

## Note

### Tesla's Right to Rise

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#### ABSTRACT

Tesla Motors Co. Inc. (“Tesla”) is being threatened by franchise dealerships that do not want to compete with Tesla’s direct to consumer sales model. Franchise dealerships are attempting to invoke state automobile franchise laws to threaten the existence of Tesla’s business model. Tesla sells one of the most technologically deft and environmentally friendly cars in the United States, and its successful business model should be upheld. The Supreme Court should follow the precedent set in *Massachusetts State Auto. Dealers Association, Inc.* and find that franchise dealership lawsuits against Tesla should be dismissed because they are an assault on innovation and the will of the consumer.

This Note will explain how state automobile franchise laws are only

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intended for manufacturers engaged in franchisor-franchisee relationships and are not intended to be protectionist. Tesla does not operate under a franchisor-franchisee model and franchise dealerships should not be shielded from competition. The Supreme Court should invalidate laws targeting Tesla’s business model, but it could also limit the scope of Tesla’s market share to prevent it from securing a monopoly. Tesla should have the right to succeed despite that franchise dealerships would like to see Tesla fail.

Abstract .....	133
I. Introduction.....	134
II. The Bull’s Eye on Tesla’s Back.....	137
A. The Evolution of Franchise Dealership Systems .....	137
1. Franchise Dealerships’ Lack of Success in the Courts .....	138
2. Formation of Dealership Associations .....	138
B. Tesla Leads the Electric Car Revolution.....	140
1. Tesla’s “Direct to Consumer” Sales Model .....	141
C. Tesla is Dismissed From Violation Lawsuits .....	143
1. Courts’ Reliance on Statutory Framework .....	143
2. When There is a Lack of Standing Against Tesla ..	144
D. Recent State Laws That Deliberately Target Tesla.....	145
III. The Supreme Court Should Strike Down Future Claims Against Tesla .....	146
A. Plain Reading of a Franchise Automobile Law .....	146
B. A Court Should Look at the Legislative History .....	147
C. Good Faith Clauses of a Franchise Agreement .....	150
1. The Intention of State Franchise Laws .....	151
a. Franchise Dealership Laws Are Not Protectionist.....	151
b. Tesla’s Impact On the Business Community ...	155
IV. The Supreme Court Should Place Restrictions On Tesla If Necessary .....	156
V. Conclusion .....	158

I. INTRODUCTION

Tesla is one of the most innovative car companies in the world, and it boasts an extremely efficient direct to consumer business model. However, envious franchise dealers who do not want to compete with Tesla are threatening its business model. Tesla’s business model works for consumers because they will be getting a transformative and environmentally friendly product without having to pay the fees of a middleman.

This Note will argue that the Supreme Court should adhere to the

legal analysis of the majority opinion in *Massachusetts State Auto. Dealers Association*.<sup>1</sup> That case refused to use a state automobile franchise law to bar Tesla's business model, and to protect dealerships from having to compete with Tesla.<sup>2</sup> In addition, that case gives Tesla significant grounds to defend against franchise dealership associations attacking Tesla's business model.<sup>3</sup>

In *Massachusetts State Auto. Dealers Association*, the plaintiffs alleged that Tesla was operating an automobile dealership in the Natick Mall in violation of a Massachusetts Automobile Franchise Law ("MAFL") that barred a manufacturer from owning a dealership.<sup>4</sup> That case indicates that Tesla is not in a franchisee-franchisor relationship because it does not sell vehicles pursuant to a franchise agreement.<sup>5</sup> Furthermore, Tesla showrooms cannot be considered automobile dealerships because customers cannot buy the cars at those very sites.<sup>6</sup>

This Note will also argue that the scope and grant of the authority to bring an action for violation of a statute must be determined by the legislative intent and subject matter of the statute.<sup>7</sup> Moreover, state automobile franchise laws are not intended to provide all franchise dealerships with the right to prevent direct competition.<sup>8</sup> Rather, the purpose of these laws is to provide a sound free market, without unfair competition by powerful manufacturers at the top of the vertical economic chain.<sup>9</sup>

This Note argues that future auto dealership claims against Tesla should be dismissed by the courts. There are franchise laws in all fifty states that prohibit manufacturers from selling directly to consumers.<sup>10</sup>

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1. *Massachusetts State Auto. Dealers Ass'n, Inc. v. Tesla Motors MA, Inc.*, 15 N.E.3d 1152, 1153 (Mass. 2014) (noting that Judge Botsford issued the majority opinion in a case which set precedent for pro-Tesla jurisprudence in the future by refusing to favorably interpret a Massachusetts automobile franchise law and promoted Tesla's successful direct to consumer sales model).

2. *Id.* at 1159 (describing Judge Botsford's opinion in that case which held that the purpose of the Massachusetts statute was not intended to prevent competitiveness, although an incidental result of that statute could have been that effect).

3. *Id.* at 1153.

4. *Id.* at 1157.

5. *Id.* at 1157.

6. *Id.* at 1157-58.

7. *See Beard Motors, Inc. v. Toyota Motor Distribs., Inc.*, 480 N.E.2d 303, 306 (Mass. 1985) (remarking that one must look at the legislative intent to determine whether one has standing under this Massachusetts statute).

8. *Id.* at 307 (noting that the Massachusetts Legislature did not intend to give any disappointed franchise dealer standing, and that this statute was only targeted against manufacturers).

9. *Id.* at 306 (remarking that the court wanted to prevent manufacturers and distributors from having virtually complete control over their dealers, which was the case before the enactment of MASS. GEN. LAWS ch. 93B).

10. Jerry Ellig & Jesse Martinez, *State Franchise Law Carjacks Auto Buyers*, MERCATUS CENTER GEO. MASON 1 (2015), <https://www.mercatus.org/system/files/Ellig-Auto-Franchise->

However, these laws are intended for those manufacturers that are already affiliated with franchise dealers.<sup>11</sup> Moreover, these laws are not intended to shield dealers from competition from manufacturers.<sup>12</sup> States that have recently passed laws to target Tesla are simply protectionist in intent.<sup>13</sup>

Section II traces the background and evolution of state franchise laws within the automobile industry. Section II also describes how Tesla is leading the electric car revolution, and why Tesla's direct to consumer sales model is effective.<sup>14</sup> Furthermore, Section II details how state legislatures have previously enacted or proposed legislation that seeks to prevent Tesla's direct to consumer sales model because it harms the traditional franchisee-franchisor model.<sup>15</sup>

Section III analyzes these state laws vis a vis *Massachusetts Auto. Dealers Association* and argues that the Supreme Court should dismiss future lawsuits against Tesla because Tesla is not in a franchisor-franchisee relationship.<sup>16</sup> Further, Section III asserts that state automobile franchise laws are not intended to be protectionist. Thus, courts should strike down lawsuits by franchise dealer associations alleging Tesla violates the statutory language of state automobile franchise laws.

Section IV maintains that courts should allow targeted restrictions only if franchise dealers can prove that Tesla will obtain a disproportion-

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MOP.pdf (stating that what started as a voluntary agreement between a manufacturer and a retailer has turned into a mandatory requirement in all fifty states and U.S. territories).

11. See Daniel Crane, *Tesla Dealer Franchise Laws, and the Politics of Crony Capitalism*, 101 IOWA L. REV. 573, 578-79 (2016) (discussing that there are automobile franchise statutes in 50 states, which commonly include prohibitions on forcing dealers to accept unwanted cars, protection against termination of franchise agreements, and that these automobile franchise dealership statutes were focused towards protecting dealers in franchise relationships from the exigencies of superior manufacturing power).

12. See Stephen Fox, *Two Roads Diverged: Tesla, Interruption, And the Commerce Clause*, 22 B.U.J. SCI. & TECH. L. 153, 177 (2016) (describing that federal and state automobile franchise legislation was intended to prevent abusive tactics such as preventing arbitrary and capricious changes in ownership of family-oriented dealerships, as well pricing requirements that cut into dealership profits, and preventing inequitable bargaining power on behalf of manufacturers was the only apparent intent of these statutes).

13. Ellig & Martinez, *supra* note 10, at 4 (describing that dealer protection laws effectively freeze the network as they restrict certain products solely to the seller, and Tesla has been denied this opportunity by state legislatures opposed to Tesla's business model).

14. Ellig & Martinez, *supra* note 10, at 3 (maintaining that Tesla's direct sales model could improve the car buying experience for consumers interested in electric vehicles).

15. *Tesla Sues Michigan Over Ban on Selling Directly to Consumers*, THE GUARDIAN (Sept. 22, 2016, 2:37 PM), <https://www.theguardian.com/technology/2016/sep/22/tesla-sues-michigan-dealer-license-rick-synder>.

16. See *Massachusetts State Auto. Dealers Ass'n, Inc. v. Tesla Motors MA, Inc.*, 15 N.E.3d 1152, 1153, 1157 (Mass. 2014) (stating that franchise dealerships aiming to sue manufacturers who engage in direct sales with the public only have standing if they are engaged in a franchisee-franchisor relationship).

ate amount of the market share.<sup>17</sup> Moreover, it argues that state regulatory agencies should limit the number of Tesla dealers within a defined radius, and that franchise dealers are entitled to a certain percentage of the market share within a certain geographical area.

