

No. 19-1173

IN THE
Supreme Court of the United States

COMCAST CORPORATION, ET AL.,
Petitioners,

v.

INTERNATIONAL TRADE COMMISSION, ET AL.,
Respondents.

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

**BRIEF IN OPPOSITION OF
ROVI CORPORATION AND ROVI GUIDES, INC.**

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QUESTIONS PRESENTED

Acting under § 337 of the Tariff Act of 1930, Pub. L. No. 71-361, 46 Stat. 590 (codified as amended at 19 U.S.C. § 1337), the International Trade Commission (“Commission”) investigated petitioners’ importation of cable television set-top boxes into the United States. The Commission determined that petitioners were importing “articles that infringe” valid U.S. patents in violation of § 337. The Federal Circuit affirmed.

The questions presented are:

1. Whether the Federal Circuit’s judgment should be vacated as moot and remanded with instructions to vacate the Commission’s orders, pursuant to *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), where petitioners argued mootness before the Federal Circuit, that court specifically rejected petitioners’ mootness arguments, and petitioners nowhere argue that the mootness issue meets the standards for review under this Court’s Rule 10.

2. Whether the Commission had authority under § 337 to prohibit Comcast from importing certain television set-top boxes, where Comcast designed the set-top boxes to permit infringement, contracted for their manufacture abroad, directed their importation into the United States, and induced its customers to use the set-top boxes in a manner that directly infringes Rovi’s patents.

3. Whether Comcast is an “importer” for purposes of § 337, where Comcast directed overseas manufacturers to produce set-top boxes to Comcast’s specifications and to deliver them to Comcast in the United States in the quantities, to the locations, and on the dates that Comcast directed.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners here, appellants below, are Comcast Corporation; Comcast Cable Communications, LLC; Comcast Cable Communications Management, LLC; Comcast Business Communications, LLC; Comcast Holdings Corporation; NBCUniversal Shared Services, LLC (formerly Comcast Shared Services, LLC); ARRIS Enterprises LLC (named below as ARRIS Enterprises Inc.); ARRIS Global Ltd. (formerly Pace Ltd.); ARRIS Group, Inc. (now merged into Ruckus Wireless, Inc.); ARRIS International Ltd. (formerly ARRIS International plc); ARRIS Solutions, Inc.; ARRIS Technology, Inc.; and PACE Americas, LLC (now merged into ARRIS Solutions, Inc.); Technicolor SA; Technicolor Connected Home USA LLC; and Technicolor USA, Inc.

Respondent here, appellee below, is the International Trade Commission.

Respondents here, intervenors below, are Rovi Corporation and Rovi Guides, Inc.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, respondents Rovi Corporation and Rovi Guides, Inc. state that Rovi Guides, Inc. is a subsidiary of Rovi Corporation. Rovi Corporation is a subsidiary of TiVo Corporation. TiVo Corporation has no parent corporation and no company owns 10% or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

There are no related proceedings within the meaning of Rule 14.1(b)(iii).

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STATEMENT

Acting under § 337 of the Tariff Act of 1930, Pub. L. No. 71-361, 46 Stat. 590 (codified as amended at 19 U.S.C. § 1337), the International Trade Commission (“Commission”) investigated petitioners’ importation of television set-top boxes into the United States. The Commission determined that petitioners were importing “articles that infringe” valid U.S. patents in violation of § 337. Pet. App. 41a. The Federal Circuit affirmed. Pet. App. 2a.

I. STATUTORY BACKGROUND

For nearly 100 years, the Commission or its predecessor has had authority to stop unfair competition in the

importation of goods. The Tariff Act of 1922, Pub. L. No. 67-318, §316, 42 Stat. 858, 943, authorized the Commission's predecessor to investigate "unfair methods of competition and unfair acts in the importation of articles." If a violation was found, the President could direct that articles involved "be excluded from entry" into the United States. *Id.* §316(e). While §316 did not define "unfair methods of competition," the Senate Report explained that the term "is broad enough to prevent every type and form of unfair practice." S. Rep. No. 67-595, at 3 (1922).

Congress re-enacted §316 as §337 of the Tariff Act of 1930. See 46 Stat. at 703-704. Although §337 did not mention patent infringement, courts and the Commission understood that §337's prohibition on "unfair methods of competition" in importation encompasses infringement. *In re Orion Co.*, 71 F.2d 458, 464-465 (C.C.P.A. 1934). "At least as early as 1980, the Commission was making determinations that inducement to infringe a valid U.S. patent under 35 U.S.C. §271(b) constituted an unfair trade act under Section 337 that could be remedied by an exclusion order." *Suprema, Inc. v. Int'l Trade Comm'n*, 796 F.3d 1338, 1350-1351 (Fed. Cir. 2015) (en banc) (collecting cases).

In 1988, Congress amended §337 by adding a provision that expressly prohibits "importation into the United States, * * * or the sale within the United States after importation * * *, of articles that * * * infringe a valid and enforceable United States patent." Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, §337(a)(1)(B)(i), 102 Stat. 1107 (1988) (codified at 19 U.S.C. §1337(a)(1)(B)(i)). "There is no indication" the amendment sought "to contract the Commission's authority regarding patent infringement." *Suprema*, 796 F.3d at 1351. To the contrary, the amendment sought to

“make [§ 337] a more effective remedy for the protection of United States intellectual property rights.” Pub. L. No. 100-418, § 1341(b).

II. PROCEEDINGS BELOW

A. The Commission Investigation

Respondents Rovi Corporation and Rovi Guides, Inc. (“Rovi”) have long been leaders in improving access to television programming through interactive programming guides used on television receivers. Rovi C.A.Br. 5. Rovi’s interactive-programming-guide technology is protected by patents. *Id.* at 5, 8. For decades, all major U.S. cable TV providers have licensed Rovi’s patented technology. C.A.App. 716-717. Comcast licensed Rovi’s technology for years, but refused to renew its license in 2016. C.A.App. 673-678.

This case concerns Comcast’s importation of devices designed for infringing two Rovi patents, U.S. Patent Nos. 8,006,263 and 8,578,413. Pet.App. 2a-3a. Those patents cover technology that, among other things, allows consumers to use mobile devices from outside the home to access interactive programming guides to record programs. See Rovi C.A.Br. 5-8. Comcast no longer disputes that it designed its Xfinity X1 set-top boxes to work with Comcast’s “Xfinity TV Remote App” on customers’ smartphones to perform remote recording in a way that infringes the ’263 and ’413 patents. Pet.App. 40a.

In April 2016, Rovi filed a complaint with the Commission, alleging that Comcast’s importation of its X1 set-top boxes violates § 337. Pet.App. 76a. Comcast induced infringement, the complaint alleged, by designing its X1 set-top boxes to “enable and facilitate infringement,” and encouraging and instructing its customers to use the set-top boxes together with the Xfinity app to infringe.

C.A.App. 1031. Rovi also named as respondents ARRIS and Technicolor—companies that manufacture Comcast’s custom set-top boxes overseas and ship them to Comcast sites in the U.S. at Comcast’s direction. Pet.App. 88a. The Commission instituted a §337 investigation—the “1001 Investigation”—in response. Pet.App. 20a.

