

No. 19-1026

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

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FORD MOTOR COMPANY,  
*Petitioner,*

— v. —

UNITED STATES,  
*Respondent.*

---

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

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**MOTION OF THE AMERICAN ASSOCIATION OF  
EXPORTERS AND IMPORTERS FOR LEAVE TO FILE  
BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR  
WRIT OF CERTIORARI**

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March 18, 2020

**MOTION OF THE AMERICAN ASSOCIATION OF  
EXPORTERS AND IMPORTERS FOR LEAVE TO FILE  
BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR  
WRIT OF CERTIORARI**

The American Association of Exporters and Importers (“AAEI”) respectfully files this motion for leave of Court to file the attached *amicus curiae* brief in support of the Petition for a Writ of Certiorari.<sup>1</sup>

AAEI expresses its grave concerns over the Federal Circuit’s holding that *eo nomine* provisions of the Harmonized Tariff Schedule of the United States (“HTSUS”), which are deemed by a reviewing court to “inherently suggest use,” A.11, should be evaluated using the test reserved by the HTSUS’ Additional U.S. Rules of Interpretation (“ARI”) 1(a) and (b) for “tariff provisions controlled by use.” The Federal Circuit’s holding blurs well-established rules of tariff construction and injects intolerable uncertainty into the classification of imported goods.

The Court should also summarily reverse the finding of the Federal Circuit that Ford waived alter-

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<sup>1</sup> No counsel for a party authored this motion in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this motion. No person other than AAEI, its members, or its counsel made a monetary contribution to its preparation or submission.

Petitioner has granted permission for the filing of the attached *Amicus Curiae* brief, which is the subject of this Motion. AAEI has not yet received consent from the Respondent. Accordingly, AAEI now moves this Court for leave.

native claims which were made before, but not decided by, the United States Court of International Trade, by not raising them in its Appellee Brief in the Circuit court. This holding is inconsistent with the position adopted by every other Circuit Court of Appeals.

AAEI has been, for nearly a century, the voice of American businesses in support of free and open trade among nations. AAEI represents numerous manufacturers, distributors, and retailers of a wide spectrum of products, including electronics, machinery, footwear, automobiles, automotive parts, food, household consumer goods, textiles and apparel—as well as international companies, freight forwarders, customs brokers, and banks. AAEI is the only national association that represents the interests of exporters and importers before the United States, its agencies, Congress, the trade community, foreign governments, and international organizations.

AAEI respectfully asserts its legitimate, substantial and compelling interests to protect against the injection of intolerable uncertainty into the classification of imported goods, and to promote the continued use of well-established rules of tariff construction.

### CONCLUSION

For these reasons, American Association of Exporters and Importers respectfully requests that this Court grant this Motion for Leave to File the attached

*Amicus Curiae* brief in support of the Petition for Certiorari.

Respectfully Submitted,

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**TABLE OF CONTENTS**

	PAGE
TABLE OF AUTHORITIES .....	ii
INTEREST OF <i>AMICUS CURIAE</i> .....	5
SUMMARY OF ARGUMENT .....	6
STATEMENT.....	9
REASONS FOR GRANTING THE PETITION.....	11
I. <i>Eo Nomine</i> and Use Provisions of the HTSUS are Distinct and Require Different Classification Tests. ....	11
II.   Use is Relevant for Determining Common Meaning of an <i>Eo Nomine</i> Tariff Provision, Therefore, a “Principal Use” Test is Unnecessary. ....	15
III.  The Federal Circuit’s “Waiver” Determination Should be Summarily Reversed. ....	19
CONCLUSION.....	21

