No. 19-1026

In the Supreme Court of the United States

FORD MOTOR COMPANY, 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

This case concerns the appropriate tariff classification of the Transit Connect 6/7, a van manufactured and imported by petitioner. Petitioner designed, marketed, sold, and delivered the van to consumers exclusively as a two-person cargo van. But to avoid the higher rate of duty that applies to cargo vans as compared to vans principally designed for passenger transport, petitioner imported each Transit Connect 6/7 with a temporary, cheap rear seat that was designed to be immediately removed as soon as the van cleared U.S. Customs and Border Protection (Customs). The question presented is as follows:

Whether Customs correctly classified the Transit Connect 6/7 as a "[m]otor vehicle[] for the transport of goods" under Heading 8704 of the Harmonized Tariff Schedule of the United States (HTSUS), rather than as a "motor vehicle[] principally designed for the transport of persons" under HTSUS Heading 8703.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 926 F.3d 741. The opinion of the United States Court of International Trade (Pet. App. 33a-100a) is reported at 254 F. Supp. 3d 1297.

JURISDICTION

The judgment of the court of appeals was entered on June 7, 2019. A petition for rehearing was denied on October 16, 2019 (Pet. 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, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. When goods are imported into this country, the United States levies duties according to the rates set by

the Harmonized Tariff Schedule of the United States (HTSUS). See 19 U.S.C. 1202. Each of the HTSUS's classification headings denotes a "general categor[y] of merchandise." *Orlando Food Corp.* v. *United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998). Subheadings within each heading "provide a more particularized segregation of the goods within each category." *Ibid.* The terms of each heading and subheading "are to be construed according to their common and commercial meanings, which are presumed to be the same." *Well Luck Co.* v. *United States*, 887 F.3d 1106, 1111 (Fed. Cir. 2018), cert. denied, 139 S. Ct. 1290 (2019).

The HTSUS contains three types of headings: *eo nomine*, principal-use, and actual-use. Duties under principal-use and actual-use headings are always assessed by reference to how imported articles are used. See Pet. App. 10a-11a. By contrast, an *eo nomine* heading "describes an article by a specific name." *Id.* at 12a (quoting *CamelBak Prods., LLC* v. *United States*, 649 F.3d 1361, 1364 (Fed. Cir. 2011)). For example, the HTSUS heading for "backpacks" is an *eo nomine* heading. See *CamelBak Products*, 649 F.3d at 1367. Such headings generally include "all forms of the named article" without reference to how those articles are used, unless "'the name itself inherently suggests a type of use.'" Pet. App. 12a-13a (quoting *Carl Zeiss, Inc.* v. *United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999)).

Congress has authorized U.S. Customs and Border Protection (Customs) to "fix the final classification and rate of duty applicable" to particular imported merchandise. 19 U.S.C. 1500(b). All imported goods must be declared at the border and made available for inspection by Customs officials. By congressional design,

however, Customs does not itself inspect or classify the overwhelming majority of such entries.

Instead, under the North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057, responsibility for classifying imported goods rests in the first instance with the importer of record. That importer must, "using reasonable care," "fil[e] with the Customs Service the declared value, classification and rate of duty applicable to the merchandise," along with information necessary to enable Customs to assess the applicable rate of duty. 19 U.S.C. 1484(a)(1)(B); 19 C.F.R. 141.90(b). In reliance on those representations, "Customs port directors may liquidate the goods as declared, without inspecting the goods or otherwise independently determining the proper duty to be paid." *Motorola, Inc.* v. *United States*, 436 F.3d 1357, 1362 (Fed. Cir. 2006). Entries liquidated in this manner are referred to as "bypass" entries. *Id.* at 1363.

An importer that is uncertain about how its merchandise should be classified may request a ruling letter from Customs Headquarters. 19 C.F.R. 177.1(c). Such a ruling "represents the official position of the Customs Service with respect to the particular transaction or issue described therein and is binding on all Customs Service personnel." 19 C.F.R. 177.9(a); see *United States* v. *Mead Corp.*, 533 U.S. 218, 222 (2001). Additionally, each Customs field office can request internal advice from Customs Headquarters, 19 C.F.R. 177.11, and Customs Headquarters may issue sua sponte rulings with respect to any issue "brought to its attention," 19 C.F.R. 177.8(b). Absent an applicable ruling, Customs officers classify entries "in accordance with the principles and precedents previously announced by the Headquarters Office." 19 C.F.R. 177.1(a)(2)(i).

2. a. This case involves two HTSUS headings that establish significantly different rates of duty for distinct categories of motor vehicles. Under Heading 8703, "vehicles principally designed for the transport of persons" are subject to a 2.5% *ad valorem* duty. HTSUS Ch. 87, Subch. XVII. Under Heading 8704, "vehicles for the transport of goods" are subject to a 25% *ad valorem* duty. *Ibid.*

This disparity is the result of a trade war between the United States and the European Economic Community in the 1960s. See Pet. App. 35a. When the European countries placed tariffs on chicken imported from the United States, the United States retaliated with a 25% tariff on, among other things, cargo vehicles imported from Europe. *Id.* at 35a-36a. The tariff on imported cargo vehicles is known colloquially as the "chicken tax." *Id.* at 36a (citation omitted).

