

No. 19-1173

In the Supreme Court of the United States

COMCAST CORPORATION, ET AL., PETITIONERS

v.

INTERNATIONAL TRADE COMMISSION, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENT

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QUESTIONS PRESENTED

The Tariff Act of 1930 (Tariff Act or Act), 19 U.S.C. 1202 *et seq.*, regulates the importation of certain articles into the United States, 19 U.S.C. 1337(a). The Tariff Act prohibits “[t]he importation into the United States, the sale for importation, or the sale within the United States after importation by the owner, importer, or consignee, of articles that * * * infringe a valid and enforceable United States patent.” 19 U.S.C. 1337(a)(1)(B)(i). The International Trade Commission (Commission) enforces the Act and investigates potential violations. If the Commission finds that a violation has occurred, it may exclude the relevant articles from entry into the United States, order the violator to refrain from related conduct, or both. 19 U.S.C. 1337(b)-(f).

After an investigation, the Commission determined that petitioners had violated Section 1337 by importing certain television set-top boxes whose use infringes patents owned by respondents Rovi Corporation and Rovi Guides, Inc. As a remedy, the Commission prohibited the importation of certain infringing set-top boxes and prohibited petitioners from engaging in certain related conduct. Petitioners appealed, but while their appeal was pending in the Federal Circuit, the underlying patents expired, causing the Commission’s orders to expire by their terms. The court of appeals held that the appeal was not moot, and it affirmed the Commission’s orders on the merits. The questions presented are as follows:

1. Whether the expiration of the Commission’s challenged orders, while petitioners’ appeal of those orders was pending in the court of appeals, rendered the appeal moot.

2. Whether the court of appeals correctly upheld the Commission’s determination that petitioners’ conduct violated Section 1337.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 951 F.3d 1301. The redacted public opinion of the International Trade Commission (Pet. App. 18a-74a) is unreported but is available at 2017 WL 11249982. The initial determination of the administrative law judge (Pet. App. 75a-949a) is unreported but is available at 2017 WL 3485153.

JURISDICTION

The judgment of the court of appeals was entered on March 2, 2020. The petition for a writ of certiorari was filed on March 25, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Tariff Act of 1930 (Tariff Act or Act), 19 U.S.C. 1202 *et seq.*, regulates the importation of certain articles into the United States. The Act declares certain

practices and the importation of certain articles to be “unlawful,” 19 U.S.C. 1337(a)(1), and it charges the International Trade Commission (Commission)—formerly known as the Tariff Commission—with enforcing its prohibitions, see 19 U.S.C. 1337(b)-(g).

The Act directs the Commission to “deal[] with” specified forms of unlawful conduct “as provided in” Section 1337. 19 U.S.C. 1337(a)(1). With exceptions not relevant here, Section 1337 directs the Commission, “on complaint under oath or upon its initiative,” to “investigate any alleged violation of” Section 1337. 19 U.S.C. 1337(b)(1). The Commission must publish notice of an investigation in the Federal Register, *ibid.*, and it must consult with specified agencies as the Commission “considers appropriate,” 19 U.S.C. 1337(b)(2).

Section 1337 further directs the Commission to “determine, with respect to each investigation conducted by it * * * , whether or not there is a violation.” 19 U.S.C. 1337(c). The Commission’s determinations “shall be made on the record after notice and opportunity for a hearing in conformity with” certain provisions of the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, 701 *et seq.* 19 U.S.C. 1337(c). “All legal and equitable defenses may be presented in all cases,” and “[a] respondent may raise any counterclaim in a manner prescribed by the Commission.” *Ibid.*

If the Commission conducts an investigation and finds a violation of Section 1337, it may impose either or both of two prospective remedies. First, the Commission may “direct that the articles concerned * * * be excluded from entry into the United States.” 19 U.S.C. 1337(d)(1). The Commission need not issue an exclusion order if it concludes that the articles should not be excluded “after considering the effect of such exclusion

upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers.” *Ibid.* An exclusion order may restrict the entry of such articles only when they are “imported by” a person found to have violated Section 1337, unless the Commission determines that a broader exclusion is needed either to “prevent circumvention” of a limited exclusion order or because “there is a pattern of violation of [Section 1337] and it is difficult to identify the source of infringing products.” 19 U.S.C. 1337(d). The Commission also may issue orders prohibiting the entry of articles during the pendency of an investigation. 19 U.S.C. 1337(e).

Second, “[i]n addition to, or in lieu of,” an exclusion order, the Commission may issue a “cease and desist order” directing specific persons to refrain from particular unlawful activities. 19 U.S.C. 1337(f)(1). The Commission may determine, however, that such an order is unwarranted based on the same set of considerations that apply to exclusion orders. *Ibid.* A person who violates a cease-and-desist order after it has become final is subject to civil penalties, which the Commission can recover through an action brought in district court. 19 U.S.C. 1337(f)(2); see also 19 U.S.C. 1337(i) (authorizing forfeiture of articles imported in repeated violation of exclusion order after notice).

The President may veto a Commission order for “policy reasons” within 60 days after it is issued. 19 U.S.C. 1337(j)(2) and (4). “Any person adversely affected by a final determination of the Commission under subsection (d), (e), (f), or (g) may appeal such determination, within 60 days after the determination becomes final, to the United States Court of Appeals for the Federal Circuit for review in accordance with chapter 7 of title 5,” *i.e.*, the

APA's judicial-review provisions, 5 U.S.C. 701 *et seq.* 19 U.S.C. 1337(c); see also 28 U.S.C. 1295(a)(6).

b. As originally enacted in 1922, the predecessor of Section 1337(a) contained only a general prohibition on

unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States.

Act of Sept. 21, 1922, ch. 356, Tit. III, § 316(a), 42 Stat. 943. Congress reenacted that prohibition, now codified at 19 U.S.C. 1337(a), in the Tariff Act of 1930. Act of June 17, 1930, ch. 497, Tit. III, Pt. 1, § 337(a), 46 Stat. 703. Since the enactment of that prohibition, the Commission has consistently construed it to prohibit the importation of articles that infringe United States intellectual-property rights, including patents. See, *e.g.*, *In re Orion Co.*, 71 F.2d 458, 461-468 (C.C.P.A. 1934) (affirming exclusion of articles that infringed patent rights).

