No. 13-803

In the Supreme Court of the United States

DECKERS OUTDOOR CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

The Harmonized Tariff Schedule of the United States (HTSUS) requires U.S. Customs and Border Protection (Customs) to classify imports of merchandise. The question presented is as follows:

Whether Customs properly interpreted the term "footwear of the slip-on type" in a particular HTSUS subheading to include a pull-on crochet boot. HTSUS Subheading 6404.19.35.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 714 F.3d 1363. The opinion of the Court of International Trade (Pet. App. 29a-54a) is reported at 844 F. Supp. 2d 1324.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 2013. A petition for rehearing was denied on October 10, 2013 (Pet. App. 55a-56a). The petition for a writ of certiorari was filed on January 7, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Duties on imports into the United States are assessed under the Harmonized Tariff Schedule of the United States (HTSUS), 19 U.S.C. 1202. Section

1500(b) of Title 19 of the United States Code requires U.S. Customs and Border Protection (Customs) to "fix the final classification and rate of duty applicable to * * * merchandise" under the HTSUS. 19 U.S.C. 1500(b). The HTSUS is organized by headings that identify general categories of merchandise, and by subheadings that identify more specific classes of the goods within each general category. Within a particular HTSUS provision, there can be many successive subheadings that increasingly narrow and further define what is included.

The tariff classification of merchandise under the HTSUS is governed by the principles set forth in the General Rules of Interpretation (GRIs) and the Additional U.S. Rules of Interpretation (ARIs). See *Orlando Food Corp.* v. *United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998). The GRIs are applied in numerical order. If the proper classification is achieved through a particular GRI, the remaining GRIs should not be considered. *Id.* at 1440. The GRIs state that, "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the [remaining GRIs]." GRI 1 ¶ 1. When a particular tariff term is not defined in the statute, it is construed in accordance with its common and commercial meaning, which are presumed to be the same. See *E.M. Chems.* v. *United States*, 920 F.2d 910, 913 (Fed. Cir. 1990); *Brookside Veneers, Ltd.* v. *United States*, 847 F.2d 786, 789 (Fed. Cir.), cert. denied, 488 U.S. 943 (1988).

2. Petitioner is an importer of Ugg® Classic Crochet boots, which have a knit upper area and a rubber

sole, and no laces, buckles, or other fasteners. Pet. App. 3a. When petitioner imported the Classic Crochet boots into the United States, Customs classified them under HTSUS Subheading 6404.19.35, which covers the following items of footwear:

> Footwear with outer soles of rubber, plastics, leather or composition leather and uppers of textile materials: Footwear with outer soles of rubber or plastics: Other: Footwear with open toes or open heels; *footwear of the slip-on type, that is held to the foot without the use of laces or buckles or other fasteners*, the foregoing except footwear of subheading 6404.19.20 and except footwear having a foxing or foxing-like band wholly or almost wholly of rubber or plastics applied or molded at the sole and overlapping the upper: Other

Ibid. (emphasis added). Merchandise that falls within this subheading is subject to a 37.5 percent ad valorem duty rate. Pet. App. 4a.

3. Petitioner filed an administrative protest challenging Customs' classification of the merchandise. Petitioner argued that the Classic Crochet boots should have been classified under a different subheading, 6404.19.90, which covers "[f]ootwear with outer soles of rubber * * * and uppers of textile materials." Subheading 6404.19.90 is a "basket provision" that applies only if merchandise is not covered by a more specific subheading. Pet. App. 4a. Under petitioner's theory, its merchandise would have been subject to a much lower duty rate (9 percent instead of 37.5 percent). *Ibid.*

4. Customs denied the protest, and petitioner filed suit in the Court of International Trade (CIT). Petitioner argued that Customs' classification was incor-

rect and that Subheading 6404.19.35 includes shoes, but not boots, *i.e.*, footwear that extends above the ankle.

The CIT granted the Government's motion for summary judgment, holding that Customs had correctly classified the merchandise. Pet. App. 29a-54a. The court held that the plain language of Subheading 6404.19.35 encompasses footwear that can be "easily and quickly donned due to the fact that one need not use a fastener of any type to secure the footwear to the foot after putting it on." *Id.* at 44a. The court explained that, within the subheading, "the relative clause 'that is held to the foot without the use of [fasteners]' serves to explain and elaborate upon the phrase 'footwear of the slip-on type.'" *Id.* at 45a. The court found the phrase "that is" to be "directly equivalent to the phrase *id est*, commonly abbreviated as 'i.e.'" or "'in other words.'" *Ibid.* The court also held, contrary to petitioner's contention, that the term "slip-on" can naturally be used to refer to boots. *Id.* at 47a-49a.

