In The

Supreme Court of Virginia

RECORD NO. 082305

VOLKSWAGEN OF AMERICA, INC., a corporation organized and existing under the laws of the State of New Jersey,
***Appellant*,**

v.

DEMERST B. SMIT, Commissioner of the Virginia Department of Motor Vehicles,

and

MILLER AUTO SALES, INC., a corporation organized and existing under the laws of the State of New Jersey,
Appellees.

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This case, which comes before this Court for a second time,[1] addresses a Virginia statute, Va. Code § 46.2-1569(7) (the "Statute"), which purports to regulate how automobile manufacturers allocate vehicles among their dealers. That Statute, which is part of a comprehensive series of provisions contained in the Virginia Motor Vehicle Dealer Franchise Act, Va. Code §§ 46.2-1500 *et seq.*, and administered by the Commissioner of the Department of Motor Vehicles (the "Commissioner"), provides that "it shall be unlawful for any manufacturer . . . :

> [t]o fail to ship monthly to any dealer, if ordered by the dealer, the number of new vehicles of each make, series, and model needed by the dealer to receive a percentage of total new vehicle sales of each make, series, and model equitably related to the total new vehicle production or importation <u>currently being achieved nationally</u> by each make, series, and model covered under the franchise.

Va. Code § 46.2-1569(7).

Appellant Volkswagen of America, Inc. ("Volkswagen") contends in this appeal that the Statute is unconstitutional in two respects. First, that the Statute is unconstitutionally vague in violation of established principles

[1] *See Volkswagen of America, Inc. v. Smit*, 266 Va. 444, 587 S.E.2d 526 (2003) ("*Volkswagen I*"), which addressed certain statutory construction issues but expressly deferred ruling on the two constitutional issues addressed in this appeal.

of due process, because: (i) it fails to give fair warning to the automobile manufacturers of what conduct is prohibited, and (ii) it delegates to the Commissioner regulatory authority without providing any ascertainable standards for enforcement. Second, the Statute violates the Commerce Clause because it impermissibly regulates interstate commerce, a power granted only to the Congress of the United States under the U.S. Constitution.

The appeal is from the affirmance by the Court of Appeals of Virginia of a final administrative agency decision of the Commissioner in response to a complaint brought against Volkswagen more than eleven years ago in 1998 by one of its Virginia dealers, Miller Auto Sales, Inc. ("Miller"). *Volkswagen of America, Inc. v. Smit, et al.*, 52 Va. App. 751, 667 S.E.2d 817 (2008).[2] The Commissioner found that Volkswagen had violated the Statute because it did not ship Miller any Beetle or Passat model vehicles during certain months in late 1997 and early 1998. The matter now comes back to this Court to decide the two Assignments of Error (nos. 2 and 3) relating to the constitutionality of the Statute under the Due Process and Commerce clauses.

[2] As noted, *infra*, the Miller Complaint challenges an allocation system instituted in 1997 and replaced by Volkswagen nearly ten years ago.

STATEMENT OF CONSTITUTIONAL IMPLICATION AND SIGNIFICANT PRECEDENTAL VALUE

This appeal raises issues of both constitutional impact and significant precedential value. As a result, the Court of Appeals' decision should not be permitted to stand as the final decision in this matter.

This case raises important constitutional issues under the dormant Commerce Clause of the U.S. Constitution and the Due Process Clauses of the Virginia and U.S. Constitutions. During the proceedings below, the Court of Appeals failed to perform a full analysis with respect to these constitutional matters. The constitutional issues in this case are of significant precedential value. Specifically, the due process issue in this matter raises the question of what amount of regulatory direction a state legislature must provide to an administrative agency charged with the enforcement of the state's regulatory laws. Additionally, the dormant Commerce Clause issue raises the question of how far an individual state can go in regulating certain aspects of the motor vehicle distribution industry.

Each year, more than $800 billion in new motor vehicle sales are made by independent franchised motor vehicle dealers throughout this country. The relationship between these dealers and the distributors they represent is regulated by a patchwork of different state laws. Although

these laws address the same regulatory areas, they do so in different ways, including ways that often have the effect of extending a state's regulatory regime beyond its own borders. These laws often place distributors in the cross-fire of competing state laws, where they are able to comply with the laws of one state only by disregarding the laws of others. The statute at issue in this case, Va. Code § 46.2-1569(7), is one such law. The issue of the constitutionality of such statute deserves the attention of the highest court of Virginia, a Commonwealth in which manufacturer-dealer laws are being actively adopted and enforced.

ASSIGNMENTS OF ERROR

2. The Court of Appeals erred by failing to hold that Va. Code § 46.2-1569(7) violates the dormant Commerce Clause of the United States Constitution on its face and as applied, despite the fact that the practical effect of the statute is to regulate commerce outside of the borders of this Commonwealth and despite the fact that the burden the statute places on interstate commerce outweighs any local benefits. *Volkswagen of America, Inc. v. Smit,* 52 Va. App. at 788-96, 667 S.E.2d at 835-40.

3. The Court of Appeals erred by failing to hold that Va. Code § 46.2-1569(7) violates the Due Process Clauses of the Virginia and U.S. Constitutions, despite the fact that the statute delegates to the Commissioner unfettered discretion to determine prohibited conduct on an arbitrary and ad hoc basis, and, as a result, is unconstitutionally vague and fails to provide fair warning to those whom the statute regulates. *Volkswagen of America, Inc. v. Smit,* 52 Va. App. at 796-99, 667 S.E.2d at 840-41.

QUESTIONS PRESENTED

1. Whether Va. Code § 46.2-1569(7) violates the Due Process Clauses of the Virginia and U.S. Constitutions because the statute delegates to the Commissioner standardless and unfettered discretion to determine prohibited conduct on an *ad hoc* and *post hoc* basis, and, as a result, is unconstitutionally vague and fails to provide fair warning to those whom the statute regulates. (Question relates to Assignment of Error No. 3.)

2. Whether Va. Code § 46.2-1569(7) on its face and as applied violates the dormant Commerce Clause of the United States Constitution because the practical effect of the statute is to regulate commerce outside of the borders of this Commonwealth (rather than within the borders of the Commonwealth of Virginia) and because the burden the statute places on interstate commerce outweighs any local benefits. (Question relates to Assignment of Error No. 2.)

