

No. 26-316

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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  
U.S. Court of Appeals for the Federal Circuit

**BRIEF OF ASSOCIATION FOR COMPETITIVE  
TECHNOLOGY (ACT), NETCHOICE, PUBLIC  
INTEREST PATENT LAW INSTITUTE (PIPLI),  
AND TECHNET AS AMICI CURIAE IN  
SUPPORT OF PETITIONER APPLE INC.**

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**IDENTITY AND INTEREST OF AMICI CURIAE**

The Association for Competitive Technology (ACT) is a not-for-profit global policy trade association that represents the global small business technology developer community.<sup>1</sup> ACT's members lead the development of innovative applications and products across consumer and enterprise use cases. The value of the U.S. ecosystem ACT represents, the app economy, is approximately \$1.8 trillion and is responsible for 6.1 million American jobs, while serving as a key driver of the \$8 trillion internet of things (IoT) revolution. Ass'n for Competitive Tech., *State of the App Economy* (2022).<sup>2</sup> ACT's members include startups, app developers, and device manufacturers who own and use patented technologies and rely on a fair, predictable intellectual property system.

NetChoice is a national trade association of online businesses that share the goal of promoting free enterprise and free expression on the Internet. NetChoice's members operate a variety of popular websites, apps, and online services, including Meta (formerly Facebook), YouTube, and Etsy. NetChoice's guiding principles are (1) promoting consumer choice,

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<sup>1</sup> Pursuant to this Court's Rule 37.2, all parties with counsel listed on the docket received notice of the amici curiae's intention to file this brief. Per Rule 37.6, amici curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

<sup>2</sup> <https://actonline.org/wp-content/uploads/APP-Economy-Report-FINAL.pdf>.

(2) continuing the successful policy of “light-touch” Internet regulation, and (3) fostering online competition to provide consumers with an abundance of services.

The Public Interest Patent Law Institute (“PIPLI”) is a nonprofit, nonpartisan public interest organization dedicated to ensuring that the patent system promotes innovation and access for the benefit of all members of the public. Countless Americans contribute to and depend on technological advances, including researchers, independent creators, small businesses, medical patients, and consumers. Yet their interests are rarely adequately represented in proceedings that shape patent law. Their absence makes it harder for the patent system to promote innovation effectively and fairly. PIPLI works to address this gap by providing free assistance, education, and counseling to people navigating the patent system; conducting policy research; and advocating for the public’s interest in court and agency proceedings that affect people’s lives and livelihoods.

TechNet is the national, bipartisan network of technology chief executive officers and senior executives that promotes the growth of the innovation economy by advocating a targeted policy agenda at the federal and 50-state level. TechNet’s diverse membership includes dynamic American businesses ranging from startups to the most iconic companies in the world and represents over five million employees and countless customers in the fields of information technology, artificial intelligence, e-commerce, the sharing and gig economies, advanced energy, transportation, cybersecurity, venture capital, and finance. TechNet advocates for a healthy patent system that yields high-

quality patents, promotes all forms of innovation, deters frivolous patent litigation, and compensates patent owners based on the value of their contributions. TechNet’s members include both startups who invest in and develop new technology, and larger companies and firms that invest in their work.

Amici have a substantial interest in the question presented because their members develop, manufacture, distribute, and support complex technology products that can be targeted in investigations under Section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337. The International Trade Commission can bar entire products from the United States, yet, unlike an Article III court considering a permanent injunction, it does not apply the equitable framework of *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). Section 337 instead relies on a threshold domestic-industry requirement that limits the Commission’s extraordinary exclusionary authority to disputes involving an industry in the United States. 19 U.S.C. § 1337(a)(2)–(3). Amici’s members have a strong interest in preserving that limitation.

### SUMMARY OF ARGUMENT

The petition presents a question that reaches far beyond parties to this case. Section 337 is a trade statute, not a general-purpose patent-enforcement regime. Congress authorized the Commission’s powerful exclusion remedy to protect qualifying domestic industries from unfair import competition. The domestic-industry requirement is what preserves that connection. It asks not merely whether a complainant owns a U.S. patent, but whether there is an “industry in the

United States” with the statutorily required investment “with respect to the articles protected by the patent.” 19 U.S.C. § 1337(a)(2)–(3).

