No. 15-438

IN THE

Supreme Court of the United States

ALLIANCE OF AUTOMOBILE MANUFACTURERS, INC.

Petitioner,

v.

MELODY A. CURREY, IN HER OFFICIAL CAPACITY AS THE COMMISSIONER OF THE DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CONNECTICUT,

Respondent,

CONNECTICUT AUTOMOTIVE RETAILERS ASSOCIATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Brief of the Association of Global Automakers, Inc. and the National Association of Manufacturers as *Amici Curiae* in Support of the Petition for a Writ of Certiorari

JAMES C. MCGRATH
Counsel of Record
WILLIAM N. BERKOWITZ
KATHERINE R. MOSKOP

SEYFARTH SHAW LLP
Two Seaport Lane, Suite 300
Boston, MA 02210
(617) 946-4918
jcmcgrath@seyfarth.com

Counsel for Amici Curiae

(Additional counsel shown on inside cover)

Of Counsel:

ELLEN J. GLEBERMAN
CHARLES HAAKE
ASSOCIATION OF GLOBAL
AUTOMAKERS, INC.
1050 K St. NW, Ste. 650
Washington, DC 20001
(202) 650-5555

Counsel for the Association of Global Automakers, Inc.

LINDA E. KELLY
PATRICK N. FORREST
MANUFACTURERS' CENTER
FOR LEGAL ACTION
733 10th St. NW, Ste 700
Washington, DC 20001
(202) 637-3000

Counsel for the National Association of Manufacturers

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATUTES

OTHER AUTHORITIES

INTEREST OF THE *AMICI CURIAE*[1]

The Association of Global Automakers represents international motor vehicle manufacturers, original equipment suppliers, and other automotive-related trade associations. Its members include American Honda Motor Co., Aston Martin Lagonda of North America, Inc., Ferrari North America, Inc., Hyundai Motor America, Isuzu Motors America, Inc., Kia Motors America, Inc., Maserati North America, Inc., McLaren Automotive Ltd., Nissan North America, Inc., Subaru of America, Inc., Suzuki Motor of America, Inc., and Toyota Motor North America, Inc. Together, the Petitioner, Alliance of Automobile Manufacturers, Inc. ("Alliance"), and Global Automakers represent virtually all of the automobile manufacturers in the United States. Global Automakers works with industry leaders, legislators, regulators, and other stakeholders in the United States to create public policies that improve motor vehicle safety, encourage technological innovation, and protect our planet. Its goal is to foster an open and competitive automotive marketplace that encourages investment, job growth, and development of vehicles that can enhance consumers' quality of life.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in

---

[1] Pursuant to Rule 37.6, counsel for *amici* certify that no counsel for any party authored this brief in whole or in part, and that no person other than *amici curiae*, their members, or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel of record for all parties received timely notice of *amici's* intention to file this brief. The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk.

the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs over 12 million men and women, contributes roughly $2.1 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for two-thirds of private-sector research and development. The NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth.

Amici share concern regarding the unprecedented intrusion of protectionist state legislation into the private contractual relationships between motor vehicle manufacturers and their dealers. Laws such as Connecticut's warranty reimbursement mandate and cost recovery ban impose artificially high costs on out-of-state manufacturers and consumers, solely for the benefit of in-state dealers, and bar recovery of those costs in the state that imposed them. Indeed, economists have found such measures to be anti-competitive, inconsistent with innovation and advancement, and harmful to consumers. Because the auto industry comprises a large segment of American manufacturing, the threat of parallel state protectionism in other industries looms. *Amici* write to advise the Court of the nature and impact of these restrictions on auto manufacturers, consumers, and the national economy.

SUMMARY OF THE ARGUMENT

Without any bona fide public purpose, the Connecticut law under review permits in-state car dealers to overcharge out-of-state manufacturers for labor and parts needed to repair vehicles under warranty. To ensure that the overcharges are borne solely by entities outside the state, Connecticut prohibits manufacturers from raising prices in Connecticut to account for the added costs imposed by the State. This burden placed on manufacturers' ability to do business with in-state consumers far outweighs any arguable public benefit of the law.

Forty-two states now have laws designed to ensure that manufacturers pay dealers artificially high prices for providing labor and parts to repair motor vehicles under warranty. Specifically, these state laws require manufacturers to pay dealers for performing warranty repairs at (or above) the "retail" rates they charge their highest-paying, non-warranty personal use customers in ways that fail to take into account the volume, predictability, and other benefits of warranty work to dealers and consumers. Connecticut and sixteen other states have gone even further, prohibiting manufacturers from recouping in the state any portion of the artificially high costs imposed by retail-level warranty reimbursement. These recoupment bars—for the first time—export the costs of state regulation, thereby effectively insulating the regulation from any meaningful democratic review by in-state interests.

