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.

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. VIRGINIA CODE § 46.2-1569(7) VIOLATES THE DUE PROCESS CLAUSES OF THE VIRGINIA AND U.S. CONSTITUTIONS 1

A. THE ISSUE RAISED BY VW'S ASSIGNMENT OF ERROR 1

B. THE STANDARD SET BY VIRGINIA CODE § 46.2-1569(7) 2

C. VIRGINIA CODE § 46.2-1569(7) IS UNCONSTITUTIONAL AS APPLIED 3

D. VIRGINIA CODE § 46.2-1569(7) IS UNCONSTITUTIONAL ON ITS FACE 8

II. VIRGINIA CODE § 46.2-1569(7) VIOLATES THE DORMANT COMMERCE CLAUSE OF THE U.S. CONSTITUTION 10

A. THE ISSUE RAISED BY VW'S ASSIGNMENT OF ERROR 10

B. VIRGINIA CODE § 46.2-1569(7) IS A PER SE VIOLATION OF THE DORMANT COMMERCE CLAUSE 11

C. VIRGINIA CODE § 46.2-1569(7) FAILS UNDER THE *PIKE* BALANCING TEST 14

CONCLUSION 15

CERTIFICATE OF SERVICE 16

TABLE OF AUTHORITIES

PAGE(S)

CASES

American Motors Sales Corp. v. E.L. Bowen & Co.,
Chancery Docket No. 4498 (June 3, 1958), attached to
Vintage Imports, LTD. v. Seagram & Sons, Inc.,
409 F. Supp. 497 (E.D. VA. 1976) 4, 6

Brown-Forman Distillers Cor. v. New York State Liquor Authority,
476 U.S. 573 (1986) 11

Gonzalez v. Vehiclehart,
550 U.S. 124 (2007) 8

Healy v. Beer Institute,
491 U.S. 324 (1989) 11, 12, 13

Heublein, Inc. v. Alcoholic Beverage Control Dept.,
237 Va. 192, 376 S.E.2d 77 (1989) 11, 12, 13

Hoffman Estates v. The Flipside, Hoffman Estates, Inc.,
455 U.S. 489 (1982) 1

Pike v. Bruce Church,
397 U.S. 137 (1970) 14

Southern Pacific Co. v. Arizona,
325 U.S. 761 (1945) 14

Volkswagen of Am., Inc. v. Smit,
266 Va. 444, 587 S.E.2d 526 (2003) 3

STATUTES

Ky. Rev. Stat. § 190.070(2)(a) 14

Mass. Gen. Laws Ch. 93B, § 4(c)(3) 14, 15

Minn. Stat. § 80E.13(a) 15

N.C. Gen. Stat. § 20-305(14) 14, 15

Ohio Rev. Code § 4517.59(F) 15

Pa. Stat. § 818.12(b)(1) 15

Va. Code § 38.2-510(A)(6) 8

Va. Code § 46.2-1569(7) ..... *passim*

INTRODUCTION

Appellant Volkswagen of America, Inc. ("VW") asks this Court to invalidate Va. Code § 46.2-1569(7) (the "Statute") on the grounds that the Statute violates both the Due Process Clauses of the Virginia and the U.S. Constitutions and the Dormant Commerce Clause of the U.S. Constitution. The Commissioner of Motor Vehicles (the "Commissioner") and Miller Auto Sales, Inc. ("Miller") ask this Court to deny VW's request.

I. VIRGINIA CODE § 46.2-1569(7) VIOLATES THE DUE PROCESS CLAUSES OF THE VIRGINIA AND U.S. CONSTITUTIONS.

A. THE ISSUE RAISED BY VW'S ASSIGNMENT OF ERROR.

Va. Code § 46.2-1569(7) violates the Due Process Clauses. In the words of *Hoffman Estates v. The Flipside, Hoffman Estates, Inc*., 455 U.S. 489, 498 (1982), the Statute fails to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited" and fails to "provide explicit standards for those who apply [it] in order to prevent arbitrary and discriminatory enforcement."

