No. 19-1026

IN THE

Supreme Court of the United States

FORD MOTOR COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The Federal Circuit's rule that *eo nomine* tariff headings that "inherently suggest[] a type of use" should be applied based on how goods are modified and used after importation is flatly contrary to this Court's bedrock precedent that goods must be classified based on their objective condition at the time of importation. It also conflicts with the HTSUS statute and international obligations. The Brief in Opposition cannot reconcile these conflicts, and barely mentions the inherently-suggests-use rule. Instead, it relies on a flawed textual analysis and various alternate arguments the courts below rejected and the government itself has disclaimed. The erroneous inherently-suggests-use rule was the sole basis for the Federal Circuit's decision below. Unless this Court intervenes, the Federal Circuit's doctrinally unmoored approach will remain binding precedent that will "promote confusion and error" in a wide range of "future classification cases." *GRK Can., Ltd.* v. *United States*, 761 F.3d 1354, 1366 (Fed. Cir. 2014) ("*GRK I*") (Reyna, J., dissenting).

The Opposition also does not respond to the showing, by Ford and *amici*, that the inherently-suggests-use rule is deeply harmful to U.S. business. Businesses need predictable, bright-line standards for tariff classification, to facilitate investment decisions worth billions of dollars and projecting years into the future. For over a century, the condition-as-imported doctrine provided that critical clarity, but the inherently-suggests-use rule fundamentally undermines it. The Federal Circuit—and the Opposition—provide no standards for importers to determine what tariff headings "suggest" use or how such headings will be applied.

The government also conspicuously declines to defend the Federal Circuit's waiver ruling. Instead, it

contends the ruling is insignificant because (in its view) the claims improperly deemed waived "lack merit," based on disputed factual assertions the CIT never adjudicated. This argument is erroneous, and again, the Federal Circuit did not rule on that basis. It held Ford waived alternate claims by not raising them in its appellee brief, even though the CIT did not decide those issues and the government did not raise them on appeal. This precedential ruling conflicts with decisions of this Court and all Courts of Appeals, violates fundamental principles of appellate procedure, and will be highly problematic for future litigants. The Petition should be granted.

I. THE FEDERAL CIRCUIT'S INHERENTLY-SUGGESTS-USE RULE IS CONTRARY TO LAW.

A. The Inherently-Suggests-Use Rule Conflicts With The Condition-As-Imported Doctrine.

The Opposition cannot reconcile the Federal Circuit's inherently-suggests-use rule with this Court's precedent that the "classification of articles imported must be ascertained by an examination of the imported article itself, in the condition in which it is imported." *Worthington* v. *Robbins*, 139 U.S. 337, 341 (1891). The government contends (Opp.17-19) the decision below "does not controvert" the condition-as-imported doctrine because the Federal Circuit considered Ford's *intent* at importation. This argument fails because this Court's precedent requires classification based on the condition "of the *imported article itself*" at the time of importation, not the importer's intent. *Worthington*, 139 U.S. at 341 (emphases added); see Pet.13-16. As the CIT correctly held, the government's "paradoxical" argument that the condition-as-imported doctrine turns upon Ford's intent to modify the

goods by removing seats after importation erroneously "urges the court to concentrate on any time other than the time of importation." App.79a-80a.

Indeed, in key precedents, the importer intended to modify the goods after importation: in *Worthington*, enamel was imported with the intent to make watch faces; in *United States* v. *Citroen*, 223 U.S. 407 (1912), loose pearls were imported with the intent to make a necklace. In both cases, this Court held that classification turned on "the condition of the article as imported," not "what afterwards the importer did with it." *Worthington*, 139 U.S. at 341; *Citroen*, 223 U.S. at 414-16.

The Opposition has little response to this precedent. It points to "hypothetical tariff headings" in *Citroen* for which it contends "consideration of use *would* be appropriate." Opp.18-19. But those hypothetical headings—"pearls that can be strung" and pearls "assorted or matched so as to be suitable for a necklace," *Citroen*, 223 U.S. at 415—have nothing to do with intended or actual use. Whether a pearl "can be strung" or is "suitable for a necklace" is an objective design question based on factors such as shape, color, and quality. Congress may use various features to define a tariff heading, but the focus remains on objective characteristics at importation.

