No. 26-316

IN THE

Supreme Court of the United States

APPLE INC.,

Petitioner,

v.

INTERNATIONAL TRADE COMMISSION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED

The decisions of the United States International Trade Commission and the Federal Circuit on the issue of domestic industry were intricately factual in nature. Based on Petitioner's appeal to the Federal Circuit, that court was charged with examining only whether substantial evidence supported the Commission's finding of significant domestic investments in labor by the Masimo Respondents "with respect to" the patented article. Petitioner's appeal did not present the legal questions it now attempts to raise to this Court.

Thus, Petitioner's first issue should be restated as follows:

1. Whether this Court should construe 19 U.S.C. § 1337(a)(3)(B) to exclude evidence of significant employment of labor for research and development, even though Petitioner never presented such a construction below but merely challenged the Commission for crediting certain evidence in finding that the Masimo Respondents satisfied the economic prong of the domestic-industry requirement. And, if the Court were to consider Petitioner's construction, whether the Commission and the Federal Circuit correctly relied on domestic investments in labor for research and development to find the Masimo Respondents satisfied 19 U.S.C. § 1337(a)(3)(B).

With regard to the second issue, Petitioner has mischaracterized the Federal Circuit's opinion. Thus, Petitioner's second issue should be restated as follows:

2. Whether the Federal Circuit affirmed the Commission's finding that Masimo proved a domestic industry under 19 U.S.C. § 1337(a)(3)(B) by adopting a rationale different than that of the Commission in violation of *SEC v. Chenery Corp.*, 332 U.S. 194 (1947).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents Masimo Corporation and Cercacor Laboratories, Inc. disclose the following:

Petitioner Masimo Corporation is a wholly owned subsidiary of Danaher Corporation, a Delaware corporation. No publicly held corporation other than Danaher owns 10% or more of the stock of Masimo Corporation.

Petitioner Cercacor Laboratories, Inc. has no parent corporation and no publicly held company owns 10% or more of Cercacor Laboratories, Inc.'s stock.

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I. INTRODUCTION

Respondent Masimo, the industry leader in the field of pulse oximetry, invented the patented technology at issue in California and invested millions of dollars in a research and development team in California to incorporate that technology into its Masimo Watch project. Masimo filed a complaint at the United States International Trade Commission to stop Petitioner Apple's importation of foreign-made Apple Watches that infringe Masimo's patents. The Commission instituted an investigation based on Masimo's complaint. After a five-day hearing, Masimo prevailed before the presiding Administrative Law Judge. The Commission affirmed and entered an exclusion order. The Federal Circuit affirmed the Commission, concluding that Apple violated 19 U.S.C. § 1337 (commonly referred to as "Section 337") by importing the infringing Apple Watches.

Apple contested many issues in this case, including whether Masimo's evidence satisfied the domestic-industry requirement of Section 337. Under that statute, a patentee can demonstrate its investments in an existing domestic industry in one of three ways—showing that it has established an industry in the U.S. with respect to the articles protected by the patent by its: (1) significant investment in plant and equipment; (2) significant employment of labor or capital; or (3) substantial investment in a patent's exploitation, including engineering, research and development, or licensing. At each level of review, over the span of five years of litigation, every adjudicator has found that Masimo established a domestic industry in the United States based on significant investments in labor relating to Masimo's patented articles. Masimo's showing

included evidence of numerous U.S. engineers working on Masimo Watch and millions of dollars in expenditures relating to those U.S. activities.

Before this Court, Apple does not challenge the findings that its foreign-manufactured Apple Watches infringe Masimo's patents, that Masimo's patents are valid, and that the public interest supports the exclusionary remedies issued by the Commission. Instead, Apple seeks certiorari based on a statutory interpretation of 19 U.S.C. § 1337(a)(3) that Apple first raised in its rehearing petition to the Federal Circuit, arguing that Masimo's U.S. investments in research and development do not qualify as domestic-industry investments. Apple's petition ignores the numerous opportunities it failed to raise this statutory argument before both the Commission and the Federal Circuit. For this reason, Apple's attempts to criticize Masimo and the Commission for not addressing this argument ring hollow.

