

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should the Supreme Court grant *certiorari* to review an unpublished Federal Circuit decision and certify an Illinois state law question to the Illinois Supreme Court when there are Illinois appellate court decisions already settling the question, Petitioner has not proposed a proper question to certify nor an accompanying statement of facts, and the result is only outcome determinative if Petitioner loses?

CORPORATE DISCLOSURE STATEMENT

In accordance with Supreme Court Rule 29.6, Respondent Toyo Tire Corporation of Itami City, Hyogo, Japan is a publicly traded company whose shares are traded on the Tokyo Stock Exchange and has no parent corporation. Based on the U.S. Securities and Exchange Commission Rules regarding beneficial ownership, Mitsubishi Corp. of Chiyoda City, Tokyo, Japan beneficially owns greater than 10% of Toyo Tire Corporation's outstanding common stock. Respondent Toyo Tire U.S.A. Corp. is wholly owned by Toyo Tire Holdings of Americas Inc. ("Toyo Holdings"). Toyo Holdings is a direct, wholly owned subsidiary of Respondent Toyo Tire Corporation.

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I. INTRODUCTION

Petitioner does not contest or claim error in the Federal Circuit’s ruling that Toyo’s accused conduct is protected by absolute litigation privilege from Petitioner’s claims of common law defamation and violation of the Illinois Deceptive Trade Practices Act (“IDTPA,” also referred to as Illinois statutory unfair competition). Consequently, the “pertinency” requirement for conduct to be privileged is conceded, and the only issue in the petition is whether that privileged conduct is also protected from other Illinois common law tort theories (here, unjust enrichment, unfair competition and interference with business expectancy).

Illinois appellate courts have already answered that question in the affirmative many times. Illinois appellate courts have confirmed that the absolute litigation privilege applies to the Illinois common law torts of: defamation, intentional and negligent infliction of emotional distress, strict liability for ultrahazardous activity, invasion of privacy, negligence, breach of contract, civil conspiracy, conversion, abuse of process, tortious interference with a prospective economic advantage, unjust enrichment, breach of fiduciary duty, aiding and abetting a breach of fiduciary duty, aiding and abetting violation of the Illinois hate crimes statute, *respondeat superior*, and fraud; as well as the statutory torts of unfair competition (IDTPA), statutory fraud and violation of the Illinois Trade Secrets Act.

The only cause of action in the petition not (yet) addressed in an Illinois appellate court decision is common law unfair competition. But Petitioner now *concedes* that the privilege protects Toyo from Petitioner’s *statutory* unfair competition claims. Ruling that common law

unfair competition is not immune, while statutory unfair competition is, would be unsupportable to say the least. This Court need not (and should not) prolong this case by acceding to Petitioner's request for *certiorari*, not for this Court to decide the issue, but to refer it to another court.

The petition also does not propose a workable, or even consistent, state law question for certification. The "question presented" in the petition is for referral of whether "privilege bars [Petitioner's] claims of tortious interference with business expectancy, unfair competition, and unjust enrichment." How "[Petitioner]'s claims" are to be characterized is left open.

In the argument, the question has broadened to "Whether Illinois' Absolute Litigation Privilege Applies To These Claims *And Facts*" (emphasis added). Will the facts include, among other things, that the conduct has already been held to be privileged and protected for defamation and statutory unfair competition claims?

In the petition's conclusion, the question has morphed to: "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*." (emphasis added).

Each, without more, would violate Illinois Supreme Court rules. Illinois requires a certification order that includes "a statement of all facts relevant to the questions certified and showing fully the nature of the controversy..." Ill. Sup. Ct. R. 20(b)(2). Petitioner has

not suggested one, and if Petitioner did, that description would surely be subject to substantial dispute.

More important, none are appropriate for certification. “[I]f an answer is dependent upon the underlying facts of a case, the certified question is improper.” *Rozsavolgyi v. City of Aurora*, 102 N.E.3d 162, 169 (Ill. 2017). The petition argument is all about the facts as (mis)construed by Petitioner.

There is no need for such a referral. To the extent any general legal principle is involved, Illinois appellate courts have answered it. Alternative common law tort theories are barred (“absolutely”) for privileged conduct. Indeed, the Illinois Supreme Court has already declined to review one of the many Illinois appellate decisions articulating and relying on this principle.

Finally, this petition does not present a proper case for *certiorari* because the referral is only outcome determinative if Petitioner loses. If Petitioner wins, Toyo has alternative undecided defenses of *Noerr-Pennington* immunity, intellectual property privilege, and sufficiency of proof, which the Federal Circuit would have to address on remand and which (depending on their resolution) may themselves be subject to requests for *certiorari*, including further requests for referrals to the Illinois Supreme Court.

II. STATEMENT OF THE CASE

A. Factual Background

Toyo is a premium (tier 1) tire manufacturer, with its largest manufacturing plant located near Atlanta,

Georgia. CAFC App. 913.¹ Petitioner is a low-cost (tier 4) tire seller who buys its tires from foreign manufacturers. Pet. App. 5a; CAFC App. 469-470, 474-475, 628, 10640. Due to disparity in price and reputation, the parties *agreed* that Toyo and Petitioner are not competitors and that a sale of one company's tire does not displace the other's. CAFC App. 628, 718-719, 915.

Unfortunately, by 2012, copying of Toyo tire designs by many (other) low-cost foreign tire companies had become "rampant." CAFC App. 23226-23235.

In August 2013, Toyo petitioned for an International Trade Commission ("ITC") investigation. Pet. App. 76a. The investigation included twenty-three respondents and asserted eight Toyo design patents. Pet. App. 6a-7a. When the investigation terminated in July 2014, eight respondents had defaulted, resulting in an exclusion order covering the named tires (and only those), four took consent decrees resulting in an exclusion order on the named tires (and only those) and eleven settled. CAFC App. 22403-22410.