As discussed in Section A, *infra*, the so-called imbalance of bargaining power used historically to justify dealer protection laws in various states no longer exists, and in all events would not justify the challenged provisions. The entry and rapid growth of carmakers based outside the United States has significantly diluted the power of any single manufacturer, while the emergence of large, powerful public and private dealer ownership groups and politically-powerful state dealer associations has made the dealers far more powerful than at any time in the past.

Requiring carmakers to pay higher than negotiated, free market rates for parts and service yields no public benefit and serves no legitimate policy objective. Rather, as discussed in Section B, *infra*, numerous academic and governmental economic studies, including those by the Federal Trade Commission ("FTC"), have confirmed that these statutes serve only to augment dealer profits and shield dealers from ordinary market forces, while potentially reducing warranty coverage and other consumer benefits due to higher costs.

Because the auto industry comprises such a large segment of American manufacturing, as reflected in Section C, *infra*, the potential for further regulatory infringement on competition in other industries—and the resulting detriment to consumers—is cause for concern. Left unchallenged, this type of legislation will be a blueprint for other industries and will erode the national economic unit that the Commerce Clause was designed to protect.

As discussed in Section D, *infra*, this case presents the Court with an opportunity to ensure that statutes burdening interstate commerce and impairing contracts are subject to meaningful review that assesses whether the ostensible public purpose or local benefit merits the economic restriction. If allowed to stand, the Second Circuit's dismissal of the Alliance's dormant Commerce Clause and Contract

Clause challenges will foreclose manufacturers' ability to contest such protectionist legislation in any meaningful way.

ARGUMENT

A. Regulation of the Motor Vehicle Manufacturer-Dealer Relationship Has Become An Epidemic Of Unjustified Protectionist State Legislation.

The commercial relationship between motor vehicle manufacturers and their dealers has, since mass distribution of motor vehicles began, been governed by privately-negotiated franchise agreements. Beginning in the 1940s and 1950s, a patchwork of state laws promulgated at the insistence of motor vehicle dealers began superseding the parties' contractual relationships.[2] This legislation includes prohibitions on a manufacturer's ability to escape its business relationship with a dealer, even at the end of its contractual term, restrictions on a manufacturer's right to appoint new dealers in the vicinity of existing dealers in order to shield established dealers from competition, and limitations on carmakers' ability to recover payments made to dealers as a result of inaccurate or even fraudulent warranty claims.[3] Un-

---

[2] Daniel A. Crane, *Tesla, Dealer Franchise Laws, and the Politics of Crony Capitalism*, Univ. of Mich. Law & Econ. Research Paper No. 15-009, at 2 (Feb. 1, 2015), http://ssrn.com/abstract=2566436.

[3] Jessica Higashiyama, *State Automobile Dealer Franchise Laws: Have They Become the Proverbial Snake in the Grass?*, Univ. of Cal. Hastings Coll. of Law Discussion Paper, at 11-12 (Apr. 1, 2009), http://ssrn.com/abstract=1394877.

til the coupling of these provisions with cost recoupment bars, there were no legislative prohibitions on trying to recover the costs of onerous regulation from those in the state that imposed them.

At the time many of these prohibitions were originally enacted, motor vehicle manufacturers were large, powerful, and concentrated—the Big Three (Ford, General Motors, and Chrysler) dominated the U.S. market, accounting for the vast majority of new motor vehicle sales.[4] The typical motor vehicle dealer, on the other hand, was perceived to be a small business with limited financial resources.

Since then, the landscape has changed dramatically. In addition to the numerous statutory provisions adopted to protect dealers, market conditions have fundamentally altered the relative bargaining powers of the parties. To begin with, the motor vehicle manufacturing industry is far less concentrated today than it was in the mid-20th century.[5] The market share of U.S. vehicle sales of the "Big Three" domestic manufacturers fell from more than 80% in the 1970s to approximately 41% in 2014, and their total annual vehicle sales dropped by 7 million

---

[4] Francine Lafontaine & Fiona Scott Morton, *Markets: State Franchise Laws, Dealer Terminations, and the Auto Crisis*, 24 J. Econ. Perspectives 233, 243 (2010); Crane, *supra*, at 2.

[5] Thomas B. Leary, Comm'r, Fed. Trade Comm'n, *State Auto Dealer Regulation: One Man's Preliminary View*, Speech at the Int'l Franchise Ass'n 34th Annual Legal Symposium (May 8, 2001), https://www.ftc.gov/public-statements/2001/05/state-auto-dealer-regulation-one-mans-preliminary-view; Mark Cooper, Consumer Fed'n of Am., *A Roadblock on the Information Superhighway: Anticompetitive Restrictions on Automotive Markets*, at 28-32 (Feb. 2001).

vehicles between 2006 and 2009 alone.[6] Among other global competitors, Toyota, Honda, Nissan, Hyundai, BMW, and Mercedes-Benz now have production facilities in the United States. In 2014, international auto manufacturers produced 46% of cars built in this country.[7] Inter-brand rivalry among manufacturers has fostered a competitive climate for dealers, in which many dealers now have franchise agreements with multiple manufacturers and fewer dealerships are dependent on a single manufacturer than in the past.[8] Indeed, the U.S. Department of Justice recently concluded that

