STAT. ANN. § 31-16-103(viii) (2024).

208. *Id.* § 31-16-101(a)(xxxi).

operate the franchise “in a manner consistent with the public interest.”²⁰⁹ Tesla’s entry into Virginia was initially met with resistance from dealers.²¹⁰ In 2016, when Tesla filed to open a second dealership, the Virginia Automobile Dealers Association sued to stop the state from granting the license²¹¹ after the Department of Motor Vehicles commissioner found that there were not any dealers available to operate a Tesla franchise consistent with the public interest.²¹² Tesla has since obtained approval to open three additional stores using this provision in Virginia law.²¹³

3. DTC Available for EV-Only Manufacturers

These states expressly permit DTC, but only for manufacturers of electric vehicles.

i. Colorado. Colorado law prohibits manufacturers from owning, operating, or controlling any dealer.²¹⁴ Tesla operated a single store in Colorado, which dealers claimed violated Colorado law.²¹⁵ In 2020, the state passed Senate Bill 167,²¹⁶ which allows manufacturers to engage in DTC for electric vehicles only, and if it did not have any franchised dealers of the same line-make, thus allowing Rivian to also enter the market.²¹⁷

ii. Utah. After an intense lobbying effort that almost saw Tesla fighting the dealer lobby at the Utah Supreme Court,²¹⁸ Utah law now provides that “a direct-sale manufacturer . . . may, without a franchise, sell, display for sale, or offer for sale or exchange a motor vehicle” if the manufacturer is an EV

209. VA. CODE ANN. § 46.2-1572(4) (2024).

210. See Stefanie Dazio, *In Va., Tesla Motors Has a Showroom Where It Can’t Make Sales*, WASH. POST (June 24, 2013), https://www.washingtonpost.com/local/tesla-motors-gallery-in-virginia-raises-questions/2013/06/24/ece59c9c-dcfb-11e2-9218-bc2ac7cd44e2_story.html.

211. Kirsten Korosec, *Tesla: Virginia Dealership Lawsuit Is Without Merit*, FORTUNE (Mar. 10, 2016, 12:13 PM), <https://fortune.com/2016/03/10/tesla-virginia-dealership-lawsuit/>.

212. Laura Vozzella, *Tesla Gets Green Light for Second Virginia Store*, WASH. POST (Nov. 30, 2016), https://www.washingtonpost.com/local/virginia-politics/tesla-gets-green-light-for-second-virginia-store/2016/11/30/b9f7d4f6-b73d-11e6-959c-172c82123976_story.html.

213. John Reid Blackwell, *Tesla Gets DMV Commissioner’s Nod to Open Three New Stores in Virginia to Sell Its Electric Cars*, RICHMOND TIMES-DISPATCH (July 29, 2021), https://richmond.com/business/tesla-gets-dmv-commissioners-nod-to-open-three-new-stores-in-virginia-to-sell-its/article_907ff7a6-d04d-5419-ae16-0d32487bec37.html.

214. COLO. REV. STAT. § 44-20-126(1) (2024).

215. Amy Wilson, *Dealers Call Tesla Factory Stores Illegal*, AUTOMOTIVE NEWS (Oct. 8, 2012, 12:00 AM), <https://www.autonews.com/article/20121008/RETAIL07/310089952/dealers-call-tesla-factory-stores-illegal>.

216. S.B. 20-167, 75th Gen. Assemb., Reg. Sess. (Colo. 2020).

217. Charles Benoit, *Rivian Wins Big as Colorado Passes Electric Vehicle Direct Sales Law*, ELECTREK (Mar. 25, 2020, 5:45 PM), <https://electrek.co/2020/03/25/rivian-wins-big-as-colorado-passes-electric-vehicle-direct-sales-law>.

218. Sarah Ryther Francom, *A New Direction: Do Utah’s Dealer Franchise Laws Drive the Auto Industry or Slow It Down?*, UTAH BUS. (Aug. 8, 2016), <https://www.utahbusiness.com/new-direction-utahs-dealer-franchise-laws-drive-auto-industry-slow/>.

manufacturer, or low-volume manufacturer, and only sells its own vehicles.²¹⁹

iii. Vermont. Prior to 2021, Vermont law prohibited manufacturers from competing against their own franchised dealers.²²⁰ Vermont law now specifically permits certain EV manufacturers, defined as manufacturers that only make zero emission vehicles and have never had a franchise in the state,²²¹ to engage in DTC sales.²²²

iv. Maryland. Maryland law prohibits a manufacturer from selling a new vehicle to a retail buyer without defining “manufacturer” or “vehicle.”²²³ In 2015, however, the state passed House Bill 235,²²⁴ which amended the law to permit limited DTC sales.²²⁵ Maryland law now permits a manufacturer to be licensed as a dealer if it deals only in electric vehicles, does not have any franchised dealers in the state, and is limited to four stores in the state.²²⁶

4. Tesla Only DTC

In this category are states that only permit Tesla to engage in DTC. None of the statutes spell out Tesla by name but are written with “operating as of this date” clauses that can only refer to Tesla in that state.²²⁷ Many states place a limit on the number of dealerships Tesla can operate. These states include those below.

i. Indiana. Indiana’s law provides that “a manufacturer or distributor may not engage in sales directly to the general public in Indiana,” but creates an exception for a manufacturer that was granted an initial license to sell new motor vehicles before July 1, 2015, and has at least one warranty repair service center in the state.²²⁸ This exception allows Tesla, but not any other EV manufacturer, such as Lucid or Rivian, to sell in the state.²²⁹ The exception came after Tesla’s initial entry into the state with a service center

219. UTAH CODE ANN. § 41-3-103(5) (West 2023).

220. See James Finn, ‘Tesla Bill’ Would Allow Electric Car Giant To Open Direct-to-Consumer Shops in Vermont, VTDIGGER (Apr. 22, 2021, 5:41 PM), <https://vtdigger.org/2021/04/22/tesla-bill-would-allow-electric-car-giant-to-open-direct-to-consumer-shops-in-vermont/>.

221. VT. STAT. ANN. tit. 9, § 4085(18) (2024).

222. *Id.* §§ 4086(i), 4097(8).

223. See MD. TRANSP. CODE ANN. §§ 15-101, 15-305 (West 2024).

224. H.B. 235, 435th Gen. Assemb., Reg. Sess. (Md. 2015).

225. Angelo Young, *Tesla Motors Inc (TSLA) Wins Approval for Direct Car Sales in Maryland, Starting October 1*, INT’L BUS. TIMES (May 12, 2015, 11:26 AM), <https://www.ibtimes.com/tesla-motors-inc-tesla-wins-approval-direct-car-sales-maryland-starting-october-1-1918655>.

226. MD. TRANSP. CODE ANN. § 15-305(e)(2)(i) (West 2024).

227. See discussion *infra* Section III.4 (discussing states’ statutes regarding “operating as of this date” clauses).

228. IND. CODE § 9-32-11-20(c), (d) (2024).

229. Fred Lambert, *Tesla Escapes Ban in Indiana by Being ‘Grandfathered In,’ but the State Moves Forward with Ban on Direct Sales*, ELECTREK (Feb. 2, 2017, 10:20 AM), <https://electrek.co/2017/02/02/tesla-indiana-grandfathered-in-ban/>.

first opening in 2016.²³⁰ Soon thereafter, local dealers pushed the state to limit Tesla's dealer license to only thirty months.²³¹ Indiana's General Assembly eventually passed House Bill 1592, codifying the ban on DTC but allowing Tesla to remain exempt.²³²

ii. Michigan. Michigan law prohibits manufacturers from selling directly to a consumer.²³³ Up until 2014, the law prohibited manufacturers from selling directly to a retail customer other than through its franchised dealers.²³⁴ In 2012, when Tesla first began selling cars in Michigan, it reasoned that the phrase "its franchised dealers" in the law meant that the law was inapplicable to Tesla since it did not have any franchised dealers.²³⁵ In October 2014, Michigan State Senator Joe Hune, whose wife was a lobbyist for auto dealers, inserted a late amendment to House Bill 5606 to strike the word "its" from the laws, meaning the prohibition on manufacturer-owned dealers would apply to all manufacturers—especially Tesla.²³⁶ One legislator told 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."²³⁷ The amendment was added at the end of the legislative session and passed without comment or debate the next day.²³⁸ Many of the legislators who voted for the amendment later said they did not know that the purpose was to take Tesla out of the Michigan market.²³⁹ In 2016, after failing to obtain a dealer license, Tesla opened its first gallery in Detroit, showcasing one vehicle in a Nordstrom department store and directing potential customers to the nearest retail store in Cleveland.²⁴⁰ That year, the company filed suit, challenging Michigan's ban on direct sales.²⁴¹ This resulted in a 2020 settlement allowing Tesla to operate service centers and deliver cars directly to customers in Michigan, but only if legal title for the vehicles is transferred outside the state.²⁴²

230. *Tesla Gets a Service Center with an Expiration Date in Indiana*, ELECTREK (Sept. 16, 2016, 2:59 PM), <https://electrek.co/2016/09/16/tesla-gets-a-service-center-with-an-expiration-date-in-indiana/>.

231. *Tesla to Open First Indy Service Center*, INDIANAPOLIS BUS. J. (Sept. 15, 2016), <https://www.ijb.com/property-lines-scott-olson/60370-tesla-to-open-first-indy-service-center>.

232. See H.B. 1592, 120th Gen. Assemb., Reg. Sess. (Ind. 2017).

233. See MICH. COMP. LAWS § 445.1564(3) (2024).

234. See *id.*

235. Will Zerhouni, *Tesla Takes on Michigan*, CATO INST. (Feb. 27, 2018), <https://www.cato.org/policy-analysis/tesla-takes-michigan>.

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. Greg Gardner, *At This Tesla Gallery, You Can Look, but You Can't Buy*, USA TODAY (Dec. 6, 2016, 1:48 PM), <https://www.usatoday.com/story/money/cars/2016/12/06/tesla-gallery-you-can-look-but-you-cant-buy/95047352/>.

241. Tim Higgins, *Tesla Files Suit To Sell Cars Directly to Consumers in Michigan*, WALL ST. J., <https://www.wsj.com/articles/tesla-files-suit-to-sell-cars-directly-to-consumers-in-michigan-147456772> 7 (last updated Sept. 22, 2016, 5:28 PM).

242. Joint Stipulation and Motion for Entry of Dismissal at 2–3, *Tesla Inc. v. Benson*, No 1:16-CV-01158-JTN-SJB (W.D. Mich. Jan. 22, 2020), ECF No. 267.

iii. Missouri. Missouri law prohibits franchisors from owning or operating a dealership.²⁴³ Tesla was issued two dealer licenses in 2015, and the Missouri Auto Dealers Association subsequently filed a lawsuit.²⁴⁴ In 2016, a circuit court ruled that Tesla should not have been granted a dealer license and the Missouri Department of Revenue should not renew its license.²⁴⁵ A three-judge panel of the Missouri Court of Appeals overturned the decision in 2017, holding that the Missouri legislature limited appeals of licensing decisions only to those denied licenses or whose licenses were revoked, and therefore the dealer association did not have standing to bring the suit.²⁴⁶

iv. Washington. Washington law generally makes it illegal for any manufacturer to compete with a new vehicle dealer by owning or operating a dealership.²⁴⁷ An exception exists for Tesla,²⁴⁸ as “[a] manufacturer that held a vehicle dealer license in this state on January 1, 2014, to own, operate, or control a new motor vehicle dealership,” as long as the vehicle is not sold by an independently franchised dealer.²⁴⁹ Rivian is now lobbying the state to amend the law to allow any EV manufacturer without a franchised dealer to engage in DTC in the state.²⁵⁰

v. Georgia. Georgia’s franchise law makes it illegal for a manufacturer to “offer to sell or sell, directly or indirectly, any new motor vehicle to a consumer in this state, except through a new motor vehicle dealer holding a franchise for the line make covering such new motor vehicle.”²⁵¹ In 2014, in order to sell in Georgia, Tesla had to agree to sell less than 150 vehicles

243. MO. REV. STAT. § 407.826 (2024).

244. Lisa Brown, *Tesla’s License to Sell Cars in Missouri Expiring*, ST. LOUIS POST-DISPATCH (Dec. 29, 2016), http://www.stltoday.com/business/local/tesla-s-license-to-sell-cars-in-missouri-expiring/article_b4f52be1-3df6-59ba-9455-73a9657ad865.html.

245. Claudia Assis, *Tesla Vows To Keep Selling Cars Directly To Missouri Consumers*, MARKETWATCH (Sept. 8, 2016, 2:42 PM), <https://www.marketwatch.com/story/tesla-vows-to-keep-selling-cars-directly-to-missouri-consumers-2016-09-08>; see also David Kravets, *Sorry Tesla, You Can’t Issue Yourself a Dealer Franchise, Court Rules*, ARSTECHNICA (Sept. 7, 2016, 3:47 PM), <https://arstechnica.com/tech-policy/2016/09/sorry-tesla-you-cant-issue-yourself-an-auto-franchise-court-rules/>.

246. *State ex rel. Mo. Auto. Dealers Ass’n v. Mo. Dep’t of Revenue*, 541 S.W.3d 585 (Mo. Ct. App. 2017); see also Dan Margolies, *Missouri Appeals Court Hands Win To Electric Car Maker Tesla*, KCUR (Dec. 5, 2017, 12:31 PM), <https://www.kcur.org/economy/2017-12-05/missouri-appeals-court-hands-win-to-electric-car-maker-tesla>.

247. WASH. REV. CODE § 46.96.185(g) (2024).

248. Todd Bishop, *Tesla Wins Battle Against Auto Dealers in Washington State, but Future Rivals Are Screwed*, GEEKWIRE (Feb. 18, 2014, 4:05 PM), <https://www.geekwire.com/2014/tesla-wins-battle-auto-dealers-washington-state-future-rivals-screwed/>.

