Record No. 082305

IN THE
SUPREME COURT OF VIRGINIA

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.,

Appellees.

BRIEF OF APPELLEE, DEMERST B. SMIT, COMMISSIONER OF THE VIRGINIA DEPARTMENT OF MOTOR VEHICLES

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INTRODUCTION

A motor vehicle franchise entails a significant expenditure of funds for a local franchisee. In addition, there exists a disparity of bargaining power between a small local distributor and a large multi-national conglomerate. Just as it has in other areas where the playing field is not level, the General Assembly has seen fit to enact a variety of legislative proposals to remedy the disparity in bargaining power. Among those is *Virginia Code* § 46.2-1569(7), which requires a manufacturer to ship to a dealer who orders the cars "the number of new vehicles of each make, series, and model needed by the dealer to receive a percentage of total new vehicle sales of each make, series, and model equitably related to the total new vehicle production or importation currently being achieved nationally by each make, series, and model covered under the franchise." The statute ensures that a dealership will receive a wider range of models, will not be frozen out of popular models, and further ensures consumer choice in the marketplace.

Volkswagen's chief complaint is that the statute is vague. But the standard found in *Virginia Code* § 46.2-1569(7) is no more vague than countless other statutory and common law standards. Outside of statutes and regulations that implicate First Amendment concerns, the void for

vagueness doctrine accommodates broader language, especially when broad language is inescapable. Were Volkswagen to prevail in its vagueness challenge, the decision would needlessly call into question a host of statutes and legal doctrines.

Finally, the statute does not infringe on the dormant Commerce Clause. The statute is not per se discriminatory, and it easily survives the applicable balancing test. The fact that the law may have some incidental effect on interstate commerce does not make it constitutionally invalid.

STATEMENT OF THE CASE

Miller Volkswagen operates a Volkswagen dealership in Winchester, Virginia. App. 1. On February 9, 1998, John C. Miller, the president of Miller Auto Sales, wrote a letter to Volkswagen of America ("the manufacturer," "Volkswagen" or "VW") complaining, among other things, that the manufacturer was violating *Virginia Code* § 46.2-1569(7) based on the way it was allocating its cars. App. 1. That statute provides in relevant part that, "[n]otwithstanding the terms of any franchise agreement, it shall be unlawful for any manufacturer . . ."

> To fail to ship monthly to any dealer, if ordered by the dealer, the number of new vehicles of each make, series, and model needed by the dealer to receive a percentage of total new vehicle sales of each make, series, and model equitably related to the total new vehicle production or importation currently

> being achieved nationally by each make, series, and model covered under the franchise.

Virginia Code § 46.2-1569(7). After mediation efforts to resolve the dispute failed, Miller Auto Sales requested that the matter be set for a hearing by the Department of Motor Vehicles. App. 3-4. Following a hearing, a hearing officer of the Department of Motor Vehicles concluded that the methodology employed by Volkswagen, in fact, violated the statute. The officer ordered Volkswagen to adopt a new methodology. App. 115. The Commissioner adopted the recommendations of the hearing officer by written decision dated July 12, 1999. App. 118-124.

Miller appealed to the Circuit Court for the City of Richmond, which affirmed the Commissioner's decision. App. 128. The Court of Appeals of Virginia likewise affirmed in a published decision. App. 125-44.

This Court granted Volkswagen's appeal, *Volkswagen of America, Inc. v. Smit*, 266 Va. 444, 587 S.E.2d 526 (2003) and reversed, holding that the Commissioner had employed an incorrect methodology. App. 157. Specifically, the Commissioner had not examined "the actual shipments received by Miller in relation to the relevant national importation numbers achieved by Volkswagen." App. 157. The Court declined to reach Volkswagen's constitutional arguments. App. 158. The matter ultimately was remanded back to the Commissioner. App. 162-63.

A hearing officer conducted a second hearing and again concluded that Volkswagen had violated the statute. Specifically, Volkswagen failed to ship any Beetles or Passat cars to Miller, when the number of cars imported far exceeded the number of dealers. App. 424-29. On August 1, 2005, the Commissioner sustained this finding in a written decision. App. 431-39.

The decision of the Commissioner is exceptionally narrow. The Commissioner concluded that an allocation of zero vehicles "would generally not satisfy the statutory requirement in months where, as in this case, the national importation numbers exceed the number of dealers nationally, and particularly where, as in this case, the vehicles are newly introduced makes, series, or models." App. 435. The Commissioner "decline[d] 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." App. 435.

The Commissioner declined to impose any sanctions against Volkswagen, holding that he lacked the authority under the statute to impose civil penalties or to take any administrative action against the dealer. App. 438. Finally, the Commissioner ruled that even if the statute

permitted him to impose specific sanctions against Volkswagen, he would decline to do so in this case. App. 438.

Volkswagen again appealed to the Circuit Court of the City of Richmond. App. 440. The court upheld this determination, and rejected Volkswagen's arguments that the statute was unconstitutionally vague and that it infringed on the dormant Commerce Clause. App. 498-506.

Volkswagen appealed to the Court of Appeals of Virginia. A panel of that Court, by published opinion, unanimously upheld the decision of the circuit court. App. 514-54. *Volkswagen of America, Inc. v. Smit*, 52 Va. App. 751, 667 S.E.2d 817 (2008). The court concluded, among other things, that the statute neither violates the dormant Commerce Clause, nor does it suffer from any "vagueness" problem. App. 550-54. Volkswagen then appealed to this Court.

