No. 18-534

In the Supreme Court of the United States

WELL LUCK COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly upheld the classification of petitioner's imported sunflower seed snack products under Harmonized Tariff Schedule of the United States Subheading 2008.19.90 (2010).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and rule: Page

Miscellaneous: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-19) is reported at 887 F.3d 1106. The opinion of the United States Court of International Trade (Pet. App. 20-44) is reported at 208 F. Supp. 3d 1364.

JURISDICTION

The judgment of the court of appeals was entered on April 11, 2018. A petition for rehearing was denied on July 20, 2018 (Pet. App. 45-46). The petition for a writ of certiorari was filed on October 17, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The question presented concerns the proper classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of certain in-shell sunflower

seed snack products imported by petitioner.[1] Entries of goods imported into the United States are assessed customs duties pursuant to the HTSUS. *United States* v. *Mead Corp.*, 533 U.S. 218, 221-222 (2001). The process by which U.S. Customs and Border Protection (Customs) classifies a particular product and assesses applicable duties on entries of that product is called "liquidation." 19 U.S.C. 1500.

If an importer believes that Customs has erroneously classified a product at liquidation, the importer may protest the classification. 19 U.S.C. 1514(c). If Customs denies the protest, the importer may seek further administrative review and/or file a complaint in the Court of International Trade (CIT), which has exclusive jurisdiction to hear a challenge to the denial of a protest. See 28 U.S.C. 1581(a), 2631(a). Section 1581(a) constitutes a waiver of the sovereign immunity of the United States. See *Humane Soc'y of the U.S.* v. *Clinton*, 236 F.3d 1320, 1328 (Fed. Cir. 2001) ("[Section] 1581 * * * provides a waiver of sovereign immunity over the specified classes of cases.").

The tariff classification of merchandise under the HTSUS is governed by the principles set forth in its General Rules of Interpretation (GRI) and the Additional U.S. Rules of Interpretation. *Orlando Food Corp.* v. *United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998). GRI 1 provides, in relevant part, that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or

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[1] Consistent with the date of entry of petitioner's merchandise, unless otherwise noted, references in this brief to the HTSUS are to the 2010 version. The HTSUS for 2010 may be located at https://www.usitc.gov/tata/hts/bychapter/basic10.htm. See 19 U.S.C. 1202.

chapter notes and, provided such headings or notes do not otherwise require, according to the [remaining GRIs.]" When merchandise is *prima facie* classifiable in two or more tariff provisions, GRI 3(a) states, in relevant part, that "[t]he heading which provides the most specific description shall be preferred to headings providing a more general description."

2. On April 9, 2010, petitioner made one entry covering three varieties (Coconut, Spiced, and All Natural Flavor) of wet-cooked and/or roasted, salted, flavored or unflavored sunflower seeds for snacking in unbroken shells. Pet. App. 2-3 & n.1. The manufacturing process that these seeds underwent is relevant to their HTSUS classification. To manufacture the imported merchandise, sunflower seeds are first selected for quality, size, and purity. *Id.* at 24. The seeds in the Coconut and Spiced varieties are then "immersed in water, sweeteners, spice and/or flavoring at 248 degrees Fahrenheit (120 degrees Celsius) for approximately 120 minutes," and then dried. *Ibid.* (citation omitted). In all three varieties, the sunflower seeds are then "heated in an oven to 302 degrees Fahrenheit (150 degrees Celsius) for approximately 65 minutes"; salt is added; and the seeds are cooled. *Ibid.* (citation omitted). The resulting processed seeds are packaged into finished product bags and imported. *Id.* at 24-25.

Customs liquidated the processed sunflower seed products, as entered, under HTSUS Subheading 2008.19.90. That subheading encompasses "fruit, nuts and other edible parts of plants, otherwise prepared or preserved, whether or not containing added sugar or other sweetening matter or spirit, not elsewhere specified or included: nuts, peanuts (ground-nuts) and other seeds, whether or not mixed together: other, including

mixtures: other," dutiable at 17.9 % *ad valorem*. Pet. App. 4 (brackets omitted) (quoting HTSUS Subheading 2008.19.90). Petitioner protested the classification of the products, arguing that its imported goods are entitled to duty-free treatment under HTSUS Subheading 1206.00.00, which encompasses "sunflower seeds, whether or not broken." *Ibid.* (citation omitted); see *id.* at 47-62. On July 16, 2012, in response to petitioner's application for further review of its protest, Customs issued headquarters ruling letter HQ H196098, which determined that the sunflower seed products are properly classified in HTSUS Subheading 2008.19.90 and directed that the protest be denied. *Id.* at 4, 63-74.

