

13- 886

No. 13-__

Supreme Court, U.S.
FILED

JAN 22 2014

OFFICE OF THE CLERK

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

PETITION FOR A WRIT OF CERTIORARI

Eric L. Chase
Genevieve K.
LaRobardier
BRESSLER, AMERY &
ROSS, P.C.
325 Columbia Turnpike
Florham Park, NJ 07932

James P. Ulwick
Jean E. Lewis
Steven M. Klepper
KRAMON & GRAHAM, P.A.
One South Street
Suite 2600
Baltimore, MD 21202

Thomas C. Goldstein
Counsel of Record
Kevin K. Russell
GOLDSTEIN &
RUSSELL, P.C.
5225 Wisconsin Ave., NW
Suite 404
Washington, DC 20015
(202) 362-0636
tg@goldsteinrussell.com

Additional Counsel on Inside Cover

Gordon A. Rehnborg, Jr.
MCDOWELL & OSBURN, P.A.
282 River Road
Manchester, NH 03105

William A. Kershaw
Lyle W. Cook
KERSHAW, CUTTER &
RATNOFF, LLP
401 Watt Avenue
Sacramento, CA 95864

QUESTION PRESENTED

This petition arises from a dispute between respondent Ford Motor Company (Ford) and the petitioners, eleven former dealers for Ford's heavy duty trucks. Ford sold its heavy duty truck manufacturing and parts business to a competitor and, accordingly, stopped supplying heavy trucks and parts to its dealers. In the dealers' subsequent breach of contract action, the district court awarded the dealers summary judgment. On Ford's appeal, the Third Circuit reversed. Ruling *sua sponte*, the court of appeals concluded that the contract was not breached because as a matter of fact Ford had continued to supply the dealers with truck parts. The panel, however, simply made that fact up: the record shows (and Ford has never disputed) that Ford ceased supplying the dealers with parts, because it was expressly required to do so by the contract under which it sold its truck manufacturing business. No doubt, that is why Ford has never defended its conduct on the basis invented by the court of appeals. Nonetheless, although petitioners demonstrated the panel's factual error in their petition for rehearing and rehearing en banc, the court of appeals denied rehearing without calling for a response.

The Question Presented is:

Whether in a case involving a significant harm to a substantial group of parties, a court of appeals' *sua sponte* invention of an indisputably false fact that is the sole premise of its ruling so far departs from the ordinary and usual course of proceedings that the judgment should be summarily reversed.

PARTIES TO THE PROCEEDINGS

In addition to the parties to the proceedings identified in the caption, the following were plaintiffs-appellees below and are petitioners here:

Badger Truck Center, Inc.
Boyer Ford Truck, Inc.
Boyer Ford Truck Sioux Falls, Inc.
Carmenita Ford Truck Sales, Inc.
Colonial Ford Truck Sales, Inc.
Colonial Trucks of Tidewater, Inc.
Colony Ford Truck Center, Inc.
Freeway Ford Truck Sales, Inc.
Motor City Ford Trucks, Inc.
West Gate Ford Truck Sales, Inc.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court's Rules, petitioners state that the following petitioners have the parent companies identified:

- Boyer Ford Truck, Inc.: Equipoise Corporation
- Boyer Ford Truck Sioux Falls, Inc.: Equipoise Corporation
- Colonial Ford Truck Sales, Inc.: Greater Richmond Businesses, Inc.
- Colonial Trucks of Tidewater, Inc.: Greater Richmond Businesses, Inc.

Petitioners further state that no publicly held company owns 10 percent or more of the stock of any of the petitioners.

TABLE OF CONTENTS

QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
RULE 29.6 CORPORATE DISCLOSURE STATEMENT.....	ii
TABLE OF AUTHORITIES	v
PETITION FOR A WRIT OF CERTIORARI.....	1
OPINIONS BELOW	1
JURISDICTION.....	1
RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS	1
STATEMENT OF THE CASE.....	2
REASONS FOR GRANTING THE WRIT	10
CONCLUSION	17
APPENDIX	1a
Appendix A, Court of Appeals Decision	1a
Appendix B, District Court 2005 Decision.....	11a
Appendix C, District Court 2009 Decision.....	40a
Appendix D, District Court Order Denying Motion To Alter Or Amend Judgment	67a
Appendix E, Order Denying Rehearing	72a
Appendix F, Petition for Rehearing	75a
Appendix G, Excerpts from Ford Heavy Duty Truck Sales and Service Agreement.....	92a
Appendix H, Excerpts from Business Transfer and Asset Purchase Agreement	109a

