No. 23-683

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

West Virginia Automobile and Truck Dealers' Association, Thornhill Auto Group, Inc., Moses Ford, Inc., and Astorg Ford of Parkersburg, Inc.,

Plaintiffs,

v.

Ford Motor Company,

Defendant.

On Certified Question from the United States District Court for the Southern District of West Virginia Charleston Division Civil Action No. 2:22-cv-00291

PETITIONERS' REPLY BRIEF

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INTRODUCTION

Ford's reply brief continues the manufacturer's campaign to muddy the meaning of the subject statutory language by creating a false dichotomy between manufacturer incentive programs that are voluntary or optional and those that would be "required." Ford continues to advance a statutory interpretation which posits that the words "required" and "approved" operate to mean that the grandfather clause found at W. Va. Code §17A-6A-10(1)(i) is only triggered if a vehicle manufacturer forces its dealership to make improvements or participate in facilities programs under the threat of franchise termination. This is not what the statute holds.

The statutory language instead uses the words "required and approved" to describe an industry term of art: franchiser image elements. This is plain to see when one zooms out from the solitary word "required" to review the statutory provision in its entirety. When viewed in full, the language is clear. The words "required" and "approved" do not describe the undertaking of the construction project itself. The statute also makes no distinction between voluntary, optional, or mandatory programs. Instead, the language states that it applies if a manufacturer offers any incentive program based at least in part on facilities and uses the words "required" and "approved" only to describe the types of franchiser image elements that are utilized in the modification of the facilities. (JAR011-012 and JAR438-441) Petitioners' interpretation of the law upholds the plain language of the statute and is fully supported by the Legislators' intent in drafting the statute. Therefore, Petitioners respectfully request this Honorable Court to answer the certified question before it in the affirmative.

1. Petitioners' position as to the application of W.Va. Code §17A-6A-10(l)(i) has consistently been that it governs the installation of franchiser required signs or image elements, regardless of whether the facility improvements were voluntary or optional.

Ford's Brief accuses the Petitioners of "rhetorical gymnastics,"[1] and attempts to support its claim by misinterpreting the arguments that Petitioners have consistently set forth from the outset of this litigation. The bottom line is that the Petitioners only ask that this Honorable Court apply the language of the subject statute as written, not as Ford claims it is written.

The language of the statute reads:

> "If a manufacturer… offers incentives or other payments to a consumer or dealer paid on individual vehicle sales under a ***program*** offered after the effective date of this subdivision… that are premised, wholly or in part, on dealer facility improvements ***or installation of franchiser image elements required by and approved by the manufacturer***… and completed within ten years preceding the ***program*** shall be determined to be in compliance with the ***program requirements*** pertaining to construction of facilities or installation of signs or other franchiser image elements that would replace or substantially alter those previously constructed or installed within that ten year period."

W. Va. Code § 17A-6A-10(1)(i) (***emphasis added***). Thus, the plain language of the act contemplates that its ten year "grandfather clause" applies to any incentive or other payment offered by a manufacturer program premised, wholly or in part, on installation of franchiser required image elements where a dealer has previously installed franchiser required image elements within the preceding 10 years.

[1] See Respondent's Brief page 2.

The statute does not say what Ford claims it says. The statute does not say that it only applies to "prior factory projects that were ***both*** required ***and*** approved by the manufacturer."[2] The words "prior factory projects" do not appear in this section of code. Instead, the words "franchiser image elements" are the words that are modified by the phrase "required and approved by the manufacturer." Ford asks this Court to apply the statute as written without adding or changing any words while its argument adds the words "prior factory projects," and changes "franchiser image elements" from something required and approved by a manufacturer to something included in a prior facility project.[3]

Ford's main argument is best summarized on page 11 of its brief, wherein Ford argues that the subject grandfather clause "provides that dealers that previously undertook facility improvements ***required by the manufacturer***, including required image elements, can obtain certain program payments for ten years following those improvements."[4] From this flawed premise, Ford hangs its fate.

