IN THE SUPREME COURT OF GEORGIA

Case No. S25A1139

Lucid Group USA, Inc.,

Plaintiff-Appellant,

v.

State of Georgia, et al.,

Defendants-Appellants,

v.

Georgia Automobile Dealers' Association,

Intervenor-Appellee.

On Appeal From The Superior Court of Fulton County
Civil Action No. 24CV008318

BRIEF OF AMICUS CURIAE AMERICANS FOR PROSPERITY FOUNDATION--GEORGIA

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Americans for Prosperity Foundation is a 501(c)(3) nonprofit organization that operates a state chapter in Georgia ("AFPF-GA") that advocates for long-term solutions to some of our country's biggest problems. One of those key ideas is that our system of federalism and dual sovereignty protects liberty.

AFPF-GA is interested in this case because it believes companies in all industries should be able to compete in the free market and supports consumer choice. AFPF-GA broadly opposes protectionist legislation that shields special interest groups from competition by creating unlawful barriers to entry, such as the Direct-Sales Prohibition at issue in this case. AFPF-GA also believes naked economic protectionism is not a legitimate state interest sufficient to support economic regulation. Economic protectionism harms competition and consumer welfare. Georgians deserve more purchasing power and choices for how to spend their hard-earned money free from unconstitutional government restrictions.

AFPF-GA is also interested in this case because it believes the Georgia Constitution plays a vital role in our system of dual sovereignty, providing additional protections for liberty and property beyond the floor guaranteed by the federal Constitution. As relevant here, the Georgia Constitution provides more protection of economic liberty and the right to pursue a lawful occupation than the federal Constitution, as interpreted by the U.S. Supreme Court.

SUMMARY OF ARGUMENT

A willing buyer of a lawful product (here, a would-be electric vehicle ("EV") purchaser) should be able to purchase from a willing seller (an EV manufacturer) without going through a government-mandated middleman (here, a brick-and-mortar car dealership). That is especially so where, as here, the manufacturer is only barred from selling directly to the consumer—without a government-mandated intermediary—with respect to *in*-state (as opposed to out-of-state) sales. Yet that is exactly what Georgia's Direct-Sales Prohibition does, harming both consumer welfare and competition without any countervailing benefit—except, of course, the economic protectionism benefitting the government-mandated middleman. This is wrong. Georgians

should be free to buy, lease, and service the car of their choosing, in the manner of their choosing, from the seller of their choosing.

The current arrangement is unconstitutional. To pass muster under the Georgia Constitution's Due Process Clause, a regulation that burdens a lawful occupation must be reasonably necessary to advance a specific legitimate interest in health, safety, or public morals. Naked economic protectionism is not a legitimate justification. Here, the sole reason for Georgia's in-state Direct-Sales Prohibition is shielding a group of businesses from economic competition. The Prohibition thus violates Georgia's Due Process Clause, as applied to Lucid's direct-sales business model, and is void.

Nor does a 1992 amendment to the Georgia Constitution narrowly targeted at overriding specific—and distinguishable—decisions by this Court wipe away the robust due process and equal protection safeguards for economic liberty guaranteed under the Georgia Constitution, as the Superior Court mistakenly found. As its "in order to" clause makes clear, Article III, Section VI, paragraph II only authorizes the General Assembly to regulate the motor vehicle industry to advance a specified subset of enumerated interests under the State's police power: "prevent[ing] frauds, unfair business practices, unfair methods of competition, impositions, and other abuses upon [Georgia] citizens." Ga. Const. Art. III, § VI, Para. II(c). Laws that do not further one or more of these specific interests fall outside of the 1992 amendment's sweep and must comport with the protection of economic liberty enshrined in Georgia Constitution's Due Process and Equal Protection Clauses.

The Superior Court mistakenly overread the provision's "notwithstanding" clause to give the State carte blanche to violate the due process and equal protection rights of car manufacturers like Lucid. In so doing, it read the "in order to" clause out of the provision, rendering it a nullity. The Superior Court thus put the cart before the horse, failing to analyze whether the Direct-Sales Prohibition actually advances any of the 1992 amendment's enumerated interests. That was error. And because the Prohibition does nothing to prevent any of the harms the 1992 amendment is aimed at, its "notwithstanding" clause does not apply.

