

No. 19-1026

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IN THE  
**Supreme Court of the United States**

\_\_\_\_\_  
FORD MOTOR COMPANY,  
*Petitioner,*

v.

UNITED STATES,  
*Respondent.*

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

\_\_\_\_\_  
**BRIEF OF *AMICUS CURIAE*  
CUSTOMS AND INTERNATIONAL TRADE  
ASSOCIATION IN SUPPORT OF PETITION FOR  
WRIT OF CERTIORARI**

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**INTEREST OF *AMICUS CURIAE***<sup>1</sup>

The Customs and International Trade Bar Association (CITBA) was founded in 1917 and incorporated in 1926. Today, CITBA is an association of lawyers whose practices primarily involve international trade regulations and the judicial review of related agency decisions. CITBA's nearly 300 attorney members represent importers, international companies and customs brokers. CITBA, therefore, on behalf of its members, has a direct interest in the tariff classification of imported products.

CITBA agrees with Ford that *eo nomine* tariff classifications are to be applied to products in their condition at the time of importation without regard to subsequent modification or use. This was the Supreme Court's decision in *Worthington v. Robbins*, 139 U.S. 337 (1891) ("In order to produce uniformity in the imposition of duties, 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."); *See also United States v. Citroen*, 223 U.S. 407, 415 (1912); *Dwight v. Meritt*, 140 U.S. 213, 219 (1891).

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<sup>1</sup> Timely notice of intent to file this brief was provided and all parties have consented to its filing. Pursuant to Supreme Court Rule 37.6, no part of this brief was authored by counsel for any party, and no person or entity has made a monetary contribution to its preparation or submission other than the *amicus curiae*, its members, or its counsel. Additionally, while CITBA includes U.S. Government lawyers, government attorneys did not participate in the decision to file or in the preparation of this brief.

CITBA has an important interest in ensuring that the HTSUS is properly interpreted and administered by U.S. Customs and Border Protection (CBP or Customs) and the trade courts in a manner that promotes both predictability and business certainty. The *Ford* decision and similar decisions from the Federal Circuit have empowered CBP to consider post-importation use of a product when applying *eo nomine* provisions of the Harmonized Tariff Schedule of the United States (HTSUS), 19 U.S.C. § 1202, at the time of importation.

The Federal Circuit's opinion regarding evidence of "use" in making tariff decisions under *eo nomine* provisions is directly contrary to Supreme Court precedent including *Worthington*, 139 U.S. at 337 and has broad reaching and negative consequences for the importing community. Consequently, the issue of the proper interpretation and application of the tariff statute warrants review by the Supreme Court.

## INTRODUCTION

This Court has the opportunity to resolve a deeply concerning CBP practice: the post-importation examination of the use of an imported product to determine its classification. The appellate court's methodology in *Ford* conflates *eo nomine* and "use" classifications into a hybrid category that is facially inconsistent with the plain language of the statute and Supreme Court precedent including *Worthington*, 139 U.S. at 337 and *Citroen*, 223 U.S. at 407. While there have been several notable dissents by Federal Circuit judges regarding that

court's consideration of evidence of "use" in the application of *eo nomine* provisions, the Federal Circuit's slow erosion of Supreme Court precedent has continued unchecked. *See, e.g., GRK Canada, Ltd. v. United States*, 761 F.3d 1354 (Fed. Cir. 2014) (Judge Reyna dissenting); *Camelbak v. United States*, 649 F.3d 1361 (Fed. Cir. 2011) (Judge Bryson dissenting).

The *Ford Motor Company* decision is disturbing because it represents both a continuation and calcification of Federal Circuit case law that is contrary to the plain language of the HTSUS statute, 19 U.S.C. § 1202, and this court's precedent. The Heading at issue in this case facially demands a consideration of design characteristics. "Design," of necessity, occurs *pre-importation*. Thus, the statute does not suggest that CBP or the courts consider post-importation use.

Unfortunately, under the *Ford* and *GRK* line of cases, tariff classification is increasingly unmoored from both the plain language of the statute and precedent. Instead, CBP has been permitted to conduct an open-ended search for evidence of post-importation use. This Court should grant certiorari to correct this disturbing trend, which creates great uncertainty for importers, and require the agency to hew once again to the statutory language.

### **FACTUAL BACKGROUND**

Petitioner's brief explains the United States' historical imposition of a 25% tariff on "motor vehicles for the transport of goods," HTSUS Heading 8704. *See* Proclamation No. 3564, 28 Fed. Reg.