STATEMENT OF FACTS AND SUMMARY OF PROCEEDINGS BELOW

This Court articulated most of the facts relevant to this appeal in its opinion issued the first time this case came before this Court in *Volkswagen I*, 266 Va. at 447-451, 587 S.E.2d at 528-30 (2003), and they need not be repeated here save in summary fashion.

This case began more than eleven years ago with a proceeding filed before the Commissioner in February, 1998. Since that time, as Commissioners and courts have debated the Statute's meaning, it has worked its way through two appeals to the Circuit Court for the City of Richmond, two appeals to the Court of Appeals of Virginia, and now this second appeal to this Court.

I. MILLER'S COMPLAINT.

This proceeding began on February 9, 1998, when Miller sent a letter to Volkswagen's local representative and a copy to then Commissioner Halcomb, which is the only "pleading" ever filed in this matter. That letter stated, simply:

> I am writing to you to respectfully inform you that allocating Volkswagens based on Customer Satisfaction Index, in my opinion, is against Virginia State Law, 46.2-1568 and 46.2-1569 especially number seven which are enclosed.[3]

(App. at 1.) The source of Miller's concern was a vehicle allocation system that Volkswagen had instituted in the fall of 1997 and replaced in 1999, under which dealers who scored below certain threshold scores on standardized customer satisfaction surveys, could have their allocations of certain high-demand vehicle models reduced. In response to Miller's letter, the matter proceeded to hearing in January, 1999, before a hearing officer appointed by the Commissioner, with Miller, in effect, acting as agency prosecutor. *Volkswagen of America, Inc. v. Smit*, 52 Va. App. 751, 760, 667 S.E.2d 817, 822 (2008).

[3] Va. Code § 46.2-1568 prohibits coercion of a dealer by a manufacturer; Va. 46.2-1569(7) is the statute at issue in this appeal.

II. THE FIRST HEARING AND APPEALS.

The issues in the first hearing were framed solely by Miller's complaint letter, which had claimed, not that Volkswagen had violated the Statute by shipping Miller too few vehicles, but that its method of allocation violated the Statute. Thus, the focus of the first hearing was whether Volkswagen's method of allocating vehicles, and in particular its use of customer satisfaction scores in the process, was somehow unfair or inequitable. During the course of those proceedings, the Commissioner never examined, and Miller took no position on, whether Volkswagen had shipped to Miller a sufficient number of vehicles or whether the number it had shipped complied with the Statute. Following the hearing, in a decision issued on July 12, 1999, the Commissioner found that the Volkswagen's "vehicle allocation methodology in effect since October, 1997, [was] unlawful and in violation of Va. Code § 46.2-1569(7)." He ordered Volkswagen to "replace the current allocation methodology with a new methodology that complies with the provisions of Va. Code § 46.2-1569(7)." (App. at 119.)

Volkswagen appealed the decision to the Circuit Court for the City of Richmond, advancing the constitutional arguments addressed in the instant

appeal, and also arguing that the Commissioner had misinterpreted the Statute by ignoring its plain language and that he had exceeded his authority by ordering Volkswagen to change its method of allocation and imposing certain sanctions. The Circuit Court rejected Volkswagen's constitutional arguments, affirmed the finding that Volkswagen had violated the Statute, but held that the Commissioner had exceeded his authority in ordering Volkswagen to change its method of allocation and imposing the sanctions. On appeal, the Court of Appeals affirmed, *Volkswagen of America, Inc. v. Quillian*, 39 Va. App. 35, 45, 569 S.E.2d 744, 749 (2002), and Volkswagen appealed to this Court.

In the first appeal, this Court reversed in part, vacated in part and remanded the decision of the Court of Appeals, ruling that the Court of Appeals had erred in affirming the Commissioner's July 12, 1999 decision. Examining the language of the Statute, this Court observed that Va. Code § 46.2-1569(7) does not regulate the method used to allocate vehicles, but instead regulates the number of vehicles manufacturers should actually ship to their Virginia dealers. The Court remanded the case, directing the Commissioner "to consider the actual monthly shipments that Volkswagen had made to Miller in relation to the number of new vehicles imported by Volkswagen on a national level," and instructed him to "determine whether

Miller obtained the number of such vehicles needed to receive a percentage of new vehicle sales 'equitably related' to the number of these types of vehicles imported by Volkswagen nationally." *Volkswagen I*, 266 Va. at 452, 587 S.E.2d at 531. Having concluded the Court of Appeals misinterpreted the Statute, the Court vacated the part of the Court of Appeals' decision which upheld the constitutionality of the Statute under the Commerce and Due Process Clauses. *Id*. at 454, 587 S.E.2d at 532.

III. THE SECOND HEARING AND APPEALS.

On remand, a second administrative hearing was conducted before a Commissioner-appointed hearing officer in February, 2005. This time Miller offered evidence relating to at least some of the information referenced in the Statute—specifically, it presented data showing the quantities of Beetle and Passat models imported by Volkswagen into the United States during the months at issue and compared those to the number shipped to Miller during those same months. However, Miller took no position on, and the Commissioner did not address, the question that the Statute actually imposes upon Volkswagen: that is, how many vehicles should it have shipped Miller in order to comply with the Statute—in other words, how many such vehicles Miller needed in order to receive "a percentage of total

new vehicle sales . . . equitably related to the total new vehicle production or importation currently being achieved nationally." (App. 429-37.)[4]

Miller's evidence avoided this question entirely. Instead of examining whether Volkswagen shipped a number of vehicles needed by Miller to achieve the statutorily prescribed percentage of sales, it merely presented data showing, by month, the number of vehicles Volkswagen imported and the number it shipped to Miller. Miller then truncated the language of the Statute to argue that Miller's shipments for those months (as opposed to its percentage of total new vehicle sales) were not "equitably related" national importations. Thus, Miller presented a chart showing that, for a number of months, Volkswagen imported various model vehicles into the U.S., but in those same months did not ship any of those same models to Miller. (App. 273.) What Miller did not do, however, was to show how the fact that Volkswagen did not ship those models to Miller in those months meant (in the words of the Statute) that Volkswagen failed to ship the number needed

[4] The Commissioner explicitly noted the lack of evidence on this point in his August 1, 2005 decision by stating, "Miller did not provide evidence regarding the number of vehicles Miller would have needed to received in order to achieve a percentage of total new vehicle sales equitably related to the total new vehicle production or importations being achieved by Volkswagen nationally, it is my opinion that, generally, allocations of zero vehicles of a certain make, series, or model for one or more months would not be equitable." (App 433.)

to “receive a percentage of total new vehicle sales . . . equitably related to national importation currently being achieved.”

