No. 24-925

IN THE

Supreme Court of the United States

GREGORY LALA, *et al.*,
Petitioners,

v.

TESLA, INCORPORATED, *et al.*,
Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should the Court grant, vacate, and remand a decision of the Fifth Circuit announced in a single-judge opinion that allows a due process claim to proceed past a motion to dismiss, when there has been no intervening factual or legal development and petitioners concede the court applied the correct legal standard?

PARTIES TO THE PROCEEDING

Petitioners are Chairman Gregory Lala of the Louisiana Motor Vehicle Commission and Commissioners Allen O. Krake, V. Price Leblanc, Jr., Eric R. Lane, Kenneth Mike Smith, Keith P. Hightower, Keith M. Marcotte, Wesley Randal Scoggin, Scott A. Courville, Donna S. Corley, Terryl J. Fontenot, Maurice C. Guidry, Raney J. Redmond, Joseph W. Westbrook, Stephen Guidry, Joyce Collier LaCour, Thomas E. Bromfield, Edwin T. Murray of the Louisiana Motor Vehicle Commission, all in their official capacities as Commissioners of the Commission. Petitioners were the defendants-appellees below.

Other defendants-appellees below who have not filed a petition for a writ of certiorari are: Louisiana Automobile Dealers Association, P.K. Smith Motors, Incorporated, T & J Ford, Incorporated, Golden Mo tors, L.L.C., Ford of Slidell, L.L.C. (doing business as Supreme Ford of Slidell), Gerry Lane Enterprises, Incorporated (doing business as Gerry Lane Chevrolet), Holmes Motors, L.L.C. (doing business as Holmes Honda), Airline Car Rental Incorporated (doing business as Avis Rent a Car), Shetler-Corley Motor, Lim ited, LeBlanc Automobiles L.C., Morgan Buick GMC Shreveport, Incorporated.

Respondents are Tesla, Incorporated; Tesla Lease Trust; and Tesla Finance, LLC. Respondents were the plaintiffs-appellants below.

CORPORATE DISCLOSURE STATEMENT

Tesla, Incorporated, does not have a parent corporation and no publicly held corporation owns 10% or more of its stock. Tesla Lease Trust is a wholly owned

subsidiary of Tesla Finance, LLC. Tesla Finance, LLC, is a wholly owned subsidiary of Tesla, Incorporated.

DIRECTLY RELATED PROCEEDINGS

Tesla, Inc. v. *Louisiana Automobile Dealers Ass'n*, No. 23-30480 (5th Cir.). Judgment entered Aug. 26, 2024; order denying petition for rehearing en banc entered Sept. 27, 2024.

Tesla, Inc. v. *Louisiana Automobile Dealers Ass'n*, No. 22-2982 (E.D. La.). Order entered June 16, 2023.

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INTRODUCTION

The Court should not grant, vacate, and remand ("GVR") the Fifth Circuit's decision reversing the dismissal of Tesla's due process claim. Petitioners identify no intervening change in law or fact, nor any authority supporting the Court's intervention at this preliminary stage of the litigation. Indeed, petitioners concede that the lower court relied on the correct legal standard in evaluating Tesla's claim. They take issue only with the factbound application of that settled law in the single-judge opinion announcing the Fifth Circuit's judgment. And that application was entirely correct: Due process forbids competitors who view Tesla's rival business model as an existential threat to their business from launching a government investigation that aims to block that alternative model by impeding Tesla's operations, driving Tesla from the state, and dissuading other manufacturers from using that model. The Court should deny the petition.

Tesla makes cars, then sells, leases, and services them directly. Unlike other auto manufacturers, Tesla's business model does not involve third-party dealers. Tesla is the leading proponent in the automotive industry of this direct-to-consumer business model. That arrangement creates significant cost savings for consumers. But automobile dealers perceive the new model as an existential threat to their business, which depends on manufacturers being unable or unwilling to adopt Tesla's approach.

Louisiana law permits Tesla to offer leases and perform warranty services without third-party dealers. But the state entity that decides whether and how Tesla may perform those functions—the Louisiana Motor Vehicle Commission ("Commission")—is controlled by the

same automobile dealers who view direct-to-consumer sales as a mortal threat to their business model. Unsurprisingly, then, the Commissioners, other dealers, and a state automobile dealers association that counts a majority of the Commissioners as its members have conspired for years to keep Tesla from operating in Louisiana in any form. These efforts culminated in the Commissioners launching an investigation of Tesla's activities in the state.

Tesla sued, arguing (as relevant here) that the Commissioners' actions contravene the Constitution's guarantee of due process. The district court disagreed and granted the Commissioners' motion to dismiss. The Fifth Circuit reversed. Writing only for himself, Judge Smith concluded that Tesla adequately pleaded a due process claim. Judge Haynes concurred in the judgment, but issued no separate opinion.

Petitioners are the 18 members of the Commission (together, "Commissioners"). Recognizing that merits review of Judge Smith's opinion would be unwarranted, the Commissioners ask this Court to issue a GVR. That request is novel and baseless in these circumstances. Outside of rare exceptions, this Court reserves GVRs for situations involving an intervening development that the lower court did not have a chance to, or failed to, consider. The Commissioners cannot point to any such development here, nor any reason to make an exception of this case.