As in most settlements, settling respondents wanted to resolve all outstanding potential disputes and be released from any liability for them. The settlements therefore included the tires identified in the ITC petition, and fourteen other tires that (as stated in the settlements) Toyo "believes infringe other intellectual property not asserted in the ITC action." Pet. App. 7a, 77a. Petitioner's TBMT tire was one of those fourteen tires.

1. Confidential Joint Appendix ("CAFC App.") filed in *Toyo Tire Corp., et al. v. Atturo Tire Corp. et al.*, No. 22-1817, Dkt. #42 (Fed. Cir.).

For all of the identified tires, named and unnamed in the ITC action, settling respondents received a release from any liability and in exchange agreed not to manufacture, import or sell those tires going forward, after a grace period. Pet. App. 7a.

One respondent (Svizz-One) wanted to settle, but exclude Petitioner's TBMT tire, which Svizz-One manufactured. Pet. App. 7a. Toyo agreed and Svizz-One settled, but with Petitioner's TBMT tire excluded from the release of liability and from the promise not to manufacture. Pet. App. 7a. Svizz-One was then included in the present litigation concerning trade dress infringement by the TBMT tire.

No other ITC respondent wanted to exclude Petitioner's tire from the settlement. To the contrary, the only respondent who testified stated that *the respondent* wanted to include every possible dispute, including any involving Petitioner's tire. CAFC App. 1027-1028.

In accordance with its rules, the ITC requires settling parties to publish settlement agreements to allow public comment before deciding whether to terminate proceedings based on the settlement. 19 C.F.R. § 210.21(b) (1). There is no evidence (or claim below by Petitioner) that Toyo itself ever "disseminated" the settlement agreements to anyone other than the ITC. Pet. App. 47a.

After publication of a Toyo settlement agreement, Petitioner sent an eight-page letter-brief to the ITC, written by an attorney and signed by Petitioner, objecting to inclusion of the Petitioner's TBMT tire. Pet. App. 7a-8a; CAFC App. 23213-23225. Toyo's counsel responded

with a letter explaining Toyo's belief of infringement and attaching an ad marketing Petitioner's tire as a "knockoff" of Toyo's. CAFC App. 23230-23231.

The ITC staff attorney also filed a letter-response in favor of the settlement, arguing that Toyo could not "significantly affect competitive positions" and the settlement did not raise "public interest concerns." CAFC App. 23236-23240. The ITC Judge cited the letter and ruled that there was no "undue burden" on competitive positions or products. CAFC App. 22280-22282.

B. Underlying Litigation, Absolute Litigation Privilege and Petitioner's Concession on Petition for *Certiorari* That Toyo's Challenged Conduct Is "Pertinent," i.e., That It Is Protected by Absolute Litigation Privilege

Toyo sued Petitioner for trade dress infringement, ultimately losing its claims after a procedural ruling that Toyo had not defined its trade dress properly early enough (or alternatively, that Toyo had changed the definition too late) – resulting in the exclusion of Toyo's experts and the loss of Toyo's trade dress claims at summary judgment.²

Petitioner filed seven counterclaims, which ultimately proceeded to trial – defamation, Lanham Act unfair

2. Petitioner claims that the Federal Circuit held that Toyo could not succeed in its trade dress claims. Pet. 16. That is not the case. Toyo was unable to proceed with its preferred definition of trade dress, and therefore could not rely on Toyo's expert reports, based on a procedural ruling about the timing of disclosure. Pet. App. 15a-20a. The Federal Circuit did not address Toyo's proof in the absence of that procedural ruling. Pet. App. 20a-26a.

competition, common law unfair competition, Illinois Deceptive Trade Practices Act (also referred to in Illinois as statutory unfair competition), interference with contract, interference with expected business, and unjust enrichment.

At trial, Petitioner predicated liability only on Toyo's ITC settlement agreements. Pet. App. 14a. Petitioner specifically pointed to the statement in the settlements that ("Toyo believes") that Petitioner's TBMT tire infringes Toyo's trade dress rights and the contractual provision not to further make, import or sell the listed tires. Pet. App. 7a, 14a.

Petitioner lost its Lanham Act claim at trial and the interference with contract claim on Toyo's motion for judgment as a matter of law ("JMOL"), neither of which were further contested by Petitioner. Pet. App. 14a.

In its motion for JMOL, Toyo argued that absolute litigation privilege (as well as the *Noerr-Pennington* doctrine and the intellectual property privilege) barred all of the counterclaims. Toyo JMOL Br. 6-14.³ The gravamen of Petitioner's response on litigation privilege was that the settlements were not "pertinent" to the ITC proceeding and so litigation privilege did not apply at all.

Petitioner lost the "pertinency" argument at JMOL for absolute litigation privilege, and the district court ruled that the privilege barred the defamation and statutory unfair competition claims. Pet. App. 44a-48a.

3. Toyo's JMOL brief ("Toyo JMOL Br.") filed in *Toyo Tire Corp., et al. v. Atturo Tire Corp., et al.*, No. 1:14-cv-00206, Dkt. #752 (N.D. Ill.).

Petitioner did not argue to the district court that, if conduct is privileged, protection may cover some state tort theories (e.g., its defamation and IDTPA claims) and not others (e.g., its common law interference, unfair competition and unjust enrichment claims). Pet. JMOL Opp’n. 7-14, 30-31.⁴ The district court reached that conclusion anyway, without briefing and by citing *dicta* in a (now) 27-year old opinion – which neither party had cited in the briefing – that the privilege only protects attorneys from defamation claims. As discussed in note 5 below, and as the Federal Circuit concluded, that *dicta* is plainly wrong. Petitioner also now essentially concedes the *dicta* to be wrong, by conceding that the privilege protects against statutory unfair competition claims, i.e., more than just defamation claims against attorneys. Pet. App. 49a-50a.