While Appellees disagree with VW's position, this Court should note that the parties actually agree on three points: (1) that this Court may review the Statute on both an "as applied" and a "facial" basis; (2) that this Court may review the Statute as an economic regulation, for which a lesser level of constitutional scrutiny applies; and (3) that the Statute, including the

phrase "equitably related," fails to specify with any level of precision what conduct the Statute actually prohibits. With respect to this last point, VW explained in its opening brief that there are a multitude of different ways to address the meaning of "equitably related" and, as a result, the Statute is unclear as to what conduct it actually prohibits. (VW Br., 18-19.) The Commissioner echoes this point in his brief, specifically noting that "[m]any factors will determine whether [a] shipment of vehicles is 'equitably related' to national importation numbers." (Comm. Br., 16). Miller, for its part, fails to take a contrary position. (Miller Br., 24). Thus, the material differences between the parties relate to whether the indefiniteness in the Statute is prohibited by the due process standard for economic regulations.[1]

B. THE STANDARD SET BY VIRGINIA CODE § 46.2-1569(7).

The Statute requires the Commissioner to compare the number of shipments to a Virginia dealer, such as Miller, with the number of shipments required by the Statute. Appellees suggest that the Statute requires a number of "*shipments*" that is "equitably related" to a distributor's

[1] The constitutional issue before the Court is not whether the Statute is unconstitutionally "overbroad," as suggested by Miller. (Miller Br., 13). Nor do the issues before the Court involve a "breach of contract" claim (*id*., 15-19), the "substantial evidence" test (*id*., 19-25), or the weighing of conflicting evidence (*id*., 19-25). Rather, the assignments of error involve constitutional issues, which raise "questions of law that [this Court] reviews *de novo*." (Comm. Br., 8.)

"national importation." This assertion is incorrect. The Statute requires a determination as to what number of "*sales*" by a dealer would be "equitably related" to the "national importation" of the distributor. *Volkswagen of Am., Inc. v. Smit*, 266 Va. 444 at 452 (2003). The Statute then prohibits the distributor from shipping to the dealer fewer vehicles than the number of vehicles that the dealer needs to receive in order to achieve the required number of sales. The Statute, therefore, is not simple and straight-forward, but sets forth a complicated regulatory standard, at the center of which is the term "equitably related."

C. VIRGINIA CODE § 46.2-1569(7) IS UNCONSTITUTIONAL AS APPLIED.

VW contends that the regulatory standard set forth in Va. Code § 46.2-1569(7) is so undefined that the Statute, as applied with respect to VW's launch of the new Beetle and the new Passat, violated due process. It is VW's position that the regulatory standard was so lacking in discernible meaning in this context that the Statute provided *no* notice to VW of what number of shipments it was required to make to Miller and *no* standards to guide the Commissioner's review of whether VW actually shipped to Miller a lawful number of vehicles. Indeed, in the context of VW's introduction of the new models, there was no possibility that the Statute could have provided VW with a reasonable opportunity to know what conduct was

prohibited: at the time of the introduction of the models, no historical sales data existed for the models and, as a result, VW could only guess at what number of "sales" by Miller might be "equitably related" to its anticipated "national importation." The Statute thus is unconstitutional under *American Motors Sales Corp. v. E.L. Bowen & Co*., Chancery Docket No. 4498 (June 3, 1958), attached to *Vintage Imports, LTD. v. Seagram & Sons, Inc*., 409 F. Supp. 497, 510-11 (E.D. VA. 1976). Appellees' disagree.

First, Appellees argue that broad standards are commonplace and necessary in economic regulations. (Comm. Br., 12-15, 19-20; Miller Br., 25-26). This assertion misses the point. The question before this Court is not whether, as a general proposition, the General Assembly is entitled to use appropriately-worded broad standards in economic regulations, but whether the particular "standard" used in Va. Code § 46.2-1569(7) is constitutionally acceptable. To resolve this Case, this Court need not establish a due process benchmark applicable to all economic regulation.

Second, Appellees argue that the particular regulatory standard set forth in Va. Code § 46.2-1569(7) is sufficiently definite to pass constitutional scrutiny. (Comm. Br., 17; Miller Br., 22-24). Appellees assert that the Statute merely requires a simple comparison between the number of "shipments" to a dealer and a distributor's "national importation" and that,

in the context of making such a comparison, the Statute has enough meaning to define what conduct is prohibited. (Comm. Br., 17; Miller Br., 31). This argument is wrong on two fronts. In the first place, as discussed above, the Statute requires a comparison of new vehicles "sales" and "national importations," rather than "shipments" and "national importations," and then a determination of how many shipments are required to attain such number of sales. The statute thus requires far more than the simple comparison urged by Appellees. In the second place, "equitably related" has no defined meaning. Appellees contend that Webster's Third New International Dictionary defines "equitably" as "in an equitable manner" and then argue that "equitable" has been defined in Virginia to mean 'fair to all concerned . . . without prejudice, favor, or rigor entailing undue hardship.'" (Comm. Br., 17; Miller Br., 31.) Clarifying "equitably related" to mean "fair" and "without prejudice, favor or rigor entailing undue hardship" merely replaces one obtuse standard with another, and actually reads critical terms – "sales and "national importations" – out of the Statute and replaces them with a regulatory standard of "fairness," which is no standard at all, especially when what is "fair" is decided *post-hoc* by the Commissioner.