## II. THE BULL'S EYE ON TESLA'S BACK

### A. THE EVOLUTION OF FRANCHISE DEALERSHIP SYSTEMS

The automobile industry first began in the early twentieth century, operating with a limited number of manufacturers lacking capital and most manufacturers selling cars directly to their consumers.<sup>18</sup> However, in the 1930's, manufacturers developed distribution systems whereby they sold their automobiles to dealerships, which then sold those automobiles to consumers.<sup>19</sup> Thus, the American automobile franchise system was born.<sup>20</sup> However, the relationship between the manufacturer and the franchise dealer prior to the 1950's was an unbalanced one, as the manufacturer was far wealthier than the ordinary franchise dealer.<sup>21</sup> Moreover, the dealer-franchise system often involved the imposition of coercive business practices by the "Big Three" (Ford, GM, and Chrysler) against auto franchise dealerships that were often small, family-run businesses.<sup>22</sup>

In 1921, Ford Motor Company owed several banks and the U.S. government approximately seventy million dollars combined.<sup>23</sup> When the Great Depression struck in 1929, Ford utilized a previously employed strategy that expanded production, cut prices, and unfortunately forced dealers to purchase unwanted automobiles.<sup>24</sup> Franchise dealers were forced to accept the unwanted cars because failing to do so would subject them to the risk of termination, while also losing a substantial capital in-

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17. Ellig & Martinez, *supra* note 10, at 4 (discussing that Relevant Market Areas ("RMAs") are necessary to prevent manufacturers from opening other franchises and give existing dealers the opportunity to charge consumers higher prices).

18. See Gary Michael Brown, Note, *State Motor Vehicle Franchise Legislation: A Survey and Due Process Challenge to Board Composition*, 33 VAND. L. REV. 385, 387 (1980) (detailing how the franchise dealership system started).

19. Brown, *supra* note 18, at 387.

20. Jessica Higashiyama, *State Automobile Dealer Franchise Laws: Have They Become the Proverbial Snake in the Grass?* 2-3 (Apr. 1, 2009), available at <https://ssrn.com/abstract=1394877>.

21. Higashiyama, *supra* note 20 (noting that manufacturers were large organizations with a successful line of automobiles, while the franchise dealer was typically a small business owner).

22. See STEWART MACALAY, *LAW AND THE BALANCE OF POWER: THE AUTOMOBILE MANUFACTURERS AND THEIR DEALERS* 10, 16 (1966) (noting that manufacturers often exert dominance over franchisees because of their wealth and negotiating advantages).

23. *Id.* at 13 (discussing how Ford Motors Co. was in great debt during a time of economic turmoil, but imposed inequitable business practices on its franchise dealers).

24. See Higashiyama, *supra* note 20, at 3-4 (discussing that during the Great Depression, Ford Motor Co. maintained its tradition of keeping its factories running while forcing dealerships to buy unwanted cars, which they did not need or want and had little chance of selling).

vestment in their dealerships.<sup>25</sup>

### 1. Franchise Dealerships' Lack of Success in the Courts

Franchise dealers were displeased with the coercive practices of manufacturers and thus attempted to challenge these franchise agreements as being contracts of adhesion.<sup>26</sup> The courts did not focus upon the inequality of bargaining power between the two parties, and the courts usually held that there was a lack of obligation on behalf of manufacturers.<sup>27</sup> For example, in *Bushwick-Decatur Motors, Inc. v. Ford Motor Co.*, the court held that a good faith clause was necessary only if the legislative intent indicated it was necessary.<sup>28</sup>

### 2. Formation of Dealership Associations

Due to franchise dealers' displeasure with the results of appealing to the federal courts on the basis of the contract doctrine, many previously inactive dealership associations became more active to seek appropriate remedies.<sup>29</sup> However, the franchise dealers associations were unable to obtain sufficient remedies from manufacturers and thus turned their attention to the legislative branch.<sup>30</sup> Franchise dealers first relied upon the National Industrial Recovery Act of the early 1930's to create a fair code of competition amongst franchise dealers and manufacturers.<sup>31</sup> There were favorable provisions in this Act for franchise dealers, such as substantially eliminating price competition among dealers by exerting control over used-car prices.<sup>32</sup> Unfortunately for the franchise dealers, in *Schechter Poultry Corp.*, the United States Supreme Court struck down

25. See Brown, *supra* note 18, at 388 (remarking that franchise dealers had little choice but to abide by the manufacturers' demands because they did not want to lose capital or to risk termination).

26. See Higashiyama, *supra* note 20, at 4 (describing that courts were not concerned about equality in the marketplace and often gave advantages to manufacturers).

27. See Brown, *supra* note 18, at 389 (discussing that franchise dealers had very little standing in the courts because the contracts drafted by the lawyers did not give adequate legal representation to all relevant parties).

28. *Bushwick-Decatur Motors, Inc. v. Ford Motor Co.*, 116 F.2d 675, 677 (2d Cir. 1940) (explaining that federal courts were not sympathetic to the bargaining inequities between manufacturers and franchise dealers and saw no precedent for a good faith doctrine).

29. See Higashiyama, *supra* note 20, at 5 (describing that the National Automobile Dealership Association has existed since 1917, but franchise dealership associations engaged in greater collective action when manufacturers engaged in coercive practices).

30. See Higashiyama, *supra* note 20, at 5 (describing the initial failures of the franchise dealership associations and how they planned to seek remedies from state legislatures as well as Congress).

31. See National Industrial Recovery Act, ch. 90, § 3, 48 Stat. 196 (1933) (stating that this Act sought to end cutthroat competition with the hope that these anti-trust laws could help expedite the process in ending the Great Depression).

32. Friedrich Kessler, *Automobile Dealer Franchises: Vertical Integration by Contract*, 66

this Act as unconstitutional, and granted another victory to the manufacturers.<sup>33</sup>

In the late 1930's, dealer associations appealed to congressmen who were sympathetic to their situation.<sup>34</sup> Because of this appeal, in 1937 the first meaningful federal action was introduced in the United States House of Representatives.<sup>35</sup> Congress passed the resolution after several hearings and directed the Federal Trade Commission (FTC) to investigate various manufacturers' practices.<sup>36</sup> The FTC investigation did not help franchise dealerships, as the primary purpose of this investigation was consumer protection rather than dealer protection.<sup>37</sup> In good measure, the "Motor Vehicle Act of 1940" was enacted to provide for greater FTC regulation of franchise agreements, including efforts to curb mistreatment involving rights of termination.<sup>38</sup>

NADA and other franchise dealership organizations finally secured the attention of franchise dealerships to pass legislation.<sup>39</sup> This resulted in investigations regarding manufacturers' poor treatment of franchise dealers, and these hearings were surprisingly deferential to franchise dealers.<sup>40</sup>

Congressional investigations into the coercive practices of manufac-

YALE L.J. 8, 1135, 1157-58, 1168 (1957) (remarking that wholesale sales intended to limit "bootlegging" limited franchise dealer's competition).

33. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537, 542 (1933) (noting that the National Industrial Recovery Act is unconstitutional because it is inconsistent with constitutional prerogatives).

34. See Kessler, *supra* note 32, at 1171 (noting that franchise dealers believed that progressive congressmen could help solve their problem).

35. Higashiyama, *supra* note 20, at 6 (demonstrating that Representative Winthrow of Wisconsin introduced legislation to combat the coercive practices of auto manufacturers, and noting his belief that it was possible for state and administrative agencies to alleviate a "great many of the evils that exist in the relations among dealers themselves").

36. See Kessler, *supra* note 32, at 1171 (noting that after lengthy hearings, the resolution was passed, authorizing the FTC to conduct an investigation on a scale far beyond that was investigated by the sponsor).

37. See FED. TRADE COMM'N, 76TH CONG., MONOGRAPH NO. 36, REPORTS OF THE FEDERAL TRADE COMMISSION ON NATURAL GAS AND NATURAL GAS PIPES IN U.S.A. AGRICULTURAL IMPLEMENT AND MACHINERY INQUIRY MOTOR VEHICLE INQUIRY 261 (S. Comm. Print 1940) (explaining the legislative intent of the statute directing the Federal Trade Commission to investigate coercive business practices of manufacturers and their relationships).

38. See Brown, *supra* note 18, at 394-95 (describing that this Act attempted to create more equal bargaining conditions by thwarting some of the manufacturers' rights of termination).

39. See Higashiyama, *supra* note 20, at 9 (describing that NADA and other dealership associations changed their strategy to persuade the United States Congress to pass legislation to alleviate their plight).

40. See generally *A Study of the Antitrust Laws: Hearings Before the S. Subcomm. On Antitrust and Monopoly of the Comm. On the Judiciary to Study the Antitrust Laws of the U.S. and Their Administration, Interpretation, and Effect Pursuant to S. Res. 61 Part 6 General Motors*, 84th Cong. (1955) (explaining that there were hearings due to increased customer dissatisfaction with the actions of manufacturers and these hearings were favorable to franchise dealers).

urers led to the passage of the Automobile Dealers Day in Court Act (“ADDCA”) in 1956.<sup>41</sup> Among other penalties, this Act enabled franchise dealers to recover damages from manufacturers who failed to act in good faith by terminating or not renewing franchise agreements.<sup>42</sup> The Act indicated that a franchise dealer could bring a lawsuit against a manufacturer if the manufacturer engaged in a franchisee-franchisor relationship, and the manufacturer failed to act in “good faith.”<sup>43</sup>

Although the franchise dealers gained a major legislative victory through Congress’ passage of this Act, the courts imposed significant barriers to securing relief under this Act.<sup>44</sup> Thus, many of the dealers found this statute to be completely ineffective.<sup>45</sup> However, the plight of franchise dealers has improved as all states have passed laws that govern franchise agreements as contracts of adhesion, including provisions that protect against termination of a franchise.<sup>46</sup>

## B. TESLA LEADS THE ELECTRIC CAR REVOLUTION

In 2003, engineers in Silicon Valley founded Tesla Motors Co. Inc., in an effort to demonstrate that electric cars are more efficient, faster, and smoother to drive than standard gas powered cars.<sup>47</sup> Elon Musk owns Tesla Motors, whose company is viewed as one of the most technologically advanced and popular companies today. Tesla cars have futuristic technology while also blending fashion and mystique. In addition, Tesla Motors boasts some of the fastest cars in the automobile industry; its first car, the 2008 Tesla Model S P100D, accelerates from 0 to 60 MPH in two and a half seconds.<sup>48</sup> Moreover, the Tesla Roadster achieves a range of

41. Automobile Dealers Day in Court Act 1956, Pub. L. No. 84-1026, 70 Stat. 1125 (1956).

42. *Id.* at § 2 (stating that it was Congress’ intent to ensure that manufacturers were acting in good faith by imposing punitive damages against manufacturers who failed to meet that condition).

