No. 21-1088

In the Supreme Court of Texas

FIRE PROTECTION SERVICE, INC.,
Appellant,
v.
SURVITEC SURVIVAL PRODUCTS, INC.,
Appellee.

Certified Question from the United States Court of Appeals for the Fifth Circuit
No. 21-20145

BRIEF FOR *AMICUS CURIAE* ASSOCIATION OF EQUIPMENT MANUFACTURERS IN SUPPORT OF APPELLEE

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INTEREST OF *AMICUS CURIAE*

The Association of Equipment Manufacturers ("AEM") is a non-profit trade association with more than 1,000 member companies engaged in the production and sale of mobile, portable and hand-held equipment used in the agriculture, construction, utilities, forestry, and mining industries, and major components, attachments and parts for such equipment. AEM's membership also includes companies supplying services to the equipment manufacturing industry. The equipment produced by many AEM member companies moves to market through a network of independent dealers.

AEM's members' products make a significant contribution to agricultural, mining, and construction activity in the State of Texas and the improvement of the infrastructure, economy, and standard of living in Texas, the United States, and the world. As of 2020, AEM members supported 622,900 jobs in Texas, contributed $68.2 billion to the state's economy, and generated $4.3 billion in state tax revenue.

Caterpillar Inc., a member of AEM, provided funds for the preparation of this brief.

INTRODUCTION

The Association of Equipment Manufacturers ("AEM") urges this Court to answer the Fifth Circuit's certified question in the affirmative: retroactive application of the Texas Dealers Act ("TDA") violates Article I, § 16 of the Texas Constitution.

AEM is the North American-based international trade group representing off-road equipment manufacturers and suppliers, with more than 1,000 companies and more than 200 product lines in the agricultural and construction-related sectors worldwide. The equipment manufacturing industry supports 2.8 million jobs in the U.S. Equipment manufacturers also contribute $288 billion a year to the U.S. economy. AEM is uniquely positioned to highlight the broader implications of the Court's decision in response to this certified question. Applying the TDA retroactively—that is, to pre-2011 at-will dealer agreements[1]—would overturn the bargained-for contractual expectations of equipment manufacturers, interfere with the ability of manufacturers to run their businesses and best serve their customers, and harm the public at large. Each of the factors articulated by this Court in

[1] As used in this brief, the term "at-will dealer agreement" refers to an agreement that is terminable by the parties without cause at any time upon giving prior notice as specified in the agreement.

Robinson v. Crown Cork & Seal Co., 335 S.W.3d 126, 145–46 (Tex. 2010) weighs heavily against retroactive application.

First, the right at issue is fundamental to the business community: freedom of contract. Before enactment of the TDA, manufacturers and dealers had broad latitude to negotiate the terms of at-will agreements. The flexibility provided by at-will dealer agreements was crucial to manufacturers, as it enabled manufacturers to take on the risk of entrusting their brands with new dealers and facilitated manufacturers' entry into new markets. Manufacturers have longstanding and settled expectations in their ability to terminate or amend pre-TDA dealer agreements with or without cause according to the terms negotiated by the parties and set out in those agreements, including based on dealer performance or economic conditions.

Second, the impairment caused by retroactive application would be severe. By its terms, the TDA eliminates the ability of manufacturers to terminate in all but the most egregious circumstances. Retroactive application would lead to particularly unfair, and potentially draconian, consequences by engrafting a for-cause termination requirement on contracts that were not drafted or negotiated with such a significant limitation in mind. An at-will dealer agreement that allows for termination without cause generally does not need to set out detailed performance

metrics, because the parties understand that the manufacturer would always be free to terminate for any reason, including non-performance. In contrast, a dealer agreement that is drafted to be terminable for good cause typically contains detailed performance requirements. Retroactive application of the TDA would convert at-will dealer agreements into "good cause" dealer agreements, but without giving manufacturers an opportunity to amend pre-existing dealer agreements to adapt to this fundamental change.

