No. 19-

IN THE

Supreme Court of the United States

FORD MOTOR COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Worthington* v. *Robbins*, this Court held that "the dutiable classification of articles imported must be ascertained by an examination of the imported article itself, in the condition in which it is imported." 139 U.S. 337, 341 (1891). For over a century, this doctrine has served as a bedrock principle in interpreting tariff provisions, providing critical certainty for the trillions of dollars' worth of goods imported into the United States each year. It is also codified in the governing statute, which provides for consideration of a good's modification and use after importation only where the applicable tariff provision is specifically "controlled by use."

Recently, the Federal Circuit has developed a doctrinally unsound and unpredictable exception to this rule. It holds that a good should be classified based on its post-importation modification and use whenever a tariff heading "inherently suggests use," even if it is not "controlled by use." The Federal Circuit applied that exception here and held that vehicles imported as passenger vehicles should be tariffed at the far higher rate for cargo vehicles because they were converted into cargo vehicles after importation.

The questions presented are:

I. Whether the Federal Circuit erred in holding, contrary to this Court's precedent, that a product's post-importation modification and use can determine its classification under a tariff heading that is not statutorily "controlled by use."

II. Whether the Federal Circuit erred in holding, in conflict with the decisions of the other twelve Circuits, that an appellee must brief issues not decided by the trial court or raised by the appellant to preserve them for remand.

PARTIES TO THE PROCEEDING

Petitioner (plaintiff-appellee below) is Ford Motor Company. Respondent (defendant-appellant below) is the United States of America.

RULE 29.6 STATEMENT

Petitioner Ford Motor Company is a publicly traded company with no parent corporation. State Street Corporation owns 10% or more of Ford Motor Company's stock.

RULE 14.1(b)(iii) STATEMENT

This case arises from the following proceedings in the Court of International Trade and U.S. Court of Appeals for the Federal Circuit:

Ford Motor Co. v. *United States*, No. 1:13-cv-291 (Ct. Int'l Trade Aug. 9, 2017).

Ford Motor Co. v. *United States*, No. 2018-1018 (Fed. Cir. June 7, 2019).

There are no proceedings in state or federal courts that are directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Ford Motor Company (Ford) respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The Federal Circuit's panel opinion is reported at 926 F.3d 741 (Fed. Cir. 2019), and reproduced at App. 1a-32a. The unpublished order denying Ford's motion for rehearing is reproduced at App. 101a-102a. The Court of International Trade's opinion granting Ford's motion for summary judgment is reported at 254 F. Supp. 3d 1297 (Ct. Int'l Trade 2017), and reproduced at App. 33a-100a.

JURISDICTION

The Federal Circuit issued its decision on June 7, 2019, App. 1a, and denied Ford's motion for rehearing on October 16, 2019, App. 101a-102a. On November 21, 2019, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including February 13, 2020. No. 19A574. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Relevant portions of the Harmonized Tariff Schedule of the United States (HTSUS), 19 U.S.C. § 1202, are set forth at App. 103a-107a.

INTRODUCTION

The petition should be granted because the Federal Circuit's tariff classification case law has become increasingly unpredictable and opaque, undermining

the clarity necessary for international trade and effective business planning. This case concerns the proper tariff classification of multipurpose vehicles that are imported into the United States as passenger wagons and subsequently, after the vehicles clear Customs, converted into cargo vans. Under longstanding precedent from this Court, how goods are intended to be used or modified after they are imported is irrelevant to their tariff classification: "[T]he dutiable classification of articles imported must be ascertained by an examination of the imported article itself, in the condition in which it is imported." *United States* v. *Citroen*, 223 U.S. 407, 414-15 (1912) (quoting *Worthington* v. *Robbins*, 139 U.S. 337, 341 (1891)). This bedrock principle is also codified in the governing statute, the HTSUS, which provides for consideration of an article's use only where the applicable tariff provision is specifically "controlled by use." It is also central to international agreements, including the General Agreement on Tariffs and Trade (GATT).

Here, the agency (Customs), the Court of International Trade (CIT), and the Federal Circuit all concluded that the relevant tariff provision is *not* "controlled by use" under the statute. Thus, as the CIT correctly held, the vehicles should be classified as passenger wagons according to their condition at importation. Yet the Federal Circuit instead relied on evidence of how the vehicles are intended to be modified and used *after* importation. It therefore reversed and ruled that the vehicles should be classified as cargo vans, subject to a far higher tariff rate. This ruling is the latest and most deeply problematic of a line of recent Federal Circuit cases permitting consideration of a good's use after importation whenever a tariff provision "inherently suggests use," even if it is not "controlled by use."

This Court's consideration of the first question presented is urgently needed. The Federal Circuit's inherently-suggests-use standard is irreconcilable with this Court's precedent, unmoored from the HTSUS and international agreements to which the United States is a party, and highly unpredictable in practice. The Court has not considered the proper standards for tariff classification in decades. Given the Federal Circuit's exclusive jurisdiction, its doctrinally incoherent and erroneous precedent has sweeping ramifications for U.S. trade law. Every year, companies must make business plans affecting trillions of dollars in imported goods. These importers require—and U.S. and international trade law is designed to provide—clear and administrable rules. But the Federal Circuit's precedent makes it impossible for importers to predict which tariff provisions "inherently suggest[ ] use," how Customs will determine classification under such provisions, and whether Customs will apply similar standards across the more than 300 ports of entry.

Furthermore, review or summary reversal is warranted on the second question presented, because the Federal Circuit's waiver ruling is clearly erroneous and conflicts with precedents of every other Circuit. In addition to the classification question, Ford raised two additional independent issues before the CIT, which the CIT did not reach given its favorable classification ruling and which the government did not raise in its opening brief. In its appellee brief, Ford observed that the Federal Circuit should "give the CIT an opportunity to address those arguments in the first instance" if the classification ruling were reversed. Appellee's Br. 72 n.8 (Fed. Cir. ECF No. 38). The Federal Circuit instead held that Ford's failure to fully brief those two issues constituted a waiver. But an appellee need not raise issues that the court below never

reached to preserve them for remand. The Federal Circuit's holding otherwise is highly prejudicial and incompatible with basic principles of appellate procedure. Indeed, the government declined to even defend this ruling in response to Ford's petition for rehearing, yet the Federal Circuit refused to correct the error. This Court's intervention is needed.

STATEMENT OF THE CASE

I. STATUTORY BACKGROUND

Goods imported into the United States are classified according to the HTSUS, 19 U.S.C. § 1202, the U.S. version of an international system for product classification, reflecting "extensive multilateral international negotiations." *Totes-Isotoner Corp.* v. *United States*, 594 F.3d 1346, 1356-57 (Fed. Cir. 2010). The HTSUS is organized by headings and subheadings: "[T]he headings set forth general categories of merchandise, and the subheadings provide a more particularized segregation of the goods within each category." *Wilton Indus., Inc.* v. *United States*, 741 F.3d 1263, 1266 (Fed. Cir. 2013). The HTSUS "shall be considered to be statutory provisions of law for all purposes." 19 U.S.C. § 3004(c)(1).

