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Peter Luu

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# PREEMPTIVE FEDERAL LEGISLATION FOR EV MANUFACTURERS TO SELL DIRECT TO CUSTOMERS

By: Peter Luu

Cite as: Peter Luu, *Preemptive Federal Legislative for EV Manufacturers to Sell Direct to Consumers*, 2023 J. L. Mob. 1.

## I. Introduction

Electric vehicles (EVs) are slated to replace internal combustible engine vehicles in the near future as the primary mode of transportation for millions of Americans.<sup>1</sup> General Motors has vowed to make only electric vehicles by 2035; Volkswagen has pledged that EVs will make up 70% of its car sales by 2030.<sup>2</sup> The local and federal governments have also taken steps to accelerate the mainstream adoption of EVs. President Biden's Electric Vehicle Charging Action Plan aims for EVs to make up 50% of new car sales by 2030.<sup>3</sup> The Biden administration also allocated \$5 billion in the Bipartisan Infrastructure Law to build a nationwide charging network.<sup>4</sup> At the state level, California aims for EVs to make up 100% of all new vehicle sales by 2035.<sup>5</sup> Fourteen other states plus Washington DC have pledged that all new medium- and heavy-duty vehicle sales in their states will be zero emissions by 2050.<sup>6</sup> However, despite the efforts, as it currently stands, EV adoption is nowhere near the goals that federal and state governments have set

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<sup>1</sup> See Camila Domonoske, *Giving up gas-powered cars was a fringe idea. it's now on its way to reality*, NPR, Nov. 20, 2021, <https://www.npr.org/2021/11/20/1055718914/giving-up-gas-powered-cars-for-electric-vehicles>.

<sup>2</sup> Justin Rowlett, *Why electric cars will take over sooner than you think*, BBC, Jun. 1, 2021, <https://www.bbc.com/news/business-57253947>.

<sup>3</sup> Press Release, The White House, FACT SHEET: The Biden-Harris Electric Vehicle Charging Acting Plan, (Dec. 13, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/13/fact-sheet-the-biden-harris-electric-vehicle-charging-action-plan/>.

<sup>4</sup> *Id.*

<sup>5</sup> Ca. Exec. Order N-79-20 (Jan. 19, 2021), <https://ww2.arb.ca.gov/resources/fact-sheets/governor-newsoms-zero-emission-2035-executive-order-n-79-20#:~:text=By%20setting%20a%20course%20to,to%20carbon%20neutrality%20by%202045>.

<sup>6</sup> Press Release, California Air Resources Board, 15 states and the District of Columbia join forces to accelerate bus and truck electrification, (Jul. 14, 2020), <https://ww2.arb.ca.gov/news/15-states-and-district-columbia-join-forces-accelerate-bus-and-truck-electrification>.

out. EVs only make up 4.6% of all vehicles in America and only 3.2% of all light vehicle sales in the United States.<sup>7 8</sup> Only 1% of the 250 million cars, SUVs, and light-duty trucks in the U.S. are EVs.<sup>9</sup> One likely reason for the slow pace of EV penetration is that while federal and state governments are taking steps to accelerate EV sales, Cold War Era dealer franchise laws in many states restrict or prohibit EV manufacturers from selling their cars or even interacting directly with customers.<sup>10</sup>

All 50 states have dealer franchise laws that prohibit or restrict EV manufacturers from selling their cars directly to consumers.<sup>11</sup> As a result, consumers encounter considerable obstacles in purchasing EVs. For example, under the current Texas dealer franchise laws, Tesla is prohibited from selling its vehicles in the state they are headquartered in.<sup>12</sup> For many reasons, some EV manufacturers prefer to sell their cars directly to consumers.<sup>13</sup> Rivian prefers direct sales because its vehicles are not produced in bulk to sell on a dealer lot but rather made to order based on consumers' individual preferences.<sup>14</sup> VinFast prefers direct sales because they want to have more control of the customer service experience.<sup>15</sup> Direct sales also

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<sup>7</sup> Sebastian Blanco, *Electric Cars' Turning Point May Be Happening as U.S. Sales Numbers Start to Climb*, CAR AND DRIVER, Aug. 8, 2022, <https://www.caranddriver.com/news/a39998609/ev-sales-turning-point/#:~:text=The%20sharp%20increase%20in%20electric,hit%20a%20historic%204.6%20percent>.

<sup>8</sup> Stacy C. Davis and Robert G. Boundy, *Transportation Energy Data Book*, 40 OAK RIDGE NATIONAL LABORATORY MANAGED BY THE US DEPARTMENT OF ENERGY, JUNE 2022, at 6.

<sup>9</sup> Blanco, *supra* note 7.

<sup>10</sup> Daniel A. Crane, *Dealer Franchise Laws, and the Politics of Crony Capitalism*, 101 IOWA L. REV. 573, 574 (2016).

<sup>11</sup> Even states that allow direct sales place significant restrictions on manufacturers. See Kristy Hartman & Laura Shields, *State Laws on Direct Sales*, National Conference of State Legislatures, <https://www.wispolitics.com/wp-content/uploads/2021/08/State-Laws-on-Direct-Sales.pdf>.

<sup>12</sup> John Voelcker, *Tesla Will Have to Ship Its Texas-Built Cars out of State to Sell Back to Residents*, THE DRIVE, May 27, 2021, <https://www.thedrive.com/tech/40779/tesla-will-have-to-ship-its-texas-built-cars-out-of-state-to-sell-back-to-residents>.

<sup>13</sup> See Elon Musk, *The Tesla Approach to Distributing and Servicing Cars*, TESLA: BLOG (Oct. 22, 2012), <https://www.tesla.com/blog/tesla-approach-distributing-and-servicing-cars>.

<sup>14</sup> Stef Schrader, *Why Rivian Won't Sell its Electric Trucks Through a Dealership*, THE DRIVE, Feb. 25, 2020, <https://www.thedrive.com/tech/32349/why-rivian-wont-sell-its-electric-trucks-through-a-dealership>.

<sup>15</sup> See Hans Greimel, *Vietnam's VinFast wants to open U.S. showrooms in 2022 to take EV crossover preorders*, AUTOMOTIVE NEWS, Oct. 29, 2021,

benefit consumers. Studies have shown that direct sales can lead to lower costs for consumers.<sup>16</sup> It is no wonder that support for direct sales spans the political spectrum, from the Koch Brothers to the Sierra Club.<sup>17</sup> Unfortunately, these dealer franchise laws are in place because of intense lobbying from the dealership association across state legislatures.<sup>18</sup> This article advocates for federal legislation to implement a nationwide EV licensing system that would allow both EV manufacturers and dealers to sell and service their vehicles directly to consumers nationwide. This prospective legislation would preempt dealer franchise laws that prohibit or limit manufacturers from selling their vehicles directly to consumers. This article does not argue that direct distribution is the superior method of distribution; instead, this article argues that manufacturers should have the freedom to pursue direct distribution. As more EV companies enter the market, EV manufacturers need to have the flexibility to use a variety of distribution systems that best suit their business needs.

Part II of this article provides background information on the history of dealer franchise laws and the current status of dealer franchise laws. Part III addresses the problems associated with the current car buying process and why some manufacturers prefer to sell their cars directly to consumers. Part III also addresses counterarguments from the dealer lobby. Part IV introduces potential federal legislative reform to preempt state dealer franchise laws to allow EV manufacturers to directly sell their vehicles to consumers.