Third, retroactive application of the TDA would harm the public interest. It would impose lopsided economic burdens on an industry that supports the employment of nearly five percent of all Texas civilian workers, saddling customers with low-quality dealers that manufacturers may be unable to terminate. At the same time, it is not clear to AEM how retroactive application of the TDA—which amounts to special-interest legislation that was not supported by any legislative findings—would provide countervailing benefits to the public.

Moreover, and perhaps in recognition of the observations summarized above, a ruling that retroactive application of the TDA violates the Texas Constitution would align with the majority of courts throughout the country that have considered similar questions. State and federal courts in Florida, Tennessee, Iowa, and North Dakota (to name just a few) have held that retroactive application of other "dealer

protection statutes" violates the federal and state constitutions. These courts have recognized that the public interest of retroactive application is scant, particularly when weighed against the severe impairment of manufacturers' rights.

Accordingly, this Court should answer the certified question in the affirmative and hold that the Texas Constitution precludes retroactive application of the TDA.

ARGUMENT

I. The *Robinson* factors weigh heavily against retroactive application.

Under the test established in *Robinson v. Crown Cork & Seal Co.*, this Court balances three factors to determine whether a statute should be applied retroactively:

1. The nature of the right as it existed prior to the statute,
2. The extent of the impairment, and
3. The nature and strength of the public interest served by the statute as evidenced by the Legislature's factual findings.

335 S.W.3d 126, 145–46 (Tex. 2010).

All three of these *Robinson* factors weigh heavily against retroactive application of the TDA.

A. Equipment manufacturers have settled expectations in dealer relationships that are terminable at-will (*Robinson* factor 1).

This Court has reaffirmed the critical public policy of freedom of contract "virtually every Court Term." *Energy Transfer Partners, L.P. v. Enter. Prod.*

Partners, L.P., 593 S.W.3d 732, 738 (Tex. 2020). This Court should uphold this public policy again.

Retroactive application of the TDA interferes with the freedom of contract of the parties who entered into at-will dealer agreements before 2011—and in some cases *decades* before 2011. The ability of parties to negotiate their own terms and conditions is a fundamental principle of freedom of contract. Through those negotiations, parties are able to determine their respective obligations and share an understanding and expectation of how they are to interact with each other prospectively. *See Nexen Inc. v. Gulf Interstate Eng'g Co.*, 224 S.W.3d 412, 419 (Tex. App.—Houston [1st Dist.] 2006, no pet.) ("The most basic policy of contract law is the protection of the justified expectations of the parties."). The ability to terminate a contract at-will is one such expectation. *See Cmty. Health Sys. Pro. Servs. Corp. v. Hansen*, 525 S.W.3d 671, 685 (Tex. 2017) (discussing "the longstanding precedent" holding that "a party does not need 'grounds' to terminate a contract in accordance with a without-cause or termination-upon-notice provision").

Before adoption of the TDA, manufacturers appropriately relied on the flexibility of at-will dealer agreements as a key part of their business strategies. When a manufacturer contracts with a dealer, the manufacturer is entrusting the dealer with its brand and reputation. Dealers are on the front line, interfacing with

customers, engaging in quality control, and servicing products. Whether building relationships with large corporations or small businesses, selling equipment often depends on personal relationships. As a result, a dealer's failure to meaningfully contribute to the dealer-manufacturer relationship can jeopardize a manufacturer's business model. At-will dealer agreements protected parties from being saddled with an unsuccessful business relationship, which can put the manufacturer's bottom line at risk and also can lead to broader damage to the manufacturer's brand and reputation, as well as harm to its customers. At-will dealer agreements allowed the manufacturer to terminate or adjust the dealer agreement as warranted to ensure the dealer was functioning effectively and that customers were being well served.