Classification of goods under the HTSUS is governed by the General Rules of Interpretation (GRIs) and Additional U.S. Rules of Interpretation (ARIs).[1] See, *e.g.*, *Orlando Food Corp.* v. *United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998). The GRIs and ARIs "are part of the HTSUS statute." *Apple Inc.* v. *United States*, 375 F. Supp. 3d 1288, 1298 (Ct. Int'l Trade 2019); see *JVC*

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[1] U.S. Int'l Trade Comm'n, *Harmonized Tariff Schedule of the United States (2020) (Rev. 2)*, at 1-2, https:// hts.usitc.gov/view/General%20Notes?release=2020HTSARev2.

Co. of Am. v. *United States*, 234 F.3d 1348, 1354 (Fed. Cir. 2000).

The HTSUS has three basic types of headings: *eo nomine*, principal use, and actual use. Most headings are "*eo nomine*," meaning an article is classified "by name, not by use." *Carl Zeiss, Inc.* v. *United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999). Certain headings, by contrast, are defined based on the product's principal or actual use. These headings are governed by ARI 1(a) and (b), which provide a statutory framework applicable only to use headings. These provisions of the ARIs apply to headings that are "controlled by use," or "controlled by the actual use," respectively. ARI 1(a), (b). Principal use provisions classify goods according to the "principal use" of the "goods of that class or kind to which the imported goods belong," ARI 1(a), "even if a particular import is … actually used inconsistently with its principal use," *Clarendon Mktg., Inc.* v. *United States*, 144 F.3d 1464, 1467 (Fed. Cir. 1998). Principal use provisions—unlike *eo nomine* provisions—are subject to the fact-intensive multi-factor test set forth in *United States* v. *Carborundum Co.*, 536 F.2d 373 (C.C.P.A. 1976).

Actual use provisions are rare and, distinct from the other types of heading, require consideration of how the particular imported good is "intended" to be used "at the time of importation" and how it is "actual[ly]" "used" after importation. ARI 1(b). Ordinarily, actual use provisions offer lower tariff rates for importers that can demonstrate the specified actual use. See, *e.g.*, HTSUS 9817.00.50 (machinery used for agricultural or horticultural purposes). Actual use provisions include post-importation procedural requirements not applicable to other headings, including proof of how the good was in fact used. See 19 C.F.R. § 10.138.

II. FACTUAL BACKGROUND

As a result of a 1960s trade war involving frozen chicken, the United States imposes a 25% tariff on "motor vehicles for the transport of goods," HTSUS 8704, known colloquially as the "chicken tax." App. 35a-36a; see Proclamation No. 3564, 28 Fed. Reg. 13,247 (Dec. 6, 1963). By contrast, the United States imposes a 2.5% tariff on vehicles "principally designed for the transport of persons." HTSUS 8703. The Explanatory Notes[2] to these headings explain that Heading 8703 includes "'multipurpose' vehicles (e.g., van-type vehicles …)," and that physical "design characteristics" distinguish vehicles classifiable under Heading 8703 from those classifiable under Heading 8704. Nonconfidential Joint Appendix 2424-27 (Fed. Cir. ECF No. 51) [hereinafter, "J.A."]. The Federal Circuit previously interpreted the difference between these headings as turning on the imported vehicles' objective "structural and auxiliary design features," rather than an assessment of how the vehicle is intended to be used. See *Marubeni Am. Corp.* v. *United States*, 35 F.3d 530, 535 (Fed. Cir. 1994). At issue here is whether Heading 8703 or 8704 applies to the Transit Connect, a small multipurpose van that Ford manufactured in Turkey. App. 2a-3a.

The Transit Connect derives from a line of European vehicles built on the same chassis as the Ford Focus sedan. App. 2a-3a. Ford sells the Transit Connect in both passenger and cargo configurations. Because of the exponentially higher tariff on cargo vehicles, Ford

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[2] The World Customs Organization publishes Explanatory Notes for each heading that, while not binding, have been described as "persuasive and are generally indicative of the proper interpretation of the tariff provision." *Container Store* v. *United States*, 864 F.3d 1326, 1330-31 (Fed. Cir. 2017).

decided to import all Transit Connects as passenger vehicles and, after importation, convert some for cargo use. J.A. 800-02. Ford modeled the U.S. Transit Connects on the passenger version of the European vehicle. App. 41a-43a. To meet U.S. and North American safety standards for passenger vehicles, Ford modified the European vehicles to include additional safety features for rear passengers. *Id.* at 42a-45a.

Consistent with their lineage, the Transit Connects have the structural design characteristics of passenger vehicles. All Transit Connects have "the same chassis and drivetrain as the Ford Focus." App. 3a. They also have permanent structural bracing beneath and on the sides of the car body to support the rear seats and safety restraints; a 2.0L Duratec engine, which is more fuel-efficient but less powerful than engines typical of cargo vehicles; and a steel unibody construction, front-wheel drive, and a Macpherson strut front suspension, all common in passenger vehicles. J.A. 21-22, 4845-49.

At importation, all Transit Connects also had a rear passenger seat meeting all federal safety standards, seatbelts for every seating position, and anchors for the rear seats and seatbelts. The rear seats were designed "to meet Ford's internal durability standards, which are intended to ensure a lifetime of trouble-free use, or approximately 150,000 miles of normal use." App. 49a-50a; see J.A. 5948-49. The rear seats had a steel frame "designed and built to withstand a collision," and a system enabling the attachment of "a LATCH-equipped child car seat." App. 49a-51a. The seats were bolted to the vehicle floor. J.A. 5937-39. All Transit Connects also had structurally reinforced second-row sliding doors with windows and child locks. App. 4a, 22a-24a; see also J.A. 4849. And they had numerous additional interior fittings, including carpeted footwells providing legroom for rear passengers; a full

length, molded cloth headliner; dome lighting in the vehicle's front, middle, and rear; rear coat hooks; a map pocket attached to the rear of the driver seat; a rear cupholder; and heat and air-conditioning adequate for the entire cabin. App. 46a-47a, 90a; J.A. 4846-52.