The Patent Act of 1952 (Patent Act), 35 U.S.C. 1 *et seq.*, as originally enacted and today, encompasses both direct and indirect infringement of United States patents. See 35 U.S.C. 271(a)-(c); Act of July 19, 1952, ch. 950, Pt. III, § 271(a)-(c), 66 Stat. 811. Direct infringement occurs when any person “without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent.” 35 U.S.C. 271(a). Indirect infringement can occur in either of two ways. First, induced infringement occurs

when a person “actively induces infringement of a patent.” 35 U.S.C. 271(b). Second, contributory infringement occurs when a person

offers to sell or sells within the United States or imports into the United States a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use.

35 U.S.C. 271(c).

By the mid-1980s, the Commission had construed Section 1337 to encompass the importation of articles that are used to induce the direct infringement of a U.S. patent. See, e.g., *In re Certain Molded-In Sandwich Panel Inserts & Methods for Their Installation*, Inv. No. 337-TA-99, USITC Pub. 1246, 1982 WL 61887 (Apr. 9, 1982), aff’d *sub nom. Young Eng’rs, Inc. v. ITC*, 721 F.2d 1305 (Fed. Cir. 1983); *In re Certain Surveying Devices*, Inv. No. 337-TA-68, USITC Pub. 1085, 0080 WL 594364 (July 7, 1980); *In re Certain Apparatus for the Continuous Production of Copper Rod*, Inv. No. 337-TA-52, USITC Pub. 1017, 1979 WL 445781 (Nov. 23, 1979). Congress nevertheless became concerned that Section 1337 was not adequately protecting U.S. intellectual-property rights. See Omnibus Trade and Competitiveness Act of 1988 (1988 Act), Pub. L. No. 100-418, Tit. I, Subtit. C, Pt. 3, § 1341(a), 102 Stat. 1211-1212. In 1988, Congress amended Section 1337 with the stated “purpose” of “mak[ing] it a more effective remedy for the protection of United States intellectual property rights.” § 1341(b), 102 Stat.

1212. Congress found that “the existing protection under [Section 1337] against unfair trade practices is cumbersome and costly and has not provided United States owners of intellectual property rights with adequate protection against foreign companies violating such rights.” § 1341(a)(2), 102 Stat. 1212.

To address that concern, Congress expanded Section 1337 to include—in addition to the existing general prohibition on certain categories of “[u]nfair methods of competition and unfair acts” that injure domestic industries, 19 U.S.C. 1337(a)(1)(A)—several additional provisions that specifically prohibit the importation of articles that infringe certain United States intellectual-property rights. 1988 Act § 1342(a), 102 Stat. 1212-1215. As relevant here, Congress explicitly made unlawful “[t]he importation into the United States, the sale for importation, or the sale within the United States after importation by the owner, importer, or consignee, of articles that * * * infringe a valid and enforceable United States patent.” *Ibid.* (19 U.S.C. 1337(a)(1)(B)(i)). In addition, for articles that infringe patents or other enumerated U.S. intellectual-property rights, the amendment relaxed the existing requirement of proof of harm to a domestic industry. To find a violation, the Commission now must determine that “an industry in the United States, relating to the articles protected by the patent, copyright, trademark, mask work, or design concerned, exists or is in the process of being established.” *Ibid.* (19 U.S.C. 1337(a)(2)).

The 1988 Act’s amendments thus codified the Commission’s longstanding interpretation of Section 1337 as prohibiting the importation of articles that infringe U.S. patents. The conference report for the 1988 Act indicated that, in adopting those amendments, Congress “d[id] not intend to change the interpretation or implementation of

current law as it applies to the importation or sale of articles that infringe certain U.S. intellectual property rights.” H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 633 (1988). Since 1988, the Commission has accordingly continued to construe Section 1337 to encompass the importation of articles that are used to induce the direct infringement of a U.S. patent. See, e.g., *In re Certain Biometric Scanning Devices, Components Thereof, Associated Software, & Prods. Containing the Same*, Inv. No. 337-TA-720, USITC Pub. 4366, 2011 WL 8883591 (Nov. 10, 2011), aff’d *sub nom. Suprema, Inc. v. ITC*, 626 Fed. Appx. 273 (Fed. Cir. 2015); *Vizio, Inc. v. ITC*, 605 F.3d 1330, 1335-1336 (Fed. Cir. 2010); see also *Spansion, Inc. v. ITC*, 629 F.3d 1331, 1343, 1353-1355 (Fed. Cir. 2010) (contributory infringement), cert. denied, 565 U.S. 1058 (2011). The en banc Federal Circuit affirmed the Commission’s approach in *Suprema, Inc. v. ITC*, 796 F.3d 1338 (2015), remanded, 626 Fed. Appx. 273 (2015), concluding that, “[b]y using the word ‘infringe,’ Section [1337] refers to 35 U.S.C. 271” and that “[t]he word ‘infringe’ does not narrow Section [1337’s] scope to any particular subsections of § 271,” but instead “encompasses both direct and indirect infringement,” including induced infringement. *Id.* at 1346.

2. a. Respondents Rovi Corporation and Rovi Guides, Inc. (collectively Rovi) are U.S. companies that develop interactive television-program guides that enable consumers to view and record programs. Historically, users relied on print media, such as newspaper listings, to decide what to watch on television. C.A. App. 789. Interactive guides allow users instead to navigate through program listings using a remote control. *Ibid.* Such guides were initially implemented on set-top boxes

that were located in the user's home and were connected to a television and a recording device. *Ibid.* A consumer who was away from home typically could not use the guide to select a program for recording. *Ibid.*

As relevant here, Rovi holds two patents, U.S. Patent Nos. 8,006,263 ('263 patent) and 8,578,413 ('413 patent), that claim an interactive television-program guide that enables users to access features of the in-home program guide when away from home—including in particular to record a program remotely. C.A. App. 789-790; Pet. App. 2a-3a. A representative claim recites “[a] system for selecting television programs over a remote access link comprising an Internet communications path for recording,” consisting of “local interactive television program guide equipment” located within a user's home on which is implemented a “local interactive television program guide,” and a “remote program guide access device” (*e.g.*, a smartphone) that is in “communication” with the local device and on which is implemented a “remote access interactive television program guide.” C.A. App. 802. The remote device displays available programs and can be used to transmit to the local device via the Internet a communication identifying the chosen program. *Ibid.* After receiving the communication, the local device then records that program. *Ibid.*; see Pet. App. 3a-5a.

b. In 2016, Rovi filed a complaint with the Commission, alleging that petitioners had violated Section 1337 by importing into the United States articles that infringed certain of Rovi's patents, including the '263 and '413 patents. Pet. App. 2a-3a, 20a. Petitioners asserted that customers of petitioner Comcast Corporation and its affiliates (collectively Comcast) infringe the '263 and '413 patents when they use Comcast's X1 system, and that Comcast was engaged in importing the set-top boxes—which

were manufactured abroad by ARRIS Enterprises, Inc. and its affiliates (collectively Arris) and Technicolor SA and its affiliates (collectively Technicolor)—used in that system. The Commission instituted an investigation and published notice in the Federal Register. *Ibid.*; 81 Fed. Reg. 33,547 (May 26, 2016) (C.A. App. 1071-1074).¹