The Circuit Court of the City of Richmond affirmed the Commissioner’s Decision on all points as did the Court of Appeals. On April 14, 2009, this Court granted, in part, Volkswagen’s Petition for Appeal limited to the two Assignments of Error articulated above challenging the constitutionality of the Statute and declined the Petition with respect to the two additional Assignments of Error raised by Volkswagen that related to the Commissioner’s misinterpretation and misapplication of the Statute and certain procedural errors committed by the Commissioner.

ARGUMENT

Va. Code § 46.2-1569(7) makes it unlawful for a motor vehicle manufacturer:

> [t]o fail to ship monthly to any dealer, if ordered by the dealer, the number of new vehicles of each make, series, and model needed by the dealer to receive a percentage of total new vehicle sales of each make, series, and model equitably related to the total new vehicle production or importation currently being achieved nationally by each make, series, and model covered under the franchise.

A manufacturer found to have violated this Statute faces a number of potentially serious consequences, including: actions brought by the Commonwealth to enjoin any conduct that the Motor Vehicle Dealer Board

deems to violate the Statute, Va. Code § 46.2-1505; significant fines, including civil penalties of $1000 per violation, Va. Code § 46.2-1507; and privately prosecuted (that is, dealer prosecuted) agency actions under Va. Code § 46.2-1573, such as the proceedings below, which may result in the award attorney's fees and costs authorized by Va. Code § 46.2-1573.01.

Volkswagen contends that this Statute, which allows the imposition of the penalties and other consequences recited, violates Due Process Clauses of the U.S. and Virginia Constitutions because it is impermissibly vague and violates the Commerce Clause of the U. S. Constitution because it is impermissibly regulating interstate commerce.

I. VA. CODE § 46.2-1569(7) VIOLATES THE DUE PROCESS CLAUSES OF THE VIRGINIA AND UNITED STATES CONSTITUTIONS.

A. THE CONSTITUTIONAL FRAMEWORK AND STANDARD OF SCRUTINY.

1. THE VAGUENESS TEST.

The Due Process Clauses of the Virginia and U.S. Constitutions prohibit the enforcement of statutes that are impermissibly vague. VA. CONST., art. I, § 11, cl. 1; U.S. CONST. amend. XIV, § 1, cl. 2; *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). In determining whether a statute is unconstitutionally vague, courts must examine two questions: *first*, does the statute "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited,"

Hoffman Estates, 455 U.S. at 498; and *second*, does the statute "provide explicit standards for those who apply [it] in order to prevent arbitrary and discriminatory enforcement." *Id*. *See Tanner v. City of Virginia Beach*, __ Va. __, 674 S.E.2d 848 (2009); *see also Schwartzmiller v. Gardner*, 752 F.2d 1341, 1345 (9th Cir. 1984) ("A statute is void for vagueness if it fails to give adequate notice to people of ordinary intelligence concerning the conduct it proscribes, *see Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971), or if it invites arbitrary and discriminatory enforcement, *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972).") If *either* of these questions can be answered in the negative, then the statute in question does not pass constitutional muster.

With respect to the first of these two questions, the court below found that the Statute was sufficiently clear, at least within what it viewed as tolerable ranges of uncertainty, to allow manufacturers to understand its meaning. *Volkswagen of America, Inc. v. Smit,* 52 Va. App. at 799, 667 S.E.2d at 841. In doing so, however, it ignored judicial precedent—including controlling precedent of this Court—which holds that standards that purport to measure lawful conduct based on what is "equitable" are unconstitutionally vague. With respect to the second question, apart from reciting its conclusion that the Statute "was sufficiently clear . . . to provide

an adequate standard of enforcement," the court below pointed to nothing in the Statute from which any explicit standards could be ascertained. *Id.*

2. LEVEL OF SCRUTINY.

Volkswagen is mindful of the case law, addressed by the court below, that "[t]he degree of vagueness that the Constitution tolerates ... depends in part on the nature of the enactment," and that "economic regulation is subject to a less strict vagueness test." *Volkswagen of America v. Smit,* 52 Va. App. at 797, 667 S.E.2d at 840 (citing *Village of Hoffman Estates,* 455 U.S. at 489). However, in light of the magnitude and seriousness of the potential consequences associated with violating the Statute, including significant penalties (despite their being labeled "civil"), this Court may judge it appropriate to apply a higher level of scrutiny, at least with respect to the due process standards of the Commonwealth's constitution.

Irrespective of the level of scrutiny, however, the Statute at issue in this case is so unclear that it is vague under *any* level of scrutiny. Under the less restrictive scrutiny, applicable under the case law addressing economic regulation, for a statute to be found vague, it must be so "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." *Id*. Volkswagen contends that the

latter is true of Va. Code § 46.2-1569(7), as the Statute provides no standards or guidelines, and utterly lacks any comprehensible meaning.

B. VA. CODE § 46.2-1569(7) FAILS TO PROVIDE A PERSON OF ORDINARY INTELLIGENCE A REASONABLE OPPORTUNITY TO KNOW WHAT CONDUCT IS PROHIBITED.

Volkswagen, and all other manufacturers, are required by the Statute to ship to each of their Virginia dealers, each month and if ordered, and for each make, series and model, the number of such vehicles "needed by the dealer to receive a percentage of total new vehicle sales . . . equitably related to the total new vehicle production or importation currently being received nationally." Primarily because the phrase "equitably related to national importation" has no ascertainable meaning, there is simply no way that a manufacturer can ever know, *looking forward*, how to apportion vehicles among its dealers before they are shipped, or, *looking back*, whether, once it has shipped those vehicles, the number shipped was sufficient to comply with the Statute. Distilled to its essence, the Statute commands manufacturers to ship vehicles in such a way as to give at least the opportunity for Virginia dealers to receive something that has never been defined—a percentage of sales "equitably related" to national production or importation—and to do so for every make, model and series it

markets. In the absence of any guidance, however, interpreting that phrase is left entirely to the unfettered opinion of the Commissioner.

To consider a simplified scenario: In 1996, Miller sold 49 Volkswagen vehicles, or .036% of those sold nationwide. In 1997, it sold 47, or .034%. (Admin. R. at Volume 11, Exhibit 139.) Using the Statute's language, these are Miller's "percentages of Volkswagen's total new vehicle sales" for those years. To make some sense of that language, it should be possible to determine whether these percentages are, or are not, "equitably related to the total new vehicle . . . importation currently being achieved nationally." However, nothing in the Statute gives any principled guidance as to how that can be done. Nor does any agency regulation or precedent (including the Commissioner's decision in this case) get any closer to supplying such guidance.

