No.

In the Supreme Court of the United States

DIGITAL ALLY, INC.,
Petitioner,

v.

TASER INTERNATIONAL, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This is an anti-trust case arising out of the use of "commercial bribery" in connection with the sale of portable video recording devices known as "body cams." Citing news reports as well as the official findings of governmental auditors, Petitioner Digital Ally, Inc. ("Digital") sued Respondent Taser International, Inc. ("Taser") in the District of Kansas. Digital alleged that that Taser had excluded it and some 20 other competitors from the relevant market by bribing government officials to purchase its body cams, exclusively. In so doing, Taser had violated not only the anti-bribery provisions that appear in § 2(c) of the Robinson-Patman Amendments to the Clayton Act, 15 U.S.C. § 13(c) but other federal and state anti-trust laws.

On motion, the District Court dismissed all of Digital's anti-trust claims. Citing *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), the District Court held that Taser had a constitutional right to "petition" these government officials to purchase its products, including through the use of bribery, and, accordingly, that Digital's anti-trust claims were barred under the "*Noerr-Pennington* Doctrine." That order of dismissal was then affirmed by the Federal Circuit, without opinion.

The following represent important questions of federal anti-trust law that either should be settled by this Court or have been decided in a way that conflicts with relevant decisions of this Court:

1. In a case of first impression, the District Court held that since the sales in question were to "governmental" purchasers, *Noerr-Pennington*

immunized Taser not merely from the "general" proscriptions upon anti-competitive conduct that appear in the Sherman Act and its state law equivalents, but the highly specific prohibitions against the use of bribery in connection with the interstate sale of goods, that appear in § 2(c) of the Robinson-Patman Act. Does this represent an unwarranted extension of *Omni* and of *Noerr-Pennington* and is it otherwise contrary to this Court's settled Robinson-Patman jurisprudence, notably the statement in *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 512 (1972) that the "bribery of a public purchasing agent may constitute a violation of § 2(c) of the Clayton Act, as amended by the Robinson-Patman Act," *Noerr-Pennington* notwithstanding, and the holding in *Jefferson County Pharm. Assoc. v. Abbott Labs*, 460 U.S. 150, 159-60, 161 and 171 (1983), that when Robinson-Patman was enacted, Congress was well aware of the prospect that the Act would apply to governmental purchases and yet declined to exempt such transactions from its provisions?

2. The District Court relied upon *Omni* for the proposition not only that there is no "conspiracy" exception to *Noerr-Pennington* , but that even conduct amounting to "bribery or some other violation of state or federal law" is immune from attack under the Sherman Act. Since there is no mention of "bribery" in the recitation of facts appearing in *Omni*; since no claims involving allegations of bribery were submitted to the *Omni* jury; since no claim of bribery was mentioned in the judgment which this Court ultimately reviewed on certiorari; and since bribery was nowhere discussed in the *Omni* dissent, is *Omni's*

suggestion that bribery of a public official is no less protected than any other form of "petitioning," merely *dicta*, of no binding effect?

3. According to *Omni*, a showing, merely, that a governmental entity possessed the "authority to regulate" in the way that was alleged by the plaintiff to be anti-competitive, is all that is necessary in order for immunity, whether arising under *Parker v. Brown*, 317 U.S. 341 (1943) or under *Noerr-Pennington*, to attach. Was that regime of immunity, "ipso facto," abrogated subsequently by *North Carolina State Board of Dental Examiners v. FTC*, 135 S. Ct. 1101 (2015) as the dissent in *Board of Dental Examiners* itself suggests and with it the Court's dictum regarding "bribery?"

PARTIES TO THE PROCEEDINGS AND U.S. SUP. CT. R. 29.6 STATEMENT

Petitioner, who was Plaintiff-Appellant below is: DIGITAL ALLY, INC.

Respondent, who was Defendant-Appellee below is: TASER INTERNATIONAL, INC.

Digital Ally, Inc. is a corporation, the common stock of which is registered with the Securities and Exchange Commission and traded on one or more public exchanges. No parent or publicly held company owns 10% or more of Digital's' common stock.

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Digital respectfully submits the within Petition for Writ of Certiorari and does so for the following reasons.

First, the District Court's holding that the specific prohibitions against the use of bribery that appear in Robinson-Patman, § 2(c) are nonetheless subject to *Noerr-Pennington* immunity is the only decision of its kind in the history of anti-trust law. This Court should ensure that it is also the last.

As Digital will show, whatever impact it may have upon the kind of "general" proscriptions against "restraint upon competition" that are contained in the Sherman Act, the "*Noerr-Pennington* doctrine" can have no effect upon the specific and unequivocal prohibition against the use of bribery, in commerce, that appears in Robinson-Patman, § 2(c), 15 U.S.C. § 13(c). As this Court has made clear, Congress intended the prohibitions appearing in Robinson-Patman to be absolute and, without more, the anti-competitive practices described therein to be unlawful.

Omni, as relied upon by the District Court, is a poor vehicle for extending the doctrine, *sub rosa*, to Robinson-Patman, § 2(c). Neither *Omni* nor, for that matter, any of the Court's other *Noerr-Pennington* jurisprudence, say anything about Robinson-Patman, much less the applicability of *Noerr-Pennington* to claims arising under § 2(c). On the contrary, using *Omni* to effect such an unprecedented extension does violence to at least two decisions of this Court that deal directly with the application of Robinson-Patman in "governmental" settings. In *Jefferson County*

Pharm. Assoc., this Court held that when Robinson-Patman was enacted, Congress was well "aware of the possibility that the act would apply to governmental purchases" and that there simply is no suggestion in its legislative history that governmental purchasing is intended to be "immune" from Robinson-Patman. Likewise, in *California Motor Transp.*, the Court stated with sufficient clarity to defy misunderstanding, that the bribery of a public purchasing agent may constitute a violation of § 2(c) of Robinson-Patman. Neither of these decisions has been criticized, distinguished or overruled, whether by *Omni* or otherwise.

Second, the suggestion in *Omni* that the "petitioning" of government officials is immune from attack under the Sherman Act, *et al.* and even when accompanied by "bribery," establishes no rule of decision and any case that purports to follow it has been decided erroneously. The parties to *Omni* did not allege that the anti-competitive regulation at issue therein had been procured through bribery. The jury in *Omni* was not asked to determine whether bribery had occurred. The judgment which this Court ultimately chose to review, on certiorari, was not a judgment involving "bribery." Bribery was not an issue which any of the parties had advanced or could have advanced before this Court. The Court's own recitation of the facts upon which it then based its decision does not mention bribery and although three justices dissented from *Omni*, their dissent nowhere discusses bribery. Whether as a rhetorical flourish or otherwise, bribery is mentioned in the majority opinion, *ex gratia*, and even then almost in passing. This Court has said that is not bound to follow its own dicta when the point at issue was not fully debated.