249. WASH. REV. CODE § 46.96.185(g)(vii) (2024).

250. Mark Harris, *Legislators Steer Washington State Toward Direct Electric Vehicle Sales, Bypassing Auto Dealers*, GEEKWIRE (Feb. 10, 2021, 3:10 PM), <https://www.geekwire.com/2021/legislators-steer-washington-state-toward-direct-electric-vehicle-sales-bypassing-auto-dealers/>.

251. GA. CODE ANN. § 10-1-664.1(c) (West 2024).

directly to consumers.²⁵² Dealers claimed the company quickly blew through that selling cap.²⁵³ By August 2014, the Georgia Automobile Dealers Association had filed a petition with the state to halt Tesla operations and revoke the company's dealer license,²⁵⁴ alleging the company had sold 173 vehicles.²⁵⁵ Tesla's response was that the law did not apply to Tesla because it did not have any franchised dealers in the state.²⁵⁶ After intense lobbying, Tesla's efforts appeared to stall, with the state House of Representatives Motor Vehicles Committee tabling a bill that would have allowed the company to sell an unlimited number of vehicles through a maximum of five outlets.²⁵⁷ Later that month, the bill passed the state's key House of Representatives Motor Vehicles Committee²⁵⁸ and then the Georgia Senate.²⁵⁹ In response, the President of the Georgia Automobile Dealer Association, Bill Morie, remarked: "Tesla is the first. Hopefully, it will be the last."²⁶⁰ It wasn't the last. Six years later, legislators once again considered legislation that would allow EV manufacturers to sell directly to consumers in a DTC model.²⁶¹ Rivian and Lucid lobbied the state to pass legislation, both in the House and Senate, that would allow direct sales by

252. Richard Read, *Tesla Fights Back in Georgia: Do Traditional Dealerships Stand a Chance?*, THECARCONNECTION (Sept. 3, 2014), https://www.thecarconnection.com/news/1094197_tesla-fights-back-in-georgia-do-traditional-dealerships-stand-a-chance.

253. *Id.*

254. Tom McParland, *Georgia Dealers Want Tesla Shut Down*, JALOPNIK (Aug. 30, 2014), <https://jalopnik.com/georgia-dealers-want-tesla-shut-down-1628719147>.

255. David Kravets, *Dealers Attack Tesla, Seek to Remove Electric Car Maker from Georgia*, ARSTECHNICA (Sept. 3, 2014, 1:45 PM), <https://arstechnica.com/tech-policy/2014/09/dealers-attack-tesla-seek-to-remove-electric-car-maker-from-georgia/>; see also Alan Ohnsman & Margaret Newkirk, *Tesla Fight Erupts in Georgia as Dealers Seek Sales Ban*, BLOOMBERG (Aug. 29, 2014, 11:01 PM), <https://www.bloomberg.com/news/articles/2014-08-29/tesla-fight-erupts-in-georgia-as-dealers-seek-sales-ban>; Steven Lang, *Georgia Dealers Want Tesla Store Shuttered for Selling Too Many Teslas*, YAHOO! (Sept. 2, 2014), <https://autos.yahoo.com/blogs/motoramic/georgia-dealers-want-tesla-store-shuttered-for-selling-too-many-teslas-192235038.html>; Peter Van Doren, *Auto Dealers Attempt to Ban Tesla from Georgia*, CATO INST. (Sept. 4, 2014, 3:43 PM), <https://www.cato.org/blog/auto-dealers-attempt-ban-tesla-georgia>.

256. Urvaksh Karkaria, *Tesla Motors Seeks to Dismiss Georgia Dealers' Petition to Ban Tesla Sales*, ATLANTA BUS. CHRON., <https://www.bizjournals.com/atlanta/blog/atlantech/2014/11/tesla-motors-seeks-to-dismiss-georgia-dealers.html> (last updated Nov. 11, 2014).

257. Matt Kempner, *Georgia Legislators Table Tesla-Backed Bill*, ATLANTA J.-CONST. (Mar. 4, 2015), <https://www.ajc.com/business/georgia-legislators-table-tesla-backed-bill/VAkN5UtXuSi433bYtldKWL/>.

258. *Tesla Motors Could Get Greenlight to Expand in Georgia*, WXIA, <https://www.11alive.com/article/money/tesla-motors-could-get-greenlight-to-expand-in-georgia/85-132171441> (last updated Mar. 10, 2015, 1:46 PM).

259. Dave Williams, *General Assembly OKs Tesla Bill*, ATLANTA BUS. CHRON. (Mar. 25, 2015), https://www.bizjournals.com/atlanta/blog/capitol_vision/2015/03/general-assembly-oks-tesla-bill.html.

260. Matt Kempner, *Georgia House OKs Bill To Let Tesla Motors Continue Selling in State*, ATLANTA J.-CONST. (Mar. 13, 2015), <https://www.ajc.com/news/state--regional-govt--politics/georgia-house-oks-bill-let-tesla-motors-continue-selling-state/PKQonnIBVss3TjAiOBeIIP/>.

261. James Salzer, *Electric Car Makers Battle Georgia Auto Dealers to Sell Directly to Buyers*, ATLANTA J.-CONST. (Mar. 2, 2021), <https://www.ajc.com/politics/electric-car-makers-battle-georgia-auto-dealers-to-sell-directly-to-buyers/TRGBU5FEWNBGJETCOZ5WHQIFIQ/>.

manufacturers without existing franchised dealers.²⁶² Electric vehicle startup Rivian has announced plans to build a \$5 billion facility in Georgia, with the aid of a \$1.5 billion incentive package from the state including tax breaks, grants, free land, and infrastructure capable of producing 400,000 vehicles annually.²⁶³

vi. Mississippi. Until 2023, Mississippi state law contained a typical clause prohibiting manufacturers from unreasonable discrimination against dealerships.²⁶⁴ However, in March 2023, the state passed House Bill 401, banning DTC for EV manufacturers unless they open franchised dealerships.²⁶⁵ The law now expressly prohibits manufacturers from applying for a dealer license or owning a dealership.²⁶⁶ Tesla's existing store was allowed to stay open, but other makers such as Rivian and Lucid are not allowed to sell DTC in the state.²⁶⁷

vii. Nevada. Nevada law prohibits DTC sales by manufacturers.²⁶⁸ One exception in the law allows EV-only manufacturers who were selling in Nevada on or before January 1, 2016 (with only Tesla meeting this definition), to engage in DTC sales.²⁶⁹ The state dealer association agreed to this carve-out for Tesla after the company announced plans for a \$5 billion factory in the state.²⁷⁰

262. Maria Merano, *Rivian Georgia Plant Pushing Lawmakers to Revisit Direct Sales Legislation*, TESLARATI (Mar. 15, 2022), <https://www.teslarati.com/rivian-georgia-factory-direct-sales/>; see also Brad Anderson, *Rivian's \$5 Billion Georgia Factory Could Open Direct Sales in the State*, CARSCOOPS (Mar. 15, 2022, 9:03 AM), <https://www.carscoops.com/2022/03/rivians-5-billion-georgia-factory-could-open-direct-sales-in-the-state/>. The legislation died in the 2022 term. Lurah Lowery, *Georgia Bill That Would Allow EV Direct Sales Stalls in Senate*, REPAIRER DRIVEN NEWS (Mar. 24, 2022), <https://www.repairerdrivennews.com/2022/03/24/georgia-bill-that-would-allow-ev-direct-sales-stalls-in-senate/>; Tom Spigolon, *Legislation for Direct Sales of EVs Faces Rough Road in General Assembly*, COVINGTON NEWS, <https://www.covnews.com/news/business/legislation-direct-sales-evs-faces-rough-road-general-assembly/> (last updated Mar. 23, 2022, 7:34 AM).

263. Peter Johnson, *Rivian (RIVN) Wins in Georgia as EV Maker Gets Green Light to Build \$5B Facility*, ELECTREK (July 17, 2023, 3:28 PM), <https://electrek.co/2023/07/17/rivian-wins-georgia-ev-maker-green-light-5b-facility/>; see also Lawrence Hodge, *Rivian Teases Jobs for Georgia if the State Considers Direct Sales*, JALOPNIK (Mar. 14, 2022), <https://jalopnik.com/rivian-teases-jobs-for-georgia-if-the-state-considers-d-1848650167>.

264. MISS. CODE ANN. § 63-17-115 (West 2024).

265. Michael Goldberg, *Tesla Can't Open More Company Stores in Mississippi After Governor Signs Bill Requiring Franchises*, FORTUNE (Mar. 15, 2023, 6:08 AM), <https://fortune.com/2023/03/15/tesla-cant-open-more-company-stores-in-mississippi-after-governor-signs-bill-requiring-franchises/>; Michael Goldberg, *Mississippi Passes Bill Restricting Electric Car Dealerships*, AP NEWS (Mar. 3, 2023, 3:49 PM), <https://apnews.com/article/mississippi-electric-cars-sales-tesla-31c06e7ecb9693f15bc578623b56fd9c>.

266. MISS. CODE ANN. § 63-17-75(5) (West 2023).

267. The only exception to the law is any EV manufacturer who had a dealership license since August 1, 2021, and is limited to one store. See *id.* § 63-17-109(6)(c). Only Tesla fits this description in Mississippi.

268. NEV. REV. STAT. § 482.36385 (2017).

269. *Id.* § 482.36349.

270. Charles Fleming, *Tesla in Nevada: Auto Dealers Give OK To Elon Musk's Direct Sales*, L.A. TIMES (Sept. 10, 2014, 6:00 AM), <https://www.latimes.com/business/autos/la-fi-hy-nevada-auto-dealers-okay-tesla-direct-sales-20140909-story.html>; see also John Kerr, *Tesla Breaks the Auto Dealer Cartel*,

viii. New Jersey. New Jersey's law prohibits vehicle franchisors from selling motor vehicles to consumers.²⁷¹ By 2013, the state had issued two dealer licenses to Tesla.²⁷² Under pressure from the New Jersey Coalition of Automotive Retailers, the state delayed renewal or any new licenses, and in March 2014, adopted a new rule that banned DTC completely, including for Tesla.²⁷³ The company announced it would keep performing service, transitioning stores into galleries where staff cannot discuss price or complete sales, and directing customers to purchase online or through stores in Philadelphia or Chelsea.²⁷⁴ Former Governor Chris Christie argued that he was just enforcing state law and that the law needed to change in order for Tesla to operate in the state.²⁷⁵ In 2015, the legislature passed a bill that permitted a franchisor that was licensed on or before January 1, 2014, and only manufactured EVs (with only Tesla meeting this definition) to engage in DTC but through a maximum of four locations.²⁷⁶ The dealer group filed a new suit against Tesla in 2019 for opening a fifth gallery with plans for a sixth.²⁷⁷ The suit was dismissed for lack of standing in 2021.²⁷⁸

ix. Ohio. In 2013, just as Tesla was about to open its first store in Ohio, the Ohio Auto Dealers Association pushed for a bill that would outlaw DTC, as part of an otherwise non-controversial bill to require drivers to move over when approaching a maintenance vehicle.²⁷⁹ As a result, Ohio law now

WALL ST. J. (Sept. 16, 2014), <https://www.wsj.com/articles/john-kerr-tesla-breaks-the-auto-dealer-cartel-1410907919>.

271. N.J. STAT. ANN. § 56:10-27 (West 2015).

272. *Defending Innovation and Consumer Choice in New Jersey*, ST. INSIDER (Mar. 11, 2014), <https://www.streetinsider.com/Corporate+News/Tesla+%28TSLA%29%3A+Defending+Innovation+and+Consumer+Choice+in+New+Jersey/9268147.html>.

273. *Id.*; see also Darryl Isherwood, *Motor Vehicle Commission Passes "Anti-Tesla" Rule*, NJ.COM (Mar. 11, 2014, 9:06 PM), https://www.nj.com/politics/2014/03/motor_vehicle_commission_passes_anti-tesla_rule_1.html.

274. Musk, *supra* note 47.

275. Brent Johnson, *Chris Christie Blames NJ's Controversial Tesla Ban on State Legislature*, NJ.COM (Mar. 18, 2014, 8:08 PM), https://www.nj.com/politics/2014/03/chris_christie_blames_njs_controversial_tesla_ban_on_state_legislature.html.

276. N.J. STAT. ANN. § 56:10-27.1 (West 2015); see also Ben Popper, *In Major Reversal, New Jersey Allows Tesla to Sell Its Cars Directly, Without Dealerships*, VERGE (Mar. 18, 2015, 1:32 PM), <https://www.theverge.com/2015/3/18/8251821/tesla-new-jersey-direct-sales-dealerships-christie>.

277. Sean Szymkowski, *Tesla Hit with New Lawsuit from New Jersey Dealer Association*, CNET (Sept. 20, 2019, 7:05 AM), <https://www.cnet.com/roadshow/news/tesla-lawsuit-new-jersey-dealer/>; see also David Willis, *NJ Gives Tesla Special Treatment, and That Hurts Consumers, Car Dealers Say*, ASHBURY PARK PRESS (Sept. 20, 2019, 5:00 AM), <https://www.app.com/story/money/business/consumer/press-on-your-side/2019/09/20/nj-tesla-car-dealers-lawsuit/2373245001/>.

278. *New Jersey Auto Dealer Association Complaint Against Tesla Dismissed*, TESLA (Apr. 22, 2021), <https://engage.tesla.com/articles/520-new-jersey-auto-dealer-association-complaint-tesla-dismissed>.

