No. 13-796

In the Supreme Court of the United States

LG ELECTRONICS, INC., LG ELECTRONICS USA, INC., AND LG ELECTRONICS MOBILECOMM USA, INC.,

Petitioners,

v.

INTERDIGITAL COMMUNICATIONS, LLC, INTERDIGITAL TECHNOLOGY CORPORATION, IPR LICENSING, INC., AND INTERNATIONAL TRADE COMMISSION,

Respondents.

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The Solicitor General correctly concludes that "the court below erred in both its jurisdictional and merits holdings." Gov't Opp. 10. He is also right that "this case [has become] moot as a result of actions taken by InterDigital." *Id.* at 7. Because of mootness, a grant of plenary review is no longer an option. The proper course would be to vacate the judgment below, as this Court has done in numerous cases that have become moot at the certiorari stage. *E.g.*, *United States* v. *Samish Indian Nation*, 133 S. Ct. 423 (2012) (vacating as moot at the request of the Solicitor General); *Indiana State Police Pension Trust* v. *Chrysler LLC*, 558 U.S. 1087 (2009) (vacating as moot over the opposition of the Solicitor General). The Solicitor General appropriately suggests that course, but only "[i]n the alternative." Gov't Opp. 16. For the reasons stated below, an order vacating the judgment below is a much better course than denial of certiorari.

The difference between denial and vacatur matters in this case. Petitioner LG and respondent InterDigital are engaged in litigation in numerous forums over the same licensing agreement that the majority of a divided Federal Circuit panel—despite lacking even a colorable basis for asserting jurisdiction—construed against LG. We can be confident that InterDigital will assert, if this Court denies certiorari, that LG is collaterally estopped from arguing its construction of the agreement in the co-pending arbitration regarding the same agreement. Although such an argument would be wrong, the

arbitrators that actually have jurisdiction should not be forced to grapple with the complex law of issue preclusion before reaching the merits. See *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 71, (1997) ("Vacatur clears the path for future relitigation by eliminating a judgment *the loser was stopped from opposing* on direct review." (emphasis added and internal quotation marks omitted)). An order of vacatur from this Court would obviate any need to debate issue preclusion.

I. The Decision Below Should Be Vacated Regardless of Whether the Questions Presented Would Merit Further Review

After LG petitioned for certiorari, InterDigital moved to withdraw the complaint that formed the basis for this action. Gov't Opp. App. 1a-12a. The ITC granted the motion. *Id.* at 13a-18a. Accordingly, the case is now moot. And the "established practice of the Court in dealing with a civil case . . . which has become moot while on its way here . . . is to reverse or vacate the judgment below." *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). That broad rule—reiterated as the general rule, with an exception not applicable here, in *U.S. Bancorp Mortg. Co.* v. *Bonner Mall Partnership*, 513 U.S. 18, 22 (1994)—would call for vacatur in this case.

The Solicitor General proposes another exception: If a case becomes moot after the court of appeals decides it, he suggests, "this Court ordinarily should decline to vacate the decision below if the case would not have warranted review on the merits." Gov't Opp. 8. There is no firm grounding for that proposed rule. And it is distinctly ill suited to cases like this one, which are mooted by the deliberate and

voluntary action of the prevailing party. This Court has rightly been skeptical of "maneuvers designed to insulate a decision from [its] review." *Knox* v. *SEIU*, 132 S. Ct. 2277, 2287 (2012). In short, even if the Solicitor General's approach were sound as a general matter, it should not be extended to this case.

A. As the Solicitor General acknowledges, this Court has never expressly adopted his position. Gov't Opp. 8. The Court has sometimes denied certiorari in cases that became moot after the lower court's decision, but it has also vacated the decision below in numerous other cases. See generally 13C WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE § 3533.10.3, at 626 n.6 (3d ed. 2008 & Supps.).

Moreover, *Camreta* v. *Greene*, which the Solicitor General cites, cuts *against* his position. The Court's statement that it had "left lower court decisions intact when mootness did not deprive the appealing party of any review to which he was entitled," 131 S. Ct. 2020, 2035 n.10 (2011), referred to an *opportunity* for review, not review as of right.