Virginia Code § 46.2-203 explicitly empowers the Commissioner, subject to the provisions of the Virginia Administrative Process Act, Va. Code § 2.2-4000, *et seq*., "to adopt reasonable administrative regulations necessary to carry out the laws administered by the Department [of Motor Vehicles] and may enforce these regulations and laws through the agencies of the Commonwealth he may designate." The Commissioner has exercised his authority to promulgate regulations applying to ten

separate chapters of the Code administered by the Commissioner covering topics related to pubic participation, accident prevention courses for older drivers, motorcycle safety, commercial driver licensing, overload permits, vehicle registration and taxation, T & M vehicle, trailer and motorcycle dealer advertising, commercial driver training schools, and Virginia driver training schools. *See* 24 VAC 220-11 *et seq.*, 24 VAC 20-30, *et seq*., 24 VAC 20-40, *et seq*., 24 VAC 20-50, *et seq.*, 24 VAC 20-60, *et seq*., 24 VAC 20-80, *et seq*., 24 VAC 20-90, *et seq*., 24 VAC 20-100, *et seq*., 24 VAC 20-110, *et seq*., and 24 VAC 20-121, *et seq*.

Neither the Commissioner nor the Motor Vehicle Dealer Board, however, has promulgated a single regulation interpreting Article 7 of Chapter 15 of Title 46.2 of the Code related to motor vehicle franchises, which has been enforced against Volkswagen by the Commissioner below.

In addition to his authority to promulgate regulations, the Commissioner has the authority to issue interpretative rules in the form of guidance documents. *See* Va. Code § 2.2-4001; *Woods v. Virginia Department of Motor Vehicles*, 26 Va. App. 450, 457, 495 S.E.2d 505, 508-09 (1998); *NVR Real Estate, LLC v. Virginia Department of Health*, 51 Va. App. 514, 526-27, 659 S.E.2d 527, 533-34 (2008). Guidance documents, while not having the force and effect of law that promulgated regulations

have, are defined as documents developed by a state agency or its staff that provides guidance of general applicability to the staff or public ". . . to interpret or implement statutes or the agency's rules or regulations . . ." *Id*. Indeed, it is the duty of every agency to annually file with the Registrar of Regulations for publication in the Virginia Register of Regulations a list of any guidance documents upon which the agency currently relies. Va. Code § 2.2-4008.

Over the eleven years that this case has been litigated, however, the Commissioner has declined to provide any guidance whatsoever. While generally a long standing interpretation of a statute administered by an agency is given deference, the failure of an agency to provide any consistent interpretation, whether by promulgated regulation or by guidance document, should result in no deference accorded to the agency's interpretation by the courts.

Given the complete absence of any interpretive assistance by the administering agency, we are left with the Statute alone for guidance. But the Statute gives absolutely no direction as to what factors are permissible to consider in determining when a percentage is or is not "equitably related." Dozens of factors determine how many vehicles a dealer will sell, and, therefore, what a dealer's percentage of national sales will be, in a

given period. Some dealers are in larger markets covering more territory. Some dealers have more competition within those markets. Some dealers have invested millions of dollars in new facilities while others are content to sell out of run down or obsolete facilities. Some dealers, like Miller,[5] sell multiple brands and prefer to concentrate their efforts on one brand over others. Some dealers are just not as good as others at selling. The Statute provides no guidance as to whether any of these factors—all of which contribute to varying degrees to a dealer's sales percentage—are appropriate to consider in deciding whether a dealer's percentage of total sales is "equitably related" to national importation.

The Statute's language becomes even more incomprehensible, and in fact profoundly unworkable in the real world, when one considers that manufacturers are called upon to comply with the Statute, not in hindsight with the benefit of data, arguments, and the opportunity to marshal *post hoc* arguments as to why something was "equitable," but in the present, continual, ordinary course of business decisions about how to allocate vehicles.

[5] At the time Miller filed its Complaint, Miller primarily sold Hondas and Volkswagens only represented about 10% of its total annual sales. (Admin. R. at Volume 10, Exhibit 63.)

For example, when a manufacturer imports a batch of vehicles into the country and must divide them among 600 dealers in all 50 states, with different facility sizes and investment, different market sizes, different numbers of these vehicles already available to them in existing inventory, and wildly varying historic sales rates, how should that manufacturer divide those vehicles in order to provide its Virginia dealers with the number needed to receive the percentage of total sales referenced in the Statute? And if the factors listed do not provide enough information with which to make that determination, what more information is needed? The Statute gives no discernable guidance in these matters, and yet manufacturers are called upon daily to make decisions which could later be found to have violated the Statute.

Instead of supplying a standard, the Statute espouses mere sentiment. It may use a few words that sound concrete (shipments, numbers and percentages), but it distills into merely a command to do what is "equitable" or "fair." As the Circuit Court has expressed it: "the statute evinces the Legislature's intent to ensure that Virginia dealers get a fair percentage of vehicles compared nationally." *Volkswagen of America, Inc. v. Holcomb*, 56 Va. Cir 72, 78 (City of Richmond 2001). However, as this case certainly has demonstrated, despite what a manufacturer may believe

is fair, it may nevertheless be invited to debate that question with both its dealers and the Commissioner, each of whom may have different opinions on the matter.

Ultimately, the fundamental reason that there is "no comprehensible standard" within the Statute is because, in the final analysis, its measure of legality hinges solely and completely on one's view of what is "equitable." In this regard, many cases, including one reviewed by this Court, have stricken statutory standards that required such a determination of "equity."

Thus, in *American Motors Sales Corp. v. E.L. Bowen & Co*., Supreme Court Docket (October 17, 1958), this Court considered a statute, with language similar to the language in Va. Code § 46.2-1569(7), that made it unlawful for a motor vehicle distributor to "unfairly and without due regard to the equities of a dealer and without just provocation, . . . cancel the franchise of such dealer." In *Bowen*, suit was initially commenced in federal court, in a case styled *E.L. Bowen & Co. v. American Motors Sales*, 153 F. Supp. 42 (E.D. Va. 1957). The federal trial court initially upheld the statute, finding it was not unconstitutionally vague. However, following that decision and with leave from the federal court, the parties repaired to the Court of Hustings for the City of Portsmouth to allow that Virginia state court to rule on whether the statute constituted special or class legislation.