The Federal Circuit distinguished Headings 8703 and 8704 in *Marubeni America Corp.* v. *United States*, 35 F.3d 530 (1994). The court explained that, in order for Heading 8703 to apply, "the vehicle must be designed 'more' for the transport of persons than goods"; that is, the "vehicle's intended purpose of transporting persons must outweigh an intended purpose of transporting goods." *Id.* at 534-535. A vehicle that is equally capable of transporting both people and goods therefore is appropriately classified under Heading 8704. *Id.* at 534.

b. Petitioner imports vehicles into the United States. As relevant here, on December 26, 2011, petitioner sought to import a single entry containing Transit Connect 6/7 vans at the Port of Baltimore. Pet. App. 2a. The Transit Connect 6/7 was built based on a line of small commercial vans that petitioner designed

for the European market and manufactured overseas. *Ibid.*

Before releasing the Transit Connect line commercially, petitioner displayed various configurations of the van at auto shows and press events across the United States. Pet. App. 43a-44a. That market research revealed that the Transit Connect "appears to have little appeal to personal use customers." C.A. App. 4751. Consumers instead preferred a vehicle that was "stylish as well as functional," and that could seat "five * * * with the capability for seven or eight." *Ibid.* They also desired comfort features such as rear airbags, rear heating and cooling vents, adequate legroom, and comfortable seats. *Ibid.* Petitioner therefore concluded that the Transit Connect line's "industrial design and austere interior are keys to rejection. Nevertheless, it continues to resonate as a viable commercial vehicle." *Ibid.*

Consistent with that research, petitioner decided to manufacture two models of the Transit Connect: the Transit Connect 9 and the Transit Connect 6/7. Pet. App. 45a & n.18.[1] The Transit Connect 9s featured, among other things, permanent side windows and a permanent rear seat for three passengers. *E.g.*, C.A. App. 2748. Customs liquidated those vans under Heading 8703, Pet. App. 41a n.13, and their classification is not at issue in this case.

Petitioner's design of the Transit Connect 6/7 differed in key respects. Of particular note, petitioner

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[1] The numbers 6, 7, and 9 refer to the sixth digit of the model's Vehicle Identification Number (VIN), which each vehicle receives at the time of manufacturing and retains for its life. C.A. App. 5540, 5555. The VIN is a unique serial number used by the automotive industry to identify vehicles. See generally 49 C.F.R. Pt. 565.

marketed the Transit Connect 6/7 to consumers exclusively as a two-person *cargo van*, as illustrated by petitioner's order guide and product sourcebook. Pet. App. 28a-29a; see C.A. App. 2792-2829. All Transit Connect 6/7 vans were "offered, ordered, [and] considered sold to consumers without" any rear seating for passengers. Pet. App. 55a n.31 (citation omitted; brackets in original). Each van was built to order. *Id.* at 3a.

Petitioner sought to import the Transit Connect 6/7s as passenger vans, however, in order to avoid paying the higher duty that applies to cargo vans under Heading 8704. Pet. App. 6a-7a. Before the Transit Connect 6/7s arrived in the United States, petitioner added to each vehicle a cheap, discardable two-person rear seat. Petitioner did not intend that consumers who purchased Transit Connect 6/7 vans would ever use that rear seat or even know that it existed. Rather, petitioner instructed its domestic port-processing contractor that, as soon as the Transit Connect 6/7 vans cleared Customs, and before they left the port of entry, the contractor should immediately alter each van so that the configuration matched the cargo-van configuration that consumers had ordered. *Id.* at 6a. The contractor accomplished that task by removing the temporary rear seat and its associated safety restraints. *Ibid.* Then, to create a flat surface (which would better accommodate cargo) behind the first row of seats, the contractor bolted a steel panel over both the rear passenger footwells and the anchor points for the rear passenger seatbelts, and installed the van's floor covering. *Ibid.*[2]

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[2] For some (but not all) Transit Connect 6/7 vans, the contractor also replaced some combination of the side and rear windows with solid panels. Pet. App. 6a.

Even before that modification procedure, at the moment the Transit Connect 6/7s were imported, the physical features of the vans' temporary rear seat confirmed that the seat was intended to be removed. When petitioner first imported these vans, it used a rear seat with a design similar to the rear seat that is permanently installed on the Transit Connect 9. Pet. App. 5a. Petitioner recognized, however, that the temporary seat on the Transit Connect 6/7s—which some employees called the "chicken tax" seat, *e.g.*, C.A. App. 2869, 5553—would "be scrapped in [the] US [and] will not be used anytime." Pet. App. 25a (email from member of petitioner's engineering team).