QUESTIONS PRESENTED:

1. Is *Virginia Code* § 46.2-1569(7) void for vagueness on its face or as applied to the specific facts of this case?

2. Does *Virginia Code* § 46.2-1569(7) violate the dormant Commerce Clause.

STATEMENT OF FACTS

The facts as found by the Commissioner are as follows. From January 1996 to March 1998, there were approximately 600 Volkswagen

dealers in the United States. App. 484. Miller ordered Passat model cars during October, November, and December of 1997, and again in January, February and March of 1998, but Volkswagen did not ship any Passats to Miller during those months. App. 435. Miller also ordered Beetle model Volkswagens during the months of February and March of 1998. Volkswagen failed to ship any Beetles to Miller during those months. App. 435-36.

With the exception of one month, the number of Passat model Volkswagens imported into the United States exceeded the number of United States Dealers. App. 484. Volkswagen imported the following Passats and Beetles during the months in question:

October 1997: 2016 Passats

November 1997: 2996 Passats

December 1997: 4835 Passats

January 1998: 1270 Passats

February 1998: 3655 Passats and 1424 Beetles

March 1998: 3682 Passats and 4213 Beetles.

App. 435-36.

ARGUMENT

"Every law enacted by the General Assembly carries a strong presumption of validity. Unless a statute clearly violates a provision of the United States or Virginia Constitutions, [a court] will not invalidate it." *City Council of the City of Emporia v. Newsome*, 226 Va. 518, 523, 311 S.E.2d 761, 764 (1984). "The party challenging the enactment has the burden of proving its unconstitutionality, and if a reasonable doubt exists as to its constitutionality, the doubt must be resolved in favor of its validity." *Hess v. Snyder Hunt Corp.*, 240 Va. 49, 53, 392 S.E.2d 817, 820 (1990).

"The wisdom and propriety of the statute come within the province of the legislature." *City of Newport News v. Elizabeth City County,* 189 Va. 825, 831, 55 S.E.2d 56, 60 (1949). "Undoubtedly, there are two sides to the question as to the wisdom or expediency of the legislative Act." *Id.* at 836, 55 S.E.2d at 62. "In a determination of the constitutional validity of a general statute, political, economic and geographical situations have no place. Such situations bring up questions of public welfare and conveniences which invoke the wisdom and policy of the legislature in their determination, within reasonable limits." *Id.* at 839, 55 S.E.2d at 64. "[C]ourts are concerned only as to whether the determination of the

legislature has been reached according to, and within, constitutional requirements." *Id.*

This case involves a constitutional challenge. "Constitutional arguments are questions of law that [this Court] reviews *de novo*." *Appalachian Voices v. State Corp. Comm'n*, 277 Va. 509, 516, 675 S.E.2d 458, 461 (2009).

I. THE STATUTE IS NOT UNCONSTITUTIONALLY VAGUE.

The Fourteenth Amendment of the United States Constitution provides that "no State shall … deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. Similarly, the Virginia Constitution provides that "no person shall be deprived of his life, liberty, or property without due process of law." Va. Const. art. I, § 11. "Because the due process protections afforded under the Constitution of Virginia are co-extensive with those of the federal constitution, the same analysis will apply to both." *Shivaee v. Commonwealth*, 270 Va. 112, 119, 613 S.E.2d 570, 574 (2005) (examining vagueness challenge).

A. Volkswagen's facial challenge must be rejected.

Volkswagen contends that *Virginia Code* § 46.2-1569(7) is invalid on its face. VW Br. 4. Unlike an as-applied challenge where the litigant simply

asks that a law be declared unconstitutional in the circumstances presently before the court, *County Court of Ulster County v. Allen,* 442 U.S. 140, 154-55 (1979), a facial challenge asks that the law be declared "invalid *in toto*" and, thus, "incapable of any valid application." *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc*., 455 U.S. 489, 494 n.5 (1982). As the United States Supreme Court recently explained:

> 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, 1191 (2008) (citations omitted). Indeed, facial challenges "are fundamentally at odds with the function of the … courts in our constitutional plan. The power and duty of the judiciary to declare laws unconstitutional is in the final analysis derived from its responsibility for resolving concrete disputes brought before the courts for decision." *Younger v. Harris,* 401 U.S. 37, 52 (1971). "It is neither our obligation nor within our traditional

institutional role to resolve questions of constitutionality with respect to each potential situation that might develop." *Gonzales v. Carhart*, 127 S. Ct. 1610, 1639 (2007).

In *Hoffman Estates*, 455 U.S. at 494-95, the United States Supreme Court set forth the standard for courts reviewing a claim that a law is unconstitutionally vague:

> In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail. The court should then examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications. *A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.* A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law.

See also Motley v. Virginia State Bar, 260 Va. 243, 247, 536 S.E.2d 98, 99 (2000) ("Vagueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis.") (quoting *Maynard v. Cartwright*, 486 U.S. 356, 361 (1988)); *Commonwealth v. Hicks*, 267 Va. 573, 580-81, 596 S.E.2d 74, 78 (2004).

Unless the statute is unconstitutional in *all of its applications*, Volkswagen's facial challenge must fail. *See United States v. Salerno*, 481 U.S. 739, 745 (1987) (A facial challenge is "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the [statute] would be valid."). It is not difficult to envision a multitude of scenarios in which a manufacturer would infringe *Virginia Code* § 46.2-1569(7). For example, a manufacturer might withhold vehicles from a dealer, even when the supply of a particular vehicle is abundant, out of sheer spite or ill will toward a particular dealer. Or, a manufacturer might simply cease shipping all vehicles to a particular dealer across the board and stubbornly refuse to correct the mistake. Because there are circumstances under which a statute would indisputably be infringed, the Court should reject the facial challenge to the statute.