For the foregoing reasons, this Court should reverse the Superior Court.

ARGUMENT

I. The Georgia Constitution Provides Robust Protection of Economic Liberty Greater Than the Federal Constitution's Floor.

The right to earn an honest living free from arbitrary and irrational government regulation is deeply rooted in the Georgia Constitution and this Court's precedent. *See Raffensperger v. Jackson (Jackson II),* 316 Ga. 383, 388–89 (2023). This Court has "long recognized that the Georgia Constitution's Due Process Clause entitles Georgians to pursue a lawful occupation of their choosing free from unreasonable government interference."[1] *Jackson v. Raffensperger (Jackson I)*, 308 Ga. 736, 740 (2020). And this Court has characterized this right as "fundamental," *see In re Coomer*, 320 Ga. 430, 440 (2024); "one of the highest rights possessed by any citizen," *Richardson v. Coker*, 188 Ga. 170, 175 (1939); and an "inherent right" people are born with that government did not give and cannot take away, *see Schlesinger v. Atlanta*, 161 Ga. 148, 159 (1925) ("The right to make a living is among the greatest of human rights, and when lawfully pursued can not be denied.").

Georgia's strong commitment to safeguarding economic liberty aligns with our Nation's history and tradition. *See Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 122 (Tex. 2015) (Willett, J., concurring) ("Economic liberty is deeply rooted in this Nation's history and tradition[.]"); *see also* Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 Harv. J.L. & Pub. Pol'y 983, 989–1016 (2013). And "the right to earn a living" has particularly "deep roots[.]" *Golden Glow Tanning Salon, Inc. v. City of Columbus*, 52 F.4th 974, 981 (5th Cir. 2022) (Ho, J., concurring); *see* James W. Ely Jr., *"To Pursue Any Lawful Trade or Avocation": The Evolution of Unenumerated Economic Rights in the Nineteenth Century*, 8 U. Pa. J. Const. L. 917, 953 (2006) ("[T]he right to pursue callings and make contracts can be traced far into the past[.]"). This right to pursue a lawful occupation without arbitrary government regulation traces back

[1] An important component of this right is the freedom "to make contracts with other citizens[.]" *Bazemore v. State*, 121 Ga. 619, 620 (1905).

centuries and predates the Founding and indeed Georgia's formation as a colony.[2] *See Golden Glow*, 52 F.4th at 982 (Ho, J., concurring). *See generally* Calabresi & Leibowitz, 36 Harv. J.L. & Pub. Pol'y at 989–1003; Timothy Sandefur, *The Right to Earn a Living*, 6 Chap. L. Rev. 207, 209–17 (2003).

As this Court recently reaffirmed, the Georgia Constitution provides robust protection of economic liberty that goes beyond that guaranteed by the federal Constitution, as interpreted by the U.S. Supreme Court.[3] *See Jackson II*, 316 Ga. at 392 (plaintiffs need not "disprove 'any reasonably conceivable state of facts that could provide a rational basis for the classification,' as the rational basis test does under federal law" (quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993)). The Georgia Constitution's proscription against irrational and arbitrary economic regulation is far from toothless and has real bite. In contrast to the federal rational-basis standard, for example, "Georgia's Due Process Clause requires more than a talismanic recitation of an important public interest" to sustain a law that impinges on the ability to engage in a lawful trade. *Id.* at 396. *Cf. Tiwari v. Friedlander*, 26 F.4th 355, 368-69 (6th Cir. 2022) (Sutton, C.J.) (noting criticisms of federal rational basis test).

