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No. 08-_____

In The Supreme Court of the United States

FORD MOTOR COMPANY,

Petitioner,

v.

DELAWARE DIRECTOR OF REVENUE,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Delaware

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the decision of the Supreme Court of Delaware, in conflict with the rulings of other state courts of last resort, violates the Commerce Clause by permitting a State to tax 100 percent of more than $700 million of a taxpayer's gross receipts based solely on the fact that the goods were "physically delivered" into the State, even though almost all the taxed activity, including the sale of the goods themselves, occurred outside the taxing State.

2. Whether the Supreme Court of Delaware's treatment of the Delaware gross receipts tax as a transaction tax on the seller that only one State has the right to tax, rather than as a tax on income that must be apportioned, violates the Commerce Clause by permitting the taxation of sales that occur outside the State's borders.

PARTIES TO THE PROCEEDING

The parties are as stated in the caption.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner has no parent corporation, and no publicly held company owns 10% or more of petitioner's stock.

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PETITION FOR A WRIT OF CERTIORARI

Ford Motor Company (Ford) respectfully petitions for a writ of *certiorari* to review the judgment of the Supreme Court of Delaware.

OPINIONS BELOW

The opinion of the Supreme Court of Delaware (App., *infra*, 1a-18a) is reported at 963 A.2d 115 (2009). The decision of the Superior Court of Delaware (App., *infra*, 19a-52a) is unreported. The order of the Supreme Court of Delaware denying Ford's motion for rehearing *en banc* (App., *infra*, 53a) is unreported.

JURISDICTION

The Supreme Court of Delaware entered its judgment on December 8, 2008. Petitioner timely filed a motion for rehearing *en banc*. The Supreme Court of Delaware denied the motion for rehearing *en banc* on January 13, 2009. Justice Souter, on April 2, 2009, granted an extension of time within which to file a petition for a writ of *certiorari* to and including May 13, 2009.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, clause 3 of the United States Constitution provides: "The Congress shall have Power * * * [t]o regulate Commerce * * * among the several States * * * ."

The relevant portions of the Delaware statutes are set forth at App., *infra,* 54a-60a.

INTRODUCTION

The questions presented address an issue of financial significance to every State and every business in the United States that sells goods at wholesale—*viz.*, the sale of goods for the purpose of resale by buyers (such as retailers)—in interstate commerce, as the decision below sustains an extraordinary extraterritorial application of a gross receipts tax by a State to capture gross receipts from sales that occur *outside* the taxing State.

Nearly 15 years ago this Court in *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995), sought to end significant confusion in state courts concerning the constitutional limitations on the assessment of sales taxes and gross receipts taxes in interstate commerce. The Court held that sales taxes—taxes imposed on the *buyer* of goods and services—could be imposed only by the State in which the transaction occurred and thus did not need to be apportioned among the States where the value of

the goods or services was created. By contrast, the Court reiterated that gross receipts taxes—taxes on the *seller* of goods and services—are not transaction taxes. The Court held that these taxes are "simply a variety of tax on income, which [is] required to be apportioned to reflect the location of the various interstate activities by which it was earned." *Id.* at 190.

Petitioner Ford Motor Company, one of the world's leading vehicle manufacturers and wholesalers, sold more than $700 million in vehicles at wholesale to independent dealerships in Delaware for resale to retail consumers during the less than four tax years at issue in this dispute. Due to a division among the state courts, however, how this $700 million in gross receipts will be treated for purposes of taxes levied on petitioner may vary State to State and city to city. Some state courts have held that the gross receipts must be apportioned amongst the various States where the economic activity underlying the gross receipts was earned. Other state courts, including the court below, have held that it does not matter whether out-of-state economic activities contributed to those sales, because only the State to which the vehicles are ultimately delivered can tax the gross receipts derived from the sales.

These divergent holdings in the state courts mean that several States claim the authority to tax the same transaction—at the point of sale, at the point of delivery, and in every other State where

activity generating a share of the gross receipts occurs. The risk of duplicative taxation is real, not speculative, in light of 1200 state and local gross receipts taxes currently in effect nationwide. *See* pages 23-25 *infra*.