Appellees next assert that the lack of clarity in Va. Code § 46.2-1569(7) is acceptable because guidance can be provided through

administrative and judicial interpretation. (Comm. Br., 17; Miller, 30). The Commissioner, however, consistently has failed to clarify the meaning of the Statute. The Commissioner has neither promulgated regulations nor issued any interpretive guidance documents. (VW Br., 16-18.) Indeed, even in his Decision, the Commissioner fails to clarify what conduct is prohibited by the Statute outside of the narrow factual scenario at issue in this case. Moreover, judicial guidance is ineffective where, as here, a statute completely fails to provide any standard, and courts have no guidelines from which to adjudicate on a case-by-case basis.

Appellees argue that this Court's decision in *E.L. Bowen*, which held language similar to the language in Va. Code § 46.2-1569(7) to be unconstitutional, does not provide either controlling precedent or helpful guidance. Appellees claim that the statute in *Bowen* is substantially different from the Statute at issue here and that the decision in *Bowen* is not readily accessible. (Comm. Br., 24; Miller Br., 35). The statute at issue in *Bowen*, however, specified which parties' equities were to be considered and stated that provocation should be taken into account, and, as a result, if anything, was more definite than the Statute. Moreover, that *Bowen* might not be readily accessible does not make it incorrect.

Appellees next assert that other states have promulgated statutes regulating vehicle shipments that use standards similar to the standard in the Statute. (Comm. Br., p 32; Miller Br., 32). Appellees, however, fail to cite a single state statute that sets forth an equitable standard as the sole measure for determining statutory compliance. They also fail to cite to a single decision upholding the constitutionality of any other state statute.[2]

Appellees next argue that the form Volkswagen Dealer Agreement – which requires VW to "endeavor to make a fair and equitable allocation and distribution" of vehicles – establishes that the Statute is sufficiently clear to put VW on notice as to what conduct the Statute prohibits. (Comm. Br., 38; Miller Br., 28). A contractual duty, however, is substantially different from a statutory duty. Indeed, VW articulated in its opening brief the factors that it evaluated in fulfilling its contractual duty, none of which were deemed relevant by the Commissioner under the Statute. Moreover, requiring one to *endeavor* to equitably allocate vehicles, as does the Dealer Agreement, is substantially different from requiring an actual equitable allocation. Indeed, if Va. Code § 46.2-1569(7) contained a scienter requirement that limited prohibited conduct to situations where a distributor failed to

[2] In fact, VW, in its opening brief, advised this Court that this case has significant precedential value precisely because many states have promulgated statutes regulating vehicle shipments.

"endeavor" to ship an equitable number of vehicles, the Statute might be constitutionally permissible. See *Gonzalez v. Vehiclehart*, 550 U.S. 124, 149 (2007) ("scienter requirements alleviate vagueness concerns").

Third and finally, Appellees argue that invalidating Va. Code § 46.2-1569(7) would threaten numerous other Virginia statutes. (Comm. Br., 20; Miller Br., 26). Appellees note that other Virginia statutes employ either an "equitable" or "reasonableness" standard. With respect to the "equitable" standard, Appellees fail to cite to any statute similar to the Statute here: three of the four cited statutes require a *regulator*, rather than a *regulated party*, to act equitably, and the fourth, Va. Code § 38.2-510(A)(6), prohibits "[n]ot attempting . . . to make . . . fair and equitable settlements," which invokes a scienter requirement. With respect to the "reasonableness" standard, such a standard is not before this Court, and there are reasons that it might be appropriate to treat such a standard differently, as "reasonableness" is a developed concept in American jurisprudence.

D. VIRGINIA CODE § 46.2-1569(7) IS UNCONSTITUTIONAL ON ITS FACE.

VW also contends that the regulatory standard set forth in Va. Code § 46.2-1569(7) is so undefined that the Statute is unconstitutional on its face. The Statute leaves a distributor guessing, before the fact, as to what *will* be required under the Statute (i.e., what *will* be equitable), and grants

unfettered discretion to the Commissioner, after the fact, to determine what actually *was* required under the Statute (i.e., what *was* equitable).