Toyo appealed and Petitioner cross-appealed to the Federal Circuit. For the defamation and statutory unfair competition claims, Petitioner argued that the settlement agreements were not pertinent to any litigation and therefore not subject to litigation privilege.

The Federal Circuit disagreed, holding that the ITC settlement agreements (under the facts of this case) were pertinent, i.e., subject to the absolute litigation privilege. Pet. App. 33a-36a. *Petitioner does not challenge that holding in its petition.*

For the remaining three common law torts (now on petition), the Federal Circuit noted that Petitioner

4. Petitioner’s opposition to Toyo’s JMOL brief (“Pet. JMOL Opp’n.”) filed in *Toyo Tire Corp., et al. v. Atturo Tire Corp., et al.*, No. 1:14-cv-00206, Dkt. #754 (N.D. Ill.).

had not argued pertinence, but also that its conclusion on pertinence for defamation and statutory unfair competition would apply. Pet. App. 36a. Petitioner does not contest that ruling before this Court, and in any event, any separate argument about pertinence for the three torts in the petition was not preserved.

Consequently, for absolute litigation privilege, there is a final, non-appealable judgment that the challenged conduct in the settlement agreements is subject to the absolute litigation privilege – both the statement of Toyo’s belief that Petitioner’s tire infringes and (at least for the statutory unfair competition claim) the settlement provision barring further manufacture/import and sale of Petitioner’s TBMT tire.

III. THE PETITION FOR *CERTIORARI* SHOULD BE DENIED

As a preliminary matter, the petition rests on a variety of incorrect factual assertions and improper innuendo.

For example:

- The petition repeatedly claims the settlements were “anticompetitive” (*e.g.*, Pet. 5, 11, 15-16). The ITC considered Petitioner’s argument. The ITC staff attorney advocated against a conclusion of anticompetitive effect and the ITC judge expressly found against any claim of “undue burden” on competition. CAFC App. 22280-22282. The settlements were not “anticompetitive” in any legally relevant way.

- Similarly, the petition repeatedly calls the agreements “trade restraints” (*e.g.*, Pet. 3-5, 7) insinuating that this would be improper or unseemly. To the contrary, and as an example, McDonald’s exclusive distribution agreement with Coca Cola is a “trade restraint” – barring Pepsi from selling to McDonald’s franchisees. Restraints on trade, such as preventing a distributor from dealing with other manufacturers, “are common” and “generally lawful.” CAFC App. 21579-21580 (Fed. Trade Comm’n); *see also Tampa Elec. Co. v. Nashville Coal. Co.*, 365 U.S. 320, 327-329 (1961). There are causes of action for unlawful restraints on trade, *e.g.*, under antitrust law. Petitioner has never asserted one.
- The petition (at Pet. 4) falsely states that “each of Toyo’s settlement agreements” included the TBMT tire. Svizz-One’s settlement agreement does not include it, and had any other respondent asked, their settlement would not include it either. *Supra*, Sec. II.A.
- The petition (at Pet. 4) wrongly claims that Toyo used the ITC proceedings to “requir[e]” respondents to include the TBMT tire (and presumably each of thirteen other third-party tires that Toyo also “believes infringe other intellectual property not asserted in the ITC action”). Quite the contrary, (i) all a respondent had to do was ask to remove the TBMT from the settlement – as Svizz-One did; and (ii) the only respondent to testify said that they *wanted* to include it and any other possible claim in the

agreement – the opposite of being forced to do so. *Supra*, Sec. II.A.

- The petition (at Pet. 5) wrongly claims that Toyo “disseminated” the ITC settlement agreements. In fact, Toyo filed them with the ITC as required by ITC rules. Nothing more. Pet. App. 47a.
- The petition misleadingly states (at Pet. 16) that Petitioner “could not have otherwise obtained relief via Toyo’s ITC proceeding,” by neglecting to mention that Petitioner sought to do exactly that with an eight-page letter-brief, but failed on the merits based on the opinions of the ITC staff attorney then ITC judge. Pet. App. 7a-8a; CAFC App. 23213-23225; *supra* Sec. II.A.

In any event, Petitioner’s factual arguments, even if true (and they are not), do not support granting *certiorari*. Absolute litigation privilege applies irrespective of the incorrect accusations in the petition. Petitioner’s looseness with the facts only amplifies the difficulty any court (respectfully, including this Court) would have in formulating a legal question to certify and a full statement of facts to go with it.

A. Illinois Case Law is Settled That “Absolute” Litigation Privilege Includes Protection for Alternative Tort Theories Based on Privileged Conduct

For absolute litigation privilege to apply, the challenged conduct must “relate to proposed or pending litigation and must be in furtherance of representation,”

which is referred to as the requirement of “pertinency.” *O’Callaghan v. Satherlie*, 36 N.E.3d 999, 1008-1011 (Ill. App. Ct. 1st Dist. 2015) (internal citations omitted). “This pertinency requirement is not strictly applied and we resolve all doubts in favor of pertinency.” *Id.* (internal citations omitted).

If conduct is *pertinent*, it is privileged. If privileged, the *scope* of protection for privileged behavior is a separate inquiry, which then follows. *See, e.g., Doe v. Williams McCarthy, LLP*, 92 N.E.3d 607, 612-615 (Ill. App. Ct. 2nd Dist. 2017) (finding conduct privileged and then assessing scope of protection for the asserted common law and statutory torts) (discussed further below); *Eagle Tr. Fund v. Miller*, 2022 IL App (5th) 210156-U, ¶¶ 29-41 (Ill. App. 5th Dist. 2022) (same); *Fanady v. Israelov*, 2025 IL App (1st) 240419-U, ¶¶ 15-25 (Ill. App. 1st Dist. 2025).

Here, Petitioner now concedes “privilege” and “scope” of protection for the defamation and Illinois statutory unfair competition claims. *Supra*, Sec. II.B. The principle, that privileged conduct is also protected from alternative tort theories, is settled in Illinois and further review is not required.

