

No. 26-316

In the Supreme Court of the United States

APPLE INC.,
Petitioner,

v.

INTERNATIONAL TRADE COMMISSION, MASIMO
CORPORATION, AND CERCACOR
LABORATORIES, INC.,
Respondents.

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

**BRIEF OF UNIFIED PATENTS, LLC AS
AMICUS CURIAE IN SUPPORT
OF PETITIONER**

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INTEREST OF AMICUS CURIAE¹

Unified Patents, LLC is a membership organization dedicated to deterring non-practicing entities (“NPEs”), and particularly patent assertion entities (“PAEs”),² from extracting nuisance settlements from operating companies on the strength of patents that are likely invalid. Unified’s more than 3,000 members include Fortune 500 companies, start-ups, automakers, retailers, cable companies, banks, financial-services companies, technology companies, open-source software developers, and manufacturers—all dedicated to reducing the drain on the United States economy caused by now-routine, baseless litigation asserting infringement of patents of dubious validity.

Unified and its counsel study the evolving business models, financial backing, and practices of PAEs. *See, e.g.,* Jonathan Stroud, *Patent Assertion Finance Is Big Business*, 15.3 *Landslide* 34 (2023); Sean Keller & Jonathan Stroud, *Litigation Funding*

¹No counsel for a party authored this brief in whole or in part, and no person or entity other than amicus curiae and its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2, no party’s consent is required.

²The U.S. International Trade Commission classifies as “Category 1” NPEs entities “that do not manufacture products that practice the asserted patents,” including inventors, universities and other research institutions, and start-ups. It classifies as “Category 2” NPEs—that is, PAEs—entities that likewise do not manufacture such products and “whose business model primarily focuses on purchasing and asserting patents.” *See* U.S. Int’l Trade Comm’n, *Section 337 Statistics: Number of Section 337 Investigations Brought by NPEs*, https://www.usitc.gov/section_337_statistics_number_section_337.htm (last visited Oct. 9, 2026).

Disclosure and Patent Litigation, 33 Fed. Cir. B.J. 77 (2024); Jonathan Stroud, *Pulling Back the Curtain on Complex Funding of Patent Assertion Entities*, 12.2 Landslide 20 (2019). Unified monitors ownership data, secondary-market patent sales, demand letters, post-issuance proceedings, and litigation to track PAE activity. It also files post-issuance administrative challenges against patents it believes are unpatentable or invalid, and it acts and litigates independently of its members. *See Unified Patents, LLC v. Uniloc USA, Inc.*, No. IPR2018-00199, Paper 33, at 10 (P.T.A.B. May 31, 2019).

Unified files this brief because the decision below implicates the systemic concerns at the core of its work. The domestic-industry requirement is the principal statutory check that keeps the U.S. International Trade Commission (“ITC” or “Commission”) from operating as a general-purpose, patent-injunction forum. As that check is relaxed, the Commission’s uniquely coercive exclusion-order power becomes available to patent owners who have built no American industry at all and who are often opaque and backed by undisclosed funders. Unified offers the Court its empirical view of how NPEs exploit the ITC.

INTRODUCTION AND SUMMARY OF ARGUMENT

In Section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337 (“Section 337”), Congress gave the ITC an extraordinary power: to bar infringing articles at the Nation’s border. That power protects American industry from unfair trade. To keep it trained on that purpose, Congress conditioned it on proof of a

“domestic industry”—a genuine domestic stake in articles that actually practice the patent. The domestic-industry requirement is the gate. When the ITC enforces that gate, it remains a trade tribunal. When it does not, the ITC becomes what Congress never intended: a forum where patent owners obtain sweeping injunctions they could not obtain in district court.

The decision below lowers that gate. The panel sustained a finding of domestic industry built on investments in devices that do not practice the asserted patents, on behalf of a commercial watch that was not completed until after the complaint was filed. *Apple Inc. v. Int’l Trade Comm’n*, 169 F.4th 1363 (Fed. Cir. 2026). It did so on rationales the Commission itself never adopted. Apple’s petition explains why that reasoning cannot be squared with the statute’s text or with *SEC v. Chenery Corp.*, 318 U.S. 80 (1943). Unified writes to explain why the question is important enough to warrant this Court’s review.

