Open Letter by Michigan Academics in Opposition to Michigan H.B. 6233

September 21, 2020

We, the signatories of this letter, are professors employed at public or private universities in the State of Michigan. We specialize in economics, competition policy, market regulation, industrial organization, or other disciplines bearing on the questions presented in this letter.

We write in opposition to Michigan H.B. 6233, which we understand is currently being considered by the legislature. In brief, the bill would bolster Michigan's existing and problematic dealer franchise law provisions that prohibit a car manufacturer from opening showrooms or service centers in the state in order to transact directly with consumers. The dealer franchise law was last amended in 2014 in a move clearly intended to block Tesla from entering the state. That led to a federal lawsuit by Tesla in 2016, which the State settled earlier this year. The settlement effectively allows Tesla to sell cars and operate service centers in Michigan. H.B. 6233 would codify that settlement, but only as to Tesla, and double down on the prohibition on direct sales and service as to all other car manufacturers, including Ford, GM, and Chrysler and even other electric vehicle ("EV") manufacturers like Rivian, Lordstown Motors, and Lucid Motors situated just like Tesla. In fact, the bill would make Michigan law even more draconian than it was before the Tesla settlement, by defining "sell" to include "offering test or demonstration drives for a new motor vehicle." This would mean that car manufacturers could not even establish opportunities (other than at an independent dealership) for customers to test drive their vehicles in the State of Michigan.

This Bill is bad policy, bad for the state of Michigan, bad for Michigan consumers and manufacturers, bad for the environment, bad for innovation, and probably unconstitutional.

A brief review of the history of dealer franchise laws may help explain how we got to where we are today. In the mid-twentieth centuries, car dealers were mostly "mom and pop" sole proprietorships. By contrast, the "Big Three" auto companies were hegemonic firms that faced relatively little domestic or foreign competition. The dealers began to complain to state legislatures that the car companies were taking advantage of them in a variety of ways. This led almost all of the states to pass dealer franchise laws intended to protect the dealers. Among other things, these laws prohibited a manufacturer from opening its own showrooms or service centers and transacting directly with customers. The dealers successfully argued that if the manufacturers were allowed to distribute directly to consumers, they could unfairly undermine their own franchised dealers.

Fast-forward to 2020. The situation is very different. First, the dealership system has grown from its "mom and pop" roots to one where enormous companies operate large dealer networks. The top 10 dealership groups alone earn over $80 billion in annual revenue, much more than most car

companies.[1] Second, the car manufacturer market has become far more competitive. Today, there are at least 15-20 major manufacturer groups selling cars in the U.S. This gives dealers more choices, and hence more leverage in contractual negotiations with manufacturers. Third, and perhaps most importantly, technological and market changes have led new entrants into the market—particularly companies selling EVs—to choose to distribute directly to consumers and not to use franchised dealers at all. As the Massachusetts Supreme Court has recognized, the original concerns that animated the direct distribution prohibitions—protecting a franchisee from its own franchisor—do not apply to a company that is not using franchisees.[2]

The dealers understand that they can no longer stand on the original justification of the dealer protection laws. Instead, they have tried to recast these prohibitions as *consumer* protection measures. These arguments are frivolous and have repeatedly been rebutted.

First, observe that, if direct distribution really threatened consumer interests, one would expect to see consumer protection organizations advocating against it. But just the opposite has happened. The staff of the U.S. Federal Trade Commission—the leading consumer protection agency in the country—has publicly stated that direct distribution bans are *bad for consumers*.[3] So have the Consumer Federation of America, Consumer Action, Consumers for Auto Reliability and Safety, and the American Antitrust Institute.[4] Compared to these non-profit organizations looking out for consumer interests, the car dealers' lobby is a very poor proxy for consumer interests.

On the merits, the dealers' consumer protection arguments make little sense. The dealers have argued that manufacturers will overcharge customers if they can sell directly to them.[5] The argument that adding a mandatory layer of costs between the manufacturer and the consumer will reduce consumer prices has no basis in economics. Nor do arguments that dealers are necessary to advocate for consumer interests in obtaining recalls or warranty service make any sense.

While direct distribution may not be the right model for every car company, prohibiting direct distribution by all car manufacturers is bad for consumer choice and innovation. The optimal mix of distribution strategies should be determined by competition and consumer response in the market—not by the legislature selecting a one-size-fits-all model. Further, EV companies have stated that channeling their products through franchised dealers is not a viable business model for them. This means that mandating that EV manufacturers sell only through dealers raises entry barriers for EV manufacturers and will slow the spread of EVs in the market. That, in turn, is bad environmental policy.

