IN THE

SUPREME COURT OF VIRGINIA

Record No. 08-2305

VOLKSWAGEN OF AMERICA, INC.,

Appellant,

v.

DEMERST B. SMIT and MILLER AUTO SALES, INC.,

Appellees.

MILLER AUTO SALES, INC.'S
BRIEF OF APPELLEE

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STATEMENT OF THE CASE

On February 9, 1998, Miller Auto Sales, Inc. ("Miller" or "Miller VW"), a retailer of Volkswagen brand motor vehicles located in Winchester, Virginia, filed a complaint with the Virginia Department of Motor Vehicles ("DMV") under Va. Code Ann. § 46.2-1569(7) (the "Statute"), challenging the shipments of vehicles that it received from Volkswagen of America, Inc. ("Volkswagen" or "VW"). Specifically, Miller asserted that VW's shipments of vehicles violated the Statute because they included an insufficient number of vehicles for Miller to achieve the sales that VW required. After a formal administrative hearing in 1999, the Commissioner of the DMV determined that VW's vehicle allocation methodology violated the Statute. On appeal, both the Circuit Court for the City of Richmond and the Court of Appeals of Virginia affirmed the Commissioner's decision, holding that there was substantial evidence in the record to support the conclusion that VW's vehicle allocation methodology was contrary to the Statute. Subsequently, the Supreme Court reversed, holding that the Commissioner exceeded his statutory authority because the Statute regulates shipment numbers rather than vehicle allocation methodologies. The Supreme Court remanded the case to the Commissioner with instructions to first make specific factual findings regarding VW's national importation numbers and

the actual monthly shipments received by Miller; and second, to determine whether the actual monthly shipments received by Miller were equitably related to VW's national importation numbers.

The instant appeal follows the Court of Appeals' decision affirming the determination of both the DMV Commissioner and the Circuit Court that VW's shipment of vehicles during certain months in 1997 and 1998 violated the Statute. Although VW does not contest the Commissioner's finding that it shipped zero of its most popular models to Miller during months in which it imported thousands of such vehicles into the United States, it claims that the Statute is unconstitutionally vague and violates the Dormant Commerce Clause of the U.S. Constitution.

Miller urges the Court to reject VW's attempt to side-step the substantive issues of the case and dismiss VW's assertion that the Statute is unconstitutional. VW has failed to meet its heavy burden in challenging the constitutionality of the Statute. The Statute affords adequate protection under the Vagueness Doctrine to satisfy the Due Process Clause. Likewise, the Statute cannot run afoul of the Dormant Commerce Clause because it only affects vehicle shipments to Virginia automobile dealers and does not regulate interstate commerce. Moreover, VW has failed to provide any factual evidence over the course these proceedings tending to

show that the Statute has any effect on interstate commerce. Likewise, VW offers mere hypothetical speculation rather than actual evidence to justify its assertion that the Statute is unconstitutionally vague. For these reasons, Miller respectfully requests that the decision of the Court of Appeals be affirmed.

QUESTIONS PRESENTED

1. Whether Va. Code Ann. § 46.2-1569(7) violates the Due Process Clauses of the Virginia and U.S. Constitutions because it is unconstitutionally vague. (Question relates to Appellant's Assignment of Error No. 3.)
2. Whether Va. Code Ann. § 46.2-1569(7) violates the Dormant Commerce Clause of the U.S. Constitution. (Question relates to Appellant's Assignment of Error No. 2.)

STATEMENT OF THE FACTS

Genesis of the Vehicle Allocation Dispute

VW is one of the world's largest motor vehicle importers and distributors. With a network of approximately 600 dealers nationwide and 17 dealers in Virginia, VW imports a fixed number of vehicles from its German parent company each year. (App. 308.) During the period under review, 1997 through 1998, VW introduced a number of popular new

models into the U.S. market, including the Passat and the Beetle. (App. 312-13). To allocate these sought-after vehicles among its dealers, VW utilized a complex formula based on sales and other data. (App. 318-21.) Because VW relied on this allocation formula rather than orders received from dealers, smaller dealers often had difficulty obtaining even the minimum number of vehicles necessary to meet VW's required inventory standards. (App. 336-37.)

Miller Auto Sales, Inc. is a Volkswagen dealer located in Winchester, Virginia. In January 1998, Miller was the smallest dealership (by vehicle sales volume) in VW's sales district 32 (which includes large Washington-Metro dealers), entitled under VW's then current vehicle allocation formula to less than one percent (.98%) of the automobiles distributed in that district. (App. 45.) Because vehicle allocations were often accomplished on a model-by-model basis (App. 22-24), it was rare for enough vehicles to be allocated at one time such that Miller (entitled to 0.98%) would actually be allocated a vehicle.[1] Since VW's dealers were not privy to the methods

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[1] Although unknown to dealers, including Miller, at the time, the Volkswagen vehicle allocation formula automatically rounded fractional vehicle shares up or down to the nearest whole number. (App. 121.) Thus, if 50 vehicles were being allocated to district 32's 12 Volkswagen dealers, the formula would round Miller's 0.98 percent "entitlement" of 0.49 vehicles down to zero vehicles. Miller's small share of the district 32 "pie" meant that

used by VW to allocate vehicles within its sales network, dealers such as Miller were left simply to wonder why they were receiving inadequate or no vehicles to meet required sales quotas. (See App. 1.)

Commencement of Administrative Proceedings by Miller VW

Frustrated, Miller commenced this action on February 9, 1998, by filing a complaint with the DMV which: (1) challenged VW's tying of the "Create An Apostle Program" ("Apostle" or "CSI") to the allocation of vehicles; and (2) asserted that Miller did not receive its equitable share of vehicle allocations under VW's distribution system. (App. 1.)

Due to the asymmetries of bargaining power present between large automobile manufacturers and smaller dealers, Virginia law regulates the activities of motor vehicle distributors. VW's operations are subject to the provisions of the Virginia Motor Vehicle Dealer Franchise Act[2] which specifically regulates franchise relationships. At issue in this case is VW's compliance with Va. Code Ann. § 46.2-1569 (the "Statute"), which, in pertinent part, reads:

> Notwithstanding the terms of any franchise agreement, it shall be unlawful for any . . . distributor . . . *to fail to ship monthly to any dealer*, if ordered by the dealer, the number of new

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it rarely qualified to receive a car, based on the system designed by Volkswagen. (Id.)

[2] Va. Code Ann. § 46.2-1500 et seq.

> 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. Upon the written request of any dealer holding its sales or sales and service franchise, the manufacturer or distributor shall disclose to the dealer in writing the basis upon which new motor vehicles are allocated, scheduled, and delivered to the dealers of the same line-make.

Va. Code Ann. § 46.2-1569(7) (emphasis added). On appeal from the 1999 hearing in this case, the Supreme Court of Virginia explained that the Statute regulates the *number* of vehicles that a motor vehicle distributor must ship and not the *allocation methodology* that the distributor utilizes to make its shipment decisions. Volkswagen of America, Inc. v. Smit, 266 Va. 444, 454, 587 S.E.2d 526, 532 (2003). Although the Commissioner determined in the first hearing that VW's conduct violated Va. Code Ann. § 46.2-1569(7), because the Commissioner based this decision on VW's allocation methods, the Supreme Court ruled that the Commissioner's analysis was unlawful. Id. at 453-54, 587 S.E.2d at 531-32. Consequently, the Court remanded the case to the Commissioner with instructions to make specific factual findings regarding VW's actual monthly shipments to Miller, VW's national importation of particular vehicle models, and a determination of whether the shipments to Miller were "equitably related" to VW's importation figures. Id. at 454, 587 S.E.2d at 532.

Evidence and Administrative Proceedings on Remand

On February 9 and 10, 2005, the second hearing in this matter was set to obtain additional evidence before DMV Hearing Officer Charles G. Aschmann. (App. 432.) The parties stipulated to incorporate all transcripts and exhibits from the first set of hearings as part of the record in lieu of retaking testimony a second time in this proceeding. (App. 274-75.) Both parties presented the testimony of experts and submitted exhibits responsive to the Supreme Court's instructions concerning the necessary factual findings required to make a determination under the Statute. (App. 277-402.)