In all events, the Court should not vacate the decision below because Tesla plausibly alleged a due process violation. As Judge Smith recognized, the Commissioners have a substantial pecuniary interest in seeing Tesla and its rival business model fail, yet they control an investigation of Tesla that aims to block that model from

taking root in Louisiana. And were all that not enough, Judge Smith's opinion announcing the Fifth Circuit's decision does not warrant this Court's intervention even if it were wrong. Petitioners concede that Judge Smith applied the proper legal standard for evaluating Tesla's due process claim, but contest only the details of how that standard applies to this case. This Court should not grant certiorari to correct such factbound determinations, particularly when they are made in an interlocutory, single-judge opinion. The Court should deny the petition.

STATEMENT

A. Tesla's Direct-To-Consumer Model And Operations In Louisiana

Tesla is an electric-vehicle manufacturer whose success has been achieved because of its cutting-edge technology and unique business model: providing sales, leasing, and warranty-repair services directly to consumers. Pet.App.5a, 55a. Unlike franchising manufacturers, who use third-party dealers ("franchise dealers"), Tesla sells and leases cars itself at uniform and transparent prices. Pet.App.55a. Tesla eliminates add-ons, mark-ups, and other fees imposed by franchise dealers, enabling Tesla to pass those savings along to customers. Pet.App.55a-56a. Tesla is the first major automobile manufacturer to adopt a direct-to-consumer model in decades and is widely viewed as the model's leading proponent. *See* Record on Appeal at 1588-1589, 1630, *Tesla* v. *Louisiana Auto. Dealers Ass'n*, No. 23-30480 (5th Cir.), Dkt.27 ("ROA").

For these reasons, franchise dealers view Tesla as an existential competitive threat to their businesses. *See* Pet.App.6a, 9a, 20a, 56a. They fear that many

consumers will prefer direct-to-consumer models if Tesla and other non-franchising manufacturers enter and expand their presence in the market. ROA.1614. That, in turn, could cause other manufacturers to reevaluate their dealer-centric business models and threaten franchise dealers' profits. *Id.* These economic threats have caused franchise dealers to actively resist Tesla's efforts to operate in Louisiana. *See infra* sec. B. Indeed, in 2017, following extensive lobbying, the Louisiana Automobile Dealers Association ("LADA"), a franchise dealer trade association, convinced the state legislature to adopt an amendment prohibiting non-franchising manufacturers like Tesla from selling cars directly to consumers without using an in-state dealer. *See* Pet.App.6a, 56a-57a; *see also* La. Rev. Stat. § 32:1261(A)(1)(k)(i). As a result, Tesla cannot sell cars directly in Louisiana.

Tesla does, however, hold a license to lease vehicles in Louisiana through Tesla Lease Trust ("TLT"). Pet.App.7a, 10a. Many Louisiana residents also own Tesla vehicles they purchased in other states and brought into Louisiana. Thus, even without direct sales, there were "thousands of registered Tesla vehicles in Louisiana" as of early 2023. Pet.App.7a.

Louisiana law also authorizes Tesla to perform warranty repairs, though the scope of that authorization remains disputed. Pet.App.6a-7a. Manufacturers are generally prohibited from "authoriz[ing] a person to perform warranty repairs … who is not a motor vehicle dealer," La. Rev. Stat. § 32:1261(A)(1)(t), but warranty repairs may be performed by a "fleet owner," *id.* § 32:1261(A)(1)(t)(ii). A "fleet owner" is a "renting or leasing company that rents, maintains, or leases vehicles to a third party." *Id.* § 32:1261(A)(1)(t)(i). The

Commission previously determined that Tesla, through TLT, meets that definition and may perform at least some warranty repairs. Pet.App.10a. Tesla does so through a service center in New Orleans. Pet.App.7a.

B. The Dealers And Commissioners' Efforts To Exclude Tesla

Louisiana's franchise dealers have responded to Tesla's entry by pursuing an illegal conspiracy—involving dealers who serve as Commissioners, other dealer members of LADA, and LADA itself—to block Tesla from performing even the limited services that Louisiana law permits. Pet.App.56a-69a.

The Commission has been the primary tool for advancing the conspiracy. Pet.App.58a. The Commission regulates the distribution and sale of motor vehicles in Louisiana. La. Rev. Stat. § 32:1253. Fifteen of the eighteen Commissioners must be "licensee[s]" of the Commission and retain those licenses while they serve on the Commission. *Id.* § 32:1253(A)(2). The remaining three are members of the public with limited responsibilities not at issue. Pet.App.58a. Critically, nine of the core fifteen members are franchise automobile dealers who directly compete with Tesla. Pet.App.59a. All nine dealer Commissioners are also members of LADA. *Id.* The Commission's decisions at issue here are therefore controlled by competitors that perceive Tesla's direct-to-consumer model as an existential threat to their livelihoods.