279. Jim Siegel, *Fight Between Tesla, Ohio Auto Dealers to Continue as Legislators Drop Amendment*, COLUMBUS DISPATCH (Dec. 4, 2013, 5:54 AM), <https://www.dispatch.com/story/news/politics/2013/12/03/fight-between-tesla-ohio-auto/23673317007/>; see also Jeff Morganteen, *Ohio Car Dealers Challenge Tesla's Business Model*, CNBC (Dec. 23, 2013, 2:29 PM), <https://www.cnbc.com/2013/12/23/ohio-car-dealers-challenge-teslas-business-model.html>.

prohibits issuing dealer licenses to manufacturers.²⁸⁰ In a narrow exception for Tesla,²⁸¹ the law allows issuing up to three licenses for any EV manufacturers licensed on or prior to January 1, 2014.²⁸²

x. Pennsylvania. In 2014, Pennsylvania amended its law to expressly allow Tesla to engage in DTC through five stores.²⁸³ The law states that a manufacturer may own no more than five new vehicle dealerships trading only in electric vehicles, as long as the manufacturer was selling vehicles for at least a year prior to the law's passage.²⁸⁴

xi. New York. New York law prohibits manufacturers from obtaining dealer licenses.²⁸⁵ In 2014, in a move designed to keep Tesla open,²⁸⁶ the law was amended to provide that licenses issued to zero emissions manufacturers before March 26, 2014, could be kept.²⁸⁷ Tesla's five stores in existence at the time were permitted to stay open, but new stores were prohibited from selling cars, prompting the automaker to open galleries, or, most recently, a store on tribal land in upstate New York.²⁸⁸

xii. North Carolina. North Carolina prohibits manufacturers from owning dealerships.²⁸⁹ Opposition from local dealers led the state to deny a second dealer license to Tesla in 2016.²⁹⁰ Like New York, the state carved out an exception for Tesla in the law, which states that EV manufacturers licensed as of March 1, 2019, are allowed to operate up to six dealerships after January 1, 2021.²⁹¹

280. OHIO REV. CODE ANN. § 4517.12(A)(11) (West 2023).

281. Dan Gearino, *Deal Will Let Tesla Operate 3 Ohio Stores*, COLUMBUS DISPATCH (Mar. 26, 2014, 12:13 PM), <https://www.dispatch.com/story/news/politics/2014/03/25/deal-will-let-tesla-operate/24231453007/>; see also Jackie Borchardt, *Panel Approves Bill That Allows Tesla Motors to Operate 3 Stores in Ohio*, CLEVELAND.COM (Mar. 25, 2014, 11:00 PM), https://www.cleveland.com/open/2014/03/panel_approves_bill_that_allow.html.

282. OHIO REV. CODE ANN. § 4517.12(A)(11)(a) (West 2023).

283. Mike Ramsey, *Pro-Tesla Bill in Pennsylvania Draws Ire of Other Auto Makers*, WALL ST. J. (June 9, 2014, 6:00 PM), <https://www.wsj.com/articles/pro-tesla-bill-in-pennsylvania-draws-ire-of-other-auto-makers-1402347818>.

284. 63 PA. STAT. AND CONS. STAT. ANN. § 818.310(c)(6)(i) (West 2019).

285. N.Y. VEH. & TRAF. LAW § 415(7)(f)(i) (McKinney 2023).

286. Kaja Whitehouse, *Cuomo Brokers Deal to Keep Tesla Stores Open*, N.Y. POST (Mar. 28, 2014, 9:32 PM), <https://nypost.com/2014/03/28/cuomo-brokers-deal-to-keep-tesla-stores-open/>.

287. N.Y. VEH. & TRAF. LAW § 415(7)(f)(iii) (McKinney 2023).

288. Don Cazentre, *Tesla to Open Its First Upstate New York Sales Showroom in Deal with Oneida Indian Nation*, SYRACUSE.COM, <https://www.syracuse.com/news/2023/06/tesla-to-open-its-first-upstate-new-york-sales-showroom-in-deal-with-oneida-indian-nation.html> (last updated June 6, 2023, 6:20 PM).

289. N.C. GEN. STAT. § 20-305.2(a) (2024).

290. David Boraks, *N.C. Says Tesla Can't Sell Cars at Charlotte-Area Store*, CHARLOTTE OBSERVER, <https://www.charlotteobserver.com/news/business/article80014067.html> (last updated May 26, 2016, 12:13 PM).

291. N.C. GEN. STAT. § 20-305.2(a)(4a) (2019).

5. Direct Sale Prohibitions (No DTC Sales)

Seventeen states explicitly prohibit manufacturers from being licensed as dealers or from owning dealerships that sell to consumers.²⁹² These laws make it challenging for new, direct-sale manufacturers like Tesla and others to enter the market without legislative changes or legal challenges.²⁹³ These states include the following:

i. Alabama. Alabama's law on unfair and deceptive trade practices prohibits manufacturers from making "direct sales or leases of new motor vehicles to the public in Alabama."²⁹⁴ In 2015, legislation that would have authorized DTC for electric vehicles was introduced by Senator Whatley but died in committee.²⁹⁵

ii. Arkansas. Arkansas law does not allow manufacturers "[t]o offer to sell or to sell any motor vehicle to a consumer, except through a licensed new motor vehicle dealer holding a franchise, a sales and service agreement, or a bona fide contract for the line make covering the new motor vehicle."²⁹⁶

iii. Connecticut. Connecticut's franchise law technically could permit DTC sales,²⁹⁷ but a separate dealer license law states that no manufacturers can hold new or used car dealers licenses in the state.²⁹⁸ In 2019, Tesla closed its Greenwich showroom after complaints by the Connecticut Automotive Retailers Association that the showroom was being used as a sales tool in violation of the Connecticut Franchise Act.²⁹⁹ Later that year, however, the company announced that it would begin leasing directly to customers through its gallery showrooms since, by the company's interpretation, leasing is a permitted activity for manufacturers.³⁰⁰ Of course, a customer coming in to

292. See, e.g., Alabama State Legislature, *Alabama Senate Bill 22*, LEGISCAN, <https://legiscan.com/AL/bill/SB22/2016/X1> (last visited Feb. 6, 2025) (demonstrating a statute that places limits on manufacturing).

293. See, e.g., ARK. CODE ANN. § 23-112-403(a)(2)(M)(i) (2023) (providing legislative changes to Arkansas law).

294. ALA. CODE § 8-20-4(3)(s) (2018).

295. See *Alabama Senate Bill 22*, *supra* note 292.

296. ARK. CODE § 23-112-403(a)(2)(M)(i).

297. Like many states, the law prohibits discriminatory or unfair treatment by manufacturers. See CONN. GEN. STAT. § 42-133bb (2024).

298. *Id.* § 14-52b.

299. Kevin Zimmerman, *Tesla Shuttters Greenwich Showroom*, WESTFAIR BUS. J. (Mar. 12, 2019), <https://westfaironline.com/fairfield/tesla-shuttters-greenwich-showroom/>. Tesla claims the dealer association sent "secret shoppers" to the showroom to attempt to induce the sales staff there into crossing the line between explaining product features to selling a vehicle. Fred Lambert, *Tesla Says a Local Car Dealer Association Sent 'Secret Shoppers' to Try to Shut Down Their Gallery*, ELECTREK (May 5, 2017, 3:21 PM), <https://electrek.co/2017/05/05/tesla-connecticut-car-dealer-secret-shoppers/>.

300. Fred Lambert, *Tesla Finds Workaround to Lease Cars in Connecticut, Where Car Dealers/Politicians Are Blocking Sales*, ELECTREK (Dec. 18, 2019, 8:17 AM), <https://electrek.co/2019/12/18/tesla-finds-workaround-to-lease-cars-in-connecticut-where-car-dealers-politicians-are-blocking-sales/>.

discuss a lease may end up deciding to buy the car online instead.³⁰¹ In 2023, Tesla announced plans to open a showroom on Indian tribal land in order to circumvent Connecticut's dealer license laws.³⁰² A representative from the dealer association commented, "I would suggest their pivoting to the sovereign nation is representative of them not wanting to abide by the law."³⁰³

iv. Iowa. Iowa law prohibits manufacturers from being licensed as a motor vehicle dealer.³⁰⁴

v. Kansas. Kansas law prohibits manufacturers from owning a dealership, operating a dealership, acting in the capacity of a dealership, "or otherwise sell[ing] new vehicles at retail."³⁰⁵

vi. Kentucky. Kentucky law prohibits manufacturers from owning or operating vehicle dealerships.³⁰⁶ EV manufacturers, such as Tesla, operate service centers where customers can take delivery of a vehicle they purchase online.³⁰⁷

vii. Louisiana. Louisiana's franchise law does not permit manufacturers to sell directly to consumers.³⁰⁸ In 2017, Louisiana enacted Senate Bill 107 explicitly prohibiting DTC sales.³⁰⁹ According to Tesla, customers in Louisiana have to go out of state to buy its vehicles.³¹⁰ The state has also attempted to stop Tesla from leasing vehicles or from providing warranty

301. Jon Fingas, *Tesla Found a Loophole That Lets It Lease Cars in Connecticut*, ENGADGET (Dec. 18, 2019), <https://www.engadget.com/2019-12-18-tesla-can-lease-cars-in-connecticut.html>.

302. Fred Lambert, *Tesla to Use Tribal Land Loophole to Finally Operate in Connecticut*, ELECTREK (July 26, 2023, 9:49 AM), <https://electrek.co/2023/07/26/tesla-use-tribal-land-loophole-operate-connecticut/>; see also Patrick Skahill, *Tesla Showroom, First of Its Kind in CT, Opens at Mohegan Sun*, CONN. PUB. RADIO (Dec. 8, 2023, 12:25 PM), <https://www.ctpublic.org/news/2023-12-08/tesla-showroom-first-of-its-kind-in-ct-opens-at-mohegan-sun> (discussing the tribal land loophole Tesla is using).

303. Susan Haigh & The Associated Press, *Elon Musk Is Bringing Tesla Showrooms To Native American Tribal Land to Get Around Local Car Dealership Laws*, FORTUNE (July 29, 2023, 10:40 AM), <https://fortune.com/2023/07/29/elon-musk-tesla-showrooms-native-american-tribal-land/>.

304. IOWA CODE § 322.3(14) (2023).

305. KAN. STAT. ANN. § 8-2438 (2024).

306. KY. REV. STAT. ANN. § 190.070 (West 2023).

307. Marcus Green, *Tesla Plans a Louisville 'Dealership.' Kentucky Law Could Complicate That*, WDRB (Aug. 6, 2021), https://www.wdrb.com/in-depth/tesla-plans-a-louisville-dealership-kentucky-law-could-complicate-that/article_d3792304-f6de-11eb-92cd-c7a2428f7844.html; see also Ben Tobin, *What's Going on with Tesla's First Planned Facility in Louisville? Here's What We Know*, LOUISVILLE COURIER J. (Aug. 16, 2021, 5:46 AM), <https://www.courier-journal.com/story/money/companies/2021/08/16/tesla-kentucky-what-can-be-expected-out-companys-facility/5554344001/> (discussing how opening a service center does not require the license that a dealership does).

308. LA. STAT. ANN. § 32:1261(A)(1)(k) (2022).

309. Mike Dolzer, *Tesla Hit with New Louisiana Law That Prohibits Direct Sales in State*, TESLARATI (June 7, 2017), <https://www.teslarati.com/louisiana-law-prohibit-tesla-direct-sales/>.

310. Meghan Bobrowsky, *Tesla Sues to Sell Cars Directly To Consumers in Louisiana*, WALL ST. J., <https://www.wsj.com/articles/tesla-sues-to-sell-cars-directly-to-consumers-in-louisiana-11661806328> (last updated Aug. 29, 2022, 5:54 PM).

service to the existing 3,000 vehicles registered in the state.³¹¹ Legal challenges to the Louisiana laws are discussed in Section IV.C.³¹²

viii. Montana. Montana law prohibits manufacturers from owning or operating dealerships in the state.³¹³

ix. Nebraska. Nebraska law prohibits manufacturers from owning or operating dealerships.³¹⁴ Several times, the legislature has considered legislation to enable EV manufacturers to sell DTC, such as in 2018 when Legislative Bill 830 was considered.³¹⁵ The state has also considered legislation that would expressly define EV manufacturers as manufacturers under the state franchise law, in response to Delaware's court ruling that its franchise law only applied to manufacturers with existing franchise relationships.³¹⁶ This legislation would have shut down Nebraska's only service center for Tesla and was not passed.³¹⁷

x. New Mexico. Under New Mexico law, it is illegal for a manufacturer to be licensed as a dealer.³¹⁸ The prohibition extends beyond selling cars and includes performing any warranty service on vehicles.³¹⁹ In 2021, Tesla responded by renovating an old casino on tribal lands in Nambé Pueblo into a sales and service center,³²⁰ and constructed a new sales, service, and delivery facility on tribal lands on the Pueblo of Santa Ana in 2023.³²¹ Several attempts to reform New Mexico law to permit DTC have failed under heavy lobbying by car dealers.³²²

311. *Id.*

312. See discussion *infra* Section IV.C (regarding a specific case challenging Louisiana law).

313. MONT. CODE ANN. § 61-4-208(3)(a) (2024).

314. NEB. REV. STAT. § 60-1438.01(2)(a) (2024).

315. Simon Alvarez, *Tesla Attends Nebraska Hearing in Support of New Bill for Direct Sales Rights*, TESLARATI (Jan. 31, 2018), <https://www.teslarati.com/tesla-nebraska-bill-support-direct-sales-model/>.

316. Andrew Wegley, *Tesla Opened a Service Center in Lincoln. Then, by Accident, a Bill Threatened to Close It*, LINCOLN J. STAR (Feb. 11, 2024), https://journalstar.com/news/local/government-politics/tesla-opened-a-service-center-in-lincoln-then-by-accident-a-bill-threatened-to-close/article_3d1dde7e-c768-11ee-9f19-c738b2aaf4b3.html.