At-will dealer agreements also provided a more efficient path for manufacturers to enter new markets. In many instances, manufacturers may depend on dealers to penetrate unfamiliar regional markets. An at-will agreement allowed a manufacturer to enter a new market and grow its presence without the risk that it potentially could be tied to a particular dealer or market in perpetuity.

In addition, at-will dealer relationships offered benefits to dealers. Many pre-2011 dealer arrangements provided reciprocal termination rights. Thus, the dealer often had the same flexibility to terminate the relationship if, for example, demand for the manufacturer's products turned out to be lower than expected or the dealer

believed it would be economically advantageous to re-position its business. In this regard, the TDA is one-sided: it preserves the ability of dealers terminate at-will but completely eliminates a manufacturer's reciprocal right. *See* TEX. BUS. & COMM. CODE § 57.152 (allowing dealer to terminate by providing "at least 30 days' prior written notice" for agreements other than single-line dealer agreements).

Another benefit for dealers was that at-will contracts generally did not include as many detailed and rigid contractual requirements as contracts that provided less flexibility in termination rights. If a contract was terminable at-will, there was no need for the manufacturer to spell out performance requirements in detail. Dealers benefited from contracts that did not require them to demonstrate their compliance with various contractual benchmarks and metrics, while providing both parties with flexibility to most effectively build their businesses. As discussed below, dealer agreements likely would have been negotiated very differently if the manufacturers had expected that they could only terminate with good cause.

B. Retroactive application of the TDA would eliminate manufacturers' right to maintain an at-will dealer relationship (*Robinson* factor 2).

Retroactive application of the TDA would amount to a complete impairment of manufacturers' contracted-for right to terminate or substantially change without cause any pre-2011 dealer agreements. In effect, a manufacturer could find itself in

a perpetual and unalterable contractual relationship, even though it entered into the relationship with the legitimate expectation that it would be terminable at will.

Before adoption of the TDA, a manufacturer operating under a terminable-at-will agreement could exit a relationship—or make a "substantial change"—for any reason, including poor performance by the dealer or changes in market conditions. Retroactive application of the TDA would eliminate these contractual rights, and would require the manufacturer to meet narrow grounds for "good cause" to terminate the agreement or even to "substantially change" the relationship with the dealer. *See* TEX. BUS. & COMM. CODE § 57.002(21) (stating that "terminate" or "termination" "means to terminate, cancel, fail to renew, or substantially change the competitive circumstances of a dealer agreement").

Retroactive application of the TDA would be particularly prejudicial to manufacturers because it would lock manufacturers into dealer agreements that were never contemplated to be terminable only for "good cause" and, therefore, do not contain the types of provisions a manufacturer would typically include. Under the TDA's "good cause" requirement, a manufacturer is permitted to terminate a dealer agreement if "the dealer fails to substantially comply with essential and reasonable requirements imposed on the dealer under the terms of the dealer agreement, provided that such requirements are not different from requirements

imposed on other similarly situated dealers either by their terms or by the manner in which they are enforced" (subject to notice and cure requirements). TEX. BUS. & COMM. CODE § 57.154;[2] *see also id.* § 57.203 (same for single-line dealer agreements).

A manufacturer drafting a dealer agreement with this good cause requirement in mind likely would have included specific dealer performance obligations, so that clear standards exist for a for-cause termination, if the dealer did not perform satisfactorily. Such granular requirements were often not included when the dealer agreement was terminable without cause. Specific contractual performance requirements were unnecessary because the at-will relationship provided manufacturers and dealers the flexibility to terminate, amend or renegotiate the agreement as they believed necessary based on the other party's performance. Thus, the TDA not only replaces an at-will termination right with a "good cause" termination right, but it also engrafts a "good cause" requirement into contracts that were not drafted with such a requirement in mind. Retroactive application of the TDA would require manufacturers to do business according to the terms of dealer agreements that were drafted for at-will dealer relationships and, therefore, not

[2] Agreements other than single-line dealer agreements can also be terminated under the TDA if "the dealer has consistently failed to meet and maintain the supplier's requirements for reasonable standards and performance objectives, so long as the supplier has provided the dealer with reasonable standards and performance objectives based on the supplier's experience in other comparable market areas." TEX. BUS. & COMM. CODE § 57.154(12).

suited to govern a contractual relationship that can only be terminated or modified for "good cause."