## II. The History of Dealer Franchise Laws and Current Status of Dealer Franchise Laws

### A. THE BEGINNING OF THE DEALER FRANCHISE SYSTEM AND THE DAVID VS. GOLIATH BATTLE BETWEEN AUTOMOBILE

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[https://www.autonews.com/automakers-suppliers/vietnams-vinfast-wants-open-us-showrooms-2022-take-ev-crossover-orders?utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=Feed%3A+autonews%2FBreakingNews+%28Automotive+News+Breaking+News+Feed%29](https://www.autonews.com/automakers-suppliers/vietnams-vinfast-wants-open-us-showrooms-2022-take-ev-crossover-orders?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+autonews%2FBreakingNews+%28Automotive+News+Breaking+News+Feed%29).

<sup>16</sup> See Gerald R. Bodish, Department of Justice: Antitrust Division Economic Analysis Group, Competition Advocacy Paper, Economic Effects of State Bans on Direct Manufacturer Sales to Car Buyers, EAG 09-1 CA, May 1, 2009, [https://www.justice.gov/atr/economic-effects-state-bans-direct-manufacturer-sales-car-buyers#N\\_11\\_](https://www.justice.gov/atr/economic-effects-state-bans-direct-manufacturer-sales-car-buyers#N_11_).

<sup>17</sup> Aebra Coe, *Koch Brothers, Sierra Club Join Law Prof. to Support Tesla*, LAW 360, Feb. 18, 2015, <https://www.law360.com/articles/622433/koch-brothers-sierra-club-join-law-prof-to-support-tesla>.

<sup>18</sup> Crane, *supra* note 10 at 577.

MANUFACTURERS AND INDEPENDENTLY OWNED CAR  
DEALERSHIPS

While the first car dealership in the U.S. was established in 1898, up until the first half of the century, consumers could purchase vehicles through a variety of distribution mechanisms.<sup>19</sup> Vehicles were sold through manufacturer-owned stores, retail outlets, independent car dealerships, and even door-to-door salespeople.<sup>20</sup> However, as the automobile industry grew, the automobile manufacturers began to contract with independently owned car dealerships through franchise agreements to sell their cars.<sup>21</sup> Before the late 1950s, the automobile manufacturers consisted of the "Big Three" while the automobile dealerships were mainly small "mom and pop" businesses.<sup>22</sup> Through their superior bargaining power, manufacturers could "coerce" the independent car dealerships into one-sided franchise agreements that pushed all the risk onto the dealers.<sup>23</sup> For example, the franchise agreements did not require the manufacturers to supply the dealers with cars and allowed the manufacturers to terminate their relationship with the dealers at any time for any reason.<sup>24</sup> As a result, manufacturers would unload their unpopular vehicles onto the dealers; the dealers would have to accept it or risk termination from the manufacturers and lose their capital investment.<sup>25</sup> During the Great Depression, when Ford was experiencing slow sales, Henry Ford decided to continue producing cars and forced the dealers to buy excess cars.<sup>26</sup> The dealers agreed to do so because else they risked termination and losing their capital investment if they refused.<sup>27</sup> Examples of such coercion and pressure from manufacturers were common before the mid-1950s.<sup>28</sup> As a result, the dealer associations began to seek relief in court, Congress, and state legislatures.<sup>29</sup>

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<sup>19</sup> Crane, *supra* note 10 at 577.

<sup>20</sup> Jessica Higashiyama, State Automobile Dealer Franchise Laws: Have They Become the Proverbial Snake in the Grass?, 2-4 (Apr. 2009) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1394877](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1394877).

<sup>21</sup> *Id.* at 2-3.

<sup>22</sup> Crane, *supra* note 10 at 577.

<sup>23</sup> *Id.* at 578.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Higashiyama, *supra* note 20 at 3-4.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 3.

<sup>29</sup> *See id.* 4-13.

### B. THE DEALERS' FAILED ATTEMPT TO SEEK RELIEF IN COURT

The dealers initially attempted to fight these one-sided franchise agreements in court through contract law.<sup>30</sup> These franchise agreements would often impose sales quota requirements on the dealers and require substantial capital investment while at the same time allowing the manufacturers to terminate the agreement at any time.<sup>31</sup> Nonetheless, courts did not take the one-sided nature of the contracts into consideration (pun intended) and often sided with the manufacturers.<sup>32</sup> With little success in court, the dealers began to lobby federal and state legislatures.<sup>33</sup>

### C. THE DEALERS ACHIEVE LIMITED SUCCESS IN LOBBYING CONGRESS

The dealers had some success in Congress. In 1940, Representative Write Patman introduced the "Motor Vehicle Act of 1940".<sup>34</sup> The Act placed substantial restrictions on the manufacturers' ability to terminate franchise agreements.<sup>35</sup> For example, the Act required that all franchise agreements be at least three years; manufacturers had to give 180 days notice prior to termination; manufacturers were only allowed to terminate the agreements for cause.<sup>36</sup> Termination also required approval from the FTC.<sup>37</sup> Many of these provisions in the Act are similar to the protections afforded to them in state legislation.

Nonetheless, the dealer associations that lobbied for these protections opposed the Act.<sup>38</sup> Perhaps, the Act did not go far enough in addressing their needs.<sup>39</sup> Strangely enough, in the 1950s, the dealers, through the National Automobile Dealers Association (NADA) successfully lobbied Congress to pass the "Automobile Dealer's Day in Court Act (ADDICA)," which was more limited in scope than the Motor Vehicle Act of 1940.<sup>40</sup> ADDICA allowed dealers to sue manufacturers for damages and attorney fees in federal court if manufacturers failed to act in good faith in carrying out the terms of

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<sup>30</sup> *Id.* at 4.

<sup>31</sup> *Id.* at 4-5.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 5.

<sup>34</sup> *Id.* at 6.

<sup>35</sup> *Id.* at 6-7.

<sup>36</sup> *Id.* at 8.

<sup>37</sup> *Id.* at 8.

<sup>38</sup> *Id.* at 394-395.

<sup>39</sup> *See id.* at 395.

<sup>40</sup> *See id.* at 395-396.

the franchise agreement or terminating it.<sup>41</sup> Unfortunately for the dealers, they again had limited success in obtaining relief in court. From the passage of ADDICA in 1956 through the late 80s, the dealers obtained relief in only 20 of 115 cases they filed.<sup>42</sup> The settlements that dealers obtained were also nowhere near the relief they sought.<sup>43</sup> The dealers experienced difficulty in court because the Act had a vague definition of "Good Faith," which required dealers to prove that the manufacturers engaged in "coercion," a vague term that the Act did not define.<sup>44</sup> The dealers were more successful in state legislatures.<sup>45</sup>

#### D. THE TIDE TURNS: DEALERS' STATE COURT VICTORIES AND THE BEGINNING OF STATE DEALER FRANCHISE LAWS

While the dealers were lobbying for federal regulations, they also began to lobby state legislatures.<sup>46</sup> Here, the dealers had more success in passing legislation that afforded them the protection they sought and, eventually, a monopoly in auto sales.<sup>47</sup> At the state level, dealers had more local ties than manufacturers.<sup>48</sup> Dealers are often involved in local politics, and state dealer associations frequently donate to state representatives.<sup>49</sup> Dealers are also large employers and provide substantial tax revenue in their communities.<sup>50</sup> The dealer association was able to pass the first dealer franchise legislation regulating the manufacturer-dealership relationship in 1937 in Wisconsin.<sup>51</sup> By the time ADICCA was passed, there were already dealer franchise laws in 20 states.<sup>52</sup> Compared to federal law, the state dealer franchise laws were heavily in favor of the dealers.<sup>53</sup> By 2009, 48 states had laws that prohibited manufacturers from requiring dealers to purchase excess cars.<sup>54</sup> In most states, even when a manufacturer can terminate a franchise agreement, they are required to buy back unsold vehicles, parts, special tools, and

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 9-10.

