No. 23-30480

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TESLA, INC. ET AL,

VS.

LOUISIANA AUTOMOBILE
DEALERS ASSOCIATION,
ET AL,

BRIEF OF LEGAL AND ECONOMIC SCHOLARS AS AMICI CURIAE IN SUPPORT OF APPELLANT

FISH & RICHARDSON P.C.

Thomas H. Reger II
1717 Main Street
Suite 5000
Dallas, TX 75201
(214) 292-4084
reger@fr.com

Attorney for Amici Curiae *R. Warren Anderson, Christine P. Bartholomew, Roger D. Blair, Donald J. Boudreaux, Henry N. Butler, Steve Calandrillo, Daniel A. Crane, Floridan Ederer, Kenneth Elzinga, Eleanor M. Fox, James Grimmelmann, Robin Hanson, Herbert Hovenkamp, Francine*

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Lafontaine, Robert H. Lande, Marina Lao, Mark A. Lemley, Stanley Liebowitz, Yekaterina Valerie Litvak, Anup Malani, Geoffrey A. Manne, Doug Melamed, Mark. J. Perry, Edward A. Snyder, Michael E. Sykuta, Alex Tabarrok, Avishalom Tor, Alexander Volokh, Samuel N. Weinstein, Lawrence J. White, Abraham L. Wickelgren

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- R. Warren Anderson, Associate Professor of Economics, University of Michigan-Dearborn
- Christine P. Bartholomew, Vice Dean for Academic Affairs and Professor of Law, University at Buffalo School of Law
- Roger D. Blair, Professor, Department of Economics, University of Florida
- Donald J. Boudreaux, Professor of Economics, George Mason University
- Henry N. Butler, Henry G. Manne Professor of Law and Economics. Chairman, Law & Economics Center, Antonin Scalia Law School, George Mason University
- Steve Calandrillo, Jeffrey & Susan Brotman Professor of Law, University of Washington School of Law
- Daniel A. Crane, Richard W. Pogue Professor of Law, University of Michigan
- Floridan Ederer, Allen and Kelli Questrom Professor in Markets, Public Policy & Law, Boston University
- Kenneth G. Elzinga, Robert C. Taylor Professor of Economics, University of Virginia
- Eleanor M. Fox, Walter J. Derenberg Professor of Trade Regulation Emerita, New York University School of Law
- James Grimmelmann, Tessler Family Professor of Digital and Information Law, Cornell Law School
- Robin Hanson, Associate Professor of Economics, George Mason University
- Herbert Hovenkamp, James G. Dinan University Professor, University of Pennsylvania Carey Law School
- Francine Lafontaine, William Davidson Profess of Business Economics and Public Policy Professor of Economics, University of Michigan
- Robert H. Lande, Venable Professor of Law Emeritus, University of Baltimore School of Law
- Marina Lao, Professor of Law, Seton Hall University School of Law
- Mark A. Lemley, William H. Neukom Professor, Stanford Law School

[1] Amici join this brief solely in their individual capacities and express only their individual views. Institutional affiliations are listed for identification purposes only.

Director, Stanford Program in Law, Science, and Technology
Senior Fellow, Stanford Institute for Economic Policy Research

- Stanley Liebowitz, Ashbel Smith Professor of Economics, University of Texas, Dallas
- Yekaterina Valerie Litvak, Professor of Law, Northwestern Pritzker School of Law
- Anup Malani, Lee and Brena Freeman Professor, University of Chicago Law School
- Geoffrey A. Manne, President & Founder | International Center for Law & Economics
- Doug Melamed, Visiting Fellow, Stanford Law School and Scholar in Residence, USC Gould School of Law
- Mark J. Perry, Professor Emeritus of Economics and Finance, University of Michigan-Flint
- Edward A. Snyder, William S. Beinecke Professor of Economics and Management, Yale University School of Management
- Michael E. Sykuta, Executive Director of Financial Research Institute and Associate Professor of Applied Economics, University of Minnesota
- Alex Tabarrok, Director: Center for Study of Public Choice Bartley J. Madden Chair in Economics at the Mercatus Center Department of Economics, George Mason University
- Avishalom Tor, Professor of Law and Director, Notre Dame Research Program on Law and Market Behavior, Notre Dame University
- Alexander Volokh, Associate Professor, Emory Law School
- Samuel N. Weinstein, Professor of Law, Co-Director, Heyman Center on Corporate Governance, Benjamin N. Cardozo School of Law, Yeshiva University
- Lawrence J. White, Robert Kavesh Professor of Economics, New York University
- Abraham L. Wickelgren, Fred And Emily Marshall Wulff Centennial Chair in Law, University of Texas

STATEMENT OF AMICI INTEREST

Amici are law professors, economists, or other academics with expertise in competition law and economic regulation. Amici do not work for Tesla, nor have they been compensated in any way for their participation in this brief.

SUMMARY OF ARGUMENT

Amici appear in support of Tesla on two issues with a common thread.[2] The district court's opinion erred in insulating the actions of the Louisiana legislature and the Louisiana Motor Vehicle Commission ("LMVC") from antitrust and constitutional review under a flawed framework for scrutinizing state regulations that suppress competition and favor economic special interests.