Following the enactment of the TDA, manufacturers entering *new* contracts could theoretically attempt to safeguard their businesses by imposing precise performance requirements on dealers to protect the manufacturer from a decline in dealer performance or other issues that could threaten the manufacturers' businesses. But manufacturers with pre-2011 dealer agreements never had any practical opportunity to make necessary changes to their dealer agreements in response to the TDA's "good cause" requirements. The appellant, Fire Protection Service, Inc., is wrong in arguing that manufacturers had a 77-day "grace period" to terminate or negotiate contracts between the passage of the TDA and its effective date.[3]

First, as Survitec explained, manufacturers cannot be deemed to have been on notice of the TDA at the time of its passage.[4]

Second, even if *arguendo* manufacturers had some notice, wholesale termination of dealer relationships in Texas (including agreements sometimes going

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[3] *See* Brief for Appellant at 46-52, *Fire Protection Service, Inc. v. Survitec Survival Prods., Inc.*, No. 21-1088 (Tex. Jan. 19, 2022).

[4] *See* Brief for Appellee at 49-59, *Fire Protection Service, Inc. v. Survitec Survival Prods., Inc.*, No. 21-1088 (Tex. Feb. 14, 2022).

back decades), and complete withdrawal from Texas markets, was not a viable or realistic option. Manufacturers had settled expectations not only of their right to terminate at-will but also of their right to *continue* an at-will relationship. Terminating all dealership agreements in Texas before the effective date of the TDA would not have preserved that right.

Third, amending dealer agreements to include more specific performance criteria in light of the TDA's "good cause" requirement also was not feasible. The TDA provides that failure to "substantially comply with essential and reasonable requirements" in a dealer agreement can serve as a basis for good cause only if "such requirements are not different from requirements imposed on other similarly situated dealers . . . ." TEX. BUS. & COMM. CODE § 57.154(a)(1). Thus, even if manufacturers had negotiated to insert specific performance requirements in Texas dealer agreements after passage of the TDA, a Texas dealer would likely claim that a violation of those requirements could not provide grounds for good cause because the requirements differ from those imposed on dealers in other states. Thus, the ruling urged by Fire Protection Service is premised on a near-impossibility—namely, that manufacturers should have (and indeed could have) renegotiated dealer agreements around the country in a matter of weeks.

In sum, retroactive application of the TDA to pre-2011 at-will dealer agreements would have draconian consequences for manufacturers and lead to "Catch-22" situations that leave manufacturers unable to adapt to changing circumstances.

Consider the following scenarios:

- Illustration 1(a): Dealer X consistently fails to perform satisfactorily and is in the bottom five percent of all of Manufacturer A's dealers. Under the TDA's "good cause" requirement, the manufacturer would be permitted to terminate the dealer agreement if the dealer failed to substantially comply with its terms. But when Manufacturer A and Dealer X entered into the dealer agreement in 1975, they did not include extensive performance obligations because it was understood that the relationship would be terminable at-will. Thus, the agreement provides Manufacturer A no express contractual basis to show that Dealer X's demonstrably poor performance "fails to substantially comply with essential and reasonable requirements . . . under the terms of the dealer agreement."