In evidence were Miller's Dealer Agreement with VW and VW's "Operating Standards for Volkswagen Retailers" (the "VW Operating Standards"), which was incorporated into the Dealer Agreement. (App. 19-21, 26-28.) With respect to dealership new vehicle inventory, the VW Operating Standards provide that "in no event shall a Retailer's minimum new vehicle inventory be less than 14 units, comprised of the following … Three Passats." (App. 20.) In addition, the VW Operating Standards state that "[a]ll retailers are required to maintain a minimum inventory of one of each Volkswagen model, either in new vehicle inventory or demonstrator service." (App. 20.) VW's "Dealer Agreement Standard Provisions," also

incorporated into Miller's Dealer Agreement, states that VW "will endeavor to make a fair and equitable allocation and distribution of the Authorized Products[3] available to it." (App. 14.) These contractual provisions impose duties on VW very similar to those of the Statute.

Miller's expert witness, Joseph Roesner, presented testimony regarding VW's shipments of Beetles and Passats to Miller. See "Volkswagen Shipments Not Equitably Related to Importation," attached hereto as "Exhibit A" (App. 9). Mr. Roesner testified that Miller was not shipped Passats or Beetles in November 1997, December 1997, January 1998, and February 1998. (App. 277-79, 283-84.) John Miller, Miller VW's vice president, testified that the dealership ordered Passats and Beetles from VW during this time period and did not receive any vehicles. (App. 406-11.) Mr. Roesner concluded, therefore, that there were no equitable shipments related to U.S. importations during this period. (App. 278-80, 294-96, 302-03.) In his hearing decision, the Commissioner noted that he found Mr. Roesner's testimony to be persuasive. The Commissioner stated:

> Based on the testimony in this case, it is undisputed that (i) Miller ordered and Volkswagen was aware of Miller's order for Passats during the months of October, November, and

[3] "Authorized Products means Authorized Automobiles and Genuine Parts." (App. 16.)

> December of 1997 and January, February, and March of 1998 and that *Volkswagen declined to ship any Passats* to Miller during those months. It is also undisputed that Miller ordered and Volkswagen was aware of Miller's order for Beetles during the months of February and March of 1998 and that Volkswagen failed to ship any Beetles to Miller during those months.

(App. at 435 (emphasis added) (citations omitted).) These specific findings regarding VW's "actual monthly shipments" of Passats and Beetles to Miller were part of the findings required in the instructions of the Supreme Court on remand. (App. 157.)

The parties also presented evidence concerning VW's national importation of these models. VW's corporate witness, Stuart Karp, testified that the new Passat was introduced in 1997 as 1998 model and that the new Beetle was introduced in 1998. (App. 312-13.) Miller's expert, Mr. Roesner, also testified concerning VW's importation figures. According to Miller's evidence, there were 18,454 Passats imported between October 1997 through March 1998. (App. 295.) Notwithstanding Miller's order, no Passats (except one of a prior model year) were shipped to Miller during this time period. (App. 302.) In his decision, the Commissioner accepted the data concerning VW's importation figures presented during the hearing.

> Information presented in Exhibit 1, introduced by Miller's expert witness and undisputed by Volkswagen, shows the following numbers of U.S. importations for Passats and Beetles during the months in question: October 1997: 2016 Passats;

> November 1997: 2996 Passats; *December 1997: 4835*; *January 1998: 1270 Passats*; February 1998: 3655 Passats and 1425 Beetles; March 1998: 3682 Passats and 4213 Beetles.

(App. 436 n.1 (emphasis added).) This finding concerning VW's national imports of Passats and Beetles is the next essential component of the required factual findings mandated by the Supreme Court.

Finally, based on the evidence in the record, the Commissioner determined that VW's shipments of zero Passats to Miller from October 1997 to March 1998 and zero Beetles during January and February 1998 were not equitably related to VW's national importation of the vehicle.

> I conclude that Volkswagen's shipment of zero Passats and zero Beetles to Miller in these months, when it is clear that they were ordered by Miller, resulted in Miller *not* obtaining the number of those vehicles needed by Miller to receive a percentage of total new vehicle sales of each make, series, and model *equitably related* to the total new vehicle importations being achieved nationally by each make, series, and model.

(App. 438 (emphasis added).) VW argued that the *allocation* to Miller during the period under review was equitable because Miller's average daily supply of Passats and Beetles met or exceeded the national average. (App. 436.) Miller argued that regardless of what number was "equitable" to VW, receiving zero vehicles when a sufficient supply is available cannot meet the statutory standard. (App. 434.) The Commissioner noted that the

Supreme Court reversed the original decision because it was based on industry allocation formulas or methodologies rather than statutory language. (App. 436.) Consequently, the Commissioner rejected VW's proposed test and rendered his decision based simply on the shipments to Miller and VW's importation data. (Id.) Because of the above three findings, the Commissioner decided that VW violated Va. Code Ann. § 46.2-1569(7). (App. 438.)

Further Appeals Following the Commissioner's Second Decision

Following the Commissioner's second decision, VW appealed the case to the Circuit Court for the City of Richmond and the Court of Appeals of Virginia. (App. 440-41.) During these appeals, VW argued *inter alia*, that the Commissioner failed to follow required procedures and that the Statute violated both the Virginia and U.S. Constitutions. (App. 446-49.) Nevertheless, both the Circuit Court and the Court of Appeals affirmed the Commissioner's decision, finding that "the commissioner performed the appropriate statutory analysis prescribed by the Supreme Court." (App. 532.)

The Court of Appeals also found that the Statute did not violate the Virginia and U.S. Constitutions because it contained "no directive, or even a suggestion, that vehicle allocations in other states are to be conducted in

accordance with Virginia requirements." (App. 547.) This Court has granted Volkswagen on appeal solely on the issues of whether the Statute is unconstitutionally vague or violates the Dormant Commerce Clause. The Court of Appeals' finding below finding that VW violated the Statute remains undisturbed.

STANDARD OF REVIEW

Virginia Code § 2.2-4027 governs the standard of review for appeals pursuant to the Administrative Process Act. That section provides "the duty of the court with respect to issues of fact shall be limited to ascertaining whether there was substantial evidence in the agency record upon which the agency as trier of fact could reasonably find them to be as it did." Va. Code Ann. § 2.2-4027. The substantial evidence standard adopted by the General Assembly was designed to give great stability and finality to the fact-findings of an administrative agency. See Virginia Real Estate Comm'n v. Bias, 226 Va. 264, 308 S.E.2d 123 (1983).

When a challenge is made to the constitutionality of a statute, there is a *strong presumption* in favor of its constitutionality. See Benderson Dev. Corp. v. Sciortino, 236 Va. 136, 141, 372 S.E.2d 751, 753 (1998).

> A facial challenge to a legislative Act is … the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exist under which the Act would be valid. The fact that [an act] might operate

> unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an "overbreadth" doctrine outside the limited context of the First Amendment.

United States v. Salerno, 481 U.S. 739, 745, 107 S. Ct. 2095, 2100 (1987) (rejecting criminal defendants' challenge to the federal Bail Reform Act because "respondents have failed to shoulder their heavy burden to demonstrate that the Act is 'facially' unconstitutional").

> [A] plaintiff can only succeed in a facial challenge by establish[ing] that no set of circumstances exists under which the Act would be valid, *i.e.,* that the law is unconstitutional in all of its applications. In determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about "hypothetical" or "imaginary" cases. The State has had no opportunity to implement [the statute under review], and its courts have had no occasion to construe the law in the context of actual disputes … or to accord the law a limiting construction to avoid constitutional questions.
>
> …
>
> Facial challenges are disfavored for several reasons. Claims of facial invalidity often rest on speculation. As a consequence, they raise the risk of premature interpretation of statutes on the basis of factually barebones records. Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. Finally, facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution. We must keep in mind that a ruling of unconstitutionality frustrates the intent of the elected representatives of the people.

Washington State Grange v. Washington State Republican Party, 128 S. Ct. 1184, 1190-91, 1194 (2008) (internal citations and quotations omitted) (rejecting political party's facial challenge to state election law on the grounds that there was "no evidentiary record" in support of claims of unconstitutionality).

ARGUMENT

I. THE STATUTE IS A FLEXIBLE ECONOMIC REGULATION THAT IS NOT UNCONSTITUTIONALLY VAGUE.

VW contends that Va. Code Ann. § 46.2-1569(7) is unconstitutionally vague for two reasons. First, it asserts that the statute does not give fair warning of the conduct prohibited. (Appellant's Br. 15.) Second, it contends that the statute does not provide a standard of enforcement for the Commissioner of the DMV. (Appellant's Br. 24.) However, a straightforward reading of the statute reveals that § 46.2-1569(7) is not impermissibly vague. It is an economic regulation, rather than a criminal or First Amendment statute, which provides a flexible means by which a distributor or manufacturer such as Volkswagen may fairly allocate its vehicle production among its dealers. In this case, the statutory standard governing vehicle shipments is essentially the same as that contained in VW's franchise agreement with Miller VW. (App. 14.) As such, the statute

provides Volkswagen fair warning of its obligations and is entitled to great deference as an economic regulation with no impact upon fundamental rights of individual citizens. The statute merely acts as a template to regulate whatever vehicle shipments Volkswagen decides to make in order to assure that Virginia dealers receive their fair share. Undoubtedly, when a dealer receives no vehicle shipments, the system cannot be fair and equitable.