Petitioner therefore took a series of steps to reduce that seat's cost. Pet. App. 5a. Petitioner first began to import the Transit Connect 6/7s with a "cost-reduced seat" version 1, the "CRSV-1," that eliminated several features of the rear seat designed for durability, safety, and the comfort of passengers. *Ibid.* (citation and internal quotation marks omitted). Petitioner thereafter "created its second cost-reduced seat," the "CRSV-2," that eliminated even more features. See *id.* at 5a-6a. The result was that petitioner imported the Transit Connect 6/7s with a rear seat that: lacked head restraints or backrest reinforcement pads; lacked four of the seven seatback wires used to provide lumbar support to passengers; lacked the mechanisms used to fold the seat forward; and lacked a rubber pad designed to decrease noise and vibration from around the rear-floor latches. *Ibid.* The temporary seat was upholstered with cost-reduced fabric that did not match that of the front seats, and its visible metal portions were not painted. *Ibid.*

Other features of the Transit Connect 6/7s confirmed petitioner's expectation that the vehicle would be used as a cargo van. The van did not possess a finished interior but instead had a painted metal floor. Pet. App. 24a; see C.A. App. 5553. The van also lacked a cargo mat, side airbags behind the front seats, rear speakers, rear hand-holds, and rear air vents. Pet. App. 24a. The record includes pictures of the Transit Connect 6/7s in the condition in which petitioner imported them:

C.A. App. 2926, 2929.

c. Petitioner did not seek a ruling letter from Customs before importing the Transit Connect 6/7 vans into the United States. C.A. App. 5548. Instead, petitioner self-certified in its entry papers that the vans were classifiable under Heading 8703 because they were "principally designed for the transport of persons." Pet. App. 58a, 64a-65a. Relying on those self-certifications, Customs liquidated several hundred entries of Transit Connect vehicles under Heading 8703 between March 2010 and November 2012. *Id.* at 58a. The vast majority of those entries were bypass entries that were liquidated without review by any Customs officer. *Ibid.* The remaining 31 entries were reviewed by Customs personnel on the basis of petitioner's documentation, but the vehicles in those entries were not physically inspected. *Ibid.* Petitioner's documentation did not inform Customs about the alterations that it made to the vans immediately after Customs inspection. See C.A. App. 4886.

Customs import specialists at the Port of Baltimore uncovered petitioner's scheme in the course of a routine training exercise in late 2011 or early 2012. The exercise included an entry of Transit Connect 6/7 vans. After physically examining the vans, the import specialists believed that the vans were being misclassified under Heading 8703. See Pet. App. 59a.

In February 2012, the Port of Baltimore notified petitioner that Customs had "initiated an investigation into Ford Motor Company importations" related to the "declaration of vehicles classified under the [HTSUS] headings 8704 and 8703." Pet. App. 60a (citations omitted). In the ensuing investigation, all Transit Connect 6/7s "were consistently discovered to be 2-passenger cargo vans while [all Transit Connect 9s] were identified as 5-passenger vehicles." *Ibid.* (citations omitted). The investigation also revealed that, at the time of importation, each Transit Connect 6/7 vehicle contained a rear seat that was removed immediately after Customs released the vehicle. *Id.* at 60a-61a. In June 2012, the Baltimore Field Office formally requested internal advice from Customs Headquarters concerning the proper classification of the Transit Connect 6/7. *Id.* at 61a.

d. On January 30, 2013, Customs issued Ruling HQ H220856, C.A. App. 5623-5635, which classified the Transit Connect 6/7 as a "vehicle[] for the transport of goods" under Heading 8704, *id.* at 5635. Customs found that, although the van bore some features typically associated with vehicles principally designed for the transport of passengers, its overall design overwhelmingly suggested that the Transit Connect 6/7 is a cargo van. *Id.* at 5627-5629. Customs also noted that petitioner had marketed the vehicle exclusively as a cargo van; that consumers viewed the vehicle exclusively as a

cargo van; and that petitioner had identified the Transit Connect 6/7 as a cargo van to its contractors. *Id.* at 5629-5630.

Customs further found that, to create the impression that the Transit Connect 6/7 was designed to accommodate passengers, petitioner had equipped each van with a cheaply designed and easily removable rear seat. C.A. App. 5628. Customs explained, however, that the cost-reduced seat was an evident attempt to disguise the van's true design and purpose. *Id.* at 5634. Accordingly, in May 2013, Customs liquidated the December 16, 2011, entry at issue by classifying the Transit Connect 6/7 vans in that entry as vehicles for the transport of goods subject to the 25% *ad valorem* rate of duty specified in Heading 8704. Pet. App. 7a.

3. After petitioner's protest of its Customs liquidation was denied, petitioner brought this suit against the United States in the United States Court of International Trade (CIT). The court entered summary judgment in petitioner's favor. The court concluded that the Transit Connect 6/7's rear seat, although temporary and designed to be immediately removed, suggested that the van was principally designed as a passenger vehicle. Pet. App. 33a-100a.

4. The court of appeals reversed. Pet. App. 1a-32a. The court concluded that, "[a]lthough HTSUS Heading 8703 is an *eo nomine* provision, the 'principally designed for' portion inherently suggests a type of use, i.e., 'the transport of persons.'" *Id.* at 13a (citation omitted). The court then applied its longstanding test for determining whether a vehicle is principally designed for passengers. That inquiry considers not only the vehicle's "'structural and auxiliary design features,'" but also "relevant" "use considerations" such as the vehicle's

"'marketing,'" "'engineering design goals,'" and "'consumer demands.'" *Id.* at 20a (quoting *Marubeni*, 35 F.3d at 535-537).