- Illustration 1(b): Recognizing that the dealer agreement, as written, does not include performance requirements, Manufacturer A considers modifying the agreement to include a requirement that Dealer X meet certain performance thresholds. But retroactive application of the TDA presents obstacles for this strategy as well. First, Dealer X could argue that the attempt to re-negotiate the terms of the dealer agreement is itself a termination requiring good cause because it "substantially change[s] the competitive circumstances of a dealer agreement." Second, even if the modification is permitted, requirements in the dealer agreement can provide a basis for good cause only if they "are not different from requirements imposed on other similarly situated dealers either by their terms or by the manner in which they are enforced." To satisfy that requirement, the

dealer would potentially need to embark on the impractical and potentially impossible task of simultaneously changing the terms of agreements with other dealers.

- Illustration 2: Manufacturer B entered a dealer agreement with Dealer Y in the 1980s as part of an expansion into West Texas. The parties specifically negotiated the agreement to include an "at-will" provision to provide both parties with the flexibility necessary to adjust to market conditions. Now, due to changing market conditions, Manufacturer B is suffering declining profits and market share due in significant part to low-performing dealerships in West Texas. If Manufacturer B does not make significant changes regarding its capital allocation, the company will be at risk of insolvency. Thousands of stakeholders would be impacted, including hundreds of employees. To continue business operations, management must shift focus and allocate resources to more profitable geographic regions, such as East Texas. Before the TDA, Manufacturer B would have had the right to terminate the dealer agreement with or without cause. The TDA, however, does not expressly provide any ground for good cause under this circumstance, and thus Manufacturer B is potentially foreclosed from making a necessary adaptation to its business strategy in response to the demands of a constantly evolving economy. The need to adapt to changing economic circumstances was contemplated at the time the parties entered into the at-will dealer agreement. Retroactive application of the TDA would remove the contracted-for flexibility to respond to market conditions.

- Illustration 3: Manufacturer C is considering terminating Dealer Z, which has engaged in dishonest behavior, resulting in numerous consumer complaints and inquiries from the Better Business Bureau and various state and federal regulatory agencies. *If* Dealer Z is *not* a single-line dealer, grounds to terminate under TEX. BUS. & COMM. CODE § 57.154(11) may exist. But *if* Dealer Z *is* a single-line dealer, the manufacturer cannot terminate based on such misconduct unless the dealer has been convicted of or pleads guilty to a felony. *See id.* § 57.203. A

> manufacturer entering into a dealer agreement after the enactment of the TDA could theoretically attempt to address this situation by including specific provisions in the dealer agreement that require the dealer to meet certain ethical standards. But such a provision was unnecessary when Manufacturer C entered into its agreement with Dealer Z because Manufacturer C had the right to terminate for any reason. Manufacturer C is now faced with the unenviable decision of continuing its relationship with Dealer Z, notwithstanding harms to customers and to its reputation, or else terminating Dealer Z and risking liability for Dealer Z's lost profits.

Manufacturers should not be put to the choices described in these scenarios.

C. The public interest would not be served—and in fact would be harmed—by retroactive application (*Robinson* factor 3).

The TDA went from introduction in the Texas House of Representatives (on March 10, 2011) to the Governor's desk (on June 17, 2011) in only three months. *See* HB 3079, 82(R) Sess. (Tex. 2011). No member of the public discussed the bill at the May 20, 2011 public hearing. *Public Hearing on HB 3079*, 2011 Leg., 82(R) Sess. 2 (Tex. 2011). Further, the bill's statement of legislative intent makes clear that it serves private interests of dealers, rather than the interest of the public at large:

> It is my intent that House Bill 3079 will prohibit suppliers from "substantially changing the competitive circumstances of the dealer agreement" without good cause. The reason this protection is needed is that dealers have no negotiating power to prevent suppliers from inserting contract language that gives the suppliers the legal right to take actions that harm a dealer's business . . . ***The purpose of this law is to protect dealers*** from changes imposed by a supplier if the changes are substantial and negatively impact the dealer's business.

ROBERT DEUELL, S. JOURNAL, 82(R), at 11 (Tex. 2011) (emphasis added).