Working through LADA and the Commission, Louisiana dealers have sought to drive Tesla from the state. Pet.App.56a. For example, the 2017 amendment that barred Tesla from directly selling cars was introduced "on behalf of the Auto Dealers Association," and LADA's president referred to it as "our bill."

Pet.App.57a. LADA and the Commissioners "met numerous times" over the course of five years, where LADA urged the Commissioners to exclude Tesla from the leasing and warranty-service markets. Pet.App.8a. Those meetings resulted in an agreement to wield the Commissioners' power to target Tesla with a baseless investigation aimed at increasing Tesla's business costs, creating a cloud over the legality of its existing operations in Louisiana, and harassing and intimidating it to leave the state. ROA.1630.

This campaign targeted Tesla's warranty-service operations as a fleet owner, even though Louisiana law specifies that "[t]he commission has no authority over a fleet owner." La. Rev. Stat. § 32:1261(A)(1)(t)(v). The dealers understand that Tesla's ability to provide warranty service is fundamental to its ability to compete in the Louisiana market. ROA.1628. Consumers need assurances that warranty service will be available when they need it, and they are unwilling to travel long distances to obtain it. *Id.* Thus, Tesla's ability to compete in Louisiana would be significantly impaired if it were unable to offer warranty service in the state. ROA.1632. Even subjecting Tesla's warranty-service operations to legal uncertainty discourages consumers from leasing Tesla cars, out of concern for their ability to access their warranty during their leases. *Id.*

The dealers' efforts to target Tesla's warranty-service operations have been brazen and consistent. Tesla's announcement that it would open a New Orleans service center in 2018 prompted a "flurry of activity" among dealers, and LADA admits that it "lobb[ied] the Commission … to rule that Tesla could not do as it planned." Pet.App.9a (alterations in original). For instance, a LADA member lamented in an email to a Commissioner that it "[was] not good for the future of our business if

the state lets" Tesla open the center. *Id.* That Commissioner forwarded the email to Lessie House, the Commission's Executive Director, who responded, "On top of it." *Id.* When another LADA member raised concerns to House, she responded, "We are on top of this." *Id.* And in an email thread with the former Chairman of the Commission (a member of LADA), which included an article about the announcement of the New Orleans service center, House again confirmed: "I am on it." *Id.* Later, in March 2020, LADA wrote a letter to the then-Chairman of the Commission, Allen Krake, suggesting ways to impede Tesla's ability to open the service center. Pet.App.62a.

The Commission ultimately agreed to initiate an "investigation" of Tesla. On August 5, 2020, it issued a subpoena to TLT for records relating to its activities in Louisiana. ROA.1619-1620. Unaware of the illegal conspiracy, and given the subpoena's narrow scope, TLT responded. ROA.1620. A month later, the Commission issued a second subpoena, seeking further records. *Id.* In February 2021, the Commission withdrew that subpoena and replaced it with a third subpoena demanding records identifying vehicles leased in Louisiana and "identifying and/or referencing warranty service and/or warranty repair performed on any and all motor vehicles" in Louisiana from June 2019 to present. ROA.119. Tesla objected to this third subpoena because, under La. Rev. Stat. § 32:1261(A)(1)(t)(v), the Commission "has no authority over a fleet owner" who performs warranty repairs for a manufacturer. ROA.1620-1621.

In response, the Commission initiated motion-to-compel proceedings before itself. During those proceedings, the Commissioners rejected Tesla's request for a decision on whether TLT is a fleet owner—even though that question would determine the Commission's

jurisdiction. ROA.1622-1623. Instead, the Commissioners agreed that Tesla must respond to the subpoena. ROA.1623. At least nine of the fifteen Commissioners who voted to commence and continue the investigation were Tesla's direct competitors with a significant financial interest in preventing Tesla's direct-to-consumer model from taking root in the state. ROA.1623-1624.

Tesla subsequently petitioned for judicial review in state court, seeking reversal of the Commission's decision to enforce the subpoena or a remand to determine jurisdiction. ROA.1624. Those proceedings remain ongoing.

C. Proceedings Below

In August 2022, Tesla filed this lawsuit. Pet.App.70a. The defendants are all eighteen Commissioners in their official capacities, the fifteen licensee Commissioners in their individual capacities, ten dealerships owned by Commissioners, and LADA. *Id.* Among other claims, the operative complaint asserted (1) a claim under Section 1 of the Sherman Act related to the illegal agreement to exclude Tesla; (2) a claim that the Commission's exercise of authority over Tesla's efforts to lease and service vehicles in Louisiana violates the Due Process Clause; and (3) a claim that Louisiana's laws banning non-franchising manufacturers from direct sales and non-fleet warranty-servicing violate the Equal Protection Clause. Pet.App.12a, 70a-72a.

In 2023, the district court dismissed Tesla's complaint with prejudice. Pet.App.54a. With respect to the due process claim, the court held that Tesla had not sufficiently alleged that the Commissioners demonstrated "actual bias," and that Tesla therefore had not shown that the Commissioners possessed a sufficient stake in regulating Tesla's leasing and servicing activities to

establish a constitutional violation. Pet.App.113a. The court also dismissed both the Sherman Act claim and the equal protection claim. Pet.App.76a-83a, 113a-121a.