An administrative law judge (ALJ) conducted a trial, Pet. App. 5a, and issued an initial determination, *id.* at 75a-949a. The ALJ determined that Arris and Technicolor are importers of the set-top boxes they manufacture; that “Comcast is sufficiently involved in the importation of the accused products that it satisfies the importation requirement”; that Comcast’s customers infringe the ’263 and ’413 patents when they use the set-top boxes, but that its customers do not infringe certain others of Rovi’s patents; and that “Comcast has induced its customers to infringe” the ’263 and ’413 patents. *Id.* at 941a-942a. The ALJ additionally found that Arris and Technicolor were not contributory infringers because the set-top boxes also had substantial non-infringing uses. *Id.* at 942a. The ALJ accordingly concluded that “a violation of [Section 1337] ha[d] occurred in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain digital video receivers and hardware and software components thereof, with respect to” the ’263 and ’413 patents. *Id.* at 947a-948a.

¹ Rovi also filed a patent-infringement suit against petitioners in the Eastern District of Texas, see generally 16-cv-322 D. Ct. Doc. 1 (Apr. 1, 2016), which was later transferred to the Southern District of New York, 16-cv-322 D. Ct. Doc. 143 (E.D. Tex. Oct. 25, 2016); 16-cv-9826 D. Ct. Doc. 144 (S.D.N.Y. Dec. 21, 2016). Pursuant to 28 U.S.C. 1659(a), petitioners moved to stay the district-court proceedings to allow the Commission’s investigation to proceed first. See, *e.g.*, 16-cv-322 D. Ct. Doc. 101 (E.D. Tex. June 10, 2016).

3. a. The Commission affirmed the ALJ's initial determination in relevant part. Pet. App. 18a-74a. The Commission agreed with the ALJ that Comcast "imports" the X1 set-top boxes at issue within the meaning of Section 1337. *Id.* at 18a-19a, 30a. The Commission also found that Comcast's X1 set-top boxes are articles that infringe the '263 and '413 patents. *Id.* at 36a-43a.

The Commission determined that Comcast's subscribers directly infringed the subject patents when they used Comcast's mobile-phone applications to schedule a television recording for later viewing on their X1 set-top boxes. Pet. App. 39a-40a. The Commission also determined that Comcast induced that infringement by instructing, directing, or advising its customers on how to use its X1 set-top boxes to carry out direct infringement of the asserted claims of the subject patents. *Id.* at 40a-43a. The Commission found that Comcast had actual knowledge of the '263 and '413 patents, which it had previously licensed but had continued to practice after its license expired. *Ibid.* The Commission further found that Comcast either had actual knowledge, or was willfully blind to the high probability, of infringement of those patents. *Ibid.* The Commission observed that the version of Comcast's mobile application for the Android operating system had been installed between one and five million times. *Id.* at 40a.

The Commission accordingly concluded that Comcast had imported articles that infringe the '263 and '413 patents, and thus was in violation of Section 1337, because "Comcast's customers directly infringed the '263 and '413 patents" and "Comcast induced that infringement." Pet. App. 36a; see *id.* at 37a. The Commission determined, however, that Arris and Technicolor had not violated Section 1337, finding that Rovi had "failed to

demonstrate direct or indirect infringement by Arris and Technicolor.” *Id.* at 37a (capitalization altered).

As a remedy, the Commission issued a limited exclusion order “as to Comcast’s infringing digital video receivers and hardware and software components thereof * * * that ‘are manufactured abroad for or on behalf of, or imported by or on behalf of Comcast or any of their affiliated companies, parents, subsidiaries, or other related business entities or their successors or assigns.’” Pet. App. 60a (quoting *id.* at 1012a). The Commission also issued cease-and-desist orders barring Comcast from certain related conduct, such as marketing infringing products. *Id.* at 64a, 952a-953a, 962a-963a, 973a-974a, 982a-983a, 992a-993a, 1003a. The Commission considered the factors set forth in Section 1337—including “the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers,” *id.* at 64a-65a (citation omitted)—and determined that no “public interest concerns” warranted withholding a remedial order in these circumstances, *id.* at 65a; see *id.* at 65a-71a. Both the limited exclusion order and the cease-and-desist orders stated that they would remain in effect only for the remaining term of the patents. See *id.* at 1012a-1013a (imposing limited exclusion order “for the remaining terms of” the ’263 and ’413 patents); *id.* at 957a, 967a, 977a, 987a, 997a, 1008a (cease-and-desist orders “shall remain in effect until [the ’263 and ’413 patents] expire”).

b. During the 60-day period for presidential review established by 19 U.S.C. 1337(j)(4), Comcast was permitted to continue importing its set-top boxes without posting a bond. Pet. App. 1013a. The President did not

disapprove the orders within that period, and the orders became final and fully effective on January 21, 2018.

Comcast promptly removed the infringing functionality from its set-top boxes. Pet. 12. It then requested a ruling from United States Customs and Border Protection (CBP) under 19 C.F.R. Part 177, that its set-top boxes should no longer be subject to exclusion in light of that modification. See C.A. App. 31,602-31,603. On March 5, 2018, CBP provided Comcast the ruling it sought, finding that “the [set-top boxes] at issue are not subject to” the limited exclusion order that the Commission had issued “in view of the changes Comcast has made to the X1 system.” C.A. App. 31,603; see *id.* at 31,603-31,631. Comcast thus was precluded from importing its set-top boxes for approximately six weeks.