Appendix I, Excerpts from Ford Memorandum To Dealers	120a
---	------

TABLE OF AUTHORITIES

Cases

<i>Buono Sales, Inc. v. Chrysler Motors Corp.</i> , 363 F.2d 43 (3d Cir. 1966) (en banc)	7, 15
<i>Dye v. Hofbauer</i> , 546 U.S. 1 (2005) (per curiam).....	16
<i>Smith v. Digmon</i> , 434 U.S. 332 (1978) (per curiam).....	16
<i>Wood v. Milyard</i> , 132 S. Ct. 1826 (2012)	10

Statutes

28 U.S.C. § 1254(1)	1
Federal Automobile Dealers Day in Court Act, 15 U.S.C. §§ 1221, <i>et seq.</i>	6
Wis. Stat. § 218.0133(7).....	4

Rules

S.Ct. R. 12(a).....	16
---------------------	----

PETITION FOR A WRIT OF CERTIORARI

Petitioners Bayshore Ford Truck Sales, Inc., et al., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit (Pet. App. 1a) is unpublished. The opinions of the district court entering summary judgment in petitioners' favor (Pet. App. 11a-66a) are unpublished.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 2013. Pet. App. 2a. The court of appeals denied a timely petition for rehearing on September 24, 2013. Pet. App. 72a-73a. On December 19, 2013, Justice Alito extended the time for filing this petition through January 22, 2014. *See* 13A613. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

There are no statutory or constitutional provisions relevant to this petition.

STATEMENT OF THE CASE

This case involves a dispute between respondent Ford Motor Company (Ford) and its heavy duty truck dealers arising from Ford's sale of its heavy duty truck and truck parts business.¹

1. Ford's relationship with each of its heavy duty truck dealers is governed by a standard Sales and Service Agreement. See Pet. App. 92a-108a (reproducing relevant excerpts of the agreement). The Agreement recognizes the very significant financial investment dealers must make in reliance on Ford's promise to provide them a regular supply of heavy duty trucks to sell:

[E]ach of the Company's franchised dealers in COMPANY PRODUCTS makes important investments or commitments in specialized heavy duty truck retail sales and service facilities and equipment, in working capital, in inventories of heavy duty trucks, parts and accessories, and trained sales and service personnel based on annual planning volumes for their markets. These investments must be substantially larger in relation to unit sales volume than for other automotive dealerships and the dealer's organization must be more highly trained technically in effective merchandising, financing and service.

¹ References to "trucks" and "parts" throughout refer to such heavy duty trucks and parts for heavy duty trucks.

Pet. App. 93a. Each dealer thus was required to invest in substantial facilities, built and maintained in compliance with Ford guidelines. *Id.* 100a. The dealers were also required to “promote[] vigorously and aggressively the sale” of Ford’s trucks, *id.* 96a, and to “maintain stocks of current models of” trucks in “an assortment and in quantities” dictated by Ford, *id.* 96a-97a. Moreover, dealers were obligated to provide warranty and other service on Ford heavy trucks, using genuine parts purchased from Ford and the types of “diagnostic and other tools, equipment and machinery” Ford designated. *Id.* 98a-99a. To perform these sales and service obligations, dealers were required to hire and train qualified personnel, including by sending workers to Ford training schools and courses at the dealers’ expense. *Id.* 100a. In addition, the agreement required dealers to maintain working capital and lines of credit in amounts set by Ford. *Id.* 100a-101a.

Ford induced the dealers to make these large, long-term investments through its commitment to supply the dealers with trucks and parts. Under the agreement:

Subject to and in accordance with the terms and conditions of this agreement, the Company shall sell COMPANY PRODUCTS to the Dealer and the Dealer shall purchase COMPANY PRODUCTS from the Company.

Pet. App. 93a. The contract defined the term “COMPANY PRODUCTS” to include:

- (1) new trucks and chassis of series 850 or higher designations and
- (2) parts and accessories therefor

Id. 95a.

The contract further provided that Ford would assume significant financial obligations in the event it terminated the contract or did not renew it. For example, if Ford terminated the agreement, it was obligated to buy back unsold inventory and special tools and equipment. Pet. App. 103a-106a. A dealer also had the option to require Ford to purchase or lease back certain physical facilities. *Id.* 106a-108a. In addition, state law frequently imposes additional obligations on car manufacturers who terminate dealer franchises. See, e.g., Wis. Stat. § 218.0133(7) (providing that grantor of franchise “shall compensate the dealer in an amount not less than the fair market value of the franchise terminated”).