That describes *Omni* and its treatment of "bribery" in connection with *Noerr-Pennington*, exactly.

Third, whether pursuant to *Parker* or *Noerr-Pennington*, *Omni* employs a simple formula for immunizing governments and the persons who "petition" them from anti-trust liability. *Omni* holds that when it can be shown that the governmental entity had the "power" to regulate in the manner alleged by the plaintiff to be anti-competitive, both that entity and the persons who induced it to so regulate are immune from suit under the Sherman Act. Once the requisite authority to act is established, either *Parker*/state action or *Noerr-Pennington* immunity will attach and in *Omni's* own words, will attach "ipso facto."

As Digital will show, this regime of immunity was modified, if not abrogated, by this Court in *North Carolina State Board of Dental Examiners v. FTC* as the dissent in that case itself recognizes. It is now the law, as announced in *Dental Examiners*, that a state cannot give immunity to those who violate the Sherman Act simply by "authorizing" them to violate it or by declaring that their actions in doing so are somehow "lawful." According to *Dental Examiners*, the mere fact that a governmental entity has been given a formal designation by the state vested with a measure of government power and required to follow procedural rules no longer entitles it to the kind of unexamined, ipso facto immunity which *Omni* endeavored to establish. If, after *Dental Examiners*, the mere vestiture with "government power" to act anti-competitively no longer carries with it an automatic promise of immunity, *Omni's* declarations regarding the ability of private persons to bribe the

presumptively "immune" with no less expectation of immunity in doing so, has likewise been impaired.

OPINIONS BELOW

The District Court's order/judgment of dismissal entered April 18, 2017 is not reported in the Federal Supplement, but is available for review at 2017 WL 131595, D. Kan. Case No. 16-2032 (1/12/2017). That order/judgment was affirmed by the Federal Circuit, without opinion, on May 2, 2018. Such order of summary affirmance does not appear in the Federal Reporter but is reported at 720 Fed. Appx. 1023 (Fed. Cir. 2018).

JURISDICTION

The District Court had subject matter jurisdiction over Digital's Second Amended Complaint pursuant to 28 U.S.C. §§ 1331, 1332, 1337, 1338 and/or 15 U.S.C. § 15(a).

On January 12, 2017, the District Court dismissed all of the anti-trust/unfair competition claims appearing in the Complaint and on April 14, 2017, the District Court certified its dismissal order of January 12, 2017 as a Final Judgment pursuant to Fed. R. Civ. P. 54(b).

On April 20, 2017, Digital filed its Notice of Appeal from that judgment to the United States Court of Appeals for the Tenth Circuit, as provided under 28 U.S.C. § 1291 and Fed. R. App. P. 4(a)(1)(A).

On July 10, 2017, the Tenth Circuit transferred Digital's appeal to the United States Court of Appeals for the Federal Circuit as provided under 28 U.S.C. §§ 1295(a)(1) and 1631.

On May 2, 2018, the Federal Circuit issued its judgment affirming the District Court's judgment of dismissal without opinion.

The within Petition for Writ of Certiorari has been filed not later than 90 days from and after May 2, 2018 as provided under U.S. Sup. Ct. R. 12 and 30 and, accordingly, the Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

15 U.S.C. § 13(c):

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

STATEMENT OF THE CASE

A. The Allegations Appearing in Digital's Complaint

1. In its original Complaint, Digital asserted claims against Taser for infringement of U.S. Patent Nos. 8,782,292 and 9,253,452, each of which gave Digital exclusive right to technology essential to the manufacture of body cams (Counts I and II).

2. In its Second Amended Complaint, Digital asserted additional claims against Taser for violation of the anti-bribery provisions appearing in the Robinson-Patman Act, § 2(c), 15 U.S.C. § 13(c) (Count III); for bribery and other anti-competitive conduct in violation of the Sherman Act, 15 U.S.C. § 1 (Count IV); for unfair trade practices in violation of Cal. Bus. & Prof. Code §§ 17403 and 17200-17208 (Counts V and VI); and for unfair competition in violation Kansas statutes, K.S.A. §§ 50-101 and 50-161 (Count VII); and K.S.A. §§ 50-112 and 50-161.

3. In material part, Digital alleged that together with perhaps 20 other competitors, it and Taser were engaged in the manufacture and sale of "body cams," most of which were sold to state and local governments.

4. Digital alleged that body cams are a unique category of product given the requirement that the devices be capable of recording alteration-resistant, time-stamped and downloadable sounds and images of evidentiary quality; that no other portable video/audiovisual recording devices are reasonably interchangeable with, nor acceptable substitutes for them, and that Digital, Taser and all other manufacturers thereof compete for the sale of their body cams in every place/locality within the United States.

B. Pleaded Facts Relating to Taser's Anti-Competitive Behavior

5. The well-pleaded facts relating to Taser's marketing practices were taken directly from news reports published by *USA Today*, the *Associated Press*, KRQE Television News 13 in Albuquerque, New Mexico, the *Los Angeles Daily News*, the *Los Angeles Times*, WREG News Channel 3 in Memphis, Tennessee and KQED TV in San Francisco, California, as well as official audit findings issued by the New Mexico State Auditor and the Office of Internal Audit of the City of Albuquerque, New Mexico.

6. Those facts, most of which Digital quoted, verbatim, included the following:

a. In the "race to equip police officers with body cameras, some cities" are "bypassing traditional purchasing rules to award" Taser with "controversial no-bid contracts" for those body cams;

b. Taser which was "emerging as a leading supplier of police body cameras has cultivated financial ties to police chiefs whose departments have bought the recording devices, raising conflict-of-interest questions;"

c. Taser "is covering airfare and hotels for police chiefs who speak at promotional conferences and is hiring recently retired chiefs as consultants, sometimes months after their cities sign contracts with the company;"

d. "[t]wo big cities are reviewing their ethics policies after the Associated Press

reported on how their police chiefs were closely linked to" Taser;

e. These "reviews [came] after the *AP* reported that Taser was building financial ties to current and former police chiefs who promote the company's body cameras and video storage system;"

f. "Salt Lake City Mayor Ralph Becker directed staff to review whether the rules and relationships with city vendors should be updated after facing questions about Chief Chris Burbank's speeches at Taser-sponsored events and online promotional video;"

g. Public records in Ft. Worth "show[ed] that Ft. Worth's then-police chief, Jeffrey Halstead, worked last year to complete a contract worth $2.7 million for 400" Taser body cameras and cloud storage "before a Taser "quarterly [sales] deadline;"

h. Halstead "later accepted Taser-funded trips to Boston, Miami and Phoenix" and after retiring from the Ft. Worth Police Department "in January, said he planned to become an 'official consultant' [for Taser] before traveling to Australia and Abu Dhabi for Taser events;"