5. The court of appeals affirmed. Pet. App. 1a-28a. The court observed that Subheading 6404.19.35 "is not limited to shoes, but instead covers '*footwear* of the slip-on type,'" and that "the term 'footwear' plainly encompasses both shoes and boots." *Id.* at 8a. The court also identified other HTSUS provisions that use the word "shoe" or "boot" to narrow a subheading's scope. *Ibid.* "In arguing that [the subheading] excludes boots," the court stated, "[petitioner] excises the word 'footwear' from the statutory text." *Id.* at 9a.

As further support for its plain-language analysis, the court of appeals noted that Treasury Decision 93-88 specifically provides that the term "slip-on" in-

cludes, *inter alia*, a pull-on boot. Pet. App. 9a (citing *Footwear Definitions*, T.D. 93-88, 27 Cust. Bull. 312, 320 (1993) (Treasury Decision)). The court explained that, although the Treasury Decision is not a Customs ruling, it has been used by Customs "since at least 1993" and was "specifically designed to assist importers 'in better understanding classification requirements.'" *Id.* at 10a. Noting Customs' consistent and longstanding practice of classifying pull-on boots as "footwear of the slip-on type," the court stated that "Customs' interpretation of the term 'slip-on' serves to enhance the persuasive power of that interpretation." *Id.* at 10a-11a. The court further explained that various dictionary and trade definitions of "slip-on" supported this interpretation. *Id.* at 11a-13a.

Addressing the subheading's relative clause ("that is held to the foot without the use of laces or buckles or other fasteners"), the court of appeals acknowledged that the clause's meaning "would have been more pellucid had Congress added an additional comma after the phrase 'that is.'" Pet. App. 15a. The court concluded, however, that "defining the term 'slip-on footwear' as footwear that does not contain 'laces or buckles or other fasteners' is consistent with dictionary definitions which indicate that the lack of fasteners is a characteristic feature of slip-on items." *Ibid.* The court of appeals also upheld the CIT's determination that there were no genuine issues of material fact that would foreclose summary judgment. *Id.* at 17a-20a.

Judge Dyk dissented. Pet. App. 21a-27a. In his view, in "order to qualify as 'footwear of the slip-on type,' under the common and commercial definition, an item of footwear must satisfy three limitations: it

must be a *shoe* (that is, not a high-cut boot); it must be *easy to slip on*; and it must have *few or no fasteners*." *Id.* at 22a. Judge Dyk concluded that the boots at issue here "fail two of the three criteria for being 'footwear of the slip-on type': they are not shoes, and they are not easy to slip on." *Id.* at 25a. The dissenting judge therefore would have held that "the boots at issue in this appeal do not fall within subheading 6404.19.35." *Id.* at 24a.

The court of appeals denied petitioner's petition for panel rehearing or rehearing en banc. Pet. App. 55a-56a.

ARGUMENT

The court of appeals correctly affirmed the CIT's judgment and Customs' interpretation of Subheading 6404.19.35. The court properly determined that, under the plain language of that subheading, the phrase "footwear of the slip-on type" encompasses the boots at issue in this case. The decision of the court of appeals does not conflict with any decision of this Court or present a recurring and important question of federal law. Further review is not warranted.

1. The court of appeals correctly held that the term "slip-on footwear" encompasses boots with no fasteners. Subheading 6404.19.35 is not limited to either shoes or boots but rather contains the broader term "footwear." When Congress seeks to limit a subheading to a subset of footwear, it employs the term "shoes" or "boots" to do so. Pet. App. 8a. Petitioner's attempt to exclude boots from the subheading's scope therefore "is contravened by the plain language of the statute" and "excises the word 'footwear' from the statutory text." *Id.* at 8a-9a.

The court of appeals also properly determined that slip-on footwear is—by definition and as a matter of common usage—footwear that has no laces, buckles, or other fasteners. Pet. App. 12a-13a. The presence of those items requires manipulation by the wearer to attach the footwear to the foot and thus takes the footwear out of the slip-on category. Petitioner's Classic Crochet boots are properly classifiable under Subheading 6404.19.35 as "footwear of the slip-on type" because those boots have no laces, buckles, or other fasteners.

Petitioner contends (Pet. 18-22) that the court of appeals incorrectly interpreted the relative clause in Subheading 6404.19.35. Petitioner argues that the interpretation adopted by Customs and upheld by the courts below "renders the phrase 'of the slip-on type' surplusage and reads it out of the statute." Pet. 19. As the CIT explained, however, the phrase "that is" often means "i.e." or "in other words." Pet. App. 45a. It is therefore unsurprising that the relative clause as a whole serves to *clarify* the term "slip-on type" rather than to add an additional limitation.