Appellees argue that the Statute provides a flexible standard appropriate for economic regulation. (Commissioner at 19; Miller at 26.) The standard in Va. Code § 46.2-1569(7), however, is so "flexible" as to provide no standard whatsoever. While economic regulations may be less definite, they still must provide notice of prohibited conduct.

Appellees next contend that there is common understanding in the automobile industry as to what it means to "equitably" allocate a vehicle. (Miller Br., 24, 26) Contrary to Appellees' assertion, there is no such common understanding, and the record certainly does not support such a proposition. Miller attempts to argue that, because VW's expert witnesses testified that VW's vehicle allocation system attempted to allocate vehicles "equitably," there is a common understanding regarding the meaning of equitable allocation. (Miller, 28.) On the contrary, the fact that VW attempted to equitably allocate vehicles and then, according to the Commissioner, failed to comply with the Statute underscores that no common understanding exists. Moreover, there certainly is no common understanding in the automobile industry as to the Commissioner's ideas of fairness, which ultimately are the basis for decisions under the Statute.

Indeed, as discussed in VW's opening brief, the two Commissioners that reviewed the case came to opposite conclusions with respect to the fairness of not shipping a vehicle to a dealer that has not purchased the repair equipment for the vehicle. (VW Br., 26.)

Appellees finally contend that Va. Code § 46.2-1569(7) clearly prohibits certain types of distributor conduct and, as a result, is not vague in all of its applications, thus allowing it to survive a facial challenge. All of the Commissioner's examples of "clearly" prohibited conduct, however, are examples of conduct that appear wrongful because of the intent with which the conduct is undertaken. The Statute, however, does not regulate intent. When the intent of the distributor is removed from each of the examples, it is not clear that the Statute prohibits the conduct described by Appellees without an analysis of all equitable factors that might be involved.

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

A. THE ISSUE RAISED BY VW'S ASSIGNMENT OF ERROR.

VW contends that Va. Code § 46.2-1569(7) violates the Dormant Commerce Clause for two separate reasons. First, the practical effect of the Statute's language is to regulate conduct outside of the Commonwealth's borders. Second, the impact of the Statute on interstate

commerce outweighs the benefit of the Statute to the Commonwealth. Appellees disagree on both fronts.

B. VIRGINIA CODE § 46.2-1569(7) IS A PER SE VIOLATION OF THE DORMANT COMMERCE CLAUSE.

Citing primarily the U.S. Supreme Court's decision in *Healy v. Beer Institute*, 491 U.S. 324 (1989), and this Court's decision in *Heublein, Inc. v. Alcoholic Beverage Control Dept.*, 237 Va. 192 (1989), VW contends that Va. Code § 46.2-1569(7) violates the Commerce Clause as an impermissible direct regulation of interstate commerce. The underlying principle in those cases is that a state statute cannot use as its measure of legality what one does outside of that state's borders. Thus, the Court in *Healy* found it to be an impermissible burden on interstate commerce for a state to require brewers distributing beer within the state to affirm that their prices were no higher than they were charging in neighboring states.[3] Similarly, this Court in *Heublein* invalidated a Virginia statute which provided that a wine supplier could not unilaterally amend a wholesaler's contract unless the same amendment is made uniformly as to wholesalers in all other states in which the supplier was marketing its product. The principle driving the same result in these two cases is that it is

[3] *See also Brown-Forman Distillers Cor. v. New York State Liquor Authority*, 476 U.S. 573 (1986) (striking New York law requiring liquor producers to affirm that no lower prices will be charged in other states).

impermissible for a state statute to require that one doing business within the state conform its conduct to what it does outside that state.

Appellees attempt to counter the principles of *Healy* and *Heublein* by arguing: (1) that the Statute has no controlling effect on the number of vehicles that VW ships to dealers in neighboring states or the number it imports into the country; (2) that there is no evidence that VW has had to, or will have to, alter its shipment policies as a result of the Statue, and that, therefore, the burden is merely hypothetical; and (3) the impact on interstate commerce must be *de minimus* because, despite other states having adopted "similar" laws, there appears to have been no apparent court challenges to this means of regulation, and, therefore, by implication, no significant impact on interstate commerce.