i. "E-mails obtained by the AP … show that" Halstead was seeking 400 more body cameras for officers" in 2014 "and that Taser promised a discount if the deal could be approved before the end of the company's sales quarter;"

j. "Over the next three weeks, Halstead successfully pushed the city to approve a no-bid contract worth up to $2.7 million," and Halstead told Taser "at one point that he deserved a raise" because he succeeded in getting the contract approved before the end of Taser's "sales quarter;"

k. In "the following months, Taser had Halstead speak at events in Phoenix, Miami and Boston covering his airfare and lodging" and the "four-day Boston trip for Halstead and a companion" alone "cost Taser $2,445;"

l. Halstead "said he reached an oral agreement" with Taser "during the contract negotiations to travel to three other cities at Ft. Worth's expense to talk about his experience with Taser cameras" and in "one e-mail, he told a Taser representative he believed he could persuade San Antonio to buy its cameras 'but my fee is not cheap! LOL';"

m. In New Orleans, former "police Superintendent Ronald Serpas confirmed he signed a Taser consulting agreement after he stepped down" from the New Orleans Police Department "in August of 2013;" that Serpas had "spoken at [Taser]-sponsored events in Canada and Arizona" and that "less than a year earlier, in December, 2013," New Orleans "agreed to a $1.4 million contract with Taser for 420 cameras and storage:"

i. In "an interview with the *AP*, Serpas declined to detail how the

consulting deal came about but said it did not violate a state ethics law because he is not lobbying his former employer" and also said that he "was not on the committee that recommended Taser for the contract;"

ii. Although Serpas said that his "role was to speak about how technology affects policing and not to promote products," Taser's own marketing materials "quote him as calling" Taser's body "cameras … 'a game changer for police departments here and around the world.'"

7. According to an official report issued by the New Mexico State Auditor, Tim Keller, in connection with a no-bid purchase of Taser body cams by the City of Albuquerque and Keller's public comments regarding the report:

a. The "former employment with the city [of Albuquerque] of former Police Chief Raymond Schultz … (ending with his retirement date of January 1, 2014) overlapped with his contract work with Taser … (beginning in October, 2013), resulting in the probable violation of City Conflict of Interest and Public Purchase ordinances and the Governmental Conduct Act" of the State of New Mexico;

b. There was "a close correlation between the Albuquerque Police Department dealings with Taser and as evidence of Taser's influence over the procurement process" former Chief Schultz "boasted [of the] personal benefits

the Chief and other [police department] employees received from Taser" thus indicating "additional violations of the City's Conflict of Interest and Public Purchase ordinances and the Governmental Conduct Act;"

c. There were weaknesses "in the procurement process" which "cast further doubt on the legitimacy of the Taser procurement" which weaknesses included "a vulnerability to non-competitive procurement ... based on" supposed exemptions "and a lack of documentation of testing to support Taser's no-bid contract;"

d. According to Keller, Schultz had "committed 'substantial violations' of city and state ethics laws in its dealings with Taser and prosecutors should determine whether to bring criminal charges;"

e. A "yearlong review of the city's handling of the $1.95 million [Taser] contract found 'rampant disregard for all of those things that protect our taxpayer dollars';"

f. Keller believed that former Police Chief "Schultz committed crimes;"

g. Keller "pointed to Taser-paid junkets for Schultz and others, the former Chief's ignoring of a one-year post-retirement prohibition on city employees going to work for city vendors and" what the auditor found to be the police department's "'intentional attempt to subvert a procurement process';"

h. According to Keller, this was "evidence that [Taser] ... was given an unfair

advantage and the inside track to a seven-figure contract" and indeed in an e-mail, former Chief "Schultz assured a Taser representative that the body camera contract had been 'greased' and would sail through a City Council committee;"

i. Keller stated that "[w]e think there's some clear evidence that these laws may have been violated and that's why we're referring this matter to the appropriate law enforcement agencies for prosecution."

8. Keller's review had "followed a series of [KRQE] News 13 reports that first showed Schultz had gone to work with Taser weeks after the city signed [the] lucrative contract with the company for body cameras and cloud-based video storage" and that Schultz had "been in talks with the company for months about a job before his retirement:"

a. In "one e-mail obtained by News 13 [pursuant] to a public records request," former Chief "Schultz assured a Taser representative that the body camera contract had been 'greased' and would sail through a City Council committee;"

b. Schultz "sent that e-mail while he was still at the helm of" the police department and "also boasted in a separate e-mail to Taser staffers that even after his retirement, he would still have the mayor of [Albuquerque], Mayor Richard Berry and Chief Administrative Officer Rob Perry" in his pocket;

c. Keller had "forwarded his findings to prosecutors who," according to Keller, "will

decide if" former Albuquerque Police Chief "Ray Schultz broke the law in his dealings with Taser;"

d. A spokesman for Albuquerque's mayor said "the city has halted monthly contract payments to Taser for the last seven months as it conducts a comprehensive review of the contract."

9. According to an Audit Report issued by the City of Albuquerque's own Office of Internal Audit less than one week after Keller's report:

a. The Albuquerque Police Department's purchase of "75 [Taser] body-worn cameras and Evidence.com data storage services … did not comply with the City of Albuquerque's … competitive procurement process;"

b. Police department personnel "bypassed purchasing regulations and approvals and compromised the integrity of the procurement process;"

c. Department officers "neglected their responsibilities as government employees to determine the Department's specific needs and then initiate a competitive procurement process to get the best product at the lowest price;"

d. The department's former Chief "entered into a contractual relationship with Taser in October, 2013" while "still technically employed by the city" and "continued to serve as a contractor after his official retirement date of December 31, 2013;"

e. Schultz "made presentations for Taser in Philadelphia and the U.K. while still on" the police department's "payroll." Since then, Schultz had "made a dozen presentations" for Taser "from Mexico City to Amsterdam and continue[d] to work as a consultant for the company;"

f. According to "information provided to auditors by Taser's Chief Operating Officer," former Chief "Schultz is paid $1,000 per day as a consultant for Taser, plus airfare, meals and hotels;"

g. In "addition, other" police "personnel accepted meals, travel and lodging from Taser" and "also solicited sponsorship donations from Taser" notwithstanding that the "acceptance of meals and other gratuities and the solicitation of funds from vendors are not consistent with city conflict of interest regulations;"

h. Police department "personnel insisted the department tested cameras from other brands," *i.e.* cameras made by someone other than Taser but nonetheless failed to "provide the purchasing department with any documentation about [that] testing;"

i. The "initial contract for 75 body cameras [was] signed by" a police department "lieutenant who didn't have authority to approve the purchase;"

j. Two police department employees identified as the department's "Fiscal Manager" and "Senior Buyer" consciously attempted "to

> get around the rules." In an e-mail, "one of the [department] employees details a city 'loophole' in which products purchased as part of an existing contract can sneak past a city committee that double checks technology purchases."

