WHITE PAPER ON UNCONSTITUTIONALITY OF MICHIGAN H.B. 6233

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

Courtney Liss
Class of 2021
University of Michigan Law School

September 24, 2020

We are, respectively, a law professor and a law student at the University of Michigan. We do not represent any client with respect to this matter. The analysis presented in this White Paper represents solely our own personal, informed views.

H.B. 6233, which was voted out of the Michigan House Government Operations Committee today by a 3-1-1 margin, would create new restrictions on direct sales and service by automobile manufacturers, but would also carve out from the law a special exemption for Tesla to continue to operate in Michigan under the terms of its January 2020 settlement with the State of Michigan. In this White Paper, we address the constitutionality of this Bill under the Michigan constitution's requirement that the legislature pass only general laws and not "special acts," except in exceptional circumstances.[1] We submit that, under Article 4, Section 29 of the Michigan Constitution, the Bill would amount to an unconstitutional "special act."

H.B. 6233

H.B. 6233 arises from a long-running political battle over the application of Michigan's Motor Vehicle Franchise Act ("MVFA") with respect to direct sales and service by automobile manufacturers. In 2014, as Tesla was preparing to establish sales and service in Michigan, the legislature amended the MVFA to "clarify" that the statute prohibited direct sales and servicing (i.e., as opposed to through franchised dealers) even by companies like Tesla that did not seek to use franchised dealers at all.[2]

In 2016, after it was denied a license to establish sales and service facilities in Michigan, Tesla filed a constitutional challenge to the new legislation in the U.S. District Court

[1] This White Paper does not address additional constitutional problems with the Bill, such as its conflict with the equal protection clause of the Fourteenth Amendment and Michigan Constitution and the dormant or negative commerce clause.
[2] Daniel A. Crane, *Tesla, Dealer Franchise Laws, and the Politics of Crony Capitalism*, 101 Iowa L. Rev. 573 (2016).

for the Western District of Michigan.[3] On January 22, 2020, Tesla and the State of Michigan entered into a stipulation of dismissal, in which the State stipulated to the following:[4]

a. Neither M.C.L. § 445.1574(1)(q) nor any other provision of Michigan law prohibits a subsidiary that is wholly owned by Tesla ("Tesla Service Subsidiary") from owning or operating one or more service and repair facilities in the state of Michigan, so long as Tesla itself does not directly own the facilities;
b. Under Michigan law (including M.C.L. § 445.1574(1)), Tesla's status as a manufacturer of motor vehicles does not prevent employees of Tesla from performing warranty, recall, service, or repair work in Michigan so long as the work is not performed at a motor vehicle repair facility that is directly owned by Tesla itself, and that those employees are properly certified as specialty or master mechanics, as appropriate, under M.C.L. § 257.1311. In 2 Case 1:16-cv-01158-JTN-SJB ECF No. 267 filed 01/22/20 PageID.3000 Page 3 of 6 particular, neither M.C.L. § 445.1574(1)(p) nor § 445.1574(1)(q) nor any other provision of Michigan law prohibits employees of Tesla from performing warranty, recall, service, or repair work at a facility owned or operated by the Tesla Service Subsidiary on vehicles owned or leased by Tesla customers;
c. No provision in M.C.L. § 445.1574(1) nor any other provision of Michigan law prohibits Tesla from delivering vehicles to Michigan residents in Michigan (whether directly, through a subsidiary, using an independent carrier, or otherwise), including assisting them with vehicle trade-ins, so long as legal title for any vehicles sold by Tesla transfers outside the state of Michigan, consistent with M.C.L. §§ 440.2106(1) and 440.2401;
d. d. Under Michigan law, employees of Tesla or the Tesla Service Subsidiary are permitted to inspect, prepare, and, if necessary, repair such vehicles in the state of Michigan before they are delivered to the Michigan resident;
e. Neither M.C.L. § 445.1574(1)(h) nor § 445.1574(1)(i) nor any other provision of Michigan law prohibits Tesla from operating one or more galleries in the State to educate customers and facilitate transactions out-of-state so long as Tesla does not transfer legal title to the vehicles within the State consistent with M.C.L. §§ 440.2106(1) and 440.2401. Permissible activities at such a gallery include (but are not limited to) conducting demonstration drives; discussing prices, service, financing, leasing, and trade-ins with potential customers; helping potential customers configure a vehicle; facilitating ordering and purchase of a vehicle for which legal title transfers out-of-state; and facilitating customer transaction paperwork for a sale for which legal title transfers out-of-state.