A. The Remedial Purpose of Va. Code Ann. § 46.2-1569(7).

The Virginia Motor Vehicle Dealer Franchise Act, Chapter 15 of Title 46.2 ("the Act") reflects the General Assembly's appropriate use of its police powers to promote the important state interest of protecting local automobile dealerships in their franchise relationships with automobile manufacturers. The Act is just one example of numerous similar statutes by both Congress and individual state legislatures to address the long-recognized disparity of bargaining power which exists between automobile manufacturers and their dealers. The Act, which is remedial in nature, seeks to ensure the equitable treatment of small businesses like Miller VW in their interaction with much larger global corporations like Volkswagen AG and its affiliates.

Manufacturers require dealers to make substantial economic investments in their local dealership in order to function as a retail distribution point. These investments include designing and constructing the dealership's physical facility and showroom, hiring numerous sales and service employees, buying new and used vehicle inventory and parts, acquiring special tools and repair equipment, and making regular purchases of local media advertising. The substantial costs associated with these investments are generally defined obligations in the dealer's franchise agreement[4] and vary specifically according to the demand for the manufacturer's products as determined by the manufacturer. As a result of this complex dealer distribution network, manufacturers avoid having to make incalculable additional investments in similar retail facilities, including the potential risk of loss inherent in such investments.

Cognizant of the imbalance of economic power that exists between large global manufacturers and small local dealerships, the U.S. Congress

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[4] The U.S. Supreme Court has noted that the terms of a dealer's franchise agreement are usually dictated by the manufacturer. "This vast disparity in economic power and bargaining strength has enabled the factory to determine arbitrarily the rules by which the two parties conduct their business affairs. These rules are incorporated in the sales agreement or franchise which the manufacturer has prepared for the dealer's signature." New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, 100 n.4, 99 S. Ct. 403, 408 (1978).

and the U.S. Supreme Court have accurately described dealerships as the "economic captives" of manufacturers.

> Dealers are with few exceptions completely dependent on the manufacturer for their supply of cars. When the dealer has invested to the extent required to secure a franchise, he becomes in a real sense the economic captive of his manufacturer. The substantial investment of his own personal funds by the dealer in the business, the inability to convert easily the facilities to other uses, the dependence upon a single manufacturer for supply of automobiles, and the difficulty of obtaining a franchise from another manufacturer all contribute toward making the dealer an easy prey for domination by the factory. On the other hand, from the standpoint of the automobile manufacturer, any single dealer is expendable. The faults of the factory-dealer system are directly attributable to the superior market position of the manufacturer.

New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, 100 n.4, 99 S. Ct. 403, 408 (1978) (citing S. Rep. No. 2073, 84th Cong., 2d Sess., 2 (1956); S. Macaulay, Law and the Balance of Power: The Automobile Manufacturers and Their Dealers (1966)).

"The disparity in bargaining power between automobile manufacturers and their dealers prompted Congress and [other] States to enact legislation to protect car retailers from perceived abusive and oppressive acts by the manufacturers." New Motor Vehicle Bd., 439 U.S. at 100-01, 99 S. Ct. at 407. (citing The Automobile Dealers' Day in Court Act, 15 U.S.C. §§ 1221, et seq. and, among other state statutes, Va. Code § 46.1-547 (Supp. 1978), the predecessor to the current Va. Code Ann. §

46.2-1569(4)). Typical provisions in these dealer statutes, such as those making it unlawful for a manufacturer to cancel or refuse to renew a dealer's franchise without "just cause," have been upheld as constitutional. 62B Am. Jur. 2d Private Franchise Contracts § 360 (2009). Prior constitutional challenges to Virginia's version of the statute have also been rejected. Am. Motors Sales Corp. v. Div. of Motor Vehicles, 592 F.2d 219, 222 (4th Cir. 1979) (rejecting manufacturer's challenge on Dormant Commerce Clause grounds to the constitutionality of Virginia Motor Vehicle Franchise Act provision relating to the appointment of new dealerships).

Va. Code Ann. § 46.2-1569(7) fully harmonizes with the underlying policy objectives of the Virginia Motor Vehicle Dealer Franchise Act and other similar federal and state statutes intended to reduce coercive practices. Because a dealer's supply of vehicles is the lifeblood of its business, the Statute seeks to prevent a manufacturer from abusing or coercing a dealer by improperly restricting vehicle shipments. It accomplishes this purpose in three ways. First, it establishes a flexible standard that requires manufacturers to equitably allocate and ship vehicles to Virginia dealerships without mandating any precise formula, methodology or quota. See Va. Code Ann. § 46.2-1569(7). Second, acknowledging that dealers usually are not informed of the manufacturer's

business reasons in making its actual shipments, the Statute requires the manufacturer to disclose "the basis upon which new motor vehicles are allocated, scheduled, and delivered to the dealers of the same line-make." Id. Third, the Statute requires the manufacturer to justify its allocations and shipments by producing records related to its "distribution of all motor vehicles" to competing dealerships. Id. As set forth below, the Statute's equitable allocation requirement is neither unconstitutionally vague nor a violation of the Dormant Commerce Clause.

B. VW Failed to Carry Its Burden Of Demonstrating That The Statute Is Unconstitutionally Vague.

VW failed to carry its burden of demonstrating that the Statute is unconstitutionally vague. Because under controlling constitutional precedent a "less strict vagueness test" applies to § 46.2-1569(7), VW bears the heavy burden of showing that the Statute is unconstitutional in all of its applications. The Court should reject VW's vagueness challenge to the Statute since it did not present any evidence below in support of its assertion that the Statute is constitutionally defective.

1. The "less strict vagueness test" applies to this appeal.

As recognized by the Court of Appeals, Va. Code Ann. § 46.2-1569(7) is an economic regulation for purposes of constitutional review. (App. 550-51.) Since it is an economic regulation, the Statute is subject to

"a less strict vagueness test." Vill. of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498-99, 102 S. Ct. 1186, 1193 (1982). The U.S. Supreme Court stated, "economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action." Id. The Court noted that it has "expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe." Id. Section 46.2-1659(7) is properly reviewed in accordance with those standards. Many of the cases cited by Volkswagen deal with unconstitutional statutes which involved criminal or fundamental rights issues. These cases demand the higher, strict scrutiny level of review and are not applicable to the instant matter.

"A law is not void for vagueness so long as it (1) establishes minimal guidelines to govern law enforcement, and (2) gives reasonable notice of the proscribed conduct." Schleifer v. City of Charlottesville, 159 F.3d 843, 853 (4th Cir. 1998) (internal quotations and citations omitted). Statutes which do not implicate constitutionally protected conduct will only be stricken if such statutes are impermissibly vague in all of their applications.

Vill. of Hoffman Estates, 455 U.S. at 494-495, 102 S. Ct. at 1191. As the Fifth Circuit stated in rejecting a manufacturer's vagueness challenge to the Texas motor vehicle dealer law, "[a]n economic regulation is invalidated only if it commands compliance in terms so vague and indefinite as really to be no rule or standard at all ... or if it is substantially incomprehensible." Ford Motor Co. v. Texas Dep't of Transp., 264 F.3d 493, 507 (5th Cir. 2001) (internal quotations omitted). Moreover, statutes enjoy "strong presumptive validity" and courts are to seek "an interpretation which supports the constitutionality of the legislation." U.S. v. Nat'l Dairy Prods. Corp., 372 U.S. 29, 32, 83 S. Ct. 594, 598 (1963). The Fourth Circuit has emphasized that "striking down ordinances . . . as facially void for vagueness is a disfavored judicial exercise." Schleifer, 159 F.3d at 853.

The fact that particular words in a statute may be imprecise in certain factual situations does not make the statute impermissibly vague when the statute is clear in the majority of fact situations to which it applies. See Republic Indus., Inc. v. Teamsters Joint Council, 718 F.2d 628, 643 (4th Cir. 1983). In short, "[c]ourts rarely invalidate a law for facial vagueness … because few facial challenges satisfy the high burden normally imposed." Schleifer, 159 F.3d at 869 (Michael, J., dissenting). Thus, the burden rests with Volkswagen to "demonstrate the constitutional defect" in the Statute.