1. **Illinois case law is settled that absolute litigation privilege includes privilege for any alternative tort theories based on privileged conduct, absent a statute with legislative intent to override the privilege**

“[T]he absolute privilege would be meaningless if a simple recasting of the cause of action [] could void its effect.” *Johnson v. Johnson & Bell, Ltd.*, 7 N.E.3d 52, 56

(Ill. App. Ct. 1st Dist. 2014) (internal citations omitted) (holding privilege protected against claims of negligent infliction of emotional distress and breach of contract).

Based on this reasoning, if the conduct is privileged, Illinois appellate courts have held that the scope of protection covers the Illinois common law torts of (bolded causes of action are those asserted in this case): **defamation**, intentional and negligent infliction of emotional distress, strict liability for ultrahazardous activity, invasion of privacy, negligence, breach of contract, civil conspiracy, conversion, abuse of process, **tortious interference with a prospective economic advantage**, **unjust enrichment**, breach of fiduciary duty, aiding and abetting a breach of fiduciary duty, aiding and abetting violation of the Illinois hate crimes statute, *respondeat superior*, and fraud; as well as the statutory torts of **unfair competition (IDTPA)**, statutory fraud and violation of the Illinois Trade Secrets Act. *See Johnson*, 7 N.E.3d at 56-57; *O'Callaghan*, 36 N.E.3d at 1008-1011; *Gorman-Dahm v. BMO Harris Bank, N.A.*, 94 N.E.3d 257, 262–264 (Ill. App. Ct. 2nd Dist. 2018); *Kim v. State Farm Mut. Auto. Ins. Co.*, 199 N.E.3d 737, 748–49 (Ill. App. Ct. 1st Dist. 2021); *Eagle Tr. Fund*, 2022 IL App (5th) 210156-U, ¶¶ 29-41; *Goodman v. Goodman*, 226 N.E.3d 704, 712 (Ill. App. Ct. 2nd Dist. 2023), *appeal denied*, 221 N.E.3d 386 (Ill. 2023); *Fanady*, 2025 IL App (1st) 240419-U, ¶¶ 15-25.

The only tort asserted in the petition, where an Illinois appellate court has not already held that the privilege applies, is common law unfair competition. Holding that the litigation privilege protects against statutory unfair competition and every common law tort considered by an Illinois court, but somehow fails to reach common law

unfair competition, would be unsupportable to say the least. The issue is settled.

The petition nevertheless unhelpfully criticizes the 2022 Illinois appellate court opinion in *Eagle Trust* as being unpublished (a stark contrast with the petition's reliance on unpublished, unappealable district court decisions, discussed below). As the Federal Circuit noted, however, the opinion is still persuasive authority in Illinois. Pet. App. 36a, n.7. The opinion is also thorough. And at this point, the Illinois cases applying this principle are almost legion.

That the *Eagle Trust* and now *Fanady* Illinois appellate courts felt that their decisions did not need publishing just confirms the Federal Circuit's same decision not to publish here. The issue of coverage of alternative tort theories based on privileged conduct is settled. Alternative common law tort theories are barred.

The only Illinois case cited in the petition that rules on the scope of absolute litigation privilege⁵ also *supports*

5. The petition does cite *Zdeb v. Baxter Int'l, Inc.*, 697 N.E.2d 425, 430 (Ill. App. Ct. 1st Dist. 1998). Twenty-seven years ago, *Zdeb* held that the Restatement (Second) of Torts § 586 does not prevent an interference claim against a corporation because "section 586 speaks directly and solely to attorneys...." *Id.* at 430. Section 587 does address the litigation privilege for clients, but it was waived and expressly not considered. *Id.* at 430-431. But *Zdeb* does also include *dicta* (i.e., not a ruling) that Section 586 only protects against defamation claims and not alternative tort theories.

Petitioner now implicitly concedes that *dicta* to be wrong, by conceding that its IDTPA claims are barred by the privilege; the privilege is conceded to extend beyond defamation. In any event,

protection in this case. *Williams McCarthy*, 92 N.E.3d at 612-615. In *Williams McCarthy*, the court noted that “when the privilege applies, ‘no liability will attach even at the expense of uncompensated harm to the plaintiff.’” *Id.* at 612 (internal citations omitted). The court determined that the challenged conduct was “pertinent,” i.e., privileged, and therefore the court had “little difficulty” affirming dismissal of all asserted common law tort claims. “[T]he privilege plainly applies. Recasting the same acts as different torts does not avoid this bar.” *Id.* at 613.

The court did not, however, allow immunity for privileged conduct (the “same acts”) based on a statutory private cause of action under the Illinois Mental Health and Developmental Disabilities Confidentiality Act. That Act creates a private cause of action for “[a]ny person aggrieved by a violation of this Act....” *Williams McCarthy*, 92 N.E.3d at 614. The issue became whether “the statutory provisions must give way to the [common law] absolute-litigation privilege.” *Id.* The court determined that the legislative intent was to create a cause of action without exception. Thus, the court ruled that the legislative intent *overrode* the common law absolute litigation privilege *which would otherwise apply*. *Id.* Compare with *Fanady*, 2025 IL App (1st) 240419-U, ¶¶ 15-25 (absolute litigation privilege protects against Illinois Trade Secrets Act

given the age of *Zdeb* (27 years), that it is inconsistent with a great many more recent Illinois cases applying the privilege beyond just defamation, that it was expressly distinguished as *dicta* in one of those case (*O’Callaghan*) and that (unlike the subsequent cases) the *Zdeb dicta* is superficial, the Federal Circuit safely and appropriately discounted the *Zdeb dicta* in favor of the many recent, well-reasoned Illinois appellate decisions. Pet. App. 35a-36a.

claims for privileged conduct due to lack of evidence of legislative intent to override common law defenses).