First, Amici submit that the district court erred in holding that commissioners of the LMVC were protected by *Noerr-Pennington* immunity when they "agreed with [the Louisiana Automobile Dealers Association ("LADA")] to use the regulatory power of the Commission to investigate Tesla." Op. at 27. Although public officials may enjoy *Noerr-Pennington* immunity when they act in a purely private capacity, a public official who is also a market participant and agrees with others to utilize public power in a manner designed to suppress competition in order to further his own economic interests should not be immunized from antitrust scrutiny. The *Noerr-Pennington* doctrine protects the rights of citizens to petition

[2] Amici take no position on other arguments raised by Tesla's appeal.

the government for redress of grievance. It does *not* protect governmental officials who conspire to use governmental power to favor their own economic interests. The district court's approach would create a loophole in the antitrust laws permitting actors wielding state power to avoid responsibility for abuses of official power.

Second, Amici dispute the district court's finding that Louisiana's direct sales ban had a rational basis in consumer protection. As Amici explain below, direct sales bans in automotive retailing were historically focused on the exclusive goal of protecting dealers in franchise relationships with manufacturers. Thus, in the cases in which this Court upheld such statutes against constitutional challenge—*Ford Motor Co. v. Texas Dep't of Transp.*, 264 F.3d 493 (5th Cir. 2001); *Int'l Truck & Engine Corp. v. Bray*, 372 F.3d 717 (5th Cir. 2004)—the ostensible rational basis of the legislation was the protection of dealers against the superior bargaining power of their franchising manufacturers. But that logic can have no bearing on the application of Louisiana's 2017, anti-Tesla direct sales prohibition, for the simple reason that Tesla (and other new electric vehicle manufacturers) do not use franchised dealers at all, but sell directly to the consuming public. In such circumstances, dealers are not being protected as franchisees, they are protected from economic competition by companies using a different business model—exactly what this Court held does *not* count as a rational basis in *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013). Further, efforts to justify direct sales bans as consumer

protection rather than dealer protection have no support in economic theory or evidence. Such arguments are mere pretexts for the economic protectionism that this Court has held does not survive equal protection scrutiny.

BACKGROUND

A brief review of the history of automobile distribution may help to frame the issues presented in Tesla's appeal. Automotive manufacturer franchising of dealers began in 1898 with a franchise by General Motors to sell steam automobiles. *See* Francine Lafontaine & Fiona Scott Morton, *Markets: State Franchise Laws, Dealer Terminations, and the Auto Crisis*, 24 J. ECON. PERSP. 233, 234 (2010). However, for the first few decades of the 20th century, franchising was not the predominant distribution model. Rather, manufacturers employed a variety of distribution methods including direct distribution through factory-owned stores and traveling salesmen, and sales through wholesalers, retail department stores, and consignment arrangements. *See* Thomas G. Marx, *The Development of the Franchise Distribution System in the U.S. Automobile Industry*, 59 BUS. HIST. REV. 465, 465-66 (1985). As automobile consumption intensified, however, the manufacturers moved increasingly toward an independent franchised dealer model in order to focus on their core competency in manufacturing and find additional sources of capital to fund their distribution operations. *See generally* Daniel A. Crane, *Tesla, Dealer Franchise Laws, and the Politics of Crony Capitalism*, 101 Iowa L. Rev. 573, 578-80 (2016).

The dealer-franchise system that has largely prevailed since the mid-twentieth century grew out of lobbying efforts by automobile dealers from the 1930s to the 1950s in response to perceived abuses of the franchise relationship by car manufacturers. *See* Crane, *supra*. At that time, General Motors, Ford, and Chrysler ("the Big Three") dominated the market. Dealers were largely family-owned "mom and pop" shops. Manufacturers were perceived as having grossly unequal bargaining power and were able to secure contracts that imposed draconian terms on the dealers. *See* Friedrich Kessler, *Automobile Dealer Franchises: Vertical Integration by Contract*, 66 YALE L.J. 1135, 1155 (1957); CHARLES MASON HEWITT, JR., AUTOMOBILE FRANCHISE AGREEMENTS 23-40 (1956); BEDROS PETER PASHIGIAN, THE DISTRIBUTION OF AUTOMOBILES, AN ECONOMIC ANALYSIS OF THE FRANCHISE SYSTEM (1961). For example, during the Depression, Henry Ford kept his factories running at "full tilt" and allegedly was able to "force" dealers to buy inventories of Model Ts that they would be unable to sell, under threat of not getting any more inventory in the future. *See* James Surowiecki, Dealer's Choice, NEW YORKER (Sept. 4, 2006), http://www.newyorker.com/magazine/2006/09/04/dealers-choice-2. According to a 1956 Senate Committee report, franchise agreements of the 1950s typically did not require the manufacturer to supply the dealer with any inventory and allowed the manufacturer to terminate the franchise relationship at will. S. REP. NO. 2073, at 3

(1956). Conversely, the manufacturers could often force dealerships to accept unwanted cars. Thus, the franchise agreements were perceived as shifting risk downward to dealers and reward upwards to the manufacturers.