Petitioners do not attempt to argue that any "prior facility project" was required by Ford. Petitioners have consistently argued that the statutory language protects Franchisee investments in "franchiser image elements required and approved by the manufacturer," via its ten-year grandfather clause. The grandfather clause never states that it only applies to "dealers that previously undertook facility improvements required by the manufacturer." Instead, the statutory language contemplates the "installation of franchiser image elements required by and approved by the manufacturer." W. Va. Code § 17A-6A-10(1)(i). Thus, the grandfather clause applies to Ford's

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[2] See Respondent's Brief page 9 (***emphasis in original***).
[3] See Respondent's Brief pg. 11-12.
[4] See Respondent's Brief pg. 11 (***emphasis in original***).

new LCP facility program because the new LCP facility program offers monies based on the changing of the franchiser image elements required and approved by Ford.

Petitioners do not argue that either the Trustmark dual facility, or the new Lincoln Vitrine were facility projects that were required by Ford. Petitioners do argue, and urge this Honorable Court to find, that both the Trustmark facility and the new Lincoln Vitrine facility are products of Ford's design team and feature numerous franchise image elements that are ***both*** required ***and*** approved by Ford. Moreover, the prior voluntary facility projects undertaken by each of the Petitioner dealers featured many franchise image elements that were ***both*** required ***and*** approved by Ford. Because Ford offered an incentive based on franchiser image elements, Petitioner dealers are statutorily entitled to receive that incentive wherein the incentive is paid for the alteration of franchise image elements required and approved by Ford within the previous ten years. *See*, W. Va. Code § 17A-6A-10(1)(i).

As Petitioners stated in their initial brief, the language used in the statute mimics the language used by manufacturers such as Ford when they refer to dealership facility construction projects. The Trustmark facilities included required franchisor image elements, such as a Ford Trustmark entry tower and exterior brand wall, Ford specified reception and greater area, Ford specified showroom area, Ford specified sales consultation and F&I area, Ford specified customer lounge and restrooms, Ford specified service department and write-up area, and Ford specified furniture for all customer areas. (JAR113-177) All of these real and tangible design decisions are delineated by Ford in their materials as required image elements. (JAR113-177) When Petitioner dealers constructed those required image elements, Ford approved them. (JAR113-177)

These required and approved franchiser image elements must be changed substantially for a dealer to qualify for the facility incentive offered in the new LCP. The Lincoln Vitrine designs feature many franchiser image elements that are distinct from and mutually exclusive to the franchiser image elements required for a Trustmark facility. Shawn McDermott testified that many design elements are controlled by Ford and that Ford has final decision over its franchisor image elements in the Lincoln Vitrine.[5]

Thus, the franchiser image elements required and approved by Ford for the Trustmark 3 facilities must be modified by a dealer that builds a Lincoln Vitrine with distinct and mutually exclusive franchise image elements. The facilities incentive in the new LCP is premised on the modification of franchise image elements in dual-branded facilities in such a manner that the facilities are no longer dual-branded. The statutory language in question is precisely intended to protect the Petitioners by requiring Ford to deem them in compliance with the facility provision of the 2020 LCP for the remainder of the applicable ten-year time frame set forth in the grandfather clause.

Petitioners do not attempt "to render the word 'required' meaningless," as is suggested by Ford.[6] Petitioners simply ask that this Honorable Court recognize that the statutory language does not reference "required construction projects" or "required incentive programs," and instead contemplates the replacement or substantial alteration of franchise image elements required by and approved by Ford.

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[5] *See*, Deposition Transcript of Shawn McDermott, JAR 438-441.

[6] *See*, Respondent Brief pg. 18.

Petitioners agree with Ford that the subject statute should be enforced as written. As written, the statute holds that Petitioner dealers are to be deemed in compliance with the facility provision of the 2020 LCP through the end of the ten-year period after the dealers last made changes to required franchise image elements approved by Ford. In this case, none of the Petitioner dealers were deemed in compliance with the 2020 LCP even though they each previously constructed or installed franchise image elements required and approved by Ford within the ten years preceding the 2020 LCP. Therefore, Ford is in violation of the grandfather provision of the Act and Petitioners urge this Honorable Court to answer the Certified Question in the affirmative.

2. Ford's distinction between "voluntary" and "required" is misplaced.

Ford argues that Petitioners want this Honorable Court to believe that the words "voluntary" and "required" have the same meaning. This argument is preposterous. Petitioners do not attempt to convince this Court that the words are synonyms. Instead, Petitioners simply set forth the ways in which the language of the statute interacts with the practical realities of manufacturer incentive programs.