4. Petitioners appealed the Commission’s decision and orders to the court of appeals under 19 U.S.C. 1337(c) and 28 U.S.C. 1295(a)(6). Pet. App. 2a.

a. After oral argument in the Federal Circuit but before the court of appeals issued a decision, the ’263 and ’413 patents expired. Pet. App. 8a; see 35 U.S.C. 154(a)(2). Petitioners moved to dismiss the appeal as moot and sought vacatur of the Commission’s decision and orders under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). Pet. C.A. Mot. to Dismiss 1-7. They contended that the appeal had become moot because the remedies the Commission had imposed were prospective in nature, and the exclusion and cease-and-desist orders by their terms were limited to the duration of the patents. *Ibid.*

The Commission opposed dismissal, contending that the appeal was not moot under Federal Circuit precedent holding that “a case may remain alive based on ‘collateral consequences, which may be found in the prospect that a

judgment will affect future litigation or administrative action.” Gov’t C.A. Opp. to Mot. to Dismiss 5 (quoting *Hyosung TNS Inc. v. ITC*, 926 F.3d 1353, 1358 (Fed. Cir. 2019)); see *id.* at 4-9. The Commission argued in the alternative that, if the appeal was moot, the case should be remanded to the Commission to decide in the first instance whether to vacate its decision. *Id.* at 9-12. Rovi likewise argued that the appeal was not moot based on (among other things) the same line of Federal Circuit precedent, Rovi C.A. Opp. to Mot. to Dismiss 3-13, and that, if the appeal was moot, the case should be remanded to the Commission to decide the vacatur issue, *id.* at 14-16.

b. The Federal Circuit denied petitioners’ motion to dismiss the appeal and affirmed the Commission’s decision on the merits. Pet. App. 1a-17a.

The court of appeals held that the appeal was not moot. Pet. App. 8a-10a. The court relied on Federal Circuit precedent holding that “collateral consequences,” including “the prospect that a judgment will affect future litigation or administrative action,” can prevent a case from becoming moot. *Id.* at 9a (quoting *Hyosung*, 926 F.3d at 1358). The court “conclude[d] that there are sufficient collateral consequences to negate mootness” here. *Id.* at 9a-10a. It observed that the Commission and Rovi had identified two additional Commission “investigations on unexpired Rovi patents that involve imported X1 set-top boxes,” and that “these investigations are likely to be affected by the decisions here on appeal.” *Id.* at 8a-9a.²

² On April 23, 2020, after the petition for a writ of certiorari was filed, the Commission terminated one of its pending investigations involving Rovi and Comcast, finding that Comcast imports its X1 set-top boxes and induces its users’ direct infringement of other Rovi patents, and issuing an additional limited exclusion order and cease-and-desist orders. 85 Fed. Reg. 23,843, 23,844 (Apr. 29, 2020).

On the merits, the court of appeals noted that “Comcast’s customers directly infringe the ’263 and ’413 patents” and “that Comcast induces its customers to directly infringe these patents.” Pet. App. 10a. Petitioners argued “that Section [1337] is not violated for two reasons”: (1) “the imported X1 set-top boxes are not ‘articles that infringe’ because the boxes do not infringe the patents at the time of importation”; and (2) “Comcast is not the importer of the X1 set-top boxes, but takes title to the imported boxes only after the boxes are imported by Arris and Technicolor.” *Ibid.* (capitalization altered). The court rejected both of those contentions. *Id.* at 11a-15a.

The court of appeals upheld the Commission’s determination that “Section [1337] applies to articles that infringe after importation.” Pet. App. 12a. The court observed that, in its earlier en banc decision in *Suprema, supra*, it had upheld the Commission’s “interpretation that the phrase ‘articles that infringe’” in Section 1337 “covers goods that were used by an importer to directly infringe post-importation as a result of the seller’s inducement.” *Id.* at 11a-12a (quoting *Suprema*, 796 F.3d at 1352-1353). The court explained that, under *Suprema*, “[t]he statute defines as unlawful ‘the sale within the United States after importation . . . of articles that—(i) infringe’” and “thus distinguishes the unfair trade act of importation from infringement by defining as unfair the importation of an article that will infringe, *i.e.*, be sold, ‘after importation.’” *Id.* at 11a (quoting *Suprema*, 796 F.3d at 1349). The *Suprema* court had accordingly held that Section 1337(a)(1)(B)’s “‘sale . . . after importation’ language confirms that the Commission is permitted to focus on post-importation activity

to identify the completion of infringement.” *Ibid.* (quoting *Suprema*, 796 F.3d at 1349). The court rejected petitioners’ contentions that “*Suprema* should be limited to its facts” and that “inducement liability must be attached to the imported article at the time of the article’s importation.” *Id.* at 12a.

The court of appeals also agreed with the Commission that, “even if the location of Comcast’s inducing conduct were legally relevant,” Comcast had engaged in inducing activity before and at the time of importation. Pet. App. 12a-13a (quoting *id.* at 41a n.13). The court cited the Commission’s finding that “Comcast designed the X1 [set-top boxes] to be used in an infringing manner, and directed their manufacture overseas—requiring, among other things, overseas installation of the relevant software onto the [set-top boxes]”—and that “Comcast then directed the importation of those [set-top boxes] to Comcast facilities in the United States.” *Ibid.* (quoting *id.* at 42a n.13). The court therefore sustained the Commission’s finding that “Comcast’s inducing activity took place overseas, prior to importation; it took place at importation; and it took place in the United States, after importation.” *Id.* at 13a (quoting *id.* at 42a n.13).

The court of appeals also sustained the Commission’s determination that Comcast is an “importer” within the meaning of Section 1337. Pet. App. 13a-15a. The court explained that “[w]hether a party is an importer” under Section 1337 “is a question of fact” on which “the Commission’s finding is reviewed for support by substantial evidence.” *Id.* at 13a. The court found that substantial evidence supported the Commission’s determination that Comcast is an importer “because Comcast causes the X1 set-top boxes to enter the United States.” *Id.* at 14a; see *id.* at 14a-15a. The court also pointed to the

ALJ's findings that "the X1 set-top boxes 'are so tailored to Comcast's system and requirements that they would not function within another cable operator's system'; that "the software at issue in the heart of this investigation is attributable squarely to Comcast"; and that Comcast exercises significant "control over the importation of the X1 set-top boxes." *Id.* at 14a (capitalization altered; citations omitted).

ARGUMENT

Petitioners contend (Pet. 15-29) that their appeal of the Commission's orders became moot when those orders expired by their own terms. In the court of appeals, the Commission argued that petitioners' appeal was not moot under that court's precedent recognizing that "collateral consequences," including "the prospect that a judgment will affect future litigation or administrative action," can prevent a case involving a challenge to expired agency action from becoming moot. Gov't C.A. Opp. to Mot. to Dismiss 5 (quoting *Hyosung TNS Inc. v. ITC*, 926 F.3d 1353, 1357 (Fed. Cir. 2019)). In light of the petition for a writ of certiorari, however, the government has reconsidered that position and has concluded that petitioners' appeal of the Commission's orders was rendered moot when those orders expired as a result of the expiration of the underlying patents. The government accordingly agrees with petitioners that the petition for a writ of certiorari should be granted, the court of appeals' judgment should be vacated, and the case should be remanded with instructions to dismiss the appeal.