Tesla appealed. The panel reversed the dismissal of the due process claim, vacated and remanded the antitrust claim, and affirmed the dismissal of the equal protection claim. Pet.App.5a. Judge Smith authored the lead opinion, with no other panel member joining the portion addressing Tesla's due process claim. Pet.App.4a. Judge Haynes concurred in the judgment only on the due process and antitrust claims, and concurred in full in the affirmance of the dismissal of the equal protection claim. Pet.App.4a n.*. Judge Douglas dissented with respect to the due process and antitrust claims but concurred in the judgment as to the court's disposition of the equal protection claim. Pet.App.35a & n.1.

On the due process claim, Judge Smith first rejected the district court's conclusion that Tesla must plead "actual bias," holding instead that "possible bias is sufficient" to state a claim. Pet.App.17a. But even if actual bias were required, Judge Smith concluded that "Tesla has pleaded enough specific facts to demonstrate *plausible* actual bias[.]" Pet.App.22a. As Judge Smith explained: "Tesla has alleged that various dealers reached out to the Commission and received responses along the lines of 'We're on it.' The Commission subsequently started investigating Tesla for regulatory violations. That is plausible actual bias on well-pleaded facts." Pet.App.17a.

Judge Smith next concluded that the Commissioners' posture towards Tesla's leasing and warranty activities "falls within the unconstitutional mire … proscribe[d]" by two foundational due process precedents:

Gibson v. *Berryhill*, 411 U.S. 564 (1973), and *Wall* v. *American Optometric Ass'n*, 379 F. Supp. 175 (N.D. Ga. 1974), *summarily aff'd sub nom. Wall* v. *Hardwick*, 419 U.S. 888 (1974). Pet.App.22a. As Judge Smith observed, "*Gibson* and *Wall* control this case," Pet.App.19a, because they stand for the proposition that individuals "'with substantial pecuniary interest in legal proceedings should not adjudicate disputes' governing revocation of a competitor's license to practice in the relevant industry—even if that authority is otherwise lawfully exercised," Pet.App.22a. Here, the Commissioners have a substantial pecuniary interest in the proceedings against Tesla in light of their incentive "to exclude new business models from entering the market." Pet.App.24a.

Judge Smith made clear that neither the possible legality of the investigation into Tesla nor evidence that the Commission once sided with Tesla on a particular legal issue undermines the plausibility of Tesla's allegations. *See* Pet.App.20a-22a & n.16. Even if the defendants are "one hundred percent right that this investigation is completely above board legally," Judge Smith explained, it would not change the result here because "that is not the problem at which *Gibson* and *Wall* take aim." Pet.App.22a.

Judge Smith concluded that *Friedman* v. *Rogers*, 440 U.S. 1, 18 (1979), did not alter the result. Per *Friedman*, "*some* action must be taken against a plaintiff" before the plaintiff can challenge the composition of a board or commission on due process grounds. Pet.App.19a (citation omitted). Tesla met that criterion by alleging that the "Commission has already begun exercising power over Tesla … by issuing subpoenas" to Tesla. Pet.App.18a.

As relevant here, Judge Douglas dissented from the court's disposition of the due process claim. Judge Douglas found the Commissioners' alleged "antagonistic relationship" with Tesla to be "conceivable, but conclusory and not plausible." Pet.App.37a. She also found that any "possible temptation" the Commission might have to target Tesla "'ignores the fact that' six of the fifteen members of the Commission"—to be clear, a non-controlling minority—"are not Tesla's competitors." Pet.App.37a-39a (citation omitted). Judge Douglas further argued that *Friedman* requires dismissal of Tesla's claim, because, in her view, Tesla's suit is a "generalized challenge to the board." Pet.App.39a.

Following the panel's decision, LADA, the Commission, and the individual Commissioners filed two separate petitions seeking rehearing *en banc* by the full Fifth Circuit. No judge in the Fifth Circuit requested *en banc* review, and the petitions for rehearing were denied. Pet.App.135a.

REASONS FOR DENYING THE PETITION

I. A GVR Is Not Warranted

The Commissioners do not seek merits review. For good reason. *See infra* secs. II, III. Instead, the Commissioners request only that the Court GVR the decision below. *See* Pet.2, 18. But the "GVR power should be exercised sparingly," *Lawrence* v. *Chater*, 516 U.S. 163, 173 (1996) (per curiam), and this is not the unusual case where a GVR might be appropriate. There have been no intervening developments—legal, factual, or otherwise—that warrant asking the Fifth Circuit to revisit its decision. Nor is this the kind of exceptional situation involving life or liberty where the Court has used a GVR

to draw attention to a potentially grave constitutional oversight.