All vehicles that Ford imports into the United States go through post-importation processing. Beginning in 2009, as part of this post-importation processing, Ford began converting some Transit Connects from passenger to cargo vehicles. App. 49a. This additional processing included unbolting and removing the rear seats, covering the real footwell with a steel plate, installing a molded cargo mat and scuff plates, and (in some vehicles) replacing the rear sliding-door windows with a solid panel. See *id.* at 56a-58a. Ford assigned a 6 or 7 as the sixth digit of the Vehicle Identification Number (VIN) to identify vehicles that would be converted after importation; vehicles that were to remain in the passenger configuration received a 9 as the sixth digit of their VIN. *Id.* at 42a. The lower courts referred to these vehicles as "Transit Connect 6/7s" and "Transit Connect 9s," respectively. By the model years at issue in this litigation, the Transit Connect 6/7s had a cost-reduced rear seat, with certain features (including the mechanism for locking the seat when folded forward) omitted. However, it is undisputed that the cost reductions did not "diminish the seat's ability to transport passengers." *Id.* at 88a-89a. The cost-reduced rear seat continued to meet "federal safety standards," including standards for "seating systems," "occupant crash protection," "seat belt assemblies," "seat assembly anchorages," and "child restraint anchor systems." *Id.* at 55a-56a & n.33, 81a n.51; J.A. 5943-45. At the time of importation, all Transit Connects were street-legal passenger vehicles. J.A. 4856.

From the start, Ford publically discussed its post-importation conversion process. Ford held numerous press and marketing events at which it discussed its post-importation processing of Transit Connect 6/7s. See, *e.g.*, J.A. 4864-66. Articles describing the conversion process appeared in popular and trade press. See, *e.g.*, *id.* at 4869-71. In September 2009, a reporter for the *Wall Street Journal* asked Customs to comment on Ford's post-importation conversion of the Transit Connect 6/7s, and the ensuing article was distributed to numerous high-raking Customs officials, including officials with authority over tariff classification. See Matthew Dolan, *To Outfox the Chicken Tax, Ford Strips Its Own Vans*, Wall St. J., Sept. 22, 2009, *available at* https://www.wsj.com/articles/SB125357990638429655 (updated Sept. 23, 2009); J.A. 4860-61, 4874-77. In response to the article, a senior official in Customs' National Commodity Specialist Division told his staff: "HQ is fully aware of this," J.A. 4876, 4862, and Customs took no action for years. In addition, field operatives at ports of entry had first-hand knowledge of Ford's conversion program from its inception and concluded it was "ok" because the conversion was "being done after release [from Customs]." See *id.* at 4878-81.

III. PROCEEDINGS BELOW

A. Customs Investigation

In December 2011, a team of lower-level Customs officers and trainees inspected *post-importation and post-conversion* Transit Connect 6/7s without rear seats, rear seatbelts, or windows. Under the mistaken assumption that the vehicles had been *imported* in that condition, a member of that team reported to senior officials that he had discovered a "huge case!" involving hundreds of millions of dollars. See J.A. 4898-99. The officials quickly discovered the mistake. *Id.* at

4899-4900. Rather than admit error to their superiors and abandon their "huge case," they spent months in search of a theory that would support an enforcement action against Ford—even as numerous Customs officials who had long been aware of Ford's conversion program explained that "there [was] no violation of Customs law," since "[g]oods are classified based on their 'condition as imported' regardless of what is done to them after importation." *Id.* at 4909 (alterations in original); see *id.* at 4907 (Customs officials stating that, because "goods are classifiable in the condition as imported," the Transit Connects "would be … passenger vehicles"); *id.* at 1500 (Customs official stating "[e]veryone seems to agree … the vans are properly classified at the time of importation despite the fact that they are substantially modified after release").

Eventually, in 2013, Customs ruled that Transit Connect 6/7s must be liquidated under Heading 8704 as cargo vehicles, without reaching the same conclusion for the Transit Connect 9s. See HQ H220856 (Jan. 30, 2013). Ford protested the ruling, and when the protest was denied, sued in the CIT.

B. CIT Proceedings

Ford challenged Customs' ruling in the CIT on three independent statutory grounds. In addition to challenging Customs' classification of the Transit Connect 6/7s, Ford argued that Customs' ruling was contrary to its prior treatment of Transit Connects, see 19 U.S.C. § 1625(c)(2), and its established and uniform practice (EUP), see *id.* § 1315(d). See J.A. 116-20.

The parties cross-moved for summary judgment, and in August 2017, the CIT ruled in favor of Ford. App. 33a-35a. In a carefully reasoned opinion, the CIT applied the "well-settled tenet of customs law" that classification "must be ascertained by an examination of

the imported article itself, in the condition in which it is imported." *Id.* at 67a (quoting *Worthington*, 139 U.S. at 341). As a result, the CIT rejected Customs' "paradoxical[ ]" argument that such an analysis "must account for post-importation processing and Ford's reasons for so doing," and instead confined its analysis to how the vehicles were presented at "the time of importation." *Id.* at 79a. Finding that the Transit Connect 6/7s' "structural and auxiliary design features" at the time of importation "point to a principal design for the transport of persons," *id.* at 90a-91a, the CIT concluded that the vehicles were properly liquidated under Heading 8703. The CIT held that the rear seat supported classification under 8703 because it was manifestly "still a seat, albeit a cheaper" one. *Id.* at 89a. Under "the well-settled 'time of importation' rule, applied with Supreme Court guidance," the CIT found that whether "Ford ultimately removes that seat after importation is immaterial." *Id.* at 80a-81a.

Because the CIT granted summary judgment in favor of Ford on classification, it made no factual findings concerning and did not rule on Ford's independent prior treatment or EUP arguments. App. 99a n.65.

C. Federal Circuit Decision

The government appealed the CIT's ruling, and the Federal Circuit reversed. The Federal Circuit acknowledged that Heading 8703 is an *eo nomine* provision and does not meet the standards of ARI 1—meaning the heading is not "controlled by use." See App. 10a-11a. However, the court concluded that Heading 8703 "inherently suggests a type of use," a standard that appears nowhere in the HTSUS. *Id.* at 11a-13a. Based on that conclusion, the court applied the *Carborundum* test for principal use headings, see

supra p. 5, and determined the tariff classification according to how the vehicles are modified and used after importation. See App. 27a-29a.

In its opposition brief, Ford noted that, if the court were to reverse on the classification issue, remand would be proper to allow the CIT "an opportunity to address" prior treatment and EUP "in the first instance." Appellee's Br. 72 n.8. The government addressed the issues for the first time in its reply brief, contending (despite the lack of a ruling below) that the Federal Circuit should reject them on the merits. The Federal Circuit held that Ford's footnote "waived" these issues because Ford did not "cite any governing law or develop what facts demonstrate that Customs had an 'established and uniform practice.'" App. 32a n.12.

Ford petitioned for panel rehearing or rehearing en banc on both the classification issue and the waiver ruling. In its opposition, the government did not defend the court's waiver ruling. Instead, it argued that the prior treatment and EUP arguments "lack merit" based on asserted factual premises that were never ruled on below. The Federal Circuit denied rehearing on October 16, 2019.