In short, *Williams McCarthy* again confirms that Illinois courts include all torts within the scope of absolute protection for privileged conduct. That includes common law torts without exception, and statutory torts unless there was a legislative intent to override common law defenses. The *Eagle Trust* and *Fanady* courts applied this same rule to dismiss all claims, where there was no legislative intent to override litigation privilege.

This Court does not need to seek the guidance of the Illinois Supreme Court on whether privileged conduct is protected from alternative common law tort theories in Illinois. There is an overwhelming basis to do so here, as the Federal Circuit did.

More important, in the *Goodman* case cited above, the Illinois Supreme Court declined review of a decision applying this principle. *Goodman v. Goodman*, 221 N.E.3d 386 (Ill. 2023). The Illinois Supreme Court has already determined that the issue does not need its review.

2. The petition unhelpfully conflates pertinence (or whether the privilege applies to conduct) and the scope of protection for privileged conduct

The petition argues that the scope of the privilege is “necessarily narrow” due to the “complete immunity provided.” Pet. 10 (quoting *Stein v. Krislov*, 999 N.E.2d 345, 357-358 (Ill. App. Ct. 1st Dist. 2013)). The petition nearly concedes the propriety of including all common

law torts within the scope of protection, i.e., “complete immunity” *for privileged conduct*. That pertinence may be construed narrowly due to complete immunity is irrelevant. The issue on petition is the scope of immunity for privileged conduct, and that is “complete immunity.”

The Illinois cases cited in the petition thus concern whether the challenged conduct is privileged at all. *E.g.*, *Kurczaba v. Pollock*, 742 N.E.2d 425, 439-441 (Ill. App. Ct. 1st Dist. 2000) (privilege does not apply at all, including for defamation, to dissemination to third-parties of papers not yet accepted by court); *Stein*, 999 N.E.2d at 357-358 (conduct by nonlitigants is not privileged, including for defamation). In these cases, privilege did not apply, and defamation (and all other tort) claims were not barred.

Here, both the district court and the Federal Circuit held that Toyo’s challenged conduct is pertinent/privileged. With the defamation and statutory unfair competition claims conceded on petition for *certiorari*, the issue of “pertinence” and whether the “privilege applies” to Toyo’s conduct is conclusively resolved. In fact, as noted above, Petitioner did not even *argue* pertinence before the Federal Circuit for the common law torts in this petition. *Supra*, Sec. II.B.

And with pertinence, “complete immunity” follows, *as stated in the petition*.

3. Petitioner’s policy arguments are unhelpful for its proposed *certiorari* issue, and were policy arguments helpful, policy heavily weighs in favor of application of the absolute litigation privilege

Petitioner’s policy arguments again conflate pertinence with scope of protection. Petitioner quotes *Williams McCarthy* for the notion that the privilege is limited to “instances where the administration of justice and public service require immunity.” That part of *Williams McCarthy* concerned pertinence, i.e., “the class of communications to which it applies.” Pertinency was found there and is given here. When it comes to scope of protection, *Williams McCarthy* makes plain that the scope of the privilege should be as absolute as possible (other than for a statutory tort with a contrary legislative intent).

Petitioner also purports to criticize the Federal Circuit’s citation of *Geick*, which applied the absolute privilege to bar business interference claims against (pertinent conduct by) government officials (as *Eagle Trust* did for the litigation privilege). Pet. 12-13 (citing *Geick v. Kay*, 603 N.E.2d 121, 129-130 (Ill. App. Ct. 2d Dist. 1992)). The petition speculates that government officials need more protection. But there is no basis for “absolute” protection to be less “absolute” for litigants than for government officials. To the contrary, for government officials, the privilege is “justified by the [] policy that officials of government should be free to exercise their duties without fear.” *Id.* Litigation privilege for attorneys is similarly to assure “the utmost freedom in their efforts” when litigating. *O’Callaghan*, 36 N.E.3d at 1008. “Utmost freedom” is at least as great as “free to exercise ... without fear.”

Petitioner adds another unsupported policy argument that the privilege should be greater for attorneys than for litigants. Not in Illinois. “A private litigant enjoys the same privilege [as an attorney] concerning a proceeding to which he is a party.” *Johnson*, 7 N.E.3d at 56; *see also Thompson v. Frank*, 730 N.E.2d 143, 145 (Ill. App. Ct. 3rd Dist. 2000) (same).

Were the Court to look for additional policy considerations under Illinois law (although there is no need to), there is strong policy support for absolute litigation privilege protection for the present case. In Illinois, the absolute litigation privilege is specifically intended to protect settlement. “In determining whether the privilege should apply, we have also considered whether a limitation on the privilege’s application would frustrate an attorney’s ability to settle or resolve cases without resorting to expensive litigation, as many disputes are best resolved out of court.” *O’Callaghan*, 36 N.E.3d at 1008 (finding attorney statements pertinent) (citing *Atkinson v. Affronti*, 861 N.E.2d 251, 255 (Ill. App. Ct. 1st Dist. 2006)) (conduct prior to litigation protected by privilege; noting that any limitation would “frustrate an attorney’s ability to settle or resolve cases without resorting to expensive litigation....”).⁶ If there is a form of conduct deserving special absolute litigation privilege protection, it is settlement. And that is the only allegedly tortious conduct here.

6. These cases involve analysis of pertinency rather than scope of protection for pertinent/privileged conduct. For scope of protection, the protection (against state tort claims) is absolute (absent a statute to the contrary) and within that framework the only policy involved is “utmost freedom” to “settle or resolve cases.”

Finally, Toyo noted in every JMOL brief before the district court and every brief before the Federal Circuit that Petitioner has never cited a single case in any jurisdiction over the history of the United States that imposes state tort liability over an intellectual property settlement agreement. Toyo CAFC Br. 65-66.⁷ That remains true before this Court, as well.