43. See 15 U.S.C. § 1222 (2017) (noting that a party could bring an action under the good faith clause of this statute if both parties are in a franchisee-franchisor relationship).

44. See Kessler, *supra* note 32, at 1140 (noting the franchise dealer must agree to the demands of manufacturer, if their demands are deemed fair and reasonable).

45. See Higashiyama, *supra* note 20, at 10 (noting the franchise dealerships’ lack of success and that the ADDCA statute has been ineffective because only twenty cases arising from this statute were filed from 1966-1986).

46. See Higashiyama, *supra* note 20, at 11 (noting that every state has franchise laws regulating the relationship between manufacturers and dealers, and Alaska was the last one to follow suit in 2002).

47. See *About Tesla*, TESLA, <https://www.tesla.com/about> (last visited Oct. 20, 2017) (describing the founding mission of Tesla and how it plans to change the automobile industry by introducing cars that are more technologically developed than other cars in the industry).

48. Tom Randall, *Tesla Unveils the World’s Fastest Production Car: 0 to 60 in 2.5 Seconds*, BLOOMBERG NEWS (Aug. 23, 2016, 2:15 PM), <http://www.bloomberg.com/news/articles/2016-08-23/tesla-releases-world-s-fastest-production-car-0-to-60-in-2-5-seconds> (noting that Tesla is an extremely fast car that can accelerate in a very short period of time).



245 miles per charge on its lithium battery.<sup>49</sup>

Tesla has led the way since 2008 in promoting electric vehicles that are extremely environmentally friendly, as these cars use no gasoline, emit no pollution, and are very powerful (needing one gear for all speeds).<sup>50</sup> The major concerns about Tesla's vehicles include their cost and their range, even though Tesla's costs have the potential to drop significantly in the near future.<sup>51</sup> However, the majority of other electric vehicles' home charging, fast chargers, and electric vehicle charging sites are only half as fast as Tesla's supercharging sites, and are less likely to function properly.<sup>52</sup> For example, a Tesla Model S can provide a week's worth of driving upon charging at one of the company's nationwide, free, and solar powered charging stations.<sup>53</sup> Consumers can have a great deal of confidence in these innovative cars as well, as the Tesla Model S P85D gained a five star safety rating for each of the National Highway Safety Administration testing categories.<sup>54</sup>

### 1. *Tesla's "Direct to Consumer" Sales Model*

Tesla Motors explained its decision in 2008 to sell directly to consumers as necessary to ensure the vitality and success of the electric vehicle ("EV") technology.<sup>55</sup> Franchise dealers can earn far higher service re-

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49. See Marc Carter, *Tesla Roadster to Get 400 Mile Battery Upgrade Later This Year*, INHABITAT (Aug. 8, 2014), <https://inhabitat.com/tesla-roadster-to-get-400-mile-battery-upgrade-later-this-year>.

50. See Kevin Bullis, *How Tesla Is Driving Electric Car Innovation*, MIT TECH. REV. (Aug. 7, 2013), <https://www.technologyreview.com/s/516961/how-tesla-is-driving-electric-car-innovation> (noting that Teslas and other electrically powered vehicles are extremely environmentally friendly as they emit little carbon dioxide).

51. Bullis, *supra* note 50 (describing that Teslas cater to only certain income demographics but have the potential to soon be extremely affordable).

52. *5 Reasons Teslas Trump Every Other Electric Car*, EV OBSESSION (Feb. 9, 2016), <http://evobsession.com/5-reasons-teslas-trump-every-other-electric-car-in-consumers-eyes/> (remarking that Tesla's superchargers are much more efficient than the superchargers of electric cars for other luxury vehicle brands).

53. Jeff Dyer & Hal Gregersen, *Decoding Tesla's Secret Formula*, FORBES (Aug. 19, 2015, 09:45 AM), <http://www.forbes.com/sites/innovatorsdna/2015/08/19/teslas-secret-formula/#1fc9b07659f8> (describing how the Tesla Model S is one of the safest and innovative cars in the world, and when it involved in a crash its doors do not break).

54. See Robert Duffer, *Tesla Model S P85D: There is Nothing Else Like It on the Road*, CHICAGO TRIBUNE (Feb. 24, 2015, 10:55 AM), <http://www.chicagotribune.com/classified/automotive/sc-cons-0219-autocover-tesla-the-d-20150217-story.html>; Peter Valdes-Dapena, *New Tesla Earns Perfect Score from Consumer Reports*, CNN MONEY (Aug. 27, 2015, 9:12 AM), <http://money.cnn.com/2015/08/27/autos/consumer-reports-tesla-p85d/index.html> (remarking that the 2014 Tesla Model S P85D received a perfect five star crash rating from the federal government and a 103 on Consumer Reports zero-to-one hundred scale ranking automobile safety, the highest score of any car that year).

55. See Crane, *supra* note 11, at 574-75 (discussing that Tesla has set itself apart from the rest of the electric car industry).

lated profits from standard gas vehicles because electric vehicles do not require oil changes, and Teslas rarely need maintenance.<sup>56</sup> Moreover, franchise dealers' lack of expertise about electric vehicles hinders consumers' abilities to buy highly efficient and affordable electric vehicles.<sup>57</sup>

Many car dealerships do not sell electric cars because selling electric cars would hurt their traditional business models and risk their profit margins.<sup>58</sup> Consumer Reports magazine conducted a study between December 2013 and March 2014 in which the magazine staff sent multiple shoppers to dealerships around the country, making anonymous visits to various showrooms that stocked electric cars.<sup>59</sup>

One of the primary reasons that Tesla's business model is successful is because Tesla has a very limited inventory, giving customers a great deal of ability to customize their cars and creates a more hands-on environment for the consumer.<sup>60</sup> Additionally, Tesla uses small showrooms located in high volume areas such as shopping malls, often only having one vehicle for display, and customers find this experience to be very helpful as they are able to receive more assistance from Tesla employees.<sup>61</sup> The ability to use small showrooms enhances the customers' experience and makes it more likely for the customer to become more knowledgeable about the electric car that he or she is interested in buying.<sup>62</sup>

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56. Nicholas Brown, *The Tesla Model S is Almost Maintenance Free*, CLEAN TECHNICA (Sept. 27, 2013), <http://cleantechnica.com/2013/09/27/tesla-model-s-almost-maintenance-free> (remarking that Teslas are far more durable than gasoline powered vehicles because there are not many parts which need to be fixed and the cars require far less maintenance services).

57. Steve Hanley, *Car Dealers Don't Like Selling EVs (No Duh.)*, CLEAN TECHNICA (Dec. 3, 2015), <http://cleantechnica.com/2015/12/03/car-dealers-dont-like-selling-evs-no-duh> (noting that many franchise dealerships do not want to educate their consumers about electric cars).

58. Elon Musk, *The Tesla Approach to Distributing and Servicing Cars*, TESLA (Oct. 22, 2012), <https://www.tesla.com/blog/tesla-approach-distributing-and-servicing-cars> (explaining franchise dealers' conflict of interest in promoting vehicles that would not grant them a large profit).

59. *Dealers Not Always Plugged In About Electric Cars, Consumer Report Study Reveals*, CONSUMER REPORTS (Apr. 22, 2014, 08:00 AM), <http://www.consumerreports.org/cro/news/2014/04/dealers-not-always-plugged-in-about-electric-cars-secret-shopper-study-reveals/index.html> (discussing how many employees were not knowledgeable about important electric car information).

60. Ruoshan Tao, *Tesla Created A Custom-Built Supply Chain That Competes With The Best, And So Can You*, TRADEGECKO (Sept. 4, 2014), <https://www.tradegecko.com/blog/tesla-custom-built-supply-chain> (remarking that Tesla keeps very little inventory and can minimize its risk while allowing a greater creation of capital).

61. Fox, *supra* note 12, at 158 (describing that Tesla's business model has been so successful because its showrooms are located in high areas of density, which make the customer experience attractive).

62. Fox, *supra* note 12, at 158-59 (describing that Tesla's unique customer experience gives customers a great deal of interaction with Tesla cars and gives them an opportunity to learn about the cars themselves).