Overruling the federal court on the question of vagueness, the Court of Hustings specifically held that the statute was "vague and indefinite" and thus unconstitutional. *American Motors Sales Corp. v. E.L. Bowen & Co*., Chancery Docket No. 4498 (June 3, 1958) (referenced in *Vintage Imports, LTD. v. Seagram & Sons, Inc*., 409 F. Supp. 497, 510-11 (E.D. Va. 1976)). This Court subsequently denied a writ of error in the case, specifically stating that the decision by the Court of Hustings was "plainly right." *American Motors Sales Corp. v. E.L. Bowen & Co*., Supreme Court Docket (October 17, 1958) (attached as Exhibit A to this Brief).[6]

In a similar case, a federal court in the Eastern District of Virginia followed the precedent in *Bowen* to find that a Virginia statute containing the same language was also unconstitutionally vague. *Vintage Imports*, 409 F. Supp. at 510. In *Vintage Imports*, the court considered a Virginia statute that prohibited a beer distributor from terminating a wholesaler

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[6] This Court's denial of the writ of error in Bowen is entitled to significant precedential value. *See Asplundh Tree Expert Co. v. Pacific Employers Ins. Co*., 269 Va. 399, n. 7, 611 S.E.2d 531 (2005), quoting *Sheets v. Castle*, 263 Va. 407, 411-12, 559 S.E.2d 616, 619 (2002) (refusal of petition for appeal carries precedential value as to "issues addressed within 'the four corners of the Court's order'"). And, as demonstrated by this Court's most recent decision on due process vagueness in *Tanner v. City of Virginia Beach*, __ Va. __, 674 S.E.2d 848 (2009) (holding that a noise ordinance prohibiting "any unreasonably loud, disturbing and unnecessary noise" was constitutionally infirm because it failed to give fair notice of unlawful conduct).

"unfairly without due regard to the equities of such wholesaler … and without just case or provocation." The court struck the statute as unconstitutionally vague because it failed to provide a person of ordinary intelligence notice of proscribed conduct. *Id*. Struggle as one might to find daylight between the language "equitably related" in the Statute at issue here and the phrase "due regard to the equities" in the *Vintage Imports* statute, there really is none.

Other courts have ruled similarly when faced with statutes which attempt to impose a "fairness" or "equitable" standard. *See* also *Arapahoe Motors, Inc. v. General Motors Corp*., 2001 U.S. Dist. LEXIS 24533 at *34 (D. Colo. March 27, 2001) (invalidating statute that made it unlawful for a manufacturer to cancel "directly or indirectly, without just cause, the franchise of any motor vehicle dealer"); *Mike Naughton Ford, Inc. v. Ford Motor Co*., 862 F. Supp 264, 271 (D. Colo. 1994) (striking down statute that prohibited the addition of a new franchise when the addition "would be inequitable to [an] existing dealer"); *General Motors Corp. v. Blevins,* 144 F. Supp. 381, 396 (D. Colo. 1956) (striking down statute that prohibited a manufacturer from canceling a dealer franchise "unfairly" and "without due regard to the equities" and without "just provocation.") These cases are indistinguishable in principle from the instant appeal.

C. VA. CODE § 46.2-1569(7) FAILS TO PROVIDE STANDARDS SUFFICIENT TO PREVENT ARBITRARY AND DISCRIMINATORY ENFORCEMENT.

With respect to the second question to be examined as part of the vagueness analysis, the Statute is also impermissibly vague because it fails to provide explicit standards sufficient to prevent arbitrary and discriminatory enforcement by those who apply it. This is so because its language contains no guidelines for how the Commissioner is to apply the phrase "equitably related." Moreover, the agency charged with administering the Statute, the Department of Motor Vehicles, has offered no regulatory guidance as to what this phrase is supposed to mean. Thus, the Statute delegates to the Commissioner unfettered authority to create basic policy with respect to vehicle shipments on an *ad hoc* basis in the context proceedings to determine a violation. Such broad discretion renders the statute unconstitutional. *See Waynesboro v. Keiser*, 213 Va. 229, 233-34, 191 S.E.2d 196, 199 (1972) (finding statute authorizing assessments to vary corresponding with achievement of "the ends of justice" to be void for vagueness as it allowed for "arbitrary adjustment"). *See also Norfolk 302, LLC v. Vassar*, 524 F. Supp. 2d 728, 739-40 (E.D. Va. 2007) (enjoining enforcement of statute where the "General Assembly failed to tie the word 'noisy' to any 'explicit standard[] for enforcement' and

where the statute "encourage[s] arbitrary and discriminatory selective enforcement").

This Court's recent decision in *Tanner v. City of Virginia Beach*, __ Va. ___, 674 S.E.2d 848 (2009) is instructive. In that case, the owners of a night club along the oceanfront strip of Virginia Beach filed a declaratory judgment action seeking to declare the City's noise control ordinance (a statute whose violation constituted a criminal misdemeanor) was, facially and as applied to the club, unconstitutionally vague and violated the Due Process clause because: (1) it failed to provide citizens with "fair notice" regarding what conduct is unlawful; and (2) because it granted law enforcement officials the "unfettered individual discretion" to make enforcement decisions. A third allegation was that the City applied and enforced the ordinance against the club "in a subjective and selective manner." *Id*., 674 S.E.2d at 850-51. In its analysis of the Ordinance, this Court stated: "Thus, the language of a law is unconstitutionally vague if persons of 'common intelligence must necessarily guess at [the] meaning [of the language] and differ as to its application.'" *Id*. The Court further noted that the constitutional prohibition against vagueness also protects citizens from the arbitrary and discriminatory enforcement of laws. "A vague law invites such disparate treatment by impermissibly delegating

policy considerations 'to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis with the attendant dangers of arbitrary and discriminatory application.'" *Id*. Applying the language of the noise Ordinance to these standards the Court struck the Ordinance as unconstitutionally vague, a result which Volkswagen submits should apply to the Statute here for the same reasons.

In fact, the absence of any discernable standard in the Statute has already led to arbitrary and, in some cases, contradictory outcomes in the course of this very proceeding. This perhaps is not surprising given that, at least until this Court intervened in *Volkswagen* I, the prevailing view of those involved in the Statute's enforcement was, as expressed most succinctly by the Court of Appeals: the "plain meaning of the first two sentences of [the Statute,] reflects the intention of the legislature to give the commissioner the *flexibility* necessary to accurately determine whether a dealer has received its fair share of vehicles from a distributor." *Volkswagen of America, Inc. v. Quillian*, 39 Va. App. 35, 63, 569 S.E.2d 744, 758 (2002).