The court of appeals concluded that, even considering the Transit Connect 6/7 as it was configured at the moment of importation, when it contained a discardable rear seat, the vehicle was principally designed for the transport of cargo rather than passengers. Pet. App. 21a-31a. The court found that, while the Transit Connect 6/7 had some structural features associated with passenger vehicles, the van's "auxiliary design features * * * compel the conclusion" that it "is designed to transport cargo." *Id.* at 26a. The court discussed the many features of the Transit Connect 6/7, including features of the temporary rear seat, that supported that conclusion. See *id.* at 23a-26a. The court explained that, even if the Transit Connect 6/7 was "*capable* of" transporting passengers in the condition in which it was imported, the combination of all the van's features showed that it was not "*principally designed* for" transporting persons, as Heading 8703 requires. *Id.* at 25a-26a (citation omitted). The court of appeals also reviewed "relevant use considerations" such as marketing materials, consumer expectations, and manner of use. *Id.* at 27a-29a. The court found that those considerations likewise "strongly disfavor" classifying the Transit Connect 6/7 as a vehicle principally designed for passengers. *Id.* at 27a.

The government had argued, in the alternative, that the temporary seat should be ignored in the classification analysis because that seat was a "disguise or artifice" meant to make the Transit Connect 6/7 appear as if it had been designed principally for the transport of persons. Pet. App. 29a n.11 (citation omitted); see

United States v. *Citroen*, 223 U.S. 407, 415 (1912) (explaining that an importer cannot escape a prescribed rate of duty "by resort to disguise or artifice"). Because the court of appeals held that the Transit Connect 6/7 could not be classified under Heading 8703 even if the temporary rear seat was taken into account, the court reversed the CIT's judgment without addressing that argument. See Pet. App. 29a n.11.

ARGUMENT

Petitioner seeks review (Pet. 12-30) of the court of appeals' straightforward and fact-intensive determination that the Transit Connect 6/7 van was not a "vehicle[] principally designed for the transport of persons" under HTSUS Heading 8703. The decision below is correct and does not conflict with any decision of this Court or of the Federal Circuit. Petitioner further contends (Pet. 30-33) that the court of appeals should have permitted it to raise certain arguments on remand. Those arguments lack merit for the reasons the government explained on appeal and in the CIT, and they do not justify petitioner's request for the extraordinary remedy of summary reversal. Further review is not warranted.

1. The court of appeals correctly held that the Transit Connect 6/7 is not a vehicle "principally designed for the transport of persons" under Heading 8703, and is instead properly classified as a vehicle "for the transport of goods" under Heading 8704. To reach that conclusion, the court applied the well-settled framework from *Marubeni America Corp.* v. *United States*, 35 F.3d 530 (Fed. Cir. 1994). That framework involves consideration of (1) the vehicle's structural design features, (2) the vehicle's auxiliary design features, and (3) certain other considerations, such as the vehi-

cle's "marketing and engineering design goals (consumer demands, off the line parts availability, etc.)." *Id.* at 535-536.

The court below thoroughly analyzed all the relevant features that the Transit Connect 6/7 possessed at the time it was imported. While acknowledging that some of the Transit Connect 6/7's structural design features were consistent with passenger use, Pet. App. 21a-23a, the court explained why the van's "auxiliary design features * * * compel the conclusion that" the Transit Connect 6/7 is a cargo van, *id.* at 26a. The court observed that the van's rear area had an unfinished metal floor and lacked amenities that passengers would demand, such as airbags behind the front seats, rear speakers, rear hand-holds, and rear vents. *Id.* at 24a.

The court of appeals also considered the "sham rear seats" that petitioner had installed in each Transit Connect 6/7, and it found that those seats were not actually intended to transport passengers. Pet. App. 25a. The court explained how petitioner's "cost-reduced" rear seat lacked passenger-centric features such as headrests, comfort wires for lumbar support, or upholstery that matched the rest of the van. *Id.* at 24a-25a (citation omitted). That seat was also designed in such a way that it could be permanently removed in less than a minute and then discarded. *Id.* at 26a. Petitioner made those design decisions because, as a member of its own engineering team explained, the "seats will be scrapped in [the] U[nited] S[tates and] will not be used anytime." *Id.* at 25a (quoting C.A. App. 5941-5942) (brackets in original). The court thus concluded, based on the physical features that the Transit Connect 6/7 possessed at

the time of importation, that the van could not be classified as a vehicle *principally* designed for transporting passengers.

The court of appeals further found that "relevant use considerations" buttressed that straightforward conclusion. Pet. App. 27a. The court noted that petitioner's market research had confirmed that the Transit Connect line of vehicles has "little appeal as a personal use vehicle—its industrial design and austere interior are keys to rejection." *Id.* at 28a (quoting C.A. App. 4751). For that reason, petitioner advertised the vehicle to consumers exclusively as a two-person cargo van. *Id.* at 28a-29a. Each custom-made van was delivered to consumers as a two-person cargo van. *Id.* at 28a. And each van was in fact used by consumers as a two-person cargo van. *Id.* at 28a-29a. The court correctly concluded that this uncontested evidence, combined with the van's physical features, "weighs heavily against classif[ying]" the Transit Connect 6/7 as a vehicle principally designed for passengers. *Id.* at 29a.