Volkswagen posits a series of hypothetical "what if" scenarios to attack the statute. VW Br. 28-29. In other words, Volkswagen seeks to invalidate the statute based upon considerations not before this Court. What is before the Court is a concrete application of the statute in the specific facts of this case. *See Shivaee*, 270 Va. at 125, 613 S.E.2d at 577 (rejecting litigant's attempt to raise hypothetical situations to attack a

statute on vagueness grounds). The Court should reject Volkswagen's facial challenge to the validity of the statute.

B. As applied in the case at bar, the statute is not vague.

1. Broadly worded statutes governing economic affairs are commonplace and such statutes do not suffer from unconstitutional vagueness.

Although "[t]he void-for-vagueness doctrine has been primarily employed to strike down criminal laws," *Groome Resources, Ltd. v. Parish of Jefferson*, 234 F.3d 192, 217 (5th Cir. 2000), the doctrine also applies in the civil context. *Id.* Courts variously formulate the standard for unconstitutional vagueness in the civil context. Some courts hold that "the [civil] statute must be 'so vague and indefinite as really to be no rule at all.'" *Id.* at 217 (quoting *Seniors Civil Liberties Ass'n v. Kemp*, 965 F.2d 1030, 1036 (11th Cir. 1992) and *Boutiller v. INS*, 387 U.S. 118, 123 (1967)). *See also Hoffman Estates*, 455 U.S. at 495 n.7. The Fourth Circuit has held that "'[a] statute can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement.'" *Greenville Women's Clinic v. S.C. Dep't of Health*, 317 F.3d 357, 366 (4th Cir. 2002) (quoting *Hill v. Colorado*, 530 U.S. 703, 732 (2000))

(addressing civil regulations governing abortion providers, but quoting *Hill*, which examined a criminal statute). Although the Commissioner believes the *Boutiller* is the proper standard in the civil context, the statute at issue is constitutional regardless of the precise wording of the standard employed.

Vague laws offend due process in two ways. First, they fail to provide the persons targeted by the statutes with "a reasonable opportunity to know what conduct is prohibited so that [they] may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Second, particularly in the criminal setting, vague laws raise the danger of "arbitrary and discriminatory application." *Id.* at 108-09.

In many areas of the law, a broadly worded statute is necessary because of the myriad situations that might arise. For example, each patient may offer unique challenges to a medical doctor. Each divorce or child custody proceeding will turn on unique facts. Recognizing this inescapable reality, the United States Supreme Court has noted that

> [t]here are limitations in the English language with respect to being both specific and manageably brief, and . . . although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with . . . .

United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 578-79 (1973). *See also Grayned*, 408 U.S. at 110 ("Condemned to

the use of words, we can never expect mathematical certainty from our language."). In light of these limitations, "striking down [laws] as facially void for vagueness is a disfavored judicial exercise." *Schleifer v. City of Charlottesville*, 159 F.3d 843, 853 (4th Cir. 1998).

The United States Supreme Court has held that the Constitution requires more precision in language if the enactment threatens the exercise of First Amendment rights or other constitutionally protected fundamental rights. "[T]he most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply." *Hoffman Estates*, 455 U.S. at 499. Furthermore, "[t]he Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are comparably less." *Id.*

In contrast, "[e]conomic regulation is subject to a less strict vagueness test." *Id.* at 498. Therefore, "in the civil context, statutes need not be as precise as in the criminal context and are, therefore, less likely to be invalidated under a void-for-vagueness challenge." *Borden v. Sch. Dist. of Twp. Of E. Brunswick*, 523 F.3d 153, 167 (3rd Cir. 2008) (explaining that

the Court has expressed greater tolerance of vagueness in enactments with civil rather than criminal penalties).

Volkswagen does not contend that selling and allocating cars is protected by the First Amendment. Furthermore, the statute is not a criminal one. Plainly, the statute at issue is an economic regulation, subject to more deferential review.

2. The statute at issue is not unconstitutionally vague.

The statute satisfies due process. The statute requires a series of straightforward steps:

(1) Is the vehicle model covered by the franchise agreement? If not, the statute does not apply.

(2) Has the manufacturer ordered the vehicle? If not, the statute does not apply.

(3) If the manufacturer has ordered the vehicle and it is covered by the franchise agreement, what is the total new monthly vehicle importation of a particular vehicle "currently being achieved nationally" by a distributor (*e.g.*, is it importing 5,000 a month, or 10,000 a month of a particular model)?

(4) How many of these vehicles have been shipped to the dealer?

(5) Is this shipment equitably related to total importation figures?

For example, suppose that Volkswagen has imported 1,200 Volkswagen Golf convertibles for the month of June, 2009. Suppose further that here are 600 dealers. Volkswagen might allocate two cars for each dealer, thus dividing up the entire importation figure of 1,200. However, as the General Assembly recognized, a rigid mathematical formula would be undesirable. Some dealers may not order any cars. Or maybe a dealer received a larger order in the prior month – perhaps Southern California dealerships received a large order of convertibles in May, whereas dealerships in the Midwest received only a few. North Dakota Volkswagen dealerships will likely order fewer convertibles than dealerships in Southern States. Perhaps fewer models of a limited edition are imported than there are dealerships. Maybe a strike has occurred at a port that prevents the models from being distributed to all dealerships. Some dealerships serve a more populous area than others. Many factors will determine whether the shipment of vehicles is "equitably related" to national importation numbers. Rather than devise a very lengthy list of factors, along with a customary "catchall," the General Assembly properly crafted a broad standard of equitableness with the specifics to be resolved on a case-by-case basis.