Camreta quotes *Bonner Mall*, which considered whether a party "ha[d] voluntarily forfeited his legal remedy by the ordinary processes of appeal *or certiorari*," making no distinction between the two. 513 U.S. at 25 (partially quoted in *Camreta*, 131 S. Ct. at 2035 n.10) (emphasis added). *Camreta* asks whether the losing party "*could* . . . *challenge* an appellate decision in this Court," *not* whether its challenge would be considered on the merits. 131 S. Ct. at 2035 n.10 (emphasis added). Finally, *Camreta* explains that "[v]acatur expunges an

adverse decision that *would be reviewable* had this case not become moot." *Ibid.* (emphasis added).

In short, this Court has focused on whether the decision would otherwise be *reviewable*, not whether it actually would be reviewed.

In any event, the Solicitor General does not suggest that his proposed gloss on *Munsingwear* should be applied as an inflexible rule. He says only that the United States has "generally" taken the position that this approach should "ordinarily" be followed. Gov't Opp. 8. The caution is appropriate. On at least one recent occasion, the Solicitor General has argued for vacatur even though he did not consider the case certworthy. Brief for the Respondent 11, *Banda-Ortiz* v. *Gonzales*, No. 06-477 (http://www.justice.gov/osg/briefs/2006/0responses/2006-0477.resp.pdf).

Accordingly, even if vacatur should *ordinarily* be reserved for certworthy cases, this rule should be qualified with appropriate exceptions.

B. Because vacatur is an equitable remedy, the Court's approach should always "take account of the public interest." *Bonner Mall*, 513 U.S. at 26. Here, the public interest strongly favors vacatur, because the Solicitor General's proposed rule should not be extended to cases that become moot as a result of the deliberate action of the party that prevailed below. See Gov't Opp. 8 (acknowledging that a "reasonable argument could be made" for this exception to what the Solicitor General takes to be the "ordinary rule"); Reply Brief for the Petitioner 3, 11, *United States* v. *Samish Indian Nation*, No. 11-1448 (http://www.justice.gov/osg/briefs/2012/2pet/7pet/2011-1448.pet.rep.pdf).

Limiting vacatur in the manner proposed by the Solicitor General would encourage parties who wish to evade this Court's review to moot cases voluntarily, thereby potentially preserving a favorable (but mistaken) precedent. Indeed, it is entirely possible that InterDigital sought to moot this case for that reason, among others. InterDigital has "waived" its right to respond to the certiorari petition, thus offering this Court no explanation for its maneuver. The Court may, of course, request a response, but it also may draw an adverse inference from InterDigital's calculated decision to say nothing, which came in the form of a waiver on the 75th day after docketing of the petition.

"[M]aneuvers designed to insulate a decision from review by this Court must be viewed with a critical eye." *Knox*, 132 S. Ct. at 2287. The Court has an "interest in preventing litigants from attempting to manipulate the Court's jurisdiction to insulate a favorable decision from review." *City of Erie* v. *Pap's A.M.*, 529 U.S. 277, 288 (2000). The only way to vindicate that interest fully is to vacate the judgment below when the prevailing party deliberately moots a pending case.

C. The Solicitor General responds that, "so long as the Court performs the same certworthiness analysis it would have performed in the absence of the mooting event . . . the respondent will have no meaningful incentive to moot the case strategically." Gov't Opp. 9-10. That assertion is misguided on two levels.

First, the Court's processes are not always transparent to outsiders. Even if the Court does adopt a practice of analyzing the certworthiness of moot

cases, respondents who are interested in acting strategically are not likely to realize it. For instance, it is far from clear what the Court's *current* practice is, even though it has recently disposed of a number of cases in this posture. As long as there is any ambiguity concerning the Court's approach, there *will* be a meaningful incentive for respondents to "attempt[] to manipulate the Court's jurisdiction." *City of Erie,* 529 U.S. at 288. Short of an opinion of this Court explaining in detail its approach to certiorari-stage mootness, only vacatur in these cases can put a stop to such efforts.

Second, the Solicitor General's approach would require this Court to perform a full certworthiness analysis in all moot cases—even when doing so would misallocate the Court's resources. This case is a clear example.