First, the domestic-industry requirement is the statutory gatekeeper that confines the ITC to its trade-protection mission, and its scope is a recurring question of national importance—one even the Commission has described as exceptionally important. The stakes are heightened because the ITC’s remedy is an exclusion order issued without the equitable limits this Court imposed on patent injunctions in *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006). Second, each relaxation of the requirement accelerates a documented migration of NPEs and PAEs to the ITC, where the threat of exclusion coerces settlements untethered to the merits—increasingly at the expense of the American

companies Section 337 was meant to protect. Third, the less rigorously the requirement is enforced, the more the ITC's power flows to patent owners hidden behind shell companies and undisclosed litigation funders—a problem the Commission itself has now moved to address by rulemaking. Because Section 337 appeals rarely reach this Court, and because the Federal Circuit is the sole appellate court for these questions, this case is a rare and clean vehicle to restore the gate Congress built. The petition should be granted.

ARGUMENT

I. The domestic-industry requirement is the gate that confines the ITC to its trade-protection mission, and its scope is a question of national importance.

A. *Congress created Section 337 to protect American industry from unfair imports—not to serve as a general patent-injunction forum.*

The ITC's patent authority is codified in Section 337, titled "Unfair practices in import trade." The Commission's jurisdiction over patent disputes is limited to imported articles, 19 U.S.C. § 1337(a)(1)(B), and its signature remedy is an exclusion order barring the importation of infringing goods, *id.* § 1337(d)(1). This Court described the purpose of Section 337's predecessor the same way: it was "designed to protect domestic industry and trade against 'unfair methods of competition and unfair acts'" in the importation and sale of articles. *Ex parte Bakelite Corp.*, 279 U.S. 438, 446 (1929).

The domestic-industry requirement is what preserves that character. The Commission may exclude an accused import “only if an industry in the United States, relating to the articles protected by the patent . . . concerned, exists or is in the process of being established.” 19 U.S.C. § 1337(a)(2). An industry exists only where, “with respect to the articles protected by the patent,” there is significant investment in plant and equipment, significant employment of labor or capital, or “substantial investment in [the patent’s] exploitation, including engineering, research and development, or licensing.” *Id.* § 1337(a)(3). The requirement serves as a gate that keeps the Commission’s exceptional powers available only to domestic industries, and it “retain[s] th[e] essential nexus” between the Commission’s authority and “an industry in the United States.” H.R. Rep. No. 100-40, pt. 1, at 157 (1987); S. Rep. No. 100-71, at 129 (1987).

Licensing is among the qualifying investments, but not every licensing program qualifies. The statute requires that the investment be “substantial,” that it be in the patent’s “exploitation,” and that it be made “with respect to the articles protected by the patent.” 19 U.S.C. § 1337(a)(3). Litigation expenses, for example, do not automatically count as investments in licensing. *John Mezzalingua Assocs. v. Int’l Trade Comm’n*, 660 F.3d 1322, 1328 (Fed. Cir. 2011). And the Commission has distinguished licensing that brings the patented article into production from licensing aimed only at collecting revenue on products already on the market, and it gives the latter less weight. See *Certain Multimedia Display & Navigation Devices & Sys., Components Thereof, & Prods. Containing Same*, Inv. No. 337-TA-694,

Comm’n Op. at 25 & n.20 (Aug. 8, 2011). Those limits keep the licensing category from swallowing the requirement. Like every part of the economic prong, they depend on a rigorous nexus to the protected articles—the nexus the panel relaxed.

That nexus was Congress’s deliberate design. When Congress enacted the present form of the requirement in 1988, it broadened the economic prong—adding the Subparagraph (C) “exploitation” category, which reaches licensing—but it did not abandon that nexus. It understood the Commission’s purpose “to adjudicate trade disputes between U.S. industries and those who seek to import goods from abroad,” and it retained the domestic-industry condition precisely to keep the forum tied to American industry. *InterDigital Commc’ns, LLC v. Int’l Trade Comm’n*, 707 F.3d 1295, 1302 (Fed. Cir. 2013) (quoting S. Rep. No. 100-71, at 128–29; H.R. Rep. No. 100-40, pt. 1, at 156–57). In the decades since, however, the requirement has been inconsistently applied and overly relaxed. A former Commissioner observed that the domestic-industry analysis “has become overly complicated, inconsistently applied, and far afield from the inquiry Congress has instructed the Commission to undertake.” *Certain Toner Supply Containers & Components Thereof (II)*, Inv. No. 337-TA-1260, Comm’n Op. at 24 (Aug. 3, 2022) (Stayin, Comm’r, concurring). The decision below is the furthest step yet down that path.

B. The ITC's power of exclusion is uniquely coercive and, unlike district-court injunctions, not subject to eBay's equitable test.