13,247 (Dec. 6, 1963). Unlike the high duty rate on cargo vehicles, there is a 2.5% tariff on vehicles “principally designed for the transport of persons.” Heading 8703, HTSUS. The Federal Circuit previously interpreted the difference between these two Headings in *Marubeni Am. Corp. v. United States*, 35 F.3d 530, 535 (Fed. Cir. 1994). It determined that design, as evidenced by physical characteristics, and not use, was the key element to vehicle classification.

Petitioner contests whether HTSUS Headings 8703 (passenger vehicles) or 8704 (cargo vehicles) applies to its Transit Connect vehicle, a small van that Ford manufactured in Turkey. Ford sells versions of the Transit Connect in both passenger and cargo configurations. Because of the higher tariff on cargo vehicles, Ford decided to design and import *all* Transit Connects as passenger vehicles and, after importation, convert some for cargo use. The practice of designing a product for tariff and import purposes is known as tariff engineering. At the time of importation, the Transit Connects were tariff engineered (*i.e.*, “designed”) to be passenger vehicles meeting all passenger car standards and tariff design criteria. These vehicles then went through post-importation processing at the Ports of importation.

Ford did not hide its intentions. Indeed, Ford publically discussed its tariff engineered design and the post-importation conversion process of the Transit Connect from a passenger vehicle to a cargo vehicle. 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).

In December 2011, CBP inspected post-importation and post-conversion Transit Connects at the Port. Thereafter, in 2013, CBP ruled that Transit Connects must be classified under Heading 8704 as cargo vehicles. *See* HQ H220856 (Jan. 30, 2013). Ford protested the ruling, and after the protest was denied, challenged the classification in the U.S. Court of International Trade (CIT). The lower court found in Ford’s favor, but the Federal Circuit reversed that decision.

### SUMMARY OF ARGUMENT

This Court should grant Ford’s petition for certiorari because it is contrary to over 100 years of Supreme Court precedent, other Federal Circuit decisions and the plain terms of the statute. There are several reasons that the Federal Circuit’s decision in *Ford* warrants consideration and correction by the Court.

First, the Federal Circuit misinterpreted the statute (*i.e.*, the HTSUS). The HTSUS contains two types of tariff classification statutory provisions—*eo nomine* and “use”—which have been interpreted as two distinct categories by the Supreme Court and Federal Circuit for over 100 years.

*Eo nomine* provisions describe a product by name, not by use. For example HTSUS Heading 7101 provides for “pearls,” and if a product is a “pearl” at the time of importation, then it is classified under Heading 7101 regardless of how it is used after importation. *See Citroen*, 223 U.S. 407 (1912).

“Use” provisions are divided into two sub-categories: “actual use” and “principal use” provisions. Under “actual use” provisions imported goods are classified according to the actual use to which the good is put in the United States if the use is intended at the time of importation, the goods are so used, and proof of actual use is furnished within 3 years after the date the goods are entered. *Aromont USA Inc. v. United States*, 671 F.3d 1310, 1363; 19 C.F.R. §§ 10.131-10.139; HTSUS, Additional U.S. Rule of Interpretation (ARI) 1(b). “Principal use” provisions require that the good be classified thereunder if the good is of the same class or kind of merchandise for which the most common use in the United States is identified in the Heading at the time of importation. ARI 1(c).

The Federal Circuit, CIT and CBP all agreed that the statutory provision at issue, Heading 8703 (“motor cars and other motor vehicles principally designed for the transport of persons”) is an *eo nomine* provision and not a “use” provision. However, the Federal Circuit interpreted Heading 8703 to “suggest” a use.

The court in *Ford* stated:

We conclude this appeal presents one of the very limited circumstances where the relevant heading, HTSUS Heading 8703, is an *eo nomine* provision for which consideration of use is appropriate because HTSUS Heading 8703 inherently suggests looking to intended use. *See Kahrs*, 713 F.3d at 646 (“Generally, we should not read a use

limitation into an *eo nomine* provision unless the name itself inherently suggests a type of use.”)

Now, must Customs look for evidence that an *eo nomine* “butter knife” of Heading 8215 was used after importation to spread butter, but not to cut a piece of bread? After all, the language of the Heading seems to “inherently suggest[] a type of use.” What if there is evidence that a cake-server of Heading 8215 is commonly used to serve pie despite a clear common and commercial meaning of the term? The Federal Circuit’s construction of an *eo nomine* provision to allow consideration of “use” has introduced uncertainty and unpredictability into the import process, and has improperly encouraged Customs to engage in post-importation fact-gathering or, more worrying, speculation as to use as part of the cargo clearance process.

The second major issue with the decision below – and the Federal Circuit decisions it extends – is that it misapplies Supreme Court precedent: *Worthington v. Robbins*, 139 U.S. 337 (1891) (“In order to produce uniformity in the imposition of duties, 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.”) and *United States v. Citroen*, 223 U.S. 407 (1912) (“The statute has furnished the test, and we are not at liberty to make another.”).