The Federal Circuit’s recent decisions have undermined the domestic-industry requirement’s gate-keeping role. In *Lashify, Inc. v. International Trade Commission*, 130 F.4th 948, 958–60 (Fed. Cir. 2025), the court read Section 337(a)(3)(B)’s reference to “labor or capital” to encompass categories such as sales, marketing, warehousing, quality control, and distribution. Its decision in *Apple Inc. v. International Trade Commission* extends that reasoning again by permitting research-and-development expenditures, which are activities Congress expressly addressed in a different provision, Section 337(a)(3)(C), to satisfy Subparagraph (B). 169 F.4th 1363, 1375–79 (Fed. Cir. 2026). It also allows investments in non-practicing prototypes to count when sufficiently connected to a later patent-practicing article. *Id.* at 1378–79.

Those holdings weaken the boundary between ordinary patent litigation and the ITC’s exceptional trade remedy. Section 337 was established to address unfair practices in import trade, not to serve as another forum for resolving the same patent disputes heard in district courts. Broadening Section 337’s threshold increasingly allows the ITC to operate as a parallel patent-enforcement forum. If almost any domestic business expenditure can be characterized as “labor or capital,” and if qualifying investments need not themselves concern an article practicing the asserted patent, the domestic-industry requirement loses much of its intended screening force. The predictable result is that a wider class of complainants

can invoke the threat of an exclusion order against productive U.S. companies, even where the complainant's connection to a genuine domestic industry is attenuated. That expansion also risks turning the Commission's exclusion remedy into a way to obtain leverage unavailable under the equitable constraints governing permanent injunctions in district court.

Before 1988, the Commission and the Federal Circuit treated domestic industry as requiring a meaningful connection to productive activity surrounding the protected article. *See Schaper Mfg. Co. v. ITC*, 717 F.2d 1368, 1372–73 (Fed. Cir. 1983). Congress broadened the statute in 1988, particularly by adding Subparagraph (C) to protect substantial investments in exploitation of intellectual property through engineering, research and development, and licensing. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1342(a), 102 Stat. 1107, 1212–13; S. Rep. No. 100-71, at 129–30 (1987). But Congress expressly retained the requirement that a domestic industry exist because that requirement supplies the “essential nexus” between the ITC's trade mission and the dispute before it. S. Rep. No. 100-71, at 129.

Lowering the threshold also has systemic consequences, because an exclusion order can interrupt the sale of an entire complex product even when the asserted patent concerns only one feature. For technology companies creating multicomponent devices, that threat creates bargaining leverage tied to the value of market access rather than the value of the patented contribution. Small businesses are particularly vulnerable because they often cannot absorb the

high cost of an accelerated Commission proceeding, re-designing a product, or an interruption in sales. Consumers also bear these costs through higher prices or reduced access to essential products.

A diluted domestic-industry rule also makes the Commission more attractive to entities seeking exclusion-order leverage despite having little connection to productive domestic activity. Patent owners remain free to pursue damages and, where equitable requirements are met, injunctions in district court. But access to the Commission’s trade remedy should depend on satisfying the trade statute Congress enacted.

Review is especially important now. The Federal Circuit has exclusive appellate jurisdiction over Commission patent cases, so no circuit split can develop. *See* 28 U.S.C. § 1295(a)(6). And a substantial share of ITC investigations settle before final adjudication, further limiting opportunities for appellate review. Colleen V. Chien, *Patently Protectionist? An Empirical Analysis of Patent Cases at the International Trade Commission*, 50 Wm. & Mary L. Rev. 63, 85–86 (2008).<sup>3</sup> The Commission itself has described the interpretation of “labor or capital” as an issue of “exceptional importance” affecting the domestic-industry inquiry. Int’l Trade Comm’n Pet. for Reh’g at 3, *Lashify, Inc. v. ITC*, No. 23-1245 (Fed. Cir. May 21, 2025). The Court therefore should not wait for the Federal Circuit simply to apply *Lashify* and *Apple* in future cases. These decisions are already the governing rules for the only appellate court that can review the Commission.

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<sup>3</sup> <https://wmlawreview.org/patently-protectionist-empirical-analysis-patent-cases-international-trade-commission>

This Court should grant certiorari to determine whether the Federal Circuit’s increasingly expansive interpretation of Section 337’s domestic-industry requirement is consistent with the statutory text, structure, and Congress’s intent to reserve the ITC’s extraordinary remedies for the protection of genuine domestic industries.