Petitioners further contend (Pet. 19-20) that the Court should direct the Federal Circuit to vacate the Commission's underlying decision under the principles articulated in *United States v. Munsingwear, Inc.*,

340 U.S. 36 (1950). Because the court of appeals concluded that the appeal was not moot, it did not address that question. And because this case arises from an agency adjudication, it may be appropriate to remand the matter to the Commission to determine whether vacatur of its decision in full or in part is warranted in these circumstances. Rather than deciding those case-specific issues in the first instance, this Court should direct the court of appeals in dismissing petitioners' appeal to address those issues, including whether to remand them to the Commission.

Petitioners argue in the alternative (Pet. 20-36) that petitioner Comcast's X1 set-top boxes are not infringing articles under Section 1337, and that Comcast is not an "importer" of those articles. Those issues would not warrant further review even if a live dispute remained. The Commission properly interpreted Section 1337 to encompass the infringing articles at issue here, and the court of appeals correctly held that substantial evidence supported the agency's factual finding that Comcast imported the articles.

1. Petitioners contend (Pet. 15-19) that their appeal became moot while the case was pending before the court of appeals, when the Commission's orders expired. Although the Commission advanced a contrary position in the court below, the government now agrees with petitioners that the appeal became moot.

a. Article III empowers federal courts "to decide legal questions only in the context of actual 'Cases' or 'Controversies.'" *Alvarez v. Smith*, 558 U.S. 87, 92 (2009) (citation omitted). "This case-or-controversy requirement subsists through all stages of federal judicial proceedings." *Lewis v. Continental Bank Corp.*, 494 U.S. 472,

477 (1990). This Court “ha[s] repeatedly held that an ‘actual controversy’ must exist not only ‘at the time the complaint is filed,’ but through ‘all stages’ of the litigation.” *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90-91 (2013) (citation omitted). If “the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome,” the case has “become[] moot—and therefore no longer a ‘Case’ or ‘Controversy’ for purposes of Article III.” *Id.* at 91 (citation omitted). “No matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit, the case is moot if the dispute ‘is no longer embedded in any actual controversy about the plaintiffs’ particular legal rights.” *Ibid.* (quoting *Alvarez*, 558 U.S. at 93).

Section 1337(c) of Title 19 authorizes “[a]ny person adversely affected by a final determination of the Commission under subsection (d), (e), (f), or (g)” of Section 1337 to “appeal such determination” to the Federal Circuit. 19 U.S.C. 1337(c). Subsections (d) and (e) of Section 1337 address exclusion orders (permanent and temporary), subsection (f) addresses cease-and-desist orders, and subsection (g) addresses procedures for both in case of default. Petitioners therefore were entitled to judicial review of the limited exclusion order and cease-and-desist orders that the Commission had entered against them.

By contrast, the Commission’s antecedent determination that a violation had occurred was made not under subsections (d)-(g), but under subsection (c) itself. See 19 U.S.C. 1337(c) (“The Commission shall determine, with respect to each investigation conducted by it under this section, whether or not there is a violation of this section.”). That determination was not independently appealable, though the court could consider its propriety

in reviewing the issuance (or nonissuance) of exclusion and cease-and-desist orders for which Section 1337(c) *does* authorize appeal. The dispute before the court thus was not the validity of an agency regulation or comparable action “addressed, so to speak, to the world at large,” but instead the validity of discrete Commission orders directed at petitioners specifically. See *Radiofone, Inc. v. FCC*, 759 F.2d 936, 938 (D.C. Cir. 1985) (separate opinion of Scalia, J.); see *id.* at 940 (“[W]hen [a reviewing court] receives what may loosely be termed an ‘appeal’ from agency action, it is *not* the matter that was before the agency which constitutes the Article III case or controversy, but rather the dispute between private parties and the agency concerning the lawfulness of the agency action.”); cf. *Super Tire Eng’g Co. v. McCorkle*, 416 U.S. 115, 121-125 (1974) (holding that suit seeking declaratory judgment that state regulations benefiting striking workers were invalid was not rendered moot by termination of particular labor strike that prompted the suit).

That specific case or controversy concerning the legality of the appealable exclusion and cease-and-desist orders ended when the underlying patents expired. The exclusion and cease-and-desist remedies the Commission had imposed operated only prospectively, prohibiting petitioners from importing the infringing articles and engaging in certain other related activities going forward. See Pet. App. 64a, 952a-953a, 962a-963a, 973a-974a, 982a-983a, 992a-993a, 1003a, 1012a-1013a. The Commission’s orders did not impose any retroactive liability or sanctions for past conduct. And each order expired by its terms while the appeal was pending before the Federal Circuit. The limited exclusion order stated that it would apply “for the remaining terms of” the ’263 and ’413 patents. *Id.* at 1012a-1013a. Each of the cease-and-

desist orders similarly stated that it “shall remain in effect until [the ’263 and ’413 patents] expire.” *Id.* at 957a, 967a, 977a, 987a, 997a, 1008a. Both patents expired in 2019, before the court of appeals had rendered a decision, *id.* at 8a; see 35 U.S.C. 154(a)(2), and there are no pending proceedings to enforce alleged violations of the orders while they were in effect. As the court of appeals has previously recognized and reiterated here, under such circumstances, “after a patent expires ‘the [Commission’s] limited exclusionary order and cease and desist orders as to that patent have no further prospective effect.’” Pet. App. 8a (quoting *Hyosung*, 926 F.3d at 1357).

When the specific agency actions that petitioners commenced their appeal to challenge “expired by [their] own terms,” their appeal of those actions became moot. *Burke v. Barnes*, 479 U.S. 361, 363-364 (1987) (holding that suit to challenge President’s putative “pocket veto” of a bill was “mooted when th[e] bill expired by its own terms”); see, e.g., *Trump v. International Refugee Assistance Project*, 138 S. Ct. 353, 353 (2017) (same regarding challenge to Executive Order that had “expired by its own terms” pending an appeal (quoting *Barnes*, 479 U.S. at 363)). At that point, it was “impossible” for the court of appeals “to grant [petitioners] any effectual relief,” *Mills v. Green*, 159 U.S. 651, 653 (1895), from the Commission actions that they challenged in the appeal.