Review is therefore necessary due to the sheer magnitude of financial harm that this conflict has caused and will continue to cause. This case alone involves more than $700 million of gross receipts derived from less than four years of sales of vehicles delivered to a State with a population of fewer than one million people. When multiplied to account for vehicles sold at wholesale to independent dealerships in all 50 States, the aggregate burden of this conflict to petitioner alone is staggering. The unresolved division in the state courts affects all businesses that sell goods or services in interstate commerce, as the conflicting rulings have already reached major automobile companies such as petitioner, leading wholesalers of household products such as Dial Corporation, the world's largest book and entertainment distributor Baker & Taylor, Inc., and the National Football League.

The time is right to resolve this division in the state courts, because the Nation cannot afford to allow these significant constitutional issues to percolate. In this period of severe economic uncertainty, businesses and States need clarity from this Court. States facing astounding drops in revenue need to know reliably what portions of a business's income they can constitutionally tax, and the Nation's

commerce as a whole needs the protections provided by the Commerce Clause against States that seek to aggressively expand their tax base to reach economic activity outside their borders.

STATEMENT OF THE CASE

A. Constitutional And Statutory Framework

1. For nearly a century, this Court has held that under the Commerce Clause, "a State may not, when imposing an income-based tax, 'tax value earned outside its borders.'" *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 164 (1983) (quoting *ASARCO Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307, 315 (1982)); *see also Hans Rees' Sons, Inc. v. North Carolina*, 283 U.S. 123 (1931).[1] The activity a State seeks to tax thus must "actually reflect a reasonable sense of how much income is generated" in the taxing State. *Container Corp.*, 463 U.S. at 169. Under this fundamental Commerce Clause tenet, a state tax on a multistate business's income, *e.g.*, a tax on a *seller* of goods or services, must be fairly

[1] This Court has articulated a four-part test to determine whether a state tax complies with the Commerce Clause requirements: the tax must (1) be applied to an activity with a substantial nexus with the taxing State, (2) be fairly apportioned, (3) not discriminate against interstate commerce, and (4) be fairly related to the services provided by the taxing State. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). This case implicates the fair apportionment prong of *Complete Auto*.

apportioned to reflect the various locations where the activities producing the income occur, so that a State does not tax the value of economic activity earned outside its borders. *Id.*

By contrast, a sales or use tax—*i.e.*, a transaction tax imposed on the *buyer* of goods or services—need not be apportioned at all. The State where the transaction occurs may impose a tax on the buyer "measurable by the gross charge for the purchase, regardless of any activity outside the taxing jurisdiction that might have preceded the sale or might occur in the future." *Jefferson Lines*, 514 U.S. at 186. Because a sale to a buyer is a "discrete event" that occurs in only one State, *id.*, there is no concern that another State could tax the buyer on the same transaction. *Id.* at 190.

2. Delaware imposes a gross receipts tax on any entity "engage[d] in the business in this State as a wholesaler." 30 Del. Code § 2902(b).

Delaware taxes wholesalers on the *"total consideration received* from sales of tangible personal property physically delivered within this State to the purchaser." *Id.* § 2901(4)(b) (emphasis added). That means Delaware taxes wholesalers on 100 percent of their gross receipts, regardless of how much of the value derived from the taxed gross receipts was earned from economic activity in other States so long as the goods eventually make their way through the stream of interstate commerce to rest in Delaware.

B. Factual Background

1. Petitioner Ford Motor Company is one of the leading automobile companies in the world. Petitioner is a Delaware corporation with its principal place of business in Dearborn, Michigan. Petitioner develops, manufactures, and sells vehicles throughout the United States and in many foreign countries.[2]

Ford does not sell vehicles directly to consumers. Rather, petitioner sells its vehicles, parts, and accessories at wholesale to independent dealers and distributors throughout the United States, including in Delaware. These dealerships, in turn, resell Ford's products to individual and corporate retail consumers. Del. S. Ct. App. A00123-124.

2. Ford's wholesale sales of vehicles to independent dealerships in Delaware cannot be described as isolated or separate transactions that occur in only one State; rather, Ford's wholesaling comprises a series of activities that take place in a number of different States. Del. S. Ct. App. A00105. These wholesaling activities include forecasting, regional allocation and marketing, and sales. The dealerships are economically responsible for the post-sale physical delivery to Delaware.

