No. 18-1018

IN THE

United States Court of Appeals for the Federal Circuit

FORD MOTOR COMPANY,

Plaintiff-Appellee,

v.

UNITED STATES,

Defendant-Appellant.

Appeal from the United States Court of International Trade
The Honorable Mark A. Barnett
Case No. 1:13-cv-00291-MAB

BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLEE FORD MOTOR COMPANY'S PETITION FOR REHEARING AND REHEARING *EN BANC*

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August 5, 2019

CERTIFICATE OF INTEREST

Counsel for *amici curiae* certifies the following:

1. Full name of party represented by me:

National Association of Manufacturers

Chamber of Commerce of the United States of America

2. Name of real party in interest represented by me:

National Association of Manufacturers

Chamber of Commerce of the United States of America

3. Parent corporations and publicly held companies that own 10% or more of stock in the party:

N/A

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (and who have not or will not enter an appearance in this case) are:

N/A

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal*:*

None.

Dated: August 5, 2019

/s/ Craig A. Lewis

Craig A. Lewis

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STATEMENT OF INTEREST[1]

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The Chamber of Commerce of the United States of America (the Chamber) is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community.

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[1] All parties have consented to the filing of this *amicus* brief. No person other than amici, their members, or their counsel authored this brief in whole or in part or contributed money intended for the funding of this brief.

Amici regularly appears before the federal courts as *amicus curiae* in cases involving issues of importance to their members. *See, e.g.*, *In re Affymetrix, Inc. & Life Techs. Corp.*, No. 19-104 (Fed. Cir.) (NAM *amicus* brief); *Return Mail, Inc. v. U.S. Postal Serv.*, No. 17-1594, ___ U.S. ___ (June 10, 2019) (Chamber *amicus* brief). This is just such a case. *Amici*'s members operate in the global economy and depend on predictability as to the applicable customs duty for goods they are importing—whether as finished goods or for further manufacturing in the United States. The panel's decision has the opposite consequence three times over. It needlessly undermines century-old settled principles of duty classification, introducing massive uncertainty and subjectivity into the process. It allows like goods to be treated differently at the whim of customs officials. And it precludes companies from engaging in lawful business planning to minimize duties.

The impact of this decision, if allowed to stand, cannot be understated for *amici*'s members. *Eo nomine* tariff codes represent the vast majority of tariff codes, and the panel has done away with the bright-line rule that has governed this tariff category for more than a century. *En banc* review is warranted.

SUMMARY OF ARGUMENT

For more than a century, the basis for the customs duty applicable to goods that fall into an *eo nomine* classification has been clear: the condition of the good as imported. Companies, including *amici*'s vast memberships, have relied on this

bright-line rule to predictably, and lawfully, make decisions about what to import, in what condition, and whether and how to further process the goods after importation. Such prudential business planning supports U.S. downstream manufacturing.

The panel's decision upends this bright-line rule. It allows Customs to look past a good's physical qualities at the time of importation and base the applicable duty classification on a company's "intended use" for the good *after* importation. *Ford Motor Co. v. United States*, 926 F.3d 741, 757 (Fed. Cir. 2019). This sea change to longstanding rules governing the proper tariff classification will have significant consequences for businesses importing goods across the vast tariff code.

The panel's decision matters to *amici*'s members in a practical, concrete way: by conflating *eo nomine* and use headings, the decision means that U.S. companies that import upstream goods for further manufacturing in the United States will face increased uncertainty. The "inherently suggests use" rule cannot logically be cabined to just a few *eo nomine* classifications and will hurt U.S. global competitiveness. It also will allow Customs unduly broad leeway to subjectively and unfairly seek to maximize tariff revenue—and potentially impose penalties for honest classifications based on goods' actual condition as imported.

The Court should reconsider the panel's decision and instead affirm the Court of International Trade's well-reasoned approach to the issue.

ARGUMENT

I. THE PANEL'S DECISION CONTRAVENES A LONGSTANDING, BEDROCK PRINCIPLE OF TARIFF CLASSIFICATION.

A. Supreme Court Precedents Established The Governing Principal Of *Eo Nomine* Classifications More Than A Century Ago.

Amici's members plan and conduct their businesses in reliance on the Supreme Court's unequivocal holding that the appropriate tariff classification turns on the condition of a good as imported—not what comes next for that good. The panel's failure to adhere to those precedents alone merits rehearing.

In *Worthington v. Robbins*, 139 U.S. 337 (1891), the Supreme Court analyzed the appropriate tariff classification for enamel that, based on an examination of the article itself at importation, gave no indication of how it would be used after importation. Even though the enamel was intended for use to make watch dials, it did not fall into the duty classification for "[w]atches, watchcases, watch movements, parts of watches, and watch materials." *Id.* at 340. Rather, "[i]n order to produce uniformity in the imposition of duties, the dutiable classification of articles imported must be ascertained by an examination of the imported article itself, in the condition in which it is imported." *Id.* at 341. The Court could not have been clearer that the ultimate use was *not* a factor in determining the proper tariff: "The fact that the article in question was used in the

manufacture of watches *has no relation to the condition of the article as imported*, but to what afterwards the importer did with it." *Id.* (emphasis added).