The "standard" for a GVR "always has been" that a "GVR is appropriate when 'intervening developments … reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome' of the matter." *Wellons* v. *Hall*, 558 U.S. 220, 225 (2010) (per curiam) (quoting *Lawrence*, 516 U.S. at 167) (alteration in original). *Lawrence* itself is a prototypical example: the Social Security Administration's intervening adoption of a "new statutory interpretation" relevant to the case warranted a GVR to enable the court of appeals to consider the agency's new interpretation. 516 U.S. at 165-166.

This established test requires *some* "intervening development[]" following the lower court's decision, or at minimum a "recent development[]" that the court below likely "did not fully consider" prior to its decision. *Lawrence*, 516 U.S. at 167. Such circumstances are necessary to overcome competing interests like "[r]espect for lower courts" and "the public interest in finality of judgments" that weigh against this Court vacating a decision without hearing the case on its merits docket. *Id.*; *see also Myers* v. *United States*, 587 U.S. 981, 982 (2019) (Roberts, C.J., dissenting) ("Unless there is some new development to consider, we should vacate the judgment of a lower federal court only after affording that court the courtesy of reviewing the case on the merits and identifying a controlling legal error.").

Here, there are no intervening or recent developments that could justify a GVR. Qualifying developments may include intervening decisions from this Court

or a State Supreme Court, new federal statutes, administrative reinterpretations of federal statutes, new state statutes, changed factual circumstances, and confessions of error. *See Lawrence*, 516 U.S. at 166-167 (collecting cases). The Commissioners do not even attempt to identify such a change in circumstances. *See* Pet.14-18. That failure alone suffices to deny their petition.

Because the Commissioners cannot meet the Court's standard for GVRs, they invent a new one, suggesting that a GVR may be appropriate whenever a lower court has "apparent[ly]" failed "to fully consider an issue." Pet.15. (citing *Andrus* v. *Texas*, 590 U.S. 806 (2020) (per curiam) and *Youngblood* v. *West Virginia*, 547 U.S. 867 (2006) (per curiam)). But the two decisions the Commissioners cite for that proposition say nothing of the sort. They instead reflect this Court's rare—and contested, *see, e.g.*, *Andrus*, 590 U.S. at 824 (Alito, J., dissenting, joined by Thomas and Gorsuch, J.J.)—practice of using GVRs to correct egregious oversights in criminal cases where the petitioner's life or liberty is at stake. *See also Stutson* v. *United States*, 516 U.S. 193, 195 (1996) (per curiam) (finding that "the equities clearly favor a GVR" where "the petitioner is in jail having, through no fault of his own, had no plenary consideration of his appeal"). To state the obvious, that is not the situation here.

In *Andrus*, the petitioner had been sentenced to death after his attorney had failed to investigate, much less introduce, "abundant mitigating evidence" about the "myriad tragic circumstances that marked Andrus' life." 590 U.S. at 806-807, 815. This Court found it "clear," in light of the uncovered mitigating evidence, that Andrus had "demonstrated [his] counsel's deficient performance." *Id.* at 808. But rather than summarily reverse, the Court issued a GVR to ensure the Texas Court of Criminal Appeals considered in the first

instance whether Andrus met the "prejudice" prong of this Court's ineffective assistance of counsel test. 590 U.S. at 806-808 (citing *Strickland* v. *Washington*, 466 U.S. 668 (1984)). That GVR was appropriate because the lower court's "one-sentence denial" of the petitioner's *Strickland* claim "did not conclusively reveal" the basis for the court's decision, including whether the court properly "analyze[d] *Strickland* prejudice or engage[d] with the effect [that] additional mitigating evidence … would have had on the jury." *Id.* at 822.

Similarly, in *Youngblood*, the petitioner was serving a lengthy sentence for sexual assault, following a conviction that rested principally on the testimony of three women he had allegedly held captive. 547 U.S. at 868. After an investigator uncovered a note that strongly suggested the sexual encounter had been consensual—as well as evidence that a state trooper had read the note and then asked for it to be destroyed—Youngblood moved to set aside his conviction for violating *Brady* v. *Maryland*, 373 U.S. 83 (1963), and its progeny. *Youngblood*, 547 U.S. at 868-869. This Court issued a GVR because it found that the petitioner had "clearly presented a federal constitutional *Brady* claim," but neither the trial court, nor the Supreme Court of Appeals of West Virginia, had "discuss[ed]" or "examin[ed] the specific constitutional claims associated with the alleged suppression of favorable evidence." *Id.* at 869, 870. Given "the significance of the issue" to the disposition of the case, a GVR was appropriate because, if the Court were to reach the merits, "it would be better to have the benefit of the views of the full Supreme Court of Appeals of West Virginia on the *Brady* issue." *Id.* at 870.

What *Andrus* and *Youngblood* have in common, aside from their tragic facts, is a lower court decision that failed to grapple with a potentially outcome-

determinative constitutional question in a criminal case where that failure potentially meant decades of jail time or the death penalty for the defendant. Nothing like that happened here. Rather, Judge Smith devoted pages of his opinion to examining the outcome-determinative constitutional question, distinguishing the cases on which the Commissioners relied, and applying the governing law to the facts of this case. *See* Pet.App.13a-25a. Indeed, every one of this Court's due process precedents cited in the Commissioners' petition is discussed in depth in Judge Smith's opinion. *Compare id.*, *with* Pet.11-14. And even if that were not true, "[t]his Court should not just GVR a case because it finds the opinion, though arguably correct, incomplete and unworkmanlike[.]" *Lawrence*, 516 U.S. at 173.