2. Petitioner argues (Pet. 13-22) that, in deciding whether a vehicle is "principally designed for the transport of persons" under Heading 8703, courts cannot consider how that vehicle is marketed, sold, and used. But the court of appeals' examination of relevant use considerations in this case was entirely proper.

a. "HTSUS terms are to be construed according to their common and commercial meanings." Pet. App. 10a (quoting *Well Luck Co.* v. *United States*, 887 F.3d 1106, 1111 (Fed. Cir. 2018), cert. denied, 139 S. Ct. 1290 (2019)). "To discern the common meaning of a tariff term," courts may "consult dictionaries, scientific authorities, and other reliable information sources." *Ibid.*

(quoting *Kahrs Int'l, Inc.* v. *United States*, 713 F.3d 640, 644 (Fed. Cir. 2013)).

The plain text of Heading 8703 makes clear that a vehicle's classification turns on its expected and intended use. Headings 8703 and 8704 both make classification dependent on what a vehicle is "designed for." A vehicle does not come within Heading 8703 simply because it is *capable* of conveying passengers; rather, the vehicle must be "principally designed for the transport of persons."

As the Federal Circuit explained decades ago, the term "designed" means "done by design or purposefully [as] opposed to accidental or inadvertent; intended, planned," *Marubeni*, 35 F.3d at 534 (citation omitted); and the term "principally" means "in the chief place, chiefly," *ibid.* (citation omitted). A vehicle falls within Heading 8703 only if it is intended for use in transporting persons, and that "intended purpose * * * must outweigh an intended purpose of transporting goods." *Id.* at 535. The Heading 8703 inquiry is therefore "intertwined with" the determination "whether a[] * * * vehicle is chiefly intended to be used to transport persons." Pet. App. 14a.

Petitioner makes no effort to reconcile its position with the text of Heading 8703. Petitioner argues (Pet. 17-18) that, because the court of appeals held that Heading 8703 is an *eo nomine* heading, consideration of a vehicle's use is prohibited as a matter of law. But petitioner identifies no authority supporting that conclusion. And the Federal Circuit has repeatedly held that, in certain circumstances, consideration of the use for which a good was designed is appropriate even in the *eo nomine* context. *E.g.*, *GRK Canada, Ltd.* v. *United States*, 761 F.3d 1354, 1359 (Fed. Cir. 2014), petition for

reh'g en banc denied, 773 F.3d 1282 (2014); *CamelBak Prods., LLC* v. *United States*, 649 F.3d 1361, 1368-1369 (Fed. Cir. 2011); *Len-Ron Mfg. Co.* v. *United States*, 334 F.3d 1304, 1313-1314 (Fed. Cir. 2003); cf. *United States* v. *Quon Quon Co.*, 46 C.C.P.A. 70, 73 (C.C.P.A. 1959) ("[U]se cannot be ignored in determining whether an article falls within an eo nomine tariff provision" set forth in the predecessor to the HTSUS).

b. Petitioner argues (Pet. 13-17) that consideration of a product's use is inconsistent with the principle that an imported article must be classified according to the condition in which it is imported. See, *e.g.*, *Worthington* v. *Robbins*, 139 U.S. 337, 341 (1891). But the court of appeals' holding "does not controvert this rule." Pet. App. 17a. As discussed above, the court assessed the condition of petitioner's vehicles *at importation*, including by taking account of the discardable rear seat. The court simply found that, taking into consideration all the features of the Transit Connect 6/7, the vehicles were cargo vans and were not principally designed for passengers.

Contrary to petitioner's contention (Pet. 20-21) the fact that the court of appeals viewed Heading 8703 as an *eo nomine* heading (see Pet. App. 11a-13a) does not show that the court's classification analysis in this case violated the condition-as-imported principle. The condition-as-imported principle does not depend on whether a HTSUS heading is *eo nomine*, principal-use, or actual-use. Indeed, the HTSUS contains many principal- and actual-use headings for which consideration of evidence of use is not only permissible but mandatory. At oral argument in the court of appeals, petitioner acknowledged that a court could consider evi-

dence of a vehicle's use if Heading 8703 were a principal- or actual-use heading. *Id.* at 18a. Petitioner does not explain why consideration of that same evidence would be inappropriate when an *eo nomine* heading classifies imported goods based on their intended use.

The authorities that petitioner cites (Pet. 14-15 & n.1) do not support its argument. Indeed, *United States* v. *Citroen*, 223 U.S. 407 (1912), significantly undermines petitioner's position. *Citroen* involved the classification of pearls, which at the time were subject to two mutually exclusive tariff provisions, under which "[p]earls in their natural state, not strung or set" were subject to a lower duty than "pearls set or strung." *Id.* at 413 (citation omitted). At issue was a set of pearls that had arrived at the border unstrung, which Customs classified as "pearls set or strung" because the pearls had been strung before importation and would be restrung thereafter. *Id.* at 413-414 (citation omitted). This Court recognized that Customs' classification would have been correct if the relevant provision had been phrased in terms of the pearls' intended or potential uses, such as "pearls that can be strung" or "pearls * * * that are assorted or matched so as to be suitable for a necklace." *Id.* at 415. But the provision at issue instead referred to pearls that are "set or strung" when imported. *Id.* at 416.