The Supreme Court reaffirmed and broadened its ruling from *Worthington* in *United States v. Citroen*, 223 U.S. 407 (1912). There, the Court held that loose, already drilled pearls, unstrung but divided into matching lots, must be classified in their condition as imported as "pearls . . . not strung"—and not as "jewelry, and parts thereof," even though it was clear that they were intended to be converted into a strung pearl necklace after importation. The Court reiterated *Worthington*'s rule that the condition at importation governs the appropriate tariff classification; while an importer cannot "resort to disguise or artifice" to hide what an article is, a good does not become dutiable at a higher rate simply "because it has been manufactured or prepared for the express purpose of being imported at a lower rate." *Id.* at 415.

Worthington and *Citroen*, and the Court's reasoning in those cases, established bedrock principles of tariff classification that have governed for more than a century. They "provide[] a simple and workable test," "permit[] certainty and impartiality in administration," and fulfill "the purpose of Congress" in articulating different classifications. *Citroen*, 223 U.S. at 424. The panel contravened the Supreme Court's unequivocal statement that importers are lawfully entitled to manufacture or prepare a good for the express purpose of

importing it at a lower rate, and then further refine the good after importation to be something else that in its complete state would have been subject to a different tariff rate.

The panel recognized that the Ford vehicle under protest was, as it entered the United States, designed with the seats and seatbelts needed to be a passenger vehicle, and thus it fell squarely within HTSUS Heading 8703 for vehicles "principally designed for the transport of persons." That should have been the end of the analysis.

B. The Panel Improperly Conflated *Eo Nomine* and "Principal Use" Provisions.

There have always been three distinct categories of tariff provisions—(1) *eo nomine*, by far the largest category; (2) principal use; and (3) actual use. The differing standards used to determine classification under each category are adapted to their characteristics. *Eo nomine* provisions are focused on objectively ascertaining the physical characteristics of the good at the time of entry, without regard to the use to which the good is put after importation. Principal use provisions, in contrast, require an evaluation of the principal use to which the good will be put, using factors set out in *United States v. Carborundum Co*., 536 F.2d 373 (C.C.P.A. 1976). The panel erred in concluding the *Carborundum* factors have relevance to an *eo nomine* provision.

By blurring the lines between *eo nomine* and use provisions, and conflating how to evaluate the different type of provisions, the panel acted as though certain *eo nomine* headings, including HTSUS Heading 8703, are analytically the same as principal use headings. It also claimed that language in HTSUS Heading 8703 supported doing so—and would limit the reach of its decision. Not so. For one thing, many headings and subheadings explicitly refer to what the good is "designed" for. *E.g.*, HTSUS Headings 8452, 8513; HTSUS Subheadings 3006.30, 8528.71, 9030.20.05. For another thing, most *eo nomine* provisions, by generally describing the types of goods that fall within those provisions, suggest some type of use in the same way as HTSUS Heading 8703. That leaves nothing but confusion about what headings trigger this new analysis. And that, in turn, grants Customs the authority to broadly—and opportunistically—apply use factors in assessing whether goods, as imported, fall within *eo nomine* tariff headings. All of these reasons counsel in favor of further review.

C. The Panel's Decision Puts U.S. Customs Law at Odds With Global Rules.

Additionally, the panel's decision is unlawful under international law and breaks from the international standard for classifying goods as entered, not in light of transformation after entry. The United States' World Trade Organization (WTO) commitments contained in Article II(1)(b) of the General Agreement on Tariffs and Trade require customs duties be assessed on goods "on their

importation." This means (in the context of an automobile goods case) that "it is the objective characteristics of the product in question when presented for classification at the border that determine [its] classification." Appellate Body Report, *China—Measures Affecting Imports of Automobile Parts*, ¶ 164, WTO Docs. WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R (adopted Dec. 15, 2008) (internal quotation marks and footnote omitted). The reason for this rule is simple: "the security and predictability of tariff concessions would be undermined if ordinary customs duties could be applied based on factors and events that occur internally, rather than at the moment and by virtue of importation." *Id.* ¶ 165.

Absent further review and reversal, importers could be required to treat like goods differently in terms of duty classification, depending whether they are being imported into the United States or anywhere else in the world. That violates international law on classifications up to the six-digit classification level, at which the HTSUS is globally harmonized. It increases compliance costs and risk of error. And it further incentivizes manufacturers to make goods abroad.

II. UNCERTAINTY CREATED BY THE PANEL'S DECISION WILL SIGNIFICANTLY HARM U.S. MANUFACTURERS BY REDUCING TRANSPARENCY, PREDICTABILITY, AND FAIRNESS.