## C. TESLA IS DISMISSED FROM VIOLATION LAWSUITS

Since Tesla has emerged as innovative new market force, courts have addressed whether manufacturers can sell cars directly to consumers and whether franchise dealers can seek relief under statutes preventing manufacturers from engaging in coercive business practices.<sup>63</sup> Although there have not been many cases at a federal level involving franchise dealerships suits against Tesla for violating state franchise laws, there has been a trend in state courts to dismiss state suits targeting Tesla.<sup>64</sup>

## 1. Courts' Reliance on Statutory Framework

In *Matter of Greater N.Y Auto Dealers Association*, the court adopted the reasoning that a franchise dealer had no standing to bar Tesla's direct to consumer sales model.<sup>65</sup> The court held that the petitioners did not have standing because they were not in a franchisee-franchisor relationship with Tesla, thus they did not suffer any injury different than the public at large.<sup>66</sup> Thus, it will be challenging for any plaintiff to establish standing if its injury is not unique in any way.<sup>67</sup>

In *Lee Dodge Inc.*, a Dodge motor vehicle franchise brought a lawsuit against Kia Motors, Inc. for a violation of a state automobile franchise law because Kia Motors, Inc. failed to recognize the dealer as a franchisee of the corporation.<sup>68</sup> The court ruled that *Lee Dodge Inc.* had no standing under the Act because it failed to meet the contractual obligations that would make it a franchisee.<sup>69</sup> This case established that a current franchise dealer must meet a condition precedent of being in a franchisee-franchisor relationship with Tesla in order to have standing to

63. *Massachusetts State Auto. Dealers Ass'n, Inc. v. Tesla Motors MA, Inc.*, 15 N.E.3d 1152, 1157 (Mass. 2014); *Greater N.Y Auto Dealers Ass'n v. Dept. of Motor Vehicles*, 969 N.Y.S.2d 721, 727 (N.Y. Sup. Ct. 2013).

64. *See Crane, supra* note 11, at 583 (describing that there have been favorable outcomes in state court cases deciding against state dealership associations suing Tesla, and many dealership associations have attempted to thwart Tesla's direct to consumer sales model through seeking relief in state legislatures).

65. *Greater N.Y Auto Dealers Ass'n*, 969 N.Y.S.2d at 727 (describing that the petitioners have failed to demonstrate that they sustained special damage different in kind and degree from the community in general).

66. *Id.* at 726 (describing that petitioners do not have standing if their suit is not related to the statutory framework).

67. *Id.* at 727 (remarking that a party can only have standing under this Act if their injury caused a special form of harm).

68. *Lee Dodge, Inc. v. Kia Motors Am.*, 2011 U.S. Dist. Lexis 97828, at \*2 (D.N.J. 2011) (noting that on November 12, 2010 the Plaintiff filed a complaint in this court alleging that Kia had breached its covenant approving of Lee Dodge as franchisee).

69. *Id.* at \*11 (remarking that there needs to be a written arrangement that grants licenses and provides common interest in marketing of automobiles to a franchise dealer and a manufacturer for them to be in a franchisee-franchisor relationship).

bring suit against Tesla.<sup>70</sup>

## 2. *When There is a Lack of Standing Against Tesla*

In *Beard Motors*, the Supreme Judicial Court of Massachusetts held the plaintiff did not have standing under Mass. Gen. Laws ch. 93B, §12A to bring an action against Bullock Toyota, Inc. due to the defendant having failed to assign its dealership to *Beard Motors*.<sup>71</sup> The complaint alleged that Bullock did not approve of the transfer of the franchise to Beard because another dealer offered more money to purchase Bullock's assets.<sup>72</sup> It follows that a franchise dealer can have standing against Tesla only if a contract relating to any franchise agreement is complete, and it is irrelevant if there was a previous oral contract.<sup>73</sup>

*American Honda Motor Co.* held that the manufacturer, American Honda Motor Co., lacked the standing necessary to legally challenge the establishment of Bernardi's Inc., a new Honda dealership, because it was not in its "relevant market area."<sup>74</sup> The court held that this Massachusetts statute was not intended to be protectionist as it stated that it wanted to have a competitive and sound free market providing a plethora of choices.<sup>75</sup> This case clarifies that a party will not have standing against Tesla merely because the party does not want to compete with Tesla.<sup>76</sup>

In contrast, *Tober Foreign Motors* discussed a state's legitimate interest in promoting economic regulation.<sup>77</sup> However, *Pike v. Bruce Church, Inc.*, notes that there must be a legitimate reason for targeting

70. Lee Dodge, *supra* note 68, at \*10; *Oppenheimer & Co., Inc. v. Oppenheim, Appel, Dixon & Co.*, 660 N.E.2d 415, 418 (N.Y. 1995) (holding that a failure to satisfy a condition precedent to the formation of a contract entitles a defendant to summary judgment).

71. *Beard Motors v. Toyota Motor Distribs., Inc.*, 480 N.E.2d 303, 307 (Mass. 1985) (noting that Beard does not have standing because it has not alleged an injury within the meaning of G.L.c. 93b, § 12A (1984 ed.)).

72. *Id.* at 304 (explaining that John Adomonis, the principal officer of Transatlantic Motors, Inc., offered more money to purchase Beard Motors).

73. *Id.* (noting that although Toyota unreasonably withheld its consent to the assignment of the franchise in violation of MASS. GEN. LAWS ch. 93B, Toyota would not have standing because this was not an injury under the statute).

74. *American Honda Motor Co., Inc. v. Bernardi's, Inc.*, 735 N.E.2d 348, 349 (Mass. 2000) (holding that Bernardi's new dealership did not fall within their respective "market area" defined as a circle with the dealer at the center).

75. *Id.* at 354 (describing that this statute was not intended to shield auto dealers from all types of competition and that it had a greater focus on counterbalancing competition).

76. *Id.* at 356 (remarking that there is a slippery slope in allowing franchise dealerships to have standing).

77. *Tober Foreign Motors, Inc., v. Reiter Oldsmobile, Inc.*, 381 N.E.2d 908, 914 (Mass. 1978) (describing that the state legislature had a legitimate state interest in preventing against the unyielding power of manufacturers).

out of state commerce.<sup>78</sup> This case will be used to illustrate that franchise dealerships have no legitimate interest in preventing Tesla from doing business in their state.<sup>79</sup>

#### D. RECENT STATE LAWS THAT DELIBERATELY TARGET TESLA

In a general sense, state franchise laws fit into three categories: (1) laws that restrict direct sales by manufacturers to consumers; (2) laws that restrict manufacturers from competing with their own dealerships; and (3) laws which set out to protect franchise dealers from the coercive tactics of manufacturers.<sup>80</sup> There are state laws in Michigan, Arizona, West Virginia, and Texas that directly prohibit manufacturers from selling their cars directly to consumers.<sup>81</sup> Although these laws do not explicitly target Tesla in their statutory language, they ensure that Tesla's direct to consumer sales business model cannot operate.<sup>82</sup> For example, a recent 2015 Michigan statute provides that motor vehicles cannot be sold directly to consumers unless the retail customer is a nonprofit organization, or a federal, state, or local government agency.<sup>83</sup> Furthermore, several state legislatures have taken aim at Tesla's business model through prohibiting manufacturers from obtaining a license to operate as a dealership because they want to prevent Tesla from putting local franchise dealerships out of business.<sup>84</sup>

The North Carolina legislature enacted a law that made it unlawful for a manufacturer to own a dealership or be involved in selling cars directly to consumers.<sup>85</sup> Moreover, this law has a protectionist element by

78. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 141-42 (1970) (holding that targeting out of state commerce for no legitimate purpose violates the Dormant Commerce Clause).

79. *Id.* (noting the court's establishment of the Pike "balancing test," in which it invalidated a state law because its burden on interstate commerce outweighed its putative local benefits).

80. See Fox, *supra* note 12, at 162 (describing the three types of state laws that prevent manufacturers from selling directly to consumers, and how they vary from one another).

81. *Id.* (remarking that multiple state legislatures have passed legislation that directly targeted Tesla's direct to consumer sales business model by not allowing direct sales to consumers).

82. Marina Lao, et al., *Direct to Consumer Auto Sales: It's Not Just About Tesla*, FED. TRADE COMM'N (May 11, 2015, 11:00 AM), <https://www.ftc.gov/news-events/blogs/competition-matters/2015/05/direct-consumer-auto-sales-its-not-just-about-tesla> (stating that Tesla faces a patchwork of state legislation ensuring that Tesla will be unable to sell cars directly to consumers).

83. MICH. COMP. LAWS ANN. § 445.1574 (14) (1)(i) (Supp. 2015) (stating that motor vehicles cannot be sold to consumers unless said consumers are part of a government agency, or other organization, although said statute is not prohibiting manufacturers from giving information to consumers about a car).

84. See Fox, *supra* note 12, at 163 (explaining that instead of legislatures advocating for a blanket ban on manufacturers from selling directly to consumers, it will not allow them to sell cars directly to consumers through prohibiting their license to operate).

85. See N.C. GEN. STAT. § 20-305.2 (2010) (stating that it is unlawful for any manufacturer,

excluding manufacturers from having facilities where they sell cars directly to consumers within any defined standard metropolitan statistical area in the state (a “SMSA”).<sup>86</sup>

As a result of Tesla’s intense legislative lobbying efforts, some states such as Georgia have implemented exemption laws that will allow Tesla to do business in their respective states.<sup>87</sup> In Georgia, a manufacturer with less than five locations manufacturing or assembling exclusively zero emissions motor vehicles, which has never sold its line of vehicles in said state, is allowed to sell cars directly to consumers.<sup>88</sup> Moreover, the Washington State Legislature passed a law providing that a manufacturer with an existing dealer license as of January 1, 2014 can legally utilize the direct to consumer sales model.<sup>89</sup> Nonetheless, these statutes are simply compromises unsustainable for the automobile industry that demonstrate the legislature’s intent to protect local jobs.<sup>90</sup>

### III. THE SUPREME COURT SHOULD STRIKE DOWN FUTURE CLAIMS AGAINST TESLA

#### A. PLAIN READING OF A FRANCHISE AUTOMOBILE LAW

When interpreting a statute, a court will look at the specific language to determine the circumstances as to when various parties have standing.<sup>91</sup> If a party attempts to bring a lawsuit by invoking a too narrow interpretation of the statute, it will be much more challenging for the plaintiff to prevail.<sup>92</sup>

The Supreme Court should dismiss franchise dealerships’ future claims against Tesla for violations of automobile franchise laws because

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or subsidiary thereof, to sell automobiles directly or indirectly through any subsidiary to consumers).