The term "equitable" means "fair to all concerned . . . without prejudice, favor or rigor entailing undue hardship." *Webster's Third New International Dictionary,* 769 (1993). Although this Court's guidance on the applicable factors is certainly welcome, as applied to the circumstances of this case – which is all this Court must decide – the failure to ship <u>any</u> Passats or Beetles to Miller despite having imported over 5,000 new Beetles and over 18,000 new Passats was not equitable.

The absence of further guidelines is not fatal to the statute. The statute does not grant "such standardless discretion" to the Commissioner that he is free to enforce his own personal preferences. *Grayned*, 408 U.S. at 113 n.22. Nor is the statute "completely subjective." *Id.* (citation omitted). The statute does not place manufacturers "only at the whim of" the Commissioner. *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90 (1965). Indeed, adjudication and development of the legal landscape on a case-by-case basis is commonplace in a variety of legal areas, including torts, antitrust, and family law. As the First Circuit noted, "[i]t may be true that the statute in effect delegates some responsibility to the courts to refine and develop standards under the act on a case-by-case basis, but this is neither unusual nor unconstitutional." *Volkswagen Interamericana, S.A. v. Rohlsen*, 360 F.2d 437, 445 (1st Cir. 1966).

Volkswagen points to the fact that the Commissioner's and the Court of Appeals' initial interpretation of the statute were inconsistent with the conclusion reached by this Court in 2003. VW Br. 26-27. The fact that there might be divergent rulings on a statute's interpretation is not surprising and does not render a statute constitutionally infirm, particularly when the case is one of first impression. Indeed, in its 2003 opinion, this Court held that the language of the statute was "plain and unambiguous." App. 155.

Volkswagen further argues that the Commissioner was not consistent in its treatment of the absence of the front-end alignment equipment as a factor. VW Br. 31-32. In the first hearing, the Commissioner concluded that Volkswagen properly withheld shipment of Passat model cars because Miller had not acquired certain repair equipment. App. 114 (decision of hearing officer) App. 122 (Commissioner decision adopting findings of hearing officer). In the second hearing, a different Commissioner concluded that the Miller's failure to acquire this equipment could not serve as a basis for withholding Passats. App. 437. Either this was or was not a correct factor to consider, but that divergence of opinion does not render the statute fatally vague.

As this Court has recognized, "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 v. City of Roanoke*, 190 Va. 564, 590, 58 S.E.2d 316, 329 (1950).

3. A long list of factors, often accompanied by a broad "catchall" phrase is no more predictable and certain than a broad standard of rasonableness or equitableness.

Presumably, a long detailed list of factors would satisfy Volkswagen's vagueness standard. In fact, a statute containing a long laundry list of factors rarely creates the level of certainty and predictability that Volkswagen claims is necessary for a statute to avoid constitutional invalidity. Take, for example, *Virginia Code* § 20-107.3(E), which provides a list of factors for a court to consider when dividing jointly owned marital property and apportioning marital debts. The statute provides *eleven* factors, the last one being "[s]uch other factors as the court deems necessary or appropriate to consider in order to arrive at a fair and equitable monetary award." *Virginia Code* § 20-107.3(E)(11). Although this test provides some measure of guidance, these eleven factors are not likely to fare any better in terms of predictability and certainty than the equitable standard at issue in the case at bar.

The United States Court of Appeals for the Fourth Circuit acknowledged this difficulty in the context of a vagueness challenge, noting that "any attempt to catalog every . . . practice that would fall into the prohibited category would result in the sort of encyclopedic and unwieldy statute [already] rejected as unnecessary." *Freilich v. Upper Chesapeake Health*, *Inc.*, 313 F.3d 205, 212 (4th Cir. 2002) (citation omitted) (upholding against a vagueness challenge the "reasonable belief" standard of the Health Care Quality Improvement Act).

Rather than provide an exhaustive list that ultimately would provide little predictability or certainty, the General Assembly appropriately chose a broad standard here as Congress and the General Assembly have done in a wide variety of other areas.

C. Invalidating a statute as vague because it contains an "equitable" standard would be extremely disruptive in many areas of the law.

As this Court well knows, many areas of the law, adjudicated on a daily basis in Virginia's courts, rely on broad standards. The tort system relies on the concept of the reasonable person. *See, e.g., Ponirakis v. Choi*, 262 Va. 119, 125, 546 S.E.2d 707, 710 (2001) (standard for contributory negligence is whether a plaintiff "failed to act as a reasonable person would have acted for his own safety under the circumstances");

Page v. Arnold, 227 Va. 74, 80, 314 S.E.2d 57, 61 (1984) (owner of domestic animal "must exercise reasonable care"). The term "reasonable" is no less broad than the term "equitable."

Similarly, the Code of Virginia contains many provisions containing broad terms like "equitable" and "reasonable." *See Virginia Code* § 20-49.8 (in a proceeding to establish parentage, the court may provide "an equitable apportionment of the expenses incurred on behalf of the child from the date the proceeding under this chapter was filed"); *Virginia Code* § 28.2-203(4) (calling for conservation measures to be "(i) fair and equitable to all fishermen; (ii) reasonably calculated to promote conservation; and (iii) carried out in such manner that no person acquires an excessive share of such privileges."); *Virginia Code* § 38.2-510(A)(6) (prohibiting insurers from, *inter alia*, "[n]ot attempting in good faith to make prompt, fair and equitable settlements of claims in which liability has become reasonably clear"); *Virginia Code* § 38.2-1509 (State Corporation Commission to "equitably allocate" disbursements of insolvent insurers).