**TABLE OF AUTHORITIES**

	PAGE(S)
<b>Cases</b>	
<i>Avenues in Leather, Inc. v. United States</i> , 423 F.3d 1326 (Fed. Cir. 2005) .....	16, 17
<i>Bausch &amp; Lomb, Inc. v. United States</i> , 148 F.3d 1363 (Fed. Cir. 1998) .....	8, 12, 13, 17
<i>Brookside Veneers, Ltd. v. United States</i> , 847 F.2d 786 (Fed. Cir. 1988) .....	7, 12
<i>Brown v. City of New York</i> , 862 F.3d 182 (2d Cir. 2017) .....	20
<i>Carborundum Co. v. United States</i> , 536 F.2d 373 (C.C.P.A. 1976) .....	10
<i>Carl Zeiss, Inc. v. United States</i> , 195 F.3d 1375 (Fed. Cir. 1999) .....	7, 12
<i>Clarendon Mktg. Inc. v. United States</i> , 21 C.I.T. 59 (1997) .....	13
<i>Crocker v. Piedmont Aviation, Inc.</i> , 49 F.3d 735 (D.C. Cir. 1995) .....	20
<i>F.W. Myers, Inc. v. United States</i> , 12 C.I.T. 566 (1988) .....	17
<i>Hampco Apparel Inc. v. United States</i> , 12 C.I.T. 92 (1988) .....	19
<i>Heartland By-Products Inc.</i> , 264 F.3d 1126 (Fed. Cir. 2001) .....	19
<i>Hernandez v. Starbuck</i> , 69 F.3d 1089 (10th Cir. 1995) .....	20
<i>Hillman v. IRS</i> , 263 F.3d 338 (4th Cir. 2001) .....	21

	PAGE(S)
<i>Irwin Ind. Tool Co. v. United States</i> , 920 F.3d 1356 (Fed. Cir. 2019).....	18
<i>Kahrs Int'l v. United States</i> , 713 F.3d 640 (Fed. Cir. 2013) .....	18
<i>Marubeni America Corp. v. United States</i> , 35 F.3d 530 (Fed. Cir. 1994) .....	9
<i>Michaelian &amp; Kohlberg, Inc. v. United States</i> , 22 C.C.P.A. 551 (1935) .....	18
<i>Northwest Airlines, Inc. v. United States</i> , 17 F. Supp. 2d 1008 (Ct. Int'l Tr. 1998) .....	17
<i>Pleasure-Way Industries, Inc. v. United States</i> , 878 F.3d 1348 (Fed. Cir. 2018).....	18
<i>Processed Plastic Co. v. United States</i> , 473 F.3d 1164 (Fed. Cir. 2006) .....	16
<i>S&amp;T Imports, Inc. v. United States</i> , 78 Cust. Ct. 45 (1977) .....	16
<i>Sports Graphics, Inc. v. United States</i> , 24 F.3d 1390 (Fed. Cir. 1994).....	17
<i>Thompson v. Hebdon</i> , 140 S. Ct. 348 (2019).....	19
<i>United States v. Citroen</i> , 223 U.S. 407 (1912)..	passim
<i>United States v. Schoverling</i> , 146 U.S. 76 (1892) .....	passim
<i>Universal Electronics Inc. v. United States</i> , 112 F.3d 488 (Fed. Cir. 1997) .....	8
<i>Worthington v. Robbins</i> , 139 U.S. 337 (1891)..	passim



	PAGE(S)
<b>Statutes</b>	
19 U.S.C. § 1315.....	20
19 U.S.C. § 1625.....	15, 19
<b>Other Authorities</b>	
<i>Skattministeriet v. Estron</i> , Case C138-18 (European Court of Justice, June 15, 2019).....	
	11
<i>WTO Appellate Body Report, China - Measures Affecting Imports of Automobile Parts</i> , WT/DS340/AB/R (December 15, 2008).....	
	11

**INTEREST OF *AMICUS CURIAE***

Pursuant to Supreme Court Rule 37, amicus curiae the American Association of Exporters and Importers (“AAEI”) submit this amicus curiae brief in support of Petitioner.<sup>1</sup>

AAEI has been, for nearly a century, the voice of American businesses in support of free and open trade among nations. AAEI represents numerous manufacturers, distributors, and retailers of a wide spectrum of products, including electronics, machinery, footwear, automobiles, automotive parts, food, household consumer goods, textiles and apparel—as well as international companies, freight forwarders, customs brokers, and banks. AAEI is the only national association that represents the interests of exporters and importers before the United States, its agencies, Congress, the trade community, foreign governments, and international organizations.

