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

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

The National Association of Manufacturers and the Chamber of Commerce of the United States of America respectfully submit this brief as *amici curiae*.[1]

[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amici*, their members, or counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties were notified of *amici*'s intent to submit this brief at least 10 days before it was due. Petitioner filed a notice of blanket consent with the Clerk. Respondent has consented to the filing of this brief.

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 approximately 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.

Amici regularly appear before the federal courts as *amicus curiae* in cases involving issues of importance to their members. *See, e.g.*, *Nestlé USA, Inc.* v. *Doe I*, Nos. 19-416 & 19-453, 2019 WL 5589062 (amicus brief of the Chamber and NAM, among others); *Behr Dayton Thermal Prods. LLC* v. *Martin*, No. 18-472, 2018 WL 5994153 (same). This is just such a case. *Amici*'s members operate in the global economy and

depend on uniformity and 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 Federal Circuit's decision has the opposite consequence three times over. It needlessly undermines century-old settled principles of tariff 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 prevents companies from engaging in lawful business planning to minimize duties.

The impact of this decision, if allowed to stand, cannot be overstated for *amici*'s members. *Eo nomine* tariff codes (meaning "by name") represent the vast majority of tariff codes, and the Federal Circuit below has done away with the bright-line rule that has governed this tariff category for more than a century. By ascribing an "inherently suggests use" test to the classification of *eo nomine* goods, the Federal Circuit has conflated the standards by which *eo nomine* goods are classified with those subject to headings designated as "principal use" or "actual use" by the tariff code. This hybrid test finds no support in the statutory text, the governing rules of interpretation, or tariff classification principles set forth by this Court more than a century ago. *Amici* respectfully request that this Court grant certiorari and restore the settled principles and uniformity that have long governed the tariff classification system.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

For more than a century, the method for classifying imported goods that fall into an *eo nomine* tariff heading has been clear: the condition of the goods 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 Court of International Trade followed this longstanding, bright-line rule when it held below that the classification analysis is limited to the condition of goods upon importation. However, the Federal Circuit's reversal—the latest in a recent line of decisions by that court repeating the same error—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. Pet. App. 13a. Under the Federal Circuit's approach, Customs could classify goods differently by looking to possible different end uses for an identical good—even if the good's *eo nomine* heading does not specify use as an element of the good's classification. Imported goods could have countless end uses, and so the Federal Circuit's "inherently suggests use" rule gives Customs virtually unfettered discretion as to how it categorizes imported goods. 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 decision below matters to *amici*'s members in a practical, concrete way: by conflating *eo nomine* and use headings, the Federal Circuit's ruling means that U.S. companies that import upstream goods for further manufacturing in the United States will face increased uncertainty as to the proper classification of goods at importation. *Eo nomine* headings are by far the most common tariff headings. Application of the "inherently suggests use" rule invented by the Federal Circuit cannot logically be cabined to just a few *eo nomine* classifications but will instead potentially infect the entire tariff schedule and will in turn 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 a good's actual condition as imported.

This result is not mere conjecture. Here, Customs classified Ford passenger vehicles as cargo vehicles based on their transformation into cargo vehicles after importation. Yet in a mirror-image case, Customs classified Dodge cargo vehicles as such, despite clear evidence that they would be transformed into passenger vehicles after importation. *See* 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. The difference in outcome between these two factually-similar cases reflects the root problem: The Federal Circuit's current approach to *eo nomine* interpretation invites ambiguity, subjectivity, and inconsistency in future application across the spectrum.

Moreover, ascribing an "inherently suggests use" test to domestic *eo nomine* classifications will have negative implications for broader international trade relations and agreements. Businesses operating globally rely on clear, predictable standards in determining where and what to import, in what condition, and at what cost. Uncertainty in *eo nomine* classification rates may lead businesses to choose to manufacture goods to completion abroad, thereby reducing the number and type of upstream goods imported to the United States to support downstream, complex U.S. manufacturing. The Federal Circuit's decision undermines uniformity and transparency at every turn, harms U.S. manufacturing, and increases U.S. companies' compliance risk and costs. In short, U.S. commerce is unambiguously harmed by the Federal Circuit's unclear rule, which gives undue power and flexibility to U.S. Customs officials to unilaterally determine tariff classifications at the expense of fairness and predictability.