317. *Id.*

318. N.M. STAT. ANN. § 57-16-5(v) (2024).

319. *Id.*

320. Brittany Bade, *Tesla Distribution, Service Center Set To Open on Nambe Pueblo*, KRQE NEWS (Sept. 9, 2021, 7:32 PM), <https://www.krqe.com/news/business/tesla-distribution-service-center-set-to-open-on-nambe-pueblo/>; Fred Lambert, *Tesla Finds Loophole to New Mexico's Dumb Ban by Launching on Tribal Land*, ELECTREK (Sept. 10, 2021, 3:54 AM), <https://electrek.co/2021/09/10/tesla-finds-loophole-new-mexico-dumb-ban-launching-tribal-land/>.

321. *Pueblo of Santa Ana & Tesla Host Groundbreaking for a New Mexico First*, ALBUQUERQUE REG'L ECONOMIC ALL. (June 1, 2023), <https://finance.yahoo.com/news/albuquerque-regional-economic-alliance-pueblo-150500651.html>.

322. See Albuquerque Journal Editorial Board, *Editorial: Tesla Dealership at Nambé Shows NM Needs to Update Law*, ALBUQUERQUE J. (Sept. 29, 2021), https://www.abqjournal.com/opinion/editorials/editorial-tesla-dealership-at-namb-shows-nm-needs-to-update-law/article_4233c2a5-8ffc-58fd-989e-47810c30bc77.html.

xi. North Dakota. Under a provision titled “Factory Store Prohibited,” North Dakota law prohibits manufacturers from owning any dealerships in the state.³²³

xii. Oklahoma. Oklahoma law prohibits issuing a dealer license to manufacturers.³²⁴ Although Tesla now operates galleries in the state, a new legislative push to close galleries is gaining ground in Oklahoma.³²⁵

xiii. South Carolina. South Carolina law prohibits manufacturers from owning or operating a dealership in the state.³²⁶ The state also prohibits manufacturers from operating a repair facility, forcing Tesla to offer mobile repairs only.³²⁷ Attempts in 2019 and 2022 to authorize DTC for EV manufacturers failed.³²⁸

xiv. South Dakota. South Dakota law prohibits manufacturers from owning or operating dealerships.³²⁹

xv. Texas. Texas law prohibits manufacturers from owning, operating, controlling, or acting in the capacity of dealerships.³³⁰ Another section of Texas law states “[a] motor vehicle shall not be advertised for sale in any manner that creates the impression that it is being offered for sale by the manufacturer or distributor of the motor vehicle.”³³¹ Language “such as ‘factory sale,’ . . . ‘wholesale prices,’ ‘factory approved,’ ‘factory sponsored,’ ‘manufacturer sale,’ or ‘distributor sale [. . .]’” are expressly outlawed.³³² Multiple attempts to change the law, especially after Tesla relocated its headquarters to Texas, were proposed but ultimately failed to overcome objections by the dealer lobby.³³³ After building a multi-billion dollar factory

323. N.D. CENT. CODE § 39-22-24 (2024).

324. OKLA. STAT. tit. 47, § 565(11) (2024).

325. Fred Lambert, *Tesla Fights Back Against Oklahoma Politicians Trying to Shut Down Its Stores*, ELETREK (Feb. 20, 2024, 9:24 AM), <https://electrek.co/2024/02/20/tesla-fights-back-against-oklahoma-politicians-shut-down-stores/>.

326. S.C. CODE ANN. § 56-15-45(A) (2004).

327. *Id.* § 56-15-45(C).

328. Herb Frazier, *Effort to Break Direct Car Sale Ban Stalls at Statehouse*, CHARLESTON CITY PAPER (Sept. 4, 2022), <https://charlestoncitypaper.com/2022/09/04/effort-to-break-direct-car-sale-ban-stalls-at-statehouse/>; see also Joseph Bustos, *McMaster Teases Automakers Interested in SC Business, Mulls Letting Tesla Sell in State*, STATE (Oct. 19, 2022), <https://www.thestate.com/news/politics-government/article267326732.html> (discussing Governor Henry McMaster’s support for allowing Tesla to sell cars in South Carolina).

329. S.D. CODIFIED LAWS § 32-6B-80 (2024).

330. TEX. OCC. CODE § 2301.476.

331. 43 TEX. ADMIN. CODE § 215.261.

332. *Id.*

333. See Jordan Bontke, *Texas Law Keeps Teslas Made in the State from Being Sold Directly To Texans*, CBS AUSTIN (Oct. 8, 2021), <https://cbsaustin.com/news/local/texas-law-keeps-teslas-made-in-the-state-from-being-sold-directly-to-texans>. The Texas Automobile Dealers Association argues that Texas dealers are pro-innovation and electric cars, and that franchise laws prevent monopolies and promote competition while protecting jobs. See Dylan Baddour, *Tesla vs. Texas Dealerships Explained: Are More Luxury Electric Cars Headed Our Way?*, HOUSTON CHRONICLE (May 26, 2016, 1:51 PM), <https://www.houstonchronicle.com/local/explainer/article/texas-law-tesla-franchise-dealership-electric-cars-7940158.php>.

in Texas, Tesla must ship its cars out of state before it can be sold to a Texas customer.³³⁴

xvi. West Virginia. In 2015, West Virginia moved to block Tesla.³³⁵ West Virginia law prohibits manufacturers from owning a dealership or acting in the capacity of a dealership.³³⁶

xvii. Wisconsin. Wisconsin law prohibits manufacturers from owning or operating a dealership.³³⁷ Legislators proposed legislation that would allow EV manufacturers to engage in DTC in 2017, but it was strongly opposed by the Wisconsin Automobile & Truck Dealers Association.³³⁸ Legislation finally passed in 2019 but was vetoed by Governor Tony Evers.³³⁹

V. THE LOSING WAR IN COURTS THUS FAR

As detailed in Part III, local dealers and automakers are engaged in various legal skirmishes across the states to settle the question of DTC by manufacturers.³⁴⁰ The unpredictable nature of litigation and political lobbying is partly the reason the patchwork of legal restrictions on automaker DTC among the fifty states still exists.³⁴¹ This Part examines the more consequential litigation from automakers in their attempts to change the landscape of state dealer-franchise laws.

A. Ford v. Texas (2001)

In 2001, Ford Motor Company engaged in a legal battle with Texas that addressed the constitutionality of that state's dealer franchise laws

334. See John Voelcker, *Tesla Will Have to Ship Its Texas-Built Cars Out of State to Sell Back To Residents*, DRIVE (May 27, 2021), <https://www.thedrive.com/tech/40779/tesla-will-have-to-ship-its-texas-built-cars-out-of-state-to-sell-back-to-residents>; Clark, *supra* note 64; Charles Morris, *Texas Fails to Change Dealership Law—Tesla Still Can't Sell Directly to State Residents*, CHARGED (May 28, 2021), <https://chargedevs.com/newswire/texas-fails-to-change-dealership-law-tesla-still-cant-sell-directly-to-state-residents/>; Niraj Chokshi et al., *Are Tesla and Texas a Perfect Match? It's Questionable*, N.Y. TIMES (Oct. 13, 2021), <https://www.nytimes.com/2021/10/08/business/tesla-texas-headquarters.html>.

335. Ben Popper, *Tesla Sales Banned by West Virginia, Whose Senate President Is Also an Auto Dealer*, VERGE (Apr. 3, 2015, 12:05 PM), <https://www.theverge.com/2015/4/3/8340433/west-virginia-ban-block-tesla-sales>.

336. W. VA. CODE §17A-6A-10(b)(12) (2024).

337. WIS. STAT. § 218.0121(2m) (2024).

338. Paul Gores, *Legislation Would Let Tesla Sell Directly To Buyers in Wisconsin*, MILWAUKEE J. SENTINEL (Nov. 1, 2017, 5:12 PM), <https://www.jsonline.com/story/money/business/2017/11/01/legislation-would-allow-direct-sales-tesla-wisconsin/822821001/>.

339. Brianna Reilly, *Gov. Tony Evers Signs First State Budget into Law After Issuing 78 Partial Vetoes*, CAP TIMES (July 3, 2019), https://captimes.com/news/local/govt-and-politics/gov-tony-evers-signs-first-state-budget-into-law-after-issuing-78-partial-vetoes/article_eed605f4-11e0-5b62-bd5a-3757f2e22bb9.html.

340. See discussion *supra* Part III (viewing nationwide legislative approaches to the issue).

341. See discussion *supra* Part III (providing examples of pushback against legislative approaches to the issue).

head-on.³⁴² In that case, Ford attempted to launch an e-commerce site, www.fordpreowned.com, for customers in Houston, Atlanta, Boston, Washington, D.C., New York, and Newark to view an online selection of preowned Ford vehicles.³⁴³ The vehicles were originally leased by a Ford dealer, sold or leased by Ford to a rental car company, or used as service vehicles by Ford employees.³⁴⁴ Customers interested in purchasing a vehicle could place a \$300 refundable deposit, and then arrange to have the vehicle delivered to a dealer in one of those cities in order to test drive the vehicle.³⁴⁵ Prices were billed as non-negotiable.³⁴⁶ Once the customer agreed to purchase the vehicle, Ford transferred the title to the dealer, who then transferred title to the customer.³⁴⁷ Twenty-two dealers in Houston signed “Dealer Participation Agreements” with Ford agreeing not to charge any extra fees, not to attempt to interest the customer in any other vehicles until after the customer declined to purchase the Ford vehicle, and not to deviate from the non-negotiable price.³⁴⁸ The Texas Motor Vehicle Division filed an administrative complaint against Ford with the Texas Motor Vehicle Board, and notified the participating dealers that they were aiding and abetting a violation of Texas law.³⁴⁹ Ford consequently filed suit in federal court alleging Texas franchise law violates the Dormant Commerce Clause, First Amendment, Equal Protection Clause, Due Process Clause, and is unconstitutionally vague.³⁵⁰ The district court found in favor of the State.³⁵¹

A three-judge panel of the Fifth Circuit affirmed the ruling.³⁵² On the Dormant Commerce Clause claim, the court held that first, the Texas statute did not intentionally discriminate against out-of-state commerce since it applied equally to all manufacturers, regardless of whether they were domiciled in Texas or not, writing:

Section 5.02C(c) does not discriminate based on Ford’s contacts with the State, but rather on the basis of Ford’s status as an automobile manufacturer. It is irrelevant under § 5.02C(c) whether Ford, as a manufacturer, is domiciled in Texas or Michigan. In either circumstance, it is similarly prohibited from engaging in retail automobile sales in Texas.³⁵³

342. Ford Motor Co. v. Tex. Dep’t. of Transp., 264 F.3d 493, 498 (5th Cir. 2001).

343. *Id.* at 499.

344. *Id.*

345. *Id.*

346. *Id.*

347. *Id.*

348. *Id.*

349. *Id.* at 498.

350. *Id.*

351. *Id.*

352. *Id.* at 512.

353. *Id.* at 502 (citing *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 87 (1987)).

The absence of this discrimination, reasoned the court, saved the Texas statute from the Supreme Court's definition of a discriminatory law under the Dormant Commerce Clause.³⁵⁴

Having found no discrimination, the court then turned to balancing of the burdens of the law on interstate commerce relative to the putative local benefits, as required by *Pike v. Bruce Church*.³⁵⁵ The court totally discounted any benefits of Ford's preowned showroom plan, finding "[t]hese arguments relate to the economic efficacy of the statute and are misdirected to this Court."³⁵⁶ The court also found no substantial burden on interstate commerce, writing "[t]he number of out-of-state vehicles retailed in Texas will not decrease" because of the Texas law.³⁵⁷ Even if there was a burden, the court found that Ford had "failed to establish that the burden is clearly excessive in relation to the putative local benefits."³⁵⁸

In this analysis, the court seems to have tripped on itself. By refusing to consider any benefits of the Ford showroom, the court appears to have rejected any notion of being able to engage in the balancing of interests required by *Pike*.³⁵⁹ Yet, the court in the same section found that Ford failed to establish that the burden on interstate commerce is excessive compared to the putative local benefits, a statement that seems to require some sort of judgment on the benefits, which the court purportedly refused to do.³⁶⁰ The opinion confirms this reluctance: "[T]his Court will not 'second guess the empirical judgment of lawmakers concerning the utility of legislation.'"³⁶¹ As discussed in Part V, twenty-two years later, six Justices on the Supreme Court, in another Dormant Commerce Clause decision involving California and the humane treatment of pigs, reminded federal judges that they have an obligation under *Pike* to engage in precisely this sort of balancing that the *Ford* court rejected.³⁶²

In its decision, the majority opinion in *Ford* lent a great deal of weight to the Supreme Court's decision in *Exxon Corp. v. Maryland*, discussed in Section V.A.³⁶³ In *Exxon*, oil producers challenged the constitutionality of a Maryland statute that prohibited oil producers from operating retail service stations in Maryland.³⁶⁴ The Supreme Court upheld the Maryland statute, holding that "merely because 'the burden of a state regulation falls on some

354. *Id.* at 502.

355. *Id.* at 503.

356. *Id.*

357. *Id.*

358. *Id.*

359. *See id.*

360. *Id.*

361. *Id.* (quoting *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 92 (1987)).

362. *See* discussion *infra* Section V.B (discussing the Court's decision in *NPPC*).

363. *See* discussion *infra* Section V.A (discussing the factual background and Court's reasoning in *Exxon*).