> [H]olding up dealers is unlikely to be a viable long-run strategy for a manufacturer when, as in the auto industry, reputation is important. Opportunistic behavior by a manufacturer would erode its reputation, making it difficult to attract new dealers and have existing dealers continue to provide the promotion and service essential to attracting []

---

[6] Lafontaine & Morton, *supra*, at 243-44; Ass'n of Global Automakers & Am. Int'l Auto. Dealers Ass'n, *The Redefined American Auto Industry: The Growing Impact of International Automakers and Dealers on the U.S. Economy 2015*, at 5, 10, https://www.globalautomakers.org/system/files/redfinedautoindustry.2015.spreads.pdf [hereinafter Global Automakers & AIADA].

[7] Global Automakers & AIADA, *supra*, at 3, 8-9.

[8] Gerald R. Bodisch, Econ. Analysis Grp., U.S. Dep't of Justice, *Economic Effects of State Bans on Direct Manufacturer Sales to Car Buyers*, Competition Advocacy Paper #EAG 09-1 CA, at 8 (May 2009), http://www.justice.gov/sites/default/files/atr/legacy/2009/05/28/246374.pdf.

> customers . . . . [Furthermore,] competition among auto manufacturers gives each manufacturer the incentive to refrain from opportunistic behavior and to work with its dealers to resolve any free-rider problems.[9]

These market dynamics incentivize manufacturers to treat dealers fairly and establish the number and kind of dealerships that will promote inter-brand competition and the public interest.[10] Such market forces and the reality of dealer bargaining power led manufacturers to pay dealers significant profit margins on warranty parts and labor—even in the absence of the warranty reimbursement provisions that are at issue in this case.

Further, the scale, strength, and economic resources of motor vehicle dealers has increased significantly in recent decades. Instead of small businesses with limited resources, there has been "a proliferation of massive chain dealerships, including some entities that own hundreds of outlets across multiple product lines."[11] The country's largest dealer, publicly-held AutoNation, has over 230 dealerships, with a current market capitalization greater than that of General Motors.[12] In 2014, the 47 larg-

---

[9] *Id.* at 7, 11.

[10] Carla Wong McMillian, *What Will It Take to Get You In A New Car Today?: A Proposal For A New Federal Automobile Dealer Act*, 45 Gonz. L. Rev. 67, 90 (2010).

[11] Leary, *supra*; *see also Chrysler Corp. v. Kolosso Auto Sales, Inc.*, 148 F.3d 892, 897 (7th Cir. 1998) ("Modern automobile dealers are substantial and sophisticated businesses.").

[12] Bodisch, *supra*, at 8; WardsAuto Group, *WardsAuto 2015 MegaDealer Top 100*, at 1, http://wardsauto.com/datasheet/

est dealer ownership groups in the country each had an average of nearly 45 dealerships in its group and revenues in excess of one billion dollars, with the two largest groups showing revenues of $19.1 billion and $16.6 billion respectively.[13] Moreover, smaller dealers obtain the benefits of bargaining power exercised by larger dealers, both through the actions of well-organized national and state dealer associations and through riding the bargaining coattails of large dealer ownership groups. As a result, the putative public-interest rationale for ever-expanding dealer "protection" laws—that dealers should be favored because they are small businesses or because they lack bargaining power—bears no relation to the reality of how automobiles are distributed and sold in the United States today.[14]

Despite this rebalancing of economic strength, at the behest of politically powerful state dealer groups and associations, dealer protection laws have expanded exponentially to cover virtually every aspect of the manufacturer-dealer relationship in an increasingly one-sided way.[15]

Warranty reimbursement—even at the parties' contract rates—represents a substantial flow of

---

wardsauto-2015-megadealer-100-pdf.

[13] WardsAuto Group, *supra*, at 1.

[14] *See Shelby County v. Holder*, 133 S. Ct. 2612, 2618-19, 2627-29 (2013) (cautioning that legislation cannot stand forever on the basis of "conditions that originally justified the[] measures," particularly where continued exercise of governmental authority is based on "decades-old data relevant to decades-old problems, rather than current data reflecting current needs").

[15] Jerry Ellig and Jesse Martinez, Mercatus Ctr. at George Mason Univ.., *State Franchise Law Carjacks Auto Buyers*, at 1 (Jan. 2015).

money from manufacturers to dealers, and it therefore has become a focus of dealers' latest legislative efforts.[16] These increased payments required of manufacturers are now coupled with recoupment bars that immunize such wealth transfers from meaningful democratic review and reaction.[17] Prior to the first warranty reimbursement regulations in the 1980s, motor vehicle manufacturers reimbursed their dealers for performing warranty repairs in accordance with contractually agreed-upon terms. These terms allowed dealers to charge carmakers not only for the cost of the parts used in warranty repairs, but also a profit on the manufacturer's own parts of 30-40%.[18] Despite enjoying a legislative monopoly entitling them to provide warranty service at high prices with no competition from independent repair shops or the manufacturers themselves, dealers demanded more.[19] In response to dealers' lobbying efforts, *forty-two* states now mandate that manufacturers reimburse their dealers for warranty repair parts and/or labor at or above their "retail" rates[20]—even, in some cases (including Connecticut), when the parts are provided to the dealer free of charge.[21]

Further, in many states, "retail" customer for purposes of calculating mandatory warranty reimbursements is defined in such a way as to exempt

---

[16] McMillian, *supra*, at 79-81.