<sup>43</sup> *Id.* at 10.

<sup>44</sup> *Id.*

<sup>45</sup> *See id.* at 11-14, 18.

<sup>46</sup> Crane, *supra* note 10 at 578.

<sup>47</sup> *See id.* 578-579.

<sup>48</sup> Higashiyama, *supra* note 20 at 18.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 11.

<sup>52</sup> *Id.*

<sup>53</sup> Francine Lafontaine & Fiona Scott Morton, *State Franchise Laws, Dealer Terminations, and the Auto Crisis*, 24 J. ECON. PERSPECT., 239 (2010).

<sup>54</sup> *Id.* at 240.



equipment from the dealer.<sup>55</sup> Thanks to their successful influence in state legislatures, dealers have gone so far as nearly eliminating manufacturers as competitors in the auto sales space.<sup>56</sup> In recounting the history of dealer franchise laws, it is important to articulate that while the dealer associations currently present dealer franchise laws as consumer protection, the history of these laws show that dealer franchise laws were actually about dealer protection, not consumer protection.<sup>57</sup>

#### E. STATUS OF DEALER FRANCHISE LAWS TODAY

All 50 states have laws that explicitly prohibit or severely limit manufacturers from selling or sometimes even servicing their vehicles to consumers.<sup>58</sup> The dealers and state legislatures have justified these prohibitions or limitations on direct sales to protect dealers from manufacturers engaging in unfair competition against the dealers by undercutting them in price.<sup>59</sup> While this widely circulated fear is unsubstantiated, it was enough to persuade state legislatures to enact some form of law that prohibited or curtailed direct sales.<sup>60</sup>

##### *i. Obstacles in states where direct sales are prohibited*

As a result of these laws, EV manufacturers and consumers encounter significant obstacles in states where direct sales are prohibited. Seventeen states explicitly prohibit direct sales.<sup>61</sup> In such states, consumers who wish to buy direct must travel outside their state to pick up their vehicle.<sup>62</sup> For example, in Connecticut, where direct sales are prohibited, consumers who wish to buy a Tesla generally travel to New York to pick up their vehicles.<sup>63</sup> In Texas, Tesla cannot even sell its vehicles in the state where it is headquartered.<sup>64</sup> Even more ironically, if Texas does not change its dealer franchise laws by the time its Texas-made Cyber Trucks are

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<sup>55</sup> *Id.* at 241.

<sup>56</sup> Higashiyama, *supra* note 20 at 12.

<sup>57</sup> *See* Crane, *supra* note 10 at 579.

<sup>58</sup> *See* Hartman & Shields, *supra* note 11.

<sup>59</sup> Crane, *supra* note 10 at 579.

<sup>60</sup> *See id.* at 593-594.

<sup>61</sup> Hartman & Shields, *supra* note 11.

<sup>62</sup> David Pogue, *Why you can't buy a Tesla in these states*, YAHOO FINANCE, Oct. 15, 2018, <https://www.yahoo.com/now/cant-buy-tesla-states-161318245.html>.

<sup>63</sup> *Id.*

<sup>64</sup> Voelcker *supra* note 12.

sold to the public, Tesla would have to ship its Cybertruck out of Texas before it can sell them back to Texan consumers.<sup>65</sup>

ii. *Other States Allow Direct Sales on a Very Limited Basis*

Other states allow some manufacturers to sell their cars directly if there are no other franchise dealers in the state or the relevant market area.<sup>66</sup> For example, in California, manufacturers are prohibited from competing with dealers in the same line-make within ten miles.<sup>67</sup> Therefore, this prohibition does not affect Tesla or any start-up EV manufacturers because these manufacturers do not have any franchise dealerships.<sup>68</sup> However, legacy car manufacturers who do have franchise dealerships, such as Toyota, GM, and Ford, would not be able to sell their cars directly to consumers in the relevant market area. This unequal treatment has led some car manufacturers, such as GM, to oppose direct sales legalization.<sup>69</sup>

Some states have carved out exceptions specifically for Tesla.<sup>70</sup> Michigan explicitly bans direct sales, but Tesla and the State reached a settlement to allow Tesla to deliver its vehicles to customers in Michigan provided that the legal title transfer be done out of state.<sup>71</sup> Unfortunately, this exception only applies to Tesla. Georgia is another state with an exception for Tesla.<sup>72</sup> In 2015, the Georgia State Assembly passed HB 393, which allowed for direct sales under three circumstances: (1) the manufacturer had been selling motor vehicles its motor vehicles in the state since January 1, 2015; (2) the manufacturer exclusively makes EVs or zero-emissions vehicles; (3) the manufacturer has never sold its vehicles through franchise dealers.<sup>73</sup> While Georgia's legislation does not explicitly mention Tesla, the language of the legislation is in essence, a carve-out specifically for Tesla. The legacy manufacturers do not exclusively produce EVs yet, and start-up EVs were not around in 2015; the exceptions set out in HB 393 would not apply to them. New Jersey, New York, and Oregon also have similar laws that carve out

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<sup>65</sup> *Id.*

<sup>66</sup> See Hartman & Shields, *supra* note 11.

<sup>67</sup> Cal. Veh.Code §11713.3 (k).

<sup>68</sup> See *id.*

<sup>69</sup> See Crane, *supra* note 10 at 572-573.

<sup>70</sup> Hartman & Shields, *supra* note 11.

<sup>71</sup> See *id.* at 6.

<sup>72</sup> See *id.* at 3.

<sup>73</sup> See *id.*

exceptions for Tesla to sell direct but prohibit any other new direct sales from manufacturers.<sup>74</sup>

*iii. Prohibitions and Restrictions on Direct Servicing and Repairs*

In some states, the ban or limitation on direct sales also extends to warranty and repair work; at least eight states, Alabama, Louisiana, New Jersey, New Mexico, North Carolina, Pennsylvania, South Carolina, and West Virginia prohibit manufacturers from performing warranty or repair service work on their own vehicles.<sup>75</sup> The ban on servicing is problematic for EV owners. Most mechanics lack the training or equipment to repair electric vehicles;<sup>76</sup> EV consumers rely on the manufacturer for auto servicing. In these states that ban manufacturers from operating repair centers, EV owners must travel out of state to have their cars serviced at a service center.<sup>77</sup> Tesla owners in New Mexico must either travel out of state or to the Tesla service center in Pueblo, a native American reservation, to have their cars serviced at a service center.<sup>78</sup> Tesla owners in Alabama would have to drive to Atlanta or Tennessee for repairs at a service center.<sup>79</sup> For some consumers, this means driving for hours to the nearest out-of-state service center. The prohibition on service and repairs represents another significant obstacle to EV adoption.

With the discrepancy in direct sales laws among states, this article calls for federal legislation to preempt these direct sales laws to provide consistency to EV manufacturers and dealers. However, before introducing the proposed legislative reform, this article addresses another question readers may have: If automobile manufacturers have been selling their cars through the dealer franchise model, shouldn't EV manufacturers such as Tesla and

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<sup>74</sup> See *id.* at 7-8.

<sup>75</sup> Ala. Code § 8-20-4(3); La. Rev. Stat. Ann. § 32.1261(A)(1)(t)(i); N.J. Stat. § 56:10-7.4; N.M. Stat. Ann. § 57-16-5; N.C. Gen. Stat. § 20-305.2; 63 Pa. Stat. Ann. § 818.310(b)(13); S.C. Code Ann. § 56-15-45(C); W. Va. Code § 17A-6A-10(b)(21).