B. The ALJ’s Initial Determination

After an evidentiary hearing, the ALJ determined that Comcast violated §337. Pet.App. 75a. The ALJ found the asserted patent claims not invalid, Pet.App. 433a-464a, and infringed, Pet.App. 371a-406a, 631a-636a.

The ALJ also determined that Comcast “is an importer for purposes of Section 337.” Pet.App. 90a. The X1 set-top boxes, he found, “are so tailored to Comcast’s system and requirements that they would not function within another cable operator’s system.” *Ibid.* Comcast requires its overseas manufacturers ARRIS and Technicolor to adhere to rigorous specifications so the set-top boxes “operate as required by Comcast within its network to provide services to Comcast subscribers.” Pet.App. 88a; C.A.App. 1570. The set-top boxes cannot be sold to anyone else without Comcast’s permission. Pet.App. 88a; C.A.App. 1570. The software at issue is also “attributable squarely to Comcast,” Pet.App. 90a—Comcast writes it and requires ARRIS and Technicolor to load it onto the set-top boxes during overseas manufacture. Pet.App. 225a; C.A.App. 136-137 n.14, 1570-1571, 1789-1791.

The ALJ further found that Comcast controls the importation of its X1 set-top boxes. Pet.App. 88a-90a. Comcast knows its set-top boxes are manufactured overseas and must be notified of changes in manufacturing locations. Pet.App. 88a; C.A.App. 1571. Comcast does not transport its set-top boxes across the border—by con-

tract, it requires ARRIS and Technicolor to be responsible for physical transportation and to handle customs formalities such as fees and documentation. Pet.App. 88a-89a; C.A.App. 30213-30214, 30381-30382. But Comcast controls the volume of set-top boxes that enter the U.S. Pet.App. 89a; C.A.App. 30211-30213, 30379-30381. And Comcast requires that they be delivered to Comcast sites in the U.S. Pet.App. 88a-89a; C.A.App. 1595-1596, 4144, 30213-30214, 30381-30382.

The ALJ also found that Comcast induced its customers to infringe Rovi's patents. Comcast "promotes, tells, and describes to its users how to use" the X1 set-top boxes' infringing functionality. Pet.App. 402a. And its customers use the set-top boxes to directly infringe in the "way Comcast promotes them." Pet.App. 402a-405a.

C. The Commission's Decision

The Commission affirmed. Pet.App. 18a-20a. It summarily affirmed the ALJ's determination that "Comcast imports the X1 STBs" into the U.S. Pet.App. 30a.

The Commission agreed that Comcast's X1 set-top boxes are "articles that infringe" under §337. It explained that, "as applied to Comcast's relevant conduct here," §337 "requires importation of articles, proof of direct infringement, and proof of inducement, all of which have been established by the record." Pet.App. 41a.

The Commission rejected Comcast's argument that its X1 set-top boxes could not be "articles that infringe," as construed in *Suprema*, 796 F.3d at 1349, because infringement "took place entirely domestically, after importation." Pet.App. 41a. That argument "miss[ed] the point": "It is no defense to the violation of a trade statute" that Comcast "actively induces the infringement by

its users as to the imported X1 STBs” from within the United States. *Ibid.*

The Commission also rejected the factual premise of Comcast’s argument, finding that Comcast engaged in extensive *overseas* conduct to induce infringement *before* importation. “Comcast designed the X1 STBs to be used in an infringing manner,” “directed their manufacture overseas—requiring, among other things, overseas installation of the relevant software onto the STBs”—and “directed the importation of those STBs to Comcast facilities in the United States.” Pet.App. 41a-42a n.13.

The Commission thus rejected Comcast’s assertion that its “inducing conduct took place entirely domestically, after importation.” Pet.App. 41a. Instead, “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-42a n.13. The Commission entered limited exclusion and cease-and-desist orders. Pet.App. 950a-1015a.¹

D. The Decision Below

The Federal Circuit affirmed. Pet.App. 2a. Comcast did not challenge the findings that Rovi’s patents were valid and infringed. The court upheld the Commission’s determination that Comcast had imported infringing articles in “violation of Section 337” as “in conformity to the statute and precedent.” Pet.App. 15a.

1. The Federal Circuit rejected Comcast’s argument, raised by supplemental brief after oral argument, that the appeal had become moot because Rovi’s patents had

¹ In response, Comcast modified its X1 system to remove the infringing remote-recording functionality for the patents’ duration. C.A. App. 31603.

expired. Pet.App. 8a. The court found the dispute remained live because the Commission had two other investigations pending—the 1103 and 1158 Investigations—concerning other, unexpired Rovi patents that involve the same Comcast set-top boxes, and present essentially the same disputes as the current appeal before the Federal Circuit. *Ibid.* The ALJ in the 1103 and 1158 Investigations had stated as much. Pet.App. 9a; C.A. Dkt. 144, Ex. 1 at 4. It “appears to be undisputed,” the court stated, that those matters “are likely to be affected by the decisions here on appeal.” Pet.App. 9a. The pending Commission investigations involve the same parties, “the same imported X1 set-top boxes,” and the same “issues” on appeal before the Federal Circuit. *Ibid.* The court found “that there are sufficient collateral consequences to negate mootness.” Pet.App. 9a-10a.²

² Later events proved those assessments correct. Less than a month after the Federal Circuit ruled, the ALJ in the 1158 Investigation issued her summary determination order that Comcast is an importer of its X1 set-top boxes for purposes of § 337. *Certain Digital Video Receivers, Broadband Gateways, and Related Hardware and Software Components*, Inv. 337-TA-1158, Order No. 36, Initial Determination Granting Complainant Rovi’s Motion for Summary Determination on Importation 1-2 (Mar. 26, 2020). The ALJ’s order relied on the Federal Circuit’s decision in this case. *Id.* at 6-7. Two months later, in the 1103 Investigation, the Commission found a § 337 violation based on Comcast’s inducement of infringement, through its customers’ use of its X1 set-top boxes, of another Rovi patent. The Commission invoked the decision in this case, explaining that it “raised several of the same issues presented here, including whether Comcast’s X1 [set-top boxes] are ‘articles that infringe’ and whether Comcast is an importer within the meaning of section 337.” *Certain Digital Video Receiver and Related Hardware and Software Components*, Inv. 337-TA-1103, Commission Opinion 6 (May 13, 2020).

2. The Federal Circuit rejected Comcast’s argument that the Commission had exceeded its authority to exclude “articles that infringe” under §337. Comcast did not dispute that X1 set-top boxes were imported *for* infringing use. Instead, Comcast urged that they are not “articles that infringe” at importation because each individual set-top box is not used in inducing infringement until *after* importation. Pet.App. 11a. The Federal Circuit disagreed, explaining that, under its decision in *Suprema*, “the phrase “articles that infringe” covers goods that were used by an importer to directly infringe post-importation as a result of the seller’s inducement.” Pet.App. 11a-12a (quoting *Suprema*, 796 F.3d at 1352-1353).

The court also emphasized that—the scope of §337 aside—Comcast had induced infringement both *before* importation and after, both *overseas* and in the United States. The court invoked the Commission’s finding that “Comcast designed the X1 STBs to be used in an infringing manner”; “directed their manufacture overseas”; and required “overseas installation” of the software at “the heart” of infringement. Pet.App. 12a, 14a. “Comcast’s inducing activity” thus “took place overseas, prior to importation; it took place at importation; and it took place in the United States, after importation.” Pet.App. 13a (quoting Pet.App. 41a-42a n.13).