86. *Id.* (a)(5)(b) (stating that it is unlawful for manufacturers to sell cars directly to consumers if they are in the standard metropolitan statistical area (SMSA) in the state, which comprises a major portion of the state).

87. *See* Fox, *supra* note 12, at 163-64 (describing that state franchise laws that allow Tesla to do business in their state were the result of intense lobbying of state legislatures by Tesla).

88. GA. CODE ANN. §10-1-664.1 (a)(8)(A) (Supp. 2015) (stating that manufacturers in Georgia, which have no more than five automobile locations, and manufacture zero emissions vehicles, will be able to sell cars directly to consumers as of January 1, 2015).

89. WASH. REV. CODE § 46.96.185(1)(g)(vii) (2014) (describing that manufacturers that have sold cars directly to consumers after January 1, 2014 will not be barred from doing so under the law).

90. *See* Fox, *supra* note 12, at 164 (explaining that Tesla’s business model is complex and that franchise dealerships have a major interest in protecting local jobs).

91. Massachusetts State Auto. Dealers Ass’n, Inc. v. Tesla Motors MA, Inc., 15 N.E.3d 1152, 1157 (Mass. 2014) (describing that the court generally looked to the regulatory scheme to determine whether a party has standing or whether its claim should be dismissed).

92. *Id.* at 1157-58 (noting that the court has often recognized that not every party who can claim an injury under a statute can bring an action thereunder).

Tesla and its dealerships are not engaged in franchisor-franchisee relationships.<sup>93</sup> Further, The Supreme Court should follow the precedent set in *Massachusetts Auto. Dealers Association*, which held that franchise automobile dealers only have standing if they are the victims of coercive business practices.<sup>94</sup>

Additionally, in *Matter of Greater N.Y. Auto Dealers Association*, the court held that the Franchise Dealer Act regulates the relationship between a manufacturer and its franchise dealers, thus parties have standing only if they are engaged in a franchisee-franchisor relationship.<sup>95</sup> Allowing these dealer claims would otherwise set a precedent that franchise dealers adverse to stiff competition would be granted standing.<sup>96</sup> As the court noted, neither franchise dealer sustained an injury when the DMV issued licenses to TESLA-NY, and they were simply attempting to shield themselves from competition.<sup>97</sup> This case establishes a clear standard, that dealer plaintiffs will only have standing when a manufacturer harms them by burdening them with unethical business practices.<sup>98</sup>

#### B. A COURT SHOULD LOOK AT THE LEGISLATIVE HISTORY

The Supreme Court should look at legislative history to better interpret challenged franchise law statutes.<sup>99</sup> In state franchise law cases, courts have decided to award great weight to interpreting the legislative history of a statute to maintain the sanctity of the legislative process.<sup>100</sup> For example, in *Massachusetts State Auto. Dealers Association*, the court turned to legislative history to determine whether the plaintiffs had

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93. *Massachusetts State Auto. Dealers Ass'n, Inc.*, 15 N.E. 3d at 1156-57 (describing that G.L.c. 93b, § 4(c)(10) had the purpose of protecting franchisees from having to succumb to dictates by manufacturers, but that these statutes do not apply to Tesla).

94. *Id.* at 1159, 1162 (holding that automobile franchise statutes should only apply to those who were economically discriminated against).

95. *Greater N.Y. Auto Dealers Ass'n v. Dept. of Motor Vehicles*, 969 N.Y.S.2d 721, 724 (N.Y. Sup. Ct. 2013) (holding that in order to commence an action for a violation of a New York automobile franchise law, there must be a franchisee-franchisor relationship between both parties).

96. *Id.* at 726 (remarking that manufacturers and dealers cannot utilize the Franchised Dealer Act as a means to sue their competitors and must show they sustained an actual injury).

97. *Id.* at 727 (remarking that the only potential injury suggested by the petitioners is that they would face an increase in business competition and explaining that courts in the future should abide by this logic).

98. *Id.* at 726-27 (outlining that the precedent set in that case, which established that petitioners do not have standing to commence an action alleging violations of the Franchised Dealer Act if they were harmed by increased business competition).

99. *See Massachusetts State Auto. Dealers Ass'n, Inc.*, 15 N.E.3d at 1157 (noting that although the specific language of a statute is obviously crucial, the legislative history is more important).

100. *Id.* at 1159 (describing that the objective of the legislature is not merely to avoid illogical results, but to respect the legislature's overall scheme).

standing under the Mass. Gen. Laws ch. 93b §§4(c)(10) and 15(A) to bar Tesla Motors MA from selling Tesla vehicles directly to consumers.<sup>101</sup> Moreover, the court concluded that unless the legislature has indicated that it wants to expand standing, then a party will have to suffer an injury consistent with the legislative intent of a statute.<sup>102</sup> A plaintiff only has standing in a suit where the plaintiff alleges that the defendant violated a state automobile franchise law, if the state legislature is explicit that the plaintiff can invoke the authority of the courts as it pertains disputed subject matter.<sup>103</sup>

In contrast to *Massachusetts Auto. Dealers Association*, the court in *Matter of Greater N.Y. Auto. Dealers Association* did not emphasize reviewing the legislative history of a state franchise law statute.<sup>104</sup> Rather than discussing the importance of whether the legislature intended a broader grant of standing for the plaintiff, the court opined that the franchise dealer was engaged in a franchisee-franchisor relationship with a manufacturer.<sup>105</sup> In future lawsuits against Tesla, dealership associations can emphasize the ruling in that case, holding that legislative history is not an extremely important objective, and could argue that any injury would grant them standing.<sup>106</sup> However, Tesla could certainly defend against this type of argument by emphasizing that these statutes are clearly intended for those parties in franchisee-franchisor relationships.<sup>107</sup>

In *Beard*, the court looked to legislative history to determine that franchisee-franchisor statutes were enacted to prevent the corrosive and coercive practices of automobile manufacturers.<sup>108</sup> The court noted that unless the legislature has clearly indicated that it intends a broader grant

101. *Id.* at 1157 (noting the court literally read the legislative intent of the statute, and that other courts should too as it pertains to selling Tesla vehicles directly to consumers).

102. *Id.* at 1158 (recognizing that not every party who can claim an injury as a result of violations of a statute or regulation has standing to bring an action there under).

103. *Fournier v. Troianello*, 127 N.E.2d 167, 170 (Mass. 1955) (noting that individual citizens can only have standing in state automobile franchise law suits if the legislative intent granting standing in these cases was not too vague to be enforced, and the plaintiffs needed to suffer an irreparable injury).

104. *Greater N.Y. Auto. Dealers Ass'n v. Depart. of Motor Vehicles of N.Y.*, 969 N.Y.S.2d 721, 727 (N.Y. Sup. Ct. 2013) (describing that the New York Franchise Dealer Act did not explicitly mention in the statute that plaintiffs can only have standing if they sustain a "special damage" which is different from the community in general).

105. *Id.* at 727 (remarking that the plaintiffs did not have standing against Tesla-NY, and noted that the court never mentioned the legislative history).

106. *Id.* at 725 (describing that this court did not look at the intent of the legislature, but future cases only indicate whether dealers were engaged in a franchisee-franchisor relationship).

107. *Id.* at 726 (noting that Tesla could use this case as an effective advocacy tool in litigation by asserting that it only applies to those in franchisee-franchisor relationships).

108. *See Beard Motors, Inc. v. Toyota Motor Distribs.*, 480 N.E.2d 303, 306 (Mass. 1985) (holding that the Legislative Research Council made it abundantly clear that this Act was intended for those engaged in a franchisee-franchisor relationship).



of standing, then the plaintiffs will not have additional standing under state franchise laws.<sup>109</sup> Furthermore, the Supreme Court should only grant relief to franchise dealers if they are the victims of inequitable bargaining power in accordance with the court's discussion in *Beard*.<sup>110</sup> This case establishes clear precedent for other courts that a disappointed purchaser of a motor vehicle franchise dealership cannot sue Tesla just because it suffered any injury.<sup>111</sup>

Courts may determine that a plaintiff has standing under a state franchise law to bring suit against Tesla only if it meets all of the terms and conditions of being under a franchise agreement.<sup>112</sup> In *Massachusetts Auto. Dealers Association, Inc.*, the court held that Tesla could not be considered an operating dealership because Tesla was not operating pursuant to a franchise agreement.<sup>113</sup> Further, in *Lee Dodge*, the court held that plaintiffs had no standing against Kia Motors for violations of the New York State Franchise Dealer Agreement because there was no manufacturer dealership embodied in a written franchise agreement.<sup>114</sup> In that case, Kia did not honor Lee Dodge's request to be a Kia franchisee because Lee Dodge's plan for conditional floor financing was rescinded.<sup>115</sup> The precedent detailing when a party is a franchise, as established in *Lee Dodge*, is a sensible solution under contract law that prevents a party from claiming standing if it fails to meet the necessary conditions.<sup>116</sup>

Additionally, in *Beard Motors*, the court held that Beard was technically not a party to a franchise agreement with Toyota because Toyota

109. *Id.* (citing that the court has "generally looked to whether the party claiming to have standing has alleged an injury" within the regulatory scheme of the statute).