10. Press reports from Memphis, Tennessee indicated that by no-bid/no-competition contract dated September 2, the Memphis, Tennessee Department of Police ordered "2,000" body cams "and video footage storage over five years" from Taser at a cost of "$9.4 million:"

> a. According to the reports, in addition to purchasing its body cams, Memphis officials had "asked Taser" to fund "a local public awareness campaign about the public safety and accountability benefits of the cameras;"
>
> b. The actual "[purchase] contract" between Taser and the city, however, did not "require" Taser to fund and failed even to mention any such "public awareness campaign;"
>
> c. Taser "gave" a "public relations" firm owned by the Memphis Mayor's "campaign manager," Deidre Malone, a contract worth "$880,000 … to conduct this 'marketing'/'public awareness'" campaign;
>
> d. The Memphis Mayor "said he was unaware his campaign manager [had been] awarded [this] $880,000 contract to do marketing for the Memphis Police Department body cameras;"

e. The Mayor insisted that he "knew nothing of the contract until reporters began asking questions;"

f. Nevertheless, Taser's hiring of a firm "partly owned by a paid campaign manager" for the Mayor had "created a political maelstrom for" him "ahead of" a "fast-approaching … election;"

g. Accordingly, on October 1, 2015, the Mayor announced that the "controversial contract between Taser International" and the "public relations firm" owned by his campaign manager had "been canceled by 'mutual consent' of both parties."

11. Based upon these and other news reports from Los Angeles and San Francisco and otherwise upon the personal knowledge of its employees, Digital alleged that Taser had:

a. Caused or induced government procurement authorities or their agents throughout the relevant market to purchase its body cams without requests for competing bids, or without adequately publicizing requests for competing bids, without allowing a reasonable time in which competitive bids could be submitted;

b. Induced such procurement authorities or their agents to treat or deem Taser as the "sole source" of body cams, without any consideration of the competing products offered by Digital and others;

c. Induced such procurement authorities or their agents to draft

specifications for the body cams to be purchased in such a way that only Taser's products could satisfy such requirements;

d. Induced such procurement authorities or their agents to purchase its product without compliance with the purchasing rules and regulations, including rules relating to competitive bidding and the testing of competitive products which otherwise governed the use of public funds by such purchasing authorities/agents for the purchase of goods or services;

e. Granted or paid "compensation or other things of value" to the municipal authorities who purchased its body cams or to their agents, representatives or intermediaries thereby preventing competition between Taser, Digital and all other sellers of body cams and injured Digital in its own business and property.

C. Taser Moves to Dismiss Under Fed. R. Civ. P. 12(b)(6)

12. On April 1, 2016, Taser moved to dismiss each of Digital's anti-trust/unfair competition claims pursuant to Fed. R. Civ. P. 12(b)(6). Taser told the District Court that it was "immune" from Digital's anti-trust claims and that there were three distinct "sources" of that "immunity:"

a. So-called "*Parker*" or "state action" immunity, recognized originally in *Parker v. Brown*, 317 U.S. 341 (1943) and founded, it is said, upon concepts of "federalism" and the

principle that however injurious they may be to competition, regulatory actions by the states or their political subdivisions were not intended by Congress to be the subjects of attack under the Sherman Act;

b. So-called "*Noerr-Pennington*" immunity of the kind identified in *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 140 (1961) and *United Mineworkers v. Pennington*, 381 U.S. 657, 670 (1965) which has as its theoretical underpinning the "right" to "petition the government" under U.S. Const. Amend. I;

c. The "Local Government Anti-Trust Act of 1984," §§ 2-4, 15 U.S.C. §§ 34-36 ("LGAA") which, although exposing them to injunctive relief and attorneys' fees, immunizes any person from liability for damages under 15 U.S.C. §§ 15, 15(a) or 15(c) based upon anti-competitive but otherwise official actions which such person induced a local government to take.

D. The District Court Dismisses All of Digital's Anti-Trust Claims But Upon *Noerr-Pennington* Grounds Exclusively

13. By Order entered January 12, 2017, the Court granted Taser's motion and dismissed all of the anti-trust/unfair competition claims appearing in Counts III-VIII of Digital's Complaint.

14. With the exception of one of its unfair competition claims arising under California law, the District Court cited a single ground for dismissing

Digital's claims: it held that Taser was "immune" from these claims under the *Noerr-Pennington* doctrine.

15. The District Court did not hold that Taser was also immune under the *Parker*/state action doctrine; or that it was immune from any liability (for damages) pursuant to the LGAA; or that Digital had failed, generally, to "plead sufficient facts" to state any anti-trust/unfair competition claims.

16. In material part, the District Court found as follows:

> a. "Federal anti-trust laws do not regulate the conduct of private individuals in seeking anti-competitive action from the government," citing, *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 379-80 (1991) and "when private individuals [take] actions designed to influence government action, those individuals [are] immune from anti-trust liability," citing, *Noerr*, 365 U.S. at 127 (1961);
>
> b. To "avoid application of *Noerr-Pennington* immunity, anti-trust plaintiffs have urged courts to apply exceptions the doctrine," including "a conspiracy exception, a bribery exception and a commercial exception;"
>
> c. In *Omni*, the Supreme Court "addressed bribery, declining to create a bribery exception;"
>
> d. "Other courts have rejected a commercial exception" to *Noerr-Pennington*;
>
> e. "[w]ithout application of these potential exceptions," Taser "remains immune

for its actions intended to influence municipalities' decisions" to purchase its body cams;

f. "[t]he court believes that this conclusion is dictated by the Tenth Circuit's decision in *Coll v. First American Title Insurance Co.*," 642 F.3d 876, 898 (10th Cir. 2011);

g. In *Coll*, the plaintiff's claims that "defendants … conspired with each other and the State Superintendent of Insurance to bribe the Superintendent to set unreasonably high insurance premium rates." The "Tenth Circuit panel held" that "the defendants were immune under *Noerr-Pennington* regardless of whether the allegations involved bribery or corruption;"

h. Although Digital "urges this court to regard *Omni's* language addressing bribery and corruption as non-binding dicta," *Coll* "certainly did not treat the language in *Omni* as dicta" and "the one case" Digital "cites that did not allow anti-trust claims to proceed based on an exception for bribery and corruption" – *Instructional Sys. Dev. Corp. v. Aetna Cas. & Sur. Co.*, 817 F.2d 639 (10th Cir. 1987) – preceded *Omni*;

i. The court "also does not agree with" Digital's "assessment that the Supreme Court recently abrogated *Omni* in its decision [in] *North Carolina State Bd. of Dental Exrs. v. FTC*, 135 S. Ct. 1101 [2015]," notwithstanding that "the dissent" in that case "complained that

the majority had diminished the impact of *Omni's* holding;"

j. Since Taser was immune from the federal anti-trust claims, it was also immune from Digital's claims under state anti-trust and fair competition statutes.