Finally, we address a particularly pernicious feature of H.B. 6233—that it makes the Tesla settlement a one-firm carve out and prohibits similarly situated companies from enjoying the same privileges that Tesla has secured through litigation. This is constitutionally suspect. If the constitutional challenge brought by Tesla had merit—as the federal district court indicated that it

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[1] Daniel A. Crane, *Tesla, Dealer Franchise Laws, and the Politics of Crony Capitalism*, 101 Iowa L. Rev. 57, 601 (2016).
[2] *Massachusetts State Auto Dealers Ass'n, Inc. v. Tesla Motors MA, Inc.,* 15 N.E. 3d 1152, 1157 (Mass. 2014).
[3] https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-regarding-michigan-senate-bill-268-which-would-create-limited-exception-current/150511michiganautocycle.pdf.
[4] https://www.autonews.com/assets/PDF/CA98362217.PDF.
[5] Crane, *supra* n. 1 at 594 n. 111 (collecting quotes from dealers).

might and the State apparently recognized in settling—then the prohibition is unconstitutional as to other companies as well. Further, by explicitly recognizing a right for Tesla but not for other EV companies, the bill would unconstitutionally discriminate between similarly situated manufacturers.

As residents of Michigan proud to see our state taking the lead on mobility innovation, we are disappointed to see another dealer-backed effort to codify car distribution as it stood in 1950. In 2015, after the legislature passed its anti-Tesla bill, the Information Technology & Innovation Foundation gave Michigan one of its dreaded "Luddite Awards." Let's do better this time. We call on the legislature not to pass H.B. 6233, or for Governor Whitmer to veto it in the unfortunate event that it reaches her desk.

Signatories (schools listed for identification purposes only):

Donald Alexander
Professor of Economics
Western Michigan University

R. Warren Anderson
Associate Professor of Economics
UM-Dearborn

Nicholas Bagley
Professor of Law
University of Michigan Law School

Christopher Bailey
Lecturer
College of Business Administration
Central Michigan University

Stephen Calkins
Professor of Law
Wayne State University

Aydin Cecen
Professor of Economics
Director CITER
Central Michigan University

Steven J. Cernak
Intermittent Lecturer
University of Michigan Law School
Adjunct Professor
WMU Cooley Law School Corporate Law & Finance Program

Jay Pil Choi
University Distinguished Professor of Economics
Michigan State University

Michael J. Clark
Associate Professor of Economics, Wallace and Marion Reemelin Chairman in Free Market Economics
Hillsdale College

Daniel A. Crane
Frederick Paul Furth, Sr. Professor of Law
University of Michigan Law School

Christopher C. Douglas
Associate Professor, Department of Economics
University of Michigan-Flint

Hugo Eyzaguirre
Associate Professor in the Economics Department and Director of the Center for Economic Education and Entrepreneurship
Northern Michigan University

Tammy Feldman
Lecturer of Business Economics and Public Policy
Ross School of Business
University of Michigan

David Hebert
Chair, Department of Economics and Associate Professor of Economics
Aquinas College

Francine Lafontaine
Associate Dean for Business + Impact
William Davidson Professor of Business Economics and Public Policy
Ross School of Business
Professor of Economics, LS&A
University of Michigan

Li Way Lee
Professor of Economics
Wayne State University

Christopher Martin
Associate Professor of Economics
Hillsdale College

Scott Masten
Professor of Business Economics and Public Policy
Ross School of Business
University of Michigan

Dale Matcheck
Professor and Department Chair, Economics
Northwood University

Mark J. Perry
Professor of Economics and Finance
School of Management
University of Michigan-Flint

J.J. Prescott
Henry King Ransom Professor of Law
Co-director, Empirical Legal Studies Center
Co-director, Program in Law and Economics
University of Michigan Law School

Ivan Pongracic,
Professor of Economics, William E. Hibbs/Ludwig von Mises Chair of Economics
Hillsdale College

Charles Steele
Chairman of Economics, Business, and Accounting, Associate Professor of Economics, Herman A. and Suzanne S. Dettwiler Chair in Economics
Hillsdale College

Jason E. Taylor
Professor of Economics
Central Michigan University

William H. Volz
Distinguished Service Professor
of Business Law and Ethics
Mike Ilitch School of Business
Wayne State University

Gary Wolfram
William Simon Professor of Economics and Public Policy, Director of Economics, Professor of Political Economy
Hillsdale College