3. On September 2, 2014, petitioner filed a complaint in the CIT, challenging Customs' denial of the protest. Pet. App. 75-89. Based on a GRI 1 analysis, the CIT granted summary judgment in the government's favor. *Id.* at 20-44. Specifically, the court ruled that

> the sunflower seeds in [petitioner's] imported merchandise are not prima facie classifiable as "sunflower seeds," as that term is used in Heading 1206, HTSUS, because the seeds in [petitioner's] imported merchandise are not suitable for general use because they are processed in a way that makes them unsuitable for all uses.

Id. at 41-42.

In reaching its decision, the CIT found that "[t]he overall structure of the HTSUS indicates that Chapter 12 includes less processed plant matter whereas Chapter 20, advocated by [the government], includes plant matter that has been processed to a greater extent." Pet. App. 33. Because it could not "locate any competing tariff provision that covers edible seeds from plants

processed in the manner that Plaintiff processes its imported sunflower seed snacks," the court held that petitioner's "sunflower seed snack products are seeds that are prepared or preserved not elsewhere specified or included within the meaning of subheading 2008.19.90, HTSUS." *Id.* at 43.

4. The court of appeals affirmed. Pet. App. 1-19. Petitioner and the government each relied on a GRI 1 analysis in arguing that the imported sunflower seed snacks are properly classifiable in that party's preferred tariff heading. The court of appeals did not adopt either party's position, however, but instead ruled that the imported merchandise is *prima facie* classifiable in *both* HTSUS Heading 1206 and HTSUS Heading 2008. *Id.* at 10, 13. The court therefore conducted a GRI 3(a) analysis and found that HTSUS Heading 2008 provides a more specific description than does HTSUS Heading 1206. *Id.* at 16-18. The court explained that the preparation or preservation necessary for merchandise to be classifiable in HTSUS Heading 2008 renders that provision more difficult to satisfy than HTSUS Heading 1206. *Id.* at 17. Accordingly, the court of appeals affirmed the CIT's judgment in the government's favor. *Id.* at 19.

5. The court of appeals denied petitioner's combined petition for panel rehearing and rehearing en banc without recorded dissent. Pet. App. 45-46.

ARGUMENT

Pursuant to GRI 3(a), the court of appeals held that HTSUS Heading 2008 is more specific than HTSUS Heading 1206. Pet. App. 16-17. Petitioner does not dispute the soundness of the court's relative-specificity analysis under GRI 3(a). Rather, petitioner argues (Pet. 11-13) that the court should not have reached GRI 3(a), and

instead should have ruled in its favor pursuant to a GRI 1 analysis.

"The GRI apply in numerical order, meaning that subsequent rules are inapplicable if a preceding rule provide[d] proper classification." *Schlumberger Tech. Corp.* v. *United States*, 845 F.3d 1158, 1163 (Fed. Cir. 2017). Under GRI 1, the determination whether a particular product falls within a particular tariff classification is a two-step process. The meaning of terms within the relevant classification first must be ascertained, and a determination then must be made as to whether the merchandise at issue is covered by such terms as properly construed. See, *e.g.*, *National Advanced Sys.* v. *United States*, 26 F.3d 1107, 1109 (Fed. Cir. 1994). If a product is determined to be *prima facie* classifiable in two or more tariff provisions, then under GRI 3(a) the court "look[s] to the provision with requirements that are more difficult to satisfy and that describe the article with the greatest degree of accuracy and certainty." *LeMans Corp.* v. *United States*, 660 F.3d 1311, 1316 (Fed. Cir. 2011) (citation omitted).

Petitioner argues that the court of appeals should not have applied GRI 3(a) to the sunflower seed products at issue in this case because those products logically could not be covered by both HTSUS Heading 1206 and Heading 2008. The government agrees that the court's reliance on GRI 3(a) was inappropriate. Because Heading 2008 is limited by its terms to products "not elsewhere specified or included," it would necessarily be inapplicable if petitioner's merchandise were covered by Heading 1206. The court of appeals' affirmance of the CIT's judgment was correct, however, because the products at issue here are properly classifiable in HTSUS Heading 2008 and not in Heading 1206.

In any event, petitioner's disagreement with the court of appeals' application of the HTSUS to a particular commodity implicates no legal issue of broad importance. Further review is not warranted.