Why the gate matters so much is clear on comparison with the district courts, which have original jurisdiction over patent disputes. 28 U.S.C. § 1338. There, since *eBay*, a patent owner must satisfy traditional equitable principles to obtain an injunction, 35 U.S.C. § 283, and NPEs and PAEs that do not practice their patents often cannot. *See eBay*, 547 U.S. at 396–97 (Kennedy, J., concurring). When they prevail, they recover a “reasonable royalty,” 35 U.S.C. § 284, which must be apportioned to the patented feature, *Garretson v. Clark*, 111 U.S. 120, 121 (1884).

The ITC offers an escape from those limits. The Commission does not apply *eBay*; it may issue an exclusion order without the irreparable-harm showing that Article III courts require. *See Spansion, Inc. v. Int’l Trade Comm’n*, 629 F.3d 1331, 1358–59 (Fed. Cir. 2010). An exclusion order can bar a respondent’s imports entirely, and the threat of that result—amplified by the cost and compressed schedule of a Section 337 investigation—pressures accused importers to settle regardless of the merits. A company that depends on imports may pay to avoid an order even when the payment exceeds anything a district court could award. That asymmetry is why the ITC must enforce the domestic-industry requirement. It is the threshold standing between the ITC’s border power and any patent owner who would borrow that power to extract a settlement.

The requirement is, in that sense, the quid pro quo for the Commission's remedy. Congress and this Court have long treated orders that keep a defendant's products off the market as extraordinary relief that must be earned. In district court, "[a]n injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course," *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010), and a patentee must satisfy the traditional four-factor test before obtaining one, *eBay*, 547 U.S. at 391. At the ITC, Congress struck a different bargain. In 1988, it relieved patent-based complainants of the need to prove injury to a domestic industry, but it kept the requirement that such an industry exist. See Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1342(a)(1), 102 Stat. 1107, 1212–15; H.R. Rep. No. 100-40, pt. 1, at 157. Equity is the gate in district court; domestic industry is the gate at the ITC. Lowering the ITC's gate, as the panel did, is therefore not a technical adjustment. It lets patent owners obtain the most extraordinary remedy in patent law without making either showing. The leverage that remedy confers—leverage no damages award can match—is the public-policy reason Congress built the gate in the first place. And the Commission itself has told the Federal Circuit that the proper scope of the economic prong is a question of exceptional importance. See Pet. of Int'l Trade Comm'n for Reh'g En Banc, *Lashify, Inc. v. Int'l Trade Comm'n*, No. 23-1245, ECF No. 117, at 3 (Fed. Cir. May 21, 2025).

II. The decision below deepens a documented migration of non-practicing entities to the ITC, at the expense of the American industry that Section 337 was meant to protect.

A. *As the economic-prong bar has fallen, NPEs and PAEs have turned the ITC's exclusion power into settlement leverage.*

Before *eBay*, most district courts granted near-automatic injunctions, and NPEs had little reason to prefer the ITC. *See eBay*, 547 U.S. at 393–94; *id.* at 395 (Roberts, C.J., concurring). After *eBay* narrowed injunctive relief in the district courts, NPEs and PAEs recognized that the ITC's nearly automatic exclusion orders offered what they could no longer readily obtain—and they came. Their aim is not to clear the market of infringing imports; most NPEs—and PAEs by definition—have no product in the market to protect. Their aim is leverage. *See* Colleen V. Chien & Mark A. Lemley, *Patent Holdup, the ITC, and the Public Interest*, 98 Cornell L. Rev. 1 (2012); *see also* Paul Taylor, *How Gremlins Opened the Door for Patent Trolls at the International Trade Commission*, 21 Ohio St. Tech. L.J. 121 (2025).

The data bear this out. Since the Commission began tracking NPE activity in 2006, shortly after *eBay*, nearly one in five Section 337 investigations has been brought on behalf of self-reported NPEs. *See* U.S. Int'l Trade Comm'n, *Section 337 Statistics*, *supra* note 2 (168 of 903 investigations from May 16, 2006, through 2025). PAEs alone account for about one in twelve. *Id.* (75 of 903). And the trend is not abating: in 2025, NPEs were the complainant in 11 of 48 investigations—nearly one in four. *Id.* These figures

understate the footprint. The America Invents Act raised the joinder bar for “civil action[s]” but left the ITC untouched, 35 U.S.C. § 299, so a single investigation can sweep in many unrelated respondents. In *Certain Digital Set-Top Boxes & Systems & Services Including the Same*, for example, an NPE named ten American companies and no foreign entity, resting its claimed domestic industry entirely on a licensee—a former defendant with which it had settled patent litigation in the Western District of Texas. Inv. No. 337-TA-1315, Compl. ¶¶ 4, 6, 133–35, 144, 181(f) (Apr. 22, 2022); see 87 Fed. Reg. 32,459 (May 31, 2022) (notice of institution); 87 Fed. Reg. 78,126 (Dec. 21, 2022) (notice of termination).