3. The Federal Circuit affirmed the Commission’s conclusion that Comcast is an “importer.” Pet.App. 13a-15a. Comcast’s X1 set-top boxes, the court explained, “are so tailored to Comcast’s system and requirements that they would not function within another cable operator’s system.” Pet.App. 14a. The Commission had “set[] forth extensive evidence of Comcast’s control over” design, manufacture, and the importation of X1 set-top

boxes. *Ibid.* Comcast “requires” that the set-top boxes “adhere to its specifications”; “provides ARRIS and Technicolor with detailed technical documents” to ensure the set-top boxes operate within its network; and “restricts ARRIS’s ability to sell” the set-top boxes “without Comcast’s permission.” *Ibid.* (alterations omitted). The Federal Circuit recounted the Commission’s findings that Comcast “knows the imported [set-top boxes] are manufactured abroad and imported into” the U.S.; “requires” that its suppliers “deliver the [set-top boxes] to Comcast delivery sites” in the U.S.; “controls the volume” of set-top boxes that enter the U.S.; and “requires” that its suppliers “handle importation formalities, such as fees, documentation, licenses, and regulatory approvals.” Pet. App. 14a-15a (alterations omitted). “The Commission’s findings of importation by or for Comcast of articles for infringing use,” the court ruled, are thus “supported by substantial evidence.” Pet. App. 15a.

REASONS FOR DENYING THE PETITION

None of the three questions the petition purports to present warrants review. The judgment below reflects a case-specific application of legal rules that Comcast does not challenge. Comcast seeks to rewrite the facts and decisions below to manufacture an issue warranting review where none was decided below and none is presented on these facts.

Comcast’s fact-bound request for vacatur of the judgment below, under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), lacks merit. This Court will sometimes grant a summary *Munsingwear* vacatur where further review of important issues is precluded because the case became moot *after* the court of appeals ruled. Here, however, Comcast argued mootness before the Federal Circuit, and that court specifically addressed—and re-

jected—Comcast’s mootness arguments. Comcast thus does not seek a *Munsingwear* order. It asks this Court to *disagree with* and *reverse* the mootness ruling below on the merits. But Comcast never suggests there is a circuit conflict on the mootness issue or that it is sufficiently important to warrant review. Nor are the other requirements for *Munsingwear* vacatur met.

Comcast’s second argument, regarding the scope of Commission authority under §337, rests on a Twilight-Zone version of the facts and decisions below. Comcast does not dispute that it induced infringement of Rovi’s patents. It argues that the Commission exceeded its authority in barring importation of Comcast set-top boxes because they “are staple articles of commerce that infringe no patents,” and “the purported inducement * * * occurred domestically after importation.” Pet. i. But neither of those assertions is correct.

Comcast’s X1 set-top boxes are not “staple articles of commerce” (like computer chips) used incidentally in an infringing system. The Commission found the set-top boxes are so custom-designed that they can be used *only* on Comcast’s system—and Comcast “designed” them to be used on its system “in an infringing manner.” Pet.App. 41a-42a n.13. Designed-for-infringement set-top boxes that can be used only by Comcast’s customers on Comcast’s systems are hardly “staples articles of commerce.” And despite Comcast’s repeated assertion that the “purported inducement * * * occurred domestically after importation,” the Federal Circuit and Commission both found the opposite: They found that inducement happened ““overseas, prior to importation; it took place at importation; and it took place in the United States, after importation.’” Pet.App. 12a-13a (quoting Pet.App.

41a-42a n.13). This case does not present the issues Comcast purports to raise.³

Comcast's third question presented fares no better. The determination that Comcast engaged in "importation" is factbound and contravenes no precedent. The decision below does not even purport to define "importation" for future cases. Review is unwarranted.

I. THE FEDERAL CIRCUIT'S MOOTNESS DETERMINATION DOES NOT WARRANT REVIEW

A. The Mootness Issue Presents No Question of Importance

Comcast asks this Court to vacate the Federal Circuit's decision "as moot" and to remand "with instructions to vacate the Commission's orders." Pet. i. According to Comcast, it is "this Court's standard practice" to grant, vacate, and remand ("GVR") "when an appeal of an administrative decision has become moot." Pet. 20. That is incorrect for the reasons below (at 15-18). But Comcast's request is misplaced regardless.

1. In the cases Comcast cites, the mootness issue arose *after* the court of appeals decided the case. As a result, the lower court had no opportunity to address mootness. See *PNC Bank Nat'l Ass'n v. Secure Access, LLC*,

³ Comcast's *amici* repeat Comcast's misplaced arguments, see, e.g., Br. of R Street Institute, *et al.*, as *Amici Curiae* 5-8 ("R Street Br."), but also levy broader attacks on Commission proceedings. They argue (for example) that Commission adjudication of patent disputes violates Article III, see *id.* at 12-15; Br. of Computer & Communications Industry Association, *et al.*, as *Amici Curiae* 15-19 ("CCIA Br."), and that the Commission should apply traditional injunctive relief requirements before issuing exclusion orders, CCIA Br. 22. Those complaints (and others raised by *amici*) cannot support review of completely unrelated questions.

138 S. Ct. 1982 (2018) (dismissal of claims in another court came after court of appeals decision); *NTA Graphics, Inc. v. NLRB*, 511 U.S. 1124 (1994) (union letter disclaiming interest came after petition was granted); cf. *Youngblood v. West Virginia*, 547 U.S. 867, 871-872 (2006) (Scalia, J., dissenting) (noting GVRs “where an intervening factor has arisen” after court of appeals decision).

Here, Comcast raises a mootness issue that arose before the court of appeals ruled and was fully briefed below. See C.A.Dkt. 142. The Federal Circuit considered Comcast’s argument, and rejected it on the merits. Pet.App. 8a-10a. Comcast thus does not ask for a “standard” *Munsingwear* GVR. Pet. 20. It asks the Court to disagree with the Federal Circuit’s mootness determination and summarily reverse. See Pet. 15-20.

This Court, however, is not “a court of error correction.” *City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1780 (2015) (Scalia, J., concurring in part and dissenting in part); see Sup. Ct. R. 10 (Court will not grant review to correct “misapplication of a properly stated rule of law”). It grants review only “for compelling reasons,” where the case presents an important and recurring issue of federal law on which the courts are divided or otherwise urgently need guidance. Sup. Ct. R. 10. Comcast has offered *no* argument that the Federal Circuit’s mootness decision meets that standard. The portion of the petition purporting to explain why “[t]his case presents issues of exceptional importance” does not even mention the first question presented. See Pet. 30-36. Reply is too late.

2. The mootness question lacks importance beyond the parties to this case. The Federal Circuit applied existing doctrine—the rule that “collateral consequences”

may sometimes “negate mootness.” Pet.App. 9a-10a (citing 13C Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Fed. Practice and Procedure §3533.3.1 (3d ed. 2008); *Hyosung TNS Inc. v. ITC*, 926 F.3d 1353, 1358 (Fed. Cir. 2019)). Other circuits recognize that doctrine as well. See, e.g., *Dailey v. Vought Aircraft Co.*, 141 F.3d 224, 228 (5th Cir. 1998); *Jones v. Haynes*, 736 F. App’x 585, 589 (6th Cir. 2018); *Kan. Judicial Review v. Stout*, 562 F.3d 1240, 1248 (10th Cir. 2009).