REASONS FOR GRANTING THE PETITION

The Federal Circuit's ruling is contrary to this Court's precedent, which has long recognized the fundamental principle that goods must be classified based on their condition at the time of importation. Instead, the Federal Circuit held that where a heading "inherently suggests use," classification turns upon how a good is intended to be modified and used *after* it is imported. This ruling is also contrary to the statute. The statute provides for goods to be classified according to their intended use only if the particular provision is

"controlled by use," which the court recognized the provision here is not.

This issue is highly important, and this Court's intervention is needed. The Court has not considered tariff classification doctrine in decades. The Federal Circuit, which has exclusive jurisdiction in this area, has developed case law that is incoherent, unpredictable, and unmoored from the statutory text and this Court's precedent. Furthermore, the question presented is highly significant to the business community, which requires clear and predictable rules regarding tariff classification to allow for orderly planning and investment. It is also important to international trade relations, and implicates international agreements.

Finally, the Federal Circuit's waiver ruling also warrants this Court's review, potentially through summary reversal. The Federal Circuit's holding that an appellee must brief issues not decided below or raised by the appellant on pain of waiver is inconsistent with the precedent of the other twelve Circuits, and will have a highly pernicious impact upon appellate procedure.

I. THE FEDERAL CIRCUIT'S INHERENTLY-SUGGESTS-USE EXCEPTION IS CONTRARY TO THIS COURT'S PRECEDENT AND THE STATUTE.

A. The Federal Circuit's Inherently-Suggests-Use Exception Conflicts With This Court's Precedent.

First, the petition should be granted because the Federal Circuit's inherently-suggests-use exception conflicts with this Court's precedent. For over a century, it has been a bedrock rule of U.S. trade law that "the dutiable classification of articles imported must

be ascertained by an examination of the imported article itself, in the condition in which it is imported." *Worthington*, 139 U.S. at 341. Thus, except where Congress specifically provides otherwise, see *infra* Part I.B, modifications intended to be made to a good *after* it is imported are not relevant to its proper classification.

In *Worthington*, Customs argued that enamel imported from England was classifiable as "watch materials," because "the enamel in controversy was imported … for use in making watch-dials, and was in fact so used." 139 U.S. at 338-39. The Court rejected the argument, holding that the enamel's classification turned on "the condition of the article as imported," not on "what afterwards the importer did with it." *Id.* at 341. In its condition at importation, the enamel in question was a raw material that could be "used for various purposes." *Id.* at 338. Accordingly, the Court held that it could not be classified as "watch materials." *Id.*

United States v. *Citroen* reaffirmed this "well-established" condition-as-imported rule. See 223 U.S. 407 (1912). The import in that case was a set of loose pearls that had been strung in Europe as a necklace, was unstrung prior to importation solely to obtain a lower tariff, was imported with the intention of being re-strung into a necklace, and was re-strung after importation. *Id.* at 414-15. This Court held that the pearls must be classified as "[p]earls … not set or strung," rather than "jewelry, and parts thereof," notwithstanding the undisputed evidence that the pearls were marketed, designed, and imported to be strung into jewelry. See *id.* at 413, 418, 422. The Court held that it was irrelevant that the pearls "could be strung, or had been collected for the purpose of stringing or of being worn as a necklace." *Id.* at 415-16. As the CIT

here explained, *Citroen* set forth a "bright line test for classification cases," App. 69a: "Does the article, as imported, fall within the description sought to be applied," 223 U.S. at 415. This bright-line rule, the Court held, is necessary to provide a "simple and workable" system that ensures "uniformity in the imposition of duties." *Id.* at 414-15, 424.[3]

Several other precedents from this Court affirm the same principle. For instance, *Dwight* v. *Merritt* held that rails imported into the United States were dutiable as rails, not scrap metal, because, "when imported," the articles were "completed rails." 140 U.S. 213, 214 (1891). Even though the rails were intended to be used as scrap metal and were not suitable for use in the U.S. as rails, the Court held that "their condition at that time [of importation] … is the test as to their dutiable classification." *Id.* at 218-19. Similarly, in *United States* v. *Schoverling*, Customs sought to classify gunstocks as "shotguns" rather than gun parts, because the importers intended to combine "the gunstocks with barrels separately imported, so as to make here completed guns." 146 U.S. 76, 81 (1892). The Court held that the importer's intent "cannot affect the rate of duty"; the gunstocks' classification "must be ascertained by an examination of them in the condition in which they are imported." *Id.* at 81-82.

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[3] *Citroen* also held that an article "does not become dutiable under the [higher rate] because it has been manufactured or prepared for the express purpose of being imported at a lower rate," 223 U.S. at 415, a practice known as "tariff engineering." *See also Merritt* v. *Welsh*, 104 U.S. 694, 701 (1882) (rejecting Customs' argument that "sugars … manufactured in dark colors on purpose to evade our duties" should be classified at the higher rate for light-colored sugars); *Seeberger* v. *Farwell*, 139 U.S. 608, 609 (1891) (holding that the lower duty applied where the importer blended a small amount of cotton into cloth to avoid the higher duty for pure woolen clothing).

The decision below starkly conflicts with this precedent. The Federal Circuit recognized that the Transit Connect has "the structural design features" of a passenger vehicle, as well as multiple interior "features indicative of passenger vehicles." App. 23a-24a. And it was undisputed that the rear seats were "*capable* of functioning as passenger seats in the condition as imported." *Id.* at 25a-26a; J.A. 5947. In short, at the time of importation, the Transit Connect 6/7s had the design characteristics of a passenger vehicle. See *supra* pp. 7-8. Under this Court's precedent, that should have been the end of the inquiry.

Yet the Federal Circuit concluded that the vehicles' physical condition at importation was outweighed by Ford's "intended purpose" of removing the seats after importation, holding that "use considerations strongly disfavor" classification under 8703. App. 25a, 27a. But classifying a good based on how it is modified and used after importation—even if such use is "intended" at importation—is irreconcilable with this Court's precedent. As in *Worthington* and *Citroen*, that Ford intended to and did convert the goods for a different use "has no relation to the condition of the article as imported, but to what afterwards the importer did with it." *Worthington*, 139 U.S. at 341.

The court below reasoned that its approach did not controvert *Worthington* and its progeny because the relevant tariff heading "inherently suggests … use." See App. 16a-18a. But such an exception appears nowhere in this Court's precedents or the HTSUS. Congress of course can choose to depart from the condition-as-imported rule—but that rule is a bedrock principle of trade law against which Congress legislates, and is also incorporated in international agreements to which the U.S. is a party. As discussed in the next subsection, the Federal Circuit's inherently-suggests-

use exception is not only flatly contrary to the condition as imported rule, it also has no grounding in the statute, see *infra* Part I.B.

B. The Federal Circuit's Inherently-Suggests-Use Exception Conflicts With The Governing Statute And International Agreements.