At bottom, the Commissioners have not "squarely" applied "this [Court's] GVR practice," Pet.15; they have instead sought this Court's intervention in a concededly un-cert-worthy case where they disagree with the fact-bound application of established law in a single-judge opinion to the allegations in Tesla's complaint. A GVR is an unusual remedy to begin with, but in these circumstances, it would be unprecedented. Because there is no basis for issuing the only relief the Commissioners seek, the petition should be denied.

II. THE DECISION BELOW WAS CORRECT

The Fifth Circuit correctly held that Tesla's due process claim survived a motion to dismiss. Tesla plausibly alleged that the Commissioners—who are in the middle of conducting an administrative investigation into Tesla—have a substantial pecuniary interest in keeping Tesla and its direct-to-consumer business model out of Louisiana. Pet.App.22a, 24a-25a. That result flows directly from *Gibson* v. *Berryhill*, 411 U.S. 564 (1973), and

Wall v. *American Optometric Ass'n*, 379 F. Supp. 175 (N.D. Ga. 1974), *summarily aff'd sub nom. Wall* v. *Hardwick*, 419 U.S. 888 (1974).

In *Gibson*, this Court addressed Alabama's Board of Optometry, a regulatory entity on which only independent optometrists in private practice were eligible to serve. *See* 411 U.S. at 578-579. The Court held that the Board could not constitutionally hold an adjudicatory hearing to consider charges against commercial optometrists (*i.e.*, optometrists affiliated with retail stores, rather than in private practice) because the Board members had a "substantial pecuniary interest" in the outcome of the relevant proceedings. *Id.* at 570, 579. Specifically, the Board wanted to "revoke the licenses of all optometrists in the State who were employed by business corporations" because, if the Board could stamp out the commercial-optometry business model, it "would possibly redound to the personal benefit of members of the Board." *Id.* at 578.

In *Wall*, a three-judge court barred a state optometry board composed of "dispensing" optometrists (optometrists who also distribute lenses and frames) from exercising "complete control" over the market entry of "prescribing" optometrists (who affiliate with other business to dispense lenses and frames). 379 F. Supp. at 178-179. The district court found "it inconceivable that" the dispensing-optometrist board members "could be called disinterested," because if prescribers "were prevented from practicing optometry in Georgia," many of those competitors' patients would likely "seek optometric services from" dispensing optometrists, such as the board members. *Id.* at 188-189. In other words, as in *Gibson*, the state board could not sit in judgment over competitors whose rival business model threatened the board members' alternative model. This Court

summarily affirmed the district court's decision in *Wall* v. *Hardwick*, 419 U.S. 888 (1974).[1]

Together, *Gibson* and *Wall* make clear that the dealer Commissioners cannot constitutionally oversee matters related to Tesla's "license to practice in" their industry. Pet.App.22a. That remains true regardless of whether the biased regulators' actions might otherwise be consistent with law. The rule is that "those with substantial pecuniary interest in legal proceedings should not adjudicate" those proceedings, period—not that biased decision makers are disqualified only when their decisions are wrong. *Gibson*, 411 U.S. at 579. The law's approach to analogous conflicts of interest is instructive. Whether a judge's pecuniary bias in a case can be excused, for example, does not turn on having decided the case correctly. *See, e.g.*, *Caperton* v. *A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) ("[T]he Due Process Clause incorporated the common-law rule that a judge must recuse himself when he has 'a direct, personal, substantial, pecuniary interest' in a case." (quoting *Tumey* v. *Ohio*, 273 U.S. 510, 523 (1927))). The same principle applies in the regulatory context.

The Commissioners concede that this is the correct legal standard. *See* Pet.11 ("Judge Smith's opinion cites the right standard but fails to properly apply it."). But they contend that Judge Smith improperly applied it by failing to identify a "substantial pecuniary interest." Pet.13. At most, the Commissioners argue, Judge Smith pointed to "Tesla's competitor status." Pet.12, 14.

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[1] This Court has treated the summary affirmance in *Wall* as part of its due process jurisprudence. *See Friedman* v. *Rogers*, 440 U.S. 1, 18 (1979) (discussing "*Gibson* and *Wall*").

