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

SUPPLEMENTAL BRIEF OF RESPONDENTS ROVI CORPORATION AND ROVI GUIDES, INC.

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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 is a subsidiary of Xperi Holding Corporation. Xperi Holding Corporation has no parent corporation.

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INTRODUCTION

Pursuant to this Court's Rule 15.8, respondents Rovi Corporation and Rovi Guides, Inc., respectfully submit this supplemental brief to address the government's reversal of position on the question of mootness. In the court of appeals, the International Trade Commission and Rovi alike argued that this dispute remained live. ITC Supp. Br., C.A. Dkt. 143, at 1-2, 5-6; Rovi Supp. Br., C.A. Dkt. 144, at 3-13. The Federal Circuit agreed. Pet. App. 8a-10a. In its response to the petition—filed the same day as Rovi's response—the government announced that it has "reconsidered [its] position," U.S. Br. 16, and now "agrees with petitioners that the court below

should have dismissed petitioners' appeal as moot," *id.* at 26. "It therefore would be appropriate," the government announces, "for this Court to grant the petition for a writ of certiorari, vacate the judgment below, and remand with instructions to dismiss the appeal." *Ibid.*

With all due respect, the government oversteps. Where the government is the *sole* respondent and beneficiary of the judgment below, it sometimes will confess error and urge this Court to vacate a judgment to which the government no longer claims entitlement. But the Federal Circuit's judgment here also runs in favor of another party—Rovi—that was, and continues to be, harmed by Comcast's unfair trade practices. Rovi is unaware of *any* case where the government, absent an intervening change in law, has urged a GVR based on its own confession of error over the objection of a private-party intervenor with which it was aligned below.

The government's proposed disposition is unsupported regardless. The government agrees with Rovi that "petitioners' merits arguments"—that Comcast's X1 set-top boxes are not "articles that infringe" and that Comcast is not an importer—"do[] not warrant further review," U.S. Br. 28, and "would not warrant further review" even apart from any mootness issues, *id.* at 17. The government, moreover, does not argue that the Federal Circuit's mootness ruling is itself important or otherwise worthy of review. To the contrary, the government now makes a mootness argument that was never pressed by any party below. Consequently, the correct course under this Court's practice—and the government's own long-standing views—is for the Court to deny the petition. That result is all but dictated by traditional standards and practices the government does not even address.

This is not a court of error-correction. The mootness issue Comcast raises is no exception.

ARGUMENT

1. The government in effect urges the court to grant, vacate, and remand based on its own confession of error. U.S. Br. 16. In the government's view, its confession of error itself requires that result: "The *government* * * * agrees with petitioners," the government declares, "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." *Id.* at 26 (emphasis added). With all due respect, that the government agrees with petitioners does not make it "therefore * * * appropriate for this Court to" GVR. The government's contrary view overreaches.

The practice of confessing error is not without controversy, even where the government is the sole respondent and holder of the judgment below. See *Young* v. *United States*, 315 U.S. 257, 258-259 (1942) ("our judicial obligations compel us to examine independently the errors confessed"); *Lawrence* v. *Chater*, 516 U.S. 163, 182-187 (1996) (Scalia, J. dissenting) (criticizing GVRs based on Solicitor General's confession of error). But the government here attempts to go further: It seeks to confess error where the judgment is also held by another party—Rovi—as intervenor below and respondent in this Court.[1]

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[1] Intervenors are "treated as if [they] were an original party * * * [on] equal standing with the original parties." 7C Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Fed. Practice and Procedure § 1920 (3d ed. 2008); see also this Court's Rule 12.6 ("All parties other than the petitioner are considered respondents."). The government nowhere suggests otherwise.

That goes too far. Where the government alone holds a judgment that was issued in error in the government's view, the government may sometimes confess error and ask the Court to summarily vacate a judgment to which it no longer claims entitlement. But the government has no right to confess error and surrender a judgment that runs in favor of *another party* over that party's express objection. Cf. *Firefighters* v. *Cleveland*, 478 U.S. 501, 529 (1986) ("A court's approval of a consent decree between some of the parties * * * cannot dispose of the valid claims of nonconsenting intervenors[.]").