Likewise, landmark federal statutes contain broad standards. For example, the Sherman Antitrust Act broadly prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is

declared to be illegal." 15 U.S.C. § 1. The Americans with Disabilities Act provides that an employer discriminates against a disabled person if the employer fails to make "reasonable accommodations" for the disabled person. 42 U.S.C. § 12112(b)(5)(a).

These many statutes and legal doctrines would needlessly be called into question should this Court conclude that the term "equitable" renders a statute or legal doctrine unconstitutionally vague. In fact, none of them suffer from vagueness. The General Assembly and the United States Congress appropriately chose broad standards in those statutes.

D. Case law supports the view that the statute is constitutional.

Courts have upheld statutes that contained an "equitable" or similarly broad standard.[1] *See, e.g., United States v. Nat'l Dairy Products Corp*., 372 U.S. 29, 35-36 (1963) (prohibition on "unreasonably low prices" upheld against vagueness challenge); *Motley*, 260 Va. at 247, 536 S.E.2d at 99 ("reasonably informed" standard not vague); *Freilich*, 313 F.3d at 212; *Painter v. Painter*, 320 A.2d 484, 490-92 (N.J. 1974) (discussing

[1] The agreement between Volkswagen and Miller provides that Volkswagen "will endeavor to make a fair and equitable allocation and distribution of the Authorized Products available to it." App. 14. Evidently, Volkswagen itself believes this to be a workable standard.

constitutional vagueness and concluding that the words "equitable distribution" set forth a standard that is not unconstitutionally vague).

None of the cases cited by Volkswagen require invalidation of the statute. Volkswagen cites this Court's recent decision in *Tanner v. City of Virginia Beach*, 277 Va. 432, 674 S.E.2d 848 (2009). However, as this Court noted, the noise ordinance at issue there implicated the First Amendment rights of the citizens of Virginia Beach and might inhibit the exercise of those rights. *Id.* at 439-40, 674 S.E.2d at 852. Second, the statute at issue in *Tanner* was a penal statute. *Id*. at 436, 674 S.E.2d at 850. Penal statutes, and statutes implicating First Amendment rights, are reviewed with more rigor. *Hoffman Estates*, 455 U.S. at 498-99. The statute at issue here is an economic regulation, subject to more deferential review.

In *E.L. Bowen & Co. v. American Motor Sales,* Chancery Docket No. 4498 (June 3, 1958 E.D. Va.), the challenged statute made it actionable to "[t]o coerce, or attempt to coerce any dealer to enter into any agreement with such manufacturer, factory branch, distributor or distributor branch, or representative thereof, or do any other act unfair to such dealer, by threatening to cancel any franchise existing between such manufacturer, factory branch, distributor, distributor branch or representative thereof, and

such dealer; or" to "[u]nfairly, without due regard to the equities of a dealer and without just provocation, to cancel the franchise of such dealer." *Virginia Code* § 46-534 (1950). The trial court found these two provisions unconstitutionally vague, and this Court denied the petition for appeal by an unpublished order. The succinct opinion of the Hustings Court of the City of Portsmouth, ultimately affirmed by this Court, is appended to the decision in *Vintage Imports, Ltd. v. Joseph E. Seagram & Sons, Inc.*, 409 F. Supp. 497, 510-11 (E.D. Va. 1976).[2]

The order of the Hustings Court does not spell out the rationale for its decision. It is worth noting, however, that the statute at issue, *Virginia Code* § 46-534, contained *three* broad standards: a franchise could not be cancelled (1) "unfairly;" (2) "without due regard to the equities of a dealer;" and (3) without "just provocation." These three rather amorphous standards pushed the statute over the edge from the permissible to the

[2] Assuming that this order "may have precedential value," *Sheets v. Castle*, 263 Va. 407, 411, 559 S.E.2d 616, 619 (2002), in light of the limited access litigants and lower courts have to such unpublished orders, that precedential value must be less than a full fledged opinion of the Court. Lower courts cannot be expected to follow as binding precedent unpublished 50-year-old orders that are buried in the archives of this Court.

vague.[3] In contrast, *Virginia Code* § 46.2-1569(7) is tethered to more specific measures: the dealer must in fact place an order for the car, and the "equitable" standard is specifically linked to the "total new vehicle production or importation currently being achieved nationally by each make, series and model covered under the franchise."

Waynesboro v. Keiser, 213 Va. 229, 191 S.E.2d 196 (1972), likewise does not support Volkswagen. At issue in that case was a statute that permitted a court to adjust a tax valuation "if the court in its discretion finds the ends of justice would be met by making an adjustment." *Id.* at 233-34, 191 S.E.2d at 199. The problem in *Keiser* was that this discretionary standard could not be reconciled with the requirement in the Virginia constitution that tax assessments be uniform and based on fair market value – not a judge's discretion. *Id.* at 234, 191 S.E.2d at 199. It is for this

[3] The statutes at issue in *Vintage Imports*, 409 F. Supp. at 510-11, and in *General Motors Corp v. Blevins*, 144 F. Supp. 381 (D. Colo. 1956), suffered from similar compounding of broad standards that rendered them unconstitutionally vague. *See Vintage Imports*, 409 F. Supp. at 499 (statute prohibited the cancellation "[u]nfairly, without due regard to the equities of such wholesaler, vintner, winery or brewery and without just cause or provocation, to cancel or terminate in whole or in part, any agreement or contract, written or oral, or the franchise of such wholesaler, vintner, winery or brewery"); *Blevins*, 144 F. Supp. at 395 (statute prohibited canceling dealer franchise "unfairly" "without just provocation" and "without due regard to the equities."). In addition, the statute under review in *Vintage Imports* provided for criminal penalties. 409 F. Supp. at 509.

reason that the lack of standards was fatal to the statute at issue in *Kaiser*. The Court did not hold that all "ends of justice" standards suffered from unconstitutional vagueness, as Volkswagen suggests. VW Br. 24. It is hard to believe that this Court would have ignored its own jurisprudence and crafted unconstitutional rules of Court by establishing an appellate standard that is unconstitutionally vague. *See* Va. S. Ct. 5:25 (providing an "ends of justice" standard to overcome procedural default) and 5A:18 (same). In fact, the broad "ends of justice" standard is not unconstitutionally vague. Rather, *Keiser* found, it was problematic in light of the Constitutional mandate of "uniformity" in taxation based upon fair market value. *Keiser,* 213 Va. at 234, 191 S.E.2d at 199.

