No. 24-903

IN THE
SUPREME COURT OF THE UNITED STATES

ATTURO TIRE CORPORATION,

Petitioner,

v.

TOYO TIRE CORP., *ET AL.*,

Respondents.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

In its Brief in Opposition ("Opp."), Respondents Toyo Tire Corp. and Toyo Tire U.S.A. Corp. (collectively "Toyo") repeatedly claim that whether Illinois' absolute litigation privilege applies to claims of tortious interference with business expectancy, unfair competition, and unjust enrichment presents a "settled" question of Illinois law. Opp. at 11-12,14. Petitioner Atturo disagrees. More to the point, so did the Federal Circuit; reviewing the same cases Toyo relies on, it said just the opposite, that the most it could do was to "predict" how the Illinois Supreme Court would answer the question and whether that court would extend the privilege beyond where it had previously been applied by any Illinois court. Pet. App. at 33a.

And while the Federal Circuit cited Seventh Circuit cases discussing how it could go about making such a prediction, it failed, as does Toyo, to acknowledge cases from there that caution against federal courts extending a doctrine of Illinois law beyond where it has previously been applied in the absence of binding Illinois precedent. *See* Pet. at 11-12, *citing, inter alia, Indep. Tr. Corp. v. Stewart Info. Servs. Corp.*, 665 F.3d 930, 938 (7th Cir. 2012) ("[u]nless and until the Illinois courts address" a question of legal doctrine under Illinois law, "we refrain from extending the doctrine"). Of course, unlike the Federal Circuit, which could only "predict" what the Illinois Supreme Court would say, this Court need not "predict" anything; under Illinois Supreme Court Rule 20(a) it can just ask.

Toyo's Opposition also, and rather defensively, claims that Toyo did nothing wrong when it forced smaller tire manufacturers and distributors to promise not to do business with Atturo as a condition of settling a federal administrative case to which Atturo was not a party, and based on a trade dress Toyo does not own and Atturo does not infringe. *See* Opp. at 9-11. Atturo of course disagrees. More to the point, so did a jury, which found Toyo's conduct so underhanded that it merited an award of $100 million in punitive damages. *See* Pet. App. at 2a-3a, 14a. Whether that jury's hard work should be entirely undone by a "prediction" when an Illinois rule allows the Court to seek a conclusive answer is a question that merits this Court's consideration.

REASONS FOR GRANTING THE PETITION

As detailed in the Petition, Atturo presents an important undecided and outcome-determinative state-law question regarding the scope of Illinois' absolute litigation privilege. Pet. at i, 7-17. Atturo has petitioned this Court to ask Illinois' highest court to provide the guidance that the Federal Circuit did not have – and, unlike this Court, could not ask for under the certification procedure in Illinois Supreme Court Rule 20(a). Pet at 1-2. Without that guidance, the Federal Circuit drastically departed from the accepted and usual course of judicial proceedings for applying Illinois' absolute litigation privilege. *Id.* at 7-8, 10-15. Based only on its own "prediction," the Federal Circuit expanded Illinois' traditionally narrow absolute litigation privilege beyond what any other court applying Illinois law has ever done. Pet. App. 32a-37a. The Federal Circuit's "prediction" thereby invalidated

a jury verdict awarding Atturo millions of dollars in damages on claims under Illinois law. *Id.* at 2a-3a, 14a. Without correction, that "prediction" also stands to immunize the sort of conduct proved at trial, in which Toyo used proceedings before a federal agency to which Atturo was not a party to impose devastating economic injury on Atturo's business. Pet. at 15-17.

As explained herein, Toyo's efforts to dispute the propriety of Atturo's certification request and downplay the sweeping implications of the Federal Circuit's "prediction" are both factually and legally wrong. Toyo's Opposition is largely-based on mischaracterizations of the record (which this Court need not delve into in granting Atturo's certification request).[1] In fact, most glaringly absent from Toyo's Opposition is any mention of the jury's findings, made

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[1] As an example, throughout the Opposition, Toyo claims that Atturo "concedes" Toyo's misconduct was "pertinent" to the federal administrative case before the International Trade Commission (the "ITC Action"). Opp. 1, 6-9, 12, 14-19, 22, 24, 26. That assertion is plainly wrong, and does not become less so by repetition in the Opposition. Throughout this case, Atturo has staunchly and consistently maintained that Toyo's ITC Action against other manufacturers and distributors was not pertinent to Toyo's misconduct in forcing settlements that required them to stop doing business with Atturo. Atturo was not a party in the ITC Action, no Atturo tire was involved, and no trade dress claims were asserted. *See* Pet. at i, 1, 3, 7, 8, 13, 15, 16. Atturo has neither waived nor conceded anything in this regard.