See Coleman v. Richmond, 5 Va. App. 459, 462, 364 S.E.2d 239, 241 (1988).

2. VW introduced no evidence in support of its claim that the Statute is unconstitutionally vague.

Volkswagen cannot demonstrate a constitutional defect in the Statute because it failed to introduce any evidence before the Commissioner showing that the Statute is impermissibly vague. In its brief, VW merely recites hypothetical examples never offered to the Commissioner to argue that the Statute is vague. (See App. 16, 20.) VW states that "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 … the number shipped was sufficient to comply with the Statute." (Appellant's Br. 15 (emphasis in original).) It strains credulity, however, to believe that VW had no idea that shipping zero vehicles to Miller VW during months in which thousands of such vehicles were imported nationally could potentially violate the Statute. Simply because the Statute does not provide Volkswagen with a mathematical formula to determine its vehicle shipments does not absolve it of its duty to provide Miller VW with at least one vehicle during these months given the large supply available for allocation. (App. 9.)

VW fails to recognize that an economic regulation does not have to set a bright-line test to pass constitutional muster.[5] "It is well settled that a statute is not fatally indefinite because questions may arise as to its applicability, or opinions may differ with respect to what falls within its terms, or because it is difficult to enforce." Fallon Florist, Inc. v. Roanoke, 190 Va. 564, 590, 58 S.E.2d 316, 329 (1950). Indeed, a statute "is not unconstitutionally vague merely because a company or an individual can raise uncertainty about its application to the facts of their case. A statute is unconstitutionally vague 'only where no standard of conduct is outlined at

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[5] Experts in constitutional law have long recognized the value of broad and flexible economic regulations.

> An unclear law, a law that does not draw bright lines, might regulate (or appear to regulate) more than is necessary, and thus deter or chill persons from engaging in protected speech. In contrast, an unclear law relating to many economic matters, such as an unclear negligence law, would chill activity that does not have special First Amendment significance. The lessened risk to the Constitution makes more palatable the wait until such time as the statute is clarified by the appropriate courts. Indeed, the vagueness in the non-speech area, may be both necessary and advantageous. For example, if a law that forbids reckless driving causes people to be more cautious than absolutely necessary while driving, that is a good thing, not a bad thing. We are not concerned that the law will "chill" people's ability drive as recklessly as possible without crossing the line from legal to illegal.

7 John E. Nowak, Ronald D. Rotunda, Constitutional Law § 16.9, 1158 (2004).

all; when no core of prohibited activity is defined.'" Ford Motor Co., 264 F.3d at 508. See, e.g., Butler v. Div. of Motor Vehicles, 189 Va. 411, 418, 53 S.E.2d 152 (1949) ("[G]eneral terms, which get precision from the technical knowledge or sense and experience of men and thereby become reasonably certain, may be used"). Thus, "the vagueness test is 'whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices . . . and (impossible) standards of specificity are not required.'" Hanky v. City of Richmond, 532 F. Supp. 1298, 1310 (E.D. Va. 1982).

In the instant case, the Statute, at its core, sufficiently warned Volkswagen that it was required to treat its smallest dealers fairly and equitably in determining vehicle shipments. Va. Code Ann. § 46.2-1569(7). Specifically, the text of the Statute gives more than adequate notice to manufacturers that if they choose to ship zero vehicles when ordered by a Virginia dealer, they will have to justify such a decision by showing that their national importation numbers were so small that the allocation decision was equitable under the circumstances. Id. ("it shall be unlawful ... [t]o fail to ship …") (emphasis added). In this case, VW simply failed to provide sufficient evidence to the Commissioner that its allocation decision could be justified in light of the vehicles available to it. Similarly, VW has

failed to provide any evidence that the Statute is impermissibly vague and, therefore, has failed to meet its burden of demonstrating a constitutional defect in the Statute.

C. Section 46.2-1569(7) Is Not Vague Because It Provides Fair Warning To Manufacturers And Establishes Flexible Guidelines for Enforcement By The Commissioner.

Section 46.2-1569(7) is not vague because it provides fair warning to manufacturers and establishes flexible guidelines for enforcement by the Commissioner. The Statute is not intended to dictate the shipment and allocation decisions of automobile manufacturers and distributors. Contrary to Volkswagen's assertions, statutes using terms such as "fair" and "equitable" are not *per se* vague. Indeed, VW's cited case authority in support of this case is inapplicable to non-criminal, economic regulations like Section 46.2-1569(7). Consequently, the flexible nature of the Statute fully complies with constitutional requirements.

1. Due process requires a legislature to provide minimum general guidelines for the enforcement of an economic regulation.

Due process only requires that a legislature provide minimum general guidelines for the enforcement of an economic regulation. Legislatures are granted significant flexibility in drafting economic statutes which by necessity must be "sufficiently general to address the problem under varied

circumstances and during changing times." Parish v. Lamm, 758 P.2d 1356, 1368 (Colo. 1988). In that regard, courts have long drawn a distinction between statutes which are impermissibly vague and those which simply provide a flexible standard by which conduct is to be judged. See, e.g., Grayned v. City of Rockford, 408 U.S. 104, 110, 92 S. Ct. 2294, 2300 (1972) (finding that anti-noise statute was not impermissibly vague; rather it was "marked by flexibility and reasonable breadth, rather than meticulous specificity"); S. Ry. Co. v. Commonwealth, 205 Va. 114, 120, 135 S.E.2d 160, 166 (1964) (rejecting a vagueness challenge to a criminal statute and finding that, taken in context with the purpose of the statute, the legislature had "provided a flexible, rather than a vague, standard designed to meet the exigencies of each situation").

Section 46.2-1569(7) sets forth a flexible, not vague, standard of conduct for manufacturers in allocating vehicles to dealers that is wholly consistent with the Commissioner's larger mission to prevent unfair competition and abusive or coercive practices by manufacturers and distributors. See Va. Code Ann. § 46.2-1501. The Statute's terms are imbued with meaning in and of themselves, through context and common

knowledge within the automobile industry, and other extrinsic sources.[15] See, e.g. Commonwealth v. Gen. Elec. Co., 236 Va. 54, 68, 372 S.E.2d 599, 608 (1988) (holding tax statute permitting the Department of Taxation may adjust tax assessment equitably "in such a manner as it may determine" is not vague because the statute limits the Department's ability to make such adjustments under specific conditions). In the instant case, the Commissioner's ability to find that certain vehicle shipments are unfair is limited to those circumstances where the number of vehicles allocated and shipped to the local dealer is not reasonably proportionate "to the total new production or importation" of the manufacturer. Compare Gen. Elec., 236 Va. at 68, 372 S.E.2d at 608. By establishing the monthly number of vehicles manufactured or imported nationally as the measuring criteria, the General Assembly crafted a statute that was permissibly broad "to capture whatever creative conduct could be imagined by the statute's intended prohibition." Ford Motor Co., 264 F.3d at 509.

The Statute does not impermissibly dictate a precise number or percentage of vehicles which must be shipped to each dealer. Volkswagen

[15] In Am. Power & Light Co. v. Sec. and Exch. Comm'n, 329 U.S. 90, 104, 67 S. Ct. 133, 142 (1946), the Supreme Court stated that standards "need not be tested in isolation," and found that much meaningful content could be derived from the purpose of the act, its factual background, and its statutory context.

is left to establish its own allocation and distribution system, sales requirements, and evaluation criteria for dealers. The Statute merely requires that, within the system created by the manufacturer/distributor, Virginia dealers receive a "fair share" or equitable number of new vehicles. Va. Code Ann. § 46.2-1569(7). This is essentially the same equitable allocation covenant contained in VW's franchise agreement with its dealers. (App. 14, 16 (stating that Volkswagen "will endeavor to make a fair and equitable allocation and distribution of the Authorized Products [including new vehicles] available to it").)

According to Volkswagen's theory, the Statute provides no explicit standards for motor vehicle manufacturers to comply with the law. (Appellant's Br. 15, 18.) However, the testimony of VW's own expert witness demonstrates that the concept of equitable allocation is commonly understood in the automobile business. During the second hearing before the Commissioner, VW's expert, Sharif Farhat, testified confidently that it was the purpose of a manufacturer's vehicle allocation system "to fair[ly] and equitably distribute the vehicles that are available." (App. 346-48, 382-84.) Indeed, in his testimony Mr. Farhat sought to demonstrate that VW's allocation system (based on average day's supply analysis) distributed its own vehicles in a "fair and equitable" manner. (App. 348.)