2. In 1997, Ford sold its heavy duty truck and parts business to a competitor, Freightliner, for \$300 million. In the agreement, Ford unequivocally promised for ten years to stop producing or selling not just heavy duty trucks, but also – particularly relevant to this petition – parts and accessories for those trucks. Pet. App. 118a-19a. The sale agreement provided:

Ford agrees that, for a period of 10 years following [the sale], it will not, directly or indirectly, anywhere in the Territory, market, manufacture or sell any commercial vehicle with a gross vehicle weight exceeding 33,000 pounds [*i.e.*, heavy trucks] or *Spare Parts for any such vehicle*

Pet. App. 118a (emphasis added). Pursuant to the sale agreement, Ford stopped accepting orders from its dealers for both heavy duty trucks and parts. See

id. 15a; *see also id.* 120a-22a (letter from Ford to truck dealers).

As a consequence of the sale, petitioners lost tens of millions of dollars in sales during one of the strongest markets for heavy duty trucks in recent memory. *See* C.A. J.A. 592; C.A. S.A. 34-44. Among other things, Ford drastically reduced, then stopped, delivering trucks well before Freightliner could begin delivery of a regular supply of replacement vehicles. *See* C.A. S.A. 3, 5, 21, 24-26, 29-30. Although Freightliner offered petitioners the chance to become dealers for a new Freightliner subsidiary, the value of that franchise – for a brand with no established reputation in the market for heavy trucks – was substantially lower.

Ford itself estimated that complying with the termination provision of the dealer contracts would cost it between \$100 and \$700 million in termination obligations to the dealers under both the contracts and state law. C.A. J.A. 567. No less important, Ford's deal with Freightliner required Ford to cooperate in delivering a largely intact dealer network to the new buyer. The value of that established network was a "significant part" of the value of the business Freightliner was buying. C.A. J.A. 673, 777. In addition, terminating the contracts would have crippled Ford's ability to meet its warranty obligations to existing customers, since the Sales and Service Agreement required the dealers to provide warranty services on behalf of Ford. *See* Pet. App. 98a-99a; *see also* C.A. J.A. 714, 747.

3. Petitioners brought this breach of contract suit against Ford in the United States District Court for the District of New Jersey on behalf of a class of

Ford's heavy truck dealers.² In response, Ford did not dispute that it had ceased providing the dealers not only heavy trucks but also parts for those trucks. See, e.g., C.A. J.A. 327, ¶ 50 (Second Amended Complaint, alleging that Ford announced its signing of a "letter of intent to sell its Heavy Duty Truck assets, *including its parts business*, to Freightliner") (emphasis added); *id.* at 355, ¶ 50 (Answer, admitting allegation).

Thus, while after the sale some dealers continued to sell their pre-existing inventory of Ford-produced parts, or parts sold to the dealers by Freightliner, Ford ceased providing new parts and accessories. Instead, Ford argued that it was entitled to cease supplying all trucks and parts under the contract under a provision entitled "CHANGES IN COMPANY PRODUCTS," which provided:

[Ford] may change the design of any COMPANY PRODUCT, or add any new or different COMPANY PRODUCT or line, series or body style of HEAVY DUTY TRUCKS, at any time and from time to time, without notice or obligation to the Dealer, including any obligation with respect to any COMPANY PRODUCT theretofore ordered or

² Jurisdiction in federal district court was based on asserted violations of the Federal Automobile Dealers Day in Court Act, 15 U.S.C. §§ 1221, *et seq.* Although the district court granted Ford summary judgment on that claim, see Pet. App. 17a-21a, it retained jurisdiction over the state law claims, *id.* 21a-22a. Ford did not challenge the decision to retain jurisdiction on appeal.

purchased by or delivered to the Dealer. Such changes shall not be considered model year changes as contemplated by the provisions of any HEAVY DUTY TRUCK TERMS OF SALE BULLETIN. *[Ford] may discontinue any HEAVY DUTY TRUCK or other COMPANY PRODUCT at any time without liability to the Dealer.*

Pet. App. 101a (emphasis added).