The pattern recurs, at growing scale: a patent owner sues a manufacturer, settles for a license, and then pleads its former adversary’s products and investments as the domestic industry in its next investigation. Netlist, Inc. has run that cycle twice. In 2021—after the Commission had found, in Netlist’s earlier Section 337 investigation against SK hynix, that Netlist failed to establish a domestic industry—it settled its remaining litigation with SK hynix, which took a license. *Certain Memory Modules & Components Thereof*, Inv. No. 337-TA-1089, Comm’n Op. at 7, 13, 21–25 (Apr. 21, 2020); *Certain Dynamic Random Access Memory (DRAM) Devices, Products Containing the Same, & Components Thereof*, Inv. No. 337-TA-1472, Compl. ¶¶ 148, 161–63 (Sept. 30, 2025); Netlist, Inc., Current Report (Form 8-K), Item 1.01 (Apr. 6, 2021). When Netlist later asserted patents against Samsung Electronics Co., Ltd. (“Samsung”) in a Section 337 investigation, its claimed domestic industry rested largely on that licensee. Alongside its own investments of “tens of millions of dollars since

2021,” Netlist relied on SK hynix’s products and U.S. footprint, including more than 7,000 U.S. employees and a \$3.87 billion Indiana packaging plant not slated to operate until 2028. Inv. No. 337-TA-1472, Compl. ¶¶ 132, 135, 140–46.

Then Netlist settled with Samsung. On August 4, 2026, Samsung took a license and separately agreed to provide “documents, or declarations” for Netlist “to use in future ITC actions against third parties.” Netlist, Inc., Current Report (Form 8-K), Item 1.01 (Aug. 5, 2026). That settlement ended the Samsung investigation before any ruling on domestic industry, so the SK hynix–based industry Netlist had pleaded there was never tested. *See* Inv. No. 337-TA-1472, 91 Fed. Reg. 64,678 (Oct. 9, 2026) (notice of termination). One week later, Netlist filed a new Section 337 complaint against Micron Technology, Inc., an American memory manufacturer, and several of its customers. That complaint asserts three of the same patents and pleads Samsung’s licensed products as part of the domestic industry. *Certain Dynamic Random Access Memory (DRAM) Devices, Products Containing the Same, & Components Thereof (III)*, Inv. No. 337-TA-1523, Compl. ¶¶ 1.16, 9.1–9.4, 9.30, 10.1–10.20 (Aug. 11, 2026) [*hereinafter* DRAM Compl.]; *see* 91 Fed. Reg. 60,980 (Sept. 25, 2026) (notice of institution). Yesterday’s respondent had again become today’s domestic industry. The investments Netlist credits to that industry are Samsung’s enterprise-wide U.S. footprint: its headquarters, its fabrication plants, and its more than 12,000 U.S. employees. Allocation to the licensed products is left to discovery. DRAM Compl. ¶¶ 9.31–9.33. An industry assembled from a former adversary’s company-wide investments is exactly

what the statute’s requirement that the investment be made “with respect to the articles protected by the patent,” 19 U.S.C. § 1337(a)(3), exists to screen out. And it is precisely that requirement the panel’s rule relaxes.

B. Section 337 is now routinely invoked against American companies, and a dispute between two domestic firms over a barely-sold product does not belong in this trade tribunal.

The premise of Section 337—protecting American industry from elusive foreign infringers—has broken down even among complainants with some domestic footprint. An empirical study of two decades of ITC cases found that only about 14% of investigations were brought against purely foreign respondents; “U.S. companies are just as likely to be named in ITC actions as defendants as are foreigners.” Colleen V. Chien, *Patently Protectionist? An Empirical Analysis of Patent Cases at the International Trade Commission*, 50 Wm. & Mary L. Rev. 63, 63, 87 (2008); see also Bill Watson, *Preserving the Role of the Courts Through ITC Patent Reform*, R St. Inst., Shorts No. 57 (Mar. 2018).