Petitioner's reliance on *Citroen* would be well-founded if HTSUS 8703 referred specifically to vans or vehicles "with front and rear seats." The Transit Connect 6/7 vans had front and rear seats when they were imported, even though the rear seats were designed and intended to be removed immediately after importation. But the vans were not "principally designed for the transport of persons," at the time of importation or at

any other time. Heading 8703 is thus akin to the hypothetical tariff headings for which this Court in *Citroen* explained that consideration of use *would* be appropriate.[3]

Petitioner's reliance (Pet. 18-19) on the government's international obligations is similarly misplaced. The authorities cited by petitioner merely affirm the uncontroversial principle that articles must be classified in their condition as imported. As explained, that principle is consistent with the court of appeals' approach, which examined the Transit Connect 6/7 as it was configured at the time of importation to ascertain what the vehicles were principally designed for. And the federal statute that implements those international obligations states that, "in the event of a conflict between a GATT [General Agreement on Tariffs and Trade] obligation and a statute"—here, Headings 8703 and 8704—"the statute must prevail." *Federal Mogul Corp.* v. *United States*, 63 F.3d 1572, 1581 (Fed. Cir. 1995) (discussing 19 U.S.C. 2504(a) (1988)).

c. Contrary to petitioner's arguments (Pet. 17-18, 21-26), the court of appeals' decision is consistent with

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[3] The other decisions cited by petitioner (Pet. 14-15 & n.3) are inapposite because they did not involve tariff headings with express purposive language. See *United States* v. *Schoverling*, 146 U.S. 76, 77 (1892) ("breech-loading shotguns" or metal "wares not specifically enumerated"); *Dwight* v. *Merritt*, 140 U.S. 213, 214 (1891) ("iron bars for railroads" or "[w]rought scrap iron of every description"); *Seeberger* v. *Farwell*, 139 U.S. 608, 609 (1891) (clothing "wholly of wool" or composed "in part of wool"); *Worthington*, 139 U.S. at 340 ("watch materials" or "raw" enamel bricks); *Merritt* v. *Welsh*, 104 U.S. 694, 700-701 (1882) (sugar above or below an objectively defined color gradient ranging from "dark" to "nearly white").

Federal Circuit precedent, Customs' previous decisions, and the rules of interpretation that govern the HTSUS.

Petitioner contends (Pet. 23-24) that the court of appeals' consideration of use is inconsistent with *Western States Import Co.* v. *United States*, 154 F.3d 1380, 1381 (Fed. Cir. 1998). That case involved HTSUS Subheading 8712.00.25, which covers bicycles "not designed for use with" wide tires. *Ibid.* (citation omitted). Although the bicycles in question could be used with wide tires, the importer argued that the bicycles were "not designed for use with" wide tires because it intended that they be used with narrow tires. *Ibid.* The court of appeals rejected that argument, holding that, even if the bicycles were "'principally designed' with narrow tires in mind," "this would not prove that the bicycles were not designed for use with wide tires." *Id.* at 1382-1383.

The Federal Circuit's decision in this case does not conflict with that holding. Unlike Heading 8703, Subheading 8712.00.25 in *Western States* required an importer "to establish affirmatively that its product is *not* designed for a specific use, rather than * * * 'principally' designed for a specific purpose." 154 F.3d at 1382. The court in *Western States* construed Subheading 8712.00.25 as limited "to bikes with design features that make them not suitable for or capable of use with wider tires." *Ibid.* Evidence that the importer intended its bicycles to be used with narrow tires was not enough to prove their unsuitability for use with wide tires. The *Western States* court did not hold that a product's use may never be considered when applying a HTSUS provision, like Heading 8703, that is based on what an imported product is designed for.

Petitioner further contends (Pet. 26) that the court of appeals' holding is inconsistent with Customs' prior practice of declining to consider evidence of use. That is incorrect. Customs routinely considers evidence of use in assessing whether a vehicle is principally designed to transport passengers. In Ruling HQ 087181 (Sept. 7, 1990) (cited at Pet. 20 n.5), for example, Customs declined to classify an "underground mining utility conveyance for passengers and cargo" under Heading 8703 in part because that conveyance was "not licensed for highway use." And in Ruling NY N056077 (Apr. 21, 2009) (cited at Pet. 26), Customs considered evidence of the importer's intent to convert the Dodge Sprinter—a conceded cargo van—into a "series of shuttle bus configurations" by adding certain physical features after importation. Petitioner emphasizes (Pet. 26) that, in the latter ruling, Customs ultimately concluded that the Sprinter should not be classified under Heading 8703, notwithstanding the importer's future plans. But in that case, the importer did not dispute that the Sprinter's structural and auxiliary design features at importation conclusively demonstrated that the Sprinter was a cargo van. The ruling thus demonstrates only that evidence of a vehicle's post-importation use will not always be sufficient to prove that the vehicle is designed more for passengers than for cargo.