[17] *Id.* at 81.

[18] *Id.* at 79-80; Higashiyama, *supra*, at 14.

[19] McMillian, *supra*, at 79; Higashiyama, *supra*, at 14.

[20] *See* McMillian, *supra*, at 80 n. 73 (collecting statutes).

[21] *See, e.g.*, Conn. Gen. Stat. § 42-133s(e).

discounts or routine services provided by dealers to many customers, so manufacturers are effectively required to reimburse dealers at the highest rates charged by dealers to the least savvy or price-sensitive customers.[22] Because "profit from warranty work is tied by state statute[s] to this small population of retail customers with relatively inelastic demand[]," dealers are incentivized to maximize the prices charged to retail customers and recoup any marginal "loss" through increased warranty reimbursement from manufacturers.[23]

Needless to say, these warranty reimbursement provisions substantially raise the cost of doing business in retail reimbursement states. Although warranty repairs are provided to consumers for no charge at the time of service, their anticipated costs must be assessed and accounted for. Initially, some manufacturers raised the prices of vehicles sold to dealers in those states to account for their higher warranty reimbursement costs, which courts upheld as legitimate economic responses to the cost of regulation.[24] But dealers simply went back to their state legislatures and secured prohibitions precluding manufacturers from recovering those costs through higher prices. Such recoupment bars impose direct price controls on manufacturers and prevent them from imposing wholesale price surcharges to cover

---

[22] *See, e.g.,* Conn. Gen. Stat. § 42-133s(d); Fla. Stat. Ann. § 320.696(1)(b), (3)(b), (4)(c). *See also* McMillian, *supra*, at 95.

[23] McMillian, *supra*, at 95-96.

[24] *See, e.g., Liberty Lincoln-Mercury, Inc. v. Ford Motor Co.*, 676 F.3d 318 (3d Cir. 2012); *Acadia Motors, Inc. v. Ford Motor Co.*, 44 F.3d 1050 (1st Cir. 1995); *Acadia Motors, Inc. v. Ford Motor Co.*, 799 A.2d 1228 (Me. 2002).

dealers' increased warranty reimbursement demands. In 2003, Maine became the first state to pass a cost recovery ban.[25] Other states have followed suit, including Connecticut. These bans go beyond prohibiting charge-backs to each dealer of its augmented warranty reimbursements. Rather, they bar any form of cost recoupment, whether a state-wide vehicle standard surcharge, wholesale price increase in the state, or otherwise.[26] In just twelve years, *seventeen* states now bar manufacturers from recovering any portion of their increased reimbursement costs within the state.[27] Consequently, manufacturers must recoup these costs of doing business from out-of-state dealers and their customers.

Because the costs of such statutes are borne entirely by out-of-state parties, while in-state parties enjoy all of the benefits, those regulatory costs are invisible to the in-state political process. In the absence of meaningful review by the courts, including the balancing analysis this Court adopted in *Pike v. Bruce Church*,[28] such protectionist state laws will continue to proliferate without any realistic check.

---

[25] McMillian, *supra*, at 81; Higashiyama, *supra*, at 15.

[26] *Id.*

[27] *See, e.g.,* Conn. Gen. Stat. § 42-133s(g); Fla. Stat. § 320.696(6); Ga. Code § 10-1-641(d); Haw. Rev. Stat. § 437-56(e); Idaho Code § 49-1626(13); Me. Rev. Stat. tit. 10, § 1176; Mont. Code Ann. § 61-4-204(7); N.H. Rev. Stat. Ann. § 357-C:5(II)(b)(1)(B)(vi); N.M. Stat. § 57-16-7(G); N.C. Gen. Stat. § 20-305.1(b); N.D. Cent. Code § 51-07-29(3); Utah Code § 13-14-201(1)(jj); Vt. Stat. Ann. tit. 9, § 4086(b); Va. Code § 46.2-1571(B)(5); Wash. Rev. Code § 46.96.105(4); W. Va. Code § 17A-6A-8a(3); *Nissan N. Am., Inc. v. Motor Vehicle Rev. Bd.*, 7 N.E.3d 25, 34-36, 41 (Ill. App. Ct. 2014).

[28] 397 U.S. 137, 142 (1970).