Apple argues that Masimo cannot demonstrate a domestic industry with evidence of "significant employment of labor or capital" directed to research and development activities. According to Apple, such a finding would render superfluous the third subsection of 19 U.S.C. § 1337(a)(3) regarding substantial investment in a patent's exploitation. Apple argues that any evidence under the "significant employment of labor or capital" provision must be directed to manufacturing or production activities only. The Federal Circuit summarily denied Apple's rehearing petition that first raised this issue.

This Court should deny certiorari because Apple has not preserved the statutory interpretation argument.

This Court has a fundamental rule that, unless there are exceptional circumstances, it will not entertain arguments that were not properly raised below. Apple forfeited its statutory argument by first introducing the argument in its rehearing petition to the Federal Circuit, and its current petition is a poor vehicle for raising this statutory challenge to the factually intensive evaluation of domestic industry.

Regardless, if the Court were to reach the merits of Apple's argument, it should still deny Apple's petition. Because the phrase "significant employment of labor or capital" has no further limitations on the type of qualifying employment, it would be improper to read in any unrecited restrictions into the plain language of the statute. The Federal Circuit recently so held in *Lashify v. ITC,* 130 F.4th 948 (Fed. Cir. 2025). As long as the patentee establishes an industry in the U.S. with respect to the patented articles through significant employment of labor or capital, the domestic-industry requirement is met. Masimo made that evidentiary showing.

Finally, Apple asserts that this Court should summarily reverse because the Federal Circuit allegedly relied on certain rationales not relied on by the Commission. But Apple mischaracterizes the Federal Circuit's opinion. The Federal Circuit's reasoning was not new, but was the same as, and fully consistent with, the Commission's reasoning. The only impropriety here is Apple's newly raised statutory challenge that it never presented to the Commission. For these reasons, this Court should deny Apple's petition.

II. STATEMENT

A. Statutory Background

The Tariff Act of 1930, as amended, 19 U.S.C. § 1202 et seq., prohibits "[t]he importation into the United States, the sale for importation, or the sale within the United States after importation * * * of articles that – (i) infringe a valid and enforceable United States patent." 19 U.S.C. § 1337(a)(1)(B). Under the statute, the United States International Trade Commission is tasked with investigating "any alleged violation of this section on complaint under oath or upon its initiative." 19 U.S.C. § 1337(b)(1). An investigation typically begins with a patentee filing a complaint naming one or more parties as respondents accused of violating Section 337.

To succeed, a complainant must prove that 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). An industry exists in the United States if, "with respect to the articles protected by the patent," there has been:

> (A) significant investment in plant and equipment;
>
> (B) significant employment of labor or capital; or
>
> (C) substantial investment in its exploitation, including engineering, research and development, or licensing.

19 U.S.C. § 1337(a)(3). This statutory language is known as the domestic-industry requirement, and it consists of two components—the technical prong and the economic prong. *InterDigital Commc'ns, LLC v. ITC*, 707 F.3d 1295, 1298 (Fed. Cir. 2013). The technical prong requires the patentee to identify an actual "article" that practices at least one claim of the asserted patent. *Broadcom Corp. v. ITC*, 28 F.4th 240, 249-50 (Fed. Cir. 2022); App.9a-10a (citing cases). The economic prong requires an industry in the United States relating to the patented article through evidence of significant investment in plant and equipment, significant employment of labor or capital, or substantial investment in exploitation of the patent. App.20a. Because the economic prong requires proof of an industry "relating to the articles protected by the patent," it encompasses investments beyond the patented article itself; an investment may count toward the economic prong if the investment relates to the patented article. 19 U.S.C. § 1337(a)(2); App.22a-24a.

After conducting its investigation, if the Commission determines that there has been a violation of Section 337, it can issue an exclusion order "direct[ing] that the articles concerned, imported by any person violating the provision of this section, be excluded from entry into the United States." 19 U.S.C. § 1337(d)(1). Additionally, the Commission may choose to enter a cease-and-desist order "directing [a respondent] to cease and desist from engaging in the unfair methods or acts involved." 19 U.S.C. § 1337(f)(1).