During the 1930s to 1950s, the dealers pressured Congress to enact a scheme protecting them from the power of the Big Three. They obtained little of what they wanted from the federal government. A 1939 report by the Federal Trade Commission ("FTC") found some franchising abuses by manufacturers, but also that the exercise of manufacturer power actually created intensive retail competition to the benefit of consumers. FED. TRADE COMM'N, ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION FOR THE FISCAL YEAR ENDED JUNE 30 1939, at 24-25 (1939), https://www.ftc.gov/sites/default/files/documents/reports_annual/annual-report-1939/ar1939_0.pdf. The FTC also accused the dealers themselves of employing various anti-consumer practices, such as "padding" new car prices, price fixing, and "packing" finance charges. Eventually, the dealers secured a modest federal victory with the Automobile Dealers' Day in Court Act of 1956, Pub. L. No. 84-1026, 70 Stat. 1125, which allows dealers to sue manufacturers who, without good faith, fail to comply with the terms of a franchise agreement or terminates, cancels, or refuses to renew a franchise. *See generally Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

The dealers secured more significant victories in state legislatures. During the same time period, states began to pass statutes governing automotive franchise relations. Today, all fifty states have such laws. Their terms vary, but they commonly include prohibitions on forcing dealers to accept unwanted cars, protections against termination of franchise agreements, and restrictions on granting additional franchises in a franchised dealer's geographic market area. Crane, *supra.*

One of the typical provisions is a prohibition on direct sales by a franchising manufacturer. *See* Cynthia Barmore, *Tesla Unplugged: Automobile Franchise Laws and the Threat to the Electric Vehicle Market*, 18 Va. J. L. & Tech. 185, 189 (2013). The rationale for these direct sales prohibitions was that it was unfair for a manufacturer to induce its franchised dealer to make significant investments in promoting the manufacturer's brand and then open up its own retail store in competition with its dealer. Crane, *supra*. The manufacturer could ostensibly sell below its dealer's price (by keeping the wholesale price to the dealer high) and unfairly siphon off the benefits of the dealer's investment in the brand. To prevent such exploitation, manufacturers would be prohibited from competing against their own franchised dealers.

Since at the time of these statutes the three relevant manufacturers—General Motors, Ford, and Chrysler—were all in the franchising business, most state statutes did not spell out that the statutory prohibition was intended to apply to franchising

manufacturers. That was simply assumed. However, the structure of these statutes makes clear that manufacturer competition against its own franchisees was the exclusive concern. For example, the California statute prohibits a manufacturer from opening a retail store within a ten-mile radius of its franchised dealer. California Vehicle Code - VEH § 11713.3.

Direct sales prohibitions arose as part of a larger package of protections for dealers from unfair exploitation by their franchising manufacturer. As several judicial decisions across the country have recognized, these statutes were not intended to protect franchisees from interbrand competition from manufacturers that did not franchise at all. The decision of the Massachusetts Supreme Court in *Massachusetts State Auto. Dealers Ass'n, Inc. v. Tesla Motors, M.A., Inc.*, 15 N.E.3d 1152 (Mass. 2014) is the leading precedent. The legal question presented was whether the dealers had standing to sue Tesla under amendments to the Massachusetts franchise dealer statute. Although the court only ruled on the issue of standing—finding that the dealers lacked it—its reasoning showcases the context of the direct sales prohibitions.

As the court explained, the direct sales prohibition "was enacted in recognition of the potentially oppressive power of automobile manufacturers and distributors in relation to their affiliated dealers." *Id.* at 679 (citation omitted). The direct sales prohibition was part of a "Dealers' 'Bill of Rights' Provision," that "was

intended to protect franchised dealerships from specific types of abuses by their manufacturers." *Id.* (citation omitted). The court held that "[t]he type of competitive injury" the dealers described "between unaffiliated entities" was "not within the statute's area of concern." *Id.* at 684. "Historically, the statute was intended "to protect motor vehicle dealers from a host of unfair acts and practices historically directed at them ***by their own brand*** manufacturers and distributors." *Id.* at 684-85 (emphasis added). "It would be anomalous to find, within this detailed list of rights and protections that are conferred on dealers vis-à-vis their manufacturers and distributors, a lone provision giving dealers protection against competition from an unaffiliated manufacturer." *Id.* at 685. The court concluded that the direct sales prohibition "was intended and understood only to prohibit manufacturer-owned dealerships when, unlike Tesla, the manufacturer already had an affiliated dealer or dealers in Massachusetts." *Id.* at 688.

The Massachusetts Supreme Court got the history exactly right. So did the New York Supreme Court in *Greater New York Auto. Dealers Ass'n v. Department of Motor Vehicles*, 969 N.Y.S.2d 721 (N.Y. S. Ct. 2013), another decision denying the dealers standing to challenge Tesla's opening of a retail operation. Like the Massachusetts court, the New York court understood the state's direct sales prohibition to regulate the relationship between a franchising manufacturer and its franchised dealer, not interbrand competition by non-franchising manufacturers.

Id. at 726.

The history of dealer franchise laws cast important light on the actions of the actions of the Louisiana legislature and the LMVC with respect to direct sales. The earlier generations of direct sales prohibitions were part of a package of protections of dealers from their franchising manufacturers. Those justifications for the original direct sales bans have no bearing on the current efforts by the car dealers' lobby to block competition by electric vehicle ("EV") start-ups like Tesla that do not utilize franchised dealers at all, and therefore pose no possible risk of abusing some superior bargaining power over their dealers. Louisiana's efforts to prevent direct sales and service must therefore be understood not as protection of a dealer's contractual relationship with manufacturers, but of protection of dealers as against a new technology and form of competition. It is to those nakedly protectionist efforts that Tesla's antitrust and constitutional claims are directed.