B. The Federal Trade Commission, the Department of Justice, and Prominent Economists Recognize That Protectionist Legislation Like Connecticut's Is Anti-Competitive And Harms Consumers.

The challenged provisions are at the outer edge of special interest legislation that disrupts a national economy while serving only the interests of in-state, politically powerful entities. As dealer protection laws have proliferated, government experts and economic scholars have become increasingly critical of their market effects.[29] According to growing economic consensus, "remedial" franchise laws insulate dealers from competition with manufacturers and one another and "prevent [] manufacturer[s] from responding to the competitive marketplace in the most efficient manner."[30] Dealer protection laws effectively freeze the retail network, making it difficult for manufacturers to adjust their distribution systems in response to changing demand or close unprofitable and inefficient dealerships.[31] By operating as a barrier to entry and restraint on mobility, such legislative interference undermines the "competitive functioning of the marketplace," to the ultimate detri-

---

[29] *See, e.g.*, Lafontaine & Morton, *supra*, at 241-244.

[30] *See, e.g.*, Fed. Trade Comm'n Staff Comment to Hon. George W. Miller, Jr., Chairman of Finance Comm., N.C. House of Representatives, at 2 (June 9, 1999), https://www.ftc.gov/policy/policy-actions/advocacy-filings/1999/06/ftc-staff-comment-honorable-george-w-miller.

[31] Lafontaine & Morton, *supra*, at 243-44.

ment of consumers in the form of higher vehicle prices and a lack of innovation in vehicle distribution.[32]

Economic studies evaluating these legislative restrictions have established that such laws directly result in reduced competition among dealers, higher vehicle prices and distribution costs, lower consumption, and lower levels of service for consumers.[33] For example, a study conducted by the Federal Trade Commission concluded that state laws granting dealers exclusive territorial rights in the form of "Relevant Market Areas" increased retail automobile prices by more than 6% compared to states without such laws.[34] Overall, laws restricting the ability of auto manufacturers to establish new dealerships may have increased the amount consumers paid for new cars by about $3.2 billion per year in the 36 states that had such laws (in 1985 dollars).[35] A similarly-timed study concluded that the combined effect of all state auto franchise restrictions was to raise new car prices by approximately 9%, while lowering the total number of cars sold.[36]

In their review of the empirical literature on vertical restraints across different industries—

---

[32] *Id.*; Fed. Trade Comm'n Staff Comment to Hon. George W. Miller, Jr., *supra*, at 2.

[33] Lafontaine & Morton, *supra*, at 242-43, 248.

[34] Robert P. Rogers, Bureau of Econ. Staff Report to the Fed. Trade Comm'n, *The Effect of State Entry Regulation on Retail Automobile Markets*, at 108 (Jan. 1986).

[35] *Id.* at 11, 107-08.

[36] Richard L. Smith, II, *Franchise Regulation: An Economic Analysis of State Restrictions on Automobile Distribution*, 25 J.L. & Econ. 125, 150-54 (1982). *See also* Mark Cooper, *supra*, at 20, 23-24.

namely, exclusive territories, dealer licensing (protection from entry), and termination restrictions—two prominent economists found that privately- or contractually-imposed restraints "seem to benefit manufacturers and consumers alike."[37] Conversely, when restraints are mandated by the government, as they are in the case of state automotive franchise laws, "they lead to higher prices, higher costs, shorter hours of operation, lower consumption—and thus declines in consumer welfare."[38] Such interference by states, coupled with a patchwork of state efforts to shift costs out of state, works to the detriment of the national economy as a whole, and is precisely what the Commerce Clause was designed to prevent.[39]

With regard to warranty reimbursement statutes in particular, Dr. Francine Lafontaine, before her appointment as Director of the FTC's Bureau of Economics, concluded that such laws not only increase manufacturers' cost of doing business but actually incentivize dealers to increase their "list" prices for repairs.[40] In some cases, warranty markups are high enough to allow otherwise unprofitable dealerships to remain in business without achieving any market success at all.[41] The end result of these and other franchise laws is a "wealth transfer" that benefits (in-state) dealers at the expense of (out-of-state) consumers.[42] All of these points become rele-

---

[37] *See* Lafontaine & Morton, *supra*, at 243.

[38] *Id.*

[39] *See H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 537-38 (1949).

[40] Lafontaine & Morton, *supra*, at 240.

[41] *Id.*

[42] *Id.* at 243.

vant in a *Pike* balancing test, which provides a necessary constraint on special interest legislation when coupled with a recoupment bar that interferes with the democratic process.