<sup>76</sup> Maddie Stone, *Meet the Auto Repair Professor Pivoting to EVs*, THE VERGE, Jan. 24, 2022, <https://www.theverge.com/22883604/auto-repair-course-electric-vehicles-interview>.

<sup>77</sup> Rivian Automotive, Inc., Registration Statement under The Securities Act of 1933 (Form S-1), 139, (Oct. 1, 2021).

<sup>78</sup> Bonnie J Gordon, *Tesla Drives Through Loophole to Bring First Service Center to New Mexico*, LOS ALAMIGOS DAILY POST, Nov. 12, 2021, <https://ladailypost.com/tesla-drives-through-loophole-to-bring-first-service-center-to-new-mexico/>.

<sup>79</sup> Facebook Message from Tesla Owners Club of Alabama, (Feb. 16, 2023, 9:17PM EST).

Rivian do the same? Part III of this Article addresses this very question.

III. The Dealer Franchise Model is Incompatible for Many EV Manufacturers and EV Manufacturers Need to Be Able to Choose the Distribution Methods That Allow Them to Best Sell Their Products to Their Consumers

As previously explained, this article is not pro-direct sales, nor is it anti-dealer franchise model. There are valid reasons for a business to pursue either route. Instead, this article advocates for choice; for EV manufacturers to have the choice to pursue direct sales. In practically any industry except the auto industry, some manufacturers pursue direct sales, some that sell through franchise agreements, and some do both (i.e., Apple). Therefore, why should the automobile industry be limited to only one distribution model?

A. CONSUMERS ARE DISSATISFIED WITH THE CURRENT DEALER FRANCHISE CAR BUYING EXPERIENCE

The car buying experience is extremely frustrating for many consumers. Some dread it so much that they would rather do their taxes, clean a toilet and even give up sex than buy a car.<sup>80</sup> As anyone who has ever purchased a new car in the United States knows, the typical car buying experience goes as follows. After researching the car they want, the consumer goes to the car dealership where a pushy car salesperson soon approaches them. Sometimes the car dealership has the car the consumer wants, or sometimes, the dealership does the bait and switch and tries to upsell the consumer a more expensive model. Nevertheless, if the car dealer has the car the consumer wants, the haggling process begins. Here, the car salesman and the consumer go through hours of haggling, bargaining over price, monthly payments, financings, and options. When they agree on the price, the car salesman goes to the back to "ask permission" from the finance manager and leaves the consumer waiting. After a long wait, the finance manager comes out and plays the bad cop and tells the consumer they cannot do that price or that maybe they can, but the consumer needs to buy useless options like paint protection. The haggling process begins once again. Maybe after a few hours, the consumer gives up and purchases the car or walks away and begins the haggling process at another dealership. Millennials, who comprise the largest age group of new car purchasers, have a deep

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<sup>80</sup> Caroll Lachnit, *Half of Car Shoppers Say They'd Rather Clean a Toilet Than Buy a Car*, EDMUNDS, Jun. 2, 2014, <https://www.edmunds.com/car-news/half-of-car-shoppers-say-theyd-rather-clean-a-toilet-than-buy-a-car.html>.

disdain for the haggling process and prefer online sales.<sup>81</sup> For people of color, the car buying process is fraught with racism.<sup>82</sup> A study from the National Fair Housing Alliance showed that around 62.5% of the time, people of color who had higher incomes and credit scores than white consumers still received financing on worse terms and, on average, paid \$2,665.56 more than white consumers paid.<sup>83</sup> The car buying process also discriminates against women. Women are often subject to a “pink tax” when it comes to purchasing cars, women were on average quoted \$117.12 more than men for the same new car and paid up \$7,800 more than men for the cost of car ownership during the lifespan of the car.<sup>84</sup> Given the stress-inducing car buying experience, it is no wonder some manufacturers want to upend this model.

#### B. DIRECT SALES ALLOW THE MANUFACTURER TO HAVE MORE CONTROL OVER THE CUSTOMER SERVICE

Now compare the typical car buying experience with the customer buying experience at Tesla.<sup>85</sup> A consumer merely needs to create an account on the Tesla website. The consumer can search for the model they want. They can also schedule a touchless test drive. After choosing a model, the consumer can then pick their options. Unlike the traditional car-buying process, where the consumer is limited to what is on the lot, the consumer can customize the car and choose the add-ons they want. After choosing their options, the consumer knows the price they will pay right away; no haggling, no sneaky add-ons, no bad cop good cop games between the car salesman and the finance manager. The buying process takes 15-30 minutes, all in the comfort of their own home. If the consumer needs financing, they can apply online. While franchise dealers offer online sales,

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<sup>81</sup> Roy Furchgott, *Happy to Shun Showrooms, Millennials Storm the Car Market*, NEW YORK TIMES, Jun. 17, 2021, <https://www.nytimes.com/2021/06/17/business/buying-a-car-online-carvana.html>.

<sup>82</sup> LISA RICE & ERICH SCHWARTZ JR., DISCRIMINATION WHEN BUYING A CAR: HOW THE COLOR OF YOUR SKIN CAN AFFECT YOUR CAR-SHOPPING EXPERIENCE, NATIONAL FAIR HOUSING ALLIANCE 5, <http://nationalfairhousing.org/wp-content/uploads/2018/01/Discrimination-When-Buying-a-Car-FINAL-1-11-2018.pdf>.

<sup>83</sup> *Id.*

<sup>84</sup> Ben Guess, *A Pink Tax on Car Ownership? New Study Reveals Women May Pay Up To \$7,800 More than Men During the Length of Ownership*, JERRY, Jun. 27, 2022, <https://getjerry.com/studies/a-pink-tax-on-car-ownership-new-study-reveals-women-may-pay-up-to-usd7-800>.

<sup>85</sup> I actually went on the Tesla and created a Tesla account myself, while I did not purchase a Tesla, I followed the steps to purchase one all the way up to the payment portion.

unfortunately, often when manufacturers rely on dealers for online sales, the websites look different from dealer to dealer.<sup>86</sup> Some dealer websites are nothing more than a maneuver to get consumers to come to the showroom.<sup>87</sup> For newer EV manufacturers trying to introduce their brand to consumers, inconsistent messaging is problematic. Direct sales allow them more control over marketing and customer service.<sup>88</sup> The recent supply chain shortage in the auto market also exposes how the dealer franchise model severely handicaps the legacy manufacturers' ability to price their cars. In January 2022, despite warnings and protests from the manufacturers, the dealerships sold new cars above MSRP to 80% of car buyers.<sup>89</sup> With direct sales, the manufacturer has more control over the entire consumer experience, from marketing to pricing.

To be fair, there are advantages and disadvantages to direct sales, just as there are to the dealer franchise model.<sup>90</sup> For example, one advantage of the dealer franchise model is that the manufacturers can focus their capital on manufacturing cars while allowing the dealers to handle sales.<sup>91</sup> The local dealers may also be more familiar with the local market and can cater the messaging to their local demographic.<sup>92</sup> Nonetheless, a manufacturer's sales strategy and how it weighs the pros and cons of a direct sales or franchise, or hybrid model should be left to the manufacturers themselves, just like in any other industry. There is no equivalent legislation that dictates how Apple should distribute its products. Why should there be legislation to dictate how an EV manufacturer should sell its vehicles?

### C. THE STRUCTURE OF THE DEALER FRANCHISE MODEL ITSELF DOES NOT MAKE SENSE FOR SOME EV MANUFACTURERS

The incentive structure and the overall structure of the direct franchise model are obsolete for some EV manufacturers. In the traditional dealership franchise model, much of a dealer's profit does not stem from new car sales but rather from service and maintenance

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<sup>86</sup> Furchgott, *supra* note 81.