The Federal Circuit's uncabined and amorphous inherently-suggests-use exception is contrary to the statute and international agreements, and would upend trade law.

1. The HTSUS defines when and how use may be considered in tariff classification, providing for consideration of use *only* for two types of "use" provisions: where the heading is "*controlled by* use" or "*controlled by* the actual use." ARI 1(a), (b) (emphases added). The vast majority of provisions are *not* controlled by use. See *supra* p. 5. Rather, they are *eo nomine* provisions, which classify goods "by name, not by use." *Carl Zeiss*, 195 F.3d at 1379; see GRI 2 (providing that "reference[s] in a heading" shall be construed as referring to the goods "as entered"). Further, even for principal use provisions, goods still must be classified in their condition at importation; the consideration of use is limited to the use of "goods of that class or kind," not the post-importation use of the particular goods themselves. ARI 1(a); *Clarendon*, 144 F.3d at 1467. Only for "actual use" provisions does the HTSUS allow for consideration of the "actual use to which the imported goods are put in the United States," or the "use … intended" by the importer. ARI 1(b). Actual use provisions are very rare, and generally offer an opportunity for an importer to obtain a *lower* duty by meeting the

burden of demonstrating a particular use. See *supra* pp. 5-5.[4]

In short, "*eo nomine* provisions are distinct from use provisions and do not depend on either principal or actual use." *GRK Can., Ltd.* v. *United States*, 885 F.3d 1340, 1347 (Fed. Cir. 2018). Therefore, as a recent dissent from denial of rehearing en banc on this issue noted, "[a]ny suggestion that the ARIs may need to be reached in the context of an *eo nomine* analysis is foreign to our classification case law, and conflicts with the clear statutory language of the ARIs." *GRK Can., Ltd.* v. *United States*, 773 F.3d 1282, 1285 (Fed. Cir. 2014) (Wallach, J., dissenting from denial of rehearing en banc).

International agreements likewise embody the condition-as-imported rule, providing that duties must be assessed on goods "on their importation." General Agreement on Tariffs and Trade art. II(1)(b), Oct. 30, 1947, 61 Stat. A-3, A-14, 55 U.N.T.S. 194. As a World Trade Organization (WTO) panel has explained, GATT "contains a *strict and precise temporal element* which cannot be ignored. This means that the obligation to pay ordinary customs duties is linked to the product at the moment it enters the territory of another Member." Panel Reports, *China—Measures Affecting Imports of Automobile Parts*, ¶ 7.184, WTO Docs.

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[4] The Foreign-Trade Zone (FTZ) Act also reflects the condition-as-imported rule. It permits the creation of FTZs in or adjacent to ports of entry, and provides that goods in FTZs will be treated as though they had not yet entered the United States. *See* 19 U.S.C. § 81a *et seq*. This allows the importer to "manipulate[ ]" or "manufacture[ ]" the goods while in the FTZ to secure a lower tariff rate. *Id.* § 81c. This provision would be meaningless if the goods were to be classified according to their intended post-importation modification and use, rather than their condition at the time of importation.

WT/DS339/R, WT/DS340/R, WT/DS342/R (adopted Jan. 12, 2009). Moreover, under GATT, "it is 'the "objective characteristics" of the product in question when presented for classification at the border' that determine [its] classification." Appellate Body Reports, *China—Measures Affecting Imports of Automobile Parts*, ¶ 164, WTO Docs. WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R (adopted Jan. 12, 2009) [hereinafter China Appellate Body Reports] (footnote omitted).

Under the *Charming Betsy* doctrine, "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). Thus, the Federal Circuit has recognized that U.S. customs law "must be interpreted to be consistent with GATT obligations, absent contrary indications in the statutory language or its legislative history." *Luigi Bormioli Corp.* v. *United States*, 304 F.3d 1362, 1368 (Fed. Cir. 2002). Nothing in the HTSUS suggests Congress intended to change a century of precedent holding that goods must be classified in their condition as imported. Indeed, the United States has brought WTO charges against other countries for departing from the condition-as-imported standard, stating that the United States "follows the long-standing principle that goods should be classified based on [their] condition as entered, regardless of what occurs to the goods after entry." Addendum to Panel Reports, *China—Measures Affecting Imports of Automobile Parts*, annex A-1, ¶ 6, WTO Docs. WT/DS339/R/Add.1, WT/DS340/R/Add.1, WT/DS342/R/Add.1 (adopted Jan. 12, 2009) (U.S. Response (Panel Question 9)). Yet the court below did not even consider how its ruling comports with GATT, much less endeavor to avoid an unnecessary conflict.

2. In a recent line of cases, the Federal Circuit has permitted consideration of use far more broadly than the HTSUS and GATT allow. Rather than limit the consideration of a product's use to tariff provisions "controlled by use," ARI 1, the Federal Circuit has created an expansive and ill-defined exception for *eo nomine* tariff headings that "inherently suggest[ ] a type of use." App. 13a-15a; see also, *e.g.*, *GRK Can., Ltd.* v. *United States*, 761 F.3d 1354, 1359 (Fed. Cir. 2014) ("*GRK I*").

Here, the Federal Circuit held that Heading 8703 is an *eo nomine* provision—*not* a provision "controlled by use" under the HTSUS. See App. 11a-13a; see also *id.* at 92a-94a.[5] The court held that Heading 8703 is not a principal use provision subject to ARI 1(a), *id.* at 27a, much less an actual use provision under ARI 1(b). Thus, under the HTSUS and this Court's precedent, the classification analysis should have begun and ended by considering "the imported article itself, in the condition in which it is imported." *Worthington*, 139 U.S. at 341. "[W]hat afterwards the importer did with it" is not a relevant factor. *Id.*; see *Heyliger & Raubitschek* v. *United States*, 11 U.S. Cust. App. 90, 93 (1921) ("the subsequent history of the article as intended by the importers" is irrelevant). Here, the vehicles themselves in their condition at importation plainly had the principal design characteristics of passenger vehicles: Each had rear seats and seatbelts, rear footwells, rear side-impact beams and underbody

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[5] As Customs admitted in the CIT, the agency's "position is that [Heading] 8703 is an eo nomine provision." Fed. Cir. Suppl. App. 144-45; *see also*, *e.g.*, HQ H010587 (Nov. 24, 2009) ("[H]eading 8703, HTSUS, is also an eo nomine provision."); HQ 087181 (Sept. 7, 1990) ("It is the design features, rather than principal or sole use, which determine whether a particular motor vehicle is encompassed by heading 8703.").

bracing, and other design features found only in passenger vehicles. See *supra* pp. 7-8; App. 21a ("The structural design features favor a finding that the subject merchandise is designed for transport of passengers.").