## ARGUMENT

### **I. The Domestic-Industry Requirement Is a Central Limit on the ITC’s Extraordinary Trade Remedy**

The domestic-industry requirement is the statutory boundary between an import-trade remedy and ordinary patent enforcement. Giving independent effect to each of Section 337(a)(3)’s provisions preserves that boundary while leaving legitimate domestic research, development, and licensing activities eligible under the terms Congress selected.

#### **A. Section 337 Protects Domestic Industry; It Does Not Create an Additional Patent Court**

Section 337 makes unlawful certain unfair acts in the importation and sale of articles, including importation of articles that infringe a U.S. patent, but patent infringement is not enough. For patent-based claims, Section 337 applies “only if an industry in the United States, relating to the articles protected by the patent . . . exists or is in the process of being established.” 19 U.S.C. § 1337(a)(2). Congress then defined when such an industry exists: there must be, “with respect to the articles protected by the patent,” (A) sig-

nificant investment in plant and equipment; (B) significant employment of labor or capital; or (C) substantial investment in exploitation of the intellectual property, including engineering, research and development, or licensing. *Id.* § 1337(a)(3).

The Commission is a trade forum, not a general patent court. Section 337's purpose is to adjudicate trade disputes involving U.S. industries and imported goods, and the domestic-industry requirement preserves that trade nexus. *InterDigital Communications, LLC v. ITC*, 707 F.3d 1295, 1302 (Fed. Cir. 2013); S. Rep. No. 100-71, at 129.

The distinction matters because the Commission's principal patent remedy is categorically different from the relief ordinarily available in district court. If the Commission finds a violation, it may direct that infringing articles "be excluded from entry into the United States." 19 U.S.C. § 1337(d)(1). The order may remain effective until the Commission finds that the conditions leading to exclusion no longer exist. 19 U.S.C. § 1337(k)(1). Unlike a district court, moreover, the Commission cannot award damages to compensate a patent owner for past infringement. Its principal remedy is instead directed at the imported product itself, reflecting Section 337's trade-focused purpose of protecting domestic economic activity from unfair import competition.

Patent litigation in federal district court operates differently. A prevailing patent owner may recover damages adequate to compensate for infringement, *see* 35 U.S.C. § 284, while obtaining a permanent injunction requires satisfying traditional equitable principles. *eBay*, 547 U.S. at 391.

The Federal Circuit has held that *eBay*'s four-factor test does not govern the Commission's exclusion-order determinations. *Spansion, Inc. v. ITC*, 629 F.3d 1331, 1359 (Fed. Cir. 2010). Section 337 instead prescribes the statutory requirements that must be satisfied before the ITC can enforce exclusionary relief. *See* 19 U.S.C. §§ 1337(a)(2)–(3), (d)(1). Thus, while a complainant may obtain exclusionary relief at the ITC without making the equitable showing necessary for a district court injunction, it can only do so within Section 337's statutory framework—which includes establishing the existence of a statutorily defined domestic industry. Faithfully enforcing Congress's domestic-industry requirement is particularly important to prevent the Commission's extraordinary trade remedy from being broadly used as a means of circumventing the equitable limitations on injunctive relief.

The forums need not offer identical remedies. The concern is that complainants are accessing the ITC without satisfying the trade-related condition Congress imposed. Allowing the domestic-industry requirement to lose its limiting function transforms the Commission into a parallel patent-enforcement forum, rather than a specialized tribunal addressing unfair practices in import trade. This is not what Congress intended.

The risk is acute for small and mid-sized technology companies that frequently build products on complex supply chains and interoperable platforms. They may incorporate components supplied by others and depend on imported hardware. Even before a final merits determination, the threatened loss of market

access can jeopardize customer relationships and financing and pressure a firm to settle for reasons unrelated to the strength of the asserted patent. The domestic-industry limitation ensures that such extraordinary leverage remains tied to the kind of U.S. industry the statute protects.

**B. History Confirms That the Domestic-Industry Requirement Is a Substantive Limitation, Not a Pleading Formality**

The history of Section 337 shows a deliberate evolution of the domestic-industry limitation. Before 1988, Commission precedent generally linked domestic industry to productive domestic activity involving the protected article. In *Schaper*, for example, the Federal Circuit affirmed a determination that advertising and promotional activity did not suffice where those activities were not part of “manufacture or production or servicing of the patented item.” 717 F.2d at 1372–73. Likewise, in *Certain Products with Gremlin Character Depictions*, Inv. No. 337-TA-201, USITC Pub. 1815, Comm’n Op. at 4–5 (Mar. 1986), the Commission rejected reliance on Warner Bros.’ licensing program alone under the then-existing domestic-industry standard. *See also* Paul Taylor, *How Gremlins Opened the Door for Patent Trolls at the International Trade Commission*, 21 Ohio St. Tech. L.J. 121, 132–40 (2025).