The most obvious example of unprincipled application of the Statute is the fact that the first Commissioner, his hearing officer, and both the circuit and appellate courts, all initially interpreted the Statute to mean that

it regulated *methods* of allocation as opposed to shipments as summarized in *Volkswagen I*. Now, at least two additional examples from the remand proceedings in this case also illustrate the arbitrary application of the Statute.

1. THE BEETLE SHIPMENTS.

The Commissioner found that Volkswagen violated the Statute when it did not send any Beetles to Miller in January and February of 1998 (App. at 436) based on his "opinion that, generally, allocations of zero vehicles of a certain make, series, or model for one or more months would not be equitable." (*Id.* at p. 5.) The evidence to support this opinion was a chart prepared by Miller's expert which showed that, at least for the month of February, 1998 Volkswagen some Beetles into the country but did not ship any to Miller. (App. at 273.) The Commissioner arrived at this opinion while fully acknowledging that, for those months in which he found a violation, "Miller did not provide any evidence regarding the number of vehicles Miller would have needed to receive in order to achieve a percentage of total new vehicle sales equitably related to the total new vehicle production or importations being achieved by Volkswagen nationally." (*Id.*)

At first blush, this may seem a reasonable way to interpret the Statute, at least under the unique circumstances presented. However, for at least three reasons this *ad hoc* interpretive method of applying the Statute fails to provide any *workable* guidance to manufacturers, and, as shown in this very case, can produce results which seem at odds even with the sentiment expressed in the Statute when additional facts are brought to light.

First, a standard that is meant to be enforced *only* in situations where a manufacturer has shipped zero of a model in a given month, and only under the specific facts of this case, clearly would provide no guidance as to how vehicles actually should be allocated in any other situation. Volkswagen has about 600 dealers. If it imports less than that number of a particular model, it has to give someone zero. If that happens to be a Virginia dealer has Volkswagen violated the Statute? What does Volkswagen do if, in a given month, it imports exactly the number as its number of dealers? Does the Statute require that Miller gets one, even though there are dealers who sell ten times the number of Volkswagens that Miller sells, and who undoubtedly could argue that they should get more in order to receive their view of an appropriate percentage of sales "equitably related" to total new vehicle importation"?

Second, shipping zero vehicles to a dealer within a given month may be entirely appropriate—at least arguably—depending upon factors that the Commissioner's *ad hoc* standard does not address. To use a simplified hypothetical: If a manufacturer has three dealers in equally sized markets, and 30 vehicles to divide among them, does it give ten to each? Common sense would seem to suggest that it would depend, in large part, on how many each dealer already has available to sell in its existing inventory. If one of these dealers has none, it would seem reasonable to send that dealer more vehicles than the other two. Conversely, if two of the dealers each have none, and the other has, for example, fifteen, it would seem reasonable to send that dealer zero, and the other two dealers fifteen apiece. Common sense seems to suggest, therefore, that shipping zero vehicles in a given month is not *always* going to be inequitable. In fairness, after pronouncing his "zero-would-not-be-equitable" "general" rule, the Commissioner did insert the additional hedge that such a rule would apply "particularly where . . . the vehicles are newly introduced makes [and] assuming a dealer has no such vehicles in inventory (App. 433). Again, however, such cavalier expression hardly supplies the comprehensible standard that due process requires.

Third, there would appear to be no principled basis to even support the Commissioner's finding that Volkswagen's failure to ship Miller Beetles in January and February of 1998 violated the Statute. With respect to January: Volkswagen admittedly did not ship any Beetles to Miller in that month; however, while 444 were imported into the U.S., as of the end of that month they were still sitting in port and had not yet been sent to any dealers. (Admin. R. at Volume 5, Exhibit 314 at p. 1.) With respect to February: Volkswagen did not ship any Beetles to Miller in that month, despite having imported 1,424 of them; however, as of the end of that month, only 51 had been received among the 600 dealers nationwide, and they had not yet gone on sale to the public.[7] *(Id.* at p. 3.) On what reasoned basis, then, would it have been appropriate to find that Volkswagen violated

[7] Volkswagen well understands that, on appeal, the Commissioner's counsel has taken the position that the Commissioner made a mistake in his decision in that he really meant to find a violation in the months of February and March as opposed to January and February. (Br. of Appellee D.B. Smit, Commissioner, Ct. App. R., p. 6, fn. 1). This very well may be, but the Commissioner's decision has never been corrected. In any event, by the end of March, 2,398 Beetles had been sold in the U.S. If Miller had sold his "share," based upon his share of national sales in the prior year (or .034% (Admin. R. at Volume 11, Exhibit 139), it would have sold less than one of those vehicles. Miller was then allocated five Beetles in the first few days of April. (Admin. R. at Volume 9, Exhibit 9.) Even if one were to be able to determine what is meant by the Statute's phrase "currently being achieved," can it really be said, based on any comprehensible standard, and without making some effort to determine percentages of total sales in some period thereafter, that not shipping Miller a Beetle in March violated the Statute?

the Statute by not shipping Miller a Beetle in those months? Volkswagen raises these points not to show that the Commissioner lacked evidence to find that it has violated the Statute in those months, but rather to illustrate why casually declaring a violation based on evidence of zero shipments simply does not address all of the virtually limitless circumstances that might bear on a determination of what is "equitable."

2. The PASSAT REPAIR EQUIPMENT.

The Commissioner also found that Volkswagen violated the Statute when it failed to ship any Passats to Miller during the months of October, 1997 through March, 1998. (App. at 436.) However, in addition to the fact (ignored by the Commissioner) that Miller had a Passat in inventory during most of this period but could not sell one, (App. 55-56),[8] there was a reason Volkswagen did not ship any Passats to Miller during the period in question. Miller had not yet obtained certain specialized equipment needed to do front-end alignment repairs on the vehicle. For safety reasons, Volkswagen required dealers to acquire this equipment before it would ship them. The Commissioner in the first hearing ruled that this practice "*was*

[8] Miller had one new Passat model in its inventory as of the end of September, 1997. Instead of selling it to a customer, Miller sold that vehicle to another dealer on October 27, 1997, and then bought another Passat from a dealer on December 23, 1997. It then took Miller three months to sell that Passat to a customer. (App. 285-289.)

not inequitable" and therefore did not violate the Statute. (App. 53.) The Commissioner in the second hearing, on the same facts, held the exact opposite: that this practice constituted "a very clear and admitted violation of Va. Code § 46.2-1569(7)." (App. at 435.)