The FTC has openly questioned the justification for pro-dealer regulations and advocated for fewer restrictions on the manufacturer-dealer relationship and freedom of contract. In 1989, for example, FTC staff disagreed with Illinois' decision to prevent automobile manufacturers from licensing repair/service centers to operate in areas where their new car dealers provide repair services.[43] The FTC concluded that the bill would "injure consumers by reducing competition, increasing costs, and raising prices in the market for repair services," because it would prevent manufacturers from offering repair services in the most efficient manner and empower the dealers to charge supra-competitive prices.[44]

In 2001, then-FTC Commissioner Thomas Leary expressed concern about state laws that insulate motor vehicle dealers from competition with manufacturers.[45] He observed the reality that, while dealers at one time tended to be small businesses operating in a highly concentrated auto manufacturing

---

[43] *See* Fed. Trade Comm'n Staff Comment to James R. Thompson, Governor of Illinois (Sept. 8, 1989), https://www.ftc.gov/policy/policy-actions/advocacy-filings/1989/09/ftc-staff-comment-governor-james-r-thompson.

[44] *Id.* at 5. *See also* Fed. Trade Comm'n Staff Comment to Hon. George W. Miller, Jr., *supra*, at 2; Fed. Trade Comm'n Staff Comment to Assemblyman Paul D. Moriarty, N.J. General Assembly (May 16, 2014), https://www.ftc.gov/policy/policy-actions/advocacy-filings/2014/05/ftc-staff-comment-new-jersey-general-assembly.

[45] Leary, *supra*, at 1, 3.

industry, by 2001, dealers were frequently much larger entities benefitting from a far more competitive manufacturing sector.[46] As a result, regulatory protections for dealers were now harder to justify, particularly where they interfered with the development of new and potentially more efficient methods of motor vehicle and service distribution.[47]

Economists have called attention to the role of auto dealers' political influence over state legislators as an impetus for the passage of increasingly protectionist franchise laws. On average, states collect approximately 20% of all state sales taxes from dealers' new vehicle sales.[48] In some cities and counties, auto dealerships account for up to 40% of sales tax revenue.[49] Dealers are also active in state and local politics, and state legislators often receive significant campaign contributions from state dealer associations and individual dealers.[50] Dealers are able to leverage their local connections and influence into state laws that "extract rent from manufacturers and redistribute it to franchise dealers" under the sem-

---

[46] *Id.* at 2.

[47] *Id.* at 2-3.

[48] Higashiyama, *supra*, at 18.

[49] *Id.*

[50] *See, e.g.,* Michael Barbaro & Steve Eder, *Billionaire Lifts Marco Rubio, Politically and Personally*, N.Y. Times (May 9, 2015), http://www.nytimes.com/2015/05/10/us/billionaire-lifts-marco-rubio-politically-and-personally.html?_r=0 ("As he spoke in his office, an aide interrupted, presenting [billionaire Norman] Braman with a yellow sticky note. The Florida Senate was about to vote on a bill he had sought, granting auto dealers like himself greater leverage over car manufacturers . . . Moments later, another adviser popped his head in, declaring victory."); Higashiyama, *supra*, at 18.

blance of protecting "small business owners" from "coercive" practices and "arbitrary" terminations.[51]

In passing the warranty reimbursement mandate and recoupment bar at issue here, Connecticut has joined an increasing number of other states that have crossed the constitutional Rubicon by extracting benefits for in-state interests and ensuring the costs of those benefits will be borne solely by out-of-state interests, to the detriment of the free flow of interstate commerce. Permitted to stand, the Second Circuit's ruling would encourage resellers in other industries—such as petroleum, electricity, or healthcare—to pursue similar anti-competitive and commercially burdensome laws.

C. Dealer Protection Statutes Like Connecticut's Impose Enormous Costs On Manufacturers, To The Detriment Of The Auto Industry And Consumers.

The ultimate purpose of the Commerce Clause is to preserve the nation, rather than the individual states, as our sole "economic unit."[52] The Constitution's grant to Congress of the power to "regulate Commerce ... among the several States" reflected the Framers' "central concern" that the United States avoid the tendencies toward economic fragmentation and isolation that plagued the colonies.[53] As a corollary to that affirmative authority, the dormant Commerce Clause ensures that the unified national economy "will not be jeopardized by States acting as

---

[51] Lafontaine & Morton, *supra*, at 241.

[52] *H.P. Hood & Sons*, 336 U.S. at 537-38.

[53] *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979).

independent economic actors."[54] In violation of these core constitutional principles, Connecticut and other state legislatures have enacted protectionist measures that burden the operation of the national auto industry and harm the consumers who ultimately bear the regulatory costs.

The motor vehicle industry is viewed by many as the backbone of American manufacturing, and the hardships and inefficiencies suffered by manufacturers have a domino effect on countless suppliers, small businesses, and communities throughout the country who depend on its vibrancy. Some estimate that the auto industry is "within one degree of separation to one in ten jobs in the United States."[55] The automotive industry supports more than seven million private sector jobs, pays out $500 billion in compensation each year, and attracts foreign direct investment currently valued at $74 billion.[56] The Association of Global Automakers' members alone invested $52 billion in their U.S. operations in 2014 and created 97,000 jobs for Americans in all fifty states with an annual payroll of $7.2 billion.[57]

---

[54] *Wardair Canada, Inc. v. Fla. Dep't of Revenue*, 477 U.S. 1, 12 (1986).