Congress responded in the Omnibus Trade and Competitiveness Act of 1988. It codified three independent routes for demonstrating domestic industry and, through Subparagraph (C), expressly recognized “substantial investment” in exploitation of intellectual

property, “including engineering, research and development, or licensing.” 19 U.S.C. § 1337(a)(3)(C). As the Federal Circuit later explained, Subparagraph (C) liberalized the requirement by allowing non-manufacturing activity such as licensing and research to qualify. *John Mezzalingua Assoc., Inc. v. ITC*, 660 F.3d 1322, 1327 (Fed. Cir. 2011); *InterDigital*, 707 F.3d at 1302. However, the listed activities had to pertain to the products covered by the asserted patent. *InterDigital*, 707 F.3d at 1298.

The 1988 amendments did not make the domestic-industry requirement a formality. The Senate Report emphasized that the legislation “retains the requirement that a domestic industry exist” because the ITC adjudicates trade disputes between U.S. industries and importers and retaining that requirement preserves the “essential nexus” to that mission. S. Rep. No. 100-71, at 129. The same report explained that the first two statutory factors reflected considerations already used in prior Commission decisions, while the third went beyond those decisions to cover the enumerated exploitation activities. *Id.* at 129–30; see *Mezzalingua*, 660 F.3d at 1327.

The resulting statute embodies a careful accommodation. Congress did not confine Section 337 to factories or physical manufacturing. Universities, research enterprises, licensors, and other nonmanufacturing innovators can qualify. But they must proceed through the statutory route Congress established and prove substantial domestic investment in exploitation of the intellectual property. Mere ownership of a United States patent does not itself establish a domestic industry. *InterDigital*, 707 F.3d at 1303–04; see S.

Rep. No. 100-71, at 130 (“The mere ownership of a patent . . . would not be sufficient to satisfy this test.”).

The text reinforces that design. Subparagraphs (A) and (B) enumerate productive inputs (plant, equipment, labor, and capital), while Subparagraph (C) separately addresses exploitation of intellectual property and specifically names engineering, research and development, and licensing. 19 U.S.C. § 1337(a)(3). Congress quantified these routes differently, requiring “significant” investment or employment under (A) and (B) but “substantial” investment under (C). Moreover, it limited the qualifying investments under (C) to those directed at the “exploitation” of the intellectual property. Treating the specific activities identified in (C) as freely cognizable under the more general words “labor or capital” in (B) weakens the distinction Congress wrote into the statute and makes it easier to bypass the conditions attached to the intellectual-property-exploitation route. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (specific statutory provision governs over a general one).

The possibility of overlap does not make the categories interchangeable. Reading Subparagraph (B) to absorb activities Congress specifically enumerated in Subparagraph (C), while bypassing that provision’s distinct standard, expands a specialized agency’s remedial reach by diminishing the conditions Congress attached to it.

## **II. The Federal Circuit Disregarded the Distinct Domestic-Industry Threshold Congress Set**

The Federal Circuit’s recent decisions in *Lashify* and *Apple* have significantly broadened the domestic-industry requirement under Section 337, weakening its function as a meaningful limitation on access to the Commission’s extraordinary remedies. Although Congress established distinct statutory pathways for demonstrating a qualifying domestic industry, these decisions eliminate any meaning of Subparagraph (C) by having it subsumed into Subparagraph (B). By expanding the categories of expenditures that may satisfy Subparagraph (B) to include what is explicitly identified in Subparagraph (C), the Federal Circuit has made it possible for complainants to invoke the Commission’s exclusionary authority without having to make the distinct showing Congress required for substantial investment in the exploitation of intellectual property. The resulting statutory overlap threatens to become a means of avoiding, rather than applying, Congress’s chosen limits.

**A. *Lashify* Expanded the Categories of Expenditures That Can Satisfy Subparagraph (B)**

In *Lashify*, the Commission excluded or discounted expenditures for sales, marketing, warehousing, quality control, and distribution because, in its view, those activities were not accompanied by qualifying domestic manufacturing. The Federal Circuit reversed. It held that Subparagraph (B) contains no functional limitation on the labor or capital that may be counted and described the three subparagraphs as potentially overlapping but independently sufficient—meaning qualifying labor or capital can alone establish the economic prong. *Lashify*, 130 F.4th at 958–60.