In addition, VW's mandatory minimum stocking requirement (a common dealer franchise provision) provides valuable commercial context to the Statute's equitable allocation rule. Under VW Operating Standards, Miller is "required to maintain a minimum inventory of one of each Volkswagen model" and no less than three (3) Jettas and three (3) Passats in stock at all times. (App. 20; see also App. 12.) Miller was unable to obtain sufficient vehicles even to meet this minimum stocking requirement.[6] After Miller initiated the instant administrative action, VW began shipping more vehicles to Miller on the grounds that it needed to meet its minimum stocking requirements. (App. 11-12.) Thus, the Statute does indeed provide a flexible minimum standard for the Commissioner to use in evaluating whatever allocation choices a manufacturer/distributor makes, in order to ensure that a Virginia dealer receives a "fair share" of vehicles. Volkswagen of Am., Inc. v. Smit, 52 Va. App. 751, 798, 667 S.E.2d 817, 840 (2008); (App. at 552).

Finally, the Commissioner's decision in this case provides a limiting construction which significantly reduces the scope of the Statute and gives other manufacturers and distributors a detailed warning when declining to

[6] Stuart Karp, VW's area executive, stated in his April 8, 1998 letter to Miller VW that "I have been the Area Executive in District 32 since May of 1997 and in that time period, you have not met this [minimum stocking] requirement." (App. 11-12.)

ship any vehicles to a Virginia dealer.[7] The DMV Commissioner stated in his August 1, 2005 Hearing Decision:

> It is my opinion that shipping a number of vehicles that will enable a dealer to achieve or receive zero percent of the sales of a vehicle is generally not equitably related to national importation. I would note that I am limiting this finding, that a shipment of zero vehicles will not allow a dealer to achieve a percentage of vehicle sales equitably related to national importations, to **newly introduced** makes, series, and models of vehicles, such as the Passats and Beetles in this case, where no meaningful history of dealer and national sales exist for the new vehicle. I decline to comment on whether this analysis or finding would stand in situations where there is reliable data regarding the sales histories for particular vehicles nationally and by individual dealers.

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[7] The U.S. Supreme Court has stated that flexible standards contained in statutes may be later clarified and limited by administrative and judicial action.

> Nor do we assume that the village will take no further steps to minimize the dangers of arbitrary enforcement. The village may adopt administrative regulations that will sufficiently narrow potentially vague or arbitrary interpretations of the ordinance. In economic regulation especially, such administrative regulation will often suffice to clarify a standard with an otherwise uncertain scope.

Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. at 504, 102 S. Ct. at 1196. Besides administrative regulations, case decisions by administrative agencies and courts may also serve the need "to clarify a standard with an otherwise uncertain scope." See Washington State Grange v. Washington State Republican Party, 128 S. Ct. at 1190-91, 1194. Indeed, in Washington State Grange the U.S. Supreme Court expressed its reluctance to invalidate statutes based on a facial challenge since it deprives courts of the opportunity "to construe the law in the context of actual disputes" and "to accord the law a limiting construction to avoid constitutional questions." Id.

(App. 484 (emphasis in original).) Thus, the Commissioner's holding in this case is truly limited to situations where (1) the manufacturer/distributor ships no vehicles, and (2) the vehicles involved are "newly introduced" without reliable sales history. Since VW bears the burden of demonstrating that the Statute is invalid in all of its applications, Vill. of Hoffman Estates, 455 U.S. at 494-495, 102 S. Ct. at 1191, it must also show that the additional limiting construction provided by the Commissioner above is unconstitutionally vague. VW cannot do so because the Statute provided more than fair warning of the danger of shipping Miller no vehicles.

2. Statutes using terms such as "fair" and "equitable" are not *per se* vague.

Volkswagen seems to argue in its Brief that statutes using the terms "equitable" or "unfair" are somehow *per se* vague. (Appellant's Br. 23.) This is not an accurate statement of the law. First, as recognized by the Court of Appeals below, the term "equitable" is clear and unambiguous in Virginia law. Specifically, the court stated, "The language challenged—'equitably'--is in 'everyday usage and is commonly understood.' The term 'equitably' means "in an equitable manner." Webster's Third New International Dictionary 769 (1993). 'Equitable' means 'fair to all concerned ...: without prejudice, favor, or rigor entailing undue hardship.'" Volkswagen

of Am., Inc. v. Smit, 52 Va. App. at 798, 667 S.E.2d at 840 (citing S. Ry. Co. v. Commonwealth, 205 Va. 114, 117, 135 S.E.2d 160, 164 (1964)). Thus, the phrase "equitably related" contained in the Statute is sufficiently clear to guide administrative enforcement of its allocation requirement.

Second, many other states have enacted statutes using similar language setting forth a flexible standard for a manufacturer's allocation of vehicles, prohibiting only a manufacturer's allocation that is not "reasonable" or otherwise "unfair, inequitable, unreasonably discriminatory, or not supportable by reason and good cause." See, e.g., Fla. Stat. Ann. § 320.64(18-19) (2008)[8]; Ky. Rev. Stat. Ann. § 190.070(2)(a)[9]; Md. Code Ann., Transp. § 15-208(a-c) (2009)[10]; Mass. Gen. Laws Ann. ch. 93B, § 4(c)(3) (2009)[11]; Mich. Comp. Laws Ann. § 445.1574(1)(c) (2009)[12] Minn.

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[8] Fla. Stat. Ann. § 320.64(18-19) (prohibiting allocation systems which are "unfair, inequitable, unreasonably discriminatory, or not supportable by reason and good cause after considering the equities of the affected motor vehicles dealer or dealers").

[9] Ky. Rev. Stat. Ann. § 190.070(2)(a) (requiring vehicle shipments in "reasonable quantities relative to the new motor vehicle dealer's facilities and sales potential in the new motor vehicle dealer's relevant market area, and within a reasonable time").

[10] Md. Code Ann., Transp. § 15-208(a-c) (2009) (requiring a manufacturer to deliver vehicles "in reasonable quantities and within a reasonable time after receipt of a written order").

[11] Mass. Gen. Laws Ann. ch. 93B, § 4(c)(3) (2009) (requiring a manufacturer to deliver vehicles "in reasonable quantities and within a reasonable time after receipt of an order").

Stat. Ann. § 80E.13(a) (2009)[13]; N.C. Gen. Stat. Ann. § 20-305(14) (2009)[14]; Okla. Stat. tit. 47, § 565(A)(9)(c) (2009)[15]; Ohio Rev. Code Ann. § 4517.59(F) (2009)[16]; Pa. Stat. Ann. § 818.12(b)(1) (2009)[17]; S.C. Stat. Ann.

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[12] Mich. Comp. Laws Ann. § 445.1574(1)(c) (2009) (prohibiting a manufacturer from refusing to deliver vehicles in "reasonable quantities and within a reasonable time after receipt of a dealer's order").

[13] Minn. Stat. Ann. § 80E.13(a) (2009) (making it unlawful to fail to ship in "reasonable time and in reasonable quantity relative to the new motor vehicle dealer's facilities and sales potential in the dealer's relevant market area").

[14] N.C. Gen. Stat. Ann. § 20-305(14) (2009) (making it unlawful to fail to deliver vehicles in "reasonable quantities relative to the new motor vehicle dealer's facilities and sales potential in the new motor vehicle dealer's market area as determined in accordance with reasonably applied economic principles, or within a reasonable time," and requiring each manufacturer to "allocate its products in a manner that provides each of its franchised dealers in this State an adequate supply of vehicles by series, product line, and model to achieve the manufacturer's minimum sales requirements, planning volume, or sales objectives and that is fair and equitable to all of its franchised dealers in this State").

[15] Okla. Stat. tit. 47, § 565(A)(9)(c) (2009) (making it unlawful to "unreasonably [fail] … to offer … all models manufactured for that line-make, or unreasonably [require] a dealer to pay any extra fee, purchase unreasonable advertising displays or other materials, or remodel, renovate, or recondition the dealer's existing facilities as a prerequisite to receiving a model or series of vehicles").

[16] Ohio Rev. Code Ann. § 4517.59(F) (2009) (making it unlawful to "discriminate against any franchisee in the allocation or through the withholding from delivery of certain models of motor vehicles ordered by a franchisee out of the ordinary course of business; nor unfairly change or amend unilaterally a franchisee's allotment of motor vehicles or quota in a sales contest without reasonable cause").