This Court last confronted tariff classification standards decades ago—and the most relevant decisions here are over a century old. *See* Pet. 27 & n.6. Nothing has changed in the structure or substance of the tariff schedules that justifies abandoning established principles of tariff construction, while developments in the global economy have made the condition-as-imported rule more important now than ever. Yet, the Federal Circuit's decision flatly departs from principles this Court and the manufacturing community have long viewed as settled. Prudential business planning promotes economic growth, but the decision below threatens to upend those efforts. The time has come for this Court to revisit

and reaffirm these longstanding, workable principles governing tariff classification.

ARGUMENT

I. THE FEDERAL CIRCUIT'S DECISION CONTRAVENES LONGSTANDING, BEDROCK PRINCIPLES OF TARIFF CLASSIFICATION.

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

Amici's members plan and conduct their businesses in reliance on the Supreme Court's longstanding, unequivocal holding that the appropriate tariff classification turns on the condition of a good *as* imported—not on what a company does with the good *after* it is imported. The Federal Circuit's failure to adhere to those precedents alone merits review.

Fundamental principles of tariff classification set forth in *Worthington* v. *Robbins*, 139 U.S. 337 (1891), have guided domestic trade law for more than a century. In *Worthington*, this Court analyzed the appropriate tariff classification for "white hard enamel" that, based on an examination of the article itself at the time of importation, provided no indication of how it would be used after import. *Id.* at 338. At the outset, customs officials classified the enamel by looking to the importer's prospective use, rather than the condition of the enamel as imported. *Id.* at 338-339. Rejecting that approach, this Court determined that even though the enamel was intended for use to make watch dials, it did not fall within the duty classification for "[w]atches, watchcases, watch movements, parts of watches, and watch materials."

Id. at 340. Rather, the Court opined, "[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).

This 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 based upon their condition as imported—"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 core holding that the condition at importation governs the appropriate tariff classification. And 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. In the decision below, the Federal Circuit contravened this 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. *See id*. at 415.

In the present case, the Federal Circuit recognized that the Ford vehicle under protest was, as it entered the United States, designed with the structural and auxiliary design features needed to be a passenger vehicle, and thus fell squarely within HTSUS Heading 8703 for vehicles "principally designed for the transport of persons." The facts are undisputed—at the time of importation, Ford's vehicles plainly were passenger vehicles, as the Court of International Trade held. Whether Ford intended to subsequently transform the goods is immaterial under the Court's clear and longstanding precedent. That should have been the end of the Federal Circuit's analysis.

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

The Harmonized Tariff Schedule of the United States (HTSUS) provides 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. For starters, by its literal meaning, *eo nomine* provisions are classified "by name, *not by use*." *Carl Zeiss, Inc.* v. *United States*, 195 F. 3d 1375, 1379

(Fed. Cir. 1999) (emphasis added); *see also* Webster's Third New International Dictionary (1993) (defining *eo nomine* as "by or under that name"). At their core, *eo nomine* provisions are focused on objectively ascertaining the physical characteristics of the good at the time of entry, without regard to the good's use after importation. Accordingly, *eo nomine* classifications are thus properly determined by objectively looking to the physical characteristics of the good in question, at the time of entry.

In addition to *eo nomine* headings, the tariff code specifically defines two categories of "use" headings: "principal use" and "actual use." Principal use provisions, as the name suggests, 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). HTSUS Additional U.S. Rules of Interpretation (ARIs) provide further guidance in ascertaining a good's use where required, which in any event must "be determined in accordance with the use in the United States *at, or immediately prior to,* the date of importation." ARI 1(a) (emphasis added). This condition-at-importation analysis is also recognized under broader international trade law. *See* Pet. 18.

Finally, actual use provisions, which are relatively rare, are typically used as an incentive to obtain a lower tariff rate. Such classification "is satisfied only if such use is intended at the time of importation, the goods are so used and proof thereof is furnished" within a limited time period following the importation. ARI(1)(b). Actual use provisions are generally intended to support *lower* duty rates. *See* Pet. 17-18.