The Commissioners are wrong in both their characterization of Judge Smith's opinion and their description of relevant precedent. First, Judge Smith pointed to multiple specific allegations that raise a plausible inference that the dealer Commissioners have a substantial pecuniary interest in excluding Tesla from the market. These allegations include that the dealer Commissioners "compete directly with Tesla." Pet.App.20a. But Judge Smith also described the dealer's "general interest in the franchised-dealer model" that Tesla threatens and "strong financial incentives to keep Tesla out of Louisiana." *Id.* These financial interests were buttressed by *actual evidence*—not necessary at the motion to dismiss stage—that the Commissioners share, and have acted on, the existential financial fears of their fellow dealers. *See id.* Specifically, dealers have made clear through "a flurry of activity" that Tesla's "entry into Louisiana is 'not good for the future of [their] business.'" Pet.App.9a, 20a. When dealers raised that and similar concerns with the Commission, the responses—"I am on it," "[w]e are on top of this," and "[o]n top of it"—demonstrated that the Commissioners understood and shared the dealers' alarm. Pet.App.9a.

As in *Gibson* and *Wall*, moreover, the substantial pecuniary interest here arises from a clash with a rival business model. *Gibson* and *Wall* both concerned the efforts of independent optometrists to exclude corporate-affiliated optometrists from the market. Here, Tesla is the leading proponent of a business model—direct-to-consumer services—that represents a clear alternative to the franchise-dealer model on which a controlling bloc of the Commissioners rely. Thus, the substantial pecuniary interest arises from more than just "mere competitor status," Pet.18: like in the contests over optometry, excluding Tesla from the market would have the effect

of eliminating an alternative business model that the dealer Commissioners perceive as a substantial economic threat.

LADA's role in keeping Tesla out of the Louisiana market reinforces the application of *Gibson* and *Wall*. A trade association will be most active when its members face a systematic threat from a rival business model. That was true in *Gibson*, where it was the Alabama Optometric Association, an entity comprised entirely of independent optometrists, that brought charges against corporate-affiliated optometrists to prevent them from doing business in the state. 411 U.S. at 567. A similar dynamic was at play in *Wall*, where the court found that Georgia's optometry board was "completely controlled by members of the [Georgia Optometic Association (GOA)]," and that GOA members would economically benefit from the board's efforts to target prescribing optometrists (who adhered to a rival business model and thus were ineligible for membership in the GOA). 379 F. Supp. at 179, 188-189. Here, as with the trade associations in *Gibson* and *Wall*, LADA's fear of the threat Tesla poses to "the future of our business," Pet.App.9a, is further evidence that dealers throughout the state—including the dealer Commissioners—have a substantial pecuniary interest in stifling Tesla's business.

Against this backdrop, the Commissioners' collaborations with LADA, their actions to investigate Tesla, and their "determination that the fleet-owner exception does not allow warranty repairs on sold vehicles," all make more plausible the degree to which they view Tesla—the leading proponent of a direct-to-consumer business model—as an existential economic threat. Pet.App.20a. Tesla's allegations thus establish that the automobile franchise-dealer industry in Louisiana has a substantial pecuniary interest in keeping Tesla out of

the market, and that the Commissioners with authority over Tesla's future—a majority of whom are automobile franchise dealers—both share that interest and have acted accordingly to stymie Tesla's efforts. Judge Smith was therefore correct that "Tesla has pleaded a due process claim in line with *Gibson* and *Wall*." Pet.App.25a.

The Commissioners are wrong that this Court's decision in *Friedman* v. *Rogers*, 440 U.S. 1 (1979), would require dismissal. As Judge Smith correctly explained, *Friedman* merely "foreclosed pre-enforcement challenges to regulatory authority based on the composition of the regulatory body alone." Pet.App.19a. That is because a board's pecuniary interest may depend on the specific issue or party before it. *Friedman* thus requires that a due process challenge be situated in a "particular context," so that a court can assess whether the board's pecuniary interest results in a conflict with respect to a particular proceeding involving the plaintiff. 440 U.S. at 18.

Tesla has not challenged the composition of a regulatory body in an abstract, pre-enforcement setting. Rather, just as *Friedman* instructs, Tesla presented the Court with "a particular context"—active investigative proceedings regarding Tesla's Louisiana operations—in which "the members of the regulatory board … have personal interests that preclude[] … fair and impartial" proceedings. *Friedman*, 440 U.S. at 18. Indeed, those proceedings remain ongoing, and the Commissioners have continued to take action against Tesla, most recently by denying lessor license applications that would permit Tesla to lease vehicles from its New Orleans location. *See* Proposed Suppl. to FAC ¶¶ 4, 16, 19, *Tesla* v. *Louisiana Auto. Dealers Ass'n*, No. 2:22-cv-02982 (E.D. La.), Dkt. 272-1. That development removes this

case even further from the pre-enforcement concerns raised in *Friedman*.

In sum, this Court's due process jurisprudence confirms that Tesla has stated a valid due process claim here. This Court should therefore leave the Fifth Circuit's decision intact.

III. THE FIFTH CIRCUIT'S NARROW, FACTBOUND DECISION ANNOUNCED IN A SINGLE-JUDGE OPINION DOES NOT WARRANT THIS COURT'S REVIEW

Because the Commissioners ask this Court to use an inapt procedural tool to summarily vacate a correct lower court decision, the Court can deny the petition without considering other factors relevant to certiorari. But those factors only reinforce the appropriateness of denying the petition.