This case is a stark example. The dispute is between two domestic entities—Apple and Masimo—over patents on pulse-oximetry features. The Commission found a domestic industry not in any product Masimo was selling, but in prototypes that the panel—adopting an argument Commission counsel first made on appeal—treated as “representative” of a “Masimo Watch.” 169 F.4th at 1374–76; see Pet. 15, 32. Masimo’s commercial watch, the W1, was not completed until after the complaint

was filed, and, according to the record, it was never sold “in the United States in any meaningful quantity.” See 169 F.4th at 1373; Pet. 13 (quoting C.A.J.A. 27241). The investments credited toward the economic prong also included investments in the Circle and Wings sensors—devices that Masimo never contended practice the patents it held infringed. See 169 F.4th at 1378–79 (noting that Masimo did “not assert[] that the Circle sensor or the Wings sensor practice claims of the [Poeze] [P]atents” (alterations in original)); Pet. 14. A dispute of this kind, between domestic companies over a product not yet on the market, belongs in district court, where *eBay* and apportionment apply. It does not belong in a tribunal built to police unfair imports. The businesses swept into that shift include ordinary American companies—like the ten domestic respondents in *Set-Top Boxes*, see *supra* Part II.A—for whom an exclusion order barring imported inventory is an existential threat unrelated to any unfair trade practice. And reversal would not leave Masimo without a remedy: it would remain free to pursue its patents in district court.

That the panel’s rule is so consequential is reason enough to grant review; that it is also wrong makes the case for review stronger still. The economic prong asks whether a complainant has made a qualifying investment “with respect to the articles protected by the patent,” 19 U.S.C. § 1337(a)(3)—the articles that actually practice the patent. The panel instead credited investment in the Circle and Wings sensors as “directed to significant components, specifically tailored for use” in a later article. 169 F.4th at 1379 (quoting *Motorola Mobility, LLC v. Int’l Trade Comm’n*, 737 F.3d 1345, 1351 (Fed. Cir. 2013)).

But *Motorola*, from which that language comes, involved an operating system tailored to a patent-practicing device; it did not authorize counting investment in freestanding products that practice nothing. Apple’s petition explains why the panel’s reading also cannot be reconciled with the statute’s text and structure; Unified adds only that, as a matter of the Commission’s everyday practice, a rule under which any “precursor” investment can satisfy the economic prong leaves the domestic-industry requirement with no discernible limit—which is precisely why the question warrants this Court’s review.

III. The panel’s rule rewards opaque patent owners and undisclosed funders, underscoring the need for review.

There may be a place for NPEs and PAEs in the patent system, but it is not a trade tribunal wielding border injunctions. The less rigorously the ITC enforces the domestic-industry requirement, the more its power accrues to entities the public cannot see. Patents are often held through shell companies, and the funding behind the litigation is even more opaque. Third-party funders “enjoy almost complete anonymity, even from the judges hearing their cases,” and “generally keep funding arrangements, organizational status, and ownership and details of control . . . private.” Sean Keller & Jonathan Stroud, *Litigation Funding Disclosure and Patent Litigation*, 33 Fed. Cir. B.J. 77, 79–80 (2024); *see id.* at 96 (describing shell-company NPEs used to obscure ownership). Funded litigation is no longer marginal: identified third-party funders were associated with roughly one in four patent cases filed in 2025. Eric

Gong, Nisha Murali & Korok Ray, *Third-Party Litigation Funding in Patent Cases: Forum Shopping, Disclosure, and the Case for a Uniform Rule 14* (Sept. 2026) (unpublished manuscript), <https://ssrn.com/abstract=7538078>. And that capital follows the path of least disclosure. After the Chief Judge of the District of Delaware began requiring parties in his cases to disclose litigation funding in 2022, patent filings in that district fell by roughly 41 percent over the next two years. *Id.* at 17 (citing Emily R. Siegel, *Disclosure Order Targeting Funders Stunts Delaware Patent Suits*, Bloomberg L. (Dec. 6, 2024)). A trade forum with a lowered domestic-industry bar and, as yet, no funding-disclosure requirement is a natural destination.

The Commission has now recognized the problem and proposed rules requiring disclosure of those with an ownership or financial interest in an investigation. See Section 337 Adjudication and Enforcement, 91 Fed. Reg. 23,190 (proposed Apr. 30, 2026) (to be codified at 19 C.F.R. pt. 210). A regime that hands the ITC's most powerful remedy to unknown owners and unknown funders—on a showing of domestic industry as thin as the one approved below—is the kind of systemic distortion that warrants this Court's attention. The current anonymity of owners and funders strengthens the case for review. The more the gate is lowered, the more the ITC's border power falls into the hands of parties no court can identify. And this question will not resolve itself. Section 337 rulings rarely reach this Court, and only the Federal Circuit hears them, so the issue will never percolate through the other courts of appeals. Only this Court can fix it.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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