*Lashify* allows almost any corporate activity to be translated into employee time, facilities, services, or accumulated resources. Expenditures that previously faced meaningful objections as too remote from domestic production can now be invoked under the broad heading of labor or capital, expanding the types of investments available to complainants. *Lashify* renders Subparagraph (C) superfluous.

**B. *Apple* Extends *Lashify* to R&D, Making Subparagraph (C) Superfluous**

The ruling in *Apple v. ITC* shows how far *Lashify*'s reasoning extends. The Commission found the economic prong satisfied under Subparagraph (B) based on Masimo's U.S. research-and-development investments in its watch project. *Apple*, 169 F.4th at 1375–76. The Federal Circuit affirmed under *Lashify*, explaining that Section 337(a)(3)'s routes are “potentially overlapping but independently sufficient.” *Id.* at 1375 (quoting *Lashify*, 130 F.4th at 954). The result is that research and development—conduct Congress expressly identified in Subparagraph (C)—can also establish domestic industry through Subparagraph (B)'s general reference to labor or capital. *Id.* at 1375–79.

*Apple*'s holding leaves Subparagraph (C), with its requirement of substantial investment in exploiting the intellectual property, no independent work to do for research and development, contravening the “cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.” *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (“We are reluctant to treat statutory terms as surplusage in any setting .

. . . and we decline to do so here”) (internal quotations omitted). By permitting expenditures Congress expressly addressed in Subparagraph (C) to satisfy Subparagraph (B)’s more general requirements, the Federal Circuit deprives Subparagraph (C) of meaningful independent effect. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) (explaining that courts must give effect, if possible, to every clause and word of a statute); *Corley v. United States*, 556 U.S. 303, 314 (2009) (explaining that courts should not interpret a statute in a manner that renders another provision “superfluous, void, or insignificant”).

The panel also approved counting investments in two prototypes that did not themselves practice the asserted patents. It reasoned that those investments were part of the same iterative design process and were directed to significant components specifically tailored for use in the later patent-practicing watch. *Apple*, 169 F.4th at 1378–79. The court cautioned that not every predecessor investment will qualify, but its rule nonetheless extends the court’s earlier treatment of components “specifically tailored” for a protected article into a broader pathway for expenditures on non-practicing articles to support the domestic-industry showing. *Id.*; *see Motorola Mobility, LLC v. ITC*, 737 F.3d 1345, 1351 (Fed. Cir. 2013).

That approach is hard to reconcile with Section 337(a)(3), which counts only investment “with respect to the articles protected by the patent.” The boundaries remain uncertain because product development is often iterative, especially in software, medical technology, and connected devices. Early versions may contribute knowledge, personnel experience, testing

methods, or design choices to later products. If that developmental relationship is enough, expenditures on a wide range of non-practicing articles may be aggregated toward domestic industry, even when the complainant cannot show how much of the investment concerned the features protected by the asserted patent.

**C. Earlier Decisions Show That the Domestic-Industry Requirement Once Operated as a Meaningful Screen**

After 1988, the Federal Circuit continued to give meaningful effect to the statutory limits on qualifying domestic investment. In *Lelo Inc. v. International Trade Commission*, for example, the Federal Circuit rejected reliance on the asserted qualitative importance of domestically sourced components where the complainant failed to provide quantitative evidence establishing significant domestic investment or employment. 786 F.3d 879, 883–85 (Fed. Cir. 2015). The court explained that the statutory terms “significant” and “substantial” require an assessment of the claimed investment’s magnitude and cannot be satisfied merely by characterizing particular domestic activities or components as important. *Id.* at 883–84.

The court likewise required a concrete nexus between claimed expenditures and qualifying exploitation of the asserted intellectual property. In *Mezzalingua*, it declined to treat patent-litigation expenses as automatically establishing substantial investment in licensing, requiring evidence connecting those expenditures to a genuine licensing program. 660 F.3d at 1327–28. *Motiva* applied the same princi-

ple, affirming the Commission’s refusal to count litigation expenditures that did not further adoption and development of the patented technology. *See Motiva, LLC v. ITC*, 716 F.3d 596, 600–01 (Fed. Cir. 2013). And *Zircon* required complainants to allocate their investments to the relevant patent-practicing products rather than aggregate expenditures across products practicing different patents. *Zircon Corp. v. ITC*, 101 F.4th 817, 822–24 (Fed. Cir. 2024).