Comcast does not suggest the application of that rule reflects recurring issues. The decision below rests on unusual facts. Rovi and Comcast are involved in a series of disputes that, while involving different patents, otherwise involve the same parties, the same X1 set-top boxes, the same alleged course of wrongful conduct (design, importation, inducement), and the same arguments concerning the applicability of §337 to that conduct. See Pet.App. 9a; *Certain Digital Video Receiver and Related Hardware and Software Components*, Inv. 337-TA-1103, Commission Opinion 6 (May 13, 2020). But the additional circumstances—that the patents in the first investigation expired during appeal, while patents in other pending Commission investigations involving otherwise identical disputes have not expired—are apparently unprecedented. Review of a potentially unique decision on unique factual circumstances is unwarranted.

B. Vacatur Under *Munsingwear* Is Inappropriate

Munsingwear vacatur is not automatic. “[T]he determination” whether to grant such relief “is an equitable one.” *U.S. Bancorp Mortg. Co. v. Bonner Mall P’ship*, 513 U.S. 18, 29 (1994); *id.* at 24 (Court has “disposed of moot cases in the manner most consonant to justice”). It is thus Comcast’s “burden, as the party seeking relief from the status quo of the appellate judgment, to demon-

strate * * * equitable entitlement to the extraordinary remedy of vacatur.” *Id.* at 26. Comcast cannot meet that burden, for multiple reasons.

1. *Munsingwear* vacatur is reserved for cases where “review of [the judgment below] *was prevented*” by the “happenstance” of intervening mootness. *Munsingwear*, 340 U.S. at 40 (emphasis added). A “party who seeks review of the merits of an adverse ruling, but is *frustrated* by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment.” *Bancorp*, 513 U.S. at 25 (emphasis added). But Comcast cannot show that the alleged mootness “frustrated” or “prevented” it from “seek[ing] review” of any issue in this case. Comcast litigated the merits of this case before the Commission. It lost. Comcast then litigated both mootness and the merits in the Federal Circuit. It lost again. Now Comcast has filed a certiorari petition seeking this Court’s review of both mootness and the merits. While the existence of an antecedent mootness question may make this case an undesirable vehicle for review of the substantive issues Comcast purports to raise, that does not justify vacatur. Parties are not entitled to ideal certiorari vehicles. *Munsingwear* vacatur is warranted only where intervening happenstance “prevents” a party from obtaining review—not the case here.

2. *Munsingwear* vacatur is available, moreover, only to “those who have been prevented from obtaining the review *to which they are entitled.*” *Camreta v. Greene*, 563 U.S. 692, 712 (2011) (emphasis added). But this Court’s review is not an entitlement. See Sup. Ct. R. 10. The United States has therefore taken “the consistent position * * * that the Court should ordinarily deny review of cases (or claims) that have become moot after the court of appeals entered its judgment * * * when such

cases (or claims) *do not present any question that would independently be worthy of this Court's review.*" U.S. Br. in Opp. 7, *Elec. Privacy Info. Ctr. v. Dep't of Commerce*, No. 19-777 (U.S. Mar. 19, 2020) (emphasis added); see Stephen M. Shapiro, *et al.*, *Supreme Court Practice* § 19.4, at 968 n.33 (10th ed. 2013).

That is the case here. Comcast does not argue that the mootness issue itself is worthy of certiorari. Nor do the other two questions Comcast raises warrant review. To the contrary, both are fact-specific challenges that largely ignore the actual facts. See Sections II and III, *infra*. Comcast is not entitled to vacatur of an unfavorable ruling based on alleged mootness following full and fair litigation below, where this Court would have been singularly unlikely to have granted review on the merits issues regardless.

C. The Federal Circuit's Decision Is Correct

1. This case is not moot regardless. The issues are "live," and the parties have a "legally cognizable interest in the outcome." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000). While the patents in this case have expired, the controversy here does not turn on the specifics of the patents. On appeal, Comcast did not challenge the findings that the patents were valid and infringed. Comcast challenged only the Commission's findings that the X1 set-top boxes are "articles that infringe" under § 337, and that Comcast is an importer of those set-top boxes. See Pet.App. 11a, 14a. *Comcast* plainly believes it still has a legally cognizable interest in those issues, or it would not have asked this Court to review them.

In fact, all parties retained the requisite concrete interest in this dispute. Two pending Commission investigations involve the same Comcast products, the same means of importation, and similar issues of induced in-

fringement. See p. 7, *supra*. The dispute over whether Comcast’s conduct falls within the Commission’s §337 authority, and Comcast’s status as an importer of X1 set-top boxes, “by [their] continuing and brooding presence,” have real effects on the pending Commission investigations and the parties’ rights. *Super Tire Eng’g Co. v. McCorkle*, 416 U.S. 115, 122 (1974). The ALJ in the 1103 Investigation confirmed that the Federal Circuit’s decision below “will affect [her] finding.” Pet. App. 9a; p. 7, *supra*. When a governmental entity “has postponed making a final determination * * * pending the outcome of [a] lawsuit,” the “question is not moot.” *Roudebush v. Hartke*, 405 U.S. 15, 18-19 (1972).

2. Despite Comcast’s protestations (at 16-18), the Federal Circuit’s application of the “collateral consequences” doctrine is consistent with precedent. This Court has recognized that the consequences of resolving a dispute—on other proceedings or the parties’ interests—may defeat mootness. See *City of Erie*, 529 U.S. at 277-278 (challenge to anti-nudity ordinance not moot even though nude-dancing establishment challenging ordinance had closed); *Super Tire*, 416 U.S. at 122-126 (challenge to state policy not moot once labor strike that precipitated lawsuit ended, because policy would affect company’s ongoing collective-bargaining relationship with union); *Bank of Marin v. England*, 385 U.S. 99, 100-101 (1966) (payment of joint judgment does not moot case where petitioner could be sued for contribution); see also *Amalgamated Ass’n of St., Elec. Ry. & Motor Coach Emps. of Am. v. Missouri*, 374 U.S. 74, 77-78 (1963) (citing “presence of an existing unresolved dispute which continues”); *Chafin v. Chafin*, 568 U.S. 165, 171-173 (2013) (appeal of order requiring child’s return not mooted by child’s return because, “[o]n many levels, the

[parents] continue to vigorously contest the question of where their daughter will be raised”).

Despite Comcast’s effort (at 17) to conflate collateral consequences with “capable of repetition, yet evading review,” this Court has distinguished them. See *Super Tire*, 416 U.S. at 121-122, 125. In *Super Tire*, the strike precipitating the case had ended. Even so, this Court held that a live controversy remained because the challenged policy “is not contingent, has not evaporated or disappeared, and, by its continuing and brooding presence, casts what may well be a substantial adverse effect on the interests of the petitioning parties.” *Id.* at 122. That ongoing effect on the parties’ interests was separate from “capable of repetition, yet evading review.” *Id.* at 125 (noting latter doctrine would be relevant “[i]f we were to condition our review on the existence of an economic strike”). *Super Tire* demonstrates that, even if the specific event “that prompted that suit” ends before the case is resolved, the case may not be moot where the court’s decision will nevertheless “affect[.]” a broader “ongoing” dispute between the parties. *City of Houston, Texas v. Dep’t of Hous. & Urban Dev.*, 24 F.3d 1421, 1428-1429 (D.C. Cir. 1994) (citations omitted).