B. Procedural History

1. Masimo Revolutionizes Pulse Oximetry

Masimo is an American success story that began in 1989 in the California garage of its founder Joe Kiani. Kiani and his colleague Mohamed Diab solved a problem the pulse-oximetry industry believed was unsolvable—measuring blood oxygen saturation in clinical situations such as through patient motion. App.2a. Masimo's pioneering technology revolutionized non-invasive monitoring, saving thousands of lives and billions of dollars in healthcare costs. Today, Masimo's technology monitors over 200 million patients a year.

From the early 1990s, Masimo envisioned developing a wrist-worn pulse oximeter. In 1998, Masimo created Masimo Laboratories, later renamed Cercacor, for certain research activities. Masimo and Cercacor have collaborated in their research, and each has rights in the asserted patents through a cross-licensing arrangement. App.188a; App.562a. Both Masimo and Cercacor worked on a wrist-worn pulse oximeter, and by 2019, Masimo was clinically testing a watch-style device that measured oxygen saturation directly from the wrist. C.A. Dkt. 25-2 at 7-8. This work has led to numerous patents, including the two patents at issue here, U.S. Pat. No. 10,912,502 and U.S. Pat. No. 10,945,648 (collectively referred to as "the Poeze patents").[1]

1. Because the '502 and '648 patents listed Jeroen Poeze as the first named inventor, the parties, the Commission, and the Federal Circuit referred to the patents as the "Poeze patents." *See, e.g.*, App.2a-3a, 188a. Masimo asserted other patents, but only the Poeze patents are at issue here.

In 2019, Masimo began its formal "Masimo Watch" project. C.A. Dkt. 66-6 at 40341-42, 40436. Masimo's work on the Masimo Watch project took place entirely in California. C.A. Dkt. 66-6 at 40212; App.117a; App.551a. Masimo developed various iterative designs, all with its continuous hospital-grade pulse oximetry. App.256a; App. 257a, n. 16; C.A. Dkt. 66-6 at 40436-37. From 2019 through 2021, Masimo developed numerous iterations of the Masimo Watch and continued clinically testing these devices. App.256a; App.284a; App.286a; App.427a; App.534a; App.535a. Two versions, called Circle and Wings, had blood oxygen sensors but relied on an external device to calculate oxygen saturation. App.533a. Three later iterations—RevA, RevD, and RevE—could calculate oxygen saturation without any external device and practiced the Poeze patents. App.11a; App.257a. Masimo's testing confirmed the accuracy of the measurements obtained by its domestic industry articles and that their performance was superior to other FDA-cleared pulse oximeters. App.256a. Masimo's work culminated in a commercial product, the Masimo W1, which had a limited market release in May 2022 (C.A. Dkt. 66-11 at 70758-59) and received FDA clearance in November 2023. *See* C.A. Dkt. 25-2 at 8, 25-3 at 319-339.

2. Apple Uses Masimo's Patented Technology in its Apple Watch

In September 2014, Apple introduced its Apple Watch device, with sales starting in April 2015. But no version of Apple Watch commercially released from 2015-2019 had the ability to measure a user's blood oxygen saturation, as Apple's engineers testified that they found measuring oxygen saturation at the wrist very difficult. *See* C.A.

Dkt. 25-1 at 5 (citing evidence recognizing "invention is required"). Then, in September 2020 during the COVID pandemic, Apple released the Apple Watch Series 6 with a blood oxygen sensor to capitalize on the "chaos of COVID-19," even though Apple knew its sensor was not ready. C.A. Dkt. 25-2 at 13, Dkt. 25-4 at 56-57. Multiple news articles reviewing the Apple Watch's new blood oxygen feature warned that the results were not accurate. C.A. Dkt. 25-2 at 17-18.

Apple had been studying pulse oximetry for years and, in 2013, it met with Masimo to discuss a partnership that would permit Apple products to incorporate Masimo technology. C.A. Dkt. 25-2 at 11. But Apple did not follow through with any partnership. Instead, Apple began hiring Masimo employees to work on its Apple Watch products. *Id.* This included hiring a former Masimo employee who was Cercacor's Chief Technology Officer at the time, Marcelo Lamego, a named inventor on the patents asserted in this case. *Id.*[2]

2. Masimo sued Apple in district court and obtained a final judgment declaring that Apple used Lamego to misappropriate trade secrets and owes Masimo $818,503,697 for infringing a Masimo patent. *Masimo Corp. et al v. Apple Inc.*, 8:20-cv-00048-JVS-JDE (C.D. Cal). That judgment is on appeal to the Federal Circuit (Nos. 2026-2070, -2126). Because the Commission cannot award damages, Masimo also asserted the Poeze patents in district court, but pursuant to 28 U.S.C. § 1659, those claims were stayed pending resolution of the Commission's investigation.