ARGUMENT

I. THE *NOERR-PENNINGTON* DOCTRINE DOES NOT PROTECT STATE OFFICIALS WHO ARE ALSO MARKET ACTORS AND CONSPIRE TO USE STATE POWER TO SUPPRESS COMPETITION IN VIOLATION OF FEDERAL ANTITRUST LAW

A. The *Noerr-Pennington* and *Parker* Doctrines Should Be Read Conjunctively to Allow Scrutiny of Market Actors who Abuse State Power to Suppress Competition

Two important immunities from antitrust scrutiny protect the rights of citizens and governments to engage in ordinary democratic processes. First, grounded in

First Amendment values, *Noerr-Pennington* immunity permits citizens to petition any branch of government to take action that may suppress competition. *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965). Second, when governments enact policies that suppress competition in democratically legitimate ways, those regulatory decisions are not preempted by federal antitrust law. *Parker v. Brown*, 317 U.S. 341, 351 (1943); *California Retail Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105-06 (1980). As shorthand, it may be useful to think about *Noerr-Pennington* immunity as relating to the *inputs* of democratic processes and *Parker* immunity as relating to the *outputs*.

Often, in the hurly-burly of democratic decision-making, the doctrines converge. Thus, for example, in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), a billboard company brought suit against both the city of Columbia, South Carolina, and a private competitor that had allegedly cemented its monopolistic grasp on 95% of the city's advertising space by inducing the City to pass an ordinance severely restricting new billboard construction. *Id.* at 368. The plaintiff alleged a conspiracy between market actors and public officials to suppress competition in favor of private interests. *Id.* at 369. The Supreme Court found the suit precluded by both *Noerr-Pennington* and *Parker* immunity. On the output side, the ordinance represented the exercise of state power and, even if the state actors

who adopted it had in some way acted "corruptly," the cure was at the ballot box rather than in a federal antitrust suit. *Id.* at 379. Similarly, to the extent that the suit was focused on the private actors who urged the public officials to adopt the anticompetitive ordinance, that "a private party's political motives are selfish is irrelevant: *Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose." *Id.* at 380 (cleaned up). Thus, *Noerr-Pennington* and *Parker* immunity work conjunctively to allow citizens to petition for anticompetitive regulations, and for public officials to enact them.

But these immunities are not absolute. In particular, *Parker* immunity depends on two criteria that the Supreme Court enunciated in *Midcal*: "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." 445 U.S. at 105 (cleaned up). The function of these criteria is to allow the state to suppress competition when the state itself takes conspicuous responsibility for the decision, allowing citizens to exercise to endorse or reject the state's actions in democratic ways, such as through elections.

In recent years, the Supreme Court has made clear that the second prong of the *Midcal* test—the requirement of "active supervision" of the anticompetitive policy by state actors—requires that the state actor at issue be a "sovereign actor" and not a "nonsovereign actor controlled by active market participants." *North*

Carolina State Bd. of Dental Examiners v. FTC, 574 U.S. 494, 503-05 (2015). In *North Carolina Dental*, because the state board was controlled by dentists and dental hygienists (market actors), it did not count as the state for purposes of the second prong if *Midcal* even though it exercised the coercive power of the state. *Id.* at 510. Immunizing the state action from antitrust scrutiny in such circumstances would create an undue risk "that active market participants will pursue private interests in restraining trade." *Id*; *see also Veritext Corp. v. Bonin*, 901 F.3d 287, 290 (5th Cir. 2018) (finding absence of *Parker* immunity where discretionary decisions were made by market participants without adequate supervision of state actors).

Here, the commissioners of the LMVC are car dealers—market participants who, like the dentists in North Carolina, have incentives to wield state power to suppress competition for their own private benefit. The district court correctly held that "the State of Louisiana does not actively supervise the Commission's enforcement activities and that the commissioners are thus not entitled to *Parker* immunity." Op. at 38. Unfortunately, however, the district failed to understand the relevance of that holding to the *Noerr-Pennington* question. Although properly recognizing that the commissioners could be subject to antitrust scrutiny for anticompetitive way in which they wielded state power (the outputs), the district court held that they could not be subject to antitrust scrutiny for their conspiracy to wield state power in that way (the inputs). Op. at 31. Finding that "the availability

of *Noerr-Pennington* immunity [does not depend] on a finding that the action resulting from the petitioning constitutes state action entitled to immunity under the *Parker* doctrine," the district court dismissed Tesla's challenge to the alleged conspiracy among the commissioners to use the LMVC's power to block competition by electric vehicle manufacturers seeking to sell directly to the consuming public. *Id.*