Imposing state tort liability over an intellectual property settlement here would not only be a first, the consequences would be severe. All intellectual property cases involve multiple (alleged) infringers, from designer to manufacturer to distributor to retailer to customer. *E.g.*, 35 U.S.C. § 271(a) (patent infringement for “mak[ing], us[ing], ... sell[ing] ... or import[ing]” a patented invention). If a settlement against one accused infringer, where the accused infringer promises not to infringe going forward, generates jury-triable claims by all the others (based on rhetoric of “anticompetitiveness” or “restraint on trade”), suing less than the entire chain, or settling with less than all possible infringers, would invite a barrage of state tort claims from any nonsettling party. For example, if a manufacturer settles, distributors can no longer sell, customers can no longer buy, and all could sue. If a customer settles, manufacturers and distributors cannot sell to them. And so on. To avoid a slew of state tort jury-triable claims and counterclaims, intellectual property owners would have to sue everyone in a supply chain and never settle with less than all defendants.

7. Toyo’s opening brief (“Toyo CAFC Br.”) filed in *Toyo Tire Corp., et al. v. Atturo Tire Corp. et al.*, No. 22-1817, Dkt. #23 (Fed. Cir.).

That is simply not workable, *and that is not how it has ever worked* until the district court in this case erred, necessitating reversal by the Federal Circuit. Prolonging this case through *certiorari* and state court referral is unnecessary and against the public interest.

4. Petitioner’s arguments about “extending” law, citing unpublished, unappealable district court opinions, are unhelpful

Petitioner cites a number of Illinois district court opinions to argue that federal courts (presumably including this Court) should be reluctant to “extend” absolute litigation privilege to cover other alternative state common law tort theories. But the issue is not “extending” the privilege. The issue is whether protection in Illinois for privileged conduct is reasonably predicted to include alternative common law tort theories (it is).

It may be a reasonable rule of thumb, in the absence of any guidance, to predict that a state supreme court would not usually issue a dramatic new legal principle. Resolving rules of thumb or reluctance to predict is immaterial here, though. Illinois appellate courts have provided ample guidance.

Examination of the opinions cited in the petition, however, illuminates how weak the petition argument is. Every federal court case addressing absolute litigation privilege and cited in the petition⁸ was an unpublished,

8. One of the district court unpublished opinions does not actually rule on the privilege – it is an unpublished opinion declining to sanction an attorney for filing complaints that were

unappealable opinion denying a motion to dismiss or (in one case) for summary judgment. And they all plainly reached the wrong conclusion:

- *Stone* noted defendants only cite defamation cases and so intentional infliction of emotional distress was not barred. *Stone v. Wash. Mut. Bank*, No. 10 C 64102011, WL 3678838, at *16 (N.D. Ill. Aug. 19, 2011) (unpublished, unappealable denial of motion to dismiss). Cited above are several Illinois cases barring such claims, and so any reluctance to “predict” what Illinois courts would do was an injustice.
- *Act II Jewelry* begins by observing that Illinois only applies the privilege to defamation and invasion of privacy. *Act II Jewelry, LLC v. Wooten*, No. 15 C 6950, 2016 WL 4011233, at *6 (N.D. Ill. July 27, 2016) (unpublished, unappealable denial of motion to dismiss). As noted above, that is simply wrong as Petitioner concedes for the IDTPA claim.
- *Sanders* dismissed a complaint with leave to refile, stating that Illinois only applies the privilege to litigating attorneys making defamatory statements. *Sanders v. JGWPT Holdings, Inc.*, No. 14 C 9188, 2016 WL 4009941, at *11 (N.D.

dismissed for failure to state a claim and which were then asserted to be frivolous and sanctionable because (in addition to and among other things) absolute litigation privilege was available as an affirmative defense. *Del. Motel Assocs., Inc. v. Capital Crossing Servicing Co. LLC*, No. 17 C 1715, 2019 WL 1932586, at *4 (N.D. Ill. May 1, 2019).

Ill. July 26, 2016) (unpublished, unappealable granting of motion to dismiss with leave to refile). That *dicta* is hard to understand, because the opinion cites *Johnson* in support, which, as discussed and quoted above, unambiguously states that parties have the same privilege as lawyers and that alternative tort theories based on the same privileged acts are barred. *Johnson*, 7 N.E.3d at 56 (invasion of privacy, negligent infliction of emotional distress and breach of contract all barred by privilege).

- *Liebich* also stated that Illinois courts have only applied absolute litigation privilege to defamation claims. *Liebich v. DelGiudice*, No. 20-cv-2368, 2022 WL 874610, at *11 (N.D. Ill. Mar. 24, 2022) (unpublished, unappealable denial of motion to dismiss). But *Liebich* also inexplicably cited *Johnson* for this proposition, a case which barred three other common law torts.
- *USA Satellite* stated that privilege is only for attorneys and only for defamation. *USA Satellite & Cable, Inc. v. Mac Naughton*, No. 15 C 6331, 2017 WL 1178404, at *3 (N.D. Ill. Mar. 30, 2017) (unpublished, unappealable denial of motion to dismiss). Again, that is plainly not Illinois law as Petitioner has now conceded for its IDTPA claims.
- *Turubchuk* stated that privilege is limited to defamation and false light actions, because of defendants' failure to cite cases addressing other torts. *Turubchuk v. E.T. Simonds Constr. Co.*,

No. 12-CV-594, 2017 WL 480738, at *3 (S.D. Ill. Feb. 3, 2017) (unpublished, unappealable denial of summary judgment). Again, there are many such cases, cited above.

In short, the petition relies on unpublished and unappealable district court statements that plainly were not well thought-out and are inconsistent with numerous Illinois appellate court rulings that were either uncited or (worse) flatly contradicted by the cases cited as support, and which Petitioner now concedes are wrong since Petitioner concedes that the privilege protects from Illinois statutory unfair competition claims. These unappealable, unpublished district court errors do not support this Court's intervention for a Federal Circuit decision which does follow Illinois law and does not miscite cases.