1. Petitioner contends (Pet. 11-13) that the court of appeals should have ruled in its favor under GRI 1 because the imported merchandise cannot be *prima facie* classifiable in both HTSUS Heading 1206 and HTSUS Heading 2008. Petitioner argues (Pet. 11) that, because HTSUS Heading 2008 is limited by its terms to merchandise "not elsewhere specified or included" in the tariff statute, the court committed reversible error by failing to give effect to that limiting language. Petitioner contends (Pet. 12) that, under a proper GRI 1 analysis, petitioner's "merchandise can *only* be prima facie classifiable in HTS heading 1206."

Petitioner is correct that, under GRI 1, particular merchandise cannot be *prima facie* classifiable in two or more tariff provisions if one of the provisions includes the limiting language "not elsewhere specified or included." And even apart from that limiting language, a particular type of merchandise cannot logically be classifiable *both* as raw or minimally processed sunflower seeds under HTSUS Heading 1206 *and* as a roasted and manufactured snack food product rendered from sunflower seeds under HTSUS Heading 2008. Depending on the manufacturing processes, if any, that the seeds undergo, imported goods containing sunflower seeds may be classifiable in either HTSUS Heading 1206 or HTSUS Heading 2008; but particular merchandise cannot be classifiable in both headings. Petitioner therefore is correct that the court of appeals should not have relied on GRI 3(a) to classify petitioner's products.

Petitioner is wrong, however, in arguing that the merchandise at issue here is properly classifiable in HTSUS Heading 1206. When read together, the pertinent HTSUS tariff and chapter provisions demonstrate that, pursuant to GRI 1, prepared or preserved sunflower seed products like petitioner's imported goods are classifiable only in HTSUS Heading 2008.

a. Petitioner's processed sunflower seed snack products are not "elsewhere specified or included," Pet. 11, in any tariff provision other than HTSUS Heading 2008 because HTSUS Heading 2008 is the only tariff provision that completely describes the merchandise at issue. Although HTSUS Heading 1206 refers broadly to "edible, oil-rich seeds of a sunflower," see Pet. App. 11, that heading only partially and superficially describes the imported product that is actually at issue here, *i.e.*, manufactured sunflower seed snack products. HTSUS Heading 1206 does not accurately describe petitioner's imported merchandise because the heading encompasses only one constituent ingredient of petitioner's goods, the sunflower seeds themselves, rather than the finished product that results from subsequent processing steps.

HTSUS Heading 2008 specifically provides for the entirety of the finished product: sunflower seeds that have been prepared for consumption through processing and flavoring. See Pet. App. 13-16. That Heading therefore is the only provision that describes all elements of the imported merchandise and accounts for the manufacturing processes (roasting, flavoring, salting, etc.) necessary to render sunflower seeds into the finished product. These processes are neither reversible nor severable from the imported product's constitu-

ent ingredients, and the finished merchandise constitutes a singular and indivisible product. See *Arko Foods Int'l, Inc.* v. *United States*, 654 F.3d 1361, 1364-1366 (Fed. Cir. 2011) (upholding the CIT's decision that mellorine, an ice cream-like dessert, is not provided for *eo nomine* as an "article of milk" ice cream or edible ice under HTSUS Subheading 2105.00.40 because, although it contains milk, mellorine also contains other ingredients that remove it from the "article of milk" ice cream or edible ice provision). Accordingly, under a proper GRI 1 analysis, petitioner's imported goods are described in their entirety only by HTSUS Heading 2008 and are not "elsewhere specified or included."

b. The manner in which HTSUS Heading 2008 applies to other types of processed fruits, nuts, and seeds, and the relationship between HTSUS Heading 2008 and other tariff provisions that address unprocessed or minimally processed forms of the same commodities, reinforce that conclusion. For example, various provisions under HTSUS Subheading 2008.11 explicitly address prepared or preserved peanuts, whereas peanuts that are not processed in such a fashion are included in various provisions under HTSUS Heading 1202. The Explanatory Notes[2] associated with HTSUS Headings 1202 and 2008 confirm that processed peanuts are covered by HTSUS Heading 2008 only, and that relatively unprocessed peanuts are to be classified in HTSUS Heading 1202. See World Customs Organization, *Harmonized Commodity Description and Coding System: Explanatory Notes* 12.02 (4th Ed. 2007); *id.* 20.08. Similarly,

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[2] The "Explanatory Notes that accompany each Chapter of the HTSUS, while not legally binding, are 'persuasive' and are 'generally indicative' of the proper interpretation of the tariff provision." *LeMans*, 660 F.3d at 1316 (citation omitted).

prepared or preserved Brazil nuts, cashews, coconuts, filberts, pignolia, pistachios, almonds, watermelon seeds, and macadamia nuts are provided for in various provisions of HTSUS Subheading 2008.19, whereas unprepared and unpreserved forms of the same nuts and seeds are provided for either in HTSUS Heading 0801 or 0802, or (in the case of watermelon seeds) in HTSUS Heading 1209.