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[2] Petitioner and respondent entered into an extensive stipulation to eliminate any factual disputes. Del. S. Ct. App. A00101-117.

Forecasting. Ford's wholesaling process begins at its headquarters in Dearborn, Michigan, where marketing, sales, and purchasing employees forecast future vehicle sales and then allocate vehicles based upon those forecasts to each sales region. Del. S. Ct. App. A00104-105, A00166-167.

Regional allocation and marketing. Within each sales region, Ford's sales managers review allocations from corporate headquarters, project market conditions, and plan the most effective means for distributing to independent dealerships their share of the allocation. For the sales region that includes Delaware, Ford's district and regional managers are located in New Jersey and Virginia. Del. S. Ct. App. A00105, A00167-173. In marketing Ford's vehicles, petitioner's employees from those offices make approximately 60 visits to independent dealers in Delaware each year. These visits are the only wholesaling activity that petitioner conducts in Delaware. App., *infra,* 24a n.3.

Sales. All of the wholesale sales of petitioner's vehicles to the independent dealerships occur outside Delaware.

Title is transferred at an event known as the "gate release" at Ford's assembly plants in nine different States (Delaware not among them). There, a third party inspects and takes possession of the vehicle and drives it to a gate. At the gate, a barcode on the vehicle is scanned by Ford, the gate is raised,

and the vehicle passes through and is delivered to a common carrier. Del. S. Ct. App. A00108, A00124.

Gate release is where the sale of the vehicle occurs; petitioner at that point relinquishes legal title, ownership, risk of loss, and possession of the vehicle to the dealership. And at that moment, the vehicle is removed from Ford's inventory (and appears on the books and records of the independent dealership) and Ford recognizes income from the sale of the vehicle. Immediately after gate release, the independent dealership may sell the vehicle at retail, even before the vehicle physically makes its way through the stream of interstate commerce to the independent dealership in Delaware. As a result of that fact, no actual wholesale sales occurred within the State. Del. S. Ct. App. A00108.

Post-sale physical delivery. After gate release, the vehicles, now owned by the independent dealerships in Delaware, are transported via common carrier to a mixing center located in Fostoria, Ohio. From there the vehicles are shipped to destination ramps located in Jessup, Maryland and Twin Oaks, Pennsylvania, and thereafter to the independent dealerships located in Delaware. The independent dealerships reimburse petitioner for all costs of having the vehicles shipped to Delaware. Del. S. Ct. App. A00109.

C. Proceedings Below

1. From January 1999 to October 2002, petitioner paid a tax on 100 percent of the total gross receipts from its wholesale sales of vehicles—sales worth more than $700 million—to independent dealerships in Delaware.

Petitioner timely filed for a refund of the tax paid on that portion of gross receipts that exceeds the minimal economic activity Ford conducted in Delaware. Respondent Delaware Director of Revenue denied the refund request on May 6, 2003.

2. Petitioner sought review of that denial with the Delaware Tax Appeal Board. Prior to a ruling by the Board, petitioner removed the dispute to the Delaware Superior Court on February 11, 2004, pursuant to 30 Del. Code § 333. App., *infra*, 5a.

3. The superior court affirmed respondent's decision denying petitioner's refund. *Id.*; App., *infra*, 52a. The superior court held that "[e]ven if one were to view the wholesaling process to include the other activities initiated before the vehicles arrived in Delaware, those efforts are so intertwined with those which took place after that event, that they are incapable of segregation." App., *infra*, 46a. Petitioner appealed the superior court's decision.

4. The Supreme Court of Delaware affirmed.

The state supreme court upheld the gross receipts tax. Relying heavily on *Tyler Pipe Industries, Inc. v. Washington Department of Revenue*, 483 U.S.

232 (1987), the court held there was "no risk of impermissible multiple taxation" because the state tax "applies only to gross receipts from 'sales of tangible property *physically delivered within this State* to the purchaser or the purchaser's agent.'" App., *infra*, 14a (quoting 30 Del. Code § 2902(c)(1)). Rather than address the fact that the Constitution also permits the State where the actual sale occurred to impose the same tax, the court held that "physical delivery" is a "separate activity conducted wholly within this State," which "[o]nly Delaware has the jurisdiction to tax." App., *infra,* 15a (emphasis omitted).