To be sure, petitioners continue to disagree with the Commission about the legal issues implicated by the Commission’s decision and orders. But that disagreement “is no longer embedded in any actual controversy about the plaintiffs’ particular legal rights.” *Already*,

568 U.S. at 91 (citation omitted). And although petitioners and Rovi continue to dispute the legality of petitioners' conduct with respect to the articles at issue here and others like them, that is not the controversy that was presented to the court of appeals to decide. That court had jurisdiction to review particular exclusion and cease-and-desist orders of the Commission, and those orders had ceased to have any continuing legal effect by the time the Federal Circuit ruled. That court therefore lacked jurisdiction to adjudicate the merits of petitioners' appeal.

b. In the court of appeals, the Commission advanced a contrary position, premised on Federal Circuit precedent. Gov't C.A. Opp. to Mot. to Dismiss 5 (citing *Hyosung*, 926 F.3d at 1358); see *id.* at 4-9; *Hyosung*, 926 F.3d at 1357-1359 (agreeing with Commission that an appeal of a Commission decision became moot with respect to articles infringing a particular patent when that patent expired, but stating that "a case may remain alive based on 'collateral consequences, which may be found in the prospect that a judgment will affect future litigation or administrative action'" (brackets and citation omitted)). Rovi advanced a similar position. Rovi C.A. Opp. to Mot. to Dismiss 3-13. The court below agreed that, under its own precedent, "there [we]re sufficient collateral consequences" in this case "to negate mootness." Pet. App. 9a-10a; see *id.* at 8a-9a (citing *Hyosung*, 926 F.3d at 1357-1358). The government has now concluded, however, that the court's resolution of the mootness issue cannot be reconciled with this Court's precedent.

In referring to "collateral consequences" that prevent mootness, Pet. App. 9a (citation omitted), the Federal Circuit evoked decisions of this Court that used this

phrase in holding that a judgment itself may injure a party and thus keep a dispute over its validity alive, even though the principal effect of the judgment has ended. The quintessential example is a criminal conviction, which is “presumed” to have adverse consequences for the defendant even “after the expiration of his sentence.” *United States v. Juvenile Male*, 564 U.S. 932, 936 (2011) (per curiam); see *Spencer v. Kemna*, 523 U.S. 1, 7-14 (1998) (declining to extend presumption to challenges to parole revocation). The treatise cited by the Federal Circuit (Pet. App. 9a) discussed cases in the civil context that were held not moot where the challenged actions themselves imposed direct injuries on a party.³ Whatever the exact scope of the collateral-consequences principle, this case falls well outside it. The court of appeals identified no way in which the Commission’s exclusion and cease-and-desist orders themselves directly injure the petitioners.

The court of appeals suggested that its *own* decision on the merits of this appeal would likely affect other

³ See 13C Charles Alan Wright et al., *Federal Practice and Procedure* § 3533.3.1 n.130 (3d ed. Supp. 2020) (citing, e.g., *California Coastal Comm’n v. Granite Rock Co.*, 480 U.S. 572, 577-578 (1987) (holding that dispute over determination that permit was required for certain work was not moot, even though period of original planned work had expired, because challenger faced reclamation liability for performing work without a permit); and *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 613 n.3 (1986) (holding that dispute over denial of franchise renewal was not moot, even though renewed franchise would have expired before this Court’s decision, because that denial required the challenger to pursue a different, “more onerous” procedure)); see also, e.g., *Bank of Marin v. England*, 385 U.S. 99, 101 (1966) (holding case was not moot, even though judgment had been paid, because the party paying the judgment had served petitioner with a demand for contribution).

matters before the Commission, including disputes involving the same parties and similar issues. See Pet. App. 9a (citing statement by ALJ in another pending investigation that “‘the Federal Circuit’s ruling’ in the present appeal ‘will affect the finding’ in that investigation” (brackets and citation omitted)). That prospect is insufficient to prevent petitioners’ appeal from becoming moot. The “possible, indirect benefit in a future lawsuit” of an appellate court’s ruling in a case that has become moot pending appeal “cannot save [that] case from mootness.” *Juvenile Male*, 564 U.S. at 937 (rejecting argument that precedential effect on future cases of a decision by this Court was the kind of “collateral consequence” that could prevent mootness (citation omitted)). If the possibility that a court’s own decision in an otherwise-moot case might affect future cases “were enough to avoid mootness, no case would ever be moot.” *Ibid.* (quoting *CFTC v. Board of Trade*, 701 F.2d 653, 656 (7th Cir. 1983)); see *In re Pattullo*, 271 F.3d 898, 901 (9th Cir. 2001).

The court of appeals also suggested, Pet. App. 8a-10a, and Rovi argued below, Rovi C.A. Opp. to Mot. to Dismiss 1-2, 8, that the appeal is not moot because the *Commission* decision that the court of appeals reviewed likely would affect other proceedings, including already-pending investigations involving the same parties. Rovi observed that an ALJ in another investigation involving the same parties had accorded issue-preclusive effect to the Commission’s decision in this case, as an alternative basis for the ALJ’s ruling in that proceeding. *Id.* at 8

(citing *id.* Ex. 1, at 21-24).⁴ That rationale for finding a live dispute likewise lacks merit.

Standing alone, the possibility that a lower tribunal's ruling may have precedential or preclusive effects in future litigation does not preserve a live dispute when an appeal would otherwise become moot. Lower-court and agency decisions are routinely capable of having such effects. That was true in *Munsingwear* itself, where the government's appeal of the district court's judgment on one claim was moot even though that judgment could—and, this Court held, properly did—have preclusive effect on another claim. See *Munsingwear*, 340 U.S. at 37-40. Likewise, the fact that an agency in conducting an adjudication announces reasoning that bears on future proceedings does not prevent an appeal of that adjudication from becoming moot. See *American Fam. Life Assurance Co. v. FCC*, 129 F.3d 625, 629-630 (D.C. Cir. 1997); *Radiofone*, 759 F.2d at 938-939 (separate opinion of Scalia, J.) (explaining that “[t]he practical and legal impact” of “an interpretation of a statute, or some other legal principle, [that] is set forth as the rationale of an adjudication” is insufficient to avoid mootness of an appeal from that adjudication (emphasis omitted)); cf. *Sea-Land Serv., Inc. v. Department of Transp.*, 137 F.3d 640, 648 (D.C. Cir. 1998) (“[M]ere precedential effect within an agency is not, alone, enough to create Article III standing, no matter how foreseeable the future litigation.”).

Indeed, courts' “ordinary practice” of vacating lower-court judgments in cases that have become moot pending

⁴ The Commission has since terminated that investigation, finding that petitioners violated Section 1337 by importing articles that infringed other Rovi patents. 85 Fed. Reg. at 23,843-23,844.

appeal, *Alvarez*, 558 U.S. at 97, presupposes that an appeal can be moot even though the judgment under review (if it were not vacated) could still affect other cases. The purpose of the vacatur remedy is to “clear[] the path for future relitigation of the issues” that the ruling’s precedential or preclusive effect might otherwise block. *Ibid.* (quoting *Munsingwear*, 340 U.S. at 40). And when a court determines in a particular case that has become moot pending appeal whether the equitable remedy of vacatur is warranted, the existence of such precedential and preclusive effects is among the considerations it may take into account. See *U.S. Bancorp Mortg. Co. v. Bonner Mall P’ship*, 513 U.S. 18, 26-27 (1994). The prospect that a judgment may have precedential or preclusive effects in future litigation, standing alone, thus does not prevent mootness.