REASONS FOR GRANTING THE PETITION

I. ALTHOUGH *NOERR-PENNINGTON* MAY INDEED SHIELD CITIZEN EFFORTS TO INFLUENCE GOVERNMENT OFFICIALS FROM ATTACK UNDER THE "GENERAL" PROHIBITIONS THAT APPEAR IN THE SHERMAN ACT, THERE IS NOTHING, WHETHER IN *OMNI* OR IN ANY OTHER OPINION OF THIS COURT OR OF THE COURTS OF APPEAL TO SUGGEST THAT THE DOCTRINE ALSO IMMUNIZES PRIVATE ACTORS FROM THE SPECIFIC ANTI-BRIBERY PROVISIONS OF THE CLAYTON ACT AS AMENDED BY ROBINSON-PATMAN

A. *Omni's* Discussion of "State Action Immunity" as First Recognized in *Parker v. Brown*, 317 U.S. 341 (1943)

There were two defendants in *Omni*: the City of Columbia, Georgia ("City") which had enacted "zoning" restrictions upon the erection of "billboards" and "Columbia Outdoor Advertising" ("COA"), a billboard company that had induced the City to impose those restrictions for the express purpose of suppressing competition by the plaintiff. This Court held (with three dissenters) that under the *Parker*/state action doctrine, the City was immune

from plaintiff's Sherman Act claims, despite the allegation that it had "conspired" with COA to enact zoning ordinances that not only injured but were intended to injure competition.

The majority in *Omni* began its "state action" analysis by noting that in *Parker*, the Court had "held that the Sherman Act did not apply to anti-competitive restraints imposed by the states 'as an act of government,'" 449 U.S. at 370, quoting in part from *Parker*, 317 U.S. at 352. The "rationale of *Parker* was that, in light of our national commitment to federalism, the general language of the Sherman Act should not be interpreted to prohibit anti-competitive actions by the States in their governmental capacities as sovereign regulators," *Id*. at 374. Likewise, the "restriction of competition" by otherwise non-sovereign political subdivisions within a state such as cities or counties "may sometimes be an authorized implementation of state policy" and "where that is the case," a municipality too will have "*Parker* immunity" from alleged violations of the Sherman Act, *Id*. at 370. According to *Omni*, "no more [was] needed to establish" the City's *Parker*/state action immunity than its "unquestioned" power over the size, location and spacing of billboards, 498 U.S. at 372, 377. Since the City, indeed, had the "unquestioned" power to limit the location of billboards, it was "ipso facto" immune from attack under the Sherman Act and, given the fact that there was "no … conspiracy exception" to *Parker* immunity, *Id*. at 374, of the kind the plaintiff had asserted, its Sherman Act claims against the City would fail.

B. *Omni's* Discussion of *Noerr-Pennington* Immunity"

After holding that the City was immune from plaintiff's Sherman Act claims on *Parker*/state action grounds, the *Omni* majority then found that COA, the alleged instigator of the City's anti-competitive actions also was immune, albeit under *Noerr-Pennington* rather than *Parker*. According to *Omni*, *Noerr-Pennington* represents "a corollary to *Parker*," *Id*. at 380. Just as *Parker* protects state/local governments from attack under 15 U.S.C. § 1, *Noerr* "'shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose,'" *Id*. at 380, quoting in part from *United Mineworkers v. Pennington*, 381 U.S. at 670. If "*Noerr* teaches anything, it is that an intent to restrain trade as a *result* of the government action sought … does not foreclose protection," *Id*. at 381 (original emphasis). While the *Omni* plaintiff had urged the Court to recognize "a 'conspiracy' exception" not merely to *Parker* but to *Noerr-Pennington*, which immunity "would apply when government officials conspire with a private party to employ government action as a means of stifling competition," the Court declared that any such "exception to *Noerr* must be rejected," *Id*. at 382-83. According to *Omni*, the reasons for doing so were "largely the same as those set forth" earlier in "*Omni*" as the basis "for rejecting a 'conspiracy' exception to *Parker*," *Id*. at 383.

C. As a "Corollary" to *Parker*/State Action Immunity, *Noerr-Pennington* Immunity Must be Subject to the Same Jurisprudential Limitations

and Like Any Other "Repeal by Implication," Must be "Disfavored"

As analyzed in *Omni*, *Parker*/state action and *Noerr-Pennington*, are but two sides of the same immunity coin. Just as the several States "when acting in their respective realms, need not adhere in all contexts to a model of unfettered competition" but may, on the contrary, "impose restrictions ... or otherwise limit competition to achieve public objectives," *North Carolina State Board of Dental Examiners v. FTC*, ___ U.S. ____, 135 S. Ct. 1101, 1109, 191 L.Ed.2d 35 (2015), *Noerr-Pennington* protects the "participation" in that process by private persons, *Omni*, 499 U.S. at 383. As such, *Parker* and *Noerr-Pennington* shield both governments and private "citizens" from suit as a result of their "complimentary expressions of the principle that the anti-trust laws regulate business, not politics," *Id*. Each recognizes that "[i]f every duly-enacted state law or policy were required to confirm to the mandates of the Sherman Act ... federal anti-trust law would impose an impermissible burden on the states' power to regulate," *North Carolina Board of Dental Examiners*, 135 S. Ct. at 1109.

Since *Omni* declares that each is "complimentary" of the other, one may assume that both doctrines of immunity are subject to the same jurisprudential limitations. Both must be subject to the overarching principle that federal "anti-trust law is" itself "an essential safeguard for the Nation's free market structures" and is "'as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms,'"

Id., quoting in part from *U.S. v. Topco Assocs.*, 405 U.S. 596, 610 (1972). While "state action immunity," for example, "exists to avoid conflicts between state sovereignty and the Nation's commitment to a policy of robust competition," it "is not unbounded" and the same *must* be said of the "complimentary … principle that the anti-trust laws regulate business, not politics" that is the basis for *Noerr-Pennington*, *Omni*, 499 U.S. at 383. If, as is the case, "'state action immunity is defavored much as'" is any "'repeal[ ] by implication,'" *North Carolina Board of Dental Examiners*, 135 S. Ct. at 1110, quoting from *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 133 S. Ct. 1003, 1010, 185 L.Ed.2d 43 (2013), that same "disfavor" must attach with equal force to *Noerr-Pennington*.

Far from treating *Noerr-Pennington* with "disfavor," the District Court used *Omni* to extend the doctrine into an area where no other court had ever gone before. Prior to the District Court's order of dismissal and the summary affirmance of that order by the Federal Circuit, no other court, of whatever stripe, had applied *Noerr-Pennington* to claims arising under any provision of Robinson-Patman. More to the point, no court, anywhere, had ever before held not merely that private citizens have a "constitutional right to bribe" their officials but that this right actually "repeals" Robinson-Patman, § 2(c), a federal statute which by unambiguous proscription appears to forbid it. The District Court's holdings to this effect and the Federal Circuit's affirmance of each of them, without opinion, are matters entirely of first impression.