3. Masimo Brings a Complaint Before the ITC and the ALJ Finds That Apple Violated Section 337

In 2021, Masimo filed a complaint asserting that Apple violated Section 337 through its importation into the United States, sale for importation, and sale within the United States after importation of the Apple Watch Series 6 and any other Apple Watch with the accused light-based physiological monitoring features. Masimo asserted that Apple infringed multiple patents, including the Poeze patents. Apple stipulated that its accused foreign-made Apple Watch products are imported into the United States. App.189a.

The ALJ presiding over the investigation held a five-day evidentiary hearing and issued a 337-page Final Initial Determination. App.183a-574a. She found, among other things, that the accused Apple Watch devices infringed the Poeze patents, Masimo demonstrated a domestic industry with respect to the Poeze patents, and Apple failed to meet its burden with respect to its affirmative defenses, including invalidity.[3]

In concluding that Masimo established the technical-prong requirement for domestic industry, the ALJ explicitly found Masimo has "shown by a preponderance of the evidence that the RevA, RevD, and RevE devices measure blood oxygen saturation." App.257a; *see also*

3. Apple has tried and failed to prove the invalidity of the Poeze patents, both at the Commission and in multiple attempts at the U.S. Patent & Trademark Office. *See* App.83a (noting the Patent Office's denial of Apple's petitions); App.82a (rejecting Apple's "convoluted combination of modifications" of the prior art).

App.258a-259a, App.278a. Apple's representations to the contrary are false. *See* Pet.14, 32.

In concluding that Masimo established the economic-prong requirement for domestic industry, the ALJ found that Masimo offered reliable documentary and testimonial evidence regarding its labor and capital expenditures related to the research and development of the Masimo Watch. App.542a-553a. This evidence included the names and salaries of each engineering employee involved in the Masimo Watch project with monthly estimates of their time from 2019-2021. App.544a-545a (citing CX-0635C). The ALJ also found that these expenditures included work on Circle, Wings, and the RevA, RevD and RevE sensors because the devices "are merely 'iterations' of a product design that was continuously developed in the years leading to the filing of the complaint." App.535a. The ALJ further found that "there is no reasonable way to delineate between work on separate prototypes." *Id.* The ALJ determined those expenditures to be significant and concluded that Masimo "met the economic prong of the domestic-industry requirement based on the existence of a domestic-industry at the time of the complaint with respect to significant investments in labor and capital for the research and development of the Masimo Watch." App.553a.

In addition to these expenditures, Masimo had also offered evidence of its foundational pulse oximetry research and development activities before 2018, but the ALJ did not include that evidence in calculating domestic investments because she found "no clear explanation of the relationship between these activities and the identified Masimo Watch prototypes." App.537a; *see also id.* at n.118

(acknowledging evidence of "separate concurrent projects in this [pre-2018] timeframe related to wrist-based pulse oximetry at Masimo and Cercacor").

In challenging Masimo's domestic-industry showing at the hearing, Apple offered no legal argument regarding the scope or meaning of the statutory language for domestic industry. Nor did Apple object to the ALJ's prior finding that articles in development can qualify for domestic industry. *See* C.A. Dkt. 66-3 at 14136, n. 4; *see also Philip Morris Prods. S.A. v. ITC*, 63 F.4th 1328, 1342 (Fed. Cir. 2023) (affirming the Commission's determination that domestic industry can be met based on investments in products that could not be sold at time of complaint because the FDA had not authorized them). Apple limited its arguments to challenging the sufficiency and reliability of Masimo's evidence.

Regardless, in her decision, the ALJ addressed the scope of the statutory language in Section 337 and explained that "domestic industry investments in plant and equipment or labor and capital can include expenditures that relate to engineering or research and development." App.205a. The ALJ also quoted from a Commission decision explaining that "the text of the statute, the legislative history, and Commission precedent do not support narrowing subsections (A) and (B) to exclude non-manufacturing activities, such as investments in engineering and research and development." *Id.* (quoting *In re Certain Solid State Storage Drives, Stacked Electronics Components, and Prods. Containing Same*, Inv. No. 337-TA-1097, 2018 WL 4300500, at *9 (ITC June 29, 2018)).