110. *Id.* (noting that the injuries alleged by Beard, primarily the loss of anticipated profits from the sale of Toyotas and from capital appreciation in the value of the Toyota franchise, do not fall in the area of concern pertaining to manufacturers' coercive business practices).

111. *Id.* at 307 (holding that the court's conclusion avoids the anomalous result that would occur if were to accept Beard's interpretation of the statute and noting how the legislature did not intend that illogical result).

112. *Id.* at 306 (discussing that franchises can only have standing under a franchise automobile statute if they meet the various terms and conditions of the statute).

113. *Massachusetts State Auto. Dealers Ass'n, Inc. v. Tesla Motors MA, Inc.*, 15 N.E.3d 1155, 1157 (Mass. 2014) (describing that a manufacturer is not engaged in a franchise agreement if it is not directly or indirectly owning through a subsidiary, parent company or firm, a motor vehicle dealership).

114. *Lee Dodge, Inc. v. Kia Motors Am.*, No. 10-5939, 2011 U.S. Dist. LEXIS 97828, at \*11-12 (D.N.J. Aug. 31, 2011) (describing that a franchise dealer is only under a franchise agreement if it receives written notice or signs an agreement).

115. *Id.* at \*7-9 (describing that Lee Dodge did not honor the franchise agreement because its financing was suspended on October 11, 2010, and Kia was unable to commence its sales).

116. *Id.* at \*10-11 (detailing that the moving party does not have standing under a franchise law if it fails to meet the given terms and conditions of a franchise agreement).

never consented to the previous oral agreement.<sup>117</sup> Therein, Beard Motors complained that the assignment of the franchise to Transatlantic Motors violated their initial agreement, but the court held that the plaintiff lacked standing as it failed to allege that it would sustain any losses.<sup>118</sup> Thus, this case sets a very effective precedent for future cases in that that a party will not have standing if one cannot prove a substantial injury.<sup>119</sup>

### C. GOOD FAITH CLAUSES OF A FRANCHISE AGREEMENT

When possible, a court will look to good faith clauses in contract cases.<sup>120</sup> However, in state franchise law cases, an obligation may not be implied when it is inconsistent with other terms of the contract between the parties.<sup>121</sup> In *Lee Dodge, Inc.*, the court made it clear that these terms of good faith were null and void when the plaintiffs themselves did not meet the terms and conditions of the contract.<sup>122</sup> This is also a very strong defense against any plaintiffs who in the future will sue Tesla: if a plaintiff cannot show that it acted in good faith, it will not be granted standing.<sup>123</sup> Moreover, *Lee Dodge, Inc.* demonstrates that plaintiff's claim of promissory estoppel will be denied if the court determines that the plaintiff reasonably relied on promises made in franchise dealer agreement, but did not comply with all of the preconditions made within the franchise dealer agreement.<sup>124</sup>

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117. *Beard Motors, Inc. v. Toyota Motor Distribs., Inc.*, 480 N.E.2d 303, 305 (Mass. 1985) (noting that the agreement was expressly conditioned on Bullock Toyota obtaining the written consent of Toyota Motor Distributors, Inc.).

118. *Id.* at 306 (describing that Beard had not alleged that it had sustained or would sustain any current loss of money or property as a result of Toyota's actions, and anticipated profits do not fall into the regulatory scheme of the statute).

119. *Id.* (noting that from the reading of G.L. ch. 93B that only substantial injuries should grant a plaintiff standing, such as being susceptible to the virtue of the inequality of bargaining power).

120. *See Gruenberg v. Aetna Ins. Co.*, 510 P.2d. 1032, 1039 (Cal. 2016) (demonstrating that the defendant will be liable if it violated the implied covenant of good faith and fair dealing, and this duty is so imminent in contract cases).

121. *See Lee Dodge, Inc. v. Kia Motors Am.*, No. 10-5939, 2011 U.S. Dist. LEXIS 97828, at \*15 (D.N.J. Aug. 31, 2011) (holding that although an obligation of good faith and fair dealing is implied in every contract, the courts do not always apply good faith provisions).

122. *Id.* at \*16 (remarking that the plaintiff's claim fails as a matter of law if one party does not honor the principles of an agreement).

123. *Id.* at \*14-15 (remarking that any obligation to recognize a franchise relationship between two parties must ensure that both parties are acting in good faith).

124. *Id.* at 16-17 (remarking that promissory estoppel does not always apply, and that franchise dealers can only be granted relief if they meet the terms of an agreement).

### 1. *The Intention of State Franchise Laws*

#### a. Franchise Dealership Laws Are Not Protectionist

Courts should only grant standing to franchise dealers if they can explicitly prove that they were victims of coercive business practices committed by manufacturers.<sup>125</sup> Franchise dealers will not be able to prove that Tesla dealers engaged in coercive business practices, but only would be able to prove that they did not want to compete with Tesla because they are engaging in a different type of a business model.<sup>126</sup>

Additionally, plaintiff franchise dealers could make claims that Tesla is encroaching on their market territory or relevant market area (“RMA”).<sup>127</sup> However, these lawsuits would not apply to Tesla because Tesla’s cars are not of the same line and the same make as these franchise dealers.<sup>128</sup> Although franchise dealers would be upset that they have to compete with Tesla, there is no legal precedent to support their claims.<sup>129</sup>

Courts could also dismiss lawsuits that assert that there is a legitimate state interest in preventing Tesla’s business model, finding that these franchisee friendly laws are a form of economic protectionism.<sup>130</sup> These courts could hold that barring Tesla’s business model would violate the Commerce Clause or the Dormant Commerce Clause as outlined in *Pike v. Bruce Church, Inc.*<sup>131</sup> Further, they could find that franchise dealers are simply attempting to protect local jobs, similar to the defendants in *Pike* who were attempting to protect Arizona’s cantaloupe industry.<sup>132</sup>

125. See *id.* at 15 (discussing that ADDCA claims fail as a matter of law if there is no evidence of manufacturer’s breaching the implied covenant of good faith towards franchise dealers through acts of coercion or intimidation).

126. Ellig & Martinez, *supra* note 10, at 4 (discussing that auto dealers vigorously defend state automobile franchise laws as they want to defend their profits).

127. See *American Honda Motor Co., Inc. v. Bernardi’s Inc.*, 735 N.E.2d 348, 351 (Mass. 2000) (holding that franchise dealers can have standing against a manufacturer only if another party encroaches on their territory, or if another dealer fails to inform them that they will be constructing another dealership in their relevant market area).

128. *Id.* at 355 (noting that this statute is primarily intended for manufacturers and franchise dealers who sell cars of the same line or make as the manufacturer).

129. Ellig & Martinez, *supra* note 10, at 4 (holding that in order for a franchise dealership to claim that other businesses are encroaching on its RMA, there must first be an established relevant market area).

130. See *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) (noting that discriminatory laws which are motivated by economic protectionism are subject to a virtually per se rule of invalidity).

131. See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (noting that a state law violates the Dormant Commerce Clause when its interstate burden on commerce outweighs the law’s putative local benefits).

132. *Tober Foreign Motors, Inc. v. Reiter Oldsmobile, Inc.*, 381 N.E.2d 908, 913 (Mass. 1978) (holding that state legislation which regulate industry practices by placing such a burden on interstate commerce which outweighs its putative local effects, will be invalidated as also noted in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

In addition, unlike the ruling in *Tober*, there is no legitimate state interest in preventing competition by Tesla, because these franchise dealers are not subject to coercive industry practices committed by manufacturers, and the only state interest that exists is in protecting manufacturers from unnecessary litigation.<sup>133</sup>

When examining recent amendments to state franchise laws that explicitly target Tesla, a court would likely hold that they are protectionist because their sole focus is to protect local franchise dealers.<sup>134</sup> For example, Michigan added an amendment in 2014 that stated that it was unlawful for any vehicle manufacturer or distributor to sell any new motor vehicle directly to a retail customer other than through franchised dealers, unless the retail customer is a non-profit organization or a federal, state, or local government agency.<sup>135</sup> This amendment, enacted after Tesla started operating in 2009, can reasonably be inferred to be targeting Tesla, as it is known that Tesla sells vehicles to consumers beyond government agencies.<sup>136</sup> A court could rely upon the precedent set in *Massachusetts Auto. Dealers Association, Inc.* to strike down this statute because it is simply intended to be protectionist.<sup>137</sup> This statute is not clearly aimed at preventing the domination of the market by manufacturers at the top of the vertical chain.<sup>138</sup> In fact, Tesla has no plans to dominate the industry with its unique and costly line of cars, but rather to simply compete with franchise dealers.<sup>139</sup>

Courts should also invalidate state franchise laws such as the North

133. *Id.* at 914 (maintaining that state laws legitimate in purpose may place too great a burden on commerce, and there is no legitimate state interest in imposing excessive state burdens on manufacturers, as discussed in the *Pike* case).

134. *See generally* *Massachusetts v. State Auto. Dealers Ass'n, Inc., v. Tesla Motors MA, Inc.*, 15 N.E.2d at 1157, 1159 (holding that MASS. GEN. LAWS ch. 93B was not intended to protect established dealers from competition, although this may be an incident in the pursuit of an ultimately pro competitive goal).