§ 56-15-40 (2009)[18]; Utah Code Ann. § 13-14-201(1)(i) (2009)[19]; Vt. Stat. Ann. tit. 9, § 4097(1) (2009).[20] None of these statutes have been invalidated on the grounds that the standard set forth is unconstitutionally vague.

3. VW's cited case authority is inapplicable to non-criminal, economic regulations like Section 46.2-1569(7).

Volkswagen relies principally on three cases in support of its claim that the Statute is unconstitutionally vague. However, the cited case authorities are inapplicable to non-criminal economic regulations like Section 46.2-1569(7).

a. Am. Motor Sales Corp. v. E.L. Bowen & Co. is inapplicable.

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[17] Pa. Stat. Ann. § 818.12(b)(1) (2009) (making it unlawful to "delay, refuse or fail to deliver new vehicles … in a reasonable time and in reasonable quantity relative to the new vehicle dealer's facilities and sales potential").

[18] S.C. Stat. Ann. § 56-15-40 (2009) (making it unlawful to "refuse to deliver in reasonable quantities and within a reasonable time after receipt of dealer's order").

[19] Utah Code Ann. § 13-14-201(1)(i) (2009) (making it unlawful to "adopt, change, establish, modify, or implement a plan or system for the allocation, scheduling, or delivery of new motor vehicles … to its franchisees so that the plan or system is not fair, reasonable, and equitable").

[20] Vt. Stat. Ann. tit. 9, § 4097(1) (2009) (making it unlawful to "delay, refuse, or fail to deliver new motor vehicles or new motor vehicle parts or accessories in a reasonable time, and in reasonable quantity relative to the new motor vehicle dealer's facilities and sales potential in the new motor vehicle dealer's relevant market area").

First, VW attempts to cite Am. Motor Sales Corp. v. E.L. Bowen & Co, Chancery No. 4498 (Va. Cir. Ct. June 3, 1958) (attached as an appendix to Vintage Imps., Ltd. v. Seagram & Sons, Inc., 409 F. Supp. 497, 510-11 (E.D. Va. 1976)), an unpublished circuit court decision, as controlling precedent based on the Supreme Court's denial of a petition for appeal in the case. (Appellant's Br. 22, Exhibit A.) In that case, the circuit court held that a Virginia statute making it unlawful to cancel a dealer franchise "unfairly and without due regard for the equities" was unconstitutionally vague. Vintage Imps., 409 F. Supp. at 511. The circuit court's opinion is extremely brief and provides no analysis of the relevant constitutional precedent applicable. See id.

More importantly, however, the Supreme Court order containing the denial for the petition for appeal in E.L. Bowen contains no reference to the challenged statute being unconstitutional. (See id.) As a result, as the Court stated in Sheets v. Castle, 263 Va. 407, 412, 559 S.E.2d 616, 619-20 (2002), the denial of the petition for appeal contains no precedential value for future cases.

> We restate that, with the exceptions previously mentioned, the refusal of a petition for appeal is based upon the merits of the case. However, unless the grounds upon which the refusal is based is discernible from the four corners of the [Supreme] Court's order, the denial carries no precedential value. To hold otherwise would result in bench and bar sifting through the

> records of cases buried in the office of the Clerk of the Supreme Court of Virginia or the clerk of the circuit court to affirm or contradict speculative assertions of the reason for the Court's denial of petitions for appeal. Such unreliability and lack of clarity is not countenanced in our jurisprudence.

Id. VW's citation to a denial for a petition for appeal to a 1958 circuit court decision never followed by any other Virginia court contains the same kind of "speculative" reasoning condemned by the Supreme Court in Sheets.

Unlike the statutory language at issue in E.L. Bowen, the requirement that vehicle shipments be "equitably related" to national imports is a common term used in dealer franchise agreements. VW's "Dealer Agreement Standard Provisions," incorporated into Miller's Dealer Agreement, states that VW "will endeavor to make a fair and equitable allocation and distribution of the Authorized Products available to it." (App. 14.) In addition, VW's "Operating Standards for Volkswagen Retailers" contained in the Dealer Agreement contain minimum standards for dealer inventory and, therefore, expected vehicle shipments. (App. 19-20.) Given the Statute's similar use of language, the application of the phrase "equitably related" is knowable in this commercial context.

b. Vintage Imps., Ltd. v. Joseph E. Seagram & Sons, Inc. is inapplicable.

Second, Volkswagen bases its argument concerning the vagueness of the term "equitable" on the case of Vintage Imps., Ltd. v. Joseph E.

Seagram & Sons, Inc., 409 F. Supp. 497 (E.D. Va. 1976). (Appellant's Br. 22.) Volkswagen's reliance on Vintage is misplaced and not well founded. In Vintage, the statutory language stated that it was illegal to terminate a wholesale liquor franchise "[u]nfairly, without due regard to the equities of such wholesaler … without just cause or provocation." Vintage, 409 F. Supp. at 508.

As an initial matter, the language "due regard to the equities of such wholesaler" is not comparable to "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" as found in Section 46.2-1569(7). Unlike the regulation in Vintage, the Statute provides a method of comparison with national production or importation numbers to determine whether a dealer receives a fair number of vehicles. The language "due regard to the equities" in Vintage, however, is a stand alone phrase with no reference point and no method for comparison or determination as to what "the equities" might be.

Moreover, the presence of the term "equities" was not the basis upon which the statute in Vintage was found to be vague. The court found several phrases, individually and read together, to be problematic in the statute. See Vintage, 409 F. Supp. at 509-510. In addition, the district

court specifically noted that the Vintage statute included a possible penalty of up to 12 months incarceration. Id. at 509. As noted above, once a statute invokes criminal penalties, a very different standard of scrutiny applies. See, e.g., Vill. of Hoffman Estates, 455 U.S. at 498-9, 102 S. Ct. at 1186. Thus, Vintage is factually and legally distinguishable from the matter sub judice.[21]

c. Tanner v. City of Virginia Beach is inapplicable.

Third, VW relies on this Court's recent decision in Tanner v. City of Virginia Beach, 277 Va. 432, 674 S.E.2d 848 (2009) in support of its claim that the Statute is unconstitutionally vague. (Appellants' Br. 25.) VW's reliance is misplaced, however, as this case is clearly distinguishable. In

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[21] Volkswagen's reference to Mike Naughton Ford, Inc. v. Ford Motor Co., 862 F. Supp. 264 (D. Colo. 1994), is also unavailing. The statute involved in that matter prohibited the establishment of new franchises when doing so "would be inequitable to the existing dealer." Id. at 270. The court's musing that the statute at issue was impermissibly vague, however, constituted dicta as the court had specifically stated that the statute "is not applicable to the facts of this case." Id. at 270. Moreover, the statute imposed criminal penalties. See id.

For the same reasons, the District of Colorado's unpublished decision in Arapahoe Motors, Inc. v. General Motors Corp., Civ. Action No. 99 N 1985, 2001 U.S. Dist. LEXIS 24533 (D. Colo. Mar. 28, 2001), is also inapplicable. In Arapahoe, the court addressed the Colorado dealer statute that prohibited a manufacturer from terminating a franchise agreement for "just cause." Id. at *38. Thus, Arapahoe has little, or nothing, to do with the statutory language that Volkswagen has challenged in the instant case. Moreover, the Arapahoe court was influenced by the criminal aspects of the Colorado statute, as evidenced by it reference to a "standard of guilt" and "penalties." See id. at *37-38.

Tanner, owners of a club located on the oceanfront of Virginia Beach challenged a local city noise ordinance as unconstitutionally vague. 674 S.E.2d at 850-51. The club was a popular entertainment venue where performers presented a wide variety of live music. Id. at 850. The city ordinance carried significant criminal penalties, with a violation resulting in a class 4 misdemeanor. Id. In pertinent part, the ordinance stated:

> It shall be unlawful for any person to create, or allow to be created any unreasonably loud, disturbing and unnecessary noise in the city or any noise of such character, intensity and duration as to be detrimental to the life or health of persons of reasonable sensitivity or to disturb or annoy the quiet, comfort or repose of reasonable persons.

Id. Since the ordinance failed to objectively define "noise" (in terms of measurable decibels, for example), owners of the club complained that enforcement of the law invited "selective prosecution" by the police. See id. at 851. The circuit court rejected the club owners' constitutional challenge to the law, but the Supreme Court of Virginia reversed and invalidated it. Id. at 851-52.