Amici submit that this unmooring of the *Parker* and *Noerr-Pennington* doctrines in the context of this case was erroneous. The district court reached its conclusion in large part based on the authority of the *Areeda-Hovenkamp* treatise's assertion that "*Noerr* immunity for a private party's petition to the government in no way depends on a finding of *Parker* immunity for the subsequent government action." Op. at 31 (citing Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 229 (4th ed. 2022). Amici have no quarrel with that statement from *Areeda & Hovenkamp* as a general matter, but submit that it was misapplied as to this case. As examples given in *Areeda & Hovenkamp* illustrate, there are circumstances in which a private actor may lobby the government for anticompetitive action, causing the government to take action "that turns out later to be insufficiently authorized or even unconstitutional," and *Noerr-Pennington* immunity continues to protect the citizen's petitioning even though the ultimate state action is not immune from review. *Areeda & Hovenkamp*, ¶ 229. But that has nothing to do with the facts here, where the

alleged conspirators are not merely private citizens lobbying the government to favor their interests, but rather are market participants who have been delegated the coercive power of the state and corruptly agree to use that state power to suppress competition. To immunize such state actors from scrutiny for their agreement to misuse state power would stand the *Noerr-Pennington* doctrine on its head. Rather than protecting the rights of the public to petition the government, it would empower government to conspire against the public.

Amici propose a tailored doctrinal approach to preventing this perverse outcome: When market participants are clothed with state power but do not qualify for *Parker* immunity because they are not sufficiently supervised by state actors who are not market participants, their agreement to abuse the state power they wield to suppress competition and favor their own interests is not protected by *Noerr-Pennington* immunity. Stating the rule in this manner would adhere to *Omni Advertising's* framework for applying the *Noerr-Pennington* and *Parker* doctrines conjunctively, respect *North Carolina Dental's* concern with abuses of state power by self-interested market actors, and leave ample space for citizens who are not clothed with state power to lobby their governments for whatever favors and benefits the political process will bear.

B. The District Court Erred in Treating Allegations of Conspiracy by LMVC Commissioners as Involving Actions in the Commissioners' Private Capacities

The error in the district court's reasoning may derive from the court's assumption that the conspiracy alleged concerned actions by the commissioners in their "individual" or "private" capacities. Op. at 26-28. Amici accept that people who are state actors can, in some circumstances, also act as ordinary citizens in a purely private capacity, and that they should enjoy *Noerr-Pennington* immunity in those contexts. For example, in one of the cases cited by the district court, *Bayou Fleet, Inc. v. Alexander*, 26 F. Supp. 894 (E.D. La. 1998), the defendant was a member of the city council and also a competitor of the plaintiff. Defendant allegedly lobbied various governmental bodies other than city council—including the Louisiana Coastal Zone Management Authority, the United States Army Corps of Engineers, and the Lafourche Basin Levee District Board—to take anticompetitive action. *Id.* at 896. As to those activities, the district court found that *Noerr-Pennington* immunity applied: "Alexander's unofficial activities to persuade governmental authorities *other than the Parish Council* (of which he is a member) to make zoning and permit decisions which would close down Bayou Fleet's sand pit operations are immune from antitrust liability under the *Noerr–Pennington* doctrine." *Id.* at 896 (emphasis added).

Fair enough, but irrelevant here. As the district court recognized, Tesla's claim

is that the commissioners "agreed with LADA to use the regulatory power of the Commission to investigate Tesla." Op. at 27. The allegation here is not that the commissioners, acting in a purely private capacity, lobbied some other governmental body to take action, but rather that they agreed to use "the regulatory power of the Commission"—*their Commission*—to crush competition. By definition, a person clothed with the coercive power of the state who agrees to use that power in a particular way is not acting in a private capacity. She is acting as an agent of the state, and should be accountable to public legal principles with regard to her actions.

The approach taken by the district court threatens to immunize from antitrust scrutiny a broad array of anticompetitive actions undertaken under color of state power by self-interested market actors. Amici respectfully submit that this Court should correct that error and apply the antitrust laws to actions by market participants who are clothed with state authority and abuse that authority to suppress competition.

C. Members of the Louisiana Automobile Dealers Association Who Allegedly Conspired with Members of the LMVC to Suppress Competition Should Also Face Antitrust Scrutiny

Tesla alleges that the LMVC commissioners conspired with other members of the Louisiana Automobile Dealers Association (LADA) to wield the governmental powers of the LMVC to suppress competition. For the reasons set forth above, the commissioners should not enjoy *Noerr-Pennington* immunity for

conspiring to wield state power in a manner not immunized from antitrust review under the *Parker* doctrine. By the same token, members of LADA who conspired with them should not enjoy *Noerr-Pennington* immunity either.

The Supreme Court has held that whether *Noerr-Pennington* immunity applies in a particular context depends on "the source, context, and nature of the anticompetitive restraint at issue." *Allied Tube & Conduit Corp. v. Indian Head, Inc.*,0020486 U.S. 492, 499 (1988). In *Allied Tube*, the Court held that *Noerr-Pennington* immunity did not apply to persons who conspired in a standard-setting organization to prevent a competitive technology from being included in a technical code that would be presented to state legislatures for adoption. Because "private standard-setting associations have traditionally been objects of antitrust scrutiny" and the standardization activity was one step removed from lobbying state legislatures to adopt the relevant codes, the defendants did "not enjoy the immunity accorded those who merely urge the government to restrain trade." *Id.* at 500-01.