<sup>87</sup> *Id.*

<sup>88</sup> *See e.g.*, Greimel, *supra* note 15.

<sup>89</sup> Jacob Bogage & Aaron Gregg, *Car Dealers Are Raising Prices. Automakers Are Pushing Back. Consumers Are Stuck in Between*, NEW YORK TIMES, Feb.12, 2022, <https://www.washingtonpost.com/business/2022/02/12/ford-gm-dealer-markups/>.

<sup>90</sup> Crane, *supra* note 10 at 592.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

and used car sales.<sup>93</sup> For the first half of 2021, new car sales made up 54.5% of the revenue for the average car dealer.<sup>94</sup> However, new car sales only made up 32.4% of an average dealer's gross profit.<sup>95</sup> Meanwhile, for the same period, servicing made up 10.6% of a dealer's revenue but made up 34.8% of an average dealer's gross profit, while used car sales made up the remaining 32.7%.<sup>96</sup> Meanwhile, EVs do not require the same level of maintenance that combustible vehicles do. The type of maintenance needed is substantially different.<sup>97</sup> EVs have fewer parts and do not require oil changes.<sup>98</sup> EVs, on average, cost 50% less to maintain than gas-powered cars.<sup>99</sup>

In some instances, maintenance and tune-up for EVs do not require the consumer to come into the dealership or even be awake.<sup>100</sup> For example, with Rivian, the consumer's car is monitored and maintained 24/7 so that issues with the car are dealt with before they become a major issue.<sup>101</sup> Issues are handled through software updates. According to Rivian's Vice President of Public Policy "if it's a software update or fix, we can push that out to them[Rivian EV owners] over the cellular network at a time that is convenient to them—i.e. at 2 a.m. when the car's sitting at home and charging and the owner is asleep. We can't do that if we have to go through a franchised dealer."<sup>102</sup> A dealership model does not make sense for Rivian because the franchised dealer cannot offer what Rivian seeks to offer its consumers.

As further proof that EV servicing is incompatible with the direct franchise model, the dealer lobby in West Virginia pushed for legislation to ban manufacturers from providing over-the-air software updates to their consumers; therefore requiring consumers

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<sup>93</sup> See Mercer Capital, *Value Focus Auto Industry*, 8 MERCER CAPITAL 12, (2021).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> Rebecca Heisel, *Consumer Reports Study Finds Electric Vehicle Maintenance Cost Are 50% Less Than Gas-Powered Cars*, GREAT PLAINS INSTITUTE, Nov. 16, 2020, <https://betterenergy.org/blog/consumer-reports-study-finds-electric-vehicle-maintenance-costs-are-50-less-than-gas-powered-cars/#:~:text=Key%20takeaways%3A,to%20comparable%20gas%2Dpowered%20vehicles.>

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> Schrader, *supra* note 14.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

to come into franchise dealers for updates.<sup>103</sup> If such legislation were to pass, the dealers would not be able to provide adequate maintenance for EV consumers because dealers do not have the infrastructure to do so; the updates are done through proprietary manufacturer-owned software that dealers do not have any rights or access to.<sup>104</sup> Under the dealer franchise model, EV owners would not be able to timely update their vehicle, which would affect their vehicle's operations and safety.<sup>105</sup>

For some manufacturers, the dealer franchise model is incompatible with their sales model.<sup>106</sup> Rivian does not plan to stock a mass inventory of cars.<sup>107</sup> Their cars are made to order based on the consumer's personal preferences.<sup>108</sup> Meanwhile, traditional car dealerships typically try to sell and clear the cars on their lot.<sup>109</sup> That is what their salespeople are paid to do.

For Tesla, the dealer franchise model is incompatible because Tesla does not rely on car salespeople paid on commission.<sup>110</sup> Tesla understands that EVs are a relatively new technology and consumers need to be educated on them rather than be hustled on them.<sup>111</sup> Tesla's representatives do not receive a commission; they are instructed to educate consumers rather than push sales onto consumers.<sup>112</sup> Similarly, as Tesla develops its autonomous driving technology, consumer education will be crucial for introducing the technology to consumers. So for some manufacturers like Tesla and Rivian, forcing them to use franchise dealerships would upend their entire business model for no good reason. For these manufacturers, the dealer franchise model would also be detrimental to consumers. It would force them to undergo the stressful process of buying a car and deprive them of the cutting-edge innovation that EV manufacturers offer.

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<sup>103</sup> Johnna Crider, *EXCLUSIVE: West Virginia Wants to Ban Tesla & Others From Sending OTA Updates to Customer Cars*, CLEAN TECHNICA, Feb. 21, 2022, <https://cleantechnica.com/2022/02/21/exclusive-west-virginia-wants-to-ban-tesla-others-from-sending-ota-updates-to-customer-cars/>.

<sup>104</sup> *See id.*

<sup>105</sup> *Id.*

<sup>106</sup> *See* Schrader, *supra* note 14

<sup>107</sup> *Id.*

<sup>108</sup> *See id.*

<sup>109</sup> *See id.*

<sup>110</sup> Musk, *supra* note 13

<sup>111</sup> *See id.*

<sup>112</sup> *Id.*



#### D. COUNTERARGUMENTS FROM THE DEALER LOBBY

Along with the #FreeBritney movement, direct sales is one of the few issues that genuinely unites both ends of the political spectrum; support for direct sales spans from the Koch Brothers to the Sierra Club.<sup>113</sup> On the right, Republicans such as Florida Senator Marco Rubio support direct sales based on free-market principles.<sup>114</sup> On the left, groups such as the Sierra Club and the Consumer Federation of America support direct sales on environmentalist and consumer protection grounds.<sup>115</sup> With support from the Koch Brothers to Sierra Club, who could possibly oppose direct sales? Unsurprisingly, the dealers themselves, and surprisingly some manufacturers.<sup>116</sup> The dealer lobby has presented several arguments in opposition to direct sales. Below are counterarguments to the dealers' claim.

##### *i. Cars Are Dangerous and Need to Be Regulated*

One argument the dealer lobby gives for banning direct sales is that cars are dangerous and require regulation.<sup>117</sup> No one disagrees with this statement. This article is not calling for the deregulation of vehicle safety standards. The dealer lobby has not gone into detail specifying how bans on direct sales relate to automobile safety.<sup>118</sup> That's because it does not. Vehicle safety is regulated under the National Highway Traffic Safety Administration's Federal Motor Vehicle Safety Standards, not dealer franchise laws.<sup>119</sup> As mentioned in Part II, the primary purpose of dealer franchise laws was to protect dealers from competition; it had nothing to do with vehicle safety. Private jets, knives, and chainsaws are also dangerous products, yet there are no equivalent direct sales bans on those products. Consumers can buy a Gulfstream directly from Gulfstream.<sup>120</sup> Bans

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<sup>113</sup> Aeberle Coe, *Koch Brothers, Sierra Club Join Law Prof to Support Tesla*, LAW 360, Feb. 18, 2015, <https://www.law360.com/articles/622433/koch-brothers-sierra-club-join-law-prof-to-support-tesla>; Aisvarya Kavi, *A Bipartisan Bill Seeks to 'Free Britney' and Others Who Ask a Judge to Replace Their Guardian or Conservator*, NEW YORK TIMES, Jul. 20, 2021, <https://www.nytimes.com/2021/07/20/us/politics/free-britney-bill-law.html>.

<sup>114</sup> Crane, *supra* note 10 at 605.

<sup>115</sup> *See id.* at 606.