As the Solicitor General explains, the mootness question is straightforward. See Gov't Opp. 7. By contrast, the question of certworthiness is difficult. The Solicitor General acknowledges that the lower court was mistaken with respect to both questions presented. As explained below, the dispute between LG and the Solicitor General is over how wide-ranging and dangerous the errors are. A careful evaluation of this dispute would require close attention to the majority and dissenting opinions below, as well as to multiple precedents from this Court, the Federal Circuit, and other courts.

The Solicitor General insists that the Court should perform that exercise, even though it is within the Court's discretion simply to conclude that the case is moot and vacate the decision below. LG

submits that the latter course is a wiser allocation of the Court's scarce resources.

D. The Solicitor General's sole remaining argument is that "vacatur disserves the public interest by eliminating a 'presumptively correct' judicial precedent." *Id.* at 10 (quoting *Bonner Mall*, 513 U.S. at 26). Whatever force such a presumption may have in other cases, it has none in this case, because the decision below is straightforwardly erroneous. The Solicitor General acknowledges as much, though he understates the case,[1] and InterDigital has not offered any defense of the ruling.

The Solicitor General suggests that this Court may take the Federal Circuit's errors into account *only* as part of the certworthiness analysis, *id.* at 10 n.1, but there is no justification for that artificial constraint. No presumption of correctness can or should whitewash the Federal Circuit's obvious error in asserting jurisdiction.

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[1] We showed in the petition that the Federal Circuit construed a passing statement in *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667, 674 (1986), so broadly that the passing statement would effectively overrule the **holding** of *United States* v. *Erika, Inc.*, 456 U.S. 201 (1982). The Solicitor General does not discuss *Erika*. We explain in the next section why attention to *Erika* helps demonstrate the certworthiness of the case. For present purposes, what matters is that it is inappropriate to call a decision "presumptively correct" when it so openly contradicts a binding decision of this Court, and does so with respect to *jurisdiction*.

II. The Federal Circuit's Jurisdictional Holding Would Merit Review If This Case Were Not Moot

In concluding that it had jurisdiction over this case, the Federal Circuit relied on an extremely aggressive conception of the presumption in favor of judicial review. Pet. 9-21. The Solicitor General does not dispute that the proper application of this presumption is an important and recurring issue amply deserving this Court's review.[2]

Instead, he argues that the presumption played a relatively minor role in the decision below. He asserts that the presumption "was hardly central to the court of appeals' analysis." Gov't Opp. 13. That interpretation misapprehends both the logic and the language of the majority opinion below. A strong presumption in favor of judicial review not only *was* the basis of the majority opinion—it *had to be* the basis of that decision.

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[2] As for the second question presented, the Solicitor General acknowledges that the court "misapplied [its own] standard and invaded the province of the arbitrator." Gov't Opp. 12. In other words, this case directly bears upon the national policy, repeatedly vindicated by this Court, of ensuring that "private agreements to arbitrate are enforced according to their terms." *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 476, 479 (1989). Because at most one certworthy issue might be required (under the Solicitor General's view) to justify a vacatur order, however, and because the jurisdictional issue is so clearly certworthy, we devote no further space to the second issue.

A. Section 337 allows the Federal Circuit to review "final determination[s] of the Commission under subsection (d), (e), (f), or (g)." 19 U.S.C. § 1337(c). But the ITC's decision was indisputably rendered under subsection (c). Indeed, the opinion below openly admitted that the ITC's decision to terminate the investigation "was not a determination on the merits under [subsections] (d), (e), (f), or (g)." Pet. App. 15a.

As the petition explained, that concession resolves the jurisdictional question under the *Erika* line of cases.[3] Just as in *Erika*, the statute "[c]onspicuously . . . fails to authorize" judicial review of subsection (c) decisions. 456 U.S. at 208. "In the context of [Section 337's] precisely drawn provisions, [the] omission [of subsection (c)] provides persuasive evidence that Congress deliberately intended to foreclose further review of such claims." *Ibid.*; see also *Block* v. *Community Nutrition Institute*, 467 U.S. 340, 347 (1984).