[55] Higashiyama, *supra*, at 1; Center for Automotive Research, *Economic Contribution of the Automobile Industry to the U.S. Economy—An Update*, at 34 (Fall 2003), http://cargroup.org/?module=Publications&event=View&pubID=57.

[56] Center for Automotive Research, *Contribution of the Automotive Industry to the Economies of All Fifty States and the United States*, at 1 (Jan. 2015), http://cargroup.org/?module=Publications&event=View&pubID=113.

[57] Ass'n of Global Automakers, *Economic Impact 2015 Report*, at 1, https://www.globalautomakers.org/sites/default/files/econimpact2015.pdf.

According to the National Automobile Dealers Association, in 2013, manufacturers reimbursed dealers nationwide $17.1 billion for warranty service and parts.[58] Despite improvements in product quality (accompanied by lower anticipated warranty costs), that number represents an increase of approximately *four and a half billion dollars* from the $12.6 billion manufacturers paid dealers in 2008—just five years earlier.[59] This increase is consistent with estimates in August 2006 that automakers would have to pay dealers approximately $2 billion more each year for parts used in warranty repairs, even though they provided no additional services beyond those they had previously agreed to deliver under their franchise agreements, if retail reimbursement statutes spread nationwide in the wake of federal court rulings upholding such laws in New Jersey and Maine.[60] A study performed in 2006 by NCM Associates, a dealer consulting firm in Kansas, showed that dealerships mark up parts for retail repairs by an average of 67%, compared to the standard warranty markup of 40%.[61]

---

[58] Nat'l Auto. Dealers Ass'n, *NADA Data 2014: Annual Financial Profile of America's Franchised New-Car Dealerships*, at 11, https://www.nada.org/nadadata/.

[59] *See* Nat'l Auto. Dealers Ass'n, *NADA Data 2009: Economic Impact of America's New-Car and New-Truck Dealers, A Dealership and Industry Review*, at 11-12, http://leblog.gerpisa.org/system/files/NADA_Data_2009_final_091109.pdf.

[60] Donna Harris, *Dealerships Could Reap Warranty Windfall*, Automotive News (Aug. 21, 2006), http://www.autonews.com/article/20060821/SUB/60819025/dealerships-could-reap-warranty-windfall.

[61] *Id.*

As retail reimbursement laws have multiplied, dealers' profit margins have grown even more. A Department of Justice report revealed that one of the most lucrative aspects of the dealers' business is servicing cars.[62] Retail-level warranty reimbursement statutes directly result in more money in the pockets of the dealers at the ultimate expense of consumers, because the scope of warranty coverage and other beneficial programs will inevitably narrow—or vehicle costs will increase—as warranty costs grow.[63]

D. This Case Presents An Opportunity To Ensure That Statutes Burdening Interstate Commerce Are Meaningfully Reviewed To Assess The Merits Of A Purported Public Benefit Against The Harms Of The Economic Restriction.

A predictable reaction to the foregoing concerns is to "take them up with the legislature." But here, the dealers have successfully exported the costs of these regulations out-of-state, and the democratic process has been perverted, as the Alliance outlines in its Petition. The proliferation of these laws has reached the point where it requires meaningful constitutional treatment. The Second Circuit's dismissal of the Alliance's robust claims at the pleading stage, based not on the facts as pled but on the misapplication of the relevant constitutional doctrines, is plainly unwarranted.

Barring the Alliance's dormant Commerce Clause challenge from proceeding will foreclose

---

[62] Bodisch, *supra*, at 8, 10.

[63] Higashiyama, *supra*, at 15-16.

manufacturers' ability to contest special interest legislation that burdens interstate commerce, solely benefits in-state private individuals and entities, and lacks any legitimate public purpose. There is little hope for meaningful judicial review if the courts refuse to substantively examine a protectionist law if any conceivable state of facts supports the ostensible legislative purpose, whether or not that actual state of facts exists, has been asserted by the state, or has support in the record. One of the few remaining theories by which to assess a state's purported justifications for such nakedly protectionist regulations is the balancing test established by this Court in *Pike v. Bruce Church*.

In *Pike*, the Court adopted a balancing test to assess whether state statutes that do not expressly discriminate between in-state and out-of-state interests violate the Commerce Clause. The Court held that where a statute "regulates even-handedly to effectuate a legitimate local public interest, and its effects on inter-state commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[64] In other words, even where a state statute does not expressly discriminate between in-state and out-of-state interests, it may violate the Commerce Clause when the burden it imposes on inter-state commerce significantly outweighs the local benefits.

As discussed by the Alliance, the Second Circuit failed to apply this balancing test and instead erroneously read in the additional requirement that the in-state and out-of-state actors being compared

---

[64] 397 U.S. at 142.

must be market *competitors*.[65] But here, Connecticut has prohibited manufacturers from competing, directly or through agents, in the delivery of warranty service, meaning such a rule would eliminate any opportunity for manufacturers to seek meaningful review by the courts.