<sup>116</sup> NADA, *Why Dealer Franchise Laws*, NADA, <https://www.nada.org/WorkArea/DownloadAsset.aspx?id=21474838847>.

<sup>117</sup> *Id.*

<sup>118</sup> *See id.*

<sup>119</sup> *See* Regulations, NHTSA, <https://www.nhtsa.gov/laws-regulations/fmvss>.

<sup>120</sup> *See* Alex Davies, *You Can't Cut the Line for a G650, The \$65 Million Private Jet Billionaires Are Drooling Over*, BUSINESS INSIDER, Jun. 26, 2013,

on direct sales do not address consumer safety at all. There is also nothing unique about car dealerships that would somehow make a vehicle safer. If the logic of this argument made sense, it would mean that all "dangerous products" would have to be sold through third-party dealers. Fortunately, this is not the case for most products and should not be for EV manufacturers.

*ii. Dealers Keep Manufacturers Accountable When It Comes to Safety Recalls*

Continuing with the issue of consumer safety, dealers contend that they add an extra layer of accountability when it comes to consumer safety, particularly when it comes to consumer safety recalls.<sup>121</sup> Again, this argument makes no sense. It is quite ironic of an industry with poor customer satisfaction to suggest that they are the ones to care about consumer safety. Two, dealers are not the decisionmakers when it comes to recalling cars.<sup>122</sup> Manufacturers or the NHTSA are the ones who decide to recall a vehicle.<sup>123</sup> Third, manufacturers have many incentives to make sure their cars are safe. Vehicle safety is one of the top concerns consumers have when purchasing a car.<sup>124</sup> Furthermore, manufacturers can be and have been held liable for safety issues.<sup>125</sup> With or without dealerships, manufacturers have multiple reasons to maintain safe vehicles. For example, Rivian wishes to sell direct because it wants to provide 24/7 maintenance for its consumers to address safety issues before they become a problem.<sup>126</sup> Direct sales bans are hampering the ability of EV manufacturers to offer services that could enhance consumer safety.

*iii. Competition Between Dealers Lead to Lower Prices*

Next, the dealers contend that intrabrand competition between dealers leads to competitive prices.<sup>127</sup> They argue that with direct

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<https://www.businessinsider.com/how-to-buy-a-65-million-gulfstream-g650-2013-6>.

<sup>121</sup> Crane, *supra* note 10 at 599.

<sup>122</sup> *Id.*

<sup>123</sup> NHTSA, SAFETY ISSUES & RECALLS, <https://www.nhtsa.gov/recalls>

<sup>124</sup> Sean Tucker, *Survey: Car Shoppers Want Safety Tech and Heated Seats, Not In-Car-Shopping*, KELLY BLUE BOOK, Oct. 27, 2021, <https://www.kbb.com/car-news/survey-car-shoppers-want-safety-tech-and-heated-seats-not-in-car-shopping/>.

<sup>125</sup> See e.g. Mike Spector & Benjamin Lesser, *Special Report: Suit Over Deadly Crash Renews Spotlight on GM Safety Practices*, REUTERS, Mar. 17, 2021, <https://www.reuters.com/article/us-gm-safety-cooper-specialreport/special-report-suit-over-deadly-crash-renews-spotlight-on-gm-safety-practices-idUSKBN2B91DQ>.

<sup>126</sup> See Schrader, *supra* note 14.

<sup>127</sup> Crane, *supra* note 10 at 593-594.

sales, the manufacturer would have a retail monopoly and sell at a high markup.<sup>128</sup> This argument goes against basic economic theory.<sup>129</sup> It is no wonder that numerous economists and other academic experts in competition policy, and market regulation have come out against dealer franchise laws<sup>130</sup> Even without competition between dealers, there is still competition between manufacturers. Furthermore, cars are an elastic good.<sup>131</sup> If a manufacturer were to sell their car at a substantial markup, it would hurt their sales. It is hypocritical for dealers to argue that they offer "affordable prices" when 82% of new car buyers are paying above MSRP despite protests from the manufacturers.<sup>132</sup> In fact, according to Consumer Reports, as of August 2022, dealers have sold certain models at 24% over MSRP.<sup>133</sup> Allowing direct sales would most likely increase competition in the market. If direct sales were permitted, consumers would probably not be paying over MSRP because dealers would have to compete with manufacturers who are selling the cars to consumers at MSRP. The franchise dealer lobby's argument is also contradictory. On the one hand, dealers argue that they offer low competitive prices, but on the other hand, they argue that dealer franchise laws "level the playing field" between dealers and manufacturers.<sup>134</sup> In their lawsuit against Tesla, the dealers argued that Tesla's direct sales strategy harmed them because Tesla would price its cars too low.<sup>135</sup> So what is it? Do direct sales lead to unfair competition or do direct sales lead to overinflated prices?

*iv. Dealer Franchise Laws are Needed to Maintain a Level Playing Field; Some Manufacturers Support Dealer Franchise Laws for This Reason*

Expanding on their argument about a "level playing field," the dealers argue that dealer franchise laws are needed to protect them

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<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> Open Letter by Academics in Favor of Direct EV Sales and Service <http://pluginamerica.org/wp-content/uploads/2021/04/Direct-Sales-Nationwide-Academics-Letter-4.14.pdf>.

<sup>131</sup> *Id.* at 594

<sup>132</sup> Bogage and Gregg, *supra* note 89.

<sup>133</sup> Jeff S. Bartlett & Todd Young, *Worst Deals on New Cars Right Now*, CONSUMER REPORTS, Aug. 10, 2022, <https://www.consumerreports.org/buying-a-car/worst-deals-on-new-cars-a3991316773/>

<sup>134</sup> NADA, *supra* note 116.

<sup>135</sup> Crane, *supra* note 10 at 595.

from unfair competition.<sup>136</sup> The argument goes that there is a power imbalance between the large manufacturers and the "mom and pop" dealers, so dealer franchise laws are needed.<sup>137</sup> This argument may have made sense when these dealer franchises were enacted, but today many dealerships are run by multibillion-dollar dealer groups.<sup>138</sup> AutoNation, the country's largest dealer group, made 20 billion dollars in revenue in 2020.<sup>139</sup> Dealerships made nearly a trillion dollars in sales in 2020.<sup>140</sup> The average individual dealership made \$60 million in sales in 2020.<sup>141</sup>

If direct sales offered great prices to the extent that dealers went out of business, then dealers should go out of business. Consumers vote with their wallets. If consumers no longer wish to spend money at dealerships, there is no good reason to prop up an obsolete business. There are no laws propping up the obsolete brick-and-mortar movie rental locations. However, what is more likely the case is that even with direct sales allowed, there will still be a place and need for traditional dealerships as not all manufacturers will pursue pure direct sales.

Ironically, opposition to direct sales legislation comes from the manufacturers themselves. The legacy manufacturers such as Ford, and GM support the current dealer franchise laws because direct sales would give new EV manufacturers like Tesla an advantage.<sup>142</sup> For example, GM wrote to Governor Kasich that allowing Tesla to sell their vehicles direct to consumers would give Tesla a "distinct competitive advantage by avoiding restrictions that all other auto manufacturers face in Ohio."<sup>143</sup> Yes, Tesla does enjoy advantages over other manufacturers in some states. As previously mentioned, some states such as Georgia, New Jersey and New York, have

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<sup>136</sup> NADA, *supra* note 116.

<sup>137</sup> *See Id.*

<sup>138</sup> Crane, *supra* note 10 at 600-601.