Petitioner also contends (Pet. 17-18) that the court of appeals' consideration of use in this context is inconsistent with the interpretive principles that govern the HTSUS. But those principles simply state that goods must be classified "according to the terms of the headings and any relative section or chapter notes," whether the headings are *eo nomine*, principal-use, or actual-use, Pet. App. 104a, and that various forms of use must

be consulted with respect to principal- and actual-use headings, *id.* at 107a. Those principles do not preclude the court of appeals' conclusion that, where an *eo nomine* heading is phrased in terms of the use for which a good is designed, it is appropriate to consider how a particular article was designed, marketed, and used by consumers.

d. Finally, petitioner contends (Pet. 22-24) that the court of appeals' decision will create unpredictability. Petitioner appears to advocate (Pet. 24) a bright-line rule that would prohibit consideration of use in construing any *eo nomine* heading—even if the text of a given heading refers to the use for which a good is designed. That proposed rule cannot be reconciled with the plain text of Heading 8703. In determining whether the Transit Connect 6/7 was "principally designed for the transport of persons," Customs reasonably looked to all the relevant facts about that vehicle. Petitioner's proposal also conflicts with the foundational principle that HTSUS terms—which are treated as "statutory provisions of law for all purposes," 19 U.S.C. 3004(c)(1)—must be construed by reference to the specific "language of the heading," *Schlumberger Tech. Corp.* v. *United States*, 845 F.3d 1158, 1163 (Fed. Cir. 2017) (citation omitted), and in accordance with the heading's "common and commercial meanings," *Well Luck*, 887 F.3d at 1111 (citation omitted).

Petitioner speculates (Pet. 27-29) that, unless its proposed bright-line rule is adopted, importers will be uncertain about the classification of their goods, causing dire consequences for the tariff system. But for decades, both Customs and the Federal Circuit have examined evidence of a good's design and intended post-importation use to determine its classification, not only

in construing principal- and actual-use headings, but also in interpreting some *eo nomine* headings. In *Marubeni*—the only other case in which the Federal Circuit has addressed the scope of Heading 8703—the court of appeals affirmed a CIT decision entered after a trial in which the court heard testimony from the importer's design engineers about their design intent; in which sample vehicles were taken on test drives; and in which the parties introduced evidence of market studies of consumer preferences, "[p]roduct development documentation and advertising," and "customer use information." *Marubeni Am. Corp.* v. *United States*, 821 F. Supp. 1521, 1523-1528 (Ct. Int'l Trade 1993), aff'd, 35 F.3d 530.

In any event, petitioner's policy arguments provide no sound basis for adopting a rule that would forbid consideration of evidence that Congress plainly directed Customs to consider. And to the extent that the need to consider intended use creates ambiguity as to the appropriate tariff classification, an importer seeking to resolve that uncertainty may request a ruling letter from Customs Headquarters, 19 C.F.R. 177.1(c), and may obtain judicial review of that ruling in the CIT, the Federal Circuit, and potentially this Court. Petitioner instead elected to import the Transit Connect 6/7 without seeking a ruling letter from Customs.

3. Additional considerations reinforce the conclusion that the decision below does not warrant this Court's review.

First, petitioner's argument that courts may not examine evidence of an imported product's actual use in construing an *eo nomine* HTSUS heading is not sufficient for it to obtain reversal of the judgment below. As explained, the court of appeals held that the Transit

Connect 6/7's "auxiliary design features * * * compel the conclusion" that the vehicle "is designed to transport cargo." Pet. App. 26a. The court considered evidence of actual use only to buttress that holding. Petitioner therefore would not be entitled to reversal of the judgment below even if this Court adopted petitioner's proposed rule of interpretation.

Second, Headings 8703 and 8704 define the applicable duty by express reference to the purpose for which particular vehicles are designed. The court of appeals therefore acted properly in considering what the vehicles at issue were "for." If this Court found any logical contradiction between the Federal Circuit's consideration of intended use and that court's characterization of Heading 8703 as an *eo nomine* provision, it would not follow (as petitioner appears to assume) that the *eo nomine* characterization would control. Rather, the appropriate response would be to construe Heading 8703 as a "use provision governed by the use analysis," and petitioner's case would come out the same way. *GRK Canada, Ltd.* v. *United States*, 773 F.3d 1282, 1287 (Fed. Cir. 2014) (per curiam) (Wallach, J., dissenting from denial of rehearing en banc).