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<sup>1</sup> Pursuant to Rule 37.6, Amicus Curiae AAEI affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than amicus curiae, its members, or its counsel made a monetary contribution specifically for the preparation or submission of this brief.

Pursuant to Rule 37.3(a), Petitioner has granted permission for the filing of the instant amicus curiae brief. Amicus Curiae has not yet received consent from the Respondent. Accordingly, Amicus Curiae has moved for leave to file this brief.

## SUMMARY OF ARGUMENT

The Court should overrule the Federal Circuit’s holding that *eo nomine* provisions of the Harmonized Tariff Schedule of the United States (“HTSUS”), which are deemed by a reviewing court to “inherently suggest use,” A.11, should be evaluated using the test reserved by the HTSUS’ Additional U.S. Rules of Interpretation (“ARI”) 1(a) and (b) for “tariff provisions controlled by use.” The Federal Circuit’s holding blurs well-established rules of tariff construction and injects intolerable uncertainty into the classification of imported goods.

The Court should also summarily reverse the finding of the Federal Circuit that Ford waived alternative claims which were made before, but not decided by, the United States Court of International Trade, by not raising them in its Appellee Brief in the Circuit court. This holding is inconsistent with the position adopted by every other Circuit Court of Appeals.

Now more than ever, American importers, retailers and consumers have an abiding interest in clarity of the rules of tariff classification which are employed by United States Customs and Border Protection (“CBP”) and reviewing courts to determine the proper assessment of duties on imported goods. The tariff classification of an imported product determines the rate and amount of duty which will be chargeable upon importation, and in turn, will determine the prices which importers, wholesalers and retailers

must charge for imported goods so that they may recover their costs and earn a profit.

This Court has long recognized that importers have the right to design goods so that, in their “condition as imported,” they will attract a particular rate of duty, *United States v. Citroen*, 223 U.S. 407, 415 (1912), and has recognized that, in applying *eo nomine* tariff provisions, courts may disregard features which constitute a “disguise or artifice.” In such cases, there is no cause for a court to examine the “principal use” of the goods.

Applying “principal use” standards to *eo nomine* classifications is contrary to settled law, and diminishes importers’ reliance interests on judicial and administrative classification decisions.

Headings and subheadings in the Harmonized Tariff Schedule are of two kinds: *eo nomine* provisions, which classify goods by name; and “use” provisions, which classify goods according to actual or principal use.

*Eo nomine* provisions are predominant in the HTSUS, and are to be judicially construed according to their common and commercial meanings, which are presumed to be the same. *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999). Absent contrary legislative intent, *eo nomine* provisions cover all forms of the named article, including later-developed forms. *Brookside Veneers, Ltd. v. United States*, 847 F.2d 786, 789 (Fed. Cir. 1988). The “common meaning” of a tariff term is a question of law, presumed to be within judicial knowledge. *Bausch &*

*Lomb, Inc. v. United States*, 148 F.3d 1363, 1365 (Fed. Cir. 1998). Where there are no disputed issues of fact concerning the nature of the article, the determination of classification becomes purely a question of law. *Universal Electronics Inc. v. United States*, 112 F.3d 488 (Fed. Cir. 1997). The classification of a good under an *eo nomine* classification is determined according to the good's condition at the time of importation. *Worthington v. Robbins*, 139 U.S. 337 (1891). This Court has held, however, that a reviewing court may disregard a feature of an imported product if it is a "disguise or artifice." *Citroen*, 223 U.S. at 415.

"Use" provisions of the tariff, on the other hand, are governed by an entirely separate set of rules codified in ARI 1 to the HTSUS. Where use is the determining factor in the classification of an article, ARI 1(a) provides that it is principal use of the "class or kind" of merchandise to which the imported article belongs, in the United States at or about the time of importation, which governs classification. Thus, "use" provisions do not classify goods according to their condition as imported; they instead require an inquiry to identify the "class or kind" of merchandise to which the imported good belongs, and then an inquiry as to the "principal use" of that class or kind in the United States. In those relatively few situations where a product's classification is defined by its actual use, the proof of actual use must be certified by the importer within three years after the date of importation. *See* ARI 1(b).