The situation here is very similar to that in *Allied Tube*. Antitrust has traditionally policed trade associations, which have the potential to be employed for anticompetitive reasons. The only potential difference between this case and *Allied Tube* is that the LMVC commissioners had direct access to state power, which makes this situation even more threatening to competition than in *Allied Tube*. If the LMVC commissioners lack *Noerr-Pennington* immunity because the Commission's actions

do not count as state action for *Parker* purposes, their conspiracy with other members of the trade association should not be immunized either. Rather, Amici submit that when market participants are clothed with state power but do not qualify for *Parker* immunity because they are not sufficiently supervised by state actors who are not market participants, their agreement to abuse the state power and suppress competition should not be granted immunity from antitrust scrutiny, and any private persons who conspire with them should also not qualify for *Noerr-Pennington* immunity.

II. A PROHIBITION ON DIRECT SALES BY MANUFACTURERS WHO DO NOT HAVE FRANCHISING RELATIONSHIPS LACKS ANY RATIONAL BASIS IN EITHER DEALER PROTECTION OR CONSUMER PROTECTION

Amici now turn to a separate but related argument concerning judicial scrutiny of public power exercised to protect favored market participants from competition. The district court erred in finding that Louisiana's direct sales prohibition has a rational basis under the Fourteenth Amendment's equal protection clause. Unlike in earlier contexts where this Court upheld state automotive franchise distribution restrictions designed to protect franchised dealers from the superior power of their franchising manufacturers, no such basis could support a prohibition on direct sales by manufacturers who do not employ franchised dealers at all. Rather, as the dealers' lobby has recognized across the country, the only ostensible basis on which such statutes could be justified is *consumer* protection. But there is no rational consumer

protection basis supporting such statutes. Rather, such statutes are efforts to protect a discrete set of market participants from economic competition, which is not a legitimate basis for state action under this Court's precedent. *St. Joseph Abbey*, 712 F.3d 215.

A. This Court's Precedents Upholding Automobile Franchise Distribution Restrictions Should be Understood in the Historical Context of the Protection of Franchised Dealers against the Superior Bargaining Power of their Franchising Manufacturers

As noted in the Background section, state prohibitions on direct sales of automobiles by manufacturers have historically been focused on protecting dealers in franchising relationships with manufacturers, not on the completely different contemporary circumstance where start-up EV manufacturers do not sell through dealers at all but only directly to consumers. Understanding this history is critically important to understanding the context and reach of this Court's prior decisions upholding direct sales prohibitions.

In finding that Louisiana's prohibition on direct sales of automobiles has a rational basis, the district court relied on two decisions of this Court—*Ford Motor* and *International Truck*. However, both of those cases were decided long before a single mass-market electric vehicle was sold in the United States and at a time when every car manufacturer sold through franchised dealers. Accordingly, those cases could not and did not consider the very different circumstances in the market today—in particular, the sale of electric vehicles by manufacturers that do not have any

franchised dealers at all.

Ford Motor, decided in 2001, involved a prohibition by the Texas Department of Transportation of Ford's efforts to sell used cars through its website. 264 F.2d at 498. Ford brought a variety of constitutional challenges, including dormant commerce clause, First Amendment, due process, and equal protection arguments. Its principal equal protection argument was that the state lacked a rational basis for classifying manufacturers differently than dealers since "manufacturers do not have disproportionate power in the preowned vehicle market." *Id.* at 510. This Court rejected that argument, referring back to its dormant commerce clause analysis where it had found that the statute's "legislative history indicates the legislature's intent to prevent manufacturers from utilizing their superior market position to compete against dealers in the retail car market." *Id.* at 500. All of this makes perfect sense in light of the context in which Texas prohibited direct sales. Like every other state that regulated the dealer-manufacturer relationship, Texas was concerned with protecting dealers in franchising relationships from the superior bargaining power of the manufacturer. It was that interest that this Court held legitimate in *Ford Motor*.

International Truck, decided in 2004, did not even involve an equal protection issue. In the portion of the opinion rejecting the plaintiff's dormant commerce clause challenge, this Court referred back to the *Ford Motor's* court's concerns about "vertically integrated companies taking advantage of their market position" and

discussed the legislative concern with manufactures "unfairly competing with dealers." *Id.* at 728-29. As in *Ford Motor*, this Court was considering the legitimacy of the state's interests in policing the franchised dealer relationship given the asymmetries in power between the franchising manufacturer and its dealers and the potential for unfair exploitation of that power if the manufacturer was allowed to compete with its own dealers. There was no question about the potential interests of the state in prohibiting direct sales by manufacturers that did not use franchised dealers at all. No such manufacturers were before the Court, nor did any exist.

This case presents an entirely different circumstance than the one that faced this Court in *Ford Motor* and *International Truck*. Driven by technological changes that have fundamentally altered the economics of vehicle manufacture, distribution, and servicing, Tesla and other EV start-ups employ a business model that does not involve *any* sales through franchised dealers. Hence, protecting the dealer from the manufacturer's superior bargaining power cannot be in part of a state's rational explanation for the direct sales prohibition, as applied to EV manufacturers. This important distinction was recognized in a recent decision of the U.S. District Court for the Western District of Texas, where the court held that "*Ford* establishes that Texas has a legitimate interest in regulating the relationship between franchising manufacturers and independent franchised dealers to address an imbalance in bargaining power between the two," but "that rationale has little bearing in the

context of Lucid's challenge, which is limited to the law's application against manufacturers that do not utilize independent dealers." *Group Lucid USA, Inc. v. Johnston*, 2023 WL 5688153, at *5 (June 21, 2023). As the court recognized, "[s]uch 'direct-sales-only' manufacturers cannot control a dealer's supply of vehicles, which eliminates the central justification cited by the Fifth Circuit in upholding the prohibition" in *Ford Motor*. *Id.*