United States v. Juvenile Male, 564 U.S. 932, 937 (2011) (cited Pet. 16), is not to the contrary. That case involved only “*potential* collateral consequence[s]”—that a favorable decision “*might* serve as a useful precedent * * * in a *hypothetical* lawsuit.” *Ibid.* (emphasis added). Here, the decision below did not rely on a “potential” consequence for a “hypothetical lawsuit” or mere “precedential” effects. It determined that the controversy between the parties remained concrete and consequential given two actual, pending Commission investigations involving the *same parties* over the *same facts*—the *same infring-*

ing products, the same inducing actions, and the same means of importation—raising the same legal issues. See p. 7 & n.1, *supra*; Pet.App. 9a-10a. The case sufficiently “affected and continues to affect” the parties’ present interests to render the controversy live. *Super Tire*, 416 U.S. at 125-126.

II. THE FINDING THAT § 337 EXTENDS TO COMCAST’S X1 SET-TOP BOXES DOES NOT MERIT REVIEW

Section 337 authorizes the Commission to prevent “[u]nfair methods of competition and unfair acts in the importation of articles * * * into the United States.” 19 U.S.C. § 1337(a)(1)(A). Section 337 specifically prohibits “[t]he importation * * *, the sale for importation, or the sale within the United States after importation * * * of articles that * * * infringe a valid and enforceable United States patent.” *Id.* § 1337(a)(1)(B)(i).

Comcast does not dispute that the Commission’s § 337 authority extends to importation of goods for *induced* patent infringement. Nowhere does the petition argue that the Commission is categorically barred from excluding goods imported as part of an orchestrated scheme to induce others to use them to infringe U.S. patents. Nor does the petition deny that the Commission can “prevent importation of articles that have been part of inducement as an unfair trade act.” *Suprema*, 796 F.3d at 1349; see Pet.App. 11a.⁴

Comcast instead argues that the decision below unjustifiably “expand[s]” Commission authority beyond prior cases (like *Suprema*) by allowing exclusion of “[1] *staple*

⁴ *Amici*’s arguments that “[i]nduced infringement * * * cannot meet” § 337’s requirements, CCIA Br. 10-12, thus are irrelevant. *Amici* cannot raise issues the petition does not.

articles of commerce based on [2] *post-importation domestic inducement* of infringement.” Pet. 21-22 (emphasis added). But this case presents no question about Commission authority over “purely domestic” inducement “after importation.” Pet. i. The Federal Circuit and the Commission expressly found that Comcast’s “inducing activity took place *overseas, prior to importation,*” and “at importation,” as well as “in the United States, after importation.” Pet.App. 13a (quoting Pet.App. 41a-42a n.13) (emphasis added). Nor does the case concern “staple articles of commerce.” Pet. i. The set-top boxes at issue are so customized that they can be used only on Comcast’s system. Pet.App. 14a (quoting Pet.App. 34a n.10). Comcast “designed” those Comcast-only set-top boxes “to be used in an infringing manner.” Pet.App. 12a. Custom designed-for-infringement set-top boxes that work only on Comcast’s system are hardly “staple articles of commerce.” The case thus does not even present the issue Comcast purports to raise—much less present an issue that is important and recurring.

A. This Case Does Not Raise Important Questions About the Commission’s Jurisdiction

1. Comcast does not dispute that Rovi’s patents were infringed—or that it induced that infringement. Comcast nonetheless argues that the Commission lacks authority to prevent importation of Comcast’s designed-for-infringement set-top boxes. Describing this case as a “vast and unwarranted” expansion of Commission jurisdiction, Comcast accuses the Federal Circuit of giving the Commission authority over “patent disputes” that are “purely domestic in character” based on the importation of “staple articles” that “play at most a tangential role” in “purely domestic” induced infringement. Pet. 20-22; see Pet. 2 (similar). According to Comcast, the Commission’s

§ 337 authority to exclude “articles that infringe” limits the Commission to instances where inducement occurs *abroad, before* infringement. See Pet. 21-22. The question presented thus asks whether the Commission “exceeded its authority” by excluding “*staple articles of commerce*” where “*inducement * * * occurred domestically after importation.*” Pet. i (emphasis added).

No such issue is presented. The Federal Circuit (like the Commission) expressly rejected Comcast’s factual premise “that any inducing conduct” in this case “occurs entirely” in the U.S. “after the boxes’ importation.” Pet.App. 12a. Instead, the court of appeals (like the Commission) invoked Comcast’s *overseas* inducement *before* importation:

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. 13a (quoting Pet.App. 41a-42a n.13) (emphasis added). The decision below (like the Commission) then catalogued Comcast’s foreign inducing activity. See Pet.App. 13a-14a. Comcast does not deny that the described conduct constitutes inducement. See Rovi C.A. Br. 29-30 (pre-importation design of product for infringing use, importation for infringement, and promotion of infringing uses are all “inducement”). It simply ignores that portion of the court of appeals’ decision.

Comcast’s inducing conduct thus was not “purely domestic.” Pet. i, 2, 15, 21, 24, 25, 27, 29-30, 33, 36. Working with overseas manufacturers, Comcast “designed” the set-top boxes “to be used in an infringing manner” according to Comcast’s specifications. Pet.App. 12a; see Pet.App. 14a, 87a-88a. Comcast “directed [the set-top boxes’] manufacture overseas” before importation, in-

cluding “overseas installation of the relevant [Comcast] software onto the STBs”—software at “the heart” of infringement. Pet.App. 12a, 14a; see Pet.App. 399a. Comcast “directed the importation of those STBs to Comcast facilities in the United States” so it could supply them to customers. Pet.App. 12a-13a. And, as Comcast was importing millions of designed-for-infringement set-top boxes, it created demand for their infringing uses by marketing those uses to customers and teaching them how to infringe. See Rovi C.A.Br. 25-26; C.A.App. 82-83, 1365, 1544, 6811. Those are precisely the sort of cross-border unfair trade acts, involving induced infringement, the Commission can address.

The record likewise refutes Comcast’s repeated assertion, Pet. i, 2, 7, 8, 10, 20-24, 27, 29, 30, 31, 33, 34, 36, that the Commission claimed authority to exclude “staple articles of commerce” that just happen to be used in infringement. Comcast’s set-top boxes are not generic components, like memory chips, sold in domestic commerce to be incorporated into myriad products after importation. “Comcast designed” them to “be used in an infringing manner” in Comcast’s Xfinity system, Pet.App. 12a, and had them produced for its exclusive use, Pet.App. 14a.



C.A.App. 31738.

Loaded with custom Comcast software before importation, the boxes are “so tailored to Comcast’s system and requirements that they would not function within another cable operator’s system.” Pet.App. 14a; see Rovi C.A.Br. 25. A product that Comcast designed for its Xfinity system, imported only by Comcast, usable only on Comcast’s system, is not a “staple article of commerce.”