364. *Ford Motor Co.*, 264 F.3d at 500–01.

interstate companies does not, by itself, establish a claim of discrimination against interstate commerce.”³⁶⁵ The Fifth Circuit found “no significant factual or legal distinction between *Exxon* and the instant case.”³⁶⁶

In a concurring opinion, however, Judge Edith Jones wrote that *Exxon* compelled a result against Ford, but that “*Exxon* seems woefully out of step with the [Supreme] Court’s more recent cases.”³⁶⁷ Judge Jones then engaged in precisely the type of balancing that *Pike* requires, writing:

Ford’s dealer-cooperative, consumer-friendly program ought not be stymied by parochial state legislation. It should be obvious that the flow of interstate goods is diminished when barriers to entry totally prevent fair competition by a class of potential distributors: the favored local distributors’ price and service incentives become less keenly competitive, prices rise, and overall sales will decline from the free-market equilibrium point.³⁶⁸

This sounds very much like an argument for a “substantial burden on interstate commerce” that is required by *Pike*.³⁶⁹ Judge Jones ended her concurring opinion with this challenge: “Since this Texas statute appears to reflect a genre of state laws favoring local automobile dealers over out-of-state manufacturers, perhaps the Supreme Court will give us further guidance.”³⁷⁰ Twenty-two years later, in *NPPC*, the Court did just that, as discussed in Part V.³⁷¹ Most importantly, a dissenting opinion by Chief Justice Roberts cautioned that *Exxon* involved only firms that wanted to do business in one state, not the sort of broad, extraterritorial laws with broad national impacts represented by most state dealer franchise laws.³⁷²

B. *Lucid v. Johnston* (2022)

Lucid finds itself in a similar situation that Tesla did a decade ago, with distribution of its vehicles a major impediment to growing.³⁷³ On November 1, 2022, *Lucid* filed suit against Texas in federal district court.³⁷⁴ In its complaint, *Lucid* described its DTC model, carried out through stores known

365. *Id.* at 501 (quoting *Exxon Corp. v. Maryland*, 437 U.S. 117, 126 (1978)).

366. *Ford Motor Co.*, 264 F.3d at 500.

367. *Id.* at 512 (Jones, J., concurring).

368. *Id.*

369. *See id.*

370. *Id.*

371. *See* discussion *infra* Section V.B (discussing the effects of the Court’s reasoning in *NPPC*).

372. *Nat’l Pork Producers Council v. Ross*, 598 U.S. 356, 394–404 (2023).

373. *See* Emmet White, *Lucid Motors Sues Texas over Dealership Rights*, AUTOWEEK (Nov. 7, 2022, 5:00 PM), <https://www.autoweek.com/news/industry-news/a41886748/lucid-motors-lawsuit-texas-dealership-rights/>.

374. Complaint at 1, *Lucid Grp. USA, Inc. v. Johnston*, No. 1:22-CV-1116-RP, 2022 WL 3512080 (W.D. Tex. July 22, 2024).

as “studios,” where customers can experience vehicle ordering, a virtual-reality system to experience chosen options, and educational displays on Lucid’s technology.³⁷⁵ The studios use no-haggle transparent pricing and employ salaried staff, which Lucid contrasted to franchised dealers’ sales personnel who are “typically paid based on sales, giving them the incentive to pressure consumers, push unprofitable add-ons, and employ hardball tactics to close deals.”³⁷⁶ The company stated that it has no intention to appoint franchised dealers, and that it would not be able to attract dealers anyway given its small volume and high cost of building and operating the studios.³⁷⁷

In the complaint, Lucid argued that Texas’s franchise law allowed Lucid to lease and rent vehicles, to sell previously leased or rented vehicles, to operate galleries to showcase vehicles and offer test drives, to sell vehicles to Texas residents from out-of-state studios, to arrange for financing of vehicles, to sell parts and accessories, and to provide repairs and service.³⁷⁸ “In short, Texas law allows vehicle manufacturers like Lucid to do everything that motor-vehicle dealers do—including selling motor vehicles to Texas consumers—with one single, narrow exception: selling new motor vehicles from an established and permanent physical location in the state.”³⁷⁹

The complaint alleged that Texas franchise law violated Lucid’s due process rights to pursue legitimate business subject only to regulations that are rationally related to the advancement of a legitimate governmental interest, and that economic protection of dealers is not a legitimate governmental interest.³⁸⁰ In a second count, the complaint alleged violations of its rights under the equal protection clause, which protects its rights to be free from arbitrary classifications by the state government by prohibiting a state from treating one set of persons differently from others who are similarly situated when there is no rational basis for the differential treatment.³⁸¹ Lucid filed a motion for summary judgment on the same day it filed its complaint, seeking a declaratory judgment that Texas franchise law is unconstitutional as applied.³⁸²

An amicus brief filed by the Pacific Legal Foundation, a nonprofit legal foundation defending “the right to earn a living free of arbitrary government interference,” argued that economic liberty was a central concern of the

375. *Id.* at 5.

376. *Id.* at 6.

377. *Id.* at 7.

378. *Id.* at 9–10.

379. *Id.* at 10.

380. *Id.* at 15.

381. *Id.* at 16.

382. *Lucid Grp. USA, Inc. v. Johnston*, No 1:22-CV-1116-RP, 2023 WL 4539884, at *1 (W.D. Tex. June 21, 2023).

Fourteenth Amendment since the days of the Civil War.³⁸³ The brief also argued that laws restricting economic liberty must be rationally related to a legitimate state objective, and that economic protectionism is not a legitimate state interest.³⁸⁴ Finally, the brief argued that since the ban on DTC only benefits dealerships, it does not serve the public interest and is not rationally related to a legitimate government objective.³⁸⁵

On June 21, 2023, District Judge Pitman denied Lucid's motion for summary judgment without prejudice, finding the motion premature and holding that the defendants had shown why additional discovery in the case was needed and how such discovery could create a genuine issue of material fact.³⁸⁶

On the same day, Judge Pitman denied the defendants' motion to dismiss for failure to state a claim.³⁸⁷ Judge Pitman noted that both sides agreed that rational basis review applied to the case and that "the Due Process clause protects the 'right to pursue legitimate business subject only to regulations that are rationally related to the advancement of a legitimate governmental interest.'"³⁸⁸ More importantly, the court found that Lucid's claim is not foreclosed by *Ford Motor Co. v. Texas Department of Transportation*.³⁸⁹ That case, discussed in Section IV.A, rejected Ford's constitutional challenges to Texas franchise law.³⁹⁰ Judge Pitman held that the issues presented by Lucid are unique to manufacturers that do not already have dealers, which was an issue the Fifth Circuit did not address in *Ford*.³⁹¹ Judge Pitman also found it persuasive that Lucid cannot control the supply of vehicles to dealers since it does not have any dealers, which was a central part of the Fifth Circuit's decision upholding Texas's policy reasons for the DTC prohibition against Ford.³⁹²

While this case is in active litigation at the time of this writing, it is important to note that the plaintiff did not raise a challenge under the Dormant

383. Brief of Pacific Legal Foundation as Amicus Curiae in Support of Plaintiff's Motion for Summary Judgment at 1, *Lucid Grp. USA, Inc. v. Johnston*, No. 1:22-CV-1116-RP, 2024 WL 3512080 (W.D. Tex. Nov. 29, 2022).

384. *Id.* at 5.

385. *Id.* at 15.

386. *Lucid Grp. USA, Inc.*, 2023 WL 4539844, at *2.

387. *Lucid Grp. USA, Inc. v. Johnston*, 1:22-CV-1116-RP, 2023 WL 5688153, at *7 (W.D. Tex. June 21, 2023).

388. *Id.* at *3 (quoting Complaint at 15, *Lucid Grp. USA, Inc. v. Johnston*, No. 1:22-CV-1116-RP, 2024 WL 3512080 (W.D. Tex. Nov. 29, 2022)).

389. *Id.* at *4.

390. *See id.*

391. *Id.*

392. *Id.* at *4-5.

Commerce Clause in its complaint.³⁹³ As explained throughout this Article, preserving the Dormant Commerce Clause challenge may be productive.³⁹⁴

C. *Tesla v. Louisiana (2023)*

As discussed in Part III, Louisiana has some of the most restrictive franchise laws in the country.³⁹⁵ All DTC sales are banned and the state is attempting to stop Tesla—a manufacturer who has never had any franchised dealers in Louisiana—from providing service or warranty work to customers who brought cars in from other states.³⁹⁶ In August 2022, Tesla filed a lawsuit against Louisiana in the Eastern District of Louisiana.³⁹⁷ The suit named the Louisiana Motor Vehicle Commission and several dealers as defendants, arguing that they conspired to pass a 2017 law that prohibits selling cars in a DTC model.³⁹⁸ In June 2023, the federal district court dismissed Tesla’s lawsuit, holding that the direct sales ban applied to all manufacturers and therefore did not amount to anti-Tesla animus.³⁹⁹

On Tesla’s Dormant Commerce Clause claims, the district court quickly dispatched any argument that Louisiana’s law discriminates against out of state commerce, since it does not do so on its face.⁴⁰⁰ The court also found that the law was applied evenhandedly.⁴⁰¹ The court’s discussion of the Dormant Commerce Clause claim, including its application of *Pike* balancing, was shockingly short, with discussion taking two paragraphs.⁴⁰² Relying heavily on *Ford*, the court wrote broadly that the Commerce Clause protects the interstate market, not particular interstate firms from prohibitive or burdensome regulations.⁴⁰³ As discussed in Part V, six Justices on the Supreme Court in *NPPC* believed that courts can, and should, engage in *Pike* balancing to find whether the challenged state law has a substantial impact

393. See Complaint at 15–17, *Lucid Grp. USA, Inc. v. Johnston*, No.1:22-CV-1116-RP, 2023 WL 5688153 (W.D. Tex. June 21, 2023).

394. See discussion *infra* Section V.B (discussing the potential hostility of courts to future Dormant Commerce Clause cases).

395. See *supra* Section III.A.5 (discussing Louisiana franchise laws).

396. Meghan Bobrowsky, *Tesla Sues to Sell Cars Directly to Consumers in Louisiana*, WALL ST. J. (Aug. 29, 2022, 5:54 PM), <https://www.wsj.com/articles/tesla-sues-to-sell-cars-directly-to-consumers-in-louisiana-11661806328>.

397. *Id.*

398. *Id.*

399. *Tesla Loses Bid to Overturn Louisiana’s Ban on Direct Car Sales*, REUTERS (June 16, 2023, 3:11 PM), <https://www.reuters.com/legal/tesla-loses-bid-overturn-louisianas-ban-direct-car-sales-2023-06-16/>.

400. *Tesla, Inc. v. La. Auto. Dealers Ass’n*, 667 F. Supp. 3d 417, 459 (E.D. La. 2023), *aff’d in part, vacated in part, rev’d in part*, 113 F.4th 511 (5th Cir. 2024).

401. *Id.* at 461.

402. *Id.*

403. *Id.*

on interstate commerce, something this district court simply did not do.⁴⁰⁴ In October 2023, Tesla filed an appeal to the Fifth Circuit Court of Appeals.⁴⁰⁵

Much in the automotive landscape has changed since *Ford* was handed down in 2001.⁴⁰⁶ Back then, Tesla did not exist, and all manufacturers that wanted to engage in DTC already had established franchised dealers.⁴⁰⁷ That important distinction will test *Ford* and *Exxon* in current litigation.⁴⁰⁸ Undoubtedly, that litigation will focus on constitutional challenges based on the First Amendment, Equal Protection, and Due Process clauses.⁴⁰⁹ The Part below, however, focuses solely on the constitutionality of state franchise laws based on the Dormant Commerce Clause.⁴¹⁰

VI. PIKE'S NEW LEASE ON LIFE

A. The Dormant Commerce Clause Framework

The Dormant Commerce Clause refers to the implicit restriction on state powers derived from the Commerce Clause of the U.S. Constitution, which grants Congress the power to regulate commerce among the states.⁴¹¹ The doctrine holds that this grant of power to Congress implies a negative command: states may not pass legislation that improperly burdens or discriminates against interstate commerce.⁴¹² For purposes of state dealer franchise laws and the Dormant Commerce Clause, the most important Supreme Court cases are *Pike v. Bruce Church* and *Exxon Corp. v. Governor of Maryland*.⁴¹³

Pike v. Bruce Church involved an Arizona state statute that required cantaloupes grown in Arizona to be packaged and packed in Arizona.⁴¹⁴ The state's interest was in ensuring that consumers knew that the cantaloupes were from Arizona.⁴¹⁵ The company appealing the statute, Bruce Church, Inc., said that it would cost \$200,000 to build a packing facility in Arizona.⁴¹⁶ Justice Stewart wrote that “the Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home State

404. Nat'l Pork Producers Council v. Ross, 598 U.S. 356, 403 (2023).

405. Tesla, Inc. v. La. Auto. Dealers Ass'n, 113 F.4th 511 (5th Cir. 2024).

406. See *Ford Motor Co. v. Tex. Dep't of Transp.*, 264 F.3d 493, 499 (5th Cir. 2001).

407. See *id.* at 508–09.

408. See *id.* at 499; *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 122 (1978).

409. See *Ford Motor Co.*, 264 F.3d at 499; *Exxon Corp.*, 437 U.S. at 122.

410. See generally *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970); *Exxon Corp.*, 437 U.S. at 122 (using these cases to explain the constitutionality of state franchise laws).

411. U.S. CONST. art. I, § 8.

412. See *id.*

413. See *Pike*, 397 U.S. at 140; *Exxon Corp.*, 437 U.S. at 117.

414. *Pike*, 397 U.S. at 140.

415. *Id.* at 143.