The public interest is not served by retroactive application of a one-sided statute that allows dealers to avoid the plain terms of their contractual agreements while overturning the longstanding expectations of the parties to the agreement. While the statement of legislative intent claimed that "dealers have no negotiating power," this is an overly generalized and conclusory assumption that notably is not supported by any legislative findings. *See* Brief for Appellee at 43. Many dealerships are wealthy, powerful, and sophisticated companies.

Any analysis of the public interest must also take into account how retroactive application of the TDA would harm both manufacturers and the public at large. In the aggregate, equipment manufacturers support 2.8 million jobs across the United States, generating $288 billion to the Gross Domestic Product ("GDP") each year.[5] In Texas alone, equipment manufacturers support 622,900 jobs and contribute $39.9 billion in wages and $68.2 billion to the State's GDP each year.[6] Put differently, with

[5] *See* ASSOCIATION OF EQUIPMENT MANUFACTURERS, THE ECONOMIC IMPACT OF THE EQUIPMENT MANUFACTURING INDUSTRY 5 (2020), *available at* https://www.aem.org/AEM/media/docs/Advocacy/AEM-Economic-Impact-Report-2020.pdf.

[6] *See* ASSOCIATION OF EQUIPMENT MANUFACTURERS, EQUIPMENT MANUFACTURING IN TEXAS (2016), *available at* https://imakeamerica.com/wp-content/uploads/2016/12/TX.pdf.

13.8 million people in Texas's civilian workforce, manufacturers support the jobs of one out of every 22 Texans.[7]

Accounting for the significant positive impact manufacturers have on the community, a striking 91 percent of voters in the United States believe that manufacturing is critical to the American economy—and for good reason.[8] Retroactive application of the TDA, however, would harm the manufacturing sector—and the job, wages, and economic progress it supports—by depriving manufacturers of their legitimate expectations in, and the necessary flexibility provided by, pre-2011 at-will dealer agreements.

By way of illustration, consider the commonplace decisions that businesses regularly make regarding how to respond to market conditions and appropriately price products.[9] Profitable companies are able to pass on benefits to both employees—by way of increased wages or other benefits, and customers—by way of

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[7] *See* TEXAS WORKFORCE COMMISSION, TEXAS WORKFORCE COMMISSION ANNUAL REPORT 4 (2018), *available at* https://www.twc.texas.gov/files/news/2018-twc-annual-report-twc.pdf.

[8] *See* ASSOCIATION OF EQUIPMENT MANUFACTURERS, EQUIPMENT MANUFACTURING IN TEXAS (2016), *available at* https://imakeamerica.com/wp-content/uploads/2016/12/TX.pdf.

[9] *See* Donald N. Sull, *Why Good Companies Go Bad*, HARVARD BUSINESS REVIEW (July-Aug. 1999), *available at* https://hbr.org/1999/07/why-good-companies-go-bad (explaining that inappropriately responding to market conditions causes businesses to fail); *see also* Stéphane J.G. Girod & Samina Karim, *Article Change Management Restructure or Reconfigure?*, HARVARD BUSINESS REVIEW 6 (Mar.–Apr. 2017) (noting that empowering local teams to modify pricing was a successful aspect of a company's restructuring).

investment in new and improved products, increased philanthropic endeavors, and community investment.[10]

The opposite is also true: struggling companies are sometimes forced to cut wages and often cannot invest in the community in meaningful ways. Retroactive application of the TDA threatens to have such an effect. If a manufacturer is severely limited in its ability to terminate or modify the terms (including the pricing terms) of a poorly-performing dealer relationship, that manufacturer might need to re-allocate its resources to offset its losses. For example, an underperforming dealer could cause a decline in a manufacturer's sales, which can lead to lower production levels at manufacturing facilities in Texas and elsewhere, and ultimately fewer manufacturing jobs. The public interest would also be jeopardized by having customers rely on the inferior services of poorly-performing dealers that manufacturers are unable to terminate despite their previously-negotiated expectations of at-will relationships.