Despite Comcast’s assertions (at 2, 22), the Commission never “acknowledged” otherwise. The Commission found that the set-top boxes have non-infringing uses. Pet.App. 42a. But the fact that a Comcast-only set-top box *can be* used without invoking infringing features does not make it a staple article. Nor does it change the fact that Comcast *designed the boxes for infringing* use and *induced* customers to infringe. *Ibid.*

The record defies Comcast’s assertion that the set-top boxes are only “tangential[ly]” or “incidental[ly]” involved in infringement. Pet. 22, 23. They are critical parts of an integrated, infringing system and are “designed * * * to be used in an infringing manner.” Pet.App. 12a. Far from “lack[ing] any functionality specifically directed to infringement,” Pet. 22, the X1 boxes receive requests over the Internet to schedule recordings—a function absent from prior-art set-top boxes lacking remote-recording technology, C.A.App. 5830; see Rovi C.A.Br. 24-25. As the Federal Circuit observed, the Comcast software loaded onto the set-top boxes before importation is at the “heart” of infringement. Pet.App. 14a. Comcast’s set-top boxes were custom designed to permit infringing remote-recording operation by Comcast’s customers within Comcast’s cable system. Rovi C.A.Br. 24 (describing C.A.App. 1757-1759, 1789-1792); Tr. Oral Arg. 32:20-33:27, No. 18-1450 (Fed. Cir.), <http://www>.

cafc.uscourts.gov/oral-argument-recordings/search/audio.html; see C.A. App. 5830.⁵

Comcast’s assertion (at 22, 24) that only one percent of its customers use X1 set-top boxes to infringe is irrelevant. One hundred percent of those set-top boxes are “designed” to “be used in an infringing manner.” Pet.App. 12a. For one hundred percent of those boxes, Comcast’s advertising promoted infringing use. See pp. 5-6, *supra*. The Commission is not barred from stopping designed-for-infringement set-top boxes at the border until after Comcast’s efforts to induce infringement become more successful. An “accused device may be found to infringe if it is reasonably *capable* of satisfying the claim limitations, even though it may also be capable of noninfringing modes of operation.” *Hilgrave Corp. v. Symantec Corp.*, 265 F.3d 1336, 1343 (Fed. Cir. 2001). And here there is extensive actual infringement: One percent of Comcast’s tens of millions of subscribers means hundreds of thousands of users, engaging in millions of infringing acts. Rovi C.A.Br. 38. This case thus presents no opportunity to address whether §337 extends to “purely domestic” infringement using “staple articles of commerce.” Pet. 21-22. The findings and evidence—not addressed in Comcast’s petition—make that clear.

2. Nor does the decision below authorize a “vast and unwarranted” expansion of Commission “jurisdiction.”

⁵ That Comcast eventually disabled the infringing feature “while making no changes to the boxes themselves,” C.A. Reply Br. 15, is not to the contrary. That Comcast could disable server software that interacts with the set-top box to effect remote recording—disabling use of the infringing feature by cutting command signals—does not mean the box was not designed for infringing use in the first place.

Pet. 20. It does not “expand” the Federal Circuit’s prior reading of §337 at all. It merely applies the holding, in *Suprema*, that §337 reaches unfair trade practices involving *induced* infringement before importation, even if *direct* infringement occurs domestically. See Pet.App. 11a; *Suprema*, 796 F.3d at 1349.

Before the Federal Circuit, Comcast insisted—as it does here—that §337’s use of the present-tense phrase “articles that infringe” means that “*inducement* liability” must have “attached” “at the time of * * * importation.” Pet.App. 12a (emphasis added). Comcast contended that standard was not met because Comcast’s inducing conduct occurred only domestically, after importation. *Ibid.* The decision below rejected Comcast’s argument, but not by “expand[ing]” a prior construction of §337. It simply upheld the Commission’s finding that “Comcast’s inducing activity took place overseas, prior to importation,” as well as “at importation.” Pet.App. 13a; pp. 5-6, *supra*. This case thus falls squarely within the ambit of earlier decisions. See Rovi C.A. Br. 27-28.

While Comcast attacks a phantom “expansion” of *Suprema*, it avoids challenging *Suprema* itself. In *Suprema*, the Federal Circuit held that the Commission can exclude articles imported as part of a scheme of inducing patent infringement. It explained that “the phrase ‘articles that infringe’ covers goods that were used by an importer to directly infringe post-importation as a result of the seller’s inducement.” 796 F.3d at 1352-1353. The dissent would have held that §337 reaches only “articles” that embody all the limitations of an apparatus claim at the time it is imported—a position that would exclude articles imported to *induce* infringement. *Id.* at 1359-1360 (O’Malley, J., dissenting). While the petition mentions that the *Suprema* decision was “sharply divided,”

Pet. 7, 21, it never embraces the dissenting position. Comcast avoids saying §337 does not reach induced infringement. Instead, it challenges a supposed “expansion” of *Suprema* that does not exist.⁶

B. Comcast Fails To Show That the Issues Are Important and Recurring

Comcast likewise fails to show that the issues it purports to raise are important and recurring. Comcast prophesizes that the Commission will use “imported staple articles” as a “jurisdictional hook” to expand its authority. Pet. 31. But it offers no evidence. *Suprema* was decided five years ago. Yet Comcast identifies no case in which the Commission invoked *Suprema* to exclude a “staple article” used by different purchasers in various applications. In each of the handful of investigations where the Commission invoked *Suprema*, the imported article was intimately tied to the infringement being induced and not merely a staple article of commerce. See *Cisco Sys., Inc. v. ITC*, 873 F.3d 1354, 1363 (Fed. Cir. 2017) (devices practiced a patented method when turned on); *Certain Magnetic Tape Cartridges*, No. 337-TA-1058, 2018 WL 4943753, at *100 (Aug. 17, 2018) (exclusion of patented “LTO” tapes based on inducing infringement of claims requiring use of tapes with compatible “LTO” tape drives); *Certain Beverage Dispensing Sys.*, No. 337-TA-1130, 2020 WL 1504737, at *7 (Mar. 26, 2020) (exclu-

⁶ There is a reason for Comcast’s strategy. To obtain a *Munsingwear* vacatur, Comcast must show that vacating the judgment below will “clear[] the path for future relitigation of the issues.” 340 U.S. at 40. If Comcast were to attack *Suprema*, Comcast could not possibly make that showing: Vacatur of the decision below would not “clear” a “path for future litigation” of the issues *Suprema* resolved; *Suprema* would remain controlling regardless.

sion of beverage dispenser system components imported into U.S. and assembled into infringing beverage dispenser). Comcast’s warnings of administrative overreach are unfounded.

Comcast’s assertions about “displac[ing] the authority of Article III courts,” Pet. 23-24, are makeweight. The Commission has never claimed jurisdiction over “all domestic patent disputes that happen to involve imported articles.” Pet. 23; see R Street Br. 5-8. The Commission cannot impose damages, or enjoin Comcast’s customers from using set-top boxes to infringe. The Commission merely stopped articles at the border, a paradigmatic exercise of executive, not judicial, power. *Wheeling-Pittsburgh Steel Corp. v. Mitsui & Co.*, 221 F.3d 924, 927 (6th Cir. 2000). Over the last 14 years, the Commission has instituted fewer than 80 investigations a year (often far fewer),⁷ compared to thousands upon thousands of patent-infringement suits filed in federal court.⁸ Federal courts are hardly being “displaced.”