As petitioners observe (Pet. 17-18), the court of appeals’ approach is also in tension with the principle that an Article III court may adjudicate an otherwise-moot case if the dispute is “capable of repetition, yet evading review.” *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) (citation omitted). That exception ensures that a party who is otherwise entitled to seek judicial review of a defendant’s repeated actions is not frustrated by each action’s inherently brief duration. But “[t]hat exception applies ‘only in exceptional situations,’ where (1) ‘the challenged action is in its duration too short to be fully litigated prior to cessation or expiration,’ and (2) ‘there is a reasonable expectation that the same complaining party will be subject to the same action again.’” *Ibid.* (brackets and citation omitted).

In concluding that petitioners’ appeal is not moot, the court of appeals pointed to other proceedings before

the Commission involving the same parties and similar issues. Pet. App. 8a-9a. The pendency of those proceedings likely satisfies the “capable of repetition” requirement. But the court below did not address the “evading review” requirement, and disputes that will terminate when a patent expires are not inherently short-lived. See 35 U.S.C. 154(a)(2) (U.S. patent ordinarily expires “20 years from the date on which the application for the patent was filed in the United States”). The decision below thus might be understood as diluting the exception’s stringent requirements and excusing mootness based on likelihood of repetition alone, so long as that likelihood is sufficiently high.

c. The government accordingly agrees with petitioners that the court below should have dismissed petitioners’ appeal as moot. It therefore would be appropriate for this Court to grant the petition for a writ of certiorari, vacate the judgment below, and remand with instructions to dismiss the appeal.

Petitioners contend (Pet. 20) that, if their appeal is moot, the case should be remanded with further instructions that the court of appeals vacate the Commission’s decision. As they observe (*ibid.*), this Court and lower courts have often employed the equitable remedy of *Munsingwear* vacatur when appeals from agency decisions have become moot during the pendency of the appeals. See, e.g., *A. L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324, 331 (1961); but cf. *Radiofone*, 759 F.2d at 940 (separate opinion of Scalia, J.) (observing that, although “the *Munsingwear* rule * * * extends to agency orders as well as district court judgments under review, * * * it does not apply to the former *automatically*, since what moots the dispute before

[a court] does not necessarily nullify the agency action”).

Because it concluded that petitioners’ appeal was not moot, the court of appeals did not reach the question whether the “equitable relief” of vacatur, *Bancorp*, 513 U.S. at 26, is appropriate in these circumstances. See Pet. App. 8a-10a. As “a court of final review and not first view,” *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 800 (2017) (citation omitted), this Court ordinarily does not address such case-specific questions in the first instance. Petitioners do not identify any sound reason for the Court to depart from that practice here.

In addition, since petitioners’ request for vacatur focuses on the effect of one Commission decision on other matters before the agency, it may be appropriate for the Commission to decide in the first instance whether to vacate its decision either in full or in part. “[T]he determination” whether to vacate an underlying decision “is an equitable one,” and it “must also take account of the public interest,” including the interest in the stability and predictability provided by precedent. *Bancorp*, 513 U.S. at 26, 29. And just as “a court of appeals presented with a request for vacatur of a district-court judgment may remand the case with instructions that the district court consider the request * * * pursuant to Federal Rule of Civil Procedure 60(b),” *ibid.*, the Federal Circuit may conclude here, as it has in some prior cases, that the Commission is best positioned to determine whether vacatur of the agency’s own decision is appropriate. Order at 2-3, *Sizewise Rentals LLC v. ITC*, No. 17-2334 (Fed. Cir. Dec. 26, 2017) (agreeing with Commission that appeal of Commission order was moot where

underlying patent had expired pending appeal, and “re-mand[ing] to the Commission so that it can, in the first instance, address Appellants’ request to vacate the Commission’s final determination”); Order at 3, *Ajinomoto Co. v. ITC*, No. 18-1590 (Fed. Cir. June 27, 2018) (same).

2. Petitioners contend (Pet. 20-30) that, if their appeal is not moot, the court of appeals erred in upholding the Commission’s decision on the merits. The court below correctly rejected petitioners’ merits arguments, and its decision does not warrant further review.

a. Petitioners argue (Pet. 20-25) that the set-top boxes they imported are not “articles that * * * infringe” Rovi’s patents within the meaning of 19 U.S.C. 1337(a)(1)(B)(i). Section 1337 makes it unlawful to import—and authorizes the Commission to exclude from entry—“articles that * * * infringe a valid and enforceable United States patent.” *Ibid.*; see 19 U.S.C. 1337(d). “By using the word ‘infringe’ in the context of U.S. patents, Section 1337 “refers to 35 U.S.C. § 271, the statutory provision defining patent infringement.” *Suprema, Inc. v. ITC*, 796 F.3d 1338, 1346 (Fed. Cir. 2015) (en banc), remanded, 626 Fed. Appx. (Fed. Cir. 2015). “As reflected in § 271 and the case law from before and after 1952, ‘infringement’ is a term that encompasses both direct and indirect infringement,” *ibid.*; see 35 U.S.C. 271(a)-(c), and the Commission has long and consistently construed the term “infringe” in Section 1337(a)(1)(B)(i) to encompass both direct and indirect infringement, see pp. 4-7, *supra*.

Whereas Section 271 identifies certain *acts* that constitute “infringe[ment],” 35 U.S.C. 271(a), and identifies other associated conduct that will render actors “liable as * * * infringer[s],” 35 U.S.C. 271(b) and (c), Section 1337(a)(1)(B)(i) refers to “*articles* that * * * infringe” patents, 19 U.S.C. 1337(a)(1)(B)(i) (emphasis added). Thus,

although “[a]n ‘article’” by itself “cannot infringe under any subsection of § 271,” Section 1337 expressly contemplates that an article can be deemed infringing for purposes of Section 1337’s import-trade restrictions. *Suprema*, 796 F.3d at 1347. To harmonize those provisions, the Commission has construed Section 1337(a)(1)(B)(i) to encompass (among other things) the “importation of goods that, after importation, are used by the importer to directly infringe at the inducement of the goods’ seller.” *Id.* at 1340. The en banc Federal Circuit upheld that construction in *Suprema*. *Id.* at 1346-1352.