The tariff statute's distinction between processed and unprocessed seeds and nuts is mirrored in its treatment of fruits. Preserved and prepared fruits, such as pineapples, oranges and other citrus fruit, apricots, pears, cherries, and peaches, are covered by HTSUS Heading 2008, while the same fruits in their unprocessed state are provided for in HTSUS Chapter 8. It is thus clear that a given fruit, nut, or seed may be provided for either in HTSUS Chapter 20 (when it is prepared or preserved) or in HTSUS Chapter 8 or 12 (when it has not been processed in such a manner).[3] Indeed,

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[3] The General Explanatory Note associated with HTSUS Chapter 12, which clarifies the scope of HTSUS Headings 1201-1207, states in relevant part:

> Headings 12.01 to 12.07 cover seeds and fruits of a kind used for the extraction (by pressure or by solvents) of edible or industrial oils and fats, whether they are presented for that purpose, for sowing or for other purposes. These headings **do not**, however, **include** * * * certain seeds and fruits from which oil may be extracted but which are primarily used for other purposes.
>
> The seeds and fruits covered by the heading may be whole, broken, crushed, husked or shelled. They may also have undergone heat treatment designed mainly to ensure better preservation (e.g., by inactivating the lipolytic enzymes and eliminating part of the moisture), for the purpose of de-bittering, for inactivating antinutritional factors or to facilitate their use. However, such treatment is permitted **only if** it does not alter the character of

HTSUS Heading 2008 would serve no practical purpose if the processed fruits, nuts, and seeds that it describes continued to be covered by the provisions in HTSUS Chapters 8 and 12 that deal with unprepared and unpreserved forms of the same commodities. The court of appeals therefore need not have gone beyond GRI 1 to reach the conclusion that petitioner's imported goods are properly classified in HTSUS Heading 2008.

2. The fact that the Federal Circuit analyzed this case under GRI 3(a), rather than under GRI 1, provides no sound basis for this Court's review. See, *e.g.*, *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) ("This Court reviews judgments, not statements in opinions.") (citations and internal quotation marks omitted). Petitioner contends (Pet. 3-4) that the Federal Circuit's decision invalidates all tariff provisions containing a "not elsewhere specified or included" clause, and thus affects "493 different products totaling 166.6 Billion U.S. Dollars in annual imports into the United States" and "throws the whole HTS into disarray." That characterization of the decision below is greatly overstated.

The court of appeals' decision was confined to the three varieties of imported merchandise at issue here, and its analysis was limited to the interplay between HTSUS Headings 1206 and 2008 as applied to the subject products. No other tariff provision or specific merchandise is directly affected by the court's ruling. And while the court's invocation of GRI 3(a) was erroneous, its bottom-line conclusion that petitioner's merchandise is classifiable under HTSUS Heading 2008 was correct. Indeed, the product characteristics that the court of ap-

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the seeds and fruits as natural products and does not make them suitable for a specific use rather than for general use.

peals identified as supporting its conclusion that petitioner's merchandise is "prepared or preserved" and therefore covered by Heading 2008, see Pet. App. 14-15, are the attributes that take the merchandise out of Heading 1206 as properly construed.

To the extent the analysis below is inconsistent with prior Federal Circuit decisions construing "not elsewhere specified or included" language in other HTSUS provisions, see, *e.g.*, *R.T. Foods, Inc.* v. *United States*, 757 F.3d 1349, 1354 (Fed. Cir. 2014) (citation omitted); *Aromont USA, Inc.* v. *United States*, 671 F.3d 1310, 1316 (Fed. Cir. 2012), the more recent decision here cannot deprive the earlier rulings of their controlling precedential effect. See *Newell Companies* v. *Kenney Mfg., Co.*, 864 F.2d 757, 765 (Fed. Cir. 1988), cert denied, 493 U.S. 814 (1989). That is particularly clear because "the phrase 'not elsewhere specified or included' does not even appear in the panel's decision, except for three instances, all of which merely state the full text of [HTSUS] Heading 2008." Pet. 10 n. 2. There is consequently no sound reason to believe that the decision below will unsettle prior understandings of the legal significance that should be given to such language. And, to the extent petitioner challenges the Federal Circuit's decision as an "erroneous application of the" correct legal standard, Pet. 6, review is not warranted. See Sup. Ct. R. 10.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2019