In effect, this stipulation meant that Tesla was free to begin operating service centers in Michigan, so long as it did so through a subsidiary, and perform every aspect of car sales in Michigan other than the formal, legal transaction of transferring legal title, which still needed to be performed out of state (and could be done over the Internet).

[3] Tesla, Inc. v Jocelyn Benson, et al., United States District Court for the Western District of Michigan, case no. 1:2016-cv- 01158.

[4] https://www.michigan.gov/documents/ag/Joint_Stipulation_and_Motion_for_Entry_of_Dismissal_1-22-20_679161_7.pdf.

Significantly, the State of Michigan did not purport to create a special carve-out for Tesla based on policy considerations. To the contrary, the Joint Stipulation stated that "[t]he interpretations and representations of Michigan law set forth in this Stipulation are not based on policy choices but are objective and follow the plain, ordinary meaning of the language chosen by the Legislature." In other words, the January 2020 Settlement was not a special deal for Tesla. It was a recognition that Tesla could lawfully operate under Michigan law in the specified way. By extension, that would have to mean that any other company situated similarly to Tesla could also operate in that way.

H.B. 6233 amends various sections of the Motor Vehicle Franchise Act. It includes a new and expansive definition of "sell" and "selling" that includes virtually every activity associated with new vehicle sales transactions, including those that Tesla's settlement with the State recognizes are *not* sales under the existing statute.[5] It adds the phrase "directly or indirectly" to the prohibition on manufacturer ownership of motor vehicle service and repair facilities, which would make it impossible for a new car manufacturer to do what the State agreed that Tesla can do—own a subsidiary performing service in Michigan. In other words, the bill shuts down the possibility of interpreting Michigan law in the way the Attorney General interpreted it when settling with Tesla.

In addition to making these substantive amendments to the existing statute, the Bill makes clear that it applies to all manufacturers, all new dealer agreements, and all existing dealer agreements. But it then goes on to make a special carve out for any "manufacturer that entered into a joint stipulation and motion for entry of dismissal" in the Tesla litigation and has not sold a single new motor vehicle in the state through a franchised dealer. Such entities may perform a list of enumerated activities, which correspond directly to the activities that Tesla and the State agreed that Tesla could perform pursuant to the settlement. In other words, the bill doubles down on the existing MVFA restrictions on direct sales and service by manufacturers, but then enacts a single-company carve out to preserve the terms of Tesla's settlement with the State.

The Michigan Constitution's Prohibition on Special Legislation

Since the middle of the nineteenth century, the States have recognized that government by special act conferring benefits on interests fortunate enough to have influence in the legislature is contrary to principles of good government.[6] State constitutions began to prohibit such "crony capitalism" through provisions that required that laws by "general" and not "special," meaning that laws must apply to all similarly situated individuals or companies.[7] This rule is an analogue to the Fourteenth Amendment's mandate that all citizens be afforded "the equal protection of the laws." But it goes further in specifying that legislatures must write laws in ways

[5] "'Sell' or 'selling' as it applies to a new motor vehicle means to engage in the business of selling, trading, leasing, or offering for sale or lease, negotiating, or otherwise attempting to sell, trade, or lease a new motor vehicle, or any interest in, or written instrument pertaining to, a new motor vehicle to a customer at retail."

[6] *See* Naomi R. Lamoreaux & John Joseph Wallis, *General Laws and the Mid-Nineteenth Century Transformation of American Political Economy*, https://ccl.yale.edu/sites/default/files/files/Lamoreaux%20and%20Wallis%2C%20General%20Laws%2C%202019-10-04.pdf.

[7] *Id.*

that apply generally and do not single out particular individuals or corporations for favor or disfavor.