The decision below deviated from these rules of construction many times over. Although the Federal Circuit acknowledged that the challenged heading, HTSUS Heading 8703, is an *eo nomine* provision, *see* Pet. App. 11a-13a, 27a, the court nevertheless applied the principal use factors in *Carborundum*. *Id.* at 27a. In conducting this analysis, the Federal Circuit looked beyond the subject passenger vehicles' condition at importation, and instead considered post-importation modifications and the inherently-suggested use of the modified goods to determine that the goods should be classified as cargo vehicles. *Id.* at 28a. Concluding that the "principally designed for" language in HTSUS Heading 8703 "inherently suggests a type of use," *id.* at 13a, the Federal Circuit turned the construct of *eo nomine* on its head: evaluating whether a good's post-importation *use* is relevant to an *eo nomine* classification, rather than looking to the good's essential character and name. Further, the "inherently suggests * * * use" construct is found nowhere in the statutory text or this Court's precedents. To the contrary, this Court has consistently recognized its "duty to refrain from reading a phrase into the statute when Congress has left it out." *Keene Corp.* v. *United States*, 508 U.S. 200, 208 (1993). And the consequences of ignoring that principle here are concrete and identifiable: Under the Federal Circuit's new rule, Customs officials have authority to look beyond the condition of the article as imported, thereby nullifying the entire concept of *eo nomine* provisions.

By blurring the lines between *eo nomine* and use provisions, and conflating how to evaluate the different types of provisions, the Federal Circuit 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. HTSUS Heading 8703 states: "Motor cars and other motor vehicles principally designed for the transport of persons (other than those of heading 8702), including station wagons and racing cars." *See* Pet. App. 103a. For one thing, many *eo nomine* headings and subheadings in the tariff code across several different industries explicitly refer to what the good is "designed" for. *See, e.g.*, HTSUS Headings 8452 ("Sewing machines, other than book-sewing machines of heading 8440; *furniture, bases and covers specially designed for sewing machines*; sewing machine needles; parts thereof"), 8513 ("*Portable electric lamps designed to function by their own source of energy* (for example, dry batteries, storage batteries, magnetos), other than lighting equipment of heading 8512; parts thereof"); HTSUS Subheadings 3006.30 ("Opacifying preparations for X-ray examinations; *diagnostic reagents designed to be administered to the patient*"), 8528.71 ("Reception apparatus for television, whether or not incorporating radio-broadcast receivers or sound or video recording or reproducing apparatus: *Not designed to incorporate a video display or screen*"), 9030.20.05 ("Oscilloscopes and oscillographs: *Specially designed for telecommunications*") (all emphases added). That provides no basis for looking beyond the design of the good at the time of entry, as opposed to how it might be used after subsequent modifications. The Federal Circuit's contrary approach would open a gaping hole in the three-part classification structure described above. *See supra* pp. 9-10.

Indeed, most *eo nomine* provisions, by generally describing the types of goods that fall within those provisions, could be read to suggest some type of use in the same way as HTSUS Heading 8703. This is the very nature of tariff classification—describing what a good is can also imply what it is used for. However, HTSUS Heading 8703 does not include the word "use." And so the Federal Circuit's decision leaves nothing but confusion to importers and the business community about which headings trigger this new analysis, and which do not. 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. This Court's intervention is urgently needed to halt this unbridled authority.

C. The Federal Circuit's Decision Puts U.S. Customs Law At Odds With The United States' Commitments Under International Trade Agreements.

In addition to violating U.S. statutory law, the Federal Circuit's decision is also at odds with international trade agreement rules. The global standard for classifying goods as entered parallels the longstanding U.S. rule. For example, the United States' WTO commitments, as epitomized in part in Article II(1)(b) of the General Agreement on Tariffs and Trade (GATT), requires that customs duties be assessed on goods "on their importation." This means (as enunciated in the similar context of an automobile goods case before the WTO Appellate Body) 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; emphasis added). 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. Introducing opportunity for a subjective customs analysis that looks to suggestive use post-importation will lead to devastating consequences for global business and trade writ large.

Absent this Court's further review and reversal, importers could be required to treat like goods differently in terms of duty classification, depending on whether they are being imported into the United States or anywhere else in the world. Because the HTSUS is globally harmonized up to a certain classification level, deviating from that standard risks violation of international law. It increases compliance costs and risk of error. And it further incentivizes manufacturers to make goods abroad. These real and immediate consequences implore this Court's review.