A. The Panel Replaced A Clear, Objective Standard With Uncertainty And Subjectivity.

Amici's members depend on having the up-front clarity that the "condition as imported" rule has long provided. But under the panel's decision, risk-averse

law-abiding importers can no longer be certain that they are importing under the correct HTSUS code.

Businesses need predictability for proper medium- and long-term planning. An unpredictable and subjective "inherently suggests use" exception would inject a high degree of uncertainty and confusion for U.S. companies who import goods as to whether the new standard applies in the first place—and, if it does, what the proper outcome is. Many businesses, across multiple industries, have various downstream uses for imported goods, further multiplying the uncertainty. The panel's decision thus will increase companies' compliance costs, risks of classification error, and delays in clearing customs. The Court should not endorse a rule that creates so much uncertainty for importers making their best efforts to adhere to the rules.

B. The Panel Ignored That Legitimate Tariff Engineering Is Lawful, Prudential Business Planning That Can Bolster U.S. Manufacturing.

Amici's members have legitimately structured and invested in their U.S. manufacturing operations and supply chains in reliance upon the "condition as imported" rule that the Panel's decision undermines. That rule allows businesses to arrange their imports to minimize duties, so long as it does not involve artifice or deception (which the panel did not find was at issue here). *See Merritt v. Welsh*, 104 U.S. 694, 704 (1881) (importer may "manufacture his goods as to avoid the

burden of high duties"); *Citroen*, 223 U.S. at 1415 (similar). Conversion of a good after importation, like Ford did, is "legitimate tariff engineering." *Ford Motor Co. v. United States*, 254 F. Supp. 3d 1297, 1324 (Ct. Int'l Trade 2017)).

Legitimate tariff engineering has broader importance beyond manufacturing upstream goods to achieve lower duties. Deciding in what form to import a good, and how to arrange further manufacturing in the United States, depends on many business considerations, including what input materials are available, from what source, and at what cost. By requiring new and different tariff classifications not justified by the condition of the article at the time of importation, the panel's decision will inevitably disrupt longstanding business plans and investments, increase regulatory risk, and increase costs for U.S. manufacturing of downstream goods. For businesses considering adding new U.S. manufacturing or increasing an existing manufacturing footprint, greater tariff uncertainty increases risk and makes complex supply chain planning considerably more difficult. Projects beneficial to U.S. manufacturing and related jobs will be threatened.

The new rule also brings with it significant financial and legal risk for importers. It is likely to require Customs to reevaluate countless established classification determinations, which, given the inherent ambiguity of the new standard, will engender numerous tariff disputes and elevate the risk of customs penalties and claims for back duties for errors in classification. Protests and court

litigation to challenge unfair rulings by Customs will follow, raising compliance costs for both U.S. manufacturers and Customs.

C. The Panel's Decision Invites Arbitrary Decisions by Customs.

The panel's decision gives Customs officials overbroad discretion to make classification determinations designed to maximize tariff revenue. Customs would become nearly unfettered in determining whether an *eo nomine* provision should be interpreted based on the "inherently suggests use" standard.

This bad result is not hypothetical. In an earlier tariff classification ruling involving the Dodge Sprinter, Customs, consistent with established practice, applied the "condition as imported" rule to levy a higher tariff on vehicles that were imported as cargo vehicles but were plainly intended to be manufactured into passenger vehicles post-importation. U.S. Customs & Border Prot., NY N056077, The Tariff Classification of a Motor Vehicle From Canada (Apr. 21, 2009), *available at* https://bit.ly/2OBcjW7. Customs applied the opposite rule for the same HTSUS headings in this case. Determining the proper tariff should be objective, predictable, and easily ascertainable; the panel's decision portends a world in which tariff analysis is anything but that.

Finally, aside from permitting results-oriented conduct by Customs, the panel's decision also imposes unnecessary administrative burdens on Customs. Previously, Customs needed only verify the objective physical condition of goods

at the port of importation to confirm that the importer correctly classified the goods. But under the panel's decision, Customs can consider subjective criteria to determine an importer's "intent" for downstream manufacturing, how the import fits into an end product, and how the product will be used by end-consumers. These additional inquiries will require reviewing new information and documentation from importers and making judgment calls, all of which will inevitably increase time and burden for *amici*'s members and Customs alike.

CONCLUSION

For these reasons, this Court should grant rehearing or rehearing *en banc*.

Respectfully submitted,

August 5, 2019

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I hereby certify that on August 5, 2019, I caused a copy of the foregoing to be served by electronic means via the Court's CM/ECF system on all counsel registered to receive electronic notices.

August 5, 2019

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Circuit Rule 35(g) because it contains 2,600 words, excluding the parts of the brief exempted by the rules.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in Times New Roman 14-point font.

August 5, 2019

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