It is important to reiterate what is set forth above. The statutory language regarding what is required and approved does not pertain to the incentive programs. It does not pertain to prior construction. The subject statutory language does not pertain to any of the other things Ford points to as voluntary or optional. Instead, the statutory language regarding what is required and approved by a manufacturer pertains only to the items that Ford admits are required and approved by Ford: franchise image elements. This is a foundational premise to the ten-year grandfather clause.

The plain language of the statute holds that the grandfather clause pertains to the "installation of franchiser image elements required by and approved by the manufacturer." W. Va. Code § 17A-6A-10(1)(i). The statute does not state that it applies to the "required installation of franchiser image elements." In other words, the statute makes no delineation as to whether the installation or construction itself is required or voluntary. The statute makes its delineation only in regard to whether or not the design image elements themselves are required and approved by a manufacturer.

Programs such as the Trustmark program and the 2020 LCP are not required by Ford. In this way, the construction projects incentivized by programs like Trustmark and the 2020 LCP are not required by Ford. However, Ford admits that these voluntary programs and projects require the installation of franchise image elements that will then be approved by Ford. In this way, Ford's attempt to set forth a distinction between the word "voluntary" and the word "required" is a strategy of misdirection. The choice for a dealer to participate in a program may be voluntary, but here, said participation necessarily includes the installation of franchise image elements required and approved by Ford.

Petitioners simply ask this Court to find that the grandfather clause of the West Virginia Franchise act protects them for at least ten years when they choose to participate in a program that features the installation of franchise image elements required and approved by the manufacturer. Each of the Petitioner dealers chose to participate in Ford's Trustmark program. In doing so, they chose to construct a Trustmark facility. In constructing a Trustmark facility, each of the Petitioner dealers ***installed franchise image elements required and approved by Ford.***

Ford now offers an incentive premised on a dealer changing or replacing these previously installed franchise image elements required and approved by Ford. Because each of the Petitioner dealers installed franchise image elements required and approved by Ford within a ten-year time frame preceding Ford's new facility-based incentive, W. Va. Code § 17A-6A-10(1)(i) holds that they should have been deemed in compliance with the new facility-based incentive until the passage of the ten-year period.

Petitioners do not ask this Court to find that the sky is green, and the grass is blue. Petitioners instead simply ask this Court to find that the voluntary programs include required and approved franchise image elements, and that the 2015 version of the grandfather clause protects the installation of such required and approved image elements for ten years.

3. The legislative intent weighs heavily in Petitioners' favor regardless of Ford's refusal to engage in good faith argument on the matter.

As Petitioners set forth in their initial brief, Ford's interpretation of the subject statutory language effectively strips the grandfather clause of any merit, meaning, or practical application. Ford's interpretation not only ignores the plain language of the statute, but it also fully ignores the obvious protections the Legislature intended to bestow upon West Virginia dealers from the undue control of the vehicle manufacturer. Again, put plainly: if the subject grandfather clause does not apply in this situation, then under what set of facts would it apply?

When it comes to legislative intent, the Ford brief asks this Court to "***look to the language of the statute.***"[7] The plain language of the statue is discussed fully in Petitioners' initial brief, as well as above. The plain language of the statute is that the installation of franchise image elements

[7] *See,* Respondent's Brief, pg. 20 (***emphasis in original***).

required and approved by Ford are protected from change via facility-based incentive for ten years by the 2015 version of the grandfather clause. The plain language of the statute does not hold that the program is required or that the construction project is required. The plain language of the statute holds that required and approved franchise image elements are governed by the subject grandfather clause. Therefore, Petitioners echo Ford's request that this Court apply the language as it is found in the statute.

However, Petitioners go beyond this simple request and ask the Court to give significance and effect to the statute as a whole, and to uphold the plain and obvious meaning of the statutory language instead of the constrained and narrow interpretation offered by Ford.

The foundational intent of the West Virginia Franchise Act is to protect the motor vehicle dealerships of West Virginia from "undue control… by the vehicle manufacturer or distributor… and to protect and preserve the investments and properties of the citizens and motor vehicle dealers of [West Virginia]." W. Va. Code § 17A-6A-1 (2015).