<sup>139</sup> WARDAUTO DEALER BUS., WARDAUTO: MEGA DEALER 100, at 5 (2021), <https://www.wardsauto.com/sites/wardsauto.com/files/FINAL%202021%20Megadealer%20100.pdf>.

<sup>140</sup> NADA, *NADADATA: Annual Financial Profile of America's Franchised New-Car Dealerships 1* (2020),

<https://www.nada.org/WorkArea/DownloadAsset.aspx?id=21474861098>.

<sup>141</sup> *Id.*

<sup>142</sup> Crane, *supra* note 10 at 589-590; *See e.g.* Riley Beggin, *GM, Ford, UAW Opposition Gutted Bill That Would Have Protected Tesla Sales in Michigan*, THE DETROIT NEWS, <https://www.detroitnews.com/story/business/autos/2020/12/10/gm-ford-uaw-opposition-gutted-bill-would-have-protected-tesla-sales-michigan/3867557001/?gnt-cfr=1>.

<sup>143</sup> Crane, *supra* note 10 at 590.

created carve-outs for specifically Tesla to sell their vehicles to consumers.<sup>144</sup> However, one way to "level the playing field" is to allow all EV manufacturers to sell their cars directly to consumers. In admitting that Tesla has a "distinct competitive advantage," the manufacturers implicitly acknowledge that direct sales offer a better distribution method than the current dealer franchise model. To level the playing field, this article calls for all EV manufacturers to have the right to sell their cars directly on a nationwide scale.

v. *Dealers are Essential to Expanding EV Adoption*

Next, the dealers contend that they are essential to EV adoption.<sup>145</sup> As EVs become mainstream, the demographics of mass-market EV consumers will be significantly different from current EV consumers.<sup>146</sup> Compared to current gas-powered car buyers, EV buyers are wealthier, better informed about EVs, and often third, fourth, or fifth-time car buyers.<sup>147</sup> The dealers believe that with the mainstream adoption of EVs, the average EV buyer will resemble the average gas-powered car buyer.<sup>148</sup> When this happens, the dealers assert that they have the infrastructure and expertise to sell to a mass-market audience.<sup>149</sup> However, studies have shown that dealers do a poor job selling EVs.<sup>150</sup> One reason is that the car salespeople at dealerships are not adequately trained to sell EVs and are less incentivized to sell EVs. For a car salesperson, EVs take three to four times longer to sell than internal combustible vehicles.<sup>151</sup> While up to 71% of Americans are likely to seriously consider buying an EV,<sup>152</sup> EVs are still relatively novel for potential consumers. Consumers still have concerns and need to be educated on EV ownership. For example, consumers need to be educated on battery and charging options, servicing, and tax rebates and other incentives to adequately

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<sup>144</sup> Hartman & Shields, *supra* note 11.

<sup>145</sup> Mike Stanton, *Dealers Are Essential to Broader EV Adoption*, NADA, Jul. 21, 2021, <https://blog.nada.org/2021/07/12/dealers-are-essential-to-broader-ev-adoption/>.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> Elliot Heather, *Drivers Are Interested in Electric Cars. Dealers Don't Know How to Sell Them*, BLOOMBERG <https://www.bloomberg.com/news/articles/2021-10-26/drivers-are-into-electric-cars-dealers-don-t-know-how-to-sellthem#:~:text=Consumer%20Reports%20puts%20that%20number,combustion%20vehicle%2C%E2%80%9D%20Moloughney%20says.>

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

make their decisions to purchase an EV.<sup>153</sup> Unfortunately, the data shows that EVs are seriously underperforming in EV Sales. 74% of dealership nationwide don't even sell EVs.<sup>154</sup> According to the Sierra Club, out of 909 dealerships visited, nearly 30% of dealerships either failed to provide information on how to charge an EV or available state and federal incentives.<sup>155</sup> At dealerships where EVs were sold, 66% of the time, EVs were buried in the back of the lot.<sup>156</sup> It is no wonder that while consumers gave Tesla an average consumer satisfaction score of 4.5 out of 5, Chrysler only received an average consumer satisfaction score of 2.9/5.<sup>157</sup> Admittedly, the studies from the Sierra Club were from 2019. Even if dealerships have improved at selling EVs since then. Allowing direct sales does not mean abolishing dealerships.

Even if direct sales were to be allowed, legacy manufacturers could continue to sell their cars through dealerships. Moreover, if a start-up EV manufacturer such as Rivian or VinFast decides that they need dealerships to expand sales, they can contract with dealerships to do so. If dealers believe that their model is superior and they are essential, then what are they afraid of?

vi. *Prohibitions and Restrictions on Direct Sales Are Hindering EV Adoption*

New car sales are drastically behind the Biden Administration's goal of having EVs make up 50% of new car sales by 2030. In 2021, only 4% of new cars sold in the United States were electric vehicles.<sup>158</sup> Meanwhile, EVs make up more than a quarter of new car sales in some European countries.<sup>159</sup> Is this contrast surprising given that EV manufacturers cannot even sell their cars in many states, while in Europe, EV manufacturers can easily sell their cars directly to

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<sup>153</sup> *Id.*

<sup>154</sup> Hieu Le and Andrew Lindhardt, *Rev Up Electric Vehicles A Nationwide Study of the Electric Vehicle Shopping Experience*, SIERRA CLUB, November 2019, at 4, <https://www.sierraclub.org/sites/www.sierraclub.org/files/press-room/RevUpReportFinal.pdf>.

<sup>155</sup> *Id.* at 8.

<sup>156</sup> *Id.* at 4.

<sup>157</sup> *Id.* at 8.

<sup>158</sup> Catherine Clifford, *Electric Vehicles Dominated Super Bowl Ads, But are Still Only 9% of Passenger Car Sales*, CNBC, Feb. 14, 2022, <https://www.cnbc.com/2022/02/14/evs-dominated-super-bowl-ads-but-only-9percent-of-passenger-car-sales.html>.

<sup>159</sup> *Id.*

consumers online?<sup>160</sup> Within the United States, states with restrictive dealer franchise laws have significantly less EV adoption than states that allow direct sales. Excluding California, in states without restrictions on direct sales, EVs on average make up 3.7 registrations per 1,000 vehicle registrations in 2020; in states that prohibit direct sales, EVs make up only 1.4 registrations per 1,000 vehicle registrations.<sup>161</sup> While there could probably be many reasons for the disparity in EV adoption between states that allow direct sales and states that restrict or prohibit direct sales, a comparison between New York and Florida seems to show that dealer franchise laws play some role in hindering EV adoption.<sup>162</sup> Based on most indicators, New York should dominate Florida in EV adoption.<sup>163</sup> Both states have roughly the same population.<sup>164</sup> In New York, the state government reimburses purchases up to \$2,000 for new EV purchases,<sup>165</sup> pays companies \$5,000 to build EV chargers,<sup>166</sup> and has "the largest non-Tesla charging hub in the country." Florida offers none of these incentives.<sup>167</sup> Nevertheless, from 2019 through mid-2021, Floridians bought 59,000 new EVs while New Yorkers only bought 35,000.<sup>168</sup> In Florida, EV manufacturers without existing franchises, i.e., Tesla, and Rivian, can sell their vehicles directly to consumers without any sales caps.<sup>169</sup> Meanwhile, New York bans direct sales for all manufacturers besides Tesla.<sup>170</sup> Even then, Tesla is restricted to only five locations in the entire state.<sup>171</sup> Tesla has 17 galleries and stores in Florida.<sup>172</sup> Florida also has a faster EV adoption rate compared to New York.<sup>173</sup> For the first nine months of 2021, EVs made up 2.5%

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<sup>160</sup> Joe Miller & Peter Campbell, *Carmakers Launch Direct Internet Sales*, FINANCIAL TIMES, Aug. 16, 2020, <https://www.ft.com/content/6681b877-348b-486e-8149-aa9dc6bd7fa4>.