Some terminology from antitrust law may help bring the matter into focus. The United States Supreme Court has long recognized the critical distinction between the regulation of intrabrand competition—competition among separate sellers of the same brand of product—and interbrand competition—competition between sellers in different brands. *See, e.g., Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 878 (2007). Since Tesla does not have any franchised dealers, its participation in the Louisiana retail market concerns interbrand competition—competition between Tesla and dealers who sell different brands of cars. This Court's *Ford Motor* and *International Motor* were concerned with intrabrand competition—the potential retail competition between a franchising manufacturer and its own dealers. Whatever the legitimacy of protections against intrabrand retail competition by car manufacturers, those justifications cannot be applied to the very different circumstance of limitations on interbrand competition, such as that accomplished by the Louisiana statute under review.

B. As Applied to Non-Franchising Manufacturers, Direct Sales Prohibitions Amount to Nothing but the Protection of a Discrete Interest Group From Economic Competition, and Lack Any Rational Basis

1. There Is No Consumer Protection Justification for Prohibiting Direct Sales by Non-Franchising Manufacturers

In recent years lobbyists for the car dealers have sought to re-cast the direct sales bans as consumer protection measures. Such arguments have no basis in history, public policy, or economics.

First, such arguments are entirely contrary to the history of the dealer franchise acts. As noted above, the vehicle franchise acts of the mid-twentieth century, from which contemporary state statutes descend, were concerned with protecting *dealers*, not *consumers.*

Second, the arguments in favor of consumer protection are being advanced by dealers who stand to gain financially from the limitation of competition rather than by consumer advocates. The consumer advocates are all on the side of permitting direct sales. For example, the senior leadership of the Federal Trade Commission—the preeminent federal consumer protection organization—has expressed the view that direct sales prohibitions "operate as a special protection for dealers—a protection that is likely harming both competition and consumers."[3] Similarly, the

[3] https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-regarding-michigan-senate-bill-268-which-would-create-limited-

Consumer Federation of America, Consumer Action, and Consumers for Auto Reliability and Safety have argued that direct sales prohibitions are harmful to consumer choice and should be repealed.[4] Not a single consumer organization has joined the dealers' self-serving claim that protecting them from interbrand competition will benefit consumers.

Finally, there is simply no plausible economic merit to the argument that prohibiting consumers from choosing to buy directly from a manufacturer is in the consumer's interest. Such arguments have been repeatedly debunked by leading economists, including past senior leaders of the Justice Department's Antitrust Division and Federal Trade Commission.[5] *See also* Daniel A. Crane, *Why Intra-Brand Dealer Competition Is Irrelevant to the Price Effects of Tesla's Vertical Integration*, 165 U. Pa. L. Rev. Online 179 (2017). Direct sales prohibitions do not lower prices to consumers, provide them with superior service, or in any way protect their interests. In sum, there is no viable consumer protection reason for prohibiting direct sales.

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exception-current/150511michiganautocycle.pdf (statement by Directors of Bureaus of Economics and Competition and Office of Policy Planning).

[4]https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjdk6rEhIH7AhXirYkEHTfVAF0QFnoECA4QAQ&url=https%3A%2F%2Fwww.autonews.com%2Fassets%2FPDF%2FCA98362217.PDF&usg=AOvVaw2q-aEMuK_w6Dcepj_A27AP.

[5] https://pluginamerica.org/wp-content/uploads/2021/04/Direct-Sales-Nationwide-Organizations-Open-Letter-4.13.pdf.

2. Prohibiting Non-Franchising Manufacturers from Selling Directly Will Diminish Consumer Choice, Impede Innovation, and Slow the Penetration of EV Technology

There are important consumer welfare reasons for allowing direct sales of electric vehicles. To Amici's knowledge, every EV start-up that has announced its plans to sell EVs in the United States has announced that it will pursue a direct sales model because selling through franchised dealers would be a significant competitive disadvantage. This list includes a large and diverse set of companies—not just well-known manufacturers like Tesla, but newer car companies like Rivian and Lucid, medium and heavy duty truck manufacturers like Arrival, and solar-powered car makers like Aptera. These companies have uniformly argued that the franchise dealer model is not suitable for EV sales by start-up companies that do not already have an established dealer network.

The traditional dealer model is based on high-pressure sales tactics to sell existing inventory to customers who already understand the technology, and then to earn the majority of the dealership's profits when the customer returns for service on the car. None of those assumptions work for EV sales. Customers need to be educated about the new technology, and most customers interact with an EV company a number of times before deciding to buy its product. There is no existing inventory sitting on the lot; EVs are typically build-to-order. And the profits dealers can expect from service are significantly lower than with internal combustion cars,

since an EV's service needs tend to be much lower. Not surprisingly, secret shopper studies of EV by dealers by the Sierra Club and Consumer Reports have found that dealers are ill-motivated and ill-prepared to sell EVs.[6]

Which distribution strategies work for which companies and which consumers can only be ascertained in a competitive market when companies and consumers can freely experiment and choose. Unless there is some rational reason to prohibit non-franchising manufacturers from pursuing a direct sales strategy, that strategy should be permitted. As noted throughout this brief, there is no such rational reason.