Yet because it determined that Heading 8703 "inherently suggests … use," App. 13a, the Federal Circuit refused to classify the vehicles according to their condition at importation. Instead, the court concluded that the vehicles must be classified based on how they were intended to be modified and used after importation. The Federal Circuit held that "[t]he CIT erred by not considering use," *id.* at 18a, and that although 8703 is *not* a principal use provision, "the criteria for determining principal use are also relevant here," *id.* at 27a. The Federal Circuit relied heavily on evidence of the vehicles' actual and intended use, including the "manner of use," "post-importation processing," and "advertising," *id.* at 28a-29a, and held that these "use considerations strongly disfavor" classification under 8703, *id.* at 27a; see also, *e.g.*, *id.* at 12a ("[T]he CIT erred by refusing to consider intended use …."); *id.* at 18a (considering "intended use"); *id.* at 28a ("Transit Connect 6/7s undergo post-importation processing and are not utilized like passenger vehicles." (citations omitted)). This use analysis is not authorized by the HTSUS for a provision that is not "controlled by use." ARI 1.

Furthermore, the decision below is an unprecedented and particularly problematic expansion of the inherently-suggests-use cases, because the court relied upon the use of the goods after they had been substantially modified, and were no longer in the condition they had been at importation. In prior cases where the Federal Circuit has held a provision "inherently sug-

gests use," the good has not been modified after importation. Thus, the Federal Circuit previously relied upon use to further elucidate the character of the good in its condition at importation. For example, in *CamelBak Products, LLC* v. *United States*, the court looked to use to understand a composite product combining elements of a backpack and a drink container. 649 F.3d 1361, 1368-69 (Fed. Cir. 2011); see also *Len-Ron Mfg. Co.* v. *United States*, 334 F.3d 1304, 1311 (Fed. Cir. 2003) (considering use to determine whether the import was a vanity case). Here, the Federal Circuit considered the Transit Connect 6/7s' use not to understand the vehicles' condition at the time of importation but to override it, finding it outweighed by the intent to modify the vehicles after importation. See, *e.g.*, App. 25a.

The decision below is contrary to the longstanding bedrock principle that goods must be classified in their condition at importation, and it conflicts with the governing statute and international agreements. The petition should be granted.

II. THE FEDERAL CIRCUIT'S INHERENTLY-SUGGESTS-USE EXCEPTION IS HIGHLY UNPREDICTABLE AND HAS GRAVE RAMIFICATIONS FOR INTERNATIONAL TRADE.

A. The Inherently-Suggests-Use Exception Undermines The Certainty And Predictability Necessary To International Trade.

The Federal Circuit's inherently-suggests-use exception is also highly unpredictable and doctrinally incoherent. Indeed, the lack of "articulable standards" regarding "basic questions" has led commentators to compare the Federal Circuit's rulings on the issue to

Alice in Wonderland. Michael G. Hodes & Nina C. Mohseni, *Classification Determinations in the United States Court of International Trade Brought Under 28 U.S.C. § 1581(A)*, 46 Geo. J. Int'l L. 27, 37 (2014). The resulting uncertainty for importers is extremely detrimental to international trade.

First, the Federal Circuit's inherently-suggests-use exception is highly unpredictable, making it impossible for importers to know *ex ante* which headings may be found to "suggest" use. The Federal Circuit's decisions have not announced any clear dividing line between the headings that "inherently suggest use" and those that do not. Wood screws, *GRK I*, 761 F.3d at 1359-60, self-tapping screws, *id.*, baskets, see *id.* at 1358 (citing *United States* v. *Quon Quon Co.*, 46 C.C.P.A. 70, 73 (1959)), and vanity cases, *Len-Ron*, 334 F.3d at 1311, have all been held to "inherently suggest use." On the other hand, watch materials, *Worthington*, 139 U.S. at 340-41, pliers, *Irwin Indus. Tool Co.* v. *United States*, 920 F.3d 1356, 1362 (Fed. Cir. 2019), wrenches, *id.*, and bicycles "not designed for use with [wide] tires," *W. States Import Co.* v. *United States*, 154 F.3d 1380, 1381 (Fed. Cir. 1998), have not. But why, for example, does the classification "wood screws" require inquiry into whether the screws are intended to be used "to fasten wood," but "watch materials" does not turn on whether the materials are intended to be used to make watches?

The Federal Circuit has provided no principles to determine where—or how broadly—the exception will apply. Rather, its rulings on the issue are contradictory. For instance, in this case, the court held that the phrase "principally designed" in Heading 8703 "inherently suggests looking to intended use." App. 13a-14a, 18a. Yet in an earlier decision, *Western States Import*, the court ruled that a tariff heading covering bicycles

"not designed for use with [wide] tires" did *not* inherently suggest a particular type of use. See 154 F.3d at 1382-83. The Federal Circuit gave little explanation why the word "design" permits consideration of use in one heading but not in another—much less why consideration of use is required by the heading that does not mention use, but prohibited by the heading that does.

The lack of a principled answer creates grave uncertainty for the innumerable other headings that could be said to "suggest" use (or not). Indeed, contrary to the Federal Circuit's statements that the inherently-suggests-use exception will apply only in "very limited circumstances," App. 18a, a vast array of *eo nomine* headings could be said to "inherently suggest" a type of use. See, *e.g.*, HTSUS 6506.10.3030 ("Motorcycle helmets"); 6601 ("Umbrellas and sun umbrellas …"); 9105.21 ("Wall clocks"); 2710.19.3010 ("Aviation engine lubricating oils"); 4202.92.94 ("Cases designed to protect and transport compact disks …"); 9303.90.40 ("Pistols and revolvers designed to fire only blank cartridges or blank ammunition"); 6405.90.20 ("Disposable footwear, designed for one-time use"); 9405.50.20 ("Incandescent lamps designed to be operated by propane or other gas …").

Second, even if a party could predict which headings would trigger the exception, grave uncertainty would remain because the Federal Circuit's inherently-suggests-use test is doctrinally incoherent and internally contradictory. It is fundamental that there are three categories of tariff classifications: *eo nomine*, principal use, and actual use. See *supra* p. 5. Each category has its own legal standards. *Id.* Yet, as dissenting judges have warned, the Federal Circuit has now "conflate[d the] two very different categories of tariff classifications" "by requiring consideration of the intended use

of the named articles" to define *eo nomine* provisions. *GRK I*, 761 F.3d at 1363 (Reyna, J., dissenting). The inherently-suggests-use line of cases "blurs the boundaries between *eo nomine* and principal use provisions," and fails to "explain when such an analysis is required or even how 'intended use' differs from principal use as defined by ARI 1(a)." *Id.* at 1363, 1366 (Reyna, J., dissenting); see Hodes & Mohseni, *supra*, at 36-37 (noting that the term "intended use" is "foreign to the use analysis provided in ARI 1" and the Federal Circuit has "failed to define [it] or to suggest any method of analysis to either align the term[ ] with or distinguish [it] from the ARIs' 'principal use' and 'actual use' concepts").