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

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

In assessing the subject vehicle at its post-importation state, and looking to the vehicle's "inherently suggest[ed] * * * use," Customs flouted the longstanding principles that have guided the domestic tariff classification system for decades. HTSUS Heading 8703's "principally *designed for*" language means what it says: a look to design, requiring consideration of the good's "physical characteristics" at the time of entry. *See supra* pp. 9-10, 12. The rules that govern classification of goods under the HTSUS focus on the essential character of the good as entered to determine the proper HTSUS heading, no matter whether the good is finished or unfinished. Here, Ford's imported vehicles were indeed finished passenger vehicles upon importation. Nowhere does the statutory text offer support for Customs' newfound "inherently suggests * * * use" interpretation. Nor does the statutory text authorize consideration of physical characteristics imparted to imported articles at some unknown point in time after importation.

"Whatever may have been in the minds" of Congress at the time of drafting the tariff code, "the legislative intent is to be sought, first, from the words they have used. If these are clear, we need go

no further; if they are obscure or ambiguous, then the intent may have to be sought out by reference to the context, * * * to the history of the art or trade, to general history, to anything that will throw light on the meaning of the obscure or ambiguous terms use. But there is no obscurity or ambiguity here." *Merritt* v. *Welsh*, 104 U.S. 694, 702 (1881). Rather, for over a century, this Court has steadfastly adhered to the same, unambiguous, interpretive principles of tariff classification: "[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." *Worthington*, 139 U.S. at 341. And the distinction between *eo nomine* and principal use provisions is deliberate. "[W]here Congress includes particular language in one section of a statute but omits it in another * * *, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Keene Corp.*, 508 U.S. at 208. In classifying HTSUS Heading 8703 as an *eo nomine* provision, care was taken to ascribe to it a classification determined "by name, not by use." *Carl Zeiss*, 195 F. 3d at 1379.

Amici's members depend on having the up-front clarity that the "condition as imported" rule has long provided. But under the Federal Circuit's decision, risk-averse, law-abiding importers can no longer be certain that they are importing under the correct HTSUS code. Compliance costs will necessarily balloon for responsible importers that strive to strictly adhere to a new rule that replaces clarity and predictability with an ever-moving target.

The "inherently suggests * * * use" test, quite simply, makes no sense. For instance, a heading specify-

ing bicycles "not designed for *use* with [wide] tires" apparently does not inherently suggest use, but a heading specifying "[m]otor cars and other motor vehicles *principally designed for* the transport of persons" apparently does inherently suggest use. Pet. 23-24 (emphases added and internal quotation marks omitted); Pet. App. 103a (HTSUS Heading 8703). There is no way for importers to determine which test applies to their goods, even when they can afford to receive good counsel from experienced trade lawyers. And, it is impracticable for importers to request a ruling for every single good they import. The Federal Circuit has left importers in a very tough spot.

Businesses need predictability for proper medium- and long-term planning. Determining whether to import a good, and how much to pay for it, depends on the good's overall cost. But without knowing which tariff will apply, there is no way to evaluate the ultimate, effective cost of the good until after a company has already decided to import it.

This is even more important for businesses making large, long-term investments in the United States such as high-value manufacturing. These types of manufacturing businesses often require hundreds or thousands of imported goods as inputs for making the downstream goods here in the United States. 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. The Federal Circuit's decision has unbounded consequences: uncertainty over proper standards for classification will increase companies' compliance

costs, risks of classification error, and delays in clearing customs. These additional risks and costs to American businesses are unnecessary. This Court should not let stand a rule that creates so much uncertainty for importers making their best efforts to adhere to the rules.

B. The Federal Circuit 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 Federal Circuit'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 neither the Federal Circuit nor the Court of International Trade found to be at issue here). As the Court of International Trade recognized, "[l]egitimate tariff engineering refers to 'the long-standing principle[ ] that merchandise is classifiable in its condition as imported and that an importer has the right to fashion merchandise to obtain the lowest rate of duty and the most favorable treatment.' " Pet. App. 37a & n.8; *see also Merritt*, 104 U.S. at 704 (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." *Id.* at 69a-70a.