On the other hand, mischaracterizations of the record by Toyo are something that has plagued the entirety of this case and resulted in multiple sanctions orders against Toyo from the district court. The magistrate judge, who closely oversaw discovery for years, described Toyo's "approach to discovery throughout this entire litigation" as "obfuscation, frustration, and manipulation of discovery to its advantage through any means necessary at all times." Fed. Cir. App. at 8020.

in support of its multi-million-dollar damages award, that Toyo engaged in predatory conduct against a competitor. And, although this litigation began in 2014, now is the first and only opportunity for Atturo to ask for certification to the Illinois Supreme Court of the important question presented in the Petition. *See* Pet. at 2, 8; ILL. SUP. CT. R. 20(a).

A. The Petition Presents An Unsettled Question Of Illinois Law.

Toyo's Opposition is primarily based on its repeated contention that Atturo's Petition presents a "settled" question of Illinois law. Opp. at 11-12,14; *see also id.* at i, 1. That is clearly not true.

The Federal Circuit found that Illinois case law did not provide it with the necessary guidance to apply the absolute litigation privilege and thus it needed to "predict" what to do. Pet. App. at 33a. The Federal Circuit stated:

> The Illinois Supreme Court **has not addressed** whether the absolute litigation privilege can be applied to bar these claims [for tortious interference, unfair competition, and unjust enrichment]. We **must therefore predict** how that court would decide this issue. . . . **[N]o published Illinois decision** has applied the absolute litigation privilege to the particular torts at issue here . . .

Id. (emphasis added); *see also id.* at 36a (recognizing that "[t]here is no published Illinois Court of Appeals opinion applying the absolute litigation privilege to the three torts at issue here"). The District Court also found this issue to be unsettled. *Id.* at 49a (explaining that "[n]o Illinois court has applied the privilege to

tortious interference claims," "[n]or has Toyo cited any Illinois case law applying this privilege to unfair competition or unjust enrichment").

In other words, Toyo's after-the-fact attempt to claim that there are cases "settling" this unsettled question is unfounded and was rejected by the two lower courts. Opp. at i; *see also id.* at 1, 11-12,14. Indeed, *no* case was "settled" enough for the Federal Circuit to rely on it rather than "predict" how to apply Illinois' absolute litigation privilege to Atturo's claims of tortious interference with business expectancy, unfair competition, and unjust enrichment. Pet. App. at 33a.[2]

Critically, this Petition presents the first and only opportunity in this case for Atturo to request that this important and distinctly unsettled issue be settled. *See* Pet. at 2, 8; ILL. SUP. CT. R. 20(a). Illinois Supreme Court Rule 20(a) allows Illinois' highest court to accept certified questions from this Court or the Seventh Circuit on dispositive issues of Illinois law on which Illinois courts have not yet settled. *See id.* However, as explained in the Petition, this appeal went to the Federal Circuit instead of the Seventh Circuit due to the procedural quirk of short-lived patent claims against other parties (not Atturo) being included in Toyo's complaint. *See* Pet. at 6, n.1. Thus, this case is now finally positioned for certification and for this unsettled issue of Illinois law to be settled.

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[2] Likewise, Toyo's claim that the many cases cited in Atturo's Petition warning against extension of the absolute litigation privilege "all plainly reached the wrong conclusion" is equally dubious and not based on any Illinois precedent. Opp. 21-24.

B. The Petition Proposes A Proper Question For Certification To The Illinois Supreme Court.

Toyo also opposes Atturo's certification request by alleging that Atturo "has not proposed a proper question to certify nor an accompanying statement of facts." Opp. at i; *see also id.* at 2-3, 25-29. Again, Toyo is wrong.

The Petition presents the following straightforward and narrow legal issue to be answered by the Illinois Supreme Court:

> Whether Illinois' absolute litigation privilege extends to claims of tortious interference with business expectancy, unfair competition, and unjust enrichment under Illinois law and, if so, whether it immunizes Toyo's conduct proved at trial.

Pet. at 21; ILL. SUP. CT. R. 20(b)(1). The Petition also contains ample narrative of the operative facts from which the Illinois Supreme Court can fully ascertain the nature of the dispute in which the question arose – as would briefs filed in that court if the certified question is accepted. Pet. at i, 1, 3-7; ILL. SUP. CT. R. 20(b)(2). The Illinois Supreme Court will also have access to the entire Federal Circuit record, including briefs and appendices. *See also* ILL. SUP. CT. R. 20(c),(d).

Toyo's demands for some additional "statement of facts" in Atturo's Petition (Opp. at i, 11, 26-27) is not called for under the Illinois rule or prior cases certifying issues to the Illinois Supreme Court. *See* ILL. SUP. CT. R. 20(b). The rule does not require that (*see id.)* and, in particular, that is not how the Seventh Circuit does it. For example, in *Roberts v. Alexandria Transportation, Inc.*, 968 F.3d 794, 801 (7th Cir.