Congress did give the Commission and district courts a few partially overlapping powers. Section 271(c) of title 35, for example, allows district courts to remedy “import[ation]” of patented inventions. Under §337, the Commission can order the exclusion of infringing articles. 19 U.S.C. § 1337(a)(1)(B). The Commission can remedy “the sale” of patented articles “within the United States after

⁷ See Section 337 Statistics: Number of New, Completed, and Active Investigations by Fiscal Year (Apr. 15, 2020), https://www.usitc.gov/intellectual_property/337_statistics_number_new_completed_and_active.htm.

⁸ See 2018 Patent Dispute Report: Year in Review, Unified Patents (Jan. 2, 2019), <https://www.unifiedpatents.com/insights/2019/1/2/2018-patent-dispute-report-year-in-review>.

importation,” *ibid.*, conduct district courts can address under 35 U.S.C. §271(c). But Commission authority remains limited to importation. That limited authority authorizes no “end-run” around *eBay Inc. v. Merc-Exchange, LLC*, 547 U.S. 388 (2006). Pet. 23-24. *eBay*’s requirements for district court injunctions are rooted in the “long tradition of equity practice.” 547 U.S. at 391. The Commission’s remedies, and constraints on their exercise, are controlled instead by statute and set by Congress. 19 U.S.C. §1337(d)-(g).⁹

In this case, Comcast worked with foreign companies to design set-top boxes exclusively for Comcast; designed them specifically for infringing use; directed their manufacture abroad; and required that they be loaded with Comcast software necessary for infringement. Comcast then imported those made-for-infringement set-top boxes by the millions while promoting and teaching its customers to infringe. Comcast offers no good reason to believe Congress meant only for courts, and not the Commission, to remedy that unfair trade practice by stopping the set-top boxes at the border.

C. This Case Is a Poor Vehicle for Review

This case also represents a poor vehicle. Any putative dispute about §337’s scope cannot alter the outcome.

⁹ Comcast and its *amici* also complain about Commission review of patent validity issues. Pet. 35; Br. of Unified Patents, LLC, *et al.*, as *Amici Curiae* 12-15. Those arguments are irrelevant here: Comcast abandoned its invalidity arguments on appeal. That the Commission lacks jury trials is also irrelevant. The Commission cannot award damages; it can grant only a form of specific relief, which carries no jury-trial right either. See *Root v. Ry. Co.*, 105 U.S. 189, 205-206 (1881).

Comcast argued that § 337’s “plain text” “requires that inducement liability must have attached with respect to an article at the time of that article’s importation.” Comcast C.A.Br. 29; see Pet.App. 12a. But here, inducement liability did attach by importation, as Comcast’s “inducing activity” happened “overseas, prior to importation,” and “at importation.” Pet.App. 13a. Even Comcast’s interpretation of § 337 was met.

Comcast’s position also rests on a quirky assumption about the meaning of “articles that infringe.” Comcast does not dispute that, by the time the Commission ruled, thousands upon thousands of imported X1 boxes were being used to infringe Rovi’s patents throughout the United States through conduct Comcast induced. Comcast seems to argue, however, that the *next* shipment—or any additional shipments—are not “articles that infringe” because the *individual* set-top boxes in those shipments have not yet themselves been “used in inducement” before being imported. Comcast C.A.Br. 32.

That defies basic principles. For example, advertising can constitute inducement, see *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 935 (2005), but typically is directed to *a class* of goods, not individual units. The Commission’s authority likewise is directed to excluding classes of goods, not singling out individual units. When § 337 speaks of “articles that infringe,” it means classes of articles that are infringing—not that each individual article has already been put to an infringing use before importation. Regardless, “Comcast’s inducing conduct” included “design[ing]” the set-top boxes for infringing use, and having each loaded with Comcast software essential to infringement before being imported. Pet.App. 12a. Comcast thus practiced inducement as to *each* individual set-top box *before* importation. That

Comcast cannot prevail even under its own legal theory weighs dispositively against review.

Finally, according to Comcast, this case is moot. While the issues remain live for the reasons given above, see pp. 15-18, *supra*, the existence of an antecedent mootness issue—not alleged to have broader importance—weighs against review as well.

D. The Commission’s (and *Suprema*’s) Reading of § 337 Is Correct

Comcast challenges the Commission’s and Federal Circuit’s application of § 337, but offers no sustained analysis of that provision’s text and history. By its terms, § 337 authorizes the Commission to exclude “articles that * * * infringe” a domestic patent. The reference to “articles that infringe” is an obvious short-hand. *Suprema*, 796 F.3d at 1346. By statute, infringement is defined in terms of *actions* taken by *people*: Anyone who engages in infringing conduct, by “mak[ing],” “us[ing],” or “sell[ing]” the patented technology without the patentee’s permission, for example, is deemed an infringer. Patent Act of 1790, 1 Stat. 109-112; see 35 U.S.C. § 271(a). An “article” by itself cannot “infringe.” See U.S.Br. 12, *Suprema v. Int’l Trade Comm’n*, No. 12-1170 (Fed. Cir. Oct. 22, 2014).

Given that, the Federal Circuit properly understood that Congress used “articles that infringe” as a “short-hand” for articles that are the subject of infringement. *Suprema*, 796 F.3d at 1347. Courts likewise routinely use “various forms of shorthand references to devices that infringe” when describing devices that, when made, used, or sold, result in infringement under the Patent Act. *Id.* at 1347 & n.4; see U.S.Br. 12 in No. 12-1170, *supra*. Congress similarly used “articles that infringe” to refer to articles that are the basis for “infringement,” in-

cluding induced infringement. *Suprema*, 796 F.3d at 1347. That holding comports with statutory construction principles. When interpreting specialized statutory terms, it makes sense to examine how those terms are used in the relevant field. *Gozlon-Peretz v. United States*, 498 U.S. 395, 408 (1991).

Consistent with that, the Commission had exercised authority to investigate and proscribe importation of articles used to induce infringement long before Congress added §337(a)(1)(B)(i) with its “articles that infringe” language in 1988. See pp. 1-3, *supra*. Importation to induce infringement, the Commission had long held, was an “unfair act[] in the importation of articles” within the scope of §337. See *Suprema*, 796 F.3d at 1350. And Congress emphasized that, when it inserted language to prohibit importing “articles that infringe” in §337(a)(1)(B)(i), it sought to “strengthen” the Commission’s ability to combat patent infringement, not narrow it. See *id.* at 1351; pp. 2-3, *supra*. Reading that amendment to divest the Commission of long-settled authority over a vast swath of activity—importing goods designed to induce infringement—would do the opposite.

Comcast’s argument that §337’s “*in rem focus*” requires the Commission to “examine the articles themselves to determine whether they are infringing,” Pet. 23, simply begs the question. As explained above (at 29-30), articles cannot themselves infringe; conduct by people infringes. Comcast’s assertion that the articles themselves must “satisfy the limitations of a patent,” Pet. 23, without more, is circular *ipse dixit*. Comcast offers no evidence that anyone ever used the shorthand “articles that infringe” (or similar phrases like “infringing product”) to mean only articles that somehow infringe by their very existence. See *Suprema*, 796 F.3d at 1347.