416. *Id.* at 144.

that could more efficiently be performed elsewhere.”⁴¹⁷ The Court formulated the rule as such: “Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”⁴¹⁸

Exxon Corp. v. Governor of Maryland dealt with a Maryland statute passed in 1973 during the oil crisis that prohibited oil producers from owning retail gas stations in the state.⁴¹⁹ Exxon owned thirty-six retail gas stations in Maryland, used to test innovative marketing concepts or products.⁴²⁰ The company sued the state, challenging the validity of Maryland’s statute on both constitutional and federal statutory grounds.⁴²¹

In the majority opinion upholding the Maryland statute, Justice Stevens wrote that the Commerce Clause does not protect “the particular structure or methods of operation in a retail market.”⁴²² The Commerce Clause “protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations.”⁴²³

It is important to note that the majority opinion did not refer to, or discuss, the Dormant Commerce Clause—even once.⁴²⁴ As Stephen Fox points out in his 2016 article, the *Exxon* court did not even cite *Pike* in its opinion.⁴²⁵ Instead, the court rested its opinion solely on the fact that overall supply of gasoline would not be decreased in the state, and that the law regulated all refiners evenhandedly without regard to their domicile.⁴²⁶ To Fox, this intentional overlooking of the protectionist reason for the laws means “legislators can achieve protectionist outcomes by manipulating regulations around existing economic realities.”⁴²⁷ Indeed, the idea that protectionism as an unconstitutional motivator for state laws under the Dormant Commerce Clause is decades old.⁴²⁸

417. *Id.* at 145.

418. *Id.* at 142.

419. *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 121 (1978).

420. *Id.*

421. *Id.* at 122.

422. *Id.* at 127.

423. *Id.* at 127–28.

424. Fox, *supra* note 99, at 170.

425. *Id.*

426. *Id.*

427. *Id.*

428. See generally Donald H. Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865, 1870 (1987).

B. National Pork Producers Council v. Ross (2023)

In 2001, in *Ford Motor Co. v. Texas Department of Transportation*, Judge Edith Jones challenged the Supreme Court to shed clarity on dealer franchise laws in spite of *Exxon*.⁴²⁹ In 2016, fifteen years later, Michigan’s Daniel Crane wrote that “there are glimmers of hope for a challenge to bans on pure direct distribution.”⁴³⁰ He argued that “if the courts demand more—actual empirical support, even if contestable, and logical consistency—then the direct distribution bans will be susceptible to challenge.”⁴³¹ He reviewed a Fourth Circuit decision using the Dormant Commerce Clause to invalidate a Virginia statute protecting motorcycle dealers.⁴³² He also reviewed two cases from the Fifth and Sixth Circuits involving protections for funeral homes from competition in casket cases.⁴³³ He emphasized the decisions’ dicta that “protecting a discrete interest group from economic competition is not a legitimate governmental purpose” in concluding that in the future, DTC bans may fail rational basis scrutiny under the Equal Protection Clause.⁴³⁴ The glimmer of hope that Professor Crane talked about, and the clarification that Judge Jones was asking for, was based in equal protection and rational basis, but as it turns out, a case involving pigs and California and the Dormant Commerce Clause provides much more than a glimmer of hope.⁴³⁵

NPPC was handed down by the Supreme Court in May 2023.⁴³⁶ The National Pork Producers Council sued California after 63% of participating voters passed Proposition 12 in 2018, prohibiting the sale of pork in California that comes from breeding pigs confined in a cruel manner.⁴³⁷ The district court and the Ninth Circuit dismissed the complaint for failing to state a claim under the Dormant Commerce Clause.⁴³⁸ Justice Gorsuch delivered the majority opinion for the Court affirming the lower courts, writing that “[w]hile the Constitution addresses many weighty issues, the type of pork chops California merchants may sell is not on that list.”⁴³⁹

The opinion first addressed the core holdings of Dormant Commerce Clause cases: “state laws offend the Commerce Clause when they seek to ‘build up . . . domestic commerce’ through ‘burdens upon the industry and

429. See *Ford Motor Co. v. Tex. Dep’t of Transp.*, 264 F.3d 493, 512 (5th Cir. 2001).

430. Crane, *supra* note 12, at 603.

431. *Id.*

432. *Id.* (discussing *Yamaha Motor Corp. v. Jim’s Motorcycle, Inc.*, 401 F.3d 560 (4th Cir. 2005)).

433. *Id.* at 604 (discussing *Joseph Abbey v. Castille*, 712 F.3d 215, 222 (5th Cir. 2013) and *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002)).

434. *Id.* (quoting *Craigmiles*, 312 F.3d at 224).

435. See *Ford Motor Co. v. Tex. Dep’t of Transp.*, 264 F.3d 493, 512 (5th Cir. 2001); Crane, *supra* note 12, at 603.

436. *Nat’l Pork Producers Council v. Ross*, 598 U.S. 356, 356 (2023).

437. *Id.* at 365.

438. *Id.* at 363.

439. *Id.* at 364.

business of other States,’ regardless of whether Congress has spoken.”⁴⁴⁰ This antidiscrimination principle lies at the “very core” of Dormant Commerce Clause jurisprudence.⁴⁴¹ In recent cases, the Court has interpreted this to mean that “the Commerce Clause prohibits the enforcement of state laws ‘driven by . . . economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.’”⁴⁴² The pork producers did not claim intentional discrimination by California, so the Court did not address this issue much further.⁴⁴³ It is important, however, that the Court affirmed the central line of reasoning in the Dormant Commerce Clause cases—states cannot pass laws driven by economic protectionism of in-state interests by burdening out-of-state competitors.⁴⁴⁴ When applied to state franchise laws protecting car dealers by prohibiting DTC sales, it would be hard to argue outright discrimination against out-of-state commerce.⁴⁴⁵ While there is certainly evidence to suggest that the laws are motivated by economic protectionism,⁴⁴⁶ the laws apply equally to in-state dealers as well as out-of-state dealers⁴⁴⁷ in outlawing DTC sales.

The pork producers then advanced two theories to argue their case. The first theory, the extraterritoriality doctrine, “forbid[s] enforcement of state laws that have the ‘practical effect of controlling commerce outside the State,’ even when those laws do not purposely discriminate against out-of-state economic interests.”⁴⁴⁸ The pork producers argued that Proposition 12 “impos[ed] substantial new costs on out-of-state pork producers,” thus having an extraterritorial impact on companies normally outside California’s jurisdiction.⁴⁴⁹ The pork producers relied on three cases to advance this argument—*Baldwin v. G.A.F. Seelig* (invalidating “New York laws that barred out-of-state dairy farmers from selling their milk in [New York] ‘unless the price paid to’ them matched the minimum price New

440. *Id.* at 369 (quoting *Guy v. Baltimore*, 100 U.S. 434, 443 (1880)) (internal quotations omitted).

441. *Id.* (quoting *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 581 (1997)).

442. *Id.* (citing *Dep’t of Rev. of Ky. v. Davis*, 533 U.S. 328, 337–38 (2008)).

443. *Nat’l Pork Producers Council*, 598 U.S. at 370–71.

444. *Id.* at 369–70.

445. *See supra* Section II.B (explaining that the origin of DTC laws purported to protect independent dealerships from manufacturers).

446. *See supra* Section I.B (discussing motivations for the franchise laws).

447. Not all dealers are local mom-and-pop entities. Some are large publicly-traded companies, such as AutoNation, Penske Automotive Group, Lithia Motors, Group 1 Automotive, Sonic Automotive, Hendrick Automotive Group, Berkshire Hathaway Automotive, and Asbury Automotive Group. *See The Largest Auto Dealers and Dealerships in the World*, DEALERONESTOP (July 20, 2023), <https://www.dealeronestop.com/the-largest-auto-dealers-and-dealerships-in-the-world/>. “As of 2021, the top 10 dealership groups in the [United States] had annual revenues of around \$100 billion, more than any company that actually makes cars.” Sammon, *supra* note 42.

448. *Nat’l Pork Producers Council*, 598 U.S. at 371 (quoting Brief for Petitioners at 2, *Nat’l Pork Producers Council v. Ross*, 598 U.S. 356 (2022) (No. 21-468), 2022 WL 2165184, at *2) (emphasis added).

449. *Id.*

York law guaranteed in-state producers”),⁴⁵⁰ *Brown-Forman Distillers Corp. v. New York State Liquor Authority* (invalidating a New York law “requir[ing] liquor distillers to affirm . . . that their in-state prices were no higher than their out-of-state prices”)⁴⁵¹, and *Healy v. Beer Institute* (invalidating “a Connecticut law requir[ing] out-of-state beer merchants to affirm that their in-state prices were no higher than those charged in neighboring States.”).⁴⁵² Justice Gorsuch rejected the theory that these cases created “an ‘almost *per se*’ rule under the [D]ormant Commerce Clause,” writing that “[t]his Court has never before claimed so much ‘ground for judicial supremacy under the banner of the [D]ormant Commerce Clause.’ We see no reason to change course now.”⁴⁵³

While the Court rejected adopting the *per se* rule, the Court did not water down the precedents in *Brown-Forman*, *Healy*, and *Baldwin*.⁴⁵⁴ The majority opinion reiterated its concern with “simple economic protectionism” in *Brown-Forman*,⁴⁵⁵ and stressed that the three state laws “had [the] *specific* impermissible ‘extraterritorial effect’ . . . [of] deliberately ‘prevent[ing] out-of-state firms from undertaking competitive pricing’ or ‘depriv[ing] businesses and consumers in other States of “whatever competitive advantages they may possess.””⁴⁵⁶ “In recognizing this much, we say nothing new.”⁴⁵⁷

Applied to state laws preventing DTC sales, it may be possible to argue that while the pork producers failed, the state franchise laws do run afoul of this line of cases. Forcing manufacturers like Tesla and Rivian, who have no franchised dealers anywhere, to establish franchises in Texas or Louisiana will create pricing pressures at the retail level.⁴⁵⁸ The dealers will necessarily demand a profit from their sales, which means the automakers will have to move away from a one-price nationwide model.⁴⁵⁹ This may very well lead to the kind of price discrimination that Justice Gorsuch found troubling, creating the specific extraterritorial effect of deliberately preventing the automakers from undertaking competitive pricing or depriving consumers in other states of their competitive advantages.⁴⁶⁰ Or, Tesla and Rivian could keep a national one-price, much like Apple products cost the same whether they are bought through a retailer or directly from Apple, and simply accept

450. *Id.* at 371–72 (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 519 (1935)).

451. *Id.* at 372 (citing *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986)).

452. *Id.* at 371–72 (citing *Healy v. Beer Inst.*, 491 U.S. 324, 328–31 (1989)).

453. *Id.* at 376 (quoting *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 337 (2007)) (internal citations omitted).

454. *Id.* at 373–74.

455. *Id.* at 372 (quoting *Brown-Forman*, 476 U.S. at 576).

456. *Id.* at 374 (quoting *Healy*, 491 U.S. at 338–39) (internal citations omitted).

457. *Id.*

458. See Rivian Automotive, *supra* note 60, at 6.

459. See Colias, *supra* note 119.

460. *Nat’l Pork Producers Council*, 598 U.S. at 375–76.

a smaller profit margin when forced to sell through a dealer.⁴⁶¹ Presumably, if that happened, *Baldwin* and its progeny would not be offended under the Court's *NPPC* ruling.⁴⁶²

After rejecting the extraterritoriality doctrine and declining to adopt the almost per se rule, Justice Gorsuch finally turned to the last theory advanced by the pork producers, which is a traditional analysis under *Pike*.⁴⁶³ As discussed in Section V.A, under *Pike*, courts should “assess ‘the burden imposed on interstate commerce’ by a state law and prevent its enforcement if the law’s burdens are ‘clearly excessive in relation to the putative local benefits.’”⁴⁶⁴ While upholding the central tenets of *Pike*, Justice Gorsuch, along with Justices Thomas and Barrett, cautioned that *Pike* does not allow judges to strike down state laws regulating the interstate sale of ordinary goods “based on nothing more than their own assessment of the relevant law’s ‘costs’ and ‘benefits.’”⁴⁶⁵ “Whatever other judicial authorities the Commerce Clause may imply, that kind of freewheeling power is not among them.”⁴⁶⁶ Judges should not use the “[D]ormant Commerce Clause as ‘a roving license for federal courts to decide what activities are appropriate for state and local government to undertake.’”⁴⁶⁷ Justice Gorsuch then wrote that judges cannot really conduct this kind of balancing in the pork case, which has increased costs of pork production on the cost side, and concern for the health and safety of California consumers on the benefit side:⁴⁶⁸

How is a court supposed to compare or weigh economic costs (to some) against noneconomic benefits (to others)? No neutral legal rule guides the way. . . . Really, the task is like being asked to decide “whether a particular line is longer than a particular rock is heavy.” . . . [Y]our guess is *better* than ours. In a functioning democracy, policy choices like these usually belong to the people and their elected representatives.⁴⁶⁹

It is important to remember that this part of the opinion, rejecting courts’ ability to conduct *Pike* balancing, is only supported by three Justices.⁴⁷⁰ Justices Kagan and Sotomayor, who provided the additional votes to affirm the lower courts, wrote separately:

461. See Colias, *supra* note 119.

462. See *Nat’l Pork Producers Council*, 598 U.S. at 374–75.

463. *Id.* at 377.

464. *Id.* (quoting Brief for Petitioners at 44, *Nat’l Pork Producers Council v. Ross*, 598 U.S. 356 (2022) (No. 21-468), 2022 WL 21651841).

465. *Id.* at 380.

466. *Id.*

467. *Id.* (quoting *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 343 (2007)).

468. *Id.* at 380–81.

469. *Id.* at 381–82 (quoting *Bendix Autolite Corp. v. Midwesco Enters. Inc.*, 486 U.S. 888, 897 (Scalia, J., concurring)).