It may be tempting to gloss over these inconsistent rulings with the observation that—just as any finder of fact can be—the first Commissioner was merely wrong and the second was (sufficiently) right, but such casual dismissal of the matter would not seem to cover the magnitude of this inconsistency. In fact, there is no principled way to determine which Commissioner was right. More to the point, there is no way to determine whether the "equitably related" language leaves enough room for a manufacturer to refrain from shipping a vehicle that a dealer is not able to fix.

The scenarios above are but two situations that happened to arise in this case. However, when dozens of manufacturers are called upon to allocate millions of vehicles (with dozens of combinations of models and series) among thousands of dealers, the type of retrospective and *ad hoc* assessment that the Commissioner engaged in here, applying what he thought would "generally" be appropriate, does not substitute for the comprehensible standard that due process requires.

II. VA. CODE § 46.2-1569(7) VIOLATES THE DORMANT COMMERCE CLAUSE OF THE U.S. CONSTITUTION.

A. THE CONSTITUTIONAL FRAMEWORK.

The Commerce Clause of the U.S. Constitution, U.S. CONST., art. I, § 8, cl. 3, gives Congress the power to regulate interstate commerce, and, by virtue of granting such power, imposes a restriction on permissible state regulation of interstate commerce. Under controlling U.S. Supreme Court precedent, courts must apply a two-tiered approach in analyzing a state economic statute that is challenged under the Commerce Clause. *Volkswagen*, 52 Va. App. 751 at 788, 687 S.E.2d 817 at 835. Under the first tier analysis (typically referred to as the "*per se"* analysis"), a court must find a statute *per se* unconstitutional if it does one of three things: (a) "directly regulates . . . interstate commerce; (b) "discriminates against interstate commerce"; or (c) has an effect that "favor[s] in-state economic interests over out-of-state interests." *Id*. at 31, *citing Healy v. Beer Institute*, 491 U.S. 324, 337 (1989). Under the second tier analysis (typically referred to as the "*Pike* analysis"), even if a state statute does not directly regulate or discriminate against interstate commerce or have the effect of favoring in-state economic interests over out-of-state interests, a court must find the statute to be unconstitutional if the "burden imposed on [interstate]

commerce is clearly excessive in relation to the putative local benefits." *Id*. at 36, *citing Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

In this case, Volkswagen contends that the Statute is *per se* unconstitutional because the statute directly regulates commercial conduct outside of Virginia, and further contends that the Statute is unconstitutional under the *Pike* analysis because the statute unduly burdens interstate commerce. Volkswagen does not contend that the Statute either discriminates against interstate commerce or favors in-state economic interests over out-of-state interests.

B. VA. CODE § 46.2-1569(7) IS PER SE UNCONSTITUTIONAL.

As the court below correctly recognized, the fundamental question under the *per se* analysis is whether Va. Code § 46.2-1569(7) "has the practical effect of controlling commercial activity wholly beyond Virginia's borders." *Volkswagen*, 52 Va. App. 751 at 751, 667 S.E.2d 817 at 835. In this regard, the relevant framework for decision is set forth in *Healy* and *Heublein*. Under those decisions, the Statute must be struck down as a direct regulation of conduct outside of this Commonwealth if the Statute: either (a) has the practical effect of controlling conduct beyond the boundaries of Virginia; or (b) should other states adopt similar legislation, could lead to a commercial gridlock of inconsistent and competing state

regulations. *Healy,* 491 U.S. at 336. *See also Heublein*, 237 Va. at 198, 376 S.E. 2d at 80.

Under *Healy* the critical issue is whether a statute has the "practical effect" of regulating commercial activity outside of the enacting state. Va. Code § 46.2-1569(7) determines a distributor's compliance with Virginia law by comparing the number of vehicles the distributor is shipping into Virginia with the number of vehicles a distributor imports nationally, and requires that a distributor be found in violation of the Statute if it decreases the vehicles it ships into Virginia without making changes nationwide. The practical effect of the Statute, then, under the *Healy* analysis, is to control the number of vehicles that the distributor can import into the country: if the distributor desires to decrease the number of vehicles that it ships to its Virginia dealers, then it must decrease the number of vehicles that it imports nationally and, correspondingly, the number of vehicles that it ships to dealers located both in Virginia and in other states.

In *Heublein*, this Court addressed the constitutional validity of a Virginia statute that provided that:

> [N]o winery shall unilaterally amend a wholesaler's contract unless the same amendment is . . . made uniformly as to all wholesalers of winery in question in all states in which the winery is marketing its product.

Heublein, 237 Va. at 195, 376 S.E.2d at 78. The Court found that the statute forced a liquor supplier that "desired unilaterally to amend its wholesalers' contracts in Virginia . . . to impose the same amendment in every other state." *Id*. at 198; 376 S.E.2d at 80. In this way, it concluded that the practical effect of the statute was to make what liquor distributors did in other states the standard for evaluating their conduct in Virginia. The practical effect of that statute caused it to run afoul of the Commerce Clause. *Id.* The Statute in this case is substantially similar to the statute at issue in *Heublein* and the result in that case should control here.

The court below sidestepped *Heublein* on the premise that, because Va. Code § 46.2-1569(7) does not explicitly use the phrase "other states," it is distinguishable from that case. However, nothing in *Healy* or any other decision suggests that the principle enunciated rests on whether the phrase "other states" appears in a statute. Indeed, nothing in *Healy* or any other decision makes the constitutional validity of any statute turn on the form of the words used therein, but rather on the statute's actual, practical effect. Here, Va. Code § 46.2-1569(7) requires that the number of vehicles that a distributor must ship into Virginia be based upon the number of vehicles that a distributor imports "nationally." Because the U.S. is a federation of states, the word "nationally" in the Statute necessarily implicates conduct

by a distributor within a state because a distributor can never import a vehicle into the nation without also importing that vehicle into some particular state as well. By tying the number of shipments a distributor is required to make to Virginia dealers to the number of importations the distributor achieves nationally, the Statute effectively references other states as if the phrase was explicitly used. In fact, when compared with a statute that required a distributor to ship a number of vehicles to each dealer in Virginia that was equitably related to the number of vehicles that a distributor imports into Virginia, it is clear that Va. Code § 46.2-1569(7) is a per se violation of the Commerce Clause.