This Court has made clear that a regulation that places "a burden on the ability to practice a lawful occupation is only constitutional if it is reasonably necessary to advance an interest in health, safety, or public morals." *Jackson II*, 316 Ga. at 391. That is a discrete, circumscribed universe of legitimate justifications. *See id.* And for a law that burdens the right to earn an honest living to be upheld the State must be able to identify "a specific interest" in one

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[2] *See, e.g.*, *Allen v. Tooley*, 80 Eng. Rep. 1055 (K.B. 1614); *The Case of the Tailors of Ipswich*, 77 Eng. Rep. 1218 (K.B. 1610); *The Case of the Monopolies*, 77 Eng. Rep. 1260 (K.B. 1602); *Davenant v. Hurdis*, 72 Eng. Rep. 769 (K.B. 1599).

[3] Under our system of federalism, "state constitutions are not mere shadows cast by their federal counterparts, always subject to change at the hand of a federal court's new interpretation of the federal constitution." *Olevik v. State*, 302 Ga. 228, 234 n.3 (2017). And "state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution." *Arizona v. Evans*, 514 U.S. 1, 8 (1995); s*ee also Elliott v. State*, 305 Ga. 179, 187 (2019).

of those categories.[4] *See id.* at 392. *Cf. Felton v. Atlanta*, 4 Ga. App. 183, 185 (1908) ("common inherent right" to earn honest living "is so well established that limitations thereon are to be strictly construed"). A law that is unsupported by a legitimate police power justification "is repugnant to constitutional guaranties and void." *Bramley v. State*, 187 Ga. 826, 835 (1939); *see* Ga. Const. Art. I, § II, Para. V(a) ("Legislative acts in violation of this Constitution . . . are void[.]").

II. Lucid Has Stated a Claim That the Direct-Sales Prohibition Violates Lucid's Due Process Right To Pursue Its Business Free From Unreasonable Government Regulation.

To state a claim for a violation of the Georgia Constitution's Due Process Clause, a plaintiff must plead facts showing "that an occupation is otherwise lawful and that a regulation unreasonably burdens the ability to pursue it[.]"[5] *Jackson II*, 316 Ga. at 391. Lucid's Complaint easily meets this test.[6] First, there is no dispute that manufacturing and selling high-quality EVs is a lawful profession and that direct manufacturer-to-consumer sales "would be lawful but for the challenged restriction." *Id.* Second, Lucid has established that the Direct-Sales Prohibition arbitrarily—indeed, nonsensically—and unreasonably burdens Lucid's lawful business.

As Lucid's Complaint shows, the Direct-Sales Prohibition has no connection to the State's legitimate interest in protecting Georgians' health

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[4] Even if the State identifies such an interest, "if the challenger can establish that a regulation imposing restrictions on a lawful occupation does not advance the articulated public purpose by means that are reasonably necessary for that purpose, then the regulation cannot stand." *Jackson II*, 316 Ga. at 393.

[5] *Amicus* agrees that Lucid's Equal Protection and Uniformity Clause claims should proceed but primarily writes here to focus on why the Direct-Sales Prohibition violates Due Process.

[6] At this stage, Lucid's factual allegations are taken as true, and all doubts are resolved in Lucid's favor. *See Norman v. Xytex Corp.*, 310 Ga. 127, 128 (2020) (At motion-to-dismiss stage, courts "take the allegations in the complaint as true and resolve all doubts in favor of the" plaintiffs.).

and safety and public morals.[7] *See generally id.* To the contrary, Lucid's Complaint unmasks the Prohibition as naked economic protectionism, at least as applied to Lucid's direct-sales business model. *See* V1-191, 196 (¶¶ 34, 46).

As Lucid explains, the Prohibition harms the competitive process and consumer welfare, *see* V1-191–93 (¶¶ 34, 37–38); substantially increases consumer costs while reducing consumer choice and experience, *see* V1-192–93 (¶¶ 37–38); does nothing to protect consumers from unfair or deceptive business practices, including fraud, and perversely frustrates the State's ability to do so, *see* V1-191–92 (¶¶ 36–37); and is untethered to any interest in protecting franchised dealers from unfair competition or business practices by manufacturers—particularly direct-sale-only manufacturers like Lucid, which do not use middlemen at all, *see* V1-193 (¶ 39).

Shielding franchised dealers from competition at the expense of Georgia consumers is not a legitimate state interest, let alone one sufficient to justify the Prohibition. As this Court recently emphasized, "protectionism" is not a legitimate justification for regulations that interfere with the ability to engage in a lawful occupation and restrict otherwise lawful business transactions.[8] *Jackson II*, 316 Ga. at 392. To the contrary, this Court has said, "human dignity and individual freedom demand that one engaged in a lawful business

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[7] The due process right at issue here "is concerned with the imposition of arbitrary (i.e., not reasonably necessary) burdens on the ability to pursue a lawful occupation." *Jackson II*, 316 Ga. at 390. "Disparate treatment" of similarly situated entities "is evidence of the violation" of this right. *Id.* Tellingly, Georgia law allows a different EV manufacturer to operate its own dealerships in Georgia and sell its vehicles directly to consumers. *See* O.C.G.A. § 10-1-664.1(a)(8); V1-188–89 (¶¶ 23–29).

[8] In a similar vein, federal courts have also found "protecting a discrete interest group from economic competition is not a legitimate governmental purpose." *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002); *see, e.g., St. Joseph Abbey v. Castille*, 712 F.3d 215, 222–23 (5th Cir. 2013); *Merrifield v. Lockyer*, 547 F.3d 978, 991 n.15 (9th Cir. 2008). The Supreme Court of the United States has also "suggest[ed] that bare economic protectionism does not meet the legitimacy requirement" necessary to sustain economic legislation. *Powers v. Harris*, 379 F.3d 1208, 1226 n.1 (10th Cir. 2004) (Tymkovich, J., concurring in part and concurring in the judgment) (collecting cases).

injurious to no one must not be arbitrarily prevented" from pursuing it by laws that "set up trade barriers solely for the purpose of protecting a resident against proper competition." *Moultrie Milk Shed, Inc. v. Cairo*, 206 Ga. 348, 352 (1950). That is all the Direct-Sales Prohibition does.

Accordingly, Lucid has stated a claim for a due process violation sufficient to survive a motion to dismiss.

A. The Direct-Sales Prohibition Is an Unreasonable Burden Because It Harms the Competitive Process and Consumer Welfare.

The State conspicuously declined below to dispute or engage with Lucid's factual allegations or attempt to offer any legitimate justification for the Direct-Sales Prohibition.[9] *See* V1-293 n.7. And for good reason: none exist.

Direct-sales bans, like the one at issue here, are simply a form of cronyism that restrict market competition and undermine consumer welfare. *See generally* Todd Zywicki, *Rent-Seeking, Crony Capitalism, and the Crony Constitution*, 23 S. Ct. Econ. Rev. 77 (2015) (discussing problem of rent seeking and cronyism). These innovation-inhibiting restrictions are an outgrowth of statutes from a bygone era designed for a different context: manufacturers abusing an imbalanced bargaining power with franchised dealerships. *See* Daniel A. Crane, *Tesla, Dealer Franchise Laws, and the Politics of Crony Capitalism*, 101 Iowa L. Rev. 573, 577–79 (2016). At least today, however, such laws solely operate as naked economic preferences, protecting an incumbent group at the expense of new entrants.[10] *See* Danny Kenny, *Banning of Direct Electric Vehicle Sales Only Helps Car Dealers*, Real Clear Markets (Sept. 2022)[11]; *see also* Timothy Sandefur, *Is Economic Exclusion a Legitimate State*

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[9] Nor did the Superior Court grapple with this question. *See* V2-368–69.

[10] "[T]he principle that states may not act upon naked preferences should not be thought to threaten any legislature's regulatory agenda" but instead "reflects a view of legitimacy in the legislative process[.]" Steven Menashi & Douglas H. Ginsburg, *Rational Basis With Economic Bite*, 8 NYU J.L. & Liberty 1055, 1104 (2014).

[11]https://www.realclearmarkets.com/articles/2022/09/23/banning_of_direct_electric_vehicle_sales_only_helps_car_dealers_855145.html

Interest, 14 Wm. & Mary Bill of Rts. J. 1023, 1042 (2006) (describing economic protectionism as "use of force for the benefit of a particular, private interest group" that "limits the freedom of some members of society solely for the benefit of others, with no public justification").

As Lucid alleged below, the Direct-Sales Prohibition not only harms the competitive process but also irrationally harms consumer welfare, reducing consumer choice. *See* V1-191–96 (¶¶ 34–46). As a U.S. Department of Justice economist broadly observed: "Perhaps the most obvious benefit from direct manufacturer sales would be greater customer satisfaction, as auto producers better match production with consumer preferences ranging from basic attributes on standard models to meeting individual specifications for customized cars." Gerald R. Bodisch, Econ. Analysis Grp., *Economic Effects of State Bans on Direct Manufacturer Sales to Car Buyers*, EAG 09-1 CA, at 4 (May 2009) (hereinafter "DOJ Competition Advocacy Paper").[12] It could also "have the potential to reduce inventory costs." *Id.* Conversely, as an open letter signed by dozens of leading economics and antitrust academics has explained, direct-sales bans do nothing to help or protect consumers and, in fact, are "bad for consumer interests." *See* Open Letter by Academics in Favor of Direct EV Sales and Service 4 (April 14, 2021) (hereinafter "Open Letter").[13]

In short, all that the Georgia Direct-Sales Prohibition does is protect a favored special interest group (auto dealers) from economic competition to the detriment of consumers and competition.

B. There Is No Rational Justification for Georgia's Direct-Sales Prohibition.

The State thus far has stayed mute on the rationale, if any, it believes justifies the Direct-Sales Prohibition. V1-293 n.7. But the policy arguments the dealers' lobbies around the nation typically advance to justify direct-sales bans are insufficient. Further, this Court should reject any attempt to recast the dealer protection law as a consumer protection statute. *See* Crane, 101 Iowa L.

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[12] https://www.justice.gov/sites/default/files/atr/legacy/2009/05/28/246374.pdf.

[13] https://laweconcenter.org/wp-content/uploads/2021/04/Direct-Sales-Nationwide-Academics-Letter-4.14.pdf.

Rev. at 593. As shown below, "[n]o sophisticated economic analysis is required to see the pretextual nature of," *see Craigmiles*, 312 F.3d at 229, the typical arguments in favor of the dealers' favored government-mandated middleman status.

The purported "disparity in bargaining power between automobile manufacturers and their dealers" has often been invoked to justify the type of restriction at issue here. *See New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96, 100–02 & n.7 (1978). Historically, "direct distribution prohibitions were expressly justified as part of a package of protections for dealers against the exercise of superior manufacturer bargaining power." Crane, 101 Iowa L. Rev. at 579. But that justification does not make sense in this context because "[d]irect-sales-only manufacturers like Lucid have no independent franchised dealers, and so there is no competitive-power imbalance or manufacturer-franchisee relationship for the state to regulate." V1-193 (¶ 39).

As to putative consumer welfare justifications for direct-sales bans like Georgia's Direct-Sales Prohibition, "[t]he dealers usually lead with, and lean most heavily on, the argument that distribution through dealers is necessary to reduce prices to consumers." Crane, 101 Iowa L. Rev. at 593. Not so. As Professor Crane has explained, this argument—which the dealers themselves don't buy—"contravenes economic principles" and lacks empirical support; in short, "[t]he consumer price reduction theory is farcical." *Id.* at 594–96; *see* DOJ Competition Advocacy Paper at 6–10 (addressing dealer concerns). The opposite is true. "[I]f anything, vertical integration by manufacturers should result in a lowering of retail prices, even if there are no efficiencies or cost savings to vertical integration." Crane, 101 Iowa L. Rev. at 594; *see also* DOJ Competition Advocacy Paper at 4 ("Direct manufacturer car sales may have the potential to reduce inventory costs."). Indeed, Lucid's Complaint avers that the Direct-Sales Prohibition *increases* consumers' costs through double marginalization by adding a middleman (and corresponding markup). *See* V1-192 (¶ 37). This drives up the cost of vehicle purchases by thousands of dollars. *See* V1-192 (¶ 37).

Another common "consumer welfare" argument holds that direct-sales bans promote quality customer service. But the idea that manufacturers are incentivized to provide shoddy customer service also makes no sense. *See*

Crane, 101 Iowa L. Rev. at 596. After all, as Professor Crane explains: "Car manufacturers make multi-billion-dollar investments to create new car technologies and brands, investments they cannot recoup without creating long-term customer loyalty." *Id.* at 596–97. Brand loyalty is particularly important for EV manufacturers, and providing quality customer service is a key part of generating and maintaining it. *See id.* That holds true for Lucid's customer-centric business model. Even if it were otherwise, this Court has made clear that "a generic interest in promoting access to quality services" is not a sufficient justification for burdening the ability to engage in a lawful occupation. *Jackson II*, 316 Ga. at 397.

Arguments that direct-sales bans are "necessary in order to ensure compliance with state regulatory requirements," "promote vehicle safety," and protect "unique bastions of virtue in local communities" are equally unpersuasive. *See* Crane, 101 Iowa L. Rev. at 598–601. In fact, the Direct-Sales Prohibition's territorial limitations *undermine* the idea that it furthers the State's interest in safety and protecting Georgians from unfair and deceptive practices. *See* V1-193 (¶ 39); *see also* Open Letter at 4 ("There is no credible consumer protection argument in favor of prohibiting direct distribution."). In any event, under the Georgia Constitution, "generic interests of quality or honesty of goods and services" "are decidedly *not* sufficient to justify a burden on the ability to practice a lawful profession." *Jackson II*, 316 Ga. at 392.

Georgia consumer-protection laws already apply to *all* in-state dealerships, regardless of who owns or operates them, *see, e.g.,* O.C.G.A. §§ 10-1-780 *et seq.* (Georgia Lemon Law), including prohibitions against deceptive sales practices, *see, e.g., id.* §§ 10-1-370 *et seq.* (Uniform Deceptive Trade Practices Act); *id.* §§ 10-1-383 *et seq.* (Fair Business Practices Act); *id.* §§ 10-1-420 *et seq.* (prohibiting false and fraudulent advertising). In other words, Georgia *already* polices inappropriate sales tactics by all sellers, leaving no remaining legitimate state interest for the Direct-Sales Prohibition to accomplish. *See, e.g., St. Joseph Abbey*, 712 F.3d at 225. *Cf. Tesla Inc. v. Del. DMV*, 297 A.3d 625, 634 (Del. 2023) (noting defendant's failure to "explain how fraud or abuse are prevented by a direct sales ban"). The Direct-Sales Prohibition, as applied to Lucid, renders these statutory provisions—which reflect the Georgia Legislature's judgment on consumer-protection policy—

meaningless. By forcing Georgia residents to purchase EVs outside of its borders, the Direct-Sales Prohibition also *frustrates* Georgia's ability to police and protect consumers from unfair and deceptive practices. *See* V1-191–92 (¶ 36).

As 70 eminent law and economics professors wrote regarding a similar direct-sales ban: "[W]e have not heard a single argument for a direct distribution ban that makes any sense. To the contrary, these arguments simply bolster . . . [the case] that the regulations in question are motivated by economic protectionism that favors dealers at the expense of consumers and innovative technologies." Open Letter to New Jersey Governor Chris Christie on the Direct Automobile Distribution Ban, International Center for Law & Economics (March 26, 2014);[14] *see also* Open Letter at 1 ("Prohibiting direct distribution of EVs is not supported by legitimate public policy objectives, and has a variety of negative consequences[.]"). That sentiment properly summarizes Lucid's substantive arguments against the prohibition.

Further underscoring the irrationality of this type of protectionist legislation, the Federal Trade Commission ("FTC")—the federal agency tasked with protecting consumers and competition—has long advocated *against* direct-sales bans. *See, e.g.*, Marina Lao, Debbie Feinstein, and Francine Lafontaine, *Direct-to-Consumer Auto Sales: It's Not Just About Tesla* (May 11, 2015).[15] As the FTC has explained: "A fundamental principle of competition is that consumers—not regulation—should determine what they buy and how they buy it. Consumers may benefit from the ability to buy cars directly from manufacturers[.]" *Id.* Accordingly, all states, including Georgia, "should allow consumers to choose not only the cars they buy, but also how they buy them."[16]

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[14] http://laweconcenter.org/images/articles/tesla_letter_icle.pdf.

[15] https://www.ftc.gov/enforcement/competition-matters/2015/05/direct-consumer-auto-sales-its-not-just-about-tesla

[16] A DOJ economist has also echoed this theme: "The salient point is that whether or not direct manufacturer sale of autos is to evolve as a distribution channel in the United States should be determined by the preferences of consumers and the ability of auto producers to meet those preferences, rather than being precluded by fiat." DOJ Competition Advocacy Paper at 4; *see also* Joint Letter of the Antitrust Division of the U.S. Department of Justice and

Id. Because there is no rational justification for Georgia's Direct-Sales Prohibition, it is unconstitutional as applied to Lucid.

III. The Superior Court Misapprehended the Sweep of The 1992 Amendment's "Notwithstanding" Clause, Reading the "In Order To" Limitation Out of the Provision.

Despite these constitutional shortcomings, the Superior Court found that Article III, Section VI, Paragraph II(c)'s "notwithstanding" clause foreclosed Lucid's Due Process and Equal Protection challenges. *See* V2-369. But it did so without first analyzing whether Lucid plausibly alleged that the Direct-Sales Prohibition was enacted "in order to prevent frauds, unfair business practices, unfair methods of competition, impositions, and other abuses upon [Georgia] citizens." Ga. Const., Art. III, Sec. VI, Para. II(c).[17] In so doing, the Superior Court overread the "notwithstanding" clause to entirely sweep away the Georgia Constitution's robust protection of economic liberty *and* rendered the "in order to" clause a nullity. That was error.

Georgia's Constitution is interpreted based on its original public meaning. *See Olevik v. State*, 302 Ga. 228, 235 (2017) ("We interpret a constitutional provision according to the original public meaning of its text[.]"). This Court has made clear that the Georgia Constitution "should be construed to make all its parts harmonize and to give a sensible and intelligent effect to each part, as it is not presumed that the drafters intended that any part would be without meaning." *Camden Cty. v. Sweatt*, 315 Ga. 498, 509 (2023) (cleaned up). This counsels against "any interpretation that would render a word superfluous or meaningless" in the Georgia Constitution. *See Gwinnett Cty. Sch. Dist. v. Cox*, 289 Ga. 265, 271 (2011).

Application of these principles makes clear that Article III, Section VI, Paragraph II(c) of the Georgia Constitution's "notwithstanding" clause is

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the Federal Trade Commission on Franchised Dealer Requirements to Sell and Service Motor Vehicles and Nebraska Legislative Bill 51, 3–4 (March 14, 2019), https://www.justice.gov/atr/page/file/1146236/download.

[17] As discussed above, the Complaint's detailed factual allegations, which must be taken as true at this stage, show that this protectionist measure has nothing to do with any of those objects. *See* V1-191–98 (¶¶ 34–46, 54, 61).

limited to regulations promulgated "in order to prevent frauds, unfair business practices, unfair methods of competition, impositions, and other abuses upon its citizens." Ga. Const. Art. III, § VI, Para. II(c). The "in order to" clause is not precatory. Its function is to limit the "notwithstanding" clause's sweep to measures that actually further that list of enumerated interests that authorize the General Assembly to regulate. Legislation that does not advance any of those enumerated interests is not immunized from scrutiny under the Georgia Constitution's Due Process and Equal Protection Clauses. If it were otherwise, this language would be superfluous and there would be no reason to include it.

The meaning of amendments to the Georgia Constitution may also be ascertained by "reference to other statutes and the decisions of the courts." *De Jarnette v. Hosp. Auth. of Albany*, 195 Ga. 189, 205 (1942) (cleaned up). That interpretive principle is instructive here. As this Court has explained, the 1992 "amendment was needed to overcome decisions of this Court striking down previous statutes regulating motor vehicle franchise practices as violating due process and the constitutional provision barring legislation authorizing agreements that lessen competition." *WMW, Inc. v. Am. Honda Motor Co.*, 291 Ga. 683, 686 n.3 (2012). But that is all. It was not designed to give the General Assembly a blank check to ignore the heightened due process and equal protection protections enshrined in the Georgia Constitution.