REASONS FOR GRANTING THE PETITION

REVIEW IS NECESSARY BECAUSE STATE COURTS ARE SHARPLY DIVIDED OVER WHETHER A STATE MAY TAX 100 PERCENT OF GROSS RECEIPTS WHERE SIGNIFICANT ECONOMIC ACTIVITY GENERATING THOSE GROSS RECEIPTS OCCURS OUTSIDE THE TAXING STATE

Notwithstanding this Court's mandate in *Jefferson Lines* that gross receipts taxes are taxes on income and must be apportioned, state courts are in conflict over whether a State can tax 100 percent of the gross receipts regardless of where the economic activity that generated those receipts occurred.

A. The Decision Below Creates Further Confusion Over Whether A Gross Receipts Tax Must Be Apportioned That Will Not Be Resolved Absent This Court's Intervention

a. The decision below cannot be reconciled with the rulings of six other state courts.

Rather than concluding, like the court below, that a single situs—such as the location of "physical delivery" to the buyer or the location of a national sales office—confers the exclusive "jurisdiction to tax this separate activity conducted wholly within th[e] State," App., *infra*, 15a, the Supreme Court of Pennsylvania has held that "when considering the constitutionality of a gross receipts tax, it is the *activities* that generate those gross receipts that are determinative in an apportionment analysis," *Northwood Construction Co. v. Township of Upper Moreland*, 856 A.2d 789, 805 (Pa. 2004) (emphasis added), *cert. denied*, 544 U.S. 962 (2005). The Pennsylvania court has explained that "it is only the receipts generated from the in-state component of the underlying activity that * * * may [be] properly tax[ed] under constitutional apportionment principles." *Id.*

The *Northwood Construction Corp.* decision followed a prior ruling of the Supreme Court of Pennsylvania, which also made clear that gross receipts taxes must be apportioned to reflect where the value being taxed was generated. *Philadelphia Eagles Football Club, Inc. v. City of Philadelphia*, 823

A.2d 108 (Pa. 2003). That state court of last resort explained that "[h]istorically" this Court "has not required apportionment of gross receipts from activities involving manufacturing and sales" but that this Court has more recently "distanced itself from the gross receipts tax and sales tax analogy" under which States may tax the full value of the seller's gross receipts. *Id.* at 129-130. The Pennsylvania court thus held that *Jefferson Lines* rejected the contention that "gross receipts tax[es] * * * [are] wholly immune from the constitutional requirement of fair apportionment." *Id.* at 130. In its view, *Jefferson Lines* required the value of the taxpayer's gross media receipts attributable to its activities outside the State to be excluded from the taxing authority's gross receipts tax calculation. *Id.* at 133-134 (looking to "the source of the underlying activity that generated the media receipts").

The Supreme Court of Virginia in *City of Winchester v. American Woodmark Corp.*, 471 S.E.2d 495 (Va. 1996), likewise invalidated a gross receipts tax that was imposed on 100 percent of the revenues of a business because, "[g]iven the number of facilities and operations outside [the State], it is equally axiomatic that the value added to the product by the [in-State] operations could not possibly produce 100% of the revenues." *Id.* at 498.

And the Supreme Court of Colorado has explained, in *General Motors Corp. v. City & County of Denver*, 990 P.2d 59 (Colo. 1999) (en banc) that the

Constitution requires "an examination of 'the in-state business activity which triggers the taxable event and the practical or economic effect of the tax on that interstate activity.'" *Id.* at 71 (quoting *Goldberg v. Sweet*, 488 U.S. 252, 262 (1989)). Accordingly, the Colorado court stated that "[i]n the context of income taxes or taxes on gross receipts, apportionment must take into account the location where revenue is generated," while sales and use taxes on the buyer of goods and services do not require such apportionment. *Id.*