The Michigan Constitution of 1909 introduced such a prohibition in Article 5, Section 30, providing: "The Legislature shall pass no local or special act in any case where a general act can be made applicable . . . which question shall be a judicial one." A complementary provision, Article 12, Section 1 also addressed "special acts:" "Corporations may be formed under general laws, but shall not be created, nor shall any rights, privileges or franchises be conferred upon them, by special act of the legislature." It was therefore clear, in its inception, that a "special act" within the meaning of the Michigan constitution included an act granting special privileges to certain corporations.

In 1963, the State of Michigan revised its Constitution. The new Constitution did not carry forward the language of Article 12 Section 1 pertaining specifically to corporations, but retained the core language of Article 4, Section 30 pertaining to general laws. Section 4, Article 29 now provides:

> Local or special acts. Sec. 29. The legislature shall pass no local or special act in any case where a general act can be made applicable, and whether a general act can be made applicable shall be a judicial question. No local or special act shall take effect until approved by two-thirds of the members elected to and serving in each house and by a majority of the electors voting thereon in the district affected. Any act repealing local or special acts shall require only a majority of the members elected to and serving in each house and shall not require submission to the electors of such district.

Given this legislative history, there can be no question that a "special act" within the meaning of the Michigan Constitution includes acts of the legislature concerning corporations. Although the Constitutional language prohibiting special acts granting corporations "rights, privileges, or franchises" is gone, the prohibition on "special acts" where a general law is possible remains.

Although Article IV Section 29 concerns both "local" and "special" acts and most of the cases decided under it concern regional legislation (*i.e.*. legislation affecting just one city or region of the state), Michigan cases also make clear that Section 29 concerns "special" acts directed at a single corporation. The Michigan judiciary has applied Article IV Section 29 in determining if acts are "special" acts which apply only to individual corporations, notably in *Rohan v. Detroit Racing Association* and *General Motors Corp. v. Department of Treasury*.[8]

In *Rohan*, the Michigan Supreme Court stated the general rule as follows:

> [T]he rule is settled that a statute relating to persons or things as a class is a general law, but a statute relating to particular persons or things of a class is special. Under this rule it is apparent that in every case the vice of a law, as a special law, is that it

[8] *Rohan v. Detroit Racing Ass'n*, 314 Mich. 326, 350, 22 N.W.2d 433, 442 (1946); *Gen. Motors Corp. v. Dep't. of Treasury*, 290 Mich. App. 355, 378–80, 803 N.W.2d 698, 713–14 (2010).

> rests upon a false and deficient classification and does not embrace all of the class to which it is naturally related.'[9]

The court defined the nature of a "special law" as one that relates only to particular persons or things of a class which the court is to determine by looking to "its substance rather than its form."[10] The court in *Rohan* was asked to find an act authorizing pari-mutual betting at a horse racetrack invalid as a special act that gave racetracks (and specifically, the one targeted by the lawsuit) authorization for betting that would be illegal outside of the tracks. However, the court found that the act was not "special" because, though the act only allowed such betting at race-tracks, it was not specific to the individual racetrack at issue in the case and would apply to all such racetracks "of the class to which it is naturally related." The court assumed that if the statute had applied solely to the particular race-track at issue, it would have been unconstitutional.

Applying *Rohan* nearly 70 years later in *General Motors Corp.*, the Michigan Court of Appeals again referenced the special acts provision of Art. 4 Sec 29. The case arose when General Motors responded to a court decision about the Use Tax Act by requesting a multimillion dollar tax refund from the state, and the legislature responded by passing an act to close the loophole and deny General Motors' refund request.[11] General Motors asserted that as the other automobile manufacturers in the state, Ford Motor Company and DaimChrysler Corporation, did not plan to seek refunds, the legislation was targeted directly at their own company in violation of the special acts provision. The court instead found, following *Rohan*, that the law was not a special act and could be considered "general in a constitutional sense" even when "in its application, [it may] only effect one person or one place."[12] The court then articulated the general rule as follows: "***If a law is general and uniform in its operation upon all persons in like circumstances, it is general in the constitutional sense***."[13]

Although the case law applying Article 4, Section 29 outside the "local" statute question is sparse, the governing principle is clear: the Michigan constitution requires the legislature to act by *general* laws and not to pass laws that apply merely to a single corporation and not to all corporations in like circumstances.