First, the Fifth Circuit's decision is narrow and confined to the facts of this case. The decision affects one set of proceedings, instituted by one regulatory board, against one regulated party that has asserted case-specific allegations of bias and substantial pecuniary interest. The panel's judgment does not jeopardize the Commission's other operations, nor the operations of other regulatory boards within the Fifth Circuit.[2]

The Commissioners argue otherwise only by mischaracterizing Judge Smith's opinion. Judge Smith did not hold that "mere competitor status[] establishes a due

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[2] Nor are petitioners right to assert (Pet.3, 16) that a single-judge opinion, in which the sole concurring judge concurs only in the judgment, is necessarily precedential. *See Indest* v. *Freeman Decorating, Inc.*, 168 F.3d 795, 796 n.1 (5th Cir. 1999) (Wiener, J., specially concurring) (noting that because neither of the two opinions in the case "enjoys a quorum" of at least two panel members, "neither writing constitutes precedent in this Circuit").

process violation." Pet.11. As Judge Smith correctly concluded, excluding Tesla would not only eliminate another sales outlet; it would also further the dealer Commissioners' "general interest in the franchised-dealer model" by preventing a rival direct-to-consumer model from taking root in Louisiana. Pet.App.20a. And the Commissioners' substantial pecuniary interest was further confirmed by evidence of actual bias, including discussion that Tesla's "entry into Louisiana is 'not good for the future of our [that is, the dealers'] business.'" Pet.App.9a, 20a.

Judge Smith's treatment of the Fifth Circuit's decision in *Chrysler Corp.* v. *Texas Motor Vehicle Commission*, 755 F.2d 1192 (5th Cir. 1985)—a case on which Judge Douglas's dissent heavily relies—makes clear that his decision in no way "calls into question … virtually every State regulatory board in the Fifth Circuit." Pet.2. *Chrysler* also involved a "dealer-majority commission" and a suit brought by a manufacturer, but the due process claim turned out differently. *See* Pet.App.23a-24a & n.18. Specifically, *Chrysler* was about "warranty-related disputes between the purchasers of new vehicles and automobile manufacturers." Pet.App.23a (quoting *Chrysler*, 755 F.2d at 1195). Because there were good reasons to think the "predictors of bias … point[ed] in opposite directions"—sometimes the commissioners might be unsympathetic to manufacturers and sometimes they might be biased against other dealers—there were insufficient grounds to find that the commission's composition violated the manufacturer's due process rights. *See id.* In this setting, by contrast, "the [Commission's] bias is predictable" and points in only one direction given the substantial pecuniary interest the Commissioners have in excluding Tesla

and its rival business model from the market. Pet.App.24a.

Moreover, the other boards that the Commissioners invoke rarely address disputes involving the kind of substantial pecuniary interest at stake here and in *Gibson* and *Wall*, where regulators have a financial stake in the success or failure of a competing business model and are acting to keep that rival model from taking root within their state. Nursing boards, medical boards, real estate commissions, and the like (*see* Pet.17) usually address one-off licensing or disciplinary matters in a large market. With those sorts of issues, the "level of attenuation" between the adjudicator's interest and any given proceeding is "remote." *New York State Dairy Foods, Inc.* v. *Northeast Dairy Compact Comm'n*, 198 F.3d 1, 14-15 (1st Cir. 1999); *see also Stivers* v. *Pierce*, 71 F.3d 732, 743 (9th Cir. 1995) ("[I]t is unlikely that any attorney practicing in a city like Los Angeles would have a competitive interest sufficiently strong to require that he be disqualified from considering the licensing of an additional lawyer."). Nothing in Judge Smith's opinion suggests a due process problem with any of these proceedings.

Second, this case does not implicate a circuit split, an unsettled area of law, or any other consideration worthy of this Court's intervention. To the contrary, the Commissioners' petition concedes that the legal standard here is clear and uncontroversial. *See, e.g.*, Pet.11. And "certiorari is rarely granted when the asserted error consists of … the misapplication of a properly stated rule of law." S. Ct. R. 10.

Finally, the petition arises from a decision on a motion to dismiss. Further factual development will crystalize the due process issues in this case. Discovery may reveal additional evidence further substantiating the

bias of the dealer Commissioners, their substantial pecuniary interest in excluding Tesla and its direct-to-consumer model from Louisiana, or the alignment between the Commission and LADA. As noted (*supra* p.20), additional evidence along these lines has already arisen since the Fifth Circuit's decision: shortly thereafter, the Commissioners denied lessor license applications that would have enabled Tesla to lease from its New Orleans facility. Proposed Suppl. to FAC ¶ 16. The Commission made this decision after waiting more than two months past the statutory deadline, and even though the Commission's inspector had not found "any issues" with the applications. *Id.* ¶¶ 14, 16. The Commissioners' pretextual explanation for the denial only raises further questions about the Commissioners' posture towards Tesla, *see id.* ¶¶ 16-19, which discovery may resolve. Intervention now, before Tesla has obtained any discovery from the Commissioners, is a particularly inappropriate use of the Court's resources.

CONCLUSION

The petition should be denied.

Respectfully submitted.

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