This principle is enshrined, for example, in Customs' own rules when goods are imported into Foreign Trade Zones (FTZs). *See* 19 U.S.C. § 81a *et seq.* FTZs "are the United States' version of * * * free-

trade zones"—"secure areas under [Customs'] supervision" that are located "in or near [Customs'] ports of entry." *About Foreign-Trade Zones and Contact Info*, U.S. Customs & Border Prot., https://www.cbp.gov/border-security/ports-entry/cargo-security/cargo-control/foreign-trade-zones/about (last modified Mar. 2, 2020). These zones provide an intermediary space where both foreign and domestic goods "may be moved" for purposes of "storage, exhibition, assembly, manufacturing, and processing." *Id.* Goods imported into a FTZ can be further manufactured without paying a duty upon importation into a FTZ. When the goods exit the FTZ for consumption, the importer can "elect to pay either the duty rate applicable on the foreign material placed in the zone or the duty rate applicable on the finished article transferred from the zone whichever is to his advantage." *Id.* Customs, in its rules governing FTZs, expressly states that taking advantage of the best duty rate is one of the benefits of electing to import into a FTZ.

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. The Federal Circuit's decision paves the way for new and different *eo nomine* tariff classifications that are not grounded in the condition of the good upon importation. Its rule 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 Federal Circuit's rule also brings with it significant financial and legal risk for importers. To be faithful to the rule as espoused by the Federal Circuit below, Customs will need to reevaluate countless established classification determinations. Given the inherent ambiguity of the Federal Circuit's standard, this 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 and unsupported rulings by Customs will follow, raising compliance costs for both U.S. manufacturers and Customs alike. These consequences are a far cry from what this Court envisioned when it reaffirmed the "simple and workable" principles of tariff classification that have governed undisturbed for over a century. *Citroen*, 223 U.S. at 424.

C. The Federal Circuit's Decision Invites Arbitrary Decisions by Customs.

The leeway granted to Customs by the Federal Circuit's amorphous rule has already led to an unfair result in this case, and will continue to cause harm rippling across many U.S. manufacturing industries in the future if left unchecked. The Federal Circuit's decision provides Customs officials with overbroad discretion to make classification determinations designed to maximize tariff revenue. The history in this very case bears that out: After inspecting post-

importation, post-conversion Transit Connect 6/7s and assuming the vehicles had been imported in that condition, Customs officials soon realized their error. *See* Pet. 9-10; Fed. Cir. J.A. 4898-900. Nevertheless, the court below ignored that mistaken judgment and continued to look at whether post-importation modifications "inherently suggested" the modified good would be put to a use for which there is a higher tariff rate—cargo vehicles. Such a subjective approach gives Customs nearly unfettered discretion to determine whether an *eo nomine* provision should be interpreted based on the "inherently suggests use" standard, *see* Pet. 26, even though this Court has forewarned just the opposite: "Discretion in the custom-house officer should be limited as strictly as possible." *Merritt*, 104 U.S. at 702.

This dangerous 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, classifying the vehicles according to the higher tariff rate. Determining the proper tariff should be objective, predictable, and easily ascertainable; the Federal Circuit's decision portends a world in which tariff analysis is anything but that.

Part of the concern with the Federal Circuit's rule is the means by which Customs makes classification

determinations, collects customs duties, and interacts with importers. Thousands of Customs officials at the 328 ports of entry throughout the country are charged with making classification decisions every day. *See At Ports of Entry*, U.S. Customs & Border Prot., https://www.cbp.gov/border-security/ports-entry (last modified Apr. 2, 2018). Those officials have the power to demand additional information regarding imported goods, or to take action against an importer if they disagree with the importer's self-classification of goods. *See* 19 C.F.R. § 151.11 (authorizing Customs officials to request information from importers via Customs Form 28 (CF-28)); *id.* § 152.2 (authorizing Customs to notify the importer of increases in duties via Customs Form 29 (CF-29)). The "inherently suggests use" rule invented by the Federal Circuit invites increased subjectivity, arbitrariness, and inconsistency. It also provides opportunity for Customs officials to issue CF-28 inquiries and CF-29 actions at much higher levels than ever before. The likelihood of substantial differences in duty rates for downstream products has increased in recent years, due to increased duties for many thousands of products generated by major shifts in the United States' approaches to tariff policy. And so, unfettered discretion by Customs to make results-oriented decisions on duty rates will lead to many more classification disputes with substantial commercial significance for U.S. companies.

Finally, aside from permitting arbitrary and even results-oriented conduct by Customs, the Federal Circuit's decision also imposes unnecessary administrative burdens on the agency itself. 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 Federal Circuit'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. With respect to *eo nomine* classifications—classifications that should be determined "by name"—where is the line drawn? The subjective approach to *eo nomine* review advanced by the Federal Circuit finds no home in the tariff code.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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