Other state appellate courts are in accord with these state supreme court rulings. The Arizona appellate court in *Southern Pacific Transportation Co. v. Arizona*, for example, has admonished that this Court "has made it clear that a sales tax that is paid in the taxing state on an interstate transaction need not be apportioned, but that an income, gross receipts, or privilege tax on such a transaction will violate the Commerce Clause in the absence of fair apportionment." 44 P.3d 1006, 1013 (Ariz. Ct. App. 2002); *see also Northwest Energetic Servs., LLC v. California Franchise Tax Bd.*, 71 Cal. Rptr. 3d 642 (Cal. Ct. App. 2008); *General Motors v. City of Kansas City*, No. WD 46246, 1994 WL 49620 (Mo. Ct. App. Feb. 22, 1994) (invalidating an unapportioned gross receipts tax on receipts from vehicle sales to dealers in the city), *vacated on other grounds*, 895 S.W.2d 59 (Mo. Ct. App.), *cert. denied*, 516 U.S. 909 (1995).

b. On the other side of the legal divide are the rulings of the supreme courts of Washington and Hawaii.

In *Ford Motor Co. v. City of Seattle*, a sharply divided Washington court (in a 5-to-4 decision) upheld a gross receipts tax on 100 percent of the wholesale sales of Ford within the taxing jurisdiction, and concluded that "[s]ales at wholesale * * * must be considered conducted entirely within the destination city" so that "no other state * * * can tax it." 156 P.3d 185, 194 (Wa. 2007) (en banc), *cert. denied*, 128 S. Ct. 1224 (2008). The decision, however, was strongly disputed by four members of that state court. The dissent explained that "[c]learly, Ford's wholesaling activities were not conducted wholly within Washington; its vehicles were sold in Michigan—title, ownership, and possession are transferred when Ford delivers the vehicles to a common carrier at its factory in Michigan," *id.* at 200 (Sanders, J., dissenting), which meant that the State was taxing the full value of transactions that other States had the right to tax, *id.* at 201.

The Supreme Court of Hawaii also mistakenly has held that, while "packaging, arrangements for delivery, and the actual loading of the products" can occur in other States and may be "crucial to the delivery of goods to consumers," these actions do not involve "any activity that creates taxable sales proceeds." *Baker & Taylor, Inc. v. Kawafuchi*, 82 P.3d 804, 816 (Haw. 2004). The court thus sustained the gross receipts tax on the grounds that the tax "only

taxes gross proceeds from the sale of goods made to people who are located in Hawaii." *Id.* at 816-817.

The Court should not allow this division among state courts to percolate any further, particularly at the cost of duplicative taxation on the same gross receipts by numerous States. The issues have been well-vetted by the state courts, and there is no indication that the divergent constitutional theories will be reconciled absent this Court's intervention.

B. The Delaware Court's Decision To Effectively Treat The Gross Receipts Tax As A Transaction Tax Rather Than As A Tax On Income Cannot Be Reconciled With The Precedent Of This Court

1. This Court's rulings require that gross receipts taxes be fairly apportioned to reflect where the taxed economic activity was earned rather than 100 percent allocated to where delivery occurs

a. The Delaware gross receipts tax should have been, but was not, analyzed as a tax on income, which must be apportioned to reflect where petitioner's wholesaling activities occurred. That result, as well as the identical results of the Washington and Hawaii Supreme Courts, *Ford*, 156 P.3d at 194; *Baker & Taylor*, 82 P.3d at 816, cannot be reconciled with *Jefferson Lines* and should be reviewed by this Court.

Rather than ensure that the state tax fairly "reflect[ed] the location of the various interstate

activities" where the gross receipts were earned, *Jefferson Lines*, 514 U.S. at 190, the court below acknowledged but ignored the significant out-of-state activities comprising petitioner's wholesale sales to which both Ford and the State had stipulated. This included sales forecasting, marketing strategy, advertising, and the transfer of title of vehicles, all of which occurred outside the State of Delaware in Michigan, New Jersey, Virginia, Georgia, Illinois, Kentucky, Minnesota, Missouri, and Ohio. *See* pages 7-9 *supra*. According to the court below, petitioner's out-of-state wholesaling activities were inconsequential to the Commerce Clause analysis. The court's "determinative factor" with respect to the constitutionality of the tax on petitioner's gross receipts was only the location where the vehicle is ultimately "physically delivered." App., *infra*, 6a (citation omitted).