Those cases did not deny protection to genuine innovators or impose an absolute domestic-manufacturing requirement. Rather, they required complainants to show why their asserted U.S. activity was the kind of domestic industry Congress authorized the Commission to protect. Together, these decisions enforced meaningful requirements of quantity, nexus, and allocation, ensuring that the Commission’s extraordinary remedy remained tied to qualifying domestic economic activity rather than patent ownership, litigation expenditures, or generalized business spending. The limiting principle survived the 1988 amendments and informed decades of decisions applying Section 337. The recent expansion thus marks a departure from a sustained understanding of the statute, not merely from a preference for domestic manufacturing.

*Lashify* and *Apple* move in the opposite direction. *Lashify* removed functional limits on labor and capital, while *Apple* applied that reasoning to an activity Congress expressly assigned to Subparagraph (C) and credited development work associated with non-practicing prototypes. The cumulative effect is to

weaken the screen precisely where the strength of the Commission's remedy calls for careful enforcement.

### **III. Disregarding Congress's Standards Will Have Systemic Consequences for U.S. Technology Companies and Small Innovators**

An expansive interpretation of domestic industry affects more than the eventual availability of exclusion orders: it affects where patent disputes are filed, the leverage created by the filing itself, and the costs imposed on domestic businesses that must defend their access to the U.S. market.

#### **A. A Broader Domestic-Industry Rule Expands Access to Exclusion-Order Leverage**

For technology companies, the practical issue is not limited to who ultimately wins an ITC merits determination. The availability of an exclusion order changes bargaining dynamics from the outset. A modern connected device may embody thousands of patented technologies and depend on global manufacturing and distribution. A dispute over a narrow feature can therefore place a much larger product at risk. The possibility that the ITC will exclude the finished product gives patent owners "undue leverage in negotiations." *Cf. eBay*, 547 U.S. at 396–97 (Kennedy, J., concurring) (recognizing that when a patent covers a small feature of a multicomponent product, the threat of injunctive relief can cause enhanced negotiating leverage).

The consequences of that leverage extend beyond the parties to the dispute. Where an asserted patent covers only a discrete component or feature, an exclusion order may nevertheless restrict access to a much broader product incorporating numerous independently developed technologies. Companies that supply components unrelated to the technology at issue can face disruptions in demand that may lead to production stoppages and furloughs. Consumers may face fewer available products, delayed access to new technologies, higher prices, or reduced competition. Businesses that rely on those products may also experience disruptions unrelated to the patented invention itself.

Small businesses are particularly vulnerable to exclusionary leverage. They often lack the litigation budgets and diversified product portfolios of the largest technology companies. An expedited investigation can divert engineering and management resources, delay financing or product launches, and force difficult settlement decisions. A domestic-industry rule that admits more complaints into the ITC thus imposes costs on U.S. innovators even in cases that never culminate in an exclusion order.

Businesses outside an investigation can also be affected. A small supplier whose component goes into an excluded product often depends on a few customers and lacks the reserves to weather a sudden loss of orders. And when there is no actual underlying domestic industry to absorb the displaced demand, these unrelated suppliers become collateral damage.

Empirical evidence predating *Lashify* underscores why this matters. The Commission has become

an attractive venue to NPEs following *eBay*, precisely because exclusion can provide leverage unavailable through an ordinary damages remedy. ITC, *Budget Justification: Fiscal Year 2012*, at 21 (2011).<sup>4</sup> A study of 227 Section 337 investigations instituted since 2017 found that 20.7% involved allegations of domestic industry based on the activities of third parties, such as licensees, and those investigations were concentrated in computers and phones. Charles Duan, *The U.S. International Trade Commission: An Empirical Study of Section 337 Investigations*, R Street Pol’y Study No. 246, at 9–10 (Nov. 2021). The study also found that investigations initiated by non-practicing entities who rely on third-party licensees to establish domestic industry produced violation findings less frequently but settled more frequently than the overall set. *Id.* at 10. Those data illustrate that the domestic-industry doctrine can materially affect access to the ITC and settlement dynamics in technology disputes.