The two types of classification provisions thus use radically different legal tests and rely upon entirely different sets of evidence. Conflating them, as the Federal Circuit did in this case, runs contrary to this Court’s decisions in *Worthington, supra, United States v. Schoverling*, 146 U.S. 76, 80-81 (1892), and *Citroen, supra*. To the extent use may be relevant to an *eo nomine* tariff classification, a reviewing court may take use into account in determining the common meaning of a tariff term. Where a Court suspects a “disguise or artifice,” *Citroen*, 223 U.S. at 415—as the Federal Circuit apparently did here, referring to certain features as a “sham,” A.23—its remedy is to disregard them, as indicated in *Citroen*, not to embark upon an inconsistent and unnecessary “second bite at the apple” classification exercise.

### **STATEMENT**

This case involves the proper classification of certain imported Ford “Transit” motor vehicles which, as imported, were equipped with rear passenger seats and other design features indicating that they were to be used for the transport of passengers, inviting classification under Heading 8703, HTSUS. After importation, Ford modified some of the vehicles by removing the rear passenger seat and installing a floor mat.

The United States Court of International Trade, following *Marubeni America Corp. v. United States*, 35 F.3d 530 (Fed. Cir. 1994), properly analyzed the vehicles in their condition as imported, concluding that

“[t]he structural design features favor a finding that the subject merchandise is designed for the transport of passengers.” A.20. But despite the presence of rear seating and other passenger-friendly features, the Federal Circuit, reviewing “auxiliary design features,” concluded that the vehicles were not principally designed for the transport of passengers. A.24-25. Removal of the second-row seats, the CAFC concluded, facilitated “post-importation processing of converting the Transit Connect 6/7s into cargo vans by using sham rear seats that would be stripped from the vehicles.” A.23. The Federal Circuit held that the Trade Court “erred in its evaluation of these auxiliary design features which compel the conclusion that the subject merchandise is designed to transport cargo.” A.25.

While acknowledging that “Heading 8703 is an *eo nomine* provision, not a principal use provision,” A.25, the CAFC, relying on the “principal use” test articulated in *Carborundum Co. v. United States*, 536 F.2d 373 (C.C.P.A. 1976), concluded that “the subject merchandise is not classifiable under HTSUS Heading 8703,” A.27, but rather under Subheading 8704 s “Motor vehicles for the transport of goods”—a classification provision governed by “principal use” considerations. A.29.

By construing the *eo nomine* provision of Heading 8703 to encompass the “principal use” test reserved for tariff provisions “controlled by use,” the CAFC gave CBP a “second bite at the apple” to sustain its liquidated classification under Heading 8704. This

was unnecessary, and contrary to settled law. The appellate court could have properly considered use as a relevant factor in defining the common meaning of Heading 8703 without straying from settled law, and could have employed the *Citroen* analysis to disregard any features deemed a “disguise or artifice.” 223 U.S. at 415.

### REASONS FOR GRANTING THE PETITION

#### I. *Eo Nomine* and Use Provisions of the HTSUS are Distinct and Require Different Classification Tests.

This Court has long recognized that, for tariff nomenclatures to be effective, goods must be classified in their “condition as imported.” *Worthington*, 139 U.S. at 341 (a good’s classification is based on the “condition in which it is imported,” not “what afterwards the importer did with it.”); *Schoverling*, 146 U.S. at 81. Customs and importers should be able to classify goods under an *eo nomine* provision based on an examination of the product’s objective properties and characteristics at the time of entry.<sup>2</sup> *See Citroen*, 223

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<sup>2</sup> That *eo nomine* tariff provisions should be administered according to objective properties and characteristics at the time of importation is a foundational principle of tariff classification law, both at the World Trade Organization, *see WTO Appellate Body Report, China - Measures Affecting Imports of Automobile Parts*, WT/DS340/AB/R (December 15, 2008), and among the United States’ principal trading partners. *Skattministeriet v. Estron*, Case C138-18, at ¶ 52 (European Court of Justice, June 15, 2019) (“... according to the case-law of the Court, the intended use of a



U.S. at 415. Thus, the objective properties and characteristics of Ford’s Transit vans as vehicles designed for the transport of passengers were evident from an examination of the vehicles in their condition as imported. That should have been the end of the inquiry; instead, the Federal Circuit expanded its inquiry to ask “what afterwards the importer did with it.” *See Worthington*, 139 U.S. at 341.