Third, as the government explained below, it is long settled that importers are forbidden from employing "disguise or artifice" to transform an article that would "fall within" one tariff classification into an article that "appear[s] otherwise." *Citroen*, 223 U.S. at 415. The record overwhelmingly demonstrates that petitioner installed the cost-reduced temporary rear seat in the Transit Connect 6/7 as a sham designed to make a two-person cargo van appear to be a vehicle "principally designed for the transport of persons." The seat was constructed from inferior materials and lacked features

that petitioner knew customers would have demanded for passenger safety and comfort. Indeed, the seat did not even comply with petitioner's own safety manual because it lacked the red indicator flag that passengers must use to determine whether the seat is properly latched upright. C.A. App. 6130. Those undisputed facts confirm that Customs properly disregarded the cost-reduced rear seat as a "disguise or artifice" when classifying the Transit Connect 6/7.[4]

4. In the alternative, petitioner asks (Pet. 30-33) this Court to summarily reverse the court of appeals' decision rejecting petitioner's request to remand the case to the CIT so that petitioner could advance two alternative arguments. Such extraordinary relief from this Court is unwarranted because those arguments lack merit for the reasons set forth in the government's briefs before the CIT and the court of appeals.

a. Contrary to petitioner's argument (Pet. 30), Customs was not required to follow the notice-and-comment provisions of 19 C.F.R. 177.12(c) before classifying the Transit Connect 6/7 as a vehicle for the

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[4] The principle that an importer cannot avoid the applicable tariff rate "by resort to disguise or artifice" would not be implicated if HTSUS 8703 referred to vans "with front and rear seats." Cf. p. 18, *supra*. Petitioner did not simply cause the Transit Connect 6/7 vans to "appear" (*Citroen*, 223 U.S. at 415) to have rear seats; the vans actually *had* rear seats at the time of importation. Under HTSUS 8703 as written, however, the applicability of that tariff classification depends on whether the Transit Connect 6/7 vans are "principally designed for the transport of persons"—*i.e.*, whether their "intended purpose of transporting persons * * * outweigh[s] [their] intended purpose of transporting goods." *Marubeni*, 35 F.3d at 535. The totality of the evidence makes clear that petitioner's temporary installation of the rear seats is a (transparent) attempt to make the intended purpose of the vans appear to be something it is not.

transport of goods. Those provisions apply only when Customs modifies or revokes "the treatment previously accorded" to "substantially identical transactions." 19 C.F.R. 177.12(c)(1). Such previous treatment exists only if a Customs official "responsible for the subject matter" has made an "actual" classification decision that Customs has "consistently applied" for at least two years "immediately preceding the claim of treatment." 19 C.F.R. 177.12(c)(1)(i)(B)-(C). "The determination of whether the requisite treatment occurred" involves "an assessment of all relevant factors." 19 C.F.R. 177.12(c)(1)(ii).

Here, the overwhelming majority of petitioner's entries of Transit Connect 6/7 vans were "bypass" entries automatically liquidated under Heading 8703 pursuant to petitioner's self-certifications, without any Customs examination or review. Pet. App. 58a (citation omitted). The remaining entries were reviewed by import specialists based on petitioner's import documents, but no specialist ever inspected the associated vehicles. *Ibid.* Because those entries were "processe[d] expeditiously and without examination or Customs officer review," they carry "no weight whatsoever." 19 C.F.R. 177.12(c)(1)(ii).

In addition, Customs did not apply the alleged determination for more than two years. The entry at issue here was made on December 26, 2011, Pet. App. 34a, but petitioner's first entry of Transit Connect 6/7s was liquidated on March 5, 2010, see C.A. App. 110, 123. And even if an "actual determination" had been made and had been applied for the requisite period, petitioner's "material omission[s] in connection" with the entries, 19 C.F.R. 177.12(c)(1)(iii)(C), would preclude it from relying on that determination. Petitioner cannot evade responsibility for those omissions by asserting (Pet. 9)

that its disclosure obligations were satisfied through marketing scripts, a journalist's questions, a handful of news articles, and isolated reports from Customs officers not ultimately responsible for classification determinations. See Gov't C.A. Reply Br. 20-23.

b. For similar reasons, petitioner is wrong in arguing (Pet. 30) that Customs' alleged "established and uniform practice" of classifying the Transit Connect 6/7 under HTSUS 8703 equitably estops the agency from adopting a different classification here. 19 U.S.C. 1315(d). As noted, petitioner failed to seek a ruling letter from Customs before disguising imported cargo vans as vehicles principally designed for passengers. Only after Customs initiated its investigation did petitioner disclose complete details of its scheme to the agency.[5] Petitioner therefore has no equitable claim to

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[5] The petition for a writ of certiorari suggests (Pet. 9) that Customs leadership believed that petitioner's conduct was permissible and that the investigation into its importation of the Transit Connect 6/7 should be closed without action. But petitioner's cherry-picked statements obscure the nature of Customs' deliberations. For example, one national import specialist noted that "he believe[d] that there [was] a classification issue with the current importation process used by Ford." C.A. App. 4909. An attorney-advisor in Customs Headquarters expressed incredulity at petitioner's claim that it was engaged in legitimate tariff engineering. *Id.* at 1468 ("'[C]ondition as imported', taken to the next level!!!"). A senior Baltimore port official warned against prematurely concluding the investigation without first "run[ning]" the question "by [c]ounsel." *Id.* at 1447. And a Customs program manager explained that Customs could treat the cost-reduced temporary rear seat as a disguise or artifice if Customs could "show[] that certain vehicles are pre-designated for equipment removal upon importation" by "prov[ing] intent" and by "be[ing] able to tie specific * * * VIN[s] to the practice"—precisely the showing that Customs ultimately made. *Id.* at 1495.

classification of the Transit Connect 6/7 vans as vehicles principally designed for passengers under Heading 8703.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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