II. UNLIKE THE SHERMAN ACT, ROBINSON-PATMAN CONTAINS NO "GENERAL" PROHIBITIONS AGAINST RESTRAINTS OF TRADE WHICH FOR WANT OF "SPECIFICITY," CONGRESS "MAY NOT HAVE INTENDED" TO APPLY TO THE SOVEREIGN STATES OR TO THOSE CITIZENS WHO CHOOSE TO PETITION THEM; THE PROSCRIPTIONS APPEARING IN ROBINSON-PATMAN ARE SPECIFIC; THEY ARE ABSOLUTE; BY THEIR TERMS, THEY APPLY TO BUYERS AND SELLERS OF GOODS IN COMMERCE WITHOUT REGARD TO WHETHER THEY ARE "GOVERNMENTAL" OR "NON-GOVERNMENTAL" ENTITIES AND THERE IS NOTHING, WHETHER IN *PARKER/NOERR-PENNINGTON* OR IN *OMNI* THAT SAYS ANYTHING TO THE CONTRARY

Both *Omni* and *Parker* hold that the Sherman Act represents no more than a "general" prohibition against restraints of trade which, for want of "specificity," Congress may not have "intended" to apply to the sovereign states or to those citizens who "petition" them. The same cannot be said of Robinson-Patman, § 2(c). There is nothing "general" about § 2(c) which provides, in relevant part, that:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce to pay or grant, or to receive or accept, anything of value as a commission … or other compensation …

> except for services rendered in connection with the sale or purchase of goods … either to the other party to such transaction or to an agent, representative or other intermediary therein where such intermediary is acting in fact for or in behalf or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid, 15 U.S.C. § 13(c).

Nor, given the language used, can there be any question "that Congress intended to bring commercial bribery within the ambit of" Robinson-Patman "section 2(c) [15 U.S.C. § 13(c)]," *Stephen Jay Photo., Ltd. v. Olan Mills, Inc.*, 903 F.2d 988, 993 (4th Cir. 1990), citing *FTC v. Henry Broch & Co.*, 363 U.S. 166, 169-70, n. 6 (1960). At least "[f]our circuits have applied a commercial bribery analysis in section 2(c) cases" and "the common thread" in each of those cases "has been the passing of illegal payments from seller to buyer or vice versa,'" *Id.*, quoting from *Seaboard Supply Co. v. Congoleum Corp.*, 770 F.2d 367, 372 (3d Cir. 1985).

Indeed, § 2(c)'s prohibitions against commercial bribery have been applied, in fact, to purchases of goods not merely by "local" governments but by "sovereign" states. Specifically violations of § 2(c) have been found when a "state official … responsible for [assessing] the nutritional value of fish food" has been paid to "use his expertise to influence state purchasing officials to buy the seller's fish food," *Id.*, citing *Rangen, Inc. v. Sterling Nelson & Sons*, 351 F.2d 851 (9th Cir. 1965).

Second, and in sharp contrast to "the Sherman Act, which 'protects *competition, not competitors* …,'" *2660 Woodley Rd. Joint Ven. v. ITT Sheraton Corp.*, 369 F.3d 732, 742 (3d Cir. 2004), quoting in part from *Monahan's Marine, Inc. v. Boston Whaler, Inc.*, 866 F.2d 525, 528 (1st Cir. 1989) (original emphasis), it "is now settled that a § 2(c) plaintiff," like Digital, "does not have to prove competitive injury to establish a § 2(c) violation," *Id*. at 739. As this Court made clear in *FTC v. Simplicity Pat. Co.*, 360 U.S. 55, 65 (1959), "§ 2(c) of the Robinson-Patman Act makes the business practices described therein unlawful" as "'proscriptions'" which "'are absolute …'" and do not "'require[ ] as proof of a *prima facie* violation, a showing that the illicit practice has had an injurious or destructive effect on competition,'" *Id*. at 739, quoting in part from *Simplicity*, 360 U.S. at 65.

Given its obvious strength of purpose, before § 2(c) or any other provision of Robinson-Patman can be deemed to have been "repealed" by a judicially-crafted doctrine of "immunity," *Parker* and its progeny require that the reasons why it should be so nullified, be stated clearly and that they be at least equally powerful as the statute itself. *Omni* is the poorest of vehicles for that purpose. *Omni* fails even to mention Robinson-Patman much less declare that those sellers who make payoffs to their governmental customers are immune not only from claims of "conspiracy" under the Sherman Act, but from claims of commercial bribery in violation of Robinson-Patman, § 2(c). There is nothing in *Omni* to suggest, even obliquely, that just as "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose," *Omni*, 499 U.S. at 380, the doctrine likewise immunizes a seller

from the explicit and "absolute," prohibition against the use of bribery in connection with the sale of goods that appears in Robinson-Patman, § 2(c). Nothing in *Omni* indicates that, much as "the Sherman Act did not undertake to prohibit" the acts of state sovereigns or their political subdivisions in imposing restraints of trade, Congress also did not, even though the facially "absolute" "proscriptions" of Robinson-Patman, § 2(c), *Simplicity*, 360 at 65, "undertake" to prohibit the bribery of a buyer by a seller where the buyer is a "governmental entity," *Omni*, 499 U.S. at 374, quoting in part from *Parker*, 317 U.S. at 352.

In summary, there is no suggestion in *Omni* nor, for that matter, in the entire body of *Parker*/*Noerr-Pennington* jurisprudence that the constitutional right to "petition" a state or political subdivision to act anti-competitively also immunizes a seller of goods from the absolute and unambiguous prohibition against bribery that is Robinson-Patman, § 2(c).

III. *JEFFERSON COUNTY PHARM. ASSOC. V. ABBOTT LABS*, 460 U.S. 150, 157 (1983) APPEARS TO FORBID THE INVOCATION OF *PARKER AND, CONCOMITANTLY, NOERR-PENNINGTON* IMMUNITY IN ROBINSON-PATMAN CASES GIVEN ITS HOLDING THAT "MEMBERS OF CONGRESS WERE AWARE OF THE POSSIBILITY THAT" ROBINSON-PATMAN "WOULD APPLY TO GOVERNMENTAL PURCHASES;" THAT THE LEGISLATIVE HISTORY CONTRADICTS "ANY SUGGESTION" THAT SUCH TRANSACTIONS "ARE

EXEMPT FROM ROBINSON-PATMAN" AND THAT IN THE ABSENCE OF AN EXPLICIT EXEMPTION APPEARING IN THE STATUTE ITSELF, THERE IS NO REASON TO BELIEVE THAT CONGRESS INTENDED TO DENY SMALL BUSINESSES LIKE DIGITAL THE PROTECTION OF ROBINSON-PATMAN SIMPLY BECAUSE THE OFFENDING TRANSACTION INVOLVED A GOVERNMENTAL ENTITY