Classification of goods pursuant to an *eo nomine* provision is a two-step process:

... the court construes the relevant (competing) classification headings, a question of law; determines what the merchandise at issue is, a question of fact; and then ... adjudges ... the proper classification under which it falls, the ultimate question in every classification case and one that has always been treated as a question of law.

*Bausch & Lomb*, 148 F.3d at 1366 (emphasis added).

*Eo nomine* tariff provisions are to be construed according to their common and commercial meanings, which are presumed to be the same. *Carl Zeiss*, 195 F.3d at 1379. Absent contrary legislative intent, *eo nomine* provisions cover all forms of the named article, including later-developed forms. *Brookside Veneers*, 847 F.2d at 789. The “common meaning” of a

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product may constitute an objective criterion for classification if it is inherent to the product, and that inherent character must be capable of being assessed on the basis of the product’s objective characteristics and properties ... ” (Emphasis added)).

tariff term is a question of law, presumed to be within judicial knowledge. *Bausch & Lomb*, 148 F.3d at 1365.

The Federal Circuit’s decision conflicts with, and undermines, the principles of this Court’s holdings in *Worthington*, *Schoverling*, and *Citroen*.

Congress has, from time to time, enacted a relatively few tariff provisions which classify goods according to use—either according to the good’s actual use, or the principal use of the class or kind of goods to which the good belongs. In these cases, the classification of an imported good cannot be determined by examining it in its “condition as imported,” and a completely different inquiry must be undertaken. In the case of the rare “actual use” provisions, ARI 1(b)<sup>3</sup> requires that the importer certify the actual use of the imported article to CBP within three years of importation. *See e.g., Clarendon Mktg. Inc. v. United States*, 21 C.I.T. 59 (1997). Most “use” provisions of the tariff classify goods according to the “principal use” in the

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<sup>3</sup> ARI 1 provides:

- (a) a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use;
- (b) a tariff classification controlled by the actual use to which the imported goods are put in the United States is satisfied only if such use is intended at the time of importation, the goods are so used and proof thereof is furnished within 3 years after the date the goods are entered;

United States of the “class or kind” of articles to which the imported merchandise belongs, as specified in ARI 1(a). Under this test, the classification of goods by “use” is not a question of law, but of fact. The analysis is not on “what the good is,” but on “how similar goods are principally used after importation.” Such questions of fact are not static, and the principal use of a class of goods determined in 2019 may not be the principal use for that same class in 2021. A new factual inquiry must be undertaken.

To properly plan its goods for importation, an importer must know whether classification will be according to the objective properties and characteristics of the goods at the time of importation (*i.e.*, *eo nomine*) or whether classification will be governed by “principal use.” The CAFC’s decision in this case makes that distinction virtually impossible to discern.

There is no guidepost for determining whether an *eo nomine* tariff provision “inherently suggests” a use, A.11, and is ultimately to be controlled by principal use. In this case, the determination may have been driven by nothing more than the Federal Circuit’s determination that the rear seats installed in the vans were a “sham,” A.23, and a desire to reach a different rule which would lead to a different result than the CIT reached.

Even if an *eo nomine* provision “inherently suggests” use, the Federal Circuit has been unclear about whether the classification provision should be treated

as one “controlled by” use and governed by ARI 1(b), or whether, after considering use, the Court may employ an *eo nomine* classification analysis. This uncertainty not only leaves importers unsure about how to classify their products at the time of importation, it is nothing less than an abandonment of longstanding rules of tariff classification set out by this Court in cases such as *Worthington*, *Schoverling*, and *Citroen*. It undermines the reliance interest which AAIEI members and other importers place on settled judicial and administrative classification decisions and the rules of construction employed in arriving at those decisions.<sup>4</sup> *See e.g.*, 19 U.S.C. § 1625(c) (limiting CBP’s ability to revoke or modify rulings). Where a classification is “controlled by” use, precedent is not controlling, and a new, fact-driven “principal use” determination must be made for each new importation.