Indeed, the government's request here appears unprecedented. Rovi has been unable to find any case where the Solicitor General urged this Court to vacate a judgment in favor of it and *other parties* based solely on the government's confession of error. This Court has sometimes concluded that a GVR was appropriate in light of the government's confession of error, but only in cases where the government is the sole respondent. See Pet. Supp. Br. 10, *Wynn Las Vegas, LLC* v. *Cesarz*, No. 16-163 (U.S. June 6, 2018). This Court "has never held that the government can 'confess error' in a case between two private parties, or that such a government 'confession' would be conclusive of that private dispute." *Id.* at 6-7; see *Wynn Las Vegas, LLC* v. *Cesarz*, 138 S. Ct. 2670 (2018) (denying certiorari). The closest analogous government confession of error that Rovi could find was *National Restaurant Ass'n* v. *Department of Labor*, U.S. Br. 13, 17, No. 16-920 (U.S. May 22, 2018). But in that case, the government urged vacatur in light of its changed views *and* intervening legislation and administrative proceedings. *Id.* at 23-27. And this Court responded by denying the petition. *Nat'l Rest. Ass'n* v. *Dep't of Labor*, 138 S. Ct. 2697 (2018) (denying cert-

iorari). To our knowledge, the government has never before urged that, because *it* has reversed from the position it took below, a judgment held by *another* party should "therefore" be summarily vacated.

Recognizing Rovi's independent interest in the judgment is especially important here. While the Commission defended its ruling below, Rovi was the party injured by Comcast's unfair trade practices, and Rovi is still pursing relief with respect to Comcast's continued importation of X1 set-top boxes that infringe other, unexpired Rovi patents. See Pet. App. 8a-9a; Rovi Br. in Opp. 7, 13.

2. The government, moreover, does not even attempt to reconcile its support for a GVR here with other longstanding principles. This Court has explained that the equitable remedy of vacatur is available 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); see Rovi Br. in Opp. 14-15. As Rovi has explained, Comcast has nowhere been denied *any* review to which it is otherwise entitled: Comcast has not been prevented from obtaining court of appeals review or from presenting a petition for a writ of certiorari in this Court. Rovi Br. in Opp. 14-15. The government does not contend otherwise.

This Court's review, moreover, is not an entitlement. See Sup. Ct. R. 10. As the leading treatise on this Court's practice explains, it is thus this Court's longstanding practice to "den[y] certiorari in arguably moot cases *unless* the petition presents an issue (other than mootness) worthy of review." Stephen M. Shapiro, *et al.*, *Supreme Court Practice* § 19.4, at 968 n.33 (10th ed. 2013) (emphasis added). Until now, that has been "the consistent position" of the United States as well: It repeatedly has urged "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 U.S. Br. in Opp. 10, *Thryv, Inc.* v. *Click-to-Call Techs., LP*, No. 18-916 (U.S. May 1, 2019); U.S. Br. in Opp. 12-14, *Enron Power Mktg., Inc.* v. *N. States Power Co.*, No. 99-916 (U.S. Jan. 28, 2000).

Under that settled standard, Comcast is not entitled to vacatur here. Rovi explained why Comcast's challenges to the merits of the Commission's and Federal Circuit's decisions do not warrant review. See Rovi Br. in Opp. 18-35. The government agrees: "The court below correctly rejected petitioners' merits arguments, and its decision does not warrant further review." U.S. Br. 28. "Those issues would not warrant further review," it says, even apart from the mootness question. *Id.* at 17. The government does not explain why this Court should not adhere to its traditional practice of "den[ying] certiorari" despite a claim of mootness where the petition fails to "present[ ] an issue (other than mootness) worthy of review." Shapiro, *supra,* § 19.4, at 968 n.33.

Nor does anyone argue that the mootness issue *itself* is important and recurring and warrants review. See Rovi Br. in Opp. 12-13. Comcast never claimed that. See *id.* at 15. Nor does the government. While the government spends 13 pages of its brief setting forth its "reconsidered" view on mootness—urging that the decision below incorrectly applies the "collateral-consequences principle"—it never once suggests the issue independently warrants this Court's review. See U.S. Br. 16-28. The closest it comes is to suggest the decision below "*might*

be understood as diluting" the requirements of the "capable of repetition, yet evading review" doctrine. *Id.* at 25-26 (emphasis added). But such speculation is not sufficient to support this Court's review.