Applying that understanding here, the Commission found that Comcast’s customers’ use of certain functionalities of the X1 set-top boxes infringed Rovi’s patents, and that Comcast induced that infringement. Pet. App. 36a-41a. It was “undisputed” below “that direct infringement of the ’263 and ’413 patents occurs when the imported X1 set-top boxes are fitted by or on behalf of Comcast and used with Comcast’s customers’ mobile devices.” *Id.* at 13a. The Commission concluded that “Comcast had actual knowledge of the ’263 and ’413 patents at least since 2014,” and that Comcast either “knew or was willfully blind to the high probability that its actions would cause its customers to infringe the * * * patents.” *Id.* at 41a.

Petitioners argued below that Section 1337 “is limited to excluding articles that infringe at the time of importation,” Pet. App. 11a, and they renew that contention (Pet. 21-23) in this Court. The Commission and the court of appeals correctly rejected that contention. Pet. App. 11a-13a, 41a-42a. As the Federal Circuit explained in *Suprema* and reiterated here, Section 1337 “contemplates that infringement may occur after importation,” since it makes unlawful “the sale within the United

States after importation . . . of articles that * * * infringe.’” *Id.* at 11a (quoting *Suprema*, 796 F.3d at 1349) (emphasis omitted). The statutory text “thus distinguishes the unfair trade act of importation from infringement by defining as unfair the importation of an article that will infringe, *i.e.*, be sold, ‘after importation.’” *Ibid.* (citation omitted). The Tariff Act’s purposes and history confirm that commonsense understanding. See 796 F.3d at 1350-1353.

Petitioners argue (Pet. 22-23) that the Commission’s interpretation disregards “Section [1337’s] *in rem* focus” on “articles themselves” rather than on “the *in personam* conduct of alleged infringers.” That contention lacks merit. Petitioners do not appear to challenge the Commission’s reliance on the Patent Act’s delineation of the conduct that infringes a patent, 35 U.S.C. 271, in construing Section 1337(a)(1)(B)(i)’s reference to “articles that * * * infringe.” And they identify no sound reason to read “infringe” in that provision to encompass only some but not all of the forms of direct and indirect infringement that Section 271 delineates, including induced infringement under Section 271(b). It follows that, when “[i]nduced infringement * * * is accomplished by supplying an article, the article supplied can be an ‘article that infringes’ if the other requirements of inducement are met.” *Suprema*, 796 F.3d at 1349. The Commission’s reading simply “recognizes that the acts necessary for induced infringement, including acts of direct infringement, may not occur simultaneously at the time of importation.” *Ibid.*

The Commission independently determined that, “even if the location of Comcast’s inducing conduct were legally relevant,” it made no difference in this case because “Comcast’s inducing activity took place overseas,

prior to importation; it took place at importation; and it took place in the United States, after importation.” Pet. App. 41a n.13. Petitioners identify no basis for second-guessing that factual determination, which in any event would not warrant this Court’s review. See *United States v. Johnston*, 268 U.S. 220, 227 (1925); Sup. Ct. R. 10.

b. Petitioners separately contend (Pet. 25-30) that the court of appeals erred in sustaining the Commission’s finding that Comcast imported the infringing products. That argument also lacks merit and does not warrant review.

“Whether a party is an importer in terms of Section [1337] is a question of fact” that is reviewable on appeal only for “substantial evidence.” Pet. App. 13a (citing *In re Orion Co.*, 71 F.2d 458, 462 (C.C.P.A. 1934)). The Commission affirmed the ALJ’s finding that Comcast had engaged in “importation” of the infringing products within the meaning of 19 U.S.C. 1337(a)(1)(B)(i). Pet. App. 30a. That determination rested on the ALJ’s factual finding that Comcast is closely “involved with the design, manufacture, and importation of the accused products.” *Id.* at 90a. The ALJ observed that “the accused products are so tailored to Comcast’s system and requirements that they would not function within another cable operator’s system,” and that “the software at issue in the heart of th[e] investigation is attributable squarely to Comcast.” *Ibid.*

In affirming the Commission’s determination, the court of appeals described examples of the “extensive evidence of Comcast’s control over the importation of the X1 set-top boxes.” Pet. App. 14a. The evidence showed that the set-top boxes were “designed only for Comcast” according to precise “specifications and ac-

ceptability standards”; that Comcast “knows the imported products are manufactured abroad and imported into the United States” for delivery to Comcast; that “Comcast alone controls the volume of accused products that enter the United States”; and that “Comcast requires Arris and Technicolor to handle importation formalities, such as fees, documentation, licenses, and regulatory approvals.” *Id.* at 14a-15a (capitalization altered; brackets and citation omitted). Petitioners do not appear to dispute any of these facts.

Petitioners fault the court of appeals and the Commission (Pet. 27-28) for disregarding the meaning of “importation.” The statute does not define that term, and the Commission’s interpretation accords with petitioners’ view (Pet. 27) of its “plain meaning”: “the bringing of goods into the country from abroad.” The Commission’s findings show that Comcast accomplished that result, through the companies it engaged to carry out the mechanics of entry at Comcast’s behest. Comcast did not merely “engage[] in conduct *related* to importation.” Pet. 28. It orchestrated and controlled the entire operation of developing and bringing into the United States products tailored exclusively for Comcast.

Petitioners identify no sound reason to adopt a crabbed reading of “importation” that would invite evasion of the Tariff Act by importers who operate through middlemen. That reading is especially incongruous in a statute that does not impose retrospective liability but simply bars continued importation and marketing of infringing articles. Whether Comcast or the companies with which it contracted held title during transit and liaised with customs officials has little bearing on whether continued importation of infringing articles at Comcast’s direction and for its exclusive benefit would be consistent with

Congress's intent. Cf. 19 U.S.C. 1337(d)(2)(A) (authorizing broader exclusion order to prevent evasion).

c. Even if the merits questions petitioners raise otherwise warranted review, this case would be an unsuitable vehicle in which to resolve them. As discussed above, the government agrees with petitioners that the appeal is moot. See pp. 16-28, *supra*. At a minimum, substantial doubt exists as to whether this case continues to present a live dispute, and the Court would need to resolve that threshold jurisdictional issue before it could address the merits.

CONCLUSION

The petition for a writ of certiorari should be granted, and the judgment of the court of appeals should be vacated. The case should be remanded with instructions to dismiss petitioners' appeal as moot, and for a determination (including possibly on remand by the Commission) whether the Commission's decision should be vacated.

Respectfully submitted.

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