<sup>161</sup> Liam Denning, *Car Dealerships Aren't Fit for the Electric Age*, BLOOMBERG, Jan. 5, 2022, <https://www.bloomberg.com/opinion/articles/2022-01-05/car-dealership-laws-aren-t-fit-for-the-ev-age>.

<sup>162</sup> *See id.*

<sup>163</sup> Robinson Meyer, *The Simplest Way to Sell More Electric Cars in America*, THE ATLANTIC, Jan. 21, 2022, <https://www.theatlantic.com/technology/archive/2022/01/climate-electric-vehicle-car-dealership-power/621330/>.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *See id.*

<sup>171</sup> *See id.*

<sup>172</sup> Meyer, *supra* note 163.

<sup>173</sup> *See* Denning, *supra* note 161.

of all new vehicle sales in Florida compared with 2.1% in New York.<sup>174</sup> From the perspective of the consumer, the disparity is unsurprising. A consumer is more likely to purchase something if the product is more readily available. One way to make EVs more readily available is to allow manufacturers to sell the cars they manufacture in all fifty states. Consequently, Part IV of this article calls for federal legislation to preempt state restrictions and prohibitions on direct sales of EVs.

#### IV. USING FEDERAL LEGISLATION TO PREEMPT STATE FRANCHISE LAWS THAT BAN EV MANUFACTURERS FROM DIRECT SALES

Dealer franchise laws exist mainly at the state level.<sup>175</sup> A potential reform would be to reform the legislation on a state-by-state level. However, convincing 50 state governments to change dealer franchise laws would be an extremely time-consuming and intensive effort at a time when the federal government is aiming to accelerate EV adoption in the near short term. Furthermore, state-level reform has proven to be a failure for EV adoption. The idea of federal preemption was brought to the Obama Administration as far back as 2013.<sup>176</sup> However, at the time, the Obama Administration responded that dealer franchise laws were traditionally made at the state level and that even without federal preemption, the Obama Administration was already making progress on EV adoption. However, both responses from the Obama Administration are flawed. One, just because something is tradition, doesn't mean it should be continued. Two, as mentioned in Section 1 of this article, there is a tradition of federal legislation regulating auto sales. Dealers themselves have lobbied the federal government for dealer franchise protections in the past and there is federal legislation that protects dealers such as the Automobile Dealer's Day in Court Act (ADDICA). Again, as explained in Section I, dealer franchise laws were regulated at the state level, not for constitutional or policy reasons but because the state level is where the dealer lobby had the most success in lobbying for dealer franchise protections. Three, in the nearly ten years since the Obama Administration's response, EV adoption remains sluggish. As previously mentioned, EVs currently only make up

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<sup>174</sup> *Id.*

<sup>175</sup> See Kristy Hartman & Laura Shields, *supra* note 11.

<sup>176</sup> K.S., *Allow Tesla to Sell Directly to Consumers in all 50 States*, WE THE PEOPLE: THE WHITE HOUSE, Jun. 5, 2013, <https://petitions.obamawhitehouse.archives.gov/petition/allow-tesla-motors-sell-directly-consumers-all-50-states/>.



3.2% of new car sales, far behind the Biden Administration's goal of EVs making up 50% of new car sales by 2030.<sup>177</sup> Leaving it up to the states has failed. Federal preemption is needed to provide manufacturers with a guaranteed right to sell the very products they manufacture.

This article calls for the introduction of the Federal Electric Vehicle Dealer Act (FEVDA), which I have helped draft for Professor Daniel Crane at the University of Michigan Law School. This legislation would preempt state bans and restrictions on direct sales for EV manufacturers. Under the Constitution's Supremacy Clause, federal laws take priority over state laws.<sup>178</sup> For example, Congress preempted all state regulations for medical devices.<sup>179</sup> Federal preemption would replace the fifty different dealer franchise laws that restrict or prohibit EV direct sales and servicing today and instead allow EV manufacturers and dealers the right to sell cars to consumers. Federal preemption would create a level playing field for both legacy and start-up manufacturers.

First, this legislation would create a federal licensing/permit system for all EV manufacturers and dealers who wish to sell their vehicles. Under FEVDA, an EV is defined as "a motor vehicle primarily powered by an electric motor that draws current from rechargeable storage batteries, fuel cells, photovoltaic arrays, or other sources of electric current and may include an electric-hybrid vehicle." This definition of an EV is the same as that under The Energy, Independence and Security Act.<sup>180</sup> All manufacturers who wish to sell more than five vehicles per year must obtain this license. The eligibility requirement to obtain this license would be similar to the eligibility requirements that state governments require of car dealerships currently.<sup>181</sup> Manufacturers and dealers who wish to obtain this permit would need to apply to the Department of Transportation, demonstrating their "character, financial status, integrity, and reputation." Furthermore, the applicant would need to be bonded to obtain a license, similar to how state regulators require dealerships to be bonded.<sup>182</sup>

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<sup>177</sup> Blanco, *supra* note 7; The White House, *supra* note 3.

<sup>178</sup> See Legal Information Institute. Cornell Law School, *Preemption*, LEGAL INFORMATION INSTITUTE, <https://www.law.cornell.edu/wex/preemption>.

<sup>179</sup> *Id.*

<sup>180</sup> 42 U.S.C.S. §13271 (4).

<sup>181</sup> See MCLS §257.48.

<sup>182</sup> *Id.*

Second, once a manufacturer or dealer obtains an EV selling license, they are free to sell and service their cars directly to consumers. To avoid the issue of commandeering, the enforcement of these regulations and the funding would be entirely through the federal government. The funding would come from the application and renewal fees. The fees would be set to ensure sufficient revenue to fund the regulation and enforcement of the license. This legislation would only preempt state laws that prohibit or restrict direct sales and servicing. Otherwise, state consumer protection, employment, environmental protection, lemon laws, lending, and financial regulation, and zoning and land use laws would still apply. Even state laws that govern contractual relations between dealers and manufacturers, such as franchise termination agreements, would still be intact as long as those laws do not prohibit or directly restrict direct sales. Therefore, nothing in this legislation creates a disadvantage for current franchise dealers. There is nothing in this proposed legislation asking for direct sales to replace dealer franchises. It merely creates a system that allows EVs manufacturers and dealers to sell their vehicles. In doing so, EV manufacturers will have the option to choose to sell directly to their customers. By allowing more distribution systems, EVs will be more accessible to consumers and aid in the EV adoption.

#### V. CONCLUSION

Despite numerous government programs and efforts from EV manufacturers, EV adoption remains sluggish. While many factors play into EV adoption, such as availability, affordability, and familiarity, current state dealer franchise laws are a significant impediment. These franchise laws prohibit or significantly curtail the ability of EV manufacturers to sell their vehicles and create obstacles for consumers who wish to purchase EVs from the manufacturer. The dealer franchise laws also hinder innovation because, for some EV manufacturers, the outdated dealer franchise laws are incompatible with the services and innovations that manufacturers wish to offer their consumers. As a result, dealer franchise laws deprive consumers of the latest cutting-edge technologies. This Article calls for passage FEVDA to preempt state bans and restrictions on direct sales to accelerate EV adoption and make EVs more available. FEVDA will allow EVs to open more dealerships and expand their sales to consumers. It will also provide consumers in all states with more choices to purchase their vehicles. With more EV sales and more choices, EVs will be more available to

mainstream consumers, contributing to the federal government's goal of EV adoption.