In fact, the government's new arguments before this Court disprove importance. The government acknowledges that a live dispute remains between the parties, as "petitioners and Rovi continue to dispute the legality of petitioners' conduct with respect to the articles at issue here." U.S. Br. 21. It concedes that the exact controversy—concerning the same practices, the same importation methods, under the same contracts—remains vibrant. *Ibid.*; see Rovi Br. in Opp. 16-17; *Chafin* v. *Chafin*, 568 U.S. 165, 171-173 (2013). But it urges that *this case* is moot based on a technical argument regarding the content of § 337's statutory review provision. Section 337, the government observes, authorizes a "person adversely affected by a final determination of the Commission under subsection (d), (e), (f), or (g)" to appeal to the Federal Circuit. 19 U.S.C. § 1337(c). Those sections address exclusion orders and cease-and-desist orders for violations of § 337(c). *Id.* § 1337(d), (e), (f). Thus, the government claims, the "specific case or controversy" on appeal in this case was limited to the Commission's limited exclusion and cease-and-desist orders, which allegedly went moot when the orders expired. U.S. Br. 18-19. While live disputes remain concerning "the Commission's antecedent determination that a violation had occurred," the government argues that determination cannot support a live controversy because it was made "under subsection (c)" and "was not independently appealable" under the statute. *Id.* at 18.

The government does not contend that its statutory argument demonstrates the issue's importance—outside

the § 337 context or even within it. As Rovi explained (at 13), the decision in this case rests on unique factual circumstances that are unlikely to recur; the government does not suggest otherwise. More important, the argument the government now raises, based on the specifics of the statutory review mechanism, was never pressed below. Comcast did not argue it. See Comcast Supp. Br., C.A. Dkt. 142-1. Rovi and the Commission did not either. ITC Supp. Br., C.A. Dkt. 143; Rovi Supp. Br., C.A. Dkt. 144. And Comcast did not even raise that argument in its petition seeking a GVR in this Court. See Pet. 15-20.

Because the argument was never made to the Federal Circuit, that court has not rejected it—and it remains open to the Commission or others to press it in the future (in the extraordinarily unlikely event the unique factual circumstances that gave rise to the issue here ever recur). As this Court has explained, where a court has not "squarely addressed [an] issue," or has merely assumed an answer, the court remains "free to address the issue on the merits" in a future case. *Brecht* v. *Abrahamson*, 507 U.S. 619, 631 (1993); see also *Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533, 557 (2001) (Scalia, J., dissenting) ("Judicial decisions do not stand as binding 'precedent' for points that were not raised, not argued, and hence not analyzed."). Nowhere does the government explain how a decision that does not even address its new theory, much less foreclose its future acceptance, is sufficiently important to warrant this Court's review. By contrast, traditional practice should prevent this Court from adopting the government's new theory in this case, never presented below, in the first instance. This is "a court of final review and not first view." U.S. Br. 27 (quoting

Bethune-Hill v. *Va. State Bd. of Elections*, 137 S. Ct. 788, 800 (2017)).[2]

3. Ultimately, the government never explains why the Court should disregard prior practice and GVR this case notwithstanding the absence of "any question that would independently be worthy of this Court's review." U.S. Br. in Opp. 7, *Elec. Privacy Info Ctr.*, *supra*. The government appears to suggest a different course is appropriate because the supposed error below is jurisdictional. U.S. Br. 17-18 (discussing Article III). But the same is true in every other case of intervening mootness where the government has urged that review be denied, see pp. 5-6, *supra*.