A meaningful domestic-industry requirement constrains exclusionary leverage by reserving the Commission’s remedy for complainants that establish the domestic activity Congress required. Lowering the threshold changes the settlement dynamics in every investigation. A complainant able to characterize sales, distribution, research, engineering, or licensing expenses as “labor or capital” gains access to the threat of exclusion even if the expenditures would not satisfy the statutory provision specifically governing the activity. The statutory framework should not be

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<sup>4</sup> [http://www.usitc.gov/press\\_room/documents/budget\\_2012.pdf](http://www.usitc.gov/press_room/documents/budget_2012.pdf)

interpreted to disadvantage the productive American enterprises that Section 337 was enacted to protect.

**B. The Rule Invites Greater Use of the ITC by Entities Whose Connection to Productive U.S. Industry is Attenuated**

The concern is not that research, licensing, marketing, distribution, or other non-manufacturing activities are unimportant. Congress expressly protected some of them as qualifying investments. Congress limited consideration of these expenditures to those made “with respect to the articles protected by the patent,” but Subparagraph (C) imposes a different quantitative threshold for their relevance. Using Subparagraph (B) as a catchall for them erases the expressly different statutory instruction to treat these expenditures differently when assessing the existence of a domestic industry.

That shift creates obvious opportunities for patent-assertion entities and other complainants with limited productive activity of their own. The Commission’s own statistics demonstrate that non-practicing entities already make meaningful use of Section 337. In 2025, patent-assertion entities accounted for more than ten percent of Section 337 unfair-trade investigations that year. *See Section 337 Statistics: Number of Section 337 Investigations Brought by NPEs*, ITC (updated Feb. 3, 2026).<sup>5</sup> Those figures predate the full practical effect of the decisions in *Lashify* and *Apple*.

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<sup>5</sup> [https://www.usitc.gov/section\\_337\\_statistics\\_number\\_section\\_337.htm](https://www.usitc.gov/section_337_statistics_number_section_337.htm).

Congress did not deny all nonmanufacturing patent owners access to the Commission. Subparagraph (C) expressly protects substantial domestic investment in engineering, research and development, and licensing. 19 U.S.C. § 1337(a)(3)(C). *InterDigital* confirms that domestic production is unnecessary when the complainant establishes substantial domestic investment in exploitation of the intellectual property relating to patent-protected products. 707 F.3d at 1298. Enforcing that route as written protects legitimate research and licensing industries while preserving the domestic-industry requirement's limiting function. Nor would that approach leave small U.S. companies without a forum. Firms that design, market, and support products here while manufacturing abroad, like the complainant in *Lashify*, can still show a domestic industry through significant labor or capital devoted to the protected articles, or through substantial investment under Subparagraph (C). What no complainant should be able to do is relabel activity Congress assigned to Subparagraph (C) to avoid that provision's requirements.

Under *Lashify* and *Apple*, complainants may invoke broader categories of labor and capital, including R&D and certain investments in non-practicing prototypes, under Subparagraph (B). The risk is not that such activities would never qualify; Congress expressly made qualifying R&D eligible under (C). It is that applying (B) to those same investments may circumvent the distinct statutory inquiry Congress prescribed for the domestic-industry requirement to be fulfilled.

### **C. This Dispute Has Far-Reaching Consequences**

This case reaches beyond these products, patents, and parties. The Federal Circuit's construction governs every future Section 337 complainant seeking to rely on research-and-development spending under Subparagraph (B). It also affects every respondent whose products enter through international supply chains.

The next target may be a device maker, a software-enabled manufacturer, an automotive supplier, a startup, or a small developer whose product depends on imported components. A single exclusion order may affect the respondent, its suppliers, developers, commercial partners, and customers. Misuse of exclusion authority can divert investment from research, development, and manufacturing and can be particularly damaging to startups and small businesses. The domestic-industry requirement protects all such companies by ensuring that the ITC's extraordinary trade remedy is reserved for disputes with the statutorily required domestic nexus.

Exclusion orders can disrupt widely used computing products, reduce competition, and impose costs on American consumers and businesses when no qualifying domestic industry needs protection. Those concerns increase as the threshold for invoking the Commission's jurisdiction-like domestic-industry prerequisite falls.

The effect also runs counter to the trade statute's central logic. Section 337 was designed to protect American industry from unfair import competition. A doctrine that makes it easier to use the Commission's

exclusion power against productive U.S. technology companies without a comparably concrete domestic industry on the complainant's side risks turning the statute against the domestic industries it was meant to protect. The Court should review the statutory boundary before that result becomes entrenched.