3. Louisiana's Effort to Block Direct Sales by Non-Franchising Manufacturers Lacks Any Rational Basis

In *St. Joseph Abbey*, this Court held that "naked economic preferences are impermissible to the extent that they harm consumers." 712 F.3d at 223. This holding captures the reality of Louisiana's direct sales prohibition. Whereas prohibiting direct sales by franchising manufacturers may plausibly be justified as protecting dealers in franchise relationships with those manufacturers,[7] prohibiting EV manufacturers from selling directly to consumers has only one purpose: protecting

[6] Sierra Club Releases First Ever Nationwide Investigation into Electric Vehicle Shopping Experience | Sierra Club (https://www.sierraclub.org/press-releases/2022/01/sierra-club-releases-first-ever-nationwide-investigation-electric-vehicle); Dealership Survey | Electric Cars - Consumer Reports News (https://www.consumerreports.org/cro/news/2014/04/dealers-not-always-plugged-in-about-electric-cars-secret-shopper-study-reveals/index.htm).

[7] Amici take no position on whether any of the original justifications for direct sales prohibitions as applied to franchising manufacturers are still viable.

dealers from a new form of technology and competition by companies with whom they have no relationship whatsoever. This statute is not designed to protect consumers, but to deprive them of choices and entrench the power of incumbent dealers. This is "mere economic protection of a particular industry," "that is favoritism," and "a naked transfer of wealth" from consumers to incumbent car dealers. *Id.* at 222-23. As such, it lacks any rational basis, and runs afoul of the equal protection clause of the Fourteenth Amendment.

4. The LMVC's Warranty Servicing Ban Also Lacks a Rational Basis

In addition to challenging Louisiana's statutory direct sales ban, Tesla challenges the LMVC's efforts to prevent Tesla from performing warranty servicing in Louisiana. Like the legislature's ban on direct sales, as applied to EV manufacturers seeking to service their own cars, a ban on servicing the manufacturer's own cars lacks any rational basis and represents a naked effort to block competition from a new technology and business model.

If anything, a ban on manufacturer-performed service is even more anticompetitive and anti-consumer than a ban on direct sales. Even in states like Louisiana that prohibit a company like Tesla from selling its cars to consumers, consumers are able to purchase a Tesla. They can interact with Tesla over the Internet or travel to another state to purchase or take delivery of their vehicle. No state does, nor consistently with the dormant commerce clause could, prohibit its

citizens from buying a car in another state and bringing it back home. Even though the direct sales ban undoubtedly creates considerable inconveniences for customers wishing to explore buying a Tesla or other EV and therefore raises a high entry barrier to EV market penetration, thousands of Louisiana residents have nonetheless purchased a Tesla.

A ban on service would mean that these customers would have no local option for servicing their vehicle. Although an EV's regular servicing needs tend to be lower than an internal combustion vehicle's and some servicing can be accomplished through remote diagnostics or over-the-air updates, there is still some servicing that needs to be done at a physical location by a trained technician. Preventing EV manufacturers from creating bricks-and-mortar servicing locations to satisfy their customers' needs and meet their warranty obligations is an extraordinarily anti-consumer measure. It discourages customers from buying a Tesla or other start-up's EV, and forces customers who do buy one to wait for a technician to come to their home for any work that does not need to be done in a shop or to drive to another state for service that does need to be done in a shop.

The adverse implications of service bans on competition between EV start-ups and dealers in incumbent brands are clear. The dealers have calculated that if they can stop local servicing, they can make buying a Tesla sufficiently unattractive that they will dramatically slow Tesla's market penetration (and that of other EV

start-ups). There are no legitimate public policy reasons for prohibiting a manufacturer that does not franchise dealers from servicing its own cars.

CONCLUSION

Amici respectfully submit that the district court's dismissal of Tesla's antitrust and equal protection claims should be reversed.

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Respectfully submitted,

/s/ Thomas H. Reger II

Thomas H. Reger II
FISH & RICHARDSON P.C.
1717 Main Street, Suite 5000
Dallas, TX 75201
(214) 292-4084
reger@fr.com

Attorney for Amici Curiae *R. Warren Anderson, Christine P. Bartholomew, Roger D. Blair, Donald J. Boudreaux, Henry N. Butler, Steve Calandrillo, Daniel A. Crane, Floridan Ederer, Kenneth Elzinga, Eleanor M. Fox, James Grimmelmann, Robin Hanson, Herbert Hovenkamp, Francine Lafontaine, Robert H. Lande, Marina Lao, Mark A. Lemley, Stanley Liebowitz, Yekaterina Valerie Litvak, Anup Malani, Geoffrey A. Manne, Doug Melamed, Mark. J. Perry, Edward A. Snyder, Michael E. Sykuta, Alex Tabarrok, Avishalom Tor, Alexander Volokh, Samuel N. Weinstein, Lawrence J. White, Abraham L. Wickelgren*

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of October, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Thomas H. Reger II
Thomas H. Reger II

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f), the brief contains 6473 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word for Office 365 in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ Thomas H. Reger II
Thomas H. Reger II