By focusing on the discrete post-sale event of physical delivery, the Delaware court in effect treated its gross receipts tax, which must be fairly apportioned as a tax on income under *Jefferson Lines*, as a sales—*i.e.*, transaction—tax, which does not. But if that is to be the manner in which gross receipts taxes must be constitutionally analyzed—which would represent a sharp departure from *Jefferson Lines*, 514 U.S. at 190—such a result should come from this Court, not the Delaware court below.

b. Nor does *Tyler Pipe* permit the State to treat wholesale gross receipts taxes as transaction taxes under the Commerce Clause.

The court below was wrong when it concluded that "*Tyler Pipe* is squarely on point," App., *infra*, 14a, because the state tax "applies only to gross receipts from 'sales of tangible property *physically delivered within this State* to the purchaser or the purchaser's agent.'" *Id.* (quoting 30 Del. Code § 2902(c)(1)). The critical factor in *Tyler Pipe*, which is absent here, *see* pages 7-9 *supra*, was the fact that the wholesaling activity occurred wholly *within* that State.

The *Tyler Pipe* Court thus did not create an artificial construct dictating that all wholesaling activities, as a matter of constitutional law in all cases, occur at the situs of the sale rather than where the actual wholesaling activities occurred. The Court held that the wholesaling activities in *Tyler Pipe* were *exclusive* to Washington only because they were conducted by "in-state sales representative[s] engaged in substantial activities" within that State. 483 U.S. at 249.[3]

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[3] These *permanent* in-state sales representatives "maintain[ed] and improve[d] name recognition, market share, goodwill, and individual customer relations of Tyler Pipe," *Tyler Pipe*, 483 U.S. at 249 (citation omitted), and provided the taxpayer with "virtually all their information regarding the Washington market, including: product performance; competing products; pricing, market conditions and trends; existing and upcoming construction projects; customer financial liability; and other critical information of a local nature." *Id.* at 250. Indeed, this Court in *Tyler Pipe* could cite to no out-of-state wholesaling activities, other than the fact that out-of-state executives "directed" the "solicitation of business" run by the in-state sales representatives. *Id.* at 249.

Accordingly, in *Tyler Pipe*, this Court rejected only the argument that an apportionment formula for a gross receipts tax on wholesaling must take into account the *manufacturing* activities of the taxpayer that occur outside the taxing State. *Id.* at 248-251. The Court explained that the taxpayer's out-of-state manufacturing activities could be ignored entirely because "the activity of wholesaling—whether by an in-state or an out-of-state manufacturer—must be viewed as a separate activity conducted wholly within Washington that no other State has jurisdiction to tax." *Id.* at 251. Far from creating a categorical rule that wholesaling occurs exclusively in the State where the sale is made, *Tyler Pipe* rejected only the taxpayer's "erroneous assumption" that manufacturing and wholesaling together were a single "unitary activity," the receipts of which must be apportioned in the aggregate. *Id.*

In any event, *Tyler Pipe* must be read in conjunction with this Court's subsequent admonition in *Jefferson Lines* that gross receipts taxes must be apportioned to reflect the various locations where the gross receipts were earned. *Jefferson Lines*, 514 U.S. at 190. And it cannot be disputed, and was not disputed by the State, that petitioner's wholesaling activities were almost exclusively conducted in States other than Delaware. *See* pages 7-9 *supra*. The Delaware court, in fact, explicitly relied on petitioner's wholesaling activities conducted outside the State when it held that the gross receipts tax did not violate the Commerce Clause because petitioner

"caused deliveries to dealers in Delaware." App., *infra*, 17a. But the fact that the discrete event of delivery, not by petitioner but by the common carrier to the dealership, occurs in Delaware does not obviate the *Jefferson Lines* requirement that the tax be apportioned.

2. Even if the Delaware court properly treated its gross receipts tax as a transaction tax rather than as a tax on income, review is required because the State taxed out-of-state sales

Even if this Court were to discard nearly a century of Commerce Clause precedent and treat gross receipts taxes imposed on the *seller* of goods like transaction taxes—*e.g.*, sales taxes on the *buyer* of those goods—review would be required because the Delaware tax is based on where the delivery to the independent dealership occurs rather than where the sale occurs.