The government dismisses the rest of this Court's precedent in a footnote, Opp.19 n.3, insisting those cases are distinguishable because the relevant tariff headings lacked "purposive language." This is a variant on the same argument the government made—and this Court rejected—in those cases: that tariff provisions should be interpreted to turn on the importer's subjective intent rather than the good's objective features at importation. But 8703 is no more "purposive" than "watch materials" (materials *for* a watch),

Worthington, 139 U.S. at 338-39, "jewelry … parts" (parts *for* jewelry), *Citroen*, 223 U.S. at 413-16, or "'iron bars for railroads," *Dwight* v. *Merritt*, 140 U.S. 213, 214 (1891); see pp.5-7, *infra*. The decision below conflicts with the fundamental principle that goods must be classified based on their condition at importation.

B. The Federal Circuit's Consideration Of Intended Use Conflicts With HTSUS And GATT.

1. The government likewise fails to align its argument with the statutory text or the United States' treaty obligations. As to the statute, the government concedes there are "three types of headings: *eo nomine*, principal-use, and actual-use," Opp.2, but treats these categories as doctrinally irrelevant, *e.g.*, Opp.21.

HTSUS, however, makes clear that a heading's type controls its interpretation—in particular, whether that interpretation depends on use. The government contends (Opp.17-18) that because HTSUS makes consideration of use "not only permissible but mandatory" for use provisions, it is equally relevant to *eo nomine* provisions. But the statute permits consideration of use only for headings "controlled by use." ARI 1. Indeed, prior to the Federal Circuit's recent adoption of the inherently-suggests-use rule, the mere "suggestion that the ARIs may need to be reached in the context of an *eo nomine* analysis [was] foreign to our classification case law." *GRK Can., Ltd.* v. *United States*, 773 F.3d 1282, 1285 (Fed. Cir. 2014) ("*GRK II*") (Wallach, J., dissenting from denial of rehearing).[1]

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[1] Principal-use provisions are consistent with the condition-as-imported doctrine. *Cf.* Opp.17-18. They classify based on the "principal use" "of goods of that class or kind" at importation—not

The government has even less to say about U.S. international obligations. It agrees that the General Agreement on Tariffs and Trade (GATT) requires imported goods to be classified based on their condition as imported. Opp.19. Indeed, the U.S. has enforced this obligation on other countries, including China for imposing higher tariffs on auto parts "based on how the part is actually used internally, and not on the condition of the part as imported." Panel Reports, *China—Measures Affecting Imports of Automobile Parts*, ¶¶4.453, 4.574, WTO Docs. WT/DS339/R, WT/DS340/R, WT/DS342/R (adopted Jan. 12, 2009). The government says the conflict can be disregarded because "the statute must prevail." Opp.19. But it is fundamental that such conflicts should be avoided "if any other possible construction remains." *Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). That presumption bears particular weight for HTSUS since, as the name suggests, its purpose is to *harmonize* U.S. tariffs with the international system. See *Marubeni Am. Corp.* v. *United States*, 35 F.3d 530, 532-33 (Fed. Cir. 1994). HTSUS can and should be interpreted to follow the condition-as-imported doctrine.

2. The Opposition also argues "the plain text of Heading 8703" requires consideration of use. Opp.22. But 8703 makes no reference to use, covering "vehicles principally *designed* for the transport of persons." The assertion that "design" means "expected and intended

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the intended or actual post-importation use of the particular good. ARI 1(a). Only "actual-use" provisions turn on the "intended" and "actual" use of the imports. ARI 1(b). Actual-use provisions are rare, and typically offer a reduced tariff. Pet.5. This narrow statutory exception to the condition-as-imported doctrine precludes additional, judge-made exceptions like the inherently-suggests-use rule. *See TRW Inc.* v. *Andrews*, 534 U.S. 19, 28-29 (2001).

use," Opp.16, is not plain text but the government's erroneous gloss.

Instead, "design" typically refers to objective "arrangement of features … according to aesthetic or functional criteria." *Oxford English Dictionary* (3d ed. 2012); accord *Black's Law Dictionary* (11th ed. 2019) ("pattern or configuration"). Prior to this case, the government consistently interpreted 8703 in this manner, stating "[i]t is the design features, rather than principal or sole use, which determine" classification in 8703. HQ 087181 (Sept. 7, 1990). The Explanatory Notes likewise provide "classification of certain motor vehicles in [8703] is *determined by certain features* which indicate that the vehicles are principally designed for the transport of persons." J.A.2425 (emphasis added). The Opposition makes no mention of this highly persuasive authority, Pet.6, presumably because the Transit Connects had every feature the 8703 Explanatory Notes identify. App.83a-90a.