2020), the court certified a straightforward question of law to the Illinois Supreme Court under Rule 20(a) without providing any statement of facts, simply directing its clerk to "transmit the briefs and appendices in this case, together with this opinion, to the Illinois Supreme Court," and stating that, "[o]n the request of that Court, the Clerk will transmit all or any part of the record as that Court so desires." And the Seventh Circuit did the same thing when certifying a question under Rule 20(a) in *Collins Co., Ltd. v. Carboline Co.*, 837 F.2d 299, 302 (7th Cir. 1988).[3] Critically, the Illinois Supreme Court accepted and decided the certified questions in both those cases, apparently untroubled by the lack of a separate "statement of facts." *See Roberts v. Alexandria Transp., Inc.*, 2021 IL 126249; *Collins Co., Ltd. v. Carboline Co.*, 125 Ill.2d 498 (1988). And while the sufficiency of the factual record is an issue that should lie with the Illinois Supreme Court in exercising its discretion whether or not to accept this Court's certification request, it is worth noting that this case, which was tried to a jury, boasts an ample factual record.

Toyo's repeated reliance on *Rozsavolgyi v. City of Aurora*, 2017 IL 121048 (Opp. at 3, 29) to oppose Atturo's certification request is also mistaken. In that

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[3] Similarly, recent cases certifying questions to other state supreme courts do not include the kind of separate and/or additional statement of facts Toyo demands from Atturo in its Opposition. *See, e.g., Ind. Right to Life Victory Fund v. Morales,* 66 F.4th 625, 632 (7th Cir. 2023); *Whiteru v. Wash. Metro. Area Transit Auth.,* 89 F.4th 166, 172 (D.C. Cir. 2023); *Zurich Am. Ins. Co. v. Med. Props. Tr., Inc.,* 88 F.4th 1029, 1035 (1st Cir. 2023); *McKesson v. Doe*, 592 U.S. 1, 1035 (2020).

case, the question asked was deemed to be "overbroad," ignoring "the breadth of the Illinois Human Rights Act, which provides for numerous types of civil actions for unlawful conduct in a variety of contexts." *Rozsavolgyi*, 2017 IL 121048, ¶ 26. "Answering the" *Rozsavolgyi* "question as framed would necessarily bear on situations not before" the Illinois Supreme Court "and would therefore result in an advisory opinion." *Id.* Further, "the form" of the question in *Rozsavolgyi* was problematic because it "acknowledge[d] the existence of appellate case law" on the issue and thus made it "questionable at best whether a substantial difference of opinion exist[ed] so as to support certification." *Id.* at ¶¶ 31-32.

No such concerns exist in this case. Atturo's proposed question (Pet. at 21) is narrow and straightforward and is posed directly by this case and the Federal Circuit's decision, which that court made clear is unsettled under Illinois law (Pet. App. at 33a).

C. The Petition Raises An Outcome-Determinative Issue.

Toyo also argues that certification is inappropriate because the question it poses is "not outcome determinative." Opp. at i. 29; *see also id.* at 3. Given that the Federal Circuit's prediction caused it to invalidate a jury verdict, that contention is hard to swallow. The question Atturo asks the Court to certify is "outcome-determinative" because it did, in fact, determine the outcome.

The brunt of Toyo's opposition here appears to be that, if the Illinois Supreme Court accepts the certification request and answers differently than the Federal Circuit, this case will continue. *See* Opp. at

29-32. But the presence of issues that may remain after a certified question is answered presents no obstacle to certification where, as here, the certified question *was* determinative of proceedings below. *See Collins Co., Ltd. v. Carboline Co.*, 864 F.2d 560, 561 (7th Cir. 1989), in which the Seventh Circuit, having received an answer to its certified question different than the trial court had given, thereupon reversed and remanded "for continued discovery and trial."

As *Collins* makes clear, no case or rule requires that a question can only be certified under Illinois Supreme Court Rule 20(a) if a different answer ends the case in all respects. The Federal Circuit's "prediction" that Illinois' absolute litigation privilege would have barred Atturo's three claims against Toyo was entirely determinative of that appeal and of the validity of the jury's verdict. No more is required.

CONCLUSION

For the foregoing reasons, and those set forth in the Petition for a writ of *certiorari*, the Court should grant the Petition and certify the following question to the Illinois Supreme Court pursuant to Illinois Supreme Court Rule 20(a):

> Whether Illinois' absolute litigation privilege extends to claims of tortious interference with business expectancy, unfair competition, and unjust enrichment under Illinois law and, if so, whether it immunizes Toyo's conduct proved at trial.

Should the Illinois Supreme Court accept the request and answer the question in a manner different than the Federal Circuit did, the Court should vacate the decision of the Federal Circuit and remand the case

for further proceedings consistent with the Illinois Supreme Court's opinion.

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Respectfully submitted,

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