One persuasive case cited by Volkswagen simply involved a different term and, therefore, is irrelevant. *See, e.g.*, *Norfolk 302, L.L.C. v. Vassar*, 524 F. Supp. 2d 728, 739-40 (E.D. Va. 2007) (sustaining vagueness challenge to the statutory prohibition on "noisy" establishments). The Commissioner does not deny that some terms can be vague. However, the Commissioner denies that the use of a broad standard of "equitableness" or "reasonableness" renders a statute vague in circumstances such as the economic regulation at issue here.

Volkswagen also cites two non-binding cases by the same federal district court judge in Colorado, *Arapahoe Motors, Inc. v. General Motors Corp.*, 2001 U.S. Dist Lexis 24533 (D. Colo. March 27, 2001) (Nottingham, J.) (holding that the phrase "just cause" was unconstitutionally vague); *Mike Naughton Ford, Inc. v. Ford Motor Co*., 862 F. Supp. 264, 271 (D. Colo. 1994) (Nottingham, J.) (holding that the phrase "would be inequitable" was vague). In the Commissioner's view, these decisions by a single judge are simply wrong. And two decisions by one judge do not support the view that the use of broad standards renders a statute unconstitutionally vague.

E. This Court should reject Volkswagen's belated attack on the Commissioner's factual determinations.

In its brief, for the first time on appeal to this Court and with no attendant assignment of error, Volkswagen raises a number of factual issues in support of its argument that the Commissioner's decision is flawed. VW Br. 27-32. For example, Volkswagen contends that Beetle cars were "sitting in port" and, therefore, it cannot be faulted for failing to ship Beetles to Miller. VW Br. 30. For February, Volkswagen contends, only 51 Beetles had been shipped and, consequently, it should not be faulted for failing to ship any Beetles to Miller. VW Br. 30. Volkswagen never raised these points in the Court of Appeals, nor are they the subject of an assignment of error in this Court. The factual findings upon which the

Commissioner's decision rests are now final. If Volkswagen disagreed with these findings, it was required to raise the argument below, not for the first time in this Court. Therefore, these arguments are procedurally defaulted. Va. S. Ct. R. 5:25; 5:17(c). Furthermore, on appeal, the evidence is viewed in the light most favorable to the prevailing party. *See, e.g.*, *Shivaee*, 270 Va. at 127, 613 S.E.2d at 578.

Ultimately, while the vagueness standard should remain more robust in the context of criminal law, and in cases implicating the exercise of First Amendment rights or other fundamental rights, the Commissioner's narrow "as-applied" determination should be upheld, particularly with respect to this economic regulation.

II. THE STATUTE DOES NOT INFRINGE UPON THE DORMANT COMMERCE CLAUSE

A. The statute is not subject to "per se" scrutiny.

Under the Articles of Confederation, the National Government lacked power to regulate commerce among the States, and "[b]ecause each State was free to adopt measures fostering its own local interests without regard to possible prejudice to nonresidents, . . . a 'conflict of commercial regulations, destructive to the harmony of the States' ensued." *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 571 (1997) (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 224 (1824)

(Johnson, J., concurring)). Over the years, "[t]he Commerce Clause[4] has accordingly been interpreted . . . not only as an authorization for congressional action, but also, even in the absence of a conflicting federal statute, as a restriction on permissible state regulation." *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979).

Of course, the Commerce Clause does not render a state powerless to enact valid regulations which may incidentally burden interstate commerce. "The limitation imposed by the Commerce Clause is by no means absolute, and the States retain authority under their general police powers to regulate matters of legitimate local concern, even though interstate commerce may be affected." *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (internal quotation marks and citation omitted).

If a state law discriminates against interstate commerce, it is "virtually *per se* invalid." *Dep't of the Revenue of Kentucky v. Davis*, 128 S. Ct. 1801, 1808 (2008). One way a statute can be invalid is if it has an impermissible extraterritorial effect. In *Healy v. Beer Institute*, 491 U.S. 324 (1989), the Court held that the

> Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within

[4] U.S. Const.. Art. I, § 8, cl. 3 (empowering Congress "[t]o regulate Commerce . . . among the several states.").

> the State . . . . Second, a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature. The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State. Third, the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation. Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another state.

Id. at 336-37 (internal quotation marks, citations, and footnotes omitted).

Relying on *Healy*, Volkswagen argues that the statute "has the practical effect of controlling commerce outside of Virginia." VW Br. 34. Volkswagen further contends that it would be exposed to inconsistent obligations if other States adopted similar measures. VW Br. 34-35. Therefore, Volkswagen contends, *Virginia Code* § 46.2-1569(7) is "per se" invalid under the Commerce Clause.