Appellees' first argument is directly negated by this Court's ruling in *Heublein*, and entirely misses the point of that case and *Healy.* To require that distributors ship some number proportionate to "national" supply logically and necessarily impacts what is done in other states. If a distributor ships more of a particular model into states other than Virginia, it correspondingly must make more available to Virginia dealers in order for them to get their "fair share." And if Virginia dealers are receiving what the Commissioner deems to be an inadequate share, those vehicles must

necessarily come from somewhere else – diverting vehicles from dealers in other states. In fact, as allocations are determined, the supply of vehicles is necessarily fixed, and the Statute's impact on interstate commerce thus is even more pernicious than the statutes in *Healy* and *Heublein.*

Appellees' second argument is also beside the point. Neither *Healy* nor *Heublein* imposed any evidence-based proof that a statute which required in-state conformance to out-of-state standards had already caused a firm to alter its out-of-state behavior in order to conform to the statute. Thus, in *Heublein,* this Court made no effort to assess whether any wine supplier had actually attempted (or even desired) to amend its wholesaler contracts. Its decision rested solely on the fact that a supplier could not do so in other states without doing so in Virginia. Nor did the Court in *Healy* engage in any such analysis. Rather, the constitutional infirmity in those cases derived from the fact that the regulated firms could not alter their behavior outside of the state without altering their behavior in the state.

Appellees' third argument – referencing how other states have chosen to regulate vehicle shipments and noting the absence of legal challenges to those statutes – mischaracterizes the statutes in those states. States, indeed, have adopted a variety of statutes purporting to regulate how a distributor ships or allocates vehicles among its dealers.

These statutes (some of which are referenced in Miller's Brief at 32-34) range from those that require a distributor to ship vehicles in "reasonable quantities and within a reasonable time" (*e.g.*, Mass. Gen. Laws Ch. 93B, § 4(c)(3)), to those that require that reasonableness be measured relative to the dealer's sales facilities and sales potential (*e.g.*, Ky. Rev. Stat. § 190.070(2)(a).), to those that require shipments sufficient to meet the dealer's sales potential within its territory or the dealer's minimum sales responsibility (*e.g.*, N.C. Gen. Stat. § 20-305(14)). However, only one other state, Utah, has adopted a statute, like Virginia's, which requires that vehicles be distributed in a manner measured by what is done "nationally." For this reason, the absence of any reported challenge provides no authority in support of the constitutionality of the Statute.

C. VIRGINIA CODE § 46.2-1569(7) FAILS UNDER THE *PIKE* BALANCING TEST.

VW also contends that this Court should invalidate Va. Code § 46.2-1569(7) under the balancing test set forth in *Pike v. Bruce Church*, 397 U.S. 137 (1970). Citing *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945) and its progeny, VW argues that, under the *Pike* test, a state statute should be struck down if the statute attempts to regulate an aspect of national commerce that, because of the need for national uniformity, demands that regulation, if any, be prescribed by a single (*i.e.*, national)

authority. Appellees largely ignore this argument, responding solely by making the conclusory statement that the Statute easily meets the constitutional test. Despite Appellees' casual brush off of VW's argument, even a cursory review of the various laws that purport to regulate vehicle shipments (many of which are quoted at 32-34 of Miller's brief) reveals that the requirements of those laws cannot be reconciled, making it virtually impossible for distributors to comply with all of them simultaneously.[4]

CONCLUSION

For the foregoing reasons, VW respectfully requests that this Court hold 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. VW prays that the Court declare the Statute unconstitutional and unenforceable, and reverse and enter final judgment in this matter for VW.

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[4] VW, when it allocates vehicles among its 600 dealers located in all 50 states: (1) is compelled by the Virginia and Utah statutes to allocate so that each dealer is shipped a number needed by the dealer to receive a percentage of sales equitably related to national importation; (2) is compelled by statutes in some states to deliver vehicles in reasonable quantities and in a reasonable time (*e.g.*, Mass. Gen. Laws Ch. 93B, § 4(c)(3)); (3) is compelled by statutes in other states to deliver vehicles in a reasonable fashion relative to dealer facilities and sales potential (*e.g.*, Pa. Stat. § 818.12(b)(1); Minn. Stat. § 80E.13(a)); (4) is compelled by statutes in other states to deliver vehicles sufficient for the dealer to achieve minimum sales requirements, planning volume, or sales objectives (N.C. Gen. Stat. § 20-305(14)); and (5) is compelled in other states not to discriminate against dealers in allocation (Ohio Rev. Code § 4517.59(F)).

Respectfully Submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 5:29 and 5:26(d) of the Rules of the Supreme Court of Virginia, I herby certify that on this 30th day of June, 2009, fifteen bound copies of the Reply Brief of Appellant and one electronic copy in CD-ROM format were hand filed with the Clerk of this Court. I also caused three bound copies of the Reply Brief of Appellant to be served, via first-class mail, upon:

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