135. MICH. COMP. LAWS ANN. § 445.1574 (a)(i) (West 2017) (providing that a manufacturer is barred from selling any new motor vehicle directly to a retail customer other than through franchised dealers, unless the retail customer is a non-profit organization).

136. Crane, *supra* note 11 (discussing how this amendment that was brought to the floor by a Michigan state senator receiving campaign contributions from franchise dealers, was directed at Tesla because it established that manufacturers need to distribute their vehicles to a franchise dealer, a change from “its franchise dealer”, which doesn’t apply to Tesla); Kirsten Korosec, *Tesla Has a New Kind of Buyer*, FORTUNE (July 29, 2015), <http://fortune.com/2015/07/29/tesla-millennials/> (noting that millennials and middle class Americans are purchasing Teslas).

137. *See* *Massachusetts Auto. Dealers Ass'n, Inc.*, 15 N.E.3d at 1160 (Mass. 2014) (noting that it would be anomalous to find, within this detailed list of rights and protections, a lone provision giving dealers protection against competition from an unaffiliated manufacturer).

138. *Id.* (describing that the Court struck down this claim against Tesla because this Massachusetts statute was not intended to be protectionist and suggesting that future cases should follow this precedent).

139. *Id.* at 1159 (remarking that the purpose of the MASS. GEN. LAWS ch. 93B 4(c) (10) statute was to prevent the domination by oligarchs at the top of the manufacturing chain).

Carolina Motor Vehicles Law (“NCMVL”) that seeks to prevent Tesla from selling recreational vehicles to consumers, given that this provision is not aimed at preventing coercive tactics and only targets Tesla.<sup>140</sup> Moreover, courts should seek to invalidate laws such as NCMVL, because limiting a manufacturer’s ability to sell its vehicles only within a 10-15 mile radius around the site of the previous franchise dealer only has a purpose of protecting local jobs.<sup>141</sup> Further, courts can rely upon *Massachusetts Auto. Dealers Association* to strike down state laws such as those in North Carolina that prohibit the ownership, operation, or control of a dealership by a manufacturer such as Tesla unless there is no independent dealer available in the relevant market to operate such a franchise.<sup>142</sup> The notion that there should be fewer automobile dealers in a given area because there are no independent dealers in the area that agree to sell a certain brand of cars is harmful to the consumer.<sup>143</sup> Further, such restrictions are protectionist because they effectively harm manufacturers, as they do not limit their restrictions solely to Tesla.<sup>144</sup>

The State of Georgia has also targeted Tesla by banning manufacturers that sell zero emissions vehicles directly to consumers.<sup>145</sup> Courts could rely upon *Massachusetts Auto. Dealers Association, Inc.* to hold that this amendment was unrelated to coercive business practices, that it would prohibit a free market, and that it would prevent consumers from purchasing technologically sound zero omissions cars.<sup>146</sup>

Courts should also strike down limitations to state franchise laws

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140. See generally N.C. GEN. STAT. ANN. § 20-305.2 (a)(7) (West 2017) (describing that the ownership, operation, or control of a dealership that sells primarily recreational vehicles as defined in G.S. 20-4.01 by a manufacturer, factory branch, or distributor is barred).

141. *Id.* (c)(2) (stating that a manufacturer is barred from selling motor vehicles within a five to twenty-mile radius around the site of the previous franchisee dealership facility, as determined in the same manner that the relevant market area is determined under G.S.20-286 (13b)).

142. *Id.* (a)(3) (maintaining that it is unlawful for any motor vehicle manufacturer to engage in the ownership, operation, or control of any facility if the Commissioner determines after a hearing on the matter at the request of any party, that there is no independent dealer available in the relevant market area to own and operate an automobile franchise).

143. See GA. CODE ANN. § 10-1-664.1(a)(8)(A) (West 2017) (describing that it is unlawful for a manufacturer that assembles or manufactures zero emissions vehicles to sell those vehicles directly to consumers).

144. See *Massachusetts State Auto. Dealers Ass’n, Inc. v. Tesla Motors MA, Inc.*, 15 N.E. 3d 1155, 1155-62 (Mass. 2014) (describing that Regulation of Business Practices Between Motor Vehicle Manufacturers, Distributors, and Dealers, XV MASS. GEN. LAWS, ch. 93B (West 2012) and other similar statutes are not intended to prevent consumers from buying vehicles that they want).

145. See Motor Vehicle Fair Practices Act, Ga. Code Ann. tit. 10, § 1-664.1(a)(8) (West 2015) (the 2015 amendment to the Act forbids manufacturers with control of more than five automobile dealerships from selling zero-emissions automobiles to consumers).

146. See *Massachusetts Auto. Dealers Ass’n, Inc.*, 15 N.E. 3d at 1155,1159 (noting that the purpose of Mass. Gen. Laws ch. 93B was not to protect established dealers from competition).

such as an Ohio law that represents a compromise intended to address sales by Tesla.<sup>147</sup> Although the Ohio Legislature decided to allow Tesla to sell its cars directly to consumers on a limited basis, this statute does not provide a long-term solution for other companies that may wish to sell directly to consumers.<sup>148</sup> Moreover, due to the legislature's willingness to compromise on this issue, it shows that Ohio may allow manufacturers to sell cars directly to consumers, but one of the state's primary concerns is to protect jobs.<sup>149</sup>

Lawsuits by state franchise dealership associations against Tesla should be dismissed because it is in the public interest to promote competition and to permit consumers to obtain the best possible automobiles available.<sup>150</sup> *American Honda Motor Co., Inc.* established that while there is a legitimate public interest to ensure that franchise dealers are not put out of business, it is not a coercive business practice to have more dealers competing in a relevant market area ("RMA").<sup>151</sup> Under the *American Honda Motor Co.* analysis, there is no public interest in prohibiting greater competition amongst Tesla and other franchise dealers.<sup>152</sup> Further, statutes such as Mass. Gen. Laws ch. 93B ensure that manufacturers do not dictate what franchise dealers do, but rather these laws promote sound free market competition between various auto dealers.<sup>153</sup> In *American Honda Motor Co.*, the court held that American Honda Motor Company did not have standing to challenge the establishment of a nearby new Bernardi's Honda dealership because the new dealership was not within Bernardi's proposed "relevant market area" and the dealer

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147. See Ohio Rev. Code Ann. § 457 (11) (a) (2013) (noting that a manufacturer or an affiliated entity of a manufacturer who were selling their automobiles at established place of business in the state, will continue to be allowed to sell these vehicles if these manufacturers don't own more than three licensed motor vehicle dealerships).

148. See *id.*

149. Crane, *supra* note 11, at 600 (describing that legislative compromises such as these are intended to prevent some conflict between manufacturers and franchise dealers, but indicating that these statutes are still mainly intended to protect the jobs of local franchise dealers and their employees).

150. See *American Honda Motor Co, Inc. v. Bernardi's, Inc.*, 735 N.E.2d 348, 354 (2000) (describing that there is a public interest in ensuring that consumers have many options in purchasing various vehicles).

151. *Id.* at 352 (remarking that there needs to be a balance between those competing interests by affording existing dealers some protection from competition within a dealer's RMA if the placement of the proposed new dealership is found to be arbitrary under MASS. GEN. LAWS ch. 93B).

152. *Id.* at 354 (noting that MASS. GEN. LAWS ch. 93B also applies to transactions between dealers and the public, and that fair governance between manufacturers and franchise dealers is necessary).

153. *Id.* (holding that there is a public interest at stake in promoting greater free market competition amongst automobile dealers and the purpose behind a statute such as MASS. GEN. LAWS ch. 93B is to protect franchise dealers from manufacturers using coercive tactics).

was not engaging in any unfair business practices.<sup>154</sup>

Unlike the manufacturer in *Tober Foreign Motors*, Tesla has no plans to dominate the relevant market area.<sup>155</sup> Thus, there is no legitimate state interest in preventing a business from simply competing with other businesses in a given state because it has no plans to engage in unfair business practices or to monopolize the market.<sup>156</sup> This Massachusetts statute could be applied in a manner to prevent consumers from having the opportunity to shop in person for highly innovative and technologically sound Tesla vehicles and then purchase the same online.<sup>157</sup> Moreover, there is a lack of evidence that there is an imbalance of economic power in this situation, as Tesla would be acting within its own economic interest and not preventing any actions by franchise dealers.<sup>158</sup>

#### b. Tesla's Impact On the Business Community

Tesla's direct to consumer sales model positively impacts the business community because it upholds the notion of our nation's open market.<sup>159</sup> Under this scenario, industries that promote innovative technologies will be rewarded, and not be disrupted by those forces that are resistant to change.<sup>160</sup> Moreover, the emergence of Tesla affects the business community, and specifically consumers, because of its reduced costs that allows it to be an innovative and profitable company that advances consumer interests.<sup>161</sup> Tesla has already released the Model S that

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154. See *American Honda Motor Co.*, *supra* note 150, at 351 (discussing that the statute defines a "relevant market area" as a circumscribed geographical area immediately surrounding its dealer location in which it obtained two-thirds of its business during the period that the dealership business has been operated from said location or a three-year period).

155. See *Tober Foreign Motors, Inc. v. Reiter Oldsmobile, Inc.*, 381 N.E.2d 908, 910 (Mass. 1978) (noting that GM's Oldsmobile division was slowly building up a monopoly as GM shipped into the market about 13,000 Oldsmobile cars, which vehicles were manufactured outside of Massachusetts).