In the last decade, federal appellate courts have begun to require more than boilerplate assertions from states defending statutes that seem nakedly protectionist upon first impression. For example, the Fourth Circuit invoked the dormant Commerce Clause in striking down a Virginia statute granting all motorcycle dealers protest rights whenever a franchising manufacturer opened a new dealership anywhere in the Commonwealth, even outside the dealer's geographic market area.[66] The evident purpose of the statute was to give dealers the power to extract concessions from manufacturers, but the Commonwealth tried to justify it as preventing dealer "oversaturation."[67] While noting the general principle that courts should rarely cast doubt on "a statute's putative benefits," the court nonetheless pushed back sharply on the "putative benefits," finding them ill-served by the "unnecessary and excessive breadth" of the statute.[68] If courts recognize and apply applicable case law requiring a meaningful review of such statutes, as the Fourth Circuit did in *Yamaha Motor Corp.,* then manufacturers will have a legal mechanism to challenge protectionist legislation. The *Pike*

---

[65] See Petition for Writ of Certiorari, at 12-14.

[66] *Yamaha Motor Corp., U.S.A. v. Jim's Motorcycle, Inc.*, 401 F.3d 560, 563 (4th Cir. 2005).

[67] *Id.* at 566, 570-71, 573.

[68] *Id.*

balancing test should be applied here to invalidate Connecticut's retail warranty reimbursement provision and cost recovery ban. In the absence of substantive judicial review, such anti-competitive, anti-consumer laws will continue to multiply and thrive in states across the country.

Similarly, the "foreseeability" test has been used by lower courts to eviscerate any meaningful Contract Clause review, permitting states to adopt seemingly innocuous regulations and then argue that later, more onerous provisions—which clearly impair pre-existing contracts—were foreseeable.[69] That incremental process is precisely what happened in Connecticut. The state used the basic dealer protections it adopted to justify requiring warranty labor reimbursement at the "reasonable" rate charged by dealers to nonwarranty customers.[70] It then relied on those provisions as evidence that dealer-determined retail reimbursement and, in turn, cost recovery bans, were similarly foreseeable.

The Second Circuit adopted this faulty logic in analyzing the Alliance's Contract Clause challenge, holding that Connecticut's "long" history of "close state regulation" of the manufacturer-dealer relationship made the retail warranty reimbursement mandate and cost recovery ban foreseeable,[71] despite the fact that Connecticut had never regulated war-

---

[69] *See, e.g., Alliance of Auto. Mfrs. v. Gwadosky*, 430 F.3d 30, 42-43 (1st Cir. 2005).

[70] *See* Conn. Pub. Act 82-445 (An Act Concerning Automobile Dealerships), § 2(b) (codified as Conn. Gen. Stat. § 42-133s(b) (1982)).

[71] *Alliance of Auto. Mfrs. v. Currey*, 6 F. App'x 10, 13-14 (2d Cir. 2015).

ranty parts reimbursement or interfered with manufacturers' ability to determine the wholesale prices of their own products. As the Alliance argues in its Petition, this chain of reasoning, taken to its logical conclusion, strips the Contract Clause of any meaning whatsoever.[72] Market participants simply cannot reasonably anticipate that some regulation of their contract relationships justifies all regulation of those relationships, and cannot adjust their bargained for expectations to account for them. Some lower courts have recognized as much,[73] but this Court's guidance is needed to clarify the "foreseeability" question.

CONCLUSION

The Alliance's Petition for a Writ of Certiorari should be granted.

---

[72] *See* Petition, at 32.

[73] *See, e.g., Chrysler Corp. v. Kolosso Auto Sales, Inc.*, 148 F.3d 892, 895 (7th Cir. 1998) ("[A] history of regulation is never a sufficient condition for rejecting a challenge based on the contracts clause."); *In re Workers' Comp. Refund*, 46 F.3d 813, 820 (8th Cir. 1995) ("[R]egulation does not automatically foreclose the possibility of contract impairment.").

November 9, 2015

Respectfully submitted,

JAMES C. MCGRATH
Counsel of Record
WILLIAM N. BERKOWITZ
KATHERINE R. MOSKOP
SEYFARTH SHAW LLP
Two Seaport Lane
Boston, MA 02210
(617) 946-4918
jcmcgrath@seyfarth.com

Counsel for Amici Curiae

Of Counsel:

ELLEN J. GLEBERMAN
CHARLES HAAKE
ASSOCIATION OF GLOBAL AUTOMAKERS, INC.
1050 K St. NW, Ste. 650
Washington, DC 20001
(202) 650-5555

Counsel for the Association of Global Automakers, Inc.

LINDA E. KELLY
PATRICK N. FORREST
MANUFACTURERS' CENTER FOR LEGAL ACTION
733 10th St. NW, Ste 700
Washington, DC 20001
(202) 637-3000

Counsel for the National Association of Manufacturers