Past Federal Circuit precedent also does not support the government. The Opposition relies heavily on *Marubeni*'s reference to an "intended purpose of transporting persons." Opp.13. But *Marubeni*'s very next sentence shows this test turns on the vehicle's "structural and auxiliary design features," 35 F.3d at 535, not the importer's subjective intent. *Western States Import Co.* v. *United States* confirms this interpretation: "[A]ccording primacy to the designer's state of mind and limiting the examination of the objective physical design features" would "change[] the language of the statute." 154 F.3d 1380, 1383 (Fed. Cir. 1998). The Opposition tries to distinguish *Western States* because it interpreted the phrase "not designed for use," rather than "principally designed," Opp.20. But *Western States* held that heading's "closest corollary" was 8703, 154 F.3d at 1382, and rejected the

"purposive" interpretation of "design" the government urges here.

The government also argues "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." Opp.16. But the cases cited are the recent Federal Circuit decisions creating the inherently-suggests-use rule—the very rule Ford challenges. Opp.16-17. Those decisions sparked dissents, calls for rehearing, and academic criticism explaining that consideration of use under *eo nomine* headings "is foreign to our classification case law, and conflicts with the clear statutory language." *GRK II*, 773 F.3d at 1285 (Wallach, J., dissenting from denial of rehearing); see Pet.22-27. The Opposition does not defend this rule, which has been widely criticized for "promot[ing] confusion and error." *GRK I*, 761 F.3d at 1366 (Reyna, J., dissenting); Chamber Br.15-18.

Further, the decision here greatly expands this problematic rule. In prior cases, the Federal Circuit looked to use to elucidate a product's condition at importation where the functionality of its objective features was unclear, *e.g. CamelBak Prods., LLC* v. *United States*, 649 F.3d 1361, 1368-69 (Fed. Cir. 2011). Here, the Federal Circuit relied on use to *override* the good's condition at importation because it was intended to be modified later. That ruling is irreconcilable with this Court's precedent and HTSUS.

C. The Government's Alternative Arguments Fail.

Unable to justify the Federal Circuit's ruling, the government contends the court could have ruled in its favor on other grounds. But there is no need for this

Court to consider these alternate arguments. In any event, they lack merit.

1. The Opposition mischaracterizes the decision as "fact-intensive." Opp.13. The question here is not how to weigh facts, but rather what facts the court may legally consider. The Federal Circuit explicitly reversed the CIT for "applying an improper *legal* analysis." App.29a n.11 (emphasis added).

In addition, the Opposition shows no error in the CIT's thorough and sound ruling that the features of the Transit Connect demonstrate a principal design for passenger transport. Even the Federal Circuit agreed the structural design features "favor a finding that the subject merchandise is designed for transport of passengers." App.21a; Pet.7-8.[2] The Opposition instead focuses on the rear seat, which it characterizes as "sham," "temporary," "designed to be immediately removed," and "discardable." But these pejoratives have nothing to do with the seat itself, App.86a-90a; rather, they are erroneous contentions that the seat should be disregarded because Ford removed it after importation. *Supra* pp.2-3. As for the seat's cost-reduced features, Opp.24-25, the CIT correctly held that while they made it "cheaper, and, perhaps, less attractive," it was "undisputed[ly]" a seat, App.89a, meeting all relevant safety and durability standards. See Opp.25 n.4 (conceding "the vans actually *had* rear seats at the time of importation").

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[2] The government erroneously asserts the Transit Connect was "based on a line of small commercial vans." Opp.4-5. It was based on a European *passenger* van, with the same drivetrain and chassis as the Ford Focus sedan. App.3a. Moreover, the Transit Connect had underbody bracing, side-impact protection, and other features to support the rear seat and protect rear passengers, all of which remained in the vehicle after seat removal. App.43a, 57a-58a.

2. Next, tacitly acknowledging the Federal Circuit applied a use analysis, not an *eo nomine* analysis, the government argues that 8703 is a use heading. Opp.24. But since the enactment of HTSUS, the government has consistently said that "8703 is an *eo nomine* provision." Fed.Cir.Suppl.App.144-45; Pet.20. And the Federal Circuit expressly held 8703 is an *eo nomine* provision, but that use was nonetheless controlling because it "inherently suggests use." App.11a-18a. That ruling is indefensible and should be reversed.