In other words, as this Court has already explained to the Federal Circuit, the omission of subsection (c) is not mere "congressional silence." *United States* v. *Fausto,* 484 U.S. 439, 447 (1988) (reversing Federal Circuit's ruling allowing judicial review contrary to statutory scheme). To the contrary, "it displays a clear congressional intent to deny . . . judicial review." *Ibid.*

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[3] In discussing "[t]he authorities to which petitioners point," Gov't Opp. 13 n.3, the Solicitor General does not mention any of the three key cases cited by LG: *Erika, Block,* and *Fausto*. Pet. 11-13.

Erika, *Block* and *Fausto* control this case. The *only* way the panel majority could have found jurisdiction here is by applying a stronger presumption in favor of judicial review than those cases allow. In other words, the court *had* to demand more than a "fairly discernible" congressional intent to preclude review. *Block*, 467 U.S. at 351. That is precisely what it did.

The Federal Circuit suggested that the exclusion of subsection (c) from the list of reviewable provisions has little meaning "in the context of judicial review of administrative action." Pet. App. 15a n.10. Indeed, according to the panel majority, petitioners "'disregard[ed] the general rule that judicial review will not be precluded on the sole ground that specific procedures for judicial review of a particular agency action are not spelled out in a statute.'" Pet. App. 14a (quoting *Allied Corp.* v. *U.S. Int'l Trade Comm'n*, 850 F.2d 1573, 1579) (Fed. Cir. 1988)).

But that "general rule," now applied by the Federal Circuit for a quarter-century, directly contradicts the "longstanding principle" embodied in *Erika*: "that a statute whose provisions are finely wrought may support the preclusion of judicial review . . . by negative implication." *Shalala* v. *Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 34 n.3 (2000) (citing *Erika*, *Fausto*, and *Block*).

In other words, this decision was no isolated or localized error. Instead, in the opinion below and in *Allied Corp.*, the Federal Circuit has taken the mistake it made in *Fausto* and elevated it to the level of a general principle. And what rationale did the court give for this "rule"? Unsurprisingly, it cited the presumption in favor of judicial review, and insisted

that only clear and convincing evidence can overcome it. Pet. App. 14a; but see *Block*, 467 U.S. 350-51 (explaining that the lower court was wrong to apply the presumption in the "strict evidentiary sense").

In short, the Federal Circuit relied on its overly aggressive view of the presumption in favor of judicial review to create a rule that flatly contradicts the *Erika* line of cases. Only by applying such a rule could the panel majority get around its own concession (Pet. App. 15a) that this case involves an action *not* among those made reviewable by the precisely drawn text of the relevant statute. Accordingly, the presumption in favor of judicial review played an absolutely central role in this case.

B. Nothing in the Solicitor General's brief undermines this conclusion. The court's jurisdictional analysis did discuss several questions in addition to the presumption of judicial review, but each of those questions became relevant *only* because of the mistaken application of the presumption.

For instance, if the Federal Circuit had properly concluded that review was limited to final determinations *under the subsections listed in the statute*, it would not have needed to analyze whether the ITC order was a "final determination"—or its "equivalent"—in some general sense made relevant only by another line of Federal Circuit cases that depart from this Court's precedents. See Gov't Opp. 13 (citing Pet. App. 12a-17a & n.8).[4]

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[4] Similarly, it would have had no occasion to consider whether the ITC order was in some sense similar to a "final decision" under the Federal Arbitration Act. See Gov't Opp. 13 (citing Pet. App. 17a-18a).

Indeed, the Federal Circuit's oft-repeated holding that it can review any agency action that is the "equivalent" of a final determination, Pet. App. 10a-12a, 15a, only makes the opinion below *more* certworthy. See Pet. 22-25. In asking whether an agency action had "the same operative effect, in terms of economic impact," as a final determination, Pet. App. 16a (internal quotation marks omitted), this entire line of cases defies this Court's guidance that statutory text must be the "lodestar" of the preclusion inquiry. *Erika*, 456 U.S. at 206. Such an ongoing violation of basic principles governing the interpretation of jurisdictional statutes would itself merit further review if this case had not become moot.

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment below should be vacated as moot.

Respectfully submitted.

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