4. The Commission Agrees That Apple Violated Section 337 and Issues an Exclusion Order

Apple petitioned the Commission to review numerous issues from the ALJ's decision. Though the ALJ's decision clearly explained that research and development expenditures may be considered under Subsections (A) and (B), Apple did not challenge that explanation before the Commission, thereby abandoning that issue.[4]

The Commission decided to review certain issues, while affirming the remaining ALJ findings, conclusions and supporting analysis. App.57a. As relevant here, the Commission reviewed the ALJ's domestic-industry findings with respect to the Poeze patents. The Commission affirmed the ALJ's finding that Masimo proved "the existence of a domestic industry by way of significant employment of labor with respect to Masimo's investments in research and development for the Masimo Watch." App.116a-117a. After considering the parties' briefings and voluminous public-interest submissions, the Commission also affirmed the ultimate conclusion that Apple violated Section 337 and issued a limited exclusion order and cease-and-desist order. App.181a-182a.

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4. *See* 19 C.F.R. § 210.43(b) (providing that "[a]ny issue not raised in a petition for review will be deemed to have been abandoned by the petitioning party" and "any argument not relied on in a petition for review will be deemed to have been abandoned"); *Finnigan Corp. v. ITC,* 180 F.3d 1354, 1362-63 (Fed. Cir. 1999) ("A party seeking review in this court of a determination by the Commission must 'specifically assert' the error made by the ALJ in its petition for review to the Commission.").

Apple appealed the Commission's decision to the Federal Circuit and immediately sought a stay of the Commission's orders pending appeal. Applying the traditional four-factor test for interim relief outlined in this Court's decision in *Nken v. Holder*, 556 U.S. 418, 434 (2009), the Federal Circuit denied Apple's motion, allowing the limited exclusion order and cease-and-desist order to go into effect. C.A. Dkt. 33.

Apple represents that the exclusion order bans the importation of Apple's infringing design until August 2028 when Masimo's asserted patents expire (Pet.15), wrongly implying that, until then, it cannot sell a device with any blood oxygen functionality. Apple omits that it imports another Watch design with blood oxygen functionality.[5] Unlike the banned device, the currently imported Apple Watch displays the blood oxygen saturation measurement on a paired Apple iPhone.[6]

5. Appellate Briefing and Oral Argument

In its appeal to the Federal Circuit, Apple 's briefing of the domestic-industry issues challenged whether Masimo's devices qualified as "articles" under Section 337 and, with respect to the economic-prong, only the reliability of Masimo's evidence. *See* C.A. Dkt. 54-1 at 19-20 (Apple's summary of its "article" argument and evidentiary challenges to Masimo's proof of expenses);

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5. *See An Update on Blood Oxygen for Apple Watch in the U.S.*, Aug. 14, 2025, at https://www.apple.com/newsroom/2025/08/an-update-on-blood-oxygen-for-apple-watch-in-the-us/.

6. *Id.*

C.A. Dkt. 63 at 7 ("Section 337 requires a finished 'article,' not a nascent development project.").

At oral argument, Apple pivoted away from its statutory argument regarding "article," and instead argued that Section 337 requires "symmetry" between the economic and technical prongs. Oral Arg. Rec. at 12:25-12:50 (arguing that the lack of "symmetry" between Masimo's economic prong and the technical prong evidence was a "threshold failing"). According to Apple's "symmetry" argument, the subject of the technical prong inquiry—the patented article—limits the investments that can be considered for the economic prong inquiry. In Apple's view, only investments directly tied to the patented article itself could satisfy the economic prong.

To rebut Apple's assertions regarding "symmetry" between the economic and technical prongs, the Commission cited *Motorola Mobility, LLC v. ITC*, 737 F.3d 1345 (Fed. Cir. 2013), a decision in which investments in non-patent-practicing software were considered in the economic-prong analysis. Oral Arg. Rec. at 20:35-21:33. Apple also addressed this decision during oral argument and in subsequent briefing to the Federal Circuit. Oral Arg. Rec. at 38:00-38:33; C.A. Dkt. 104 at 8-9.