Ford's argument faced the very significant obstacle that the en banc Third Circuit had rejected almost the identical defense in a very similar case involving Chrysler, also governed, as in this case, by Michigan law. *Buono Sales, Inc. v. Chrysler Motors Corp.*, 363 F.2d 43, 47-49 (3d Cir. 1966) (en banc). Consistent with that decision, petitioners argued that Ford's interpretation would negate the contract's express termination provisions by permitting Ford to evade its termination obligations. Further, the definitions provision of the contract distinguished between the singular and plural version of "HEAVY DUTY TRUCK," making clear that if the contract permitted Ford to stop providing all of its heavy duty trucks, it would have used the plural form. See Pet. App. 95a-96a ("HEAVY DUTY TRUCK' shall mean *any* truck or chassis, and 'HEAVY DUTY TRUCKS' shall mean *all* trucks and chassis included in this agreement. . . .") (emphasis added).

The district court granted petitioners summary judgment on their breach of contract claim. Pet. App. 22a-32a. The court explained that Ford's interpretation of the dealer agreement could not be reconciled with "other terms and conditions of the Agreements, including the stated purpose and all 12

plus pages of termination provisions.” *Id.* 30a. The court set for trial eleven “bellwether” cases for a determination of lost profits arising from Ford’s breach of contract. A jury returned individual verdicts for the eleven dealers. *Id.* 3a.

4. Ford appealed the judgment in favor of the eleven dealers to the Third Circuit. On appeal, Ford did not dispute that, as expressly required by the sale agreement, it had ceased providing the dealers with heavy duty trucks and parts. Instead, it did the exact opposite: it renewed its argument that it had the contractual right to completely stop supplying petitioners with heavy-duty trucks and their parts and accessories, without liability. *See, e.g.*, Resp. C.A. Br. 22 (“Thus, Ford had the power to discontinue any heavy-duty truck or chassis and any ‘*parts and accessories therefor*’ without liability to the dealer.”) (emphasis added).

The Third Circuit reversed on grounds no party had asserted and on the basis of a factual mistake. The panel declined to decide Ford’s actual argument that it was entitled to stop providing dealers with any company products at all. Pet. App. 9a n.4. Instead, the court based its decision on a legal theory developed by the panel entirely *sua sponte*. The court held that the term “COMPANY PRODUCT” was defined to include truck parts and accessories. *Id.* 8a. Without any citation to the record, the panel then incorrectly stated that “although Ford discontinued the production of all heavy trucks, Ford continued to manufacture and distribute parts and accessories to the Dealers.” *Id.* 9a. As a result, the panel reasoned, “Ford satisfied its end of the bargain by continuing to provide ‘COMPANY PRODUCTS’—i.e. parts and

accessories—to the Dealers.” *Id.* The court accordingly reversed and remanded for entry of judgment in Ford’s favor. *Id.* 10a.

5. Petitioners petitioned for panel rehearing and rehearing en banc, documenting that the panel’s decision was based on the mistaken belief that Ford had continued to provide the dealers parts and complaining that the panel *sua sponte* resolved the case on a ground Ford neither preserved below nor argued on appeal. *See* Pet. App. 75a-91a. But the Third Circuit denied the petition without calling for a response from Ford or providing any explanation. *See id.* 72a-73a.

6. The district court subsequently held that it was required as a matter of law to apply the Third Circuit’s ruling with respect to the eleven petitioners in this petition to all the other dealers, a further sixty-three. The court concluded that it was “not empowered to remedy any error the Third Circuit may have committed in reaching its decision.” Pet. App. 71a.

REASONS FOR GRANTING THE WRIT

This Court should summarily reverse the court of appeals' judgment. The ruling below depends entirely on a single factual premise that the court of appeals made up without giving petitioners the opportunity to correct it. That premise is indisputably false. The error moreover destroys substantial rights of a significant number of parties. This Court has warned that basing decisions on grounds never raised by the parties or subjected to adversarial briefing risks precisely such errors. *See, e.g., Wood v. Milyard*, 132 S. Ct. 1826, 1833 (2012). The Third Circuit's refusal to grant rehearing or rehearing en banc to correct the obvious error constitutes a substantial departure from ordinary judicial process that requires this Court to exercise its supervisory authority.

1. There is no genuine dispute that the Third Circuit's judgment is premised on a manifest factual error that the court of appeals introduced into the case despite the parties' own clear understanding of the actual facts. When it sold its heavy duty truck business to Freightliner, Ford stopped providing petitioners both trucks *and* parts and accessories.

That fact is plain on the face of the sales contract between Ford and Freightliner. Article VI of the contract is entitled "TRANSFER OF SPARE PARTS BUSINESS ASSETS." Pet. App. 115a. Section 6.1 of that Article is entitled "Spare Parts Business Assumption" and requires that

Freightliner will assume the Spare Parts Business . . . which will include the procurement, warehousing, sale and

distribution of those quantities of Spare Parts and Common Spare Parts required to fulfill the reasonable expectations of vehicle owners

Pet. App. 115a³; *see also* C.A. J.A. 589 (Ford executive testifying that sale included “the related service parts business”); C.A. S.A. 6 (memorandum to Ford Board of Directors, explaining that under the deal “Ford would sell its Heavy Truck intellectual property, tooling, equipment and *parts business*”) (emphasis added). The contract thus provides for “the transfer of Spare Parts in Ford’s inventory from Ford warehouses to Freightliner warehouses.” Pet. App. 115a.

Ford further entered into a covenant not to compete with Freightliner that encompassed both heavy trucks *and* spare parts:

Ford agrees that, for a period of 10 years following [the sale], it will not, directly or indirectly, anywhere in the Territory, market, manufacture or sell any commercial vehicle with a gross vehicle weight exceeding 33,000 pounds [*i.e.*, heavy trucks] *or Spare Parts for*

³ “Spare Parts Business” is defined to “mean all aspects, including without limitation procurement, warehousing, sales, marketing and distribution, related to the sale of Spare Parts and Common Spare Parts for Product Lines.” Pet. App. 111a. And the contract defines “parts” to include accessories. *See id.* (“Spare Parts” defined to include “HN80 Spare Parts”); *id.* (“HN80 Spare Parts” defined to include “assemblies, components, *accessories* and any other part used in the HN80”) (emphasis added); *id.* 110a (“Common Spare Parts” defined to include “accessories”).

any such vehicle, except parts required to service Ford's pre-existing F-Series trucks and buses. . . .

Pet. App. 118a (emphasis added).

Consistent with this promise, the contract provided that Ford would stop taking parts orders from petitioners:

Ford will remove access by Ford's dealers and other customers to DOES II or other order system with respect to all Ford part numbers for all Spare Parts, and *Ford will cease taking orders for those Spare Parts.*

Pet. App. 117a (emphasis added). True to its word, shortly after closing the deal with Freightliner, Ford sent a memorandum to petitioners stating:

Parts Ordering

FORD WILL ACCEPT ORDERS FOR HEAVY TRUCK PARTS UNTIL 4:00PM EST ON THURSDAY, MARCH 12, 1998. All orders submitted after 4:00pm EST on March 12 *will not be processed.* . . .

All existing backorders of unique heavy truck parts as of 4:00 pm EST on March 12 *will be cancelled* within the Ford system and transferred to Freightliner for handling.

Pet. App 121a (emphasis added).

After the Third Circuit's ruling, Ford has never claimed that the Third Circuit is correct that it is continuing to produce or provide dealers with parts or accessories, although it made a limited, and entirely disingenuous, effort to lend some minimal

credence to the panel decision in subsequent proceedings in the district court. Dealers who were not parties to the appeal requested that the district court not apply the ruling below to them, on the ground that the ruling was based on a plainly false factual premise. In response, Ford cited to snippets of testimony from a handful of dealers who stated that they had continued “to *sell* Ford heavy truck parts” after Ford ceased production of heavy trucks. *See* Doc. 592-1, at 20 (emphasis altered); *see also id.* (“Individual Plaintiffs testified that they *sold* and made money from *selling* Ford spare parts”) (emphasis added). But the court of appeals’ decision is not premised on the belief that the *dealers* continued to *sell* parts; it understood that the contract obligated *Ford* to “manufacture and distribute parts and accessories to the Dealers.” Pet. App. 9a. And Ford omitted that the parts being sold were either leftover inventory from before the sale, or were part of the \$57 million in parts inventory Ford sold to Freightliner, which *Freightliner* (not Ford) was providing to the dealers. *See* Pet. App. 115a-18a.⁴ Moreover, Ford made no attempt to explain

⁴ As one dealer testified:

What inventory we had at Ford heavy duty truck and parts that we purchased from Ford prior to 1997 that weren’t returned to Ford were available for us to sell, but the remaining parts were transferred over to [Freightliner’s subsidiary] Sterling and their organization, and those parts would have been through the Sterling parts, and that took some time to get up and running and coordinated.

how its contrary implication that Ford was continuing to provide dealers parts would fail to put it in breach of its contract with Freightliner or could be reconciled with its prior notification to dealers that it would not be accepting orders for spare parts after March 12, 1998.

3. The Third Circuit's unfounded judgment should not stand. The panel's factual error was indisputably consequential. The mistake was essential to the judgment, being the only ground upon which the panel reversed and ordered summary judgment be issued in Ford's favor. *See* Pet. App. 8a-10a. And that erroneous judgment has resulted in the dismissal of claims by dozens of dealers who, it is undisputed, suffered substantial damages as a result of Ford's conduct.

Correcting that error would not require any significant investment of this Court's resources. The Court need only acknowledge what is indisputably correct: that Ford has not, in fact, continued to supply petitioners with parts. When Ford responds to this petition, the answer to that question should be undisputed. And even if Ford does attempt to obfuscate the truth, it is apparent on the face of

Doc. 592-2, at 79. Petitioners' ability to continue for a time to sell their existing parts inventory or obtain new parts from Freightliner would be no defense to Ford even under the Third Circuit's interpretation of the contract, which requires *Ford* itself to provide dealers with Company Products; the Third Circuit did not suggest (nor, given the language of the contract, could it) that Ford could satisfy its obligations by arranging for some third party to provide petitioners with substitute products. *See* Pet. App. 93a, 95a.

Ford's contract with Freightliner, which is appended in relevant part to this petition. The Court accordingly can resolve this petition through a short per curiam opinion simply remanding the case for reconsideration in light of that obvious mistake.⁵

The Court could also make clear that its decision is not a broad invitation to petitions seeking simple error correction but rather is justified by the unusual combination of four facts: (1) the ruling below rests exclusively on a false factual premise; (2) the false premise was never asserted by any party below, but instead was an invention of the appellate panel; (3) petitioners exhausted every avenue available to make the court aware of the error and to seek its correction in the court of appeals; and (4) the erroneous decision

⁵ On remand, the Third Circuit will be free to consider any argument that Ford has properly preserved. In those further proceedings, there is every reason to believe that the court of appeals will affirm the judgment in petitioners' favor. The panel cast no doubt on the district court's conclusion that if Ford had, in fact, ceased supplying petitioners with any products (*i.e.*, trucks, parts, and accessories) it would be in material breach of its contract with its dealers. Indeed, the panel recognized that the Third Circuit sitting en banc had previously held, in a similar case, 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 (citing *Buono Sales, Inc. v. Chrysler Motors Corp.*, 449 F.2d 715, 721-22 (3d Cir. 1971) (en banc)). But in any event, the possibility that the Third Circuit might reach the same result on a proper ground is no basis to permit it dispose of an important case on the basis of a theory and factual record invented by the panel *sua sponte*.

has significant consequences for a substantial number of parties.

Those circumstances describe the kind of substantial “depart[ure] from the accepted and usual course of judicial proceedings” described by this Court’s rules as an appropriate occasion for the exercise of this Court’s certiorari jurisdiction. *See* S. Ct. R. 10(a); *cf., e.g., Dye v. Hofbauer*, 546 U.S. 1, 3-4 (2005) (per curiam) (summarily reversing where federal court manifestly erred in asserting that a habeas claim had not been raised in the state trial court); *Smith v. Digmon*, 434 U.S. 332, 333 (1978) (per curiam) (same).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the judgment of the court of appeals summarily reversed.

Respectfully submitted,

Eric L. Chase
Genevieve K. LaRobardier
BRESSLER, AMERY &
ROSS, P.C.
325 Columbia Turnpike
Florham Park, NJ 07932

James P. Ulwick
Jean E. Lewis
Steven M. Klepper
KRAMON & GRAHAM, P.A.
One South Street
Suite 2600
Baltimore, MD 21202

Gordon A. Rehnborg, Jr.
MCDOWELL &
OSBURN, P.A.
282 River Road
Manchester, NH 03105

Thomas C. Goldstein
Counsel of Record
Kevin K. Russell
GOLDSTEIN &
RUSSELL, P.C.
5225 Wisconsin Ave., NW
Suite 404
Washington, DC 20015
(202) 362-0636
tg@goldsteinrussell.com

William A. Kershaw
Lyle W. Cook
KERSHAW, CUTTER &
RATINOFF, LLP
401 Watt Avenue
Sacramento, CA 95864

January 22, 2013