The one published, authoritative decision on "extending" doctrine, cited in the petition, is *Indep. Tr. Corp. v. Stewart Info. Servs. Corp.*, 665 F.3d 930, 938 (7th Cir. 2012). There, a single intermediate Illinois appellate court made a clear, explicit statement about the scope of tolling of the statute of limitations based on a new "adverse domination" theory. *Id.* at 936-938 (citing the Illinois appellate decision in *Lease Resolution Corp. v. Larney*, 719 N.E.2d 165, 170 (Ill. App. Ct. 1st Dist. 1999)). The Illinois Supreme Court had not addressed the doctrine nor had any other Illinois appellate court. The Seventh Circuit held that following the single Illinois appellate court ruling was *proper*, and also declined to extend the doctrine "beyond the clear bounds of *Larney*, in which the court stated explicitly [the extent of the doctrine]." Thus, it would not be reasonable to predict that an Illinois court

would go outside the “clear bounds” that were “explicitly stated.”

Here, there are multiple Illinois appellate court opinions explicitly stating that absolute privilege bars alternative common law tort theories for privileged conduct. *Supra*, Sec. III.A.1. The Federal Circuit made no extension beyond a clear, explicitly stated boundary. The Federal Circuit followed those bounds.

More important, the Seventh Circuit also did not refer the matter to the Illinois Supreme Court in *Indep. Tr. Corp.* A *single* Illinois appellate court opinion articulating a new defense was sufficient. Much, much more supports the Federal Circuit’s ruling here.

B. The Proposed Certification Is Inappropriate and Unhelpful

1. The petition does not identify any appropriate question for certification nor explain how to draft a “statement of all facts”

The petition relies on so many factual arguments that it is difficult to imagine what legal principle this Court could appropriately certify for state court review. The petition claims that the privilege should not protect anticompetitive conduct – but “anticompetitive conduct” was not the conclusion of the ITC, and Toyo and Petitioner are not competitors. What role should “anticompetitive” effect have (if any) and how should that be communicated in a question certified to the Illinois Supreme Court?

Similarly, Petitioner claims a restraint on trade. But it is a *legal* restraint on trade and Petitioner has never provided any authority to suggest otherwise – there is no antitrust or similar claim in this case. *Supra*, Sec. III (second bullet). Should the Illinois Supreme Court be asked whether the torts of unjust enrichment, interference with business, and common law unfair competition be predicated on *legal* restraints on trade in an intellectual property settlement?

The Petition argues (wrongly) that Toyo forced respondents to include the TBMT tire. That is manifestly untrue as discussed above – respondents were free to omit tires and Svizz-One did omit Petitioner’s tire on request. Do those facts have a role in the certified question or is it in the petition only to take shots at Toyo? If not the latter, how are these facts to be reflected in the certified question or statement of facts?

The fact that the settlement had to be, and was, submitted to the ITC, that the ITC staff attorney reviewed and commented on Petitioner’s concerns to the ALJ judge arguing that there was no undue anticompetitive effect, and that the ITC judge reviewed the ITC attorney’s response and ruled that there was no undue burden on competition, all relate to the nature of the proceeding Toyo was litigating. How is that communicated to the Illinois Supreme Court?

Most important, Petitioner has now conceded that the absolute litigation privilege bars the defamation and the statutory unfair competition claims and conceded “pertinence” for the three common law torts on appeal. In fairness, surely those facts should also be included in

any question/statement of facts certified to the Illinois Supreme Court.

The list could easily go on.

Certification to the Illinois Supreme Court requires: “a statement of all facts relevant to the questions certified and showing fully the nature of the controversy in which the questions arose.” Ill. Sup. Ct. R. 20(b)(2). The petition cannot describe an appropriate set of facts to certify and it would be unreasonable to ask this Court to formulate one on Petitioner’s behalf.

The petition cannot even present a consistent question to certify. In the “Question Presented” section, the petition proposes that the Illinois Supreme Court be asked: “whether Illinois’ absolute litigation privilege bars [Petitioner’s] claims of tortious interference with business expectancy, unfair competition, and unjust enrichment...” Pet. i.

After extensive (and unfair) factual criticism of Toyo’s behavior, the question shifts in the argument section to: “Whether Illinois’ Absolute Litigation Privilege Applies To These Claims And Facts.” Pet. 17. What “these facts” are is unexplained.

The conclusion then presents a different question: “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. 21. Indeed, this version is more simply stated as whether absolute litigation privilege “immunizes

Toyo's conduct proved at trial." That is not certification of a legal issue to review. *See* Ill. Sup. Ct. R. 20(a) (allowing certification of "questions of State law"). That is a referral of the entire absolute litigation privilege issue – facts, fact-finding⁹ and all.

Worse, "conduct proved at trial" is not even a finally resolved question in this case. On appeal, Toyo briefed the sufficiency of Petitioner's proof related to each of the state common law counterclaims in the petition, including in relation to the intellectual property privilege. Toyo CAFC Br. 66-68, 74-75. Because the Federal Circuit held Petitioner's claims barred by absolute litigation privilege, the Federal Circuit did not review those arguments.