## II. Use is Relevant for Determining Common Meaning of an *Eo Nominis* Tariff Provision, Therefore, a “Principal Use” Test is Unnecessary.

Among the factors a court may consider in defining the “common meaning” of a tariff term is the actual or intended use of the product. Thus, in *S&T*

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<sup>4</sup> A product’s classification determines the importer’s duty cost, and the prices it must charge to be profitable. Importers seek approximately 10,000 rulings each year, the vast majority dealing with classification. *See e.g.*, *Customs Ruling Online Search Service* (“*CROSS*”), accessible at <https://rulings.cbp.gov/home> (last visited March 16, 2020) (containing more than 200,000 rulings).

*Imports, Inc. v. United States*, 78 Cust. Ct. 45, 56 (1977), pineapple immersed in brine, boiled, and left in sugar syrups was held to be classifiable as “candied fruit.” The Court noted that the imported pineapples “are primarily used in baking for fruitcakes and for making higher concentrated glaze and crystallized fruit. Such uses are identical to those described by the authorities for candied fruit.” *Id.* (emphasis added).

In *Processed Plastic Co. v. United States*, 473 F.3d 1164 (Fed. Cir. 2006), the Federal Circuit upheld the classification of beach bags and backpacks containing sand toys as travel bags, rather than toys, because their primary function was utilitarian, and any play derived therefrom was incidental to this primary utilitarian function. The court held that “the backpacks and beach bag are general use articles that can be used to carry any number of different items weighing up to at least three pounds, and thus they are not suitable for use solely or principally with sand toys,” *id.* at 1173, and that they should “be classified under the *eo nomine* heading 4202 that describes them.” *Id.* at 1171.

In *Avenues in Leather, Inc. v. United States*, 423 F.3d 1326, 1332 (Fed. Cir. 2005), the Federal Circuit held that 1.5 inch thick folios were “not sufficiently large or durable enough” to hold items such as books, thick newspapers, or other personal items commonly carried in *eiusdem generis* containers of heading 4202. The Court observed that the folios at issue:

... may be used to organize and protect small and/or flat items in addition to a writing pad, they have an internal capacity of only 1 inch

and lack significant carrying space. These characteristics make them unsuitable to carry newspapers, books, and other objects that are normally carried in containers that are common to Heading 4202.

*Id.* at 1333 (emphasis added). The Court concluded that “[s]uch a specific use, which predominates over the more general description of containers, precludes classification ... under Heading 4202.” *Id.* (emphasis added).<sup>5</sup>

Thus, courts can be informed by use in determining the common meaning of an *eo nomine* tariff term, reaching a legal conclusion that will be definite, enduring, and controlling for the future. However, this is a far cry from making the leap to treat an *eo nomine* provision as one which is “controlled by use.”

If judicial determination of the common meaning of an *eo nomine term* is informed by use in the first part of the *Bausch & Lomb* analysis, the court can then examine the condition of the merchandise as imported in the second step, to determine whether the product fits within the tariff term’s common meaning.

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<sup>5</sup> See also *e.g.*, *F.W. Myers, Inc. v. United States*, 12 C.I.T. 566, 573 (1988) (*eo nomine* provision for “tractors” connoted “a motor vehicle primarily used for pushing and pulling an appliance or load.”); *Sports Graphics, Inc. v. United States*, 24 F.3d 1390 (Fed. Cir. 1994) (use of bags to store food and beverages precluded classification in *eo nomine* provision for “luggage”); *Northwest Airlines, Inc. v. United States*, 17 F. Supp. 2d 1008 (Ct. Int’l Tr. 1998) (airplane braking and steering control units not classifiable as navigational devices because they were only used while airplane was on the ground).