156. *Id.* at 911 (noting that the general statutory interpretation of this statute was to prevent against methods of unfair competition and unfair deceptive practices but recommends that there should be RMAs).

157. *Id.* at 911-12 (noting that in 1967 the legislature enacted this statute because it wanted to protect consumers and preventing people from buying Teslas is not helping consumers in the United States' free market economy).

158. Matthew DeBord, *Tesla Needs the One Thing Only Rival Carmakers Can Give It*, BUS. INSIDER (Nov. 15, 2015, 04:48 PM), <http://www.businessinsider.com/competition-is-the-best-thing-for-tesla-2015-1> (describing that Tesla would not seek to become a monopoly).

159. See Joann Muller, *The Real Reason Tesla is Still Alive (And Other Green Car Companies Aren't)*, FORBES (May 11, 2013, 06:00 AM), <https://www.forbes.com/sites/joannmuller/2013/05/11/the-real-reason-tesla-is-still-alive-and-other-green-car-companies-arent/#15f19d11501b>.

160. See Fox, *supra* note 12, at 185 (describing that courts have a vital role to play in the pace of electric vehicle adoption, and preserving our national common market).

161. Fox, *supra* note 12, at 159 (describing that Tesla's chosen business model also permits it to reduce the costs associated with predicting consumer tastes and that it has a leaner and more efficient inventory than other car manufacturers).

has a sale price of \$66,000, which is in the range of other similarly situated electric cars, and which has better all-around features.<sup>162</sup>

Tesla's direct to consumer sales model is important to the business community because it has a direct impact on customers, investors, shareholders, and employees.<sup>163</sup> Moreover, Tesla allows its investors to utilize the company's technology patents.<sup>164</sup> Tesla's direct to consumer sales model also assists the business community because Tesla employees have a very direct effect on Tesla's revenues as the company does not receive any money from franchise dealers.<sup>165</sup> This structure leads to Tesla employees having a significant impact on business productivity and performance.<sup>166</sup>

#### IV. THE SUPREME COURT SHOULD PLACE RESTRICTIONS ON TESLA IF NECESSARY

While there is no legal basis for the states to use franchise laws to bar Tesla's direct to consumer sales model, state legislatures could in the alternative consider other legislation intended to promote economic competition rather than protectionism. These statutes, and state regulations adopted thereunder, would aim to prevent Tesla from: (1) securing a disproportionate share of the new car sales market, and (2) using this dominant market share to engage in unfair business practices to the detriment of franchise dealers and consumers.<sup>167</sup> There are Relevant Market Areas ("RMAs") in nearly every state and it would not be extremely burdensome to implement restrictions based on RMAs.<sup>168</sup> As an example, state

162. Sean O'Kane, *Tesla Just Released Two Cheaper Versions of the Model S*, THE VERGE (June 9, 2016, 09:29 AM), <https://www.theverge.com/2016/6/9/11893504/tesla-model-s-60d-price-range>.

163. See Roberta Greenspan, *Tesla Motors, Inc. Corporate Responsibility/ Shareholders*, PANMORE INST., <http://panmore.com/tesla-motors-inc-stakeholders-corporate-social-responsibility> (last updated Feb. 21, 2017), (noting that Tesla's corporate social responsibility strategy addresses some of the major interests of stakeholders, while also emphasizing corporate responsibility).

164. *Id.* (describing that allowing its investors to use its technology patents can expand its brand and grant it new and innovative ideas).

165. *Id.* (describing that Tesla satisfies employees' interests through a competitive compensation strategy, as well as human resources programs designed to enhance skills development and leadership development).

166. *Id.* (describing that customers affect Tesla's revenues, and are interested in product quality and reasonable pricing. Given such significant impact, the company gives high priority to these stakeholders in its corporate social responsibility programs).

167. See Marina Lao et al., *Direct to Consumer Auto Sales: It's Not Just About Tesla*, FED. TRADE COMM'N (May 11, 2015, 11:00 AM), <https://www.ftc.gov/news-events/blogs/competition-matters/2015/05/direct-consumer-auto-sales-its-not-just-about-tesla> (noting that if the government does intervene it should adopt restrictions such as a RMA provision that is linked to clear policy objectives).

168. Ellig & Martinez, *supra* note 10, at 4 (noting that RMAs are legally required in every



regulatory agencies could implement regulations that indicate that: (1) there can only be a limited number of Tesla dealers within a certain mile radius; and (2) that franchise dealers are entitled to a certain percentage of the market share within a certain geographical area.<sup>169</sup> These regulations could not prohibit Tesla from operating in a particular area, but would effectively limit the number of Tesla dealerships in the geographical area in which they operate.<sup>170</sup>

As a practical matter, there would have to be a gradual rollout of Tesla dealerships in a particular area to determine whether Tesla was securing a disproportionate share of the market at each stage of the process.<sup>171</sup> After each Tesla dealership opened, and a defined time period had passed (i.e., one year), the state regulatory agency could then ascertain whether it would grant Tesla authorization to open additional dealerships in that geographical market.<sup>172</sup> However, once a Tesla dealership opened, the state regulatory agency arguably could not prevent the dealership from attracting customers from a wider geographic region.

In order to defend such a regulatory scheme against legal challenges, state legislatures would have to be able to establish that these regulations are intended to promote economic competitiveness rather than to further protectionism.<sup>173</sup> In addition, regulatory schemes which interfere with companies' ability to do business across state lines will likely lead to successful legal challenges.<sup>174</sup> Furthermore, it would be difficult to implement these regulations as states such as Massachusetts require that judges determine what a relevant market area is by analyzing hard statistical data regarding an automobile dealer vehicle sales, and it is unclear how

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state but Maryland, and they provide dealerships with exclusive territories and require manufacturers to prove that there is demand for establishing a new dealership within such an area).

169. See Lao et al., *supra* note 167 (noting that blanket prohibitions on direct manufacturer sales to consumers are an anomaly within the larger economy, and that specific regulatory objectives are more efficient and more productive for the economy).

170. See Trefis Team, *Why Tesla Struggles to Gain Market Share*, FORBES (Nov. 17, 2015, 01:41 PM), <http://www.forbes.com/sites/greatspeculations/2015/11/17/why-tesla-struggles-to-gain-market-share/#20e5ab8c4fed> (noting that Tesla has never attempted to monopolize the market, and there are solutions in place to prevent that from occurring).

171. *Id.* (noting that Tesla's technological improvements have not been correlated with controlling a larger percent of the market share, and outlining the process to determine whether an entity is engaging in monopolistic practices).

172. See generally N.C. Gen. Stat. § 20-305.2 (a)(6) (2017) (analyzing how state legislatures could invoke certain geographical radius areas if Tesla gains a preponderance of the market share in a certain region).

173. See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 141-42 (1970) (outlining that if a state legislature passes legislation that improperly burdens interstate commerce for no other reason than protecting local industry, it will be in violation of the Dormant Commerce Clause).

174. *Id.* at 145-46 (noting that "state statutes requiring business operations to be performed in the home [s]tate that could be more efficiently be performed elsewhere" had been found illegal, and these statutes were prone to face legal challenges in the courts).

judges would decide on these matters in the future.<sup>175</sup> Thus, this regulatory alternative is not ideal.<sup>176</sup>

## V. CONCLUSION

Lawsuits by franchise dealers against Tesla for alleged violations of state franchise laws should be dismissed because these laws are intended for manufacturers that are in a franchisee-franchisor relationship, and are not intended to be protectionist.<sup>177</sup> Moreover, if a lawsuit were to reach the Supreme Court, the Court should look to the precedent set in *Massachusetts Auto. Dealers Association*.<sup>178</sup> Many of these state laws are very similar, and the legislative history supports the proposition that they are only intended for dealers and manufacturers that are in a franchisee-franchisor relationship.<sup>179</sup> Finally, courts should hold that recently enacted state laws that directly bar Tesla's direct to consumer sales model from operating should be invalidated. Tesla should be allowed to thrive despite the animosity that franchise dealership associations direct at this innovative company.

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175. *American Honda Motor Co. v. Bernardi's, Inc.*, 735 N.E.2d 348, 428-29 (Mass. 2000) (describing that under Massachusetts Law, in order to determine the relevant a market area, a judge is required to analyze hard statistical data comprising of two-thirds of a vehicle dealerships service and vehicle sales to draw geographic areas, and after the areas are platted, the judge determines the smaller of the two).

176. Mark Jamison, *Defining Relevant Markets in Evolving Industries*, U. FLA. PUB. UTIL. RESEARCH. CTR. 1- 2 (2014) (noting that relevant market area claims are unlikely to succeed because our markets are defined very broadly and make it challenging for the plaintiff party to prove that there was a monopoly).

177. Ellig & Martinez, *supra* note 10, at 3 (discussing how preventing direct to consumer sales hurts consumers and manufacturers, while benefiting dealers).

178. See *Massachusetts State Auto. Dealers Association.*, *supra* note 137, at 1153, 1162 (noting that Tesla as an unaffiliated motor vehicle manufacturer was not affected by the 2002 amendments to the Mass. Gen. Laws ch. 93B prohibiting unfair business practices of manufacturers and distributors against motor vehicle dealers associated with them).

179. Ellig & Martinez, *supra* note 10, at 3 (remarking that most states automobile franchise laws that prohibit direct sales in some states are intended for manufacturers in franchisee-franchisor relationships, and that some states ban the sale of direct accessories as well).

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# TRANSPORTATION LAW JOURNAL

Volume 44

2017

No. 2

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