For instance, the Federal Circuit has said repeatedly that the *Carborundum* factors apply only to principal use provisions, and do not apply to *eo nomine* provisions. *R.T. Foods, Inc.* v. *United States,* 757 F.3d 1349, 1357 (Fed. Cir. 2014); *Sigma-Tau HealthScience, Inc.* v. *United States*, 838 F.3d 1272, 1278 (Fed. Cir. 2016). Yet below, the Federal Circuit held that "[w]hile we conclude that HTSUS Heading 8703 is an *eo nomine* provision, not a principal use provision, the criteria for determining principal use are also relevant here," and found several of the "*Carborundum* factors" "[p]articularly relevant." App. 27a. The decision below thus suggests that a principal use provision controlled by ARI 1(a) and an *eo nomine* provision that "inherently suggests use" are governed by the same legal standard, even though the ARIs do not apply to *eo nomine* provisions. See, *e.g.*, *Schlumberger Tech. Corp.* v. *United States*, 845 F.3d 1158, 1163 n.5 (Fed. Cir. 2017). Making matters worse, the Federal Circuit then rested largely on evidence of the specific vehicles' *actual use*, even though it is undisputed that 8703 is

not an actual use provision, and ARI 1(b) does not apply.

As the *GRK I* dissent cogently warned, this neither-fish-nor-fowl approach will continue to "promote confusion and error in future classification cases." *GRK I*, 761 F.3d at 1366 (Reyna, J., dissenting). In addition to promoting inconsistent tariff classifications and increased litigation, this lack of clarity imposes little constraint on Customs from applying whatever analysis will result in the highest possible tariff.

Strikingly, in an earlier dispute concerning these same tariff provisions, Customs *refused* to consider use in a mirror-image case where vans were modified after importation to become passenger vehicles. NY N056077 (Apr. 21, 2009). In that case, Dodge Sprinters (a competitor to the Transit Connect) were imported into the United States in a cargo-van configuration, but the vehicles were intended solely "for conversion into a … shuttle bus configuration[ ]," and were modified after importation to add "windows, a wheelchair lift, seats, interior lighting, [and] luggage racks." *Id.* There, Customs concluded that the vehicles' intended use and post-importation modification were irrelevant, and classified them according to their condition at importation. *Id.* By contrast, here, where the imports entered as passenger vehicles and were later modified into cargo vans, Customs and the Federal Circuit found use to be not only relevant but dispositive. The only consistency between these two rulings is that, in each case, Customs found the higher tariff rate applicable.

It has been decades since this Court last addressed the legal standards governing tariff classification.[6] The Federal Circuit has exclusive jurisdiction in this area, and its rulings are not only unmoored from the statute and this Court's precedent, but also have become increasingly incoherent and unpredictable. The petition should be granted to bring much-needed clarity to classification law.

B. The Question Presented Is Highly Important To International Trade.

The question presented is also highly important to international trade. The business community depends upon clear tariff classification doctrines to make critical decisions about where to invest, what to import, and in what condition to import. As the WTO explains, "[w]ith stability and predictability, investment is encouraged, jobs are created and consumers can fully enjoy the benefits of competition—choice and lower prices. The multilateral trading system is an attempt by governments to make the business environment stable and predictable." World Trade Org., *Principles of the Trading System*, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (last visited Feb. 5, 2020).

This Court has repeatedly stressed the importance of the condition-as-imported rule in achieving these critical goals of stability and predictability. The Court has recognized that "[u]ncertainty and ambiguity are

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[6] *United States* v. *Mead Corp.*, 533 U.S. 218 (2001), was a classification case, but the question presented concerned what deference was owed to Customs' rulings, not the method by which Customs should make a classification determination. *See also*, *e.g.*, *United States* v. *Haggar Apparel Co.*, 526 U.S. 380 (1999) (similar). The most relevant case, *Citroen*, 223 U.S. 407, was decided more than a century ago.

the bane of commerce," and thus "[d]iscretion in the custom-house officer should be limited as strictly as possible." *Merritt* v. *Welsh*, 104 U.S. 694, 702 (1882). Therefore, a "simple and workable test" is needed to ensure "uniformity in the imposition of duties." *Citroen*, 223 U.S. at 414-15, 424. The condition-as-imported rule furthers such "uniformity" by confining the analysis to the good itself, at a precisely specified time. *Worthington*, 139 U.S. at 337; *accord*, *e.g.*, *Dwight*, 140 U.S. at 219; *Am. Mannex Corp.* v. *United States*, 56 Cust. Ct. 31, 37 (1966) ("Customs officers should be able to classify imports by what they see before them."). By contrast, a standard that depends on evidence of post-importation use does "not admit of a fixed, definite rule," "encourages partiality, promotes injustice, and … br[eaks] down in practical application." *Citroen*, 223 U.S. at 422-23; see HQ 962125 (May 5, 2000) ("[B]y adding an examination of the 'intent of the importer' Customs only created more confusion[and] allowed shipments of identical merchandise to be classified differently….").

The problems of unpredictability and lack of uniformity are especially acute because more than 35.5 million entries of goods, worth trillions of dollars, are imported into the United States each year—many with the express intent of being processed, modified, or incorporated into other goods. See U.S. Customs & Border Prot., *CBP Trade and Travel Report Fiscal Year 2019*, at 7 (Jan. 2020), https://www.cbp.gov/sites/default/files/assets/documents/2020-Jan/CBP%20FY2019%20Trade%20and%20Travel%20Report.pdf. Thus, as the Federal Circuit itself previously recognized, if classification is made to turn upon a good's post-importation modification or use, "not only could the same product be subject to different duty rates depending on its intended end use, but Customs would be flooded

with affidavits or other evidence of differing intended uses." *Mita Copystar Am.* v. *United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994). And it would be faced with the highly burdensome task of "determining whether the merchandise was actually used for its alleged intended purpose after importation." *Id.*

Furthermore, if businesses are uncertain which tariff heading may ultimately apply, planning and investment become more difficult. This will discourage companies from importing goods, reduce manufacturing investments in the United States, and promote less efficient and less productive approaches.

Uncertainty in classification poses concerns not only for business, but also for U.S. foreign trade relations. As discussed above, *supra* pp. 18-19, the GATT and other international agreements require signatories to abide by the condition-as-imported rule. The WTO has found that the "security and predictability of tariff concessions would be undermined if ordinary customs duties could be applied based on factors and events that occur internally, rather than at the moment and by virtue of importation." China Appellate Body Reports, *supra*, ¶ 165. And the United States has not only benefitted from this requirement, but brought charges against nations that deviate from it. See *supra* p. 19. Continued expansion of the inherently-suggests-use exception could create international tensions and lead to other countries likewise refusing to follow the condition-as-imported rule for U.S. goods, or otherwise engaging in retaliation against U.S. trade. This Court should grant the petition.