In *Healy,* a Connecticut statute required out-of-state shippers of beer to affirm that their posted prices for products sold to Connecticut dealers were, as of the moment of posting, no higher than the prices at which those products were sold in the bordering States of Massachusetts, New York, and Rhode Island. *Id.* at 328. The Connecticut legislature enacted the

statute after noticing that Connecticut residents living in border areas frequently crossed state lines to purchase beer at lower prices. *Id.* at 326. The United States Supreme Court struck this law as invalid because it had "the undeniable effect *controlling* commercial activity occurring wholly outside the boundary of the State." *Id.* at 337 (emphasis added). When combined with other interlocking state laws, the Connecticut statute had an impermissible extraterritorial effect. *Id.* at 337-40.

Similarly, in *Heublein, Inc. v. Alcoholic Beverage Control Dept.*, 237 Va. 192, 198, 376 S.E.2d 77, 80 (1989), a Virginia statute provided that "[n]otwithstanding the terms, provisions, or conditions of any agreement or written contract which evidences such agreement, no winery shall unilaterally amend a wholesaler's contract unless the same amendment is . . . made uniformly as to all wholesalers of the winery in question in all states in which the winery is marketing its product." *Id.* at 195 n.4, 376 S.E.2d at 78 n.4 (quoting former *Virginia Code* § 4-118.27(B)). This Court found that the statute violated the Commerce Clause by forcing a winery to amend its contracts in all fifty states if it wished to amend any Virginia contract. *Id.* at 197-98, 376 S.E.2d at 79-80.

Virginia Code § 46.2-1569(7) does not suffer from any such defect. It has no controlling effect on the manner in which Volkswagen allocates its

cars in neighboring states. Volkswagen remains entirely free to allocate those cars as it sees fit. Furthermore, the statute does not, as Volkswagen argues, control the number of vehicles a distributor imports nationally. VW. Br. at 35. Volkswagen is free to import any number of vehicles it pleases. Volkswagen offered no evidence to show that this Virginia statute drove its decisions with respect to the number of vehicles to allocate nationwide.

Unlike the litigants in *Healy*, Volkswagen has failed to establish that the Virginia statute at issue creates an impermissible "interlocking" effect with other state regulations or statutes. Moreover, even if other States adopted statutes similar or identical to *Virginia Code* § 46.2-1569(7), such measures would still be permissible regulations. A manufacturer cannot be inequitably distributing automobiles if it is doing so based on statutory mandates. The broad equitable standard would certainly accommodate any such mandate. If a particular court or administrative agency reaches an incorrect decision as applied to particular facts, that decision can be corrected.

One powerful indication that Volkswagen's argument is without merit comes from the fact that many other States have adopted laws similar to the statute at issue. *See Ariz. Rev. Stat.* § 28-4458(E); *Fla. Stat. Ann*. § 320.64(18-19); *Ky. Rev. Stat. Ann*. § 190.070(2)(a); *Me. Rev. Stat*. 10 §

1174(3); *Md. Code Ann*.,10 *Transp.* § 15-208(a-c); *Mass. Gen. Laws Ann.* ch. 93B, § 4(c)(3); *Mich. Comp. Laws Ann*. § 445.1574(1)(c); *Minn. Stat. Ann*. § 80E.13(a); *Mont. Code Ann*. § 61-4-208(b); *Nev. Rev. Stat*. § 482.36388(1); *N.C. Gen. Stat. Ann*. § 20-305(14); *Ohio Rev. Code Ann*. § 4517.59(F); *Okla. Stat. tit*. 47, § 565(A)(9)(c); *Pa. Stat. Ann*. 63 § 818.12(b)(1); *S.C. Stat. Ann*. § 56-15-40; *Utah Code Ann*. § 13-14-201(1)(m); *Vt. Stat. Ann*. tit. 9, § 4097(1); *Wash. Rev. Code* § 46.96.185(1)(d). If these laws are as oppressive as Volkswagen maintains, one would expect that one or more manufacturers would have challenged them. That has not happened. Volkswagen's theoretical argument of a substantial burden lacks any "real world" support.

Volkswagen's assertion that Virginia law forces it to alter its nationwide strategy is likewise purely theoretical. Volkswagen has offered no proof whatsoever that Virginia law has forced it to alter the number of vehicles it imports into the United States. Laws should not be invalidated by "reference to hypothetical cases." *United States v. Raines*, 362 U.S. 17, 22 (1960). *See also Pullman v. Knott*, 235 U.S. 23, 26 (1914) (A statute "is not to be upset upon hypothetical and unreal possibilities"). The party challenging a statute as unconstitutional bears the burden of proving its unconstitutionality, and Volkswagen has failed to do so here.

Essentially, Volkswagen contends that the Commerce Clause requires unfettered discretion to allocate cars as it sees fit, without any bothersome state statute standing in its way, forcing it to allocate a few vehicles here and there to its Virginia franchisees. A statute is not invalid under the Commerce Clause merely because it can have *incidental* effects on interstate commerce. *Hughes*, 441 U.S. at 336; *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). *See also Osborn v. Ozlin*, 310 U.S. 53, 62 (1940) ("The mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within the domain which the Constitution forbids."); *Alliant Energy Corp. v. Bie*, 336 F.3d 545, 546-50 (7th Cir. 2003) (denying rehearing en banc and upholding state regulations governing utilities in the face of a Commerce Clause challenge).