A decision of the Maryland Court of Appeals[14] demonstrates the application of this principle in a context similar to addressed by H.B. 6233. Under Maryland law, "producers or refiners of petroleum products are generally prohibited from operating retail gasoline service stations with their own personnel or with a subsidiary company."[15] In 1979, the Maryland legislature adopted a statute which "in practical effect allow[ed] only one producer and refiner of petroleum products (the Mobil Corporation) to continue operating retail gasoline service stations through one of its wholly owned subsidiaries (Montgomery Ward & Co., Inc.)."[16] Like Michigan, the Maryland constitution contained a provision stating that the legislature "shall pass no special

---

[9] *Rohan*, 314 Mich. at 350.
[10] *Id.* at 349.
[11] *Gen. Motors Corp.*, 290 Mich. App. 355 at 366.
[12] *Id.* at 380-81.
[13] *Id*. (emphasis added).
[14] *Cities Service Co. v. Governor, State of Maryland*, 290 Md. 553, 431 A.2d 663 (Md. Ct. App. 1981).
[15] 431 A.2d at 665.
[16] *Id.*

Law, for any case, for which provision has been made, by an existing General Law."[17] The court considered several factors in determining whether the statute was a "special law:" "whether "whether it was actually intended to benefit or burden a particular member or members of a class instead of an entire class;" "[w]hether particular individuals or entities are identified in the statute;" "the substance and "practical effect" of [the] enactment;" "[i]f a particular individual or business sought and received special advantages from the Legislature, or if other similar individuals or businesses were discriminated against by the legislation;" [t]he public need and public interest underlying the enactment, and the inadequacy of the general law to serve the public need or public interest," and whether the law was "arbitrary and without any reasonable basis."[18]

Applying these factors, the court found it "inescapable that the mass merchandiser exemption to the Divestiture Law, with its limited qualifying dates, is a prohibited special law" under the Maryland constitution. The record showed "that the exemption was sought by Montgomery Ward, that the Legislature was advised that one business was the sole beneficiary, that Montgomery Ward is the only subsidiary of a producer or refiner which can qualify, and that no other existing general retail mass merchandiser could qualify in the future if it became a subsidiary of a producer or refiner."[19]

H.B. 6233's Unconstitutionality Under Article 4, Section 29

H.B. 6233 presents an easier case for unconstitutionality under the general laws requirement than the de facto special exemption for Mobil in the Maryland case. Here, the relevant statute explicitly names a single company—Tesla—for different treatment than any other company, even those situated similarly to Tesla. The Tesla carve out is obviously intended to benefit a single company—the company it names. A particular entity or individual is identified in the statute. The substance and practical effect of the law is to allow Tesla to operate under one set of rules while its competitors must operate under a different, and far less advantageous, set of rules. No other company will *ever* be able to qualify for the treatment the statute affords Tesla. While we do not understand that Tesla sought this legislation, the obvious purpose of this legislation is to prevent other electric vehicle manufacturers from securing the privileges Tesla secured in its settlement with the State. There is no public need or public interest to give a single company an exemption not shared by other, similarly situated companies, and the carve-out has no reasonable or rational basis.

Applying the language of the *General Motors* court, H.B. 6233 clearly is not "general and uniform in its operation upon all persons in like circumstances." An electric vehicle manufacturer situated just like Tesla—seeking to sell electric vehicles directly to consumers and without using a franchised dealer and to service those vehicles through a subsidiary in the State—is flatly prohibited from so doing. The fact that Tesla was first to market and first to sue the state is not a relevant distinction. As in *General Motors* and *Mobil*, the question is whether a company that, in the future, came to be in the same situation as the company presently covered by the law would receive the same treatment under the law. The answer to that question under H.B. 6233 is emphatically no.

[17] *Id.* at 671.
[18] *Id.* at 672-73.
[19] *Id.* at 673.

H.B. is inescapably a "special act" under Article 4, Section 29. Absent a judicial determination that a general act cannot be made applicable, it is unconstitutional.