III. SUMMARY REVERSAL IS WARRANTED TO CORRECT THE FEDERAL CIRCUIT'S WAIVER RULING, WHICH IS CONTRARY TO THE PRECEDENT OF ELEVEN OTHER CIRCUITS.

This Court's review is also warranted to correct the Federal Circuit's holding that Ford "waived" alternative claims not decided by the CIT by not raising them in its appellee brief. This holding is plainly erroneous, and conflicts with published decisions of every other Circuit. Summary reversal is therefore appropriate. See, *e.g.*, *Thompson* v. *Hebdon*, 140 S. Ct. 348, 350 n.* (2019) (per curiam) (summarily reversing a decision that conflicted with precedent "from ten Circuits").

As described above, *supra* p. 10, Ford moved for summary judgment in the CIT on three grounds: Customs classified the vehicles incorrectly; Customs' ruling was contrary to its prior treatment of the Transit Connects, see 19 U.S.C. § 1625(c)(2); and Customs' ruling was contrary to its EUP, see *id.* § 1315(d). See J.A. 116-20. The CIT did not reach the latter two issues because it ruled in Ford's favor on classification. App. 99a n.65. The government's opening brief before the Federal Circuit did not raise either issue. Ford's opposition brief therefore addressed the single issue on appeal: classification. Ford noted that its treatment and EUP claims had been raised in the CIT, and accordingly stated that if the classification ruling were reversed, the Federal Circuit "should give the CIT an opportunity to address those arguments in the first instance." Appellee's Br. 72 n.8. Instead, the Federal Circuit held that Ford had "waived" the prior treatment and EUP claims by not developing those arguments in its appellee brief. App. 32a n.12.

This ruling is clearly incorrect, and fundamentally "misconceives the roles played by the appellant, the

appellee, and the court of appeals when a district court judgment is appealed." *Hernandez* v. *Starbuck*, 69 F.3d 1089, 1093 (10th Cir. 1995). The appellant "define[s] the battleground on … appeal," *Crocker* v. *Piedmont Aviation, Inc.*, 49 F.3d 735, 740 (D.C. Cir. 1995), and "bears the burden of demonstrating the alleged error and the precise relief sought," *Hernandez*, 69 F.3d at 1093. But "[a]ppellees bear no such burden." *Id.* Instead, it is the appellee's role merely "to defend the decision of the lower court" against the appellant's specified challenges. *Brown* v. *City of New York*, 862 F.3d 182, 188 (2d Cir. 2017); see, *e.g.*, *Schering Corp.* v. *Ill. Antibiotics Co.*, 89 F.3d 357, 358 (7th Cir. 1996) ("The urging of alternative grounds for affirmance is a privilege rather than a duty."). The Federal Rules of Appellate Procedure confirm these roles, requiring the appellant—but *not* the appellee—to set forth "a statement of the issues presented for review" and "a short conclusion stating the precise relief sought." Fed. R. App. P. 28(a). Because appellees "should not … be penalized for that which they were not required to do in the first instance," an appellee does not waive a request "to have the district court address [on remand an] argument [it had] specifically preserved" by failing to brief those issues on appeal. *Hillman* v. *IRS*, 263 F.3d 338, 343 n.6 (4th Cir. 2001).

It is unsurprising, therefore, that the Federal Circuit's waiver ruling below is contrary to published decisions of every other Circuit. See, *e.g.*, *Ms. S.* v. *Reg'l Sch. Unit 72*, 916 F.3d 41, 48-50 (1st Cir. 2019); *Brown*, 862 F.3d at 188 (2d Cir.); *Eichorn* v. *AT&T Corp.*, 484 F.3d 644, 657-58 (3d Cir. 2007); *Hillman*, 263 F.3d at 343 n.6 (4th Cir.); *United States* v. *Smith*, 814 F.3d 268, 272 (5th Cir. 2016); *Kennedy* v. *City of Villa Hills*, 635 F.3d 210, 214 n.2 (6th Cir. 2011); *Frank* v. *Walker*,

819 F.3d 384, 387 (7th Cir. 2016); *United States* v. *Castellanos*, 608 F.3d 1010, 1019 (8th Cir. 2010); *Landsberg* v. *Scrabble Crossword Game Players, Inc.*, 802 F.2d 1193, 1197 (9th Cir. 1986); *Hernandez*, 69 F.3d at 1093-94 (10th Cir.); *Med. Laundry Serv.* v. *Bd. of Trs. of Univ. of Ala.*, 856 F.2d 128, 129 (11th Cir. 1988) (per curiam); *Crocker*, 49 F.3d at 740-41 (D.C. Cir.). This Court, likewise, has frequently noted that it is appropriate to remand for consideration of "alternative ground for affirmance … that neither the District Court nor the Court of Appeals panel addressed." *E.g.*, *White* v. *Pauly*, 137 S. Ct. 548, 552 (2017) (per curiam).

The Federal Circuit's waiver ruling is also highly problematic for appellate procedure. Requiring appellees to brief every possible alternative ground for affirmance on pain of forfeiture will "increase the complexity and scope of appeals" and "impos[e] significant burdens on the appellate court." *Crocker*, 49 F.3d at 740-41; *accord*, *Kessler* v. *Nat'l Enters., Inc.*, 203 F.3d 1058, 1059 (8th Cir. 2000). It forces appellees to dedicate scarce space in their sole brief to matters not raised in the opening brief and likely not material to the court's ultimate decision. See, *e.g.*, *Crocker*, 49 F.3d at 740-41 (appellee is at a "procedural handicap" because it does not have a reply brief). Every word an appellee must spend on these ancillary issues is one word fewer to expound the issues actually before the appellate court.

These burdens will likely prove particularly acute in the Federal Circuit, which has exclusive jurisdiction over complex areas of law, including intellectual property, where a single case often has several—perhaps *dozens* of—independently dispositive legal issues. Thus, under the precedent set below, a company that successfully defends against a patent infringement case on obviousness grounds may be forced to brief on appeal claim construction, anticipation, patentability,

exhaustion, and non-infringement or risk forfeiture of those defenses. This rule is counterproductive for courts, places appellees at an unfair disadvantage, and is clearly unsound as a matter of appellate procedure.

It is also telling that the government *did not seek or defend* the Federal Circuit's waiver ruling. Instead, in response to Ford's request for rehearing, the government "assum[ed] such relief were appropriate" and contended the Federal Circuit should reject Ford's treatment and EUP arguments on the merits—based on factual assertions never considered by the CIT (and unsupported by the record on summary judgment). Opp'n to Pet. for Reh'g 16 (Fed. Cir. ECF No. 110).

Accordingly, Ford respectfully requests that the Court grant full review or summarily reverse on the second question presented.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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