[10] *See generally*, Jody Heymann & Magda Barrera, *How Businesses Can Profit from Raising Compensation at the Bottom*, IVEY BUSINESS JOURNAL (Nov.–Dec. 2010), *available at* https://iveybusinessjournal.com/publication/how-businesses-can-profit-from-raising-compensation-at-the-bottom/ (describing the inverse with respect to employee benefits; investing in employees reaps benefits for employers).

II. Courts in other jurisdictions have held that retroactive application of dealer protection statutes is unconstitutional.

The vast majority of courts across the country to have considered the issue have concluded that retroactive application of other "dealer protection statutes" violates the U.S. Constitution or state constitutions.[11]

The District of North Dakota recently held that retroactive application of North Dakota's dealer protection statute violated the Federal Contracts Clause in a case brought by AEM. *See Ass'n of Equip. Mfrs. v. Burgum*, 495 F. Supp. 3d 803, 818–19, 830–31 (D.N.D. 2020). The Court emphasized the "lack of a significant and legitimate public purpose" and observed that the statute in question was an example of "special interest legislation", which "runs afoul of the Contract Clause [of the U.S. Constitution] when it impairs pre-existing contracts." *Id.* at 819 (citing *Ass'n of Equip. Mfrs. v. Burgum*, 932 F.3d 727 (8th Cir. 2019) (affirming the district court's preliminary injunction against the North Dakota dealer protection statute)).

[11] As Survitec explained, there are differences between the scope and application of the federal contract clause and the Texas contract clause. *See* Brief for Appellee at 12-20, *Fire Protection Service, Inc. v. Survitec Survival Prods., Inc.*, No. 21-1088 (Tex. Feb. 14, 2022). And the anti-retroactivity clause of the Texas Constitution "has no direct federal analogue." *Id.* at 21. Nonetheless, decisions arising under the contracts clauses of the federal and state constitutions are instructive because they evaluated the same basic question at issue here: whether the purported public interest advanced by dealer protection statutes is sufficient to justify the retroactive impairment of manufacturers' settled rights in at-will dealer relationships.

Numerous other states have similarly held that retroactive application of dealer protection statutes violate the U.S. Constitution or state constitutions because they interfere with contract rights and settled expectations. A brief overview is provided below.

- Florida: The Florida Supreme Court held that the Florida Automobile Dealers Act's provision requiring 90 days' notice for termination of a franchise agreement could not apply retroactively. *Yamaha Parts Distributors, Inc. v. Ehrman*, 316 So. 2d 557, 559–60 (Fla. 1975) (applying the contract clause of the Florida Constitution). The court recognized that retroactive application of the dealer statute would impair "the right of a manufacturer to maintain the integrity of his trade name in the marketplace," which "is a valuable right which a disreputable franchisee can quickly destroy." *Id.*; *see also Gulfside Distributors, Inc. v. Becco, Ltd.*, 985 F.2d 513, 515 (11th Cir. 1993) (holding that a 1987 Florida statute could not be applied to limit a distributor's pre-existing right to terminate a distribution agreement without good cause) (applying the contract clause of the Florida Constitution).

- Iowa: "[T]he [Iowa Franchise] Act is not based on a significant and legitimate public purpose such as a 'broad and general social or economic problem' sufficient to justify the substantial impairment that some of its provisions have on plaintiffs' license agreements in existence on the Act's effective date." *McDonald's Corp. v. Nelson*, 822 F. Supp. 597, 609 (S.D. Iowa 1993) (citation omitted) (applying the contract clauses of the U.S. and Iowa Constitutions).

- Maine: Retroactive application of Maine's dealer statute was found to be unconstitutional because it "impose[d] the new requirement on every existing agreement with no opportunity for one of the parties first to withdraw." *Rolec, Inc. v. Finlay*

Hydrascreen USA, *Inc.*, 917 F. Supp. 67, 69–70 (D. Me. 1996) (applying the federal contract clause).