6. The Federal Circuit Affirms the Commission's Decision

The Federal Circuit affirmed the Commission's determination that Apple violated Section 337. App.1a-38a. The court rejected all of Apple's challenges to the Commission's conclusions, including the Commission's analysis of both prongs of the domestic-industry

requirement. App.12a-26a. The court also rejected Apple's challenge to the Commission's holdings that Apple infringed the Poeze patents and that Apple's patent invalidity and prosecution-laches defenses were without merit. App.27a-38a.

The Federal Circuit determined that substantial evidence supported the finding that Masimo satisfied the technical prong. App.18a-19a. As part of its technical-prong analysis, the court explicitly found that substantial evidence supported the ALJ's finding that the RevA, RevD, and RevE devices measured blood oxygen levels. App.19a.

The court rejected Apple's argument that the technical prong analysis had to be limited to the specific Rev A, Rev D, and Rev E physical units that Masimo produced in discovery. App.15a. The court correctly observed that nothing in the law requires that the domestic-industry analysis "must be confined to only those individual devices a complainant physically produces in discovery, as opposed to treating such devices as representative embodiments of the broader domestic industry article they are found to reflect." App.15a.

Neither Masimo, the Commission, nor the Federal Circuit ever took the position that Masimo's Rev prototypes were representative of other *different* or *hypothetical* unproduced products, as Apple represents here. Pet.15, 32-33. As the Federal Circuit explained, the ALJ "referred broadly to 'the RevA, RevD, and RevE devices,' without suggesting that her analysis was limited to only those particular physical units that happened to be produced in discovery." App.15a. But the court

observed the ALJ was not referring to, or relying on, any "hypothetical" article. App.18a. As Masimo explained below, the physical samples it produced in discovery were representative of other devices made of each version. C.A. Dkt. 130 at 3 (explaining Masimo made between 10 and 20 watches of each RevA, RevD, and RevE before filing the complaint).

With respect to the economic prong, Apple raised only two challenges, and, as the Federal Circuit explained, those challenges were factual or evidentiary challenges. App.21a (observing that Apple "alleges that the Commission credited improper evidence" when considering Masimo's investments). The court correctly observed that "Apple does not argue that Masimo's investments in the Masimo Watch were not 'significant,'" and that "Apple does not dispute that, if properly credited, Masimo's investments would be 'significant.'" *Id.*

The Federal Circuit rejected Apple's "symmetry" argument that the Commission cannot rely on the Circle and Wings devices because they did not practice the patents. App.21a-22a. First, the Federal Circuit observed that the "Commission did rely on the same article for both the technical and economic prongs," "namely, the Masimo watch," which included particular Masimo Watch prototypes made as part of the iterative design process. App.22a. The court continued to explain, even if Circle and Wings were distinct from the patent-practicing articles, investments in Circle and Wings may count as part of the economic prong because those investments need only be made "with respect to" the patent-practicing article. *Id.* And contrary to Apple's argument, the determination of whether investments are "with respect to" the patent-

protected articles presents "a question of fact, not law, and thus is one [reviewed] for substantial evidence." App.21a (citing *Zircon Corp. v. ITC*, 101 F.4th 817, 822 (Fed. Cir. 2024)).

The court then concluded that the Commission properly adopted the ALJ's findings and reasoning that the Circle and Wings sensors led to the development of the patent-practicing articles and thus investments in them qualify as having been made "with respect to" the RevA, RevD, and RevE devices. In looking at the statute and case law, the court saw nothing to preclude such reasoning. App.23a-24a (citing *Motorola*, 737 F.3d at 1351). The court held that evidence supported the finding that a sufficient nexus exists between the investments in Circle and Wings and the patent-practicing article, such that the investments were made "with respect to" that article. App.25a. Thus, the court concluded that "substantial evidence supports the Commission finding that Masimo's investments in the Circle and Wings Sensors were made as part of the same iterative design process Masimo undertook as part of its development of a single patented-practicing commercial product, and those investments led to specifically tailored, significant technical features of patent-practicing articles, including the RevA and RevD variants of the Masimo Watch." *Id.*

Finally, Apