No. 13-886

IN THE

Supreme Court of the United States

BAYSHORE FORD TRUCK SALES, INC., et al.,

Petitioners,

v.

FORD MOTOR COMPANY,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

The petition for certiorari makes only one point, which after the brief in opposition is starkly uncontested: the Third Circuit decided this case based on a false premise that it invented – namely, that "although Ford discontinued the production of all heavy trucks, Ford continued to manufacture and distribute parts and accessories to the Dealers." Pet. App. 9a. If the court of appeals' decision were accurate, Ford could have, and would have, ended the case by submitting an opposition composed of this single declarative sentence: "The Third Circuit was correct because Ford did in fact continue to manufacture and distribute parts to its dealers."

Ford claims nothing of the sort, because it would be a sanctionable lie. Instead, Ford does everything but print the words that the petition is correct and the court of appeals was wrong. Ford nominally asserts that the ruling below is "correct," BIO 16-17, but only in the sense that *the judgment* – not the court's actual ruling – is defensible on other grounds.

Ford's contention that this Court should nonetheless leave the erroneous ruling below uncorrected because six of eleven dealers would not benefit from this Court's ruling is obviously incorrect. Although Ford can attempt that argument on remand, it will lose for three independent reasons: the extension application sufficiently identified all eleven dealers; by operation of rule, any dealer that is not a petitioner is automatically a respondent entitled to the benefit of the judgment; and all the dealers will, in any event, receive the benefit of the judgment as members of the certified class.

The only real issue for this Court is what, if anything, to do about an erroneous ruling when it is obvious and undisputed by the respondent; when it was created entirely from whole cloth by the court of appeals; when the petitioner specifically sought rehearing to correct it; when it is dispositive of the court of appeals' judgment; when the error affects the rights of roughly seventy parties (not only the bellwether dealers in this appeal, but also the parties to follow-on cases in the district court, which has deemed itself powerless to correct the error); and when the resulting unjust loss may exceed *$100 million* ($29 million for these petitioners, plus equivalent damages for the remaining dealers).

The petition urged the Court to exercise its supervisory authority and summarily reverse, and that remains an appropriate disposition. But the fact that Ford cannot and does not deny the error provides an even simpler option: the Court should enter an order vacating the judgment and remanding the case for the court of appeals to consider Ford's brief in opposition. Faced with such an order, the court of appeals could not help but recognize and correct its egregious mistake. The Court can instead deny the petition only if it is willing to adopt a categorical prohibition against correcting serious, admitted, dispositive errors in civil cases, thereby permitting the lower courts to invent facts at their whim. That is not – indeed, cannot be – the law.

I. There Is No Dispute That The Decision Below Rests Entirely On A False Factual Premise The Panel Simply Made Up.

When Ford eventually addresses the petition's only argument (tellingly, at page 15), it is unwilling to embrace the outright falsehood that is the only basis for the ruling below – *viz*., that Ford continued to produce and supply its dealers with parts after it sold its parts business to Freightliner. If the court of appeals were right, Ford would have said so in plain and simple terms.

But it cannot: as the petition demonstrated (Pet. 10-12), and Ford does not deny, if Ford *had* in fact continued to manufacture and sell parts to the dealers, it would have been in breach of its contract with Freightliner, which promised that for ten years Ford "will not, directly or indirectly . . . manufacture or sell [heavy trucks] or Spare Parts for any such vehicle." Pet. App. 118a.[1]

Ford is not above some effort at distraction. It points to testimony that some *dealers* "continued to sell Ford-brand parts and accessories at a profit after

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[1] Ford does not deny that its duties were plain from the sales contract quoted in the text and other evidence that was before the panel. *See* Pet. 4, 10-12. It plucks out one document – the "memorandum from Ford stating" expressly that because of the contract "it would not take parts orders after March 1998" – which it complains is in the record but was not before the panel (for the understandable reason that petitioners did not expect the panel to decide the case on the basis of made-up facts). BIO 16. This point makes no difference: the memorandum states a fact that Ford does not deny and that the evidence before the panel proves.

Ford stopped making heavy trucks." BIO 15-16. So what? Critically, Ford does not contend either that this was the basis for the ruling below, or that it is even a relevant point under the contract. As the petition details – and Ford importantly does not deny – this testimony reflects nothing more than that for a time after the sale, some dealers (i) had Ford parts inventory left over, or (ii) acquired parts from Freightliner. Pet. 13-14.

By contrast, the Third Circuit's decision depends on the proposition that *Ford* complied with its explicit contractual obligations because it continued to manufacture and sell parts to the dealers. *See* Pet. App. 9a (finding that "*Ford* continued to *manufacture* and *distribute* parts and accessories to the Dealers" (emphasis added)); *id*. ("As a result, the District Court's conclusion that Ford ceased *production* of all 'COMPANY PRODUCTS' was incorrect." (emphasis added)).

The distinction between dealers selling parts and Ford providing them is essential because, "[u]nder the Sales and Service Agreement, Ford agreed to *distribute* 'COMPANY PRODUCTS' to the Dealers," Pet. App. 5a (emphasis added), not simply to allow dealers to sell Ford parts acquired previously or elsewhere. The court thus explicitly held that "Ford satisfied its end of the bargain by continuing *to provide* 'COMPANY PRODUCTS' – i.e. parts and accessories – to the Dealers," *id*. 9a (emphasis added), not by continuing to allow dealers to sell their existing inventory or parts obtained from Freightliner. *See also id*. 10a ("Ford continued to provide the Dealers with COMPANY PRODUCTS because *Ford* continued to *supply* the Dealers with

parts and accessories. As a result, Ford did not breach the Sales and Service Agreement." (emphasis added)).

II. Ford Provides No Basis For Tolerating The Third Circuit's Gross Abuse Of Its Authority.

Ford offers various reasons why the Third Circuit's abandonment of its judicial role should be left unremedied. None is persuasive.

1. Ford argues that reversing would be too much work. BIO 11-13. But the Court can eliminate any burden upon itself in light of Ford's effective concession that the factual premise of the decision is wrong. The Court regularly GVR's in light of such concessions, even when the respondent defends the judgment on other grounds and even when it urges that the petition therefore be denied. *See, e.g.*, *Lawrence v. Chater*, 516 U.S. 163, 171 (1996) (per curiam) (explaining the Court's "well established practice of GVR'ing based on confessions of error that do not purport to concede the whole case"); *Diaz-Albertini v. United States*, 498 U.S. 1061 (1991) (GVR'ing based on confession of error, over respondent's objection); *Alvarado v. United States*, 497 U.S. 543, 544 (1990) (per curiam) (same). To be sure, Ford's opposition never formally "confesses error," but that is for an obvious reason: unlike the government, private parties that lack repeat-player relationships with this Court almost never make such an explicit concession. In reality, there is no genuine difference between Ford's brief in opposition in this case and a still-more-candid brief filed by the Solicitor General expressly confessing error.

This case is perfectly suited to the disposition of vacatur for the court of appeals to consider the respondent's filing in this Court. Because the panel below adopted its erroneous factual premise *sua sponte* and never called for a response to the petition for rehearing, it did not have the benefit of Ford's acknowledgment that, in fact, it did *not* "continue[] to manufacture and distribute parts and accessories to the Dealers." Pet. App. 9a. Faced with such an order by this Court, the court of appeals will undoubtedly correct its error.

2. Ford emphasizes that this Court does not interject itself into fact-bound disputes, because its resources are not well invested in "sift[ing] through the summary-judgment record." BIO 12. That is unquestionably true. But this case does not involve a fact-bound dispute *because there is no dispute*. It is not necessary for the Court to call for the record and review it.

Further, the court of appeals did not wrongly accept one party's view of contested facts over the other's – it *sua sponte* invented facts that no party claimed were true and manifestly were not. And it did so to strip a judgment in the tens of millions of dollars from scores of businesses. Ordinarily, one would expect the court of appeals to rule on the basis of the actual facts, and when it makes an error to correct the error through the rehearing process. But in this case, the Third Circuit inexplicably failed in both responsibilities.

Ford also says that this Court does not decide state law questions. BIO 12-13. That is just as true, and just as irrelevant. Petitioners do not ask this Court to decide *any* legal question, much less a

question of state law. They simply ask this Court to enter an order directing the Third Circuit to reconsider the case in light of Ford's acknowledgment that the panel completely made up the basis for its decision.

Thankfully, the Court sees very few petitions documenting such egregious and conceded abuses of judicial authority and such abject failure of the rehearing safeguard. It is the very definition of the Court's supervisory authority to direct a court of appeals to reconsider an important ruling that all agree is wrong, when that court substantially departed from the judicial role by deciding the case on an invented, false basis.

3. Ford next says that the court of appeals "did not reach" other grounds for reversing the district court's judgment in petitioners' favor. BIO 7. For example, Ford argues that it does not matter under the contract whether it actually "continued to manufacture and distribute parts and accessories to the Dealers" – which was the premise of the court of appeals' decision, Pet. App. 9a – because Ford could have satisfied that contractual obligation by delegating it to Freightliner. BIO 17.[2] Those are all questions to be considered on remand. This Court regularly issues decisions summarily reversing

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[2] In fact, this argument is so bad that Ford did not make it to the court of appeals. *See* BIO 6-7 (describing Ford's arguments below). The contract plainly requires Ford to supply dealers with *Ford* heavy trucks and parts, not to arrange for someone else to provide vehicles and parts of some other, lesser brand. *See, e.g.*, Pet. App. 95a.

clearly erroneous decisions with instructions that any alternative ground for affirmance be considered on remand. *See, e.g.*, *Hinton v. Alabama*, No. 13-6440, slip op. 12-14 (Feb. 24, 2014) (per curiam); *Lefemine v. Wideman*, 133 S. Ct. 9, 10-11 (2012) (per curiam); *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1204 (2012) (per curiam).[3]

III. Ford's Meritless Jurisdictional Objection Provides No Basis To Deny The Petition.

Ford argues that even if the decision below might otherwise warrant correction, it should be allowed to stand because six of the eleven petitioners – those not identified by name in the extension application – would not get the benefit of the reversal. BIO 9-11. On its face, this is not an argument of any substance: Ford does not dispute that it knew precisely which entities were petitioning; it is just desperate to find some way to dissuade the Court from reversing.

This Court need not "determine which Petitioners were properly identified." BIO 11. Unquestionably, Bayshore Ford is a proper petitioner and therefore there is no question about the Court's jurisdiction to reverse. On remand, Ford can try to

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[3] That the Third Circuit went to such lengths to avoid passing on Ford's actual arguments belies any suggestion that a remand would serve no purpose. Indeed, the panel cited the circuit's en banc decision in *Buono Sales, Inc. v. Chrysler Motors Corp.*, 449 F.2d 715, 721-22 (3d Cir. 1971) (en banc), as concluding that "a manufacturer's reservation of the right to discontinue distributing some products to a dealer did not allow the manufacturer to completely withdraw from the market." Pet. App. 8a.

deny some of the dealers the benefit of this Court's judgment. But if it does, it will surely lose for three independent reasons.

First, Ford ignores that this Court's Rules address precisely the situation in which some, but not all, of the losing parties on appeal petition for certiorari. Under Rule 12.6, any of the the dealers that were appellees below, but are not *petitioners*, are automatically "considered *respondents*." Sup. Ct. R. 12.6 (emphasis added). Each receives the benefit of any relief provided by the Court's judgment. *See id*; STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE § 6.20, at 437-38 (10th ed. 2013).[4]

Second, because the district court certified a class "of all similarly situated Ford heavy-truck dealers," BIO 6, with Bayshore Ford a named class representative, any relief Bayshore Ford obtains extends to the entire class of dealers, including the other appellees below. *Cf. Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317 n.3 (1988) (noting same possibility in that case).[5]

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[4] Because (as Ford acknowledges) the petition itself was filed on behalf of all appellee dealers, each has filed a "document" that suffices to "qualify [them] for . . . relief." Sup. Ct. R. 12.6. In any event, a party "need not file anything at the petition state of the proceedings, but must join in or file a brief or notify the Court of its interest in the case at the merits stage if certiorari is later granted." SUPREME COURT PRACTICE, *supra*, at 439.

[5] Although the class members contest the application of the Third Circuit's judgment to the class, vacating the Third Circuit's judgment would moot those objections. *See* Pet. App. 70a-71a.

Third, all the dealers are in any event petitioners. Consistent with counsel's informed understanding of the Court's settled practices, the extension application identified with sufficient clarity all the appellees below as seeking an extension in order to file a joint petition.

The caption to the application listed "Bayshore Ford Truck Sales, Inc., et al., petitioners." Unlike the notice of appeal in *Torres*, the application did not suggest that petitioners included only a subset of the appellees below. *See id*. at 313, 317 (explaining that notice of appeal in *Torres* listed by name fifteen of the sixteen intervenors). Also in contrast with *Torres*, this case had been certified as class action for purposes of determining liability, with Bayshore Ford as one of the class representatives. *Compare id*. at 313 *with* Pet. App. 5a-6a, 40a, 42a. Moreover, the body of the application states that "[p]etitioners petitioned for panel rehearing and rehearing en banc" in the Third Circuit, BIO App. 7a, making clear that the applicants in this Court were the same parties as had petitioned for rehearing below. BIO App. 7a. That petition for rehearing was attached to the stay application and identified all eleven petitioners by name. *See* Pet. App. 90a-91a; *Warfield v. Fidelity & Deposit Co.*, 904 F.2d 322, 325 (5th Cir. 1990) (ambiguity in notice of appeal "may be cured, however, by filing a supporting memorandum or some other paper which contains the names of each appellant").

No more was required. *Torres* itself emphasized that all Federal Rule of Appellate Procedure 3(c) requires is that the party be "named *or otherwise designated*, however inartfully." 487 U.S. at 317

(emphasis added). Applying that standard, lower courts subsequently have held that "[a]s long as it is sufficiently clear from the notice of appeal that *all* plaintiffs or *all* defendants intend to appeal, failure to name each specifically is not fatal to the unnamed persons' appeals." *Benally v. Hodel*, 940 F.2d 1194, 1197 (9th Cir. 1990). Particularly in class actions – where naming all the class members would be unwieldy at best – courts have held that it is sufficient to name a class representative followed by "et al." or similar designation. *See, e.g.*, *Rendon v. AT&T Tech.*, 883 F.2d 388, 398 n.8 (5th Cir. 1989); *Al-Jundi v. Estate of Rockefeller*, 885 F.2d 1060, 1061 n.1 (2d Cir. 1989).

These interpretations of *Torres* were codified in a 1996 amendment to Rule 3, which now provides that "an attorney representing more than one party may describe those parties with such terms as 'all plaintiffs,' 'the defendants,' 'the plaintiffs A, B, et al.,' or 'all defendants except X.'" Fed. R. App. P. 3(c)(1)(A). The rule further provides that a notice of appeal in a class action "is sufficient if it names one person qualified to bring the appeal as representative of the class." Fed. R. App. P. 3(c)(3).

Ford does not contest that the application in this case satisfied the specificity standard of Fed. R. App. P. 3(c) and provides no basis to believe that this Court reads its own rules for extension applications to be substantially more technical than the rule for notices of appeal. As discussed, our informed understanding of the Court's practice is that it does not. The commentary to the rules change states that it merely clarifies that the extension "applies to the petitioners who request it." Revisions to the Rules of

the Supreme Court of the United States Adopted Apr. 19, 2013, at 3 (capitalization omitted).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the judgment of the court of appeals either summarily reversed or vacated and remanded in light of Ford's brief in opposition.

Respectfully submitted,

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