Under this Court's longstanding transaction tax precedent, in an interstate sale of tangible goods, the only State that may validly impose a sales tax is the State where title to the goods is transferred. This is true even where the purchaser contracts with the seller to have the goods delivered into the purchaser's home State after title is transferred. *Jefferson Lines*, 514 U.S. at 186-187 (only the State of "place of sale" may impose sales tax, "even where the parties to a sales contract specifically contemplated interstate

movement of the goods either immediately before, or after, the transfer of ownership"); *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 328-329 (1944) (where purchaser already obtained title to goods before delivery by common carrier into purchaser's State, purchaser's State may not tax transaction).

The State and the court below conceded that title to the vehicles that Ford sells at wholesale is transferred outside the taxing State at the point of "gate release" at the various manufacturing locations throughout nine other States. Indeed, the court explained that "Ford did not technically"—or otherwise—"own the vehicles following gate release" where title was transferred from Ford to the independent dealerships at Ford's assembly plants outside of Delaware. App., *infra*, 17a. Because gate release and title transfer never occur in Delaware (and thus Ford never actually sells any vehicles at wholesale within Delaware), the court's decision below sustained a transaction tax on the *seller* of goods that Delaware could not impose on the *buyer* of the very same goods.

Other state courts have sustained similar transaction-based gross receipts taxes applied to sales that actually occur outside the taxing State's borders. The Supreme Court of Washington focused on the fact that the goods were delivered to dealers in Washington and stated that "it d[id] not matter in which jurisdiction the actual sales at wholesale occur[red]." *Ford*, 156 P.3d at 190. As the dissenting members of that court explained, the State and cities

"reached two thousand miles beyond their borders to tax automobile sales made in Dearborn, Michigan." *Id.* at 197 (Sanders, J., dissenting). The Hawaii Supreme Court likewise rejected the argument that the State could impose a gross receipts tax only on "transactions made in Hawaii," *Baker & Taylor*, 82 P.3d at 808, reasoning that the sales were made to "people who are located in Hawaii" even though the transaction may have occurred in other States, *id.* at 816-817. *But see id.* at 816 (holding, in contradiction, that the "sales" create the gross proceeds rather than any interstate activity crucial to the sale).

Accordingly, irrespective of whether the Delaware tax is a tax on income (see pages 2-3, 16-17 *supra*) or a transaction tax, there can be no question that Delaware's gross receipts tax as applied to Ford violates the Commerce Clause by taxing extraterritorial income. By taxing 100 percent of the gross receipts of Ford's sales to Delaware dealerships, when nearly all of Ford's wholesaling activities and the sales themselves occur in other States, Delaware "reaches beyond that portion of value that is fairly attributable to economic activities within the taxing State." *Jefferson Lines*, 514 U.S. at 185. Delaware's allocation of 100 percent of these extraterritorial transactions to itself in no way "reflect[s] a reasonable sense of how income is generated." *Container Corp.*, 463 U.S. at 169. And, even assuming this Court were to abandon *Jefferson Lines* and treat gross receipts taxes like unapportioned transaction taxes, the court below and the Washington and

Hawaii courts have imposed their gross receipts taxes on sales that occurred outside their taxing jurisdiction, in violation of the "general principle [that] a State may not tax value earned outside its borders." *ASARCO, Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307, 315 (1982).[4]

C. The State Of Delaware's Unapportioned, Destination-Based Gross Receipts Tax Results In Multiple Taxation That Burdens Interstate Commerce In Violation Of The Commerce Clause

The Court should exercise its plenary review because the decision by the Delaware court permits Delaware to tax gross receipts from activity that is already taxed by other States.

This Court has required gross receipts taxes such as Delaware's to be fairly apportioned because, without such apportionment, a multistate business's income would be subject to significant duplicative taxation. Each State in which the company conducts commerce could seek to tax the same gross receipts. *See Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 257 (1938).

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[4] The State seeks to evade this requirement by focusing on the fact that petitioner "caused" the vehicles to be delivered in Delaware. But that argument relies upon wholesaling activities that petitioner conducted outside the State.