3. Finally, the government argues the Transit Connect 6/7's condition as imported may be disregarded as a "sham or artifice." Neither court below accepted this argument, and it is contrary to this Court's precedent. This Court has long recognized that an importer may design a product "for the express purpose of being imported at a lower rate." *Citroen*, 223 U.S. at 415; see *Merritt* v. *Welsh*, 104 U.S. 694, 701 (1882) (sugar darkened with molasses solely to obtain a lower tariff not a disguise or artifice); *Seeberger* v. *Farwell*, 139 U.S. 608, 610-11 (1891) (same, as to cloth blended with small amount of cotton to avoid higher tariff on pure wool). While an importer may not employ "disguise or artifice," this doctrine applies only where the good's objective features are concealed such that the "article, as imported, [does not] fall within the description sought to be applied." *Citroen*, 223 U.S. at 415; see, *e.g.*, *Falk* v. *Robertson*, 137 U.S. 225, 232 (1890) (high-quality tobacco hidden under low-quality tobacco tariffed as high-quality tobacco). As the CIT held, in designing passenger vehicles "for the purpose of obtaining the

significantly lower" tariff, "Ford has not 'disguised' anything." App.80a-81a.[3]

II. THIS COURT'S REVIEW IS OF CRITICAL IMPORTANCE TO INTERNATIONAL TRADE.

The government also has no response to Ford and *amici*'s showing that the inherently-suggests-use rule "undermines uniformity and transparency at every turn" and "harms U.S. manufacturing." Chamber Br.6. The question presented has enormous practical importance for global trade, because businesses require clear and predictable classification standards—especially where they import goods for further manufacturing in the U.S. *Id.* at 18-20.

The government insists the inherently-suggests-use rule has not created uncertainty, Opp.29, yet it cannot explain the governing standard, offering only that, "in *certain circumstances*, consideration of the use for which a good was designed is appropriate even in the *eo nomine* context." Opp.16 (emphasis added). A "great many" *eo nomine* headings could be said to "suggest" use, and neither the Federal Circuit nor the government offers any workable standard for determining when or how use is relevant. CITBA Br.13-15; Pet.23-24.

The government suggests any confusion could be allayed through administrative rulings. Opp.23. This ad hoc approach, however, undermines the tariff system's goals of providing stability, predictability, and consistency. See Pet.27-28. Without clear rules, the

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[3] Further, contrary to the government's account of "uncover[ing]" Ford's "scheme," Opp.10, senior Customs officials were well aware of Ford's conversion program from its inception, Pet.9.

result will be inconsistent and self-interested decisions, as the government's "heads I win; tails you lose" approach to 8703 and 8704 exemplifies. See Opp.21 (asserting cargo vehicle correctly classified in 8704 despite intent to modify it for passenger use).

American businesses have "legitimately structured and invested in their U.S. manufacturing operations and supply chains in reliance upon the 'condition as imported' rule." Chamber Br.18. The Federal Circuit's undermining of that stable and predictable rule will dampen trade, increase compliance costs, and stifle investment in U.S. manufacturing.

III. THE GOVERNMENT DOES NOT DEFEND THE FEDERAL CIRCUIT'S ERRONEOUS WAIVER RULING.

The government also declines to defend the Federal Circuit's erroneous ruling that Ford waived alternate claims. This ruling is contrary to the law of the other twelve Circuits. Pet.31-32. It also overstepped the court's function as a "neutral arbiter of matters the parties present." *United States* v. *Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020). The government did not raise those alternate claims in its opening appellate brief and never contended they were waived. Nor did Ford raise those claims as alternative grounds for affirmance. The Federal Circuit's *sua sponte* decision to inject those claims into the appeal was plainly improper.

The government argues this issue does not warrant review because Ford's alternate claims "lack merit." Opp.25-28. This is a *non sequitur*; Ford has had no opportunity to be heard on the merits of these claims, because the CIT did not reach them and made no findings of undisputed fact about them, and the Federal Circuit erroneously held them waived. Absent this

Court's intervention, this flatly erroneous waiver ruling will remain Federal Circuit precedent.

The government is also wrong on the merits. Review by import specialists constitutes treatment, and Customs liquidated entries based on this determination for more than two years, Ford MSJ (ECF 56), at 43. And established and uniform practice applies because Ford accurately described the condition of the goods, and the government was well aware they were intended to be converted. Pet.9-10. The government's belated desire to create "a huge case!," J.A.4898-4900, is no justification for its bait-and-switch regarding classification, much less the Federal Circuit's insupportable waiver ruling.

CONCLUSION

For the foregoing reasons, the Petition should be granted.

Respectfully submitted,

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