Unlike *Omni, Jefferson County Pharm. Assoc. v. Abbott Labs, et al.*, 460 U.S. 150 (1983) is a Robinson-Patman case. In *Jefferson County*, this Court began its discussion by noting what should be obvious: the "coverage of the anti-trust laws" is by design "comprehensive" and represents nothing less than "'a carefully studied attempt to bring within [them] every person engaged in business whose activities might restrain or monopolize commercial intercourse among the states,'" *Jefferson County*, 460 U.S. at 157, quoting in part from *U.S. v. South-Eastern Underwriters Assn.*, 322 U.S. 533, 553 (1944). As the Court emphasized, its decisions have "repeatedly established that there is a heavy presumption against explicit exemptions from the anti-trust laws," *Id.* at 157-58 (internal quotation omitted); that any proposed "exemptions from their application are to be construed strictly" and, conversely, that Robinson-Patman in particular, is to be construed liberally" and "broadly to effectuate its purposes," *Id.* at 159.

The Court had been asked in *Jefferson County* to recognize that when purchasing goods, local

governments as well as the sellers of those goods, were generally "exempt" from compliance with Robinson-Patman and thus "immune" from any claims arising thereunder. The Court declined to recognize any such immunities holding that:

- When Robinson-Patman was enacted, "members of Congress were aware of the possibility that the Act would apply to governmental purchases," *Id*. at 159-60;

- The legislative history "directly contradict[s] any suggestion that municipalities are exempt from Robinson-Patman" for "such purchasing" as they may do in commerce, *Id*. at 161;

- It was not "clear that *any published District Court opinion has relied solely on state purchase exemption to dismiss a Robinson-Patman Act claim*," *Id*. (original emphasis); and

- There was "no reason, in the absence of an explicit exemption, to think that Congressmen … intended to deny small businesses" the "protection afforded by Robinson-Patman simply because the violator is a governmental entity," *Id*. at 171.

If the state/municipal defendants who had received the benefit of demonstrably discriminatory prices in *Jefferson County* were nonetheless "immune" from Robinson-Patman under *Parker*, the claims against them would have been dismissed. They were not. If the private actor who sold goods to these states and municipalities at discriminatory prices was itself immune from Robinson-Patman under *Noerr-Pennington*, the claims against it would have been

dismissed. They were not. *Jefferson County* is sufficient, alone, to justify reversal with regard to Digital's § 2(c) claims.

IV. IN *CALIFORNIA MOTOR TRANSP. CO. V. TRUCKING UNLIMITED*, 404 U.S. 508, 515 (1972), THE COURT ACTUALLY DECLARED THAT THE BRIBERY OF A GOVERNMENT PURCHASING AGENT MAY CONSTITUTE A VIOLATION OF § 2(C) OF ROBINSON-PATMAN

California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972) declares that like any other "First Amendment rights," the right to petition the government "may not be used as the means or the pretext for achieving 'substantive evils … which the legislature has the power to control,'" 404 U.S. at 515. Any combination, the purpose of which is to "deter … competitors from having 'free and unlimited access' to the agencies" of government "are ways of building one empire and destroying another," *Id*. When such "facts are proved, a violation of the anti-trust laws has been established" despite the assertion of First Amendment immunity since "[i]f the end result is unlawful, it matters not that the means used in violation may be lawful," *Id*.

On that basis, the Supreme Court declared that *Noerr-Pennington* notwithstanding, the "bribery of a public purchasing agent may constitute a violation of § 2(c) of the Clayton Act, , as amended by the Robinson-Patman Act," *Id*. at 512. Further, just as Digital itself had done in its opposition to dismissal in the District Court, *California Motor Transp.* cites *Rangen, Inc. v. Sterling Nelson & Sons*, 351 F.2d 851 (9th Cir. 1965) for the holding that Robinson-Patman,

§ 2(c) applies claims of "immunity" notwithstanding where a "state official … has been paid to … influence state purchasing officials to buy the seller's products," *Stephen Jay Photo., Ltd. v. Olan Mills, Inc.*, 903 F.2d 988, 993 (4th Cir. 1990), citing, *Rangen, Inc.*, 351 F.2d at 851. Like *Jefferson County, California Motor Transp.* also provides a sufficient basis, standing alone, on which to reverse the dismissal of Digital's § 2(c) claims.

V. ANY MENTION IN *OMNI* OF "BRIBERY" OF PUBLIC OFFICIALS AND/OR SOME OTHER "CORRUPTION" OF GOVERNMENTAL PROCUREMENT DECISIONS IS DICTA AND ESTABLISHES NO RULE OF DECISION BINDING UPON ANY COURT

Again, *Omni* involved billboards. COA, a local billboard company responded to the prospect of competition by "lobbying" City officials to enact zoning regulations that restricted the construction of billboards in precisely the areas in which the plaintiff/competitor sought to erect them.

As demonstrated above, this Court held that "no more is needed to establish for *Parker* purposes" and, concurrently, for purposes of *Noerr-Pennington* than "the City's … unquestioned zoning power over the size, location and spacing of billboards," 498 U.S. at 372, 377. Accordingly, even if the exercise of that zoning power were anti-competitive and was procured in furtherance of a "conspiracy" with a private participant in the affected market, such exercise was "ipso facto" immune from challenge under the anti-trust laws, *Id.*

Had the majority stopped there, where the facts themselves ended, *Omni* would have done what the Court had been asked to do: to resolve a "split" among the circuits as to whether there was a "conspiracy exception" to *Parker* or to *Noerr-Pennington*. The majority did not stop there, however, but chose to go well beyond the facts. In elaborating on the idea that there was no "'conspiracy' exception" to *Parker*/state action immunity, *Omni* declares that even if the "regulation" in question had been procured by "bribery or some other violation of state or federal law," this did not mean that the action taken was not "in the public interest" given that "[a] mayor … guilty of accepting a bribe may nevertheless take "in the public interest the same action for which the bribe was paid," *Id*. at 378. Since the anti-trust laws were "not directed to" the end of achieving "good government," but rather are "a code that condemns trade restraints, not political activity," proof of a conspiracy even to bribe would not prevent corrupt officials (or for that matter the private party who paid them off) from claiming immunity from the anti-trust laws, *Id*. at 378-79.

Digital suggests, respectfully, that this is dicta, on its face. It is undeniable that neither the record before it nor *Omni's* own recitation of the facts contains any references to bribery. On the contrary, if the Court's own statement of the facts is any guide, *Omni* was based exclusively upon allegations that public officers had been "lobbied" to act anti-competitively, which the opinion then describes as meetings between COA and "city officials to seek the enactment of zoning ordinances that would restrict billboard construction," *Id*. at 368. It is this conduct alone that gave "rise to" the immunity "issue … address[ed] in" *Omni*, *Id*., and see also, F. Gevurtz,

Politics, Corruption and the Sherman Act After City of Columbia's Blighted View, 27 U.C. Davis L. Rev. 141 (1993).