In fact, "it is inevitable that a state's law, whether statutory or common law, will have extraterritorial effects." *Instructional Systems, Inc. v. Computer Curriculum Corp.*, 35 F.3d 813, 825 (3rd Cir. 1994). For example, if Virginia law requires medical facilities to have a certain level of staffing per patient in order to ensure a certain standard of care, because there exists a finite number of doctors and nurses, that may force a hospital chain to have fewer doctors and nurses available elsewhere. A state

statute that requires a business to have insurance, or to be capitalized at a certain level, will mean that the business has fewer resources to devote to economic pursuits in another state. That sort of incidental effect does not render a state statute problematic under the Commerce Clause. *Virginia Code* § 46.2-1569(7) may have some incidental effect on Volkswagen's decisions to allocate vehicles, but it does not have an impermissible *controlling* extraterritorial effect.

B. The statute easily survives "*Pike* Balancing"

If a statute does not "per se" discriminate, courts review the measure under the *Pike* balancing test. Under this test, "[w]here the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970). In assessing the "legitimate local purpose" and the "putative local benefits," a court "must proceed with deference to the state legislature." *Yamaha Motor Corp. v. Jim's Motorcycle*, 401 F.3d 560, 569 (4th Cir. 2005). Courts owe less deference in assessing the burden imposed by a particular measure. *Id.*

Pike balancing has been subjected to withering criticism for the manner it injects courts into an improper policymaking role. *See, e.g., Camps Newfound/Owatonna,* 520 U.S. at 618-20 (Thomas, J., joined by and Rehnquist, C.J., Scalia, J., dissenting). While this Court is constrained to follow this deeply flawed test, it should be overruled for all the reasons mentioned in the dissent in *Camps Newfound/Owatonna*.[5] *See also Davis*, 128 S. Ct. at 1818 (noting the "unsuitability of the judicial process and judicial forums" for making the kind of balancing *Pike* requires).

Applying, as this Court must, the *Pike* balancing test, Volkswagen has failed to show anything more than a very incidental effect on interstate commerce. Virginia law does not place any constraints on Volkswagen's freedom to distribute its vehicles among sister States any way it sees fit. Its complaint that *Virginia Code* § 46.2-1569(7) forces a nationwide adjustment of automobile imports is purely theoretical and unsupported by any evidence. And the statute effectuates a local benefit, ensuring fair treatment of Virginia's automotive dealers and choice and competition in Virginia's automotive marketplace. The minor adjustments the statute

[5] The Commissioner makes this argument only to preserve it in the event of further review by the United States Supreme Court. Obviously, this Court is bound to follow United States Supreme Court precedent on a point of federal constitutional law.

might require a manufacturer to make are more than outweighed by these local benefits.

Volkswagen argues that the Court of Appeals "utterly ignored an entire line of U.S. Supreme Court cases that address the issue." VW Br. 40. Volkswagen says that "statutes that regulate 'those phases of the national commerce which, because of the need of national uniformity, demand their regulation, if any, be prescribed by a single authority' impose a clearly excessive burden on interstate commerce." VW. Br. 39-40. To the extent that Volkswagen "treats the need for national uniformity as an additional ground for determining that a state law violates the Commerce Clause, concerns about national uniformity are simply part of the *Pike* burden/benefit balancing analysis." *Quik Payday, Inc. v. Stork*, 549 F.3d 1302, 1307 (10th Cir. 2008), *cert. denied* 129 S. Ct. 2062 (2009). For example, in *Southern Pacific* Co. *v. Arizona ex rel. Sullivan*, 325 U.S. 761, 775 (1945), the United States Supreme Court invalidated a state law limiting train lengths. As with modern *Pike* balancing analysis, the Court weighed the problems that would be created for interstate railroad transportation if each state regulated train lengths with the local benefit that such statutes would confer. *Id.* at 771-79. The Court concluded that the statute had no "reasonable relation to safety, and made train operations

more dangerous." *Id.* at 775. On the other hand, the burden of "breaking up and reassembling long trains at the nearest terminal points before entering and after leaving the regulating state" imposed a "serious impediment to the free flow of commerce." *Id.*

In this instance, to the extent Volkswagen has established any burden at all, it is minimal. In the event of a dispute, the statute may require Volkswagen to shift a fraction number of the tens of thousands of cars it imports to its Virginia dealers, when those Virginia dealers request them, to ensure that local franchisees receive an equitable share of those vehicles. Because Volkswagen has already pledged itself contractually to providing a "fair and equitable" number of vehicles to its dealers, App. 14, in most instances the impact of Virginia law will be nonexistent.

It is also noteworthy that in nearly thirty-five years that *Virginia Code* § 46.2-1569(7) has been in effect,[6] with dozens of automobile manufacturers, and hundreds of different models being distributed to hundreds of different dealers all over Virginia, only one case has been brought to the Commissioner for a formal decision. The smooth operation of this statute for such a long period is telling with respect to the supposed burden the statute places on a manufacturer.

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[6] *See* 1974 Va. Acts ch. 568.

The United States Supreme Court has observed that "[s]tate laws frequently survive . . . *Pike* scrutiny." *Department of the Revenue of Kentucky*, 128 S. Ct. at 1808. That is the case here. The Court of Appeals correctly upheld the statute.

CONCLUSION

The judgment of the Court of Appeals of Virginia should be affirmed.

Respectfully submitted,

BRIEF OF APPELLEE,
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CERTIFICATE OF SERVICE

I certify that on this 16th day of June, 2009, twelve copies of the Brief of the Appellee, Demerst B. Smit, Commissioner of the Virginia Department of Motor Vehicles, have been filed in the Office of the Clerk of the Supreme Court of Virginia; An electronic copy of the Opening Brief has been filed with the Clerk of the Supreme Court of Virginia by e-mail at scvbriefs.@courts.state.va.us; and three copies have been mailed by first class, postage prepaid, U.S. Mail to counsel listed below:

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