There is no need to unmoor classification from the traditional rules for interpreting and applying *eo nomine* tariff terms in migrating to “principal use” considerations. *Kahrs Int’l v. United States*, 713 F.3d 640, 646 (Fed. Cir. 2013) (merchandise may “possess[] some unique features relat[ing] to its intended use” without those features transforming its identity and creating a use limitation); *see also e.g., Irwin Ind. Tool Co. v. United States*, 920 F.3d 1356 (Fed. Cir. 2019).

To the extent the Federal Circuit’s decision was influenced by the perception of a artifice to avoid the higher tariffs imposed on cargo vehicles (*see* A.23, suggesting use of “sham rear seats that would be stripped from the vehicles”), this does not justify abandoning *eo nomine* principles for use.<sup>6</sup> In *Citroen*, the Supreme Court noted:

[A] prescribed rate of duty can[not] be escaped by disguise or artifice. ... [W]hen the article imported is not the article described as dutiable at a specified rate, it does not become dutiable under the description because it has been manufactured or prepared for the express purpose of being imported at a lower rate.

223 U.S. at 415; *see also, Michaelian & Kohlberg, Inc. v. United States*, 22 C.C.P.A. 551 (1935). Where a court perceives a “disguise or artifice” in applying an

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<sup>6</sup> It is far from apparent that Ford was engaged in a ruse. Transit vehicles are representative of a type produced in a basic configuration, with the expectation that many will be upfitted for a particular use. *See e.g., Pleasure-Way Industries, Inc. v. United States*, 878 F.3d 1348 (Fed. Cir. 2018).

*eo nomine* tariff provision, it may disregard the disguising or artificial feature. *Hampco Apparel Inc. v. United States*, 12 C.I.T. 92 (1988); *Heartland By-Products Inc.*, 264 F.3d 1126, 1139 (Fed. Cir. 2001), *cert. den.* 537 U.S. 812 (2002).

Invoking this exception to the “condition as imported” rule safeguards against the use of artifice or deception. Whether “disguise or artifice” exists is a fact-specific determination to be made in each case. But all of this can be done without abandoning the *eo nomine* nature of the tariff provision, and seeking to convert it into one “controlled by use.”

### III. The Federal Circuit’s “Waiver” Determination Should be Summarily Reversed.

This Court should also grant the petition for certiorari to review 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 in plain error and conflicts with positions taken by every other Federal Judicial circuit. Summary reversal is in order. *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”).

Ford’s Complaint in this action raised several alternate arguments. First, Ford argued that CBP had erred by classifying the Transit vans as vehicles for the transportation of goods, rather than as vehicles for the transportation of passengers. Alternatively, Ford asserted that CBP’s ruling was contrary to its prior treatment of the Transit Connects, *see* 19 U.S.C. § 1625(c)(2); and that CBP’s ruling was contrary to an



“established and uniform practice” (EUP), *see* 19 U.S.C. § 1315(d), and could not be changed except after notice and comment and then only prospectively. These are separate, independent ground for suit on which Ford could prevail, regardless of the correctness of the classification used.

The CIT did not reach the alternative claims because it ruled in Ford’s favor on classification. The Government’s opening brief before the Federal Circuit did not raise either issue, and Ford’s opposition brief addressed the single issue on appeal, classification, while noting that its treatment and EUP claims had been raised in the CIT, and, should the classification decision be reversed, the case should be remanded to the CIT for consideration of these alternate claims.

The Federal Circuit should have given the CIT an opportunity to address those arguments in the first instance. Instead, the Federal Circuit held that Ford had “waived” the prior treatment and EUP claims by not developing them in its appellate brief. A.32. This was clear error. 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 v. Starbuck*, 69 F.3d 1089, 1093 (10th Cir. 1995). but “[a]ppellees bear no such burden.” *Id.* The appellee—in this case Ford—must simply “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).

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 trial 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). As noted in Ford’s Petition for a Writ of Certiorari, this is the view of every Circuit Court of Appeal.

### CONCLUSION

For these reasons, *Amicus Curiae* the American Association of Exporters and Importers respectfully submits that the instant Petition for Rehearing and Rehearing *En Banc* of Appellee, Ford Motor Company, should be granted.

Respectfully Submitted,

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