"[T]he broader context in which that text was enacted may also be a critical consideration in ascertaining" the Georgia Constitution's original public meaning. *Olevik*, 302 Ga. at 236. Here, context further reinforces giving the 1992 amendment a more modest reading. As was contemporaneously reported, the point of the amendment was to "allow the Georgia legislature to regulate manufacturers, distributors and dealers of auto-mobiles, tractors, farm equipment and heavy equipment." Calhoun Times and Gordon County News, *Election 92: Understanding the Amendments* (Oct. 29, 1992), https://tinyurl.com/CalhounTimes1992. It was described as providing "consumer protection as well as small dealer protection" and authorizing the General Assembly to "regulate the relationship between manufacturers and dealers[.]" *Id.*

The Resolution proposing the 1992 amendment sheds additional light on its original meaning. The Resolution expressly notes that it was aimed at

authorizing the General Assembly to regulate manufacturers, distributors, and dealers "in order to prevent" harmful business practices but makes no mention of exempting the General Assembly from its constraints imposed by the Georgia Constitution's Equal Protection or Due Process Clauses on its power to burden economic liberty. *See* Georgia General Assembly Acts & Resolutions, 1992 vol. 1 p. 3341–42.

"Since the people are the ultimate 'makers' of the Georgia Constitution, this requires a focus on the public meaning, not the subjective intent of the drafters." *Elliott v. State*, 305 Ga. 179, 182 n.4 (2019). Here, the "makers" of the 1992 amendment are the Georgia voters who voted to approve it. The Georgia Constitution "is to be construed *in the sense in which it was understood by the makers of it at the time when they made it*." *Olevik*, 302 Ga. 235–36 (quoting *Padelford, Fay & Co. v. Savannah*, 14 Ga. 438, 454 (1854) (emphasis in original)). Put another way, it is to be given "the meaning the people understood a provision to have at the time they enacted it." *Id.* at 235.

"[T]he actual question presented to the voters" in 1992 who approved the amendment is thus highly probative of original public meaning. *See Fox v. Grayson*, 317 S.W.3d 1, 19 (Ky. 2010). The ballot question Georgians voted was: "Shall the Constitution be amended so as to authorize the General Assembly to regulate . . . new motor vehicle manufacturers, distributors, dealers, and their representatives doing business in Georgia, including agreements among such parties, in order to prevent frauds, unfair business practices, unfair methods of competition, impositions, and other abuses upon its citizens?" Georgia General Assembly Acts & Resolutions, 1992 vol. 1 p. 3342. A Georgia voter in 1992 would understand this language to authorize the General Assembly to pass legislation to advance the State's interest in "prevent[ing] frauds, unfair business practices, unfair methods of competition, impositions, and other abuses upon [Georgia] citizens." Nothing more.

In sum, the 1992 amendment neither wipes away manufacturers' due process and equal protection rights under the Georgia Constitution nor authorizes the General Assembly to mandate use of franchise dealers at all. Lucid's Complaint shows that Georgia's Direct-Sales Prohibition is untethered to any of the enumerated State interests it lists. *See* V1-191–98 (¶¶ 34–46, 54,

61). Therefore, the 1992 amendment's "notwithstanding" clause does not preempt Lucid's equal protection and due process claims.

CONCLUSION

For these reasons, the Court should reverse the decision below.

RULE 20(5) WORD COUNT CERTIFICATION

This brief does not exceed the word-count limit imposed by this Court's Rule 20.

This 10th day of July 2025.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this day I e-filed a true and correct copy of the foregoing in the Supreme Court of Georgia. I further certify that there is a prior agreement with the parties to allow documents in a PDF format sent via email to suffice for service under Supreme Court Rule 14. Pursuant to that agreement, on this day I emailed a PDF copy of the foregoing to the following counsel:

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