Until the Federal Circuit began to disregard it, this precedent provided certainty to the entire trade community. It also ensured uniformity in how CBP classifies products and assesses tariffs, because it

requires an examination of the article itself at the time of importation, rather than speculation about future use of the product.

Finally, the legal questions presented by the petition have important practical consequences. There are dozens of *eo nomine* tariff provisions that are impacted by the Federal Circuit's failure to follow statutory requirements and Supreme Court precedent. If CBP is free to change the classification and tariff rates on imported products based on post-importation use, this will result in uncertainty and inconsistency and create significant economic harm for importers and consumers. By granting certiorari and holding that post-importation "use" may not be considered when applying the HTSUS's *eo nomine* provisions, this Court will end the Federal Circuit's troubling practice of disregarding the plain language of the statute and restore certainty and uniformity to the tariff classification regime.

## ARGUMENT

### I. THIS COURT SHOULD GRANT CERTIORARI TO CORRECT THE FEDERAL CIRCUIT'S MISAPPLICATION OF *WORTHINGTON V. ROBBINS*, AND *UNITED STATES V. CITROEN*.

CITBA urges the Court to grant certiorari to resolve the Federal Circuit's increasing flight from well-settled and longstanding Supreme Court precedent. Sometimes the words of the HTSUS statute have a plain and straightforward meaning (*e.g.*, Heading 9606, addressing "acrylic buttons"). In other cases, the Heading in the HTSUS must be interpreted (*e.g.*, "food preparations" as used in

Heading 1601). The question of what the article is or, in this case, what it is designed to be at the time of importation, has been resolved by Supreme Court precedent that has stood for over 100 years. *See Worthington*, 139 U.S. 337 (1891); *Citroen*, 223 U.S. 407 (1912).

In *Worthington*, Customs argued that imported enamel was classifiable as “watch materials,” because the product at issue was imported for use in making watch dials and was in fact so used. 139 U.S. at 338-39. The Supreme Court rejected that argument, holding that “in order to produce uniformity in the imposition of duties, the dutiable classification of articles imported must be ascertained by examination of the imported article itself in the condition in which it was imported,” not on “what afterwards the importer did with it.” *Id.* at 341. As imported, the product could be “used for various purposes.” *Id.* at 338. Therefore, this Court held that it could not be classified as “watch materials.” *Id.*

*Citroen* similarly followed the well-established condition-as-imported rule. *See* 223 U.S. 407 (1912). In *Citroen* a set of pearls had been strung in Europe as a necklace. Prior to arrival in the United States, the pearls were unstrung *solely to obtain a lower tariff* with the full intention of the importer to restring the pearls into a necklace after importation. *Citroen* 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, or tariff engineered. After importation, the pearls in

*Citroen* were in fact restrung. *Id.* at 414-15. But this Court held that the pearls must be classified as “[p]earls ... not set or strung,” rather than “jewelry, and parts thereof.” *Citroen* set the standard for classification, identifying the relevant question for Customs as: “Does the article, as imported, fall within the description sought to be applied,” 223 U.S. at 415. This is necessary to provide the public with a “simple and workable” system that ensures “uniformity in the imposition of duties.” *Id.* at 414-15.

The decision below, classifying some of Ford’s Transit Connect vans as cargo vans rather than passenger vans based on their intended use, is inconsistent with both of those precedents — as well as prior Federal Circuit decisions.

The Federal Circuit first identified what physical characteristics a motor vehicle must possess at the time of importation to be classified under the *eo nomine* provision Heading 8703 in *Marubeni Am. Corp.*, 35 F.3d at 532. In *Marubeni* the Federal Circuit properly construed Heading 8703 as an *eo nomine* provision requiring an examination of the article in its condition as imported, consistent with the statutory terms and Supreme Court precedent. Relying on *Marubeni*, Ford’s Transit Connect was imported as a passenger vehicle, with the characteristics of a passenger vehicle including rear seats, rear seat belts, rear windows, and foot wells.

While Ford intended to convert, and did convert, the Transit Connect passenger vans into cargo vans after importation, that conversion had “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 Federal Circuit’s recent *Ford* decision improperly elevates evidence of post-importation use and ignores the undisputed fact that at the time of importation the cars were passenger vehicles, contrary to the plain terms of the statute and this Court’s decisions in *Citroen* and *Worthington*. The Federal Circuit has thereby continued to slowly erode precedent, including its own precedent, without explicitly overturning or challenging the holdings.