In any event, it ultimately makes no difference whether the relative clause functions as an additional limitation (as petitioner argues) or as a definition (as the court of appeals held). If the clause is construed as a limitation, boots (like petitioner's) that lack fasteners must independently satisfy the usual understandings of "footwear of the slip-on type" in order to fall within Subheading 6404.19.35. Even under that reading, however, the subheading would encompass the Classic Crochet boots at issue here. As the court of appeals explained, the common meaning of "footwear" includes boots, "slip-on" footwear can also in-

clude boots, and it is undisputed that the Classic Crochet boots lack fasteners. See Pet. App. 15a-16a.

2. Petitioner contends (Pet. 11-16) that the court of appeals erred by deferring to Customs' longstanding practice of classifying boots without laces or other fasteners as "footwear of the slip-on type" under Subheading 6404.19.35. In *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944), the Court held that a variety of administrative rulings may warrant deference, explaining that "[t]he weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.* at 140; see *Kasten* v. *Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1335-1336 (2011); *Dell Prods. LP* v. *United States*, 642 F.3d 1055, 1060-1061 (Fed. Cir. 2011) (applying *Skidmore* deference to Customs' interpretation). The Court more recently explained that *Skidmore* remains good law and that Customs' classification rulings can warrant *Skidmore*'s "power to persuade" deference. See *United States* v. *Mead Corp.*, 533 U.S. 218, 235-237 (2001).

Petitioner substantially overstates the extent to which the deference principles described above drove the court of appeals' overall analysis in this case. The court first explained that petitioner's reading of Subheading 6404.19.35 "is contravened by the plain language of the statute." Pet. App. 8a; see *id.* at 8a-9a. Only after that textual analysis did the court observe that "[petitioner's] position is *further* undermined by *Treasury Decision* 93-88." *Id.* at 9a (emphasis added). After discussing the Treasury Decision and the con-

sistent Customs practice that had been built upon it, see *id.* at 9a-11a, the court addressed petitioner's contention that "the footwear industry does not consider any type of boot, especially one that has to be pulled on, to be of the slip-on type," *id.* at 11a (internal quotation marks omitted). The court described a variety of sources that refuted petitioner's characterization of industry terminology. *Id.* at 11a-13a. Nothing in the court of appeals' opinion suggests that the court treated principles of *Skidmore* deference as outcome-determinative here.

In any event, the court of appeals appropriately treated the Treasury Decision and longstanding Customs practice as confirmation of the statute's plain meaning. As the court below correctly noted, "the degree of deference afforded a Customs' classification depends on the 'consistency of the classification with earlier and later pronouncements.'" Pet. App. 11a (quoting *Warner-Lambert Co.* v. *United States*, 407 F.3d 1207, 1209 (Fed. Cir. 2005)). The length of time an agency has held a view as to the meaning of a statute thus "suggests that [it] reflect[s] careful consideration, not 'post hoc rationalizatio[n].' * * * And [it] consequently add[s] force to [a court's] conclusion." *Dell Prods. LP*, 642 F.3d at 1060 (quoting *Kasten,* 131 S. Ct. at 1335).

Petitioner asserts that the decision below could "effectively bar all challenges to Customs classification decisions where Customs has issued any form of written interpretation." Pet. 16. That concern is baseless. If this had been the first case in which Customs applied the term "slip-on" to boots, the issue of *Skidmore* deference would have required an analysis different from that performed by the court below, which

emphasized the long-term consistency of Customs' interpretation. And even in this case, the court did not treat prior Customs practice as "effectively bar[ring]" petitioner's challenge, but simply invoked that practice as *additional* evidence of the statute's meaning.

3. Finally, petitioner contends that the courts below erred by relying upon "selected internet websites" that, in petitioner's view, would have revealed a genuine issue of material fact. Pet. 23-24. That argument lacks merit.

The CIT noted that the government had identified several shopping websites—including petitioner's own—that referred to boots as "slip-ons." See Pet. App. 38a-39a. The court did not, however, expressly rely on those websites. Rather, the CIT analyzed the relevant statutory language, as well as dictionary and trade definitions of "footwear" and "slip-on," to conclude that footwear can include boots and that the critical element of a slip-on item is the "lack of any kind of fasteners." *Id.* at 46a; see *id.* at 44a-49a. And while the court of appeals relied in part on the shopping websites, it viewed those examples of industry usage as confirming the interpretation of "slip-on type" that other evidence supported. See *id.* at 11a-13a. The court of appeals did not err in treating the shopping websites as *relevant* to the proper interpretation of Subheading 6404.19.35, and its analysis raises no legal issue of broad importance warranting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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