- Maryland: The Eleventh Circuit found that retroactive application of Maryland's Equipment Dealer Contract Act would "substantially impair the contractual relationship between [the manufacturer and the dealer] and would violate the Contracts Clause." *Reliable Tractor, Inc. v. John Deere Constr. & Forestry Co.*, 376 F. App'x 938, 942 (11th Cir. 2010) (applying the federal contract clause).

- Michigan: The Sixth Circuit found that retroactive application of the Michigan Farm and Utility Equipment Act was unconstitutional where, before the adoption of the statute, "neither party expected such a limitation on their freedom to sever their relationship." *See Cloverdale Equip. Co. v. Manitowoc Eng'g Co.*, No. 97-1664, 1998 U.S. App. LEXIS 15144, at *15 (6th Cir. July 1, 1998) (applying the contract clauses of the U.S. and Michigan constitutions).

- Montana: "It would be unconstitutional to apply the statutory protections provided by the [Montana Licensing of New Motor Vehicle Manufacturers, Distributors, and Importers] franchise laws retroactively . . . ." *Hi-Tech Motors v. Bombardier Motor Corp.*, No. DV 02-0795, 2006 Mont. Dist. LEXIS 830, at *7 (Mont. Dist. Ct. Apr. 13, 2006) (the court did not specify the applicable provision of the Montana or U.S. Constitutions).

- Ohio: The Third Circuit found that retroactive application of Ohio's dealer statute would violate the anti-retroactivity clause of the Ohio Constitution. *See Bull Int'l, Inc. v. MTD Consumer Grp., Inc.*, 654 F. App'x 80, 92–93 (3d Cir. 2016). "The statute's heightened termination requirements . . . would negate [the manufacturer's] rights. . . and impose additional burdens, duties, obligations, or liabilities on [the manufacturer] which the parties did not include in the Agreements." *Id.* (internal quotation marks and citations omitted). *See also Bob Tatone Ford, Inc. v. Ford Motor Co.*, 197 F.3d 787, 792 (6th Cir. 1999) (same).

- Rhode Island: Retroactive application of the amendment to Rhode Island's dealers' law "would impair established contract rights" and would be "an unconstitutional interference with contractual obligations." *Scuncio Motors, Inc. v. Subaru of New England, Inc.*, 555 F. Supp. 1121, 1130 (D.R.I. 1982) (applying the federal contract clause).

- South Dakota: The Eighth Circuit found that the dealer protection statute violated the Contract Clause because it was "a substantial impairment on pre-existing contractual relationships, and that there is no legitimate and significant public purpose." *Equip. Mfrs. Inst. v. Janklow*, 300 F.3d 842, 847 (8th Cir. 2002) (applying the contract clauses of the U.S. and South Dakota Constitutions).

- Tennessee: The Sixth Circuit found that retroactive application of amendments to the Tennessee Repurchase Franchise Inventory Bill was unconstitutional under state and federal contract clauses. *See Jack Tyler Eng'g Co. v. SPX Corp.*, 294 F. App'x 176 (6th Cir. 2008). The court stated: "[w]e do not view a significant change in bargaining power between retailers and suppliers as a clear-cut advancement of the public interest when such a change is applied retroactively." *Id.*

Consistent with the reasoning and holdings of these courts, this Court should hold that retroactive application of the TDA is unconstitutional.

CONCLUSION

For the foregoing reasons, the Association of Equipment Manufacturers respectfully asks this Court to answer the certified question in the affirmative and hold that retroactive application of the TDA violates Article I, § 16 of the Texas Constitution.

Dated: March 11, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this Amicus Curiae brief contains **5,137** words, exclusive of the caption, table of contents, index of authorities, signature, certificate of compliance, and certificate of service.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was forwarded to all counsel of record by electronic filing in accordance with the Texas Rules of Appellate Procedure on March 11, 2022.

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