As indicated, three justices dissented in *Omni*. Had the applicability, whether of *Noerr-Pennington* or of *Parker* immunity, even in the face of bribery, been among the majority's hotly disputed "holdings," bribery would have been mentioned and "debated" in the dissent. It was not. Neither the words "bribery" nor "corruption" appear anywhere in that dissent, see, *Omni*, 499 U.S. 385-99.

Second, as the dissent notes, the jury which had found the petitioner liable under the Sherman Act (only to have its verdict taken away by the trial court under Fed. R. Civ. P. 50) had "returned its verdict pursuant to" an instruction that provided, in relevant part, as follows:

> So if, by the evidence, you find that the person involved in this case procured and brought about the passage of ordinances solely for the purpose of hindering, delaying or otherwise interfering with the access of the Plaintiff to the marketing area involved in this case, and thereby conspired, then, of course, their conduct would not be excused under the anti-trust laws.
>
> So, once again, an entity may engage in … legitimate lobbying … to procure legislati[on] even if their motive behind the lobbying is anti-competitive.
>
> If you find Defendants conspired together with the intent to foreclose the

> Plaintiff from meaningful access to a legitimate decision-making process with regard to the ordinances in question, then your verdict would be for the Plaintiff on that issue, *Omni*, 499 U.S. at 387, n. 2/2.

The only actionable conduct identified in this, the single verdict-directing instruction upon which the verdict, the judgment, the ensuing appeal and the grant of certiorari were each based, is "conspiracy." The objective of that conspiracy was to interfere "with the access of the Plaintiff to the marketing area involved in [the] case," and that conspiracy was declared to be non-actionable since it was based upon "legitimate lobbying … to procure legislati[on]" despite the fact that "the motive behind the lobbying is anti-competitive." *Id*. There is no mention of bribes, bribery nor any euphemism for bribery.

This Court has said "[t]here is nothing 'technical' or 'theoretical' … about" its "approach" to the matter of dicta, *Parents Involved in Comm. Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 737 (2007), citing, *Cohens v. Virginia*, 19 U.S. (6 Wheat) 264, 399-400, 5 L.Ed. 257 (1821) (Marshall, C.J.) (explaining why dicta is not binding). It has made it equally clear that it is "not bound to follow" its own "dicta in a prior case in which the point now at issue is not fully debated," *Id*. (internal quotation omitted).

Had "bribery" been pleaded and thereafter sufficiently proven that the issue of bribery could be submitted to the jury, it would have been mentioned in the verdict-directing instruction; it would have been argued by the parties and it would have been considered by the jury. It would have been addressed

in the judgment and it would then have been "debated" on appeal and on *certiorari*. None of these things occurred. Had it been in issue and the subject of a dispositive holding worthy of *stare decisis*, the dissenters would have "debated" the question as to whether "bribery" apart from or in addition to "conspiracy" was sufficient to dispel *Noerr-Pennington* or *Parker* immunity. Writing for the majority, Justice Scalia would then have responded with his usual vigor. They did not and he did not. As the Court can see, "bribery" was not "debated" at all in *Omni* much less "fully."

VI. *OMNI'S* SCHEME OF IMMUNITY, IPSO FACTO, EVEN IN CASES INVOLVING THE "BRIBERY" OF PUBLIC OFFICIALS, DOES NOT APPEAR TO HAVE SURVIVED THE COURT'S RECENT DECISION IN *NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS V. FTC*, 35 S. CT. 1101 (2015)

Omni holds that whenever it can be shown that a political subdivision has the "unquestioned" power to limit commercial/economic activity, *Parker*/state action and *Noerr-Pennington* immunity will attach even if the exercise of that power proves to be anti-competitive and the product of a conspiracy for anti-competitive purposes, *Omni*, 499 U.S. at 372, 377. This is the fundamental holding of *Omni* and everything else that *Omni* says follows from it.

Digital suggests that *Omni's* "'ipso facto … exempt[ion] from the operation of the anti-trust laws,'" simply because they "are an undoubted exercise of state sovereign authority," *Dental Examiners*, 135 S. Ct. at 1110 (quoting in part from

Omni, 499 U.S. at 374), did not survive *Dental Examiners*. *Dental Examiners* holds that even a sovereign state "[can]not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful," *Id*. at 1111, *Dental Examiners* holds that the fact that an agency had been "given a formal designation by the State, vested with a measure of government power, and required to follow some procedural rules," no longer entitled it to the kind of "ipso facto" immunity which *Omni* claims to have established, *Id*. at 1114.

The dissent in *Dental Examiners* in which the author of *Omni* joined says as much. The dissent declares that although this Court had been "unwilling in *Omni* to rewrite *Parker* in order to reach ... allegedly abusive behavior of city officials ... that is essentially what" it did in *Dental Examiners*, 135 S. Ct. at 1122 (Alito, J. dissenting). It appears, therefore, that even the author of *Omni* believes that its holding regarding the automatic immunity of public officials vested with the power to regulate and the equally automatic immunity of the persons who would induce the exercise of those powers including through bribery, has been repudiated by *Dental Examiners*.

After all, if *Omni's* guiding proposition that the mere existence of "governmental authority" to perform an anti-competitive act is sufficient alone to immunize those acts from anti-trust attack, were still "good law," the holding in *Dental Examiners* would have been impossible. Clearly, the defendant, *Board of Dental Examiners*, was able to show that, by statute, it had been given the "undoubted" state authority to regulate all things dental; that, as such, it enjoyed "a formal designation by the state;" that had been vested with

"government power" and that it had followed the procedural rules that were prescribed for the exercise of that power. If *Omni* had remained the law, the Board's complete immunity from the FTC's claims would have attached "ipso facto." Instead, this Court did something which *Omni* said it must never do: it looked behind the authority which had been granted to the Board and concluded that the otherwise undeniable power to regulate had been granted to market participants who, because they were participants, must be treated as "non-sovereign" actors for *Parker* purposes. If the automatic "ipso facto" immunity features of *Omni* did not emerge from *Dental Examiners* unaltered, can the same be said of *Omni's ex gratia* suggestion that a market participant may procure any anti-competitive action he/she wishes from a government entity empowered to take such action, even if bribery is necessary to accomplish it? Digital suggests that the only principled conclusion is that it too has been overturned.

CONCLUSION

For the foregoing reasons, Petitioner Digital Ally, Inc. respectfully suggests that the within Petition for Certiorari be granted; that the Judgment of Affirmance of the Federal Circuit be reversed, whether in whole or in part; and that the Federal Circuit be directed to remand the case to the District of Kansas for further proceedings consistent with that result.

Respectfully submitted,

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