470. See *id.* at 362 (majority opinion).

I acknowledge that the inquiry is difficult and delicate, and federal courts are well advised to approach the matter with caution. Yet, I agree with [the Chief Justice] that courts generally are able to weigh disparate burdens and benefits against each other, and that they are called on to do so in other areas of the law with some frequency. The means-ends tailoring analysis that *Pike* incorporates is likewise familiar to courts and does not raise the asserted incommensurability problems that trouble Justice [Gorsuch].⁴⁷¹

Nonetheless, Kagan and Sotomayor give the fourth and fifth votes to the majority based on their reading of the *Exxon* case.⁴⁷²

As discussed in Section V.A, the *Exxon* case involved a Maryland statute that “prohibit[ed] petroleum producers from operating retail gas stations in the State.”⁴⁷³ *Exxon* argued that since there were no in-state producers, the law’s requirements fell entirely on interstate companies “and threatened to force [them] to ‘withdraw entirely from the Maryland market’ or incur new costs to serve that market[,]” thus violating the Dormant Commerce Clause.⁴⁷⁴ Justice Gorsuch upheld the central holding of *Exxon*, that these facts did not demonstrate a substantial burden on interstate commerce under *Pike*.⁴⁷⁵ As discussed in Section V.A, on its face, Maryland’s law welcomed competition from interstate retail gas stations that did not produce petroleum, and therefore did not discriminate against out-of-state producers.⁴⁷⁶ “If the [D]ormant Commerce Clause protects the ‘interstate market . . . from prohibitive or burdensome regulations,’ . . . it does not protect ‘particular . . . firms’ or ‘particular structure[s] or methods of operation.’”⁴⁷⁷ “That goes for pigs no less than gas stations.”⁴⁷⁸ Putting the final flourish on upholding *Exxon*, he restated: “But the facts pleaded in this complaint merely allege harm to some producers’ favored ‘methods of operation.’”⁴⁷⁹ “A substantial harm to interstate commerce remains nothing more than a speculative possibility.”⁴⁸⁰

In summary, in *NPPC*, a majority of the Court upheld *Pike* and also upheld *Exxon*, holding that changes in particular structures or methods of operation are not substantial burdens on interstate commerce absent any other

471. *Id.* at 392–93 (Sotomayor, J., concurring in part) (internal citations omitted).

472. *Id.*

473. *Id.* at 383 (majority opinion) (citing *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 119–21 (1978)).

474. *Id.* (quoting *Exxon Corp.*, 437 U.S. at 125–27).

475. *Id.* at 384–85.

476. *See Exxon Corp.*, 437 U.S. at 125.

477. *Nat’l Pork Producers Council*, 598 U.S. at 384 (quoting *Exxon Corp.*, 437 U.S. at 127–28) (alteration in original).

478. *Id.* at 385.

479. *Id.* at 386–87 (quoting *Exxon Corp.*, 437 U.S. at 127).

480. *Id.* at 387.

discrimination.⁴⁸¹ If this were the end of the story, it would appear that *NPPC* would not lend any potential attack on state franchise laws outlawing DTC any help.⁴⁸²

The *NPPC* story does not end there, however. *NPPC* was a fractured opinion, generating what some legal scholars have dubbed the “Tidewater Voting Paradox.”⁴⁸³ The case broke down as follows:

[Justice Gorsuch] delivered the opinion of the Court with respect to Parts I, II, III, IV–A, and V, in which [Thomas, Sotomayor, Kagan, and Barrett] joined, an opinion with respect to Parts IV–B and IV–D, in which [Thomas] and [Barrett] joined, and an opinion with respect to Part IV–C, in which [Thomas, Sotomayor, and Kagan] joined. [Sotomayor] filed an opinion concurring in part, in which [Kagan] joined. Barrett filed an opinion concurring in part. Roberts filed an opinion concurring in part and dissenting in part, in which [Alito, Kavanaugh, and Jackson] joined. [Kavanaugh] filed an opinion concurring in part and dissenting in part.⁴⁸⁴

The dissent, written by Chief Justice Roberts, attracted four votes.⁴⁸⁵ He wrote: “Although *Pike* is susceptible to misapplication as a freewheeling judicial weighing of benefits and burdens, it also reflects the basic concern of our Commerce Clause jurisprudence that there ‘be free private trade in the national marketplace.’”⁴⁸⁶ In addressing Justice Gorsuch’s argument about weighing costs and benefits, he wrote: “I certainly appreciate the concern, but sometimes there is no avoiding the need to weigh seemingly incommensurable values.”⁴⁸⁷ Critically, the Chief Justice noted that although there were only four dissenters, the fractured opinion meant that “a majority of the Court agree[d] that it is possible to balance benefits and burdens under the approach set forth in *Pike*.”⁴⁸⁸ One commenter summarized as follows: After *NPPC*, six Justices (Kagan, Sotomayor, Roberts, Alito, Kavanaugh, and Jackson) believed the Dormant Commerce Clause permits courts to

481. *See id.* at 364.

482. *See id.*

483. David Post, *Another Voting Paradox Case (Pork Division)*, VOLOKH CONSPIRACY (May 16, 2023, 11:53 AM), <https://reason.com/volokh/2023/05/16/another-voting-paradox-case-pork-division/>.

484. *Id.* One commentator speculated on the possible sequencing of how the opinion became fractured as Justice Gorsuch circulated his drafts of the majority opinion. *See* Josh Blackman, *How Did Justice Gorsuch Lose a Majority in National Pork Producers?*, VOLOKH CONSPIRACY (May 12, 2023, 5:54 PM), <https://reason.com/volokh/2023/05/12/how-did-justice-gorsuch-lose-a-majority-in-national-pork-producers/>.

485. *Nat’l Pork Producers Council*, 598 U.S. at 394 (Roberts, C.J., concurring in part and dissenting in part).

486. *Id.* at 395 (internal citations omitted).

487. *Id.* at 396 (quoting *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 347 (2007)).

488. *Id.* at 397.

balance in-state benefits against out-of-state harms, even when the benefits and harms are incommensurable (e.g., economic vs. non-economic).⁴⁸⁹

The four dissenters went on to write that they would have remanded the case because the pork producers had alleged more than just increased compliance costs due to California’s Proposition 12; the producers had “identif[ied] broader, market-wide *consequences* of compliance—economic harms that our precedents have recognized can amount to a burden on interstate commerce.”⁴⁹⁰ Both compliance costs and “consequential market harms” are relevant in determining whether a state law impermissibly burdens interstate commerce.⁴⁹¹ He wrote, “Our cases provide no license to chalk up *every* economic harm—no matter how derivative—to a mere cost of compliance.”⁴⁹² Observing that Proposition 12 impacted farmers nationwide, even those that do not sell in California, he wrote: “We have found such sweeping extraterritorial effects, even if not considered as *per se* invalidation, to be pertinent in applying *Pike*.”⁴⁹³ In previous cases, the Court found state laws with a “nationwide reach” constituted an obvious burden on interstate commerce.⁴⁹⁴ The Chief Justice narrowed in especially on *Edgar v. MITE Corp.*,⁴⁹⁵ a case invalidating an Illinois corporate takeover statute that authorized the secretary of state to examine tender offers even for transactions occurring entirely outside the state’s borders because of its nationwide reach.⁴⁹⁶

The Chief Justice’s dissent also addressed *Exxon*.⁴⁹⁷ While he did not go so far as to express a desire to overrule *Exxon*, he found a big difference with the facts in *Exxon* (“[t]he producers in *Exxon* operated within Maryland and wished to continue doing so”) and the facts alleged by the pork producers (“Proposition 12 will force compliance on farmers who do not wish to sell into the California market, exacerbate health issues in the national pig population, and undercut established operational practices”).⁴⁹⁸ These national impacts, according to the Chief Justice, amount to economic harms against the interstate market—not just particular interstate firms—and are therefore a substantial burden under *Pike*.⁴⁹⁹ Similarly, dealer franchise laws have national impacts beyond their state borders, creating economic harms

489. Post, *supra* note 483.

490. *Nat’l Pork Producers Council*, 598 U.S. at 397 (Roberts, C.J., concurring in part and dissenting in part).

491. *Id.* at 398.

492. *Id.* at 399.

493. *Id.* at 400.

494. *Id.*

495. *Edgar v. MITE Corp.*, 457 U.S. 624 (1982).

496. *Nat’l Pork Producers Council*, 598 U.S. at 400 (Roberts, C.J., concurring in part and dissenting in part).

497. *Id.* at 401.

498. *Id.*

499. *Id.* at 402.

against the interstate market and potentially meeting the *Pike* substantial burden standard.⁵⁰⁰

After *NPPC*, some observers concluded that the majority of the Court was hostile to future Dormant Commerce Clause cases, given the pork council's loss to California.⁵⁰¹ A closer examination of the opinions, however, reveals the picture is not that clear. The most interesting vote of the *NPPC* case came from Justice Barrett.⁵⁰² She was part of the five-Justice majority under Justice Gorsuch to uphold the Ninth Circuit's dismissal of the pork producers' claims, but in a short separate concurrence, she wrote that she disagreed with the part of the opinion that the pork producers failed to allege a substantial burden on interstate commerce.⁵⁰³ "The complaint plausibly alleges that Proposition 12's costs are pervasive, burdensome, and will be felt primarily (but not exclusively) outside California. . . . If the burden and benefits were capable of judicial balancing, I would permit petitioners to proceed with their *Pike* claim."⁵⁰⁴

As discussed above, six Justices believe *Pike* balancing is possible.⁵⁰⁵ It is important to recall that in *Ford*, a three-judge panel flatly refused to engage in true *Pike* balancing,⁵⁰⁶ so this six-Justice majority is enough votes to call into serious question the validity of the *Ford* decision.⁵⁰⁷ And with Justice Barrett, five Justices believe the pork producers have alleged facts that demonstrate a substantial burden on interstate commerce.⁵⁰⁸ Chief Justice Roberts plainly said so in his dissent: "A majority of the Court agrees that—were it possible to balance benefits and burdens in this context—petitioners have plausibly stated a substantial burden against interstate commerce."⁵⁰⁹ Therefore, after *NPPC* when courts engage in *Pike* balancing, the kinds of economic harms alleged by the pork producers are sufficient to state a viable Dormant Commerce Clause claim.⁵¹⁰ In totality, the fractured dissents call into serious question the application of *Ford* and *Exxon* to state dealer franchise laws, two critical decisions the lower courts have relied upon.⁵¹¹

500. *Id.* at 374 (majority opinion).

501. See Ian Millhiser, *The Supreme Court Rediscovered Humility—In a Case About Pigs*, VOX (May 11, 2023, 12:55 PM), <https://www.vox.com/politics/2023/5/11/23719825/supreme-court-pigs-california-national-pork-producers-ross-neil-gorsuch>.

502. See *Nat'l Pork Producers Council*, 598 U.S. at 393–94.

503. *Id.* at 394.

504. *Id.*

505. See *id.* at 397.

506. See *supra* Section V.B (discussing the ruling in *Ford Motor Co. v. Tex. Dep't of Transp.*, 264 F.3d 493 (5th Cir. 2001)).

507. See generally *Nat'l Pork Producers Council*, 598 U.S. at 356 (showing the six-Justice majority).

508. *Id.* at 393–94.

509. *Id.* at 402 (Roberts, C.J., dissenting).

510. Post, *supra* note 486. Professor Post believes the votes of the case mean the pork producers should have won the case but did not because five Justices felt the claim should be dismissed. *Id.*

511. See *supra* Section IV.C (discussing the testing of *Exxon Corp.* and *Ford* in current litigation).

C. Dealer Franchise Laws Impose a Substantial Burden on Interstate Commerce Because of the Way It Alters Behavior Outside the State

The blueprint for overturning state dealer franchise laws is therefore set by *NPPC*.⁵¹² The Dormant Commerce Clause is alive and well, as is *Pike* and its balancing test.⁵¹³ Six Justices believe courts are capable of balancing “substantial burdens” versus “putative local benefits” as required by the *Pike* framework.⁵¹⁴ And five Justices found that a state law regulating humane treatment of pigs sufficiently alleged a substantial burden on interstate commerce.⁵¹⁵ Following this line of logic, plaintiffs in a potential case against state dealer franchise laws should consider how the laws, taken together, represent a substantial burden on interstate commerce.⁵¹⁶ If the plaintiffs could flip Justice Barrett, there would be a five-vote majority to conclude that the dealer franchise laws are a substantial burden on interstate commerce, and a trial could ensue on whether those burdens are outweighed by putative local benefits.⁵¹⁷

Using this line of reasoning adopted by the four Justices in dissent, an argument against state dealer franchise laws could easily be constructed.⁵¹⁸ The laws have a nationwide reach and impose a substantial burden on interstate commerce:

1. State franchise laws that restrict the DTC model explicitly discriminate against out-of-state commerce interests by favoring in-state dealerships and preventing manufacturers, many of which are based outside the state, from selling directly to consumers.⁵¹⁹

2. State dealer franchise laws restrict market entry and competition.⁵²⁰ Where franchised dealers are not present, they close off the market completely for vehicle startups like Tesla, Rivian, and Lucid, depriving citizens in those states from economic choice. Where franchised dealers are present, the laws prevent competition by the manufacturer even when the manufacturer can provide benefits customers want, such as lower prices or no-haggle pricing.⁵²¹ It is true that the existence of many same-brand dealers in a market can lead to price reductions (and that fewer same-brand dealers conversely results in higher prices)—one 2015 study found a substantial \$500

512. See generally *Nat'l Pork Producers Council*, 598 U.S. at 374 (discussing the effects of franchise laws).

513. See generally *id.* at 356–404 (discussing the *Pike* balancing test).

514. See generally *id.* (showing that six Justices believe the courts are capable of balancing).

515. See generally *id.* at 394–403 (showing how five Justices found a substantial burden).

516. See *id.*

517. See *id.*

518. See *id.*

519. See generally *id.* at 374 (majority opinion) (discussing the effect of franchise laws).

520. See *supra* Section I.B (providing examples of restrictions).

521. See *Crane*, *supra* note 12, at 576.

price increase in the price of a Honda Accord simply by increasing the distance between dealers by thirty miles.⁵²²