#### **IV. The Court Should Address the Question Now**

Immediate review is warranted because the Federal Circuit alone reviews final Commission determinations, and later appeals may not produce opinions that revisit the legal question. The Federal Circuit's expansive statutory interpretation will shape filings and settlement decisions unless certiorari is granted.

##### **A. No Circuit Split Can Develop, and Future Federal Circuit Panels are Bound by *Lashify* and *Apple***

The Federal Circuit has exclusive jurisdiction over appeals from final Commission determinations under Section 337. 28 U.S.C. § 1295(a)(6). The absence of a circuit conflict therefore says little about the question's importance because there is no second regional circuit in which a competing interpretation can arise. Waiting for a split means waiting for something Congress's jurisdictional scheme makes impossible.

Moreover, a judgment of affirmance without opinion is permitted in specified circumstances under Federal Circuit Rule 36. Such a disposition resolves the appeal without furnishing a reasoned precedential discussion of the domestic-industry test. An opportunity to appeal is therefore not a guarantee that the

appellate court will explain or reconsider the governing statutory framework.

Nor is ordinary panel-by-panel development likely to correct the problem. *Lashify* now supplies the Federal Circuit’s controlling construction of Subparagraph (B), and *Apple* applies that construction to R&D expenditures expressly identified in Subparagraph (C). Future panels remain bound by precedential decisions absent en banc or Supreme Court intervention, and the Federal Circuit declined rehearing en banc in both *Lashify* and this case. Other ITC disputes may settle, turn on alternative grounds, or produce non-precedential dispositions rather than a fresh examination of the statutory text. Meanwhile, complainants and respondents must make litigation and investment decisions under the existing rule.

**B. The Issue is Recurring, Exceptionally Important, and Cleanly Presented**

Every patent complainant seeking Section 337 relief must establish domestic industry. The meaning of Subparagraph (B) is therefore not peripheral to the Commission’s work; it is part of the threshold in every patent-based investigation. Notably, the Commission itself resisted this expansion in *Lashify*; the broader interpretation came from the Federal Circuit. The Commission has characterized the interpretation of “labor or capital” under Subparagraph (B) as a question of “exceptional importance,” warning that an overly broad reading would effectively render Subparagraph (C) superfluous. Int’l Trade Comm’n Pet. for Reh’g at 3, 9, *Lashify, Inc. v. ITC*, No. 23-1245 (Fed. Cir. May 21, 2025). The Commission’s own concern

underscores the need for this Court to clarify the relationship between the statutory provisions. The agency must now administer Section 337 under a judicial construction that diminishes a limit Congress placed on its authority.

This petition also arrives at the right moment. *Lashify* was decided only in 2025. The decision below, issued in March 2026, reveals the breadth of *Lashify*'s rule by extending Subparagraph (B) to R&D and by approving reliance on certain non-practicing prototypes. *Apple*, 169 F.4th at 1375–79. The consequences are no longer hypothetical, but the doctrine is still new enough that this Court can restore the statutory boundary before parties make years of litigation and investment decisions around an unduly broad interpretation. Review would allow this Court to restore that limit and confine the ITC's extraordinary exclusion power to the trade-related disputes Congress authorized it to address.

The question is legal and concrete, asking whether the general phrase “significant employment of labor or capital” in Section 337(a)(3)(B) can be used to count categories of investment Congress specifically placed in Section 337(a)(3)(C), thereby reducing the independent work of the latter provision. Resolving that issue would provide immediate guidance to the Commission, the Federal Circuit, patent owners, and the many American businesses that import components or finished products while investing and employing workers here.

## CONCLUSION

The Federal Circuit has expanded Section 337's domestic-industry requirement beyond the limits Congress imposed, disregarding the statutory threshold for access to the ITC's powerful exclusionary remedies. That approach risks transforming the ITC from a trade forum designed to protect qualifying domestic industries into an alternative patent-enforcement venue for complainants with increasingly attenuated ties to domestic productive activity. Left undisturbed, *Apple* has the potential to inflict concrete harm on American technology companies and small businesses that face the disruptive threat of exclusion orders and the substantial costs and settlement pressure of ITC investigations. Enforcing the statutory boundary would not deny legitimate research and licensing industries the protection Congress expressly provided in Subparagraph (C). It would ensure that the ITC's exclusion power remains confined to its statutory purpose rather than becoming an alternative to the injunction standards governing ordinary patent litigation.

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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