Indeed, the finding of the court below that the Statute does not have a practical effect in other states is belied by its own assertion that the Statute's purpose is "to ensure that motor vehicle dealers located in Virginia are able to obtain a *fair share* of vehicles from their national distributors for the benefit of Virginia's motor-vehicle buying public." *Volkswagen*, 52 Va. App. 751 at 794, 667 S.E.2d 817 at 838 (emphasis added); *see also Id*. at 39-40. The admission that the Statute's purpose is to achieve a "fair share" of vehicles in Virginia is tantamount to an admission of a practical effect in another state. The "fair share" of new motor vehicles that dealers located in Virginia should receive can only be

determined in comparison to the number of new vehicles that dealers *in other states* receive. When dealing with a fixed resource such as the number of vehicles that Volkswagen imports into the U.S. annually, the natural consequence of a mandate that it must ship a "fair share" of vehicles to its dealers in Virginia is that, at times, Volkswagen must alter its conduct in other states in order to comply with the mandate by shipping vehicles to Virginia dealers that otherwise would have gone to dealers in other states.

The court below also took the position that the adoption of statutes similar to Va. Code § 46.2-1569(7) would not have the practical effect of distributors being subject to inconsistent obligations or gridlock on the conclusion that "equity" is the same in other states as it is in Virginia. This cannot be true. If multiple states adopt legislation similar to Va. Code § 46.2-1569(7), the same discretion exercised under this Statute would be placed in the hands of motor vehicle agencies in other states throughout the country. Given the expansive and flexible nature of an "equity" standard, there is no certainty that state agencies in other states would exercise their discretion in the same manner as the Commissioner, and, indeed, there is a strong likelihood that they would not. In such a case, a distributor inevitably would face different and conflicting obligations, up to

being required to ship more vehicles throughout the country than are available to it. The cumulative effect of a number of states passing laws similar to Va. Code § 46.2-1569(7), therefore, would be interference with regulatory regimes in other states, conflicting state regulation, and commercial gridlock.

C. VA. CODE § 46.2-1569(7) IS UNCONSTITUTIONAL UNDER THE PIKE ANALYSIS.

The fundamental question under the *Pike* analysis is whether Va. Code § 46.2-1569(7) burdens interstate commerce in a manner that is clearly excessive when compared to local benefits. The line of cases that began with the seminal decision in *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 774-75 (1945)[9], establish the proposition that state statutes that regulate "those phases of the national commerce which, because of the need of national uniformity, demand their regulation, if any, be prescribed by a single authority" impose a clearly excessive burden on interstate

[9] A significant line of cases has followed *Southern Pacific*. *See Edgar v. MTE Corp.*, 457 U.S. 624 (1982) (national tender offers); *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 679 (1981) (tractor trailer trucks); *Flood v. Kuhn*, 407 U.S. 258, 284-85 (1972) (baseball player contracts). *See* also *Consolidated Cigar Corp. v. Reilly*, 218 F.3d 30, 66-71 (1st Cir. 2000), aff'd in part and rev'd in part on other grounds, *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 524 (2001) (state product distribution law struck down); *NCAA v. Miller*, 10 F.3d 633, 638-39 (9th Cir. 1993) (state regulation of interstate collegiate athletics disciplinary system struck down).

commerce. *Id*. at 774-75. A state statute that regulates motor vehicle shipments is precisely the sort of statute that must be analyzed under this case law. In addressing this question, the court below held that Va. Code § 46.2-1569(7) passes constitutional scrutiny because, as the Statute is of "great[] benefit [to] Virginia's citizens," any incidental burden the Statute might place on interstate commerce is "not clearly excessive in relation to the putative local benefits." *Volkswagen*, 52 Va. App. 751 at 795, 687 S.E.2d 817 at 839. In reaching this conclusion, the court merely assumed that the burden on interstate commerce is "incidental," provided no analysis whatsoever with respect to what such burden might be, and utterly ignored an entire line of U.S. Supreme Court cases that address the issue. In fact, the burden on interstate would be immense, including mandating that Volkswagen, and all other manufacturers design their systems of allocating vehicles among their dealers nationwide in such a way as to accommodate Virginia law. For this reason, the Va. Code § 46.2-1569(7) is also a violation of the Commerce Clause under the *Pike* analysis.

CONCLUSION

For the foregoing reasons, Volkswagen respectfully requests that this Court find that Va. Code § 46.2-1569(7), violates both the Due Process Clauses of the Virginia and U.S. Constitutions and the Commerce Clause

of the U.S. Constitution, and that, for those reasons, Volkswagen prays that the Court declare the Statute unconstitutional, unenforceable, and reverse and enter final judgment in this matter for Volkswagen.

Dated: May 22, 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 5:26(d) of the Rules of the Supreme Court of Virginia, I herby certify that on this 22nd day of May, 2009, fifteen paper copies and one electronic copy on CD of the Appellant's Opening Brief and Appendix were hand filed with the Clerk of this Court, and three copies of the same were served, via first-class mail, postage prepaid, upon:

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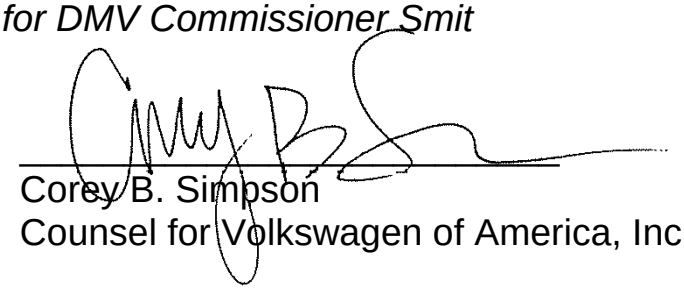

Corey B. Simpson
Counsel for Volkswagen of America, Inc.

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 17th day of October, 1958.

The petition of E. L. Bowen and Company, Incorporated, for a writ of error to a judgment rendered by the Court of Hustings for the City of Portsmouth on the 3rd day of June, 1958, in a certain proceeding then therein depending, wherein American Motor Sales Corporation was plaintiff and the petitioner was defendant, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition, and refuse said writ of error, the effect of which is to affirm the judgment of the said Hustings Court.

A Copy,

Teste:

Patricia L. Harrington, Clerk

By: *original order signed by a deputy clerk of the Supreme Court of Virginia at the direction of the Court*

Deputy Clerk