The *Ford* decision cannot be reconciled with this Court’s precedent in *Worthington* and *Citroen*. As a result of that decision, an importer may now enter two products that have identical physical characteristics, but are classified under different tariff provisions and subject to different tariff rates due to differing evidence or assumptions concerning end use. This dramatically undermines the certainty and uniformity that this Court has on multiple occasions held that the tariff statute provides. A grant of certiorari is needed to return to an application of the statutory text that complies with this Court’s precedents, as well as the Federal Circuit’s own past precedent respecting the difference between *eo nomine* and “use” tariff provisions.

## II. FORD'S PETITION PRESENTS A QUESTION OF EXCEPTIONAL IMPORTANCE TO THE IMPORTING PUBLIC.

The issue presented here — whether the courts, and by extension CBP—may examine the post-importation use of a product when interpreting and applying an *eo nomine* HTSUS statutory provision is of exceptional importance. It is critical to the integrity of our legal system that statutes are not interpreted and applied so as to give more discretion to federal agencies than was not intended by Congress and has not been sanctioned by this Court. How tariffs are applied has become an increasingly important economic issue with the expansion of global trade and imposition of additional tariffs. For this reason, it is of even greater importance now than when this Court confronted the issue in *Worthington* and *Citroen* that tariffs be applied in a uniform fashion and that business and consumers are afforded certainty.

The Federal Circuit's approach is completely untethered from the statutory rules on how evidence of use is to be presented or weighed when classifying imported articles. Under the HTSUS, the only instance in which CBP may consider the actual use of an article after importation is if the tariff provision is an "actual use" provision – and even there the consideration of use is limited. *See* U.S. Additional Rules of Interpretation (use provisions only look at principal use of class or kind to which imported article belong). Actual use provisions are rare and require importers to file post importation

certifications of use. 19 C.F.R. §§ 10.131-10.139. *Eo nomine* provisions, in contrast, historically were not subject to a use analysis.

In *Ford*, however, the Federal Circuit gave tremendous weight to post-importation use, and did so without identifying or providing an explanation of the use standard it was applying. This leaves importers and Customs without a clear path for classifying their imports. Also concerning is that importers operating in this uncertain environment and who make an incorrect assessment of the classification of their goods are subject to civil monetary penalties under 19 U.S.C. § 1592 and other potential enforcement actions. This has created a situation in which the importing public does not know when a classification of a given article requires an examination of a specific or actual use.

There are a great many statutory *eo nomine* Headings containing the word “design” where if *Ford* is not overturned “use” may become a consideration in tariff classification. See *Sullivan v. Stroop*, 496 U.S. 478, 484-85 (1990); see also *United Sav. Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) (statutory interpretation requires that the same or similar terms in a statute be interpreted the same way). The following are examples of such statutory Headings that are potentially affected by the *Ford* decision:

3006.30 Opacifying preparations for X-ray examinations; diagnostic reagents designed to be administered to the patient:

- Are the preparations actually administered to the patient?

4012.19.20 [Certain Tires] Designed for tractors provided for in subheading 8701.90.10 or for agricultural or horticultural machinery or implements provided for in chapter 84 or in subheading 8716.80.10

- Are the tires used on agricultural or horticultural machinery?

4202.92.94 Cases designed to protect and transport compact disks (CD's), CD Rom disks, CD players, cassette players, and/or cassettes

- Are the cases actually used to protect and transport compact disks?

4415.20.40 Containers designed for use in the harvesting of fruits and vegetables

- Are the containers used to harvest vegetables?

6108.22.10 Disposable briefs and panties designed for one-time use.

- Are the briefs or panties actually used only one time?

6116.10.08 Other gloves, mittens and mitts, all the foregoing specially designed for use in sports, including ski and snowmobile gloves, mittens and mitts

- Are the gloves used in sports?

6402.91.10 Footwear designed to be worn over, or in lieu of, other footwear as a protection against water, oil, grease or chemicals or cold or inclement weather

- Is the footwear actually worn over or in lieu of other footwear?

7117.19.30 Religious articles of a purely devotional character designed to be worn on apparel or carried on or about or attached to the person

- Are the religious articles actually worn on apparel or carried about on a person?

This non-exhaustive list shows the breadth of HTSUS classifications potentially affected by the Federal Circuit’s decision construing an *eo nomine* provision referencing “design” to allow inquiry into the actual use of the item.

If CBP is permitted to examine the post-importation use of articles imported under the *eo nomine* provision to determine how those articles should be classified, then CBP may unilaterally and unexpectedly change the classifications and tariff rates applied to those products—eliminating the uniformity and certainty historically required by the tariff statutes and by this Court. This lack of uniformity and certainty will have a significantly adverse economic impact on the importing community. This Court should grant certiorari to review the far reaching legal and practical effects of the Federal Circuit’s decision in this case.

**CONCLUSION**

For the foregoing reasons, and those stated by Petitioner, the Court should grant the Petition.

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March 19, 2020