And even if the Federal Circuit affirmed denial of JMOL (the Federal Circuit did not), the uncontroverted facts were that Toyo had never heard of Petitioner or its tire until Toyo's outside ITC lawyers found advertising selling the tire as a "knock-off" of Toyo. Toyo's lawyers made the decision to include the tire (with thirteen other tires not named in the ITC proceeding) in the settlements. When Petitioner objected, Toyo's lawyers explained to the ITC why the settlement was appropriate. Petitioner and Toyo *agreed* at trial that Toyo and Petitioner are not competitors and sale of one company's tire would not displace a sale by the other, due to Toyo's premium reputation and price versus Petitioner's low price and lack

9. That absolute litigation privilege is a legal issue does not mean that it cannot require resolution of underlying factual issues. *See, e.g., Nieman v. Grange Mut. Ins. Co.*, No. 12-3250, 2013 WL 173466, *4 (C.D. Ill. Jan. 16, 2013) ("Based on these factual disputes, the Court is unable to conclude at this time that Defendants' claims are barred by the absolute litigation privilege.").

of reputation. And throughout the entirety of the case, before the district court and Federal Circuit, Petitioner never identified any motive (plausible or not) for including the TBMT tire (and not any other of Petitioner's tires) in the settlements, beyond protecting intellectual property rights against what a third-party advertised as a "knock-off" of Toyo; there was not one shred of evidence of personal or corporate animus. Toyo CAFC Br. 74-75.

More fundamentally, the petition asks this Court to make a referral that the Illinois Supreme Court would regard as improper. "[C]ertified questions must not seek an application of the law to the facts of a specific case [I]f an answer is dependent upon the underlying facts of a case, the certified question is improper." *Rozsavolgyi*, 102 N.E.3d at 169 (internal citations omitted). Petitioner asks this Court to violate that principle.

2. The proposed certification is not outcome determinative (unless Petitioner loses)

The Federal Circuit found absolute litigation privilege barred Petitioner's counterclaims. Consequently, the Federal Circuit did not reach Toyo's alternative dispositive issues. Those include immunity under federal *Noerr-Pennington* doctrine, immunity under Illinois common law intellectual property privilege, and sufficiency of proof of any tortious conduct. Pet App. 26a. Therefore, the proposed certification is not "outcome determinative" unless Petitioner loses. *See* Ill. Sup. Ct. R. 20(a) (allowing certification of questions "which may be determinative of the said cause"); *Stenberg v. Carhart*, 530 U.S. 914, 918 (2000) (declining to certify question to the Nebraska Supreme Court because the certified question would not

be determinative of the cause); *Whitlock v. Brueggemann*, 682 F.3d 567, 590 (7th Cir. 2011) (declining to certify question to the Illinois Supreme Court because “the question is not one that might be determinative”).

For *Noerr-Pennington*, the district court (correctly) found Toyo’s conduct to be “pertinent” to the ITC litigation for the absolute litigation privilege – but the district court surprisingly found the same documents not “pertinent” to the ITC proceeding under *Noerr-Pennington* doctrine. The settlement agreements were entered into for the purpose of submitting to the ITC for ITC review, ITC publication, ITC receiving public comment and, if approved by the ITC (as it was over Petitioner’s objection), termination of the ITC investigation by an ITC Judge. There is no reason to think that the Federal Circuit on remand would reach a different conclusion on pertinence than the Federal Circuit (and the district court) did for litigation privilege. If so, and *Noerr-Pennington* bars the counterclaims,¹⁰ Petitioner may petition for *certiorari* again. If not, Toyo would certainly ask this Court to review.

For intellectual property privilege, this case presented an issue where the district court also (improperly) declined to “extend” the intellectual property privilege to tortious interference, unfair competition, and unjust enrichment. Pet. App. 26a. While another Illinois district court case had applied the privilege to tortious interference and

10. Application of *Noerr-Pennington* is no stretch. These very Toyo settlement agreements were held at summary judgment to be protected by *Noerr-Pennington* doctrine in a different case. Toyo CAFC Br. 72-73 (citing *Toyo Tire & Rubber Co., Ltd. v. CIA Wheel Grp.*, No. 8:15-246, 2015 WL 4545187, at *2-3 (C.D. Cal. 2015)).

unfair competition, the district court here stated that no *Illinois* court had done so; like for the absolute litigation privilege, the district court therefore refused to predict what the Illinois Supreme Court would do. Pet. App. 55a-56a. Consequently, if Petitioner is successful in having *certiorari* granted, and Petitioner was successful before the Illinois Supreme Court, and that results in a remand for further proceedings as Petitioner requests, the result may well be another request to certify a legal question to the Illinois Supreme Court – about the scope of intellectual property privilege.

For sufficiency of proof, for example, unjust enrichment requires proof that Toyo's conduct "violates fundamental principles of justice, equity, and good conscience" and a benefit unjustly retained by Toyo. Unfair competition requires behavior that "shocks judicial sensibilities." Pet. App. 63a-65a. The ITC staff attorney and ITC Judge were not "shocked" by the settlements.

Were this a case of unjust enrichment, common law unfair competition, or interference, it would be the first time in the history of the country that a court found any of these based on an intellectual property settlement agreement. As noted above, there was no conceivable motive for Toyo's outside ITC counsel to include Petitioner's tire in the settlements other than protecting intellectual property, and Petitioner has never proposed a plausible one. And again, since Toyo and Petitioner are not competitors, a benefit that was unjustly retained by Toyo is impossible to identify and, throughout the litigation, Petitioner has never purported to identify a plausible motive either. JMOL was appropriate and Toyo

believes that the Federal Circuit would have agreed, had it reached the issue.¹¹

In short, this petition is only “outcome determinative” if that outcome is the same result as denial of *certiorari*. This litigation was filed in 2014. It is time for an “outcome determinative” end.

11. At oral argument before the Federal Circuit, Judge Moore questioned Petitioner’s counsel on the counterclaims as follows: “I’m waiting for my judicial sensibilities to be shocked” and “Where is the shocking part? What’s the shock the conscious part? What did they do, exactly? You’re saying a lot of words, but what I’m not seeing, is some really, extraordinarily bad thing.” https://oralarguments.cafc.uscourts.gov/default.aspx?fl=22-1817_03052024.mp3 at 19:45, 20:30.

IV. CONCLUSION

Toyo respectfully submits that *certiorari* should be denied.

Respectfully submitted,

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