3. State dealer franchise laws represent extraterritorial regulation and impact.⁵²³ They have national implications by shaping how manufacturers design their sales and distribution models across the country.⁵²⁴ In the seventeen states where DTC is not allowed at all, home to more than 83 million people, customers who wish to visit a one-stop store to learn about a vehicle, test drive it, obtain financing, and purchase it, must go to another state to do so.⁵²⁵ In states that only allow Tesla to engage in DTC, representing another 120 million people, anyone who wishes to purchase a Rivian or Lucid must go out-of-state to find a store that will explain the product or features, and to purchase the vehicle.⁵²⁶ As explained in Part III, vehicles built in Tesla and Rivian factories in Texas and Georgia must leave the state before they can be sold to customers in Texas and Georgia.⁵²⁷ Each barrier to a seamless transaction adds costs to the final product and distorts the most natural and efficient distribution for the vehicle from factory to customer's hands.⁵²⁸ Licensing, registration, payment of local sales taxes, title transfer, insurance, service, and warranty repairs all become exponentially more complicated without the seamless one-stop shop that a traditional dealership can provide.⁵²⁹ This fragmented approach to distribution leads to inefficiencies, increased costs, and operational complexities that affect the companies' overall business practices, particularly downstream and upstream supply chain logistics, not just within the restrictive states but nationwide.⁵³⁰

4. Lack of putative local benefit. A key aspect of Dormant Commerce Clause analysis is whether any burden on interstate commerce is clearly excessive in relation to the putative local benefits.⁵³¹ Challengers could argue that the protectionist nature of these laws does not offer substantial local benefits that justify the burden on interstate commerce, especially in the context of environmental benefits associated with EVs and consumer demand for innovative purchasing options.⁵³² The Federal Trade Commission has considered the issue, and in 2014 wrote that state franchise laws operate as a special protection for dealers likely harming both competition and

522. T. Randolph Beard et al., *The Price Effects of Intra-Brand Competition in the Automobile Industry: An Econometric Analysis*, PHOENIX CTR. POL'Y PAPER NO. 48 (Mar. 2015), <https://www.phoenix-center.org/pcpp/PCPP48Final.pdf>.

523. *See Nat'l Pork Producers Council*, 598 U.S. at 374.

524. *See generally id.* (mentioning extraterritorial effects of franchise laws).

525. *See generally* Section III.A.5 (discussing areas where DTC is not available).

526. *See generally* Section III.A.4 (discussing areas where DTC is available to Tesla only).

527. *See supra* Part III (discussing all fifty states' approach to DTC).

528. *See Beard, supra* note 522 (discussing transaction costs).

529. *Id.*

530. *Id.*

531. *See Fox, supra* note 99 (providing the Commerce Clause analysis).

532. *Id.*

consumers, and stated its strong opposition to state laws that mandate a single method of distributing methods to consumers.⁵³³ In 2015, the FTC engaged in a kind of balancing of interests of its own, writing:

Protecting dealers from abuses by manufacturers does not justify a blanket prohibition like that in the current Michigan law . . . [a]bsent some legitimate public purpose, consumers would be better served if the choice of distribution method were left to motor vehicle manufacturers and the consumers to whom they sell their products.⁵³⁴

5. The market for vehicles is national and it is important to allow manufacturers to engage with consumers directly to foster competition, innovation, and consumer choice on a national scale.⁵³⁵ If a vehicle is closed off to hundreds of millions of Americans because of dealer franchise laws, companies will have to re-scale their investments, which will take much longer to amortize over a smaller production run, thus depriving them of the benefits of a national market which is precisely why the interstate commerce clauses exist.⁵³⁶ One think-tank predicted that allowing DTC for electric vehicles could increase EV adoption between 2023 and 2030 by between 360,000 and 3.9 million additional EVs, with a medium case increase of 1.4 million (a five percent increase).⁵³⁷

Ford was a clear win for the dealer lobby.⁵³⁸ While Lucid's Texas case winds its way through federal district court, and Tesla's Louisiana case is argued at the Fifth Circuit Court of Appeals, whether *Ford* remains good law appears up for grabs.⁵³⁹ *Ford*, in turn, rests on *Pike* and *Exxon*.⁵⁴⁰ How the courts address these two seminal cases will drive the future of state dealer franchise laws.⁵⁴¹ Critically, *NPPC* involves a set of relatively new Justices, creating a Court that is arguably less beholden to *stare decisis* than any other Court in history.⁵⁴² The breakdown of Justices in *NPPC*, fractured as it was,

533. Press Release, Fed. Trade Comm'n, FTC Staff: Missouri and New Jersey Should Repeal Their Prohibitions on Direct-to-Consumer Auto Sales by Manufacturers (May 16, 2014), <https://www.ftc.gov/news-events/news/press-releases/2014/05/ftc-staff-missouri-new-jersey-should-repeal-their-prohibitions-direct-consumer-auto-sales>.

534. Marina Lao et al., *Direct-To-Consumer Auto Sales: It's Not Just About Tesla*, FED. TRADE COMM'N (May 11, 2015), <https://www.ftc.gov/enforcement/competition-matters/2015/05/direct-consumer-auto-sales-its-not-just-about-tesla>.

535. See James Di Filippo & Tom Taylor, *Estimating the Impacts of Direct-to-Consumer Electric Vehicle Sales*, ATLAS PUB. POL'Y 2 (Sept. 2022), <https://atlaspolicy.com/wp-content/uploads/2022/09/direct-sales-report.pdf>.

536. See *id.*

537. *Id.*

538. See *Ford Motor Co. v. Tex. Dep't of Transp.*, 264 F.3d 493, 512 (5th Cir. 2001).

539. See *id.*

540. See *id.*; *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 181 (1970); *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 126 (1978).

541. *Ford Motor Co.*, 264 F.3d at 512; *Pike*, 397 U.S. at 157; *Exxon*, 437 U.S. at 126.

542. *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 403 (2023).

reveals a clear majority that are ready for a more muscular reading of the Dormant Commerce Clause.⁵⁴³

VII. CONCLUSION

In March 2024, the Environmental Protection Agency announced final rules on vehicle tailpipe emissions that would cut 7 billion tons of carbon emissions.⁵⁴⁴ To meet the rules, automakers must meet a fleet-wide 67% minimum standard of all-electric or plug-in hybrids (only up to 13% plug-in hybrids will count towards that 67% percent minimum) by 2032.⁵⁴⁵ The nation's largest vehicle market, California, is banning sales of all gasoline-powered vehicles in the state by 2035.⁵⁴⁶ As the nation moves towards an electric car future, the issue of DTC by electric vehicle manufacturers, as well as DTC by established manufacturers looking to sell more electric vehicles, will continue to put pressure on local car dealers.⁵⁴⁷ The dealers have enjoyed decades of influence with state legislators and the protection of protectionist state dealer franchise laws.⁵⁴⁸

The middleman approach for selling will always have a place in retailing products and services.⁵⁴⁹ Manufacturers, however, sometimes change their business models in response to changing market conditions and increased competition.⁵⁵⁰ Consider the plight of travel agents selling airline tickets.⁵⁵¹ Unfamiliar to most people under age thirty today, travel agents were a common fixture in the world of travel several decades ago.⁵⁵² Travel agents represented airlines, who paid a commission to the agents for every ticket they sold.⁵⁵³ Agents invested their time, resources, and expertise to cultivate a local clientele, and could advise customers through the buying process.⁵⁵⁴ With the advent of electronic ticketing, widespread air travel, and direct

543. *See id.*

544. *Biden-Harris Administration Finalizes Strongest-Ever Pollution Standards for Cars That Position U.S. Companies and Workers to Lead the Clean Vehicle Future, Protect Public Health, Address the Climate Crisis, Save Drivers Money*, ENV'T PROT. AGENCY (Mar. 20, 2024), <https://www.epa.gov/newsreleases/biden-harris-administration-finalizes-strongest-ever-pollution-standards-cars-position>.

545. Maxine Joselow, *Biden Seeks to Accelerate the EV Transition in Biggest Climate Move Yet*, WASH. POST (Mar. 20, 2024), <https://www.washingtonpost.com/climate-environment/2024/03/20/biden-car-emissions-rules/>.

546. Mike Colias & Christine Mai-Duc, *California Approves Rules to Ban Gasoline-Powered Cars by 2035*, WALL ST. J. (Aug. 25, 2022, 5:30 PM), <https://www.wsj.com/articles/california-set-to-approve-rules-to-ban-gasoline-powered-cars-by-2035-11661457578>.

547. *Id.*

548. *Id.*

549. *See* Naughton, *supra* note 49 (highlighting how car buying has primarily moved online).

550. Dennis Schaal, *AI Will Speed Travel Agent Decline, Says Booking CEO. Not So, Says ASTA Boss*, SKIFT (Aug. 5, 2024, 4:16 PM), <https://skift.com/2024/08/05/ai-will-speed-travel-agent-decline-says-booking-ceo-not-so-says-asta-boss/>.

551. *Id.*

552. *Id.*

553. *Id.*

554. *Id.*

distribution through airline websites (DTC), travel agents were no longer necessary to purchase tickets.⁵⁵⁵ Today, many airline tickets are purchased directly from an airline.⁵⁵⁶ Society has benefited tremendously—today, the price for air travel has come down, and consumers have many more choices for routes and timing than they ever had.⁵⁵⁷ Competition and DTC have driven innovation and product improvement, and consumers have benefited handsomely.⁵⁵⁸

Imagine if travel agents had organized the way car dealers had organized and obtained the influence of NADA and state counterparts.⁵⁵⁹ Imagine if travel agents spent millions on elections and direct campaign contributions and succeeded in getting laws passed that would prohibit customers from buying airline tickets directly from an airline in their home state. Airlines would be forced to pay a commission on each ticket sold through an agent, resulting in higher ticket prices and therefore reduced demand for air travel.⁵⁶⁰ Setting aside arguments surrounding the special federal regulation of airlines preempting state regulations, there is little factually to distinguish this scenario from what has happened in the states with automobile retailing.⁵⁶¹

As previously discussed, the lucrative business of automobile manufacturing is under siege from electric vehicles.⁵⁶² DTC by EV manufacturers would threaten dealer businesses, especially if EV sales reach a majority of vehicle sales as required by the EPA.⁵⁶³ Dealers also make a “majority of their money on servicing cars and financing them.”⁵⁶⁴ State franchise laws give dealers exclusive rights to perform reimbursed warranty services, which would disappear under DTC.⁵⁶⁵ EVs also have fewer component parts, requiring less services at the dealer.⁵⁶⁶ EV technicians are harder to find and train, and customers require more time and education before deciding to buy an EV.⁵⁶⁷ For these many reasons, dealers will continue to oppose DTC and use their considerable lobbying strength to maintain state dealer franchise laws.⁵⁶⁸ In spite of what the dealers say are local putative benefits of dealerships, state dealer franchise laws are “motivated by economic protectionism that favors dealers at the expense of

555. *See id.*

556. *Id.*

557. *See id.*; Sammon, *supra* note 42.

558. *See* Schaal, *supra* note 550.

559. *See* Sammon, *supra* note 42 (discussing NADA lobbying).

560. *See id.*

561. *Id.*

562. *See supra* Part II (discussing the shift to electric vehicles).

563. *See supra* Part II (discussing changes in consumer buying).

564. *See* Sammon, *supra* note 42.

565. *Id.*

566. *Id.*

567. *Id.*

568. *Id.*

consumers and innovative technologies.”⁵⁶⁹ An amicus brief filed in the Louisiana case at the Fifth Circuit Court of Appeals noted: “[T]he vehicle franchise acts of the mid-twentieth century, from which contemporary state statutes descend, were concerned with protecting *dealers*, not *consumers*.”⁵⁷⁰

In *NPPC*, a majority of judges on the Supreme Court demonstrated a continuing concern with excessive undue impact on interstate commerce.⁵⁷¹ Rather than walking away from *Pike*, it appears *Pike* has been sharpened, ready for use along with a mandate that courts engage in interest balancing.⁵⁷² Future legal challenges should argue for a more uniform, national approach to vehicle retailing that allows manufacturers to adopt business models that best suit their products, innovation strategies, and consumer preferences without being hindered by unconstitutional state-specific restrictions.⁵⁷³

569. In 2014, seventy-two academics, mostly from law and business schools, sent a letter to Governor Chris Christie outlining why a ban on DTC is motivated by economic protectionism. *Letter from Academics to Governor Chris Christie*, INT’L CTR. FOR LAW & ECON. (Mar. 26, 2014), https://law.wm.edu/documents/tesla_letter.pdf. In 2021, a group of seventy-one academics, again mostly from law school and business schools, penned an “open letter” in favor of DTC. See *Open Letter by Academics in Favor of Direct EV Sales and Service*, INT’L CTR. FOR LAW & ECON. (Apr. 14, 2021), <https://laweconcenter.org/wp-content/uploads/2021/04/Direct-Sales-Nationwide-Academics-Letter-4.14.pdf>.

570. Brief for Legal and Economic Scholars as Amici Curiae Supporting Appellant at 25, *Tesla Inc. v. La. Auto. Dealers Ass’n*, 677 F. Supp. 3d 417 (E.D. La. June 16, 2023) (No. 23-30480).

571. *Nat’l Pork Producers Council v. Ross*, 598 U.S. 356, 403 (2023).

572. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 181 (1970).

573. See *supra* Part V (discussing the best course of action to take regarding this issue).