For similar reasons, Comcast errs in arguing (at 23) that the statute’s use of “present tense” means that individual articles must “‘infringe’ when they cross the border.” The Dictionary Act provides that “words used *in the present tense include the future as well* as the present.” 1 U.S.C. §1 (emphasis added). “Articles that infringe” thus includes “articles that will” infringe. The Commission, moreover, does not issue exclusion orders until after “articles that gave rise to the unfair trade act” have “already been imported” and infringing activity has already occurred. *Suprema*, 796 F.3d at 1349. The Commission then exercises its authority to stop “similar articles from entering the U.S.” so as to “prevent[] future illegal acts from occurring.” *Ibid.* “Articles that infringe” thus refers to a *class of articles*: When articles like Comcast’s set-top boxes are being used for infringement in the U.S., the Commission can exclude *further* importation of more of those *same* Comcast set-top boxes as articles that infringe. See pp. 28-29, *supra*.

Finally, Comcast’s passing accusation that the decision below (or for that matter, *Suprema*) abandoned “independent judgment” in favor of deference, Pet. 24, is meritless.¹⁰ The decision below does not mention “deference” or cite *Chevron*. Rather than describe the Commission’s interpretation as “reasonable,” the decision below held it was “correct[.]” Pet.App. 12a. And correct it was.

¹⁰ Comcast’s *amici* challenge the Federal Circuit’s *Chevron* analysis in *Suprema*. R Street Br. 16-17. But the petition presses no such challenge. See p. 24, *supra*. Regardless, *Suprema*’s discussion of the statutory text, structure, history, and purpose belies any claim that the Federal Circuit eschewed “independent judgment” there. 796 F.3d at 1346-1360.

III. THE FINDING THAT COMCAST “IMPORTED” X1 SET-TOP BOXES DOES NOT MERIT REVIEW

Comcast also requests review of whether “Comcast engaged in ‘importation’ of the allegedly infringing articles.” Pet. i. That fact-bound question does not warrant this Court’s review.

A. The Issue Does Not Merit Review—And Certainly Not in This Case

The Federal Circuit announced no construction of the term “importation” to govern future cases, much less did it adopt a “virtually limitless construction.” Pet. 25. After reviewing the evidence showing Comcast designed the set-top boxes, arranged for their manufacture abroad, required the installation of Comcast software abroad, and controlled their importation, the court held that “substantial evidence” supported the “Commission’s findings of importation by or for Comcast.” Pet.App. 15a. Comcast does not assert that the Federal Circuit’s and the Commission’s fact-bound decisions conflict with a decision of this Court or a court of appeals. Nor does Comcast argue that the issue—whether the conduct identified by the Federal Circuit constitutes “importation” under § 337—is recurring or important.

Instead, Comcast requests review based on what the decision below does not do. Comcast accuses the Federal Circuit of “ignor[ing] * * * legal disputes” regarding the proper construction of “importation,” Pet. 26, and offering insufficient “analysis,” Pet. 28. If Comcast thought the court “overlooked” or “misapprehended” its argument, it should have filed a petition for panel rehearing. See Fed. R. App. P. 40(a)(2); Fed. Cir. R. 40(a)(4). It did not. This Court does not grant review as a surrogate for panel rehearing the party never sought below.

For similar reasons, this case is a poor vehicle for construing “importation” under §337. The decision below makes no pronouncements about the meaning of the term. This is “a court of review, not of first view.” *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

B. The Decision Below Is Correct

1. In any event, the decision below is correct. The plain meaning of “importation” encompasses not only carrying goods across a border, but also *causing* goods to be brought into the country. A contemporaneous edition of the Oxford English Dictionary defines “import” as “to bring in or *cause to be brought in* (goods or merchandise) from a foreign country in international commerce.” 5 *Oxford English Dictionary* 98 (1st ed. 1933) (emphasis added); see *Black’s Law Dictionary* (10th ed. 2014) (“import” means “the process or activity of bringing foreign goods into a country”).

Consistent with that, this Court has held that a party need not be the importer of record, or the person who physically transports goods across the border, to engage in importation. In *Hooven & Allison Co. v. Evatt*, 324 U.S. 652 (1945), for example, this Court held that a rope maker that had contracted with a third party for the purchase of hemp abroad and its shipment into the country—exercising control over the timing and location of importation—was an “importer.” *Id.* at 658. Because the rope maker “was the efficient cause of [the] importation,” he “was the importer.” *Id.* at 664.

Like the rope maker in *Hooven*, Comcast arranged with foreign manufacturers to produce set-top boxes overseas and to ship them into the U.S. Rovi C.A.Br. 50. Comcast had the boxes made for itself exclusively. Pet.App. 14a. Comcast also controlled importation, requiring delivery to “Comcast delivery sites in the United

States.” Pet.App. 15a. And “Comcast alone controls the volume” of set-top boxes shipped into the U.S. *Ibid.* Comcast thus was the “efficient cause” of importation—every single set-top box was imported for Comcast, at Comcast’s direction and control.

Comcast’s claim that the “Commission treated a domestic purchaser as an importer,” Pet. 30, fails. Comcast was no mere customer purchasing electronics at Best Buy. Comcast built an integrated system—utilizing Comcast’s servers, set-top boxes, and smartphone app—for infringing Rovi’s patents. And Comcast had a key piece of that system built overseas to its specification, loaded with its software, and then shipped into the U.S. to its facilities in the quantities and at the times it selected. Whatever limits the term “importation” may impose, Comcast’s activity is amply within them.

2. Comcast invokes 19 U.S.C. § 1526(f)(1), which addresses liability for “aiding and abetting importation.” Pet. 28-29. But that provision distinguishes an “importer” from one with lesser involvement who aids and abets importation *without “causing” it*. See Rovi C.A.Br. 56-57. Comcast also argues (at 28) that the Commission imposed “secondary liability,” holding Comcast responsible for importation by its foreign partners. But Comcast was held to have violated § 337 based on its *own conduct*—designing the boxes for infringement, arranging for their manufacture, and directing the amounts and locations for delivery. Pet.App. 12a-15a.

Comcast’s argument that “importation” is strictly limited to the physical act of “bringing of goods into the country from abroad,” Pet. 27, is implausible. None of Comcast’s authorities support that view. See Rovi C.A.Br. 53-54. Nor is it true that, just because its foreign partners are engaged in “importation” by bringing set-

top boxes into the country, Comcast cannot also be engaged in “importation.” Nothing in the statute suggests that there can be only one importer for an item. For example, any of several entities can be designated as the “importer of record.” 19 U.S.C. § 1484(a)(1). It follows that the broader term “importer” can include more than one entity with respect to the same item.

Comcast’s construction would eviscerate § 337, making it trivial to evade § 337’s core provisions. If causing articles to be imported into the United States does not count as “importation,” then any wrongdoer could evade § 337(a)(1)(A)’s prohibition on “unfair methods of competition” simply by having a third party assume responsibility for transportation and customs formalities. That reading of the statute cannot be correct.

CONCLUSION

The petition should be denied.

Respectfully submitted.

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