The Commerce Clause is offended when one State's overreaching creates the "possibility" of duplicative taxation. *Jefferson Lines*, 514 U.S. at 184-185; *see also Armco Inc. v. Hardesty*, 467 U.S. 638, 644-645 (1984) (taxpayer need not "prove actual discriminatory impact" or else "the constitutionality of [one State's] tax laws would depend on the shifting complexities of the tax codes of 49 other states"). This is so because, even if other States declined to tax their apportioned share of petitioner's gross receipts from vehicles delivered to Delaware, that fact would not justify a decision by Delaware to extend its tax to the portion of those gross receipts that Delaware could not otherwise reach. *See Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653, 663 (1948).

In this case, the "gate release" States of Georgia, Illinois, Kentucky, Michigan, Minnesota, Missouri, New Jersey, Ohio, and Virginia—where Ford's sales to its Delaware dealers actually occur—may have a sufficient nexus with those transactions to tax them. *See Jefferson Lines*, 514 U.S. at 186-187; *Goldberg*, 488 U.S. at 263-264. Indeed, even if this Court were to adopt the Delaware court's transaction-based approach to gross receipts taxes, those States' rights to tax the sales are superior to any right of Delaware to tax them. *Cf. Jefferson Lines*, 514 U.S. at 194 ("primacy of taxes on sales" limits right of State to which goods are transferred after sale to impose use tax on transaction that has already been subjected to sales tax by State where transaction occurred).

D. Review Is Necessary Because The Decision Below Creates Significant Economic Uncertainty And Exposes Billions Of Dollars Worth Of Petitioner's Gross Receipts To Multiple Taxation

Absent this Court's intervention, significant uncertainty concerning the constitutionality of gross receipts taxes across the Nation will undermine business planning and investment at a time when our Nation, and our automobile industry in particular, can ill afford it.

Nearly 1200 States, counties, cities, towns, and other state political subdivisions[5] annually collect over $65 billion[6] in gross receipts taxes from businesses operating within their taxing jurisdictions. In the absence of clarity from this Court, these gross receipts taxes will be subject to inconsistent constitutional constructions and cause duplicative taxation, *see Central Greyhound*, 334 U.S. at 662-663, as States and localities seek to reduce their extensive deficits by expanding their tax bases to capture economic activity that occurs outside the taxing jurisdiction, and thus falls on those without an in-state political voice.

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[5] Ernst & Young, *State and Local Jurisdictions Imposing Income, Franchise, and Gross Receipts Taxes on Businesses* 1 (Mar. 7, 2007).

[6] Ernst & Young, *Total State and Local Business Taxes: 50 State Estimates For Fiscal Year 2008*, at 4 (Jan. 2009), *available at* www.cost.org/WorkArea/DownloadAsset.aspx?id=72320.

Nor are these gross receipts taxes limited to a small subset of businesses. The gross receipts taxes like those at issue here affect almost every business in the United States—from the National Football League in *Philadelphia Eagles*, 823 A.2d at 108; to the world's largest book and entertainment distributor in *Baker & Taylor, Inc.*, 82 P.3d at 804; to petitioner, one of the world's leading vehicle manufacturers and wholesalers. Indeed, on the very same day that the Supreme Court of Delaware ruled in this case, that court rejected an identical constitutional challenge to the Delaware gross receipts tax on behalf of the Dial Corporation, a leading seller of household products such as soap. *See Director of Revenue v. Dial Corp.*, 962 A.2d 916 (Del. 2008). Dial sold its goods at wholesale, to retailers such as Target, Wal-Mart, and others, and was required to pay gross receipts taxes on the full value of those gross receipts from Delaware sales, even though Dial conducted virtually no activity related to those wholesale sales within the taxing State except national advertising.

The stakes at issue in this dispute are far reaching. In less than four tax years, a State with a population of fewer than one million people sought (and was permitted by its own state court) to impose a gross receipts tax on more than $700 million of petitioner's sales. App., *infra*, 22a. When every State and local gross receipts tax is taken into account, every year, billions of dollars of petitioner's revenues are subject to these divergent, contradictory, and

ultimately duplicative gross receipts taxes. *See* pages 23-24 *supra*. Accordingly even as petitioner continues to weather the current financial storm, these attempts by States to make up for their own revenue shortfalls create another obstacle that petitioner must (unnecessarily and unconstitutionally) clear.

CONCLUSION

For the reasons set forth above, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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