Nor does the fact that the Federal Circuit actually decided the mootness issue below somehow support a GVR. This is not a court of jurisdictional error-correction. Whether an allegation of jurisdictional error by the court of appeals warrants this Court's attention is subject to the same standards as every other legal issue under

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[2] Nor is the government's argument correct. By invoking putative *statutory* limits on *relief*, the government conflates mootness with the merits of the relief granted. As noted above (at 7), the government admits that the parties' dispute—whether Comcast's conduct falls within § 337 and amounts to importation—continues despite the patents' expiration. And the decision below, far from being "'advis[ory],'" was "'conclusive'" of that dispute: It alters the parties' "'legal relations'" by ruling that Comcast's conduct violates § 337, which is precisely why Comcast wants the decision vacated. *MedImmune, Inc.* v. *Genentech, Inc.*, 549 U.S. 118, 127 (2007). The government's contention instead is that the particular statutory provisions providing for review under § 337 do not allow the Federal Circuit to issue that kind of conclusive decree. But the "legal availability of a certain kind of relief" under a statute goes not to "mootness," but to "the merits." *Chafin*, 568 U.S. at 174; see *Powell* v. *McCormack*, 395 U.S. 486, 498-500 (1969).

Rule 10. Under similar circumstances, the government recommends denying the petition, rather than granting and reversing. In *Thryv*, for example, the government "agree[d] that the court of appeals lacked jurisdiction," but urged this Court to deny the petition anyway because "the [lower] court's contrary jurisdictional holding does not warrant further review." U.S. Br. in Opp. 10, *Thryv*, *supra*. This Court routinely denies petitions alleging jurisdictional errors in the decision below. See, *e.g.*, Pet. i, *Simon* v. *Marriott Int'l, Inc.*, No. 19-887 (U.S. Jan. 16, 2020), cert. denied, — S. Ct. —, 2020 WL 1978955 (Apr. 27, 2020); Pet. i, *United Auto.* v. *Hardin Cty.*, No. 16-1451 (U.S. June 2, 2017), cert. denied, 138 S. Ct. 130 (2017); Pet. i, *Junk* v. *Terminix Int'l Co.*, No. 10-1238 (U.S. Apr. 7, 2011), cert. denied, 132 S. Ct. 94 (2011); Pet. i, *Belshe* v. *Children's Hosp.*, No. 99-1497 (U.S. Mar. 9, 2000), cert. denied, 120 S. Ct. 2197 (2000); Pet. i, *Bell Atlantic* v. *Am. Tel. & Telegraph Co.*, No. 88-189 (U.S. Aug. 2, 1988), cert. denied, 109 S. Ct. 306 (1988). And the fact that no court has considered, much less rejected, the government's new mootness argument underscores the absence of good reason for, if not the impropriety of, summary action here. *Bethune-Hill*, 137 S. Ct. at 800.

4. Finally, the government's brief never explains why Comcast has an "equitable entitlement to the extraordinary remedy of vacatur." *U.S. Bancorp Mortg. Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 26 (1994). The government's prior positions show why equity weighs *against* vacatur in this case. The government has explained that, "[i]f the Court would have denied certiorari in any event, there is no unfairness in leaving the lower court's decision intact." U.S. Br. in Opp. 12-13, *Enron Power Mktg.*, *supra*. To the contrary, vacatur "would give the petitioner a windfall." *Ibid.*

That is the case here. Comcast had a full and fair opportunity to litigate its case, and it lost. It now has a full and fair opportunity to present its challenge to the decision below to this Court. "Judicial precedents are presumptively correct and valuable to the legal community as a whole," and unless the Federal Circuit's decision here would otherwise warrant review, it should stand. *U.S. Bancorp*, 513 U.S. at 18, 26-27. The government agrees that the decision on the merits below is correct and does not otherwise warrant this Court's review. U.S. Br. 16, 29. There is no reason why Comcast is entitled to a better remedy through summary GVR than it otherwise would have received from this Court based simply on the happenstance of alleged mootness.[3]

CONCLUSION

The petition should be denied.

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[3] Notwithstanding Rovi's disagreement with the government about whether this Court should grant, vacate, and remand—or instead deny the petition for a writ of certiorari—Rovi agrees with the government in one detail. Petitioners ask this Court to direct vacatur of the Commission decision, while the government urges that the Commission should be permitted to consider whether to vacate its own decision. See U.S. Br. 26-27. For the reasons given above, this Court should simply deny review. But Rovi agrees that, *if* the Court were to grant, vacate, and remand, whether to vacate the Commission's decision should be left to the Commission's discretion in the first instance.

Respectfully submitted.

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