In explaining its holding, the Supreme Court emphasized both the First Amendment issues present in the case and the need for definiteness when criminal penalties may be imposed. Id. at 852-53. The Court stated that "vague language in a statute or ordinance may cause citizens to avoid constitutionally permissible conduct based on a fear that they may be

violating an unclear law." Id. at 852. In addition, the Court ruled that an ordinance may not "consign a person to penal consequences without first providing sufficiently definite notice of prohibited activities." Id. at 853. In light of these free speech and criminal penalty concerns, the language of the ordinance failed to define improper "noise" with sufficient precision to survive constitutional scrutiny.[22]

In the instant case, the Dealer Statute cannot be invalidated based on the Court's ruling in Tanner. First and most importantly, Miller VW's administrative complaint concerning insufficient vehicle shipments does not implicate the right to free speech, as in Tanner. (See App. 1.) In Tanner, the city noise ordinance risked chilling the performance of live music and other expressive entertainment at the club. Tanner, 674 S.E.2d at 850, 852. In contrast, VW cannot plausibly claim in this case that any

[22] Although not stated explicitly in Tanner, the Supreme Court's opinion suggests that the vagueness of the Virginia Beach noise ordinance could be easily remedied by defining impermissible "noise" in terms of measured decibels. The Tanner Court repeatedly supported its holding by citing to the decision of the Supreme Court of Mississippi in Nichols v. City of Gulfport, 589 So.2d 1280, 1283 (Miss. 1981). In Nichols, the Supreme Court of Mississippi struck a similar city noise ordinance on vagueness grounds. Id. at 1284. There, the court explained that in the time since the ordinance was enacted it became possible to objectively measure and define a given volume of sound as harmful, annoying, or unhealthy. Id. It stated, "the ordinance is nearly half a century old, and in view of the technological age in which we now find ourselves, another look at the city's anti-noise ordinance would seem wise." Id.

constitutionally protected interest is affected by the regulation of its vehicle shipments to Virginia dealers. Va. Code Ann. § 46.2-1569(7). Second, the flexibility of the legal standard provided in the Statute is both desirable and constitutionally permissible in light of the fact that no criminal penalties are involved and the Statute solely regulates economic activity. Id. This differs from the facts of Tanner in which a violation of the noise ordinance resulted in criminal sanctions, viz., a class 4 misdemeanor. Tanner, 674 S.E.2d at 850. For these reasons, VW reliance on Tanner is clearly misplaced.

II. THE STATUTE PROMOTES A VALID STATE INTEREST AND DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE.

Volkswagen contends that Section 46.2-1569(7) violates the Dormant Commerce Clause by requiring conformity with Virginia law, and that such conformity allegedly unconstitutionally impacts commerce outside of Virginia. (Appellant's Br. 34.) Volkswagen's position is incorrect. Article I, Section 8, Clause 3 of the U.S. Constitution grants Congress the power to regulate interstate commerce. This grant of authority imposes a restriction on each state's power to promulgate laws which may impact interstate commerce. See Healy v. Beer Institute, 491 U.S. 324, 336-37, 109 S. Ct. 2491, 2499 (1989). Under prevailing constitutional precedent, state statutes will violate the Dormant Commerce Clause if they (1) directly regulate or

discriminate against interstate commerce or (2) create a burden on interstate commerce which exceeds the local benefits. Id.

In the instant case, the Statute does not impact Volkswagen's distribution of vehicles outside of Virginia, but merely proscribes unfair practices by manufacturers in their conduct of business with Virginia dealers. The Statute neither specifically dictates Volkswagen's method of allocation of vehicles within Virginia nor places limitations on Volkswagen's national allocation/distribution system. The Statute is simply a check on whatever system is utilized by the manufacturer/distributor and provides substantial benefits to the Commonwealth, such that even if the harm that Volkswagen asserts affected commerce, the harm is merely remote and incidental and does not outweigh the Statute's benefits.

A. VW Introduced No Evidence Of The Statute's Alleged Effect On Interstate Commerce And Merely Provides Speculation And Hypothetical Examples In Place Of Proof.

VW's challenge to the constitutionality of the Statute under the Dormant Commerce Clause automatically fails because it never introduced any evidence over the course of the last eleven (11) years to show that the Statute has any impact on interstate commerce whatsoever. A careful reading of VW's Brief reveals that it has not made a single citation to the record of any fact or evidence in support of its Dormant Commerce Clause

argument. (See Appellant's Br. 33-40.) In fact, VW has never seriously presented a case in favor of its constitutional claims, but has merely held these arguments in reserve in the event of an unfavorable ruling on the merits of this matter.

The U.S. Supreme Court has expressed its caution concerning facial challenges to statutes because such challenges often lack proper evidentiary support. The Court has stated:

> In determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about "hypothetical" or "imaginary" cases … Facial challenges are disfavored for several reasons. Claims of facial invalidity often rest on speculation. As a consequence, they raise the risk of premature interpretation of statutes on the basis of factually barebones records.

Washington State Grange, 128 S. Ct. at 1190-91, 1194 (internal citations and quotations omitted) (rejecting facial challenge on the grounds that there was "no evidentiary record" in support of claims of unconstitutionality).

In the instant case, Volkswagen's Dormant Commerce Clause claims utterly lack evidence of any impact, effect, or burden on interstate commerce. VW states that the "natural consequence" of the Statute is to cause Volkswagen to "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." (Appellant's Br. 38.) VW, unfortunately, cites to no evidence in the record in support of this conclusion.

VW claims that the Statute would create "gridlock … [i]f multiple states [were to] adopt legislation similar to Va. Code Ann. § 46.2-1569(7)." (Appellant's Br. 38.) However, Volkswagen introduced no evidence to the Commissioner of such "gridlock." Moreover, as set forth above, multiple states have adopted essentially the same "reasonable" or "equitable" allocation requirement contained in the Statute. Thus, VW assertion is mere speculation and hyperbole.

Lastly, VW argues that "the practical effect of the Statute … is to control the number of vehicles that the distributor can import into the country." (Appellant's Br. 35.) Volkswagen had multiple opportunities over the course of litigation in this case to present evidence concerning the Statute's impact on its vehicle importations. It never did so. As a result, rather than meeting its burden of demonstrating by real evidence the Statute's alleged constitutional defect, VW now merely presents speculation and "hypothetical" or "imaginary" cases to demonstrate an impermissible impact on interstate commerce. As such, Washington State

Grange, 128 S. Ct. at 1190-91, 1194, is directly on point in this case and is sufficient grounds to reject VW's constitutional challenge to the Statute.

Therefore, Volkswagen's decision not to develop an evidentiary record to support its claim that the Statute runs afoul of the Dormant Commerce Clause dooms it to failure.

B. Section 46.2-1569(7) Does Not Regulate Interstate Commerce.

The Statute simply does not regulate interstate commerce. "A statute discriminates against interstate commerce when it provides for 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" Ford Motor Co., 264 F.3d at 499 (citations omitted). Statutes which are discriminatory in that manner are *per se* invalid, while regulations which do not discriminate between in-state and out-of-state interests are analyzed by balancing the alleged burden on interstate commerce with the local benefits of the regulatory scheme. Id. at 499-500.

Despite Volkswagen's bald assertion that Section 46.2-1569(7) has the "practical effect" of directly regulating interstate commerce (Appellant's Br. 34), nothing about the Statute either on its face or in its application favors, regulates, or discriminates against out-of-state interests. The law specifically applies to "any manufacturer, factory branch, distributor, or

distributor branch." Va. Code Ann. § 46.2-1569 (emphasis added). The Statute thus treats all manufacturers/distributors the same, regardless of whether they are domiciled in Virginia or elsewhere. Accordingly, it is not *per se* invalid. See Ford Motor Co., 264 F.3d at 502.[23]

Furthermore, there can be no serious doubt that the Commonwealth has the authority to regulate the relationship between motor vehicle manufacturers/distributors without violating the Commerce Clause. Indeed, the United States Court of Appeals for the Fourth Circuit upheld Virginia's prior Statute in Am. Motor Sales Corp. v. Div. of Motor Vehicles, 592 F.2d 219 (4th Cir. 1979), holding that the Statute had the permissible purpose of promoting "fair dealing and the protection of small business" due to the "disparity in bargaining power between automobile manufacturers and their dealers." Id. at 222; see also New Motor Vehicle Bd. of California v. Orrin W. Fox Co., 439 U.S. at 100-101, 99 S Ct. at 408. This is not the sort of protectionism that is disfavored under the Commerce Clause. See

[23]The Statute, like the Ford Motor Co. case, "does not discriminate among in-state and out-of-state manufacturers, nor does it discriminate among in-state and out-of-state dealers by raising the costs of doing business in the local market, stripping away the economic advantages for an out-of-state participant, or giving advantages to local participants. The absence of such discrimination, either facially or in practical effect, removes [the Statute] from the Supreme Court's definition of a discriminatory law." Ford Motor Co., 264 F.3d at 502.

Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 125-6, 98 S.Ct. 2207, 2213-14 (1978).

Unlike the regulations found unconstitutional in Healey v. Beer Inst., 491 U.S. 324, 109 S. Ct. 2491 (1989) and Brown-Forman Distillers Corp. v. New York, 476 U.S. 573, 106 S. Ct. 2080 (1986),[24] the Statute does not tie compliance with Virginia law to that of any other state. For example, in both Healey and Brown-Forman, the statutes were found to violate the Commerce Clause because they required brewers and distillers to assure that the liquor prices in the enacting state would be no higher than the lowest prices offered in adjoining states for a set period of time. Brown-Forman, 476 U.S. at 575-76, 106 S. Ct. at 2082; Healey, 491 U.S. at 327, 109 S. Ct. at 2494. In both Healey and Brown-Forman, the Court found that the statutes created a "price gridlock" that short-circuited the pricing decisions of the distillers, because a distiller was unable to change the prices it charged in adjoining states without violating the enacting state's

[24]Volkwagen's relies upon alcoholic beverage cases to support its argument. As stated *infra*, in every alcoholic beverage case cited by Volkswagen, the pertinent statutes contained specific language attempting to control or discriminate in pricing or distribution between in-state and interstate commerce. The Statute in the instant case does not distinguish between in-state or interstate pricing, or controls. The Statute does not establish a floor or ceiling for pricing based on activities in other states nor does it require interstate businesses to utilize different distribution methods than in-state businesses.

law. Brown-Forman, 476 U.S. at 582-83, 106 S. Ct. at 2086; Healey, 491 U.S. at 339-40, 109 S. Ct at 2501. Thus, the statutes were unconstitutional because they expressly tied compliance under the statute with actions in other states.

In Beskind v. Easley, 325 F.3d 506 (4th Cir. 2003), and Heublein, Inc. v. Dep't of Alcoholic Beverage Control, 237 Va. 192, 376 S.E.2d 77 (1989), the applicable statutes directly and expressly discriminated against out-of-state businesses. See Beskind, 325 F.3d at 515. In Beskind in-state wineries were permitted to ship and sell their products directly to in-state residents, while out-of-state wineries were not permitted to sell directly to the consumer. Id. at 515. In Heublein, in-state wineries were exempted from the Virginia Wine Franchise Act, whereas out-of-state wineries were required to comply with the law's requirements. Heublein, 237 Va. at 198-99, 376 S.E.2d at 80.

Unlike the cases above, the equitable allocation Statute has no similar restrictions and does not tie a particular number of vehicles allocated within Virginia to allocations made in an adjoining state. See Va. Code Ann. § 46.2-1569(7). The Statute merely acts as a template to evaluate whatever system the manufacturer/distributor adopts and elects to use in order to ensure that Virginia dealers receive their fair share of new

vehicles. The denial of the benefit of being able to allocate vehicles with unfettered discretion does not rise to the level of a Commerce Clause violation. See, e.g. Welch v. Board of Supervisors, 888 F. Supp. 753, 759 (W.D. Va. 1995).

Volkswagen has represented that its practice was to adjust its allocations of vehicles at the regional, district, and local dealer levels for particular market conditions and dealer needs. (See App. 100-01 (stating that VW's vehicle allocations were "done at the local area market level, not at the national headquarters").) Thus, Volkswagen's contention that compliance with Virginia law would require a change in its allocation system outside of Virginia is purely theoretical and actually contradicts the evidentiary record.

C. The Local Benefits of Section 46.2-1569(7) Far Outweigh the Claimed Incidental and Remote Effects on Interstate Commerce.

Assuming arguendo that the Statute has some impact on interstate commerce, this Court should still uphold it because the local benefits of the Statute are clearly greater than the incidental burdens placed on interstate commerce. See City of Philadelphia v. New Jersey, 437 U.S. 617, 624, 98 S. Ct. 2531, 2535 (1978); Pike v. Bruce Church, 397 U.S. 137, 142, 90 S. Ct. 844, 847 (1970). In the instant case, as explained above, the courts

and the General Assembly have found that regulating motor vehicle manufacturers' relationships with Virginia dealers provides a substantial benefit to the small businesses of the Commonwealth. See Am. Motor Sales, 592 F.2d at 222; Fox, 439 U.S. at 100-01, 99 S. Ct. 408. In conclusion, VW has utterly failed to present any evidence in support of its claims that Va. Code Ann. § 46.2-1569(7) is unconstitutional. The Statute neither directly regulates or discriminates against commerce outside the Commonwealth and serves an important state interest in protecting local dealers. Therefore, the Statute promotes a valid state interest and does not violate the Dormant Commerce Clause.

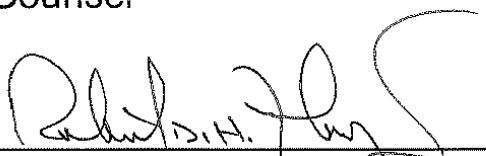
CONCLUSION

For the foregoing reasons, Appellee Miller Auto Sales, Inc. respectfully requests that this Honorable Court affirm the decisions of the Commissioner of the Virginia Department of Motor Vehicles, the Circuit Court for the City of Richmond, and the Court of Appeals of Virginia in their entirety; and award all attorney's fees and costs against Volkswagen of America, Inc. pursuant to Va. Code Ann. § 46.2-1573.01.

Respectfully submitted,

MILLER AUTO SALES, INC.

By Counsel



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CERTIFICATE OF COMPLIANCE

Pursuant to Virginia Rule 5:26(d), on this 16th day of June, 2009, I caused twelve (12) copies of Miller Auto Sales, Inc.'s Brief of Appellee to be sent by certified mail and by e-mail, postage pre-paid, to the Clerk of the Supreme Court of Virginia. I also caused three (3) copies to be sent by first class mail to the following:

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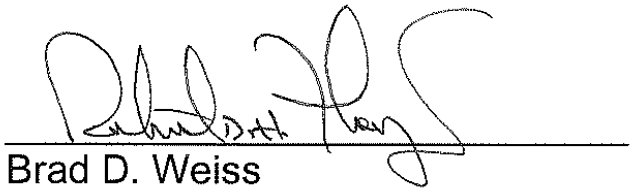

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Exhibit A

"Volkswagen Shipments Not Equitably Related to Importation"

(See App. 9.)

Shipments not Equitably Related to Importations

Month and Year	Shipments to Miller	U.S. Importations	Division Shipments	Conclusions
January 1996	0 Passats	2,919 Passats	2,247 Passats	Not Equitably Related
January 1996	0 Volkswagens	13,713 Volkswagens	11,342 Volkswagens	Not Equitably Related
February 1996	0 Passats	1,786 Passats	1,701 Passats	Not Equitably Related
March 1996	0 Passats	1,669 Passats	2,290 Passats	Not Equitably Related
March 1996	0 Volkswagens	12,308 Volkswagens	16,296 Volkswagens	Not Equitably Related
April 1996	0 Passats	1,310 Passats	2,395 Passats	Not Equitably Related
May 1996	0 Passats	594 Passats	1,604 Passats	Not Equitably Related
October 1997	0 Passats	2,016 Passats	2,521 Passats	Not Equitably Related
November 1997	0 Passats	2,996 Passats	3,176 Passats	Not Equitably Related
December 1997	0 Passats	4,835 Passats	4,894 Passats	Not Equitably Related
December 1997	0 Volkswagens	14,054 Volkswagens	15,853 Volkswagens	Not Equitably Related
January 1998	0 Passats	1,270 Passats	2,066 Passats	Not Equitably Related
January 1998	0 Volkswagens	11,493 Volkswagens	11,867 Volkswagens	Not Equitably Related
February 1998	0 Beetles	1,424 Beetles	1,166 Beetles	Not Equitably Related
February 1998	0 Passats	3,655 Passats	3,804 Passats	Not Equitably Related
March 1998	0 Beetles	4,213 Beetles	5,956 Beetles	Not Equitably Related
March 1998	0 Passats	3,682 Passats	3,691 Passats	Not Equitably Related
June 1998	1 Beetle	7,953 Beetles	10,676 Beetles	Not Equitably Related