The Petitioner dealers made significant investments in their facilities by building new facilities via Ford's Trustmark program. Participation in the program meant that the dealers installed franchise image elements that were required and approved by Ford. The plain and obvious intent of the West Virginia Franchise Act is to protect the dealers' investment in Ford required and Ford approved franchise image elements. Specifically, the 2015 version of the subject grandfather clause explicitly protects the investment in franchise image elements required by Ford for a period of ten years.

As was previously argued in the initial Petitioner's Brief, the specificity of the language in the statute proves the intent. The act utilizes "required franchiser image elements," a term of art

that is generally accepted within the motor vehicle dealership industry, to set forth the parameters of its grandfather clause. Ford utilizes the same term of art in its materials to describe the elements of a construction project that are required by Ford as "franchiser image elements."

Here, Ford provides an incentive program based on the installation of franchiser image elements wherein incentives can be received by Petitioner dealers only if they replace or substantially alter franchise image elements required and approved by Ford that were previously installed within the prior ten years. The drafters of the statutory language foresaw this scenario and drafted a grandfather clause to protect dealership investments in West Virginia.

Ford refuses to contend with the reality of the law before it. Ford misconstrues the plain language of the statute, inserts words and phrases where they cannot be found in the original, narrows the passages so that the forest cannot be seen from the trees, and ignores the plain and obvious legislative intent of the statute in favor of its own interpretation of the single word "required." This is because Ford cannot make any good faith argument that the West Virginia Legislature meant for the facility-based incentive grandfather clause to apply in any way other than the way set forth in Petitioner's briefs. In other words, Ford knows that the West Virginia Legislature meant to protect West Virginia auto dealers from the very actions of Ford in this case, and therefore Ford chooses to ignore the plain and obvious meaning of the statute, asking this Honorable Court to instead apply Ford's narrow and constrained interpretation of the law.

This Court "has long recognized that a cardinal rule of statutory construction is that significance and effect must, if possible, be given to every section, clause, word, or part of the statute. Courts should favor the plain and obvious meaning of a statute as opposed to a narrow or strained construction." *Young v. Apogee Coal, Co., LLC*, 753 S.E.2d 52, 59 (W. Va. 2013), quoting

Syl. Pt. 3, *Meadows v. Wal-Mart Stores, Inc.*, 530 S.E.2d 676 (W. Va. 1999); *T. Weston, Inc. v. Mineral Cnty.*, 638 S.E.2d 167, 171 (W. Va. 2006), citing *Davis Mem'l Hosp. v. W.Va. State Tax Comm'r*, 671 S.E.2d 682 (W. Va. 2008); *Thompson v. Chesapeake & O. Ry. Co.*, 76 F.Supp. 304 (S.D.W. Va. 1948) (internal citations and quotations omitted).

The specific factual scenario before the District Court is addressed by a specific grandfather clause passed by the West Virginia Legislature for the benefit and protection of West Virginia's motor vehicle dealers. This Honorable Court is urged to rule in support of the intention of the Legislature to protect this State's auto vehicle dealers from the violative practices of Ford.

CONCLUSION

The certified question before this Honorable Court centers around the language in the statute referencing the installation, alteration, or replacement of image elements "required and approved by the manufacturer." Ford's interpretation of the statutory language is narrow and constrained. Ford's interpretation inserts language into the statute that does not otherwise exist. Ford's interpretation fully ignores the inherent purpose of the statute.

Petitioners respectfully urge this Court to answer the District Court's certified question in the affirmative. In doing so, this Honorable Court will uphold the plain and unambiguous language of the facilities-based incentive grandfather clause and fulfill the statute's legislative intent to protect the investments of this State's auto vehicle dealers from undue control by vehicle manufacturers.

WEST VIRGINIA AUTOMOBILE AND TRUCK DEALERS ASSOCIATION, THORNHILL AUTO GROUP, INC., MOSES FORD, and ASTORG FORD OF PARKERSBURG, INC.,

By Counsel,

/s/ *Geoffrey Cullop*

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CERTIFICATE OF SERVICE

The undersigned, counsel of record for Petitioners, does hereby certify on this 29th day of March, 2024, that a true copy of the foregoing "Petitioner's Reply Brief" was served upon opposing counsel by depositing same to them in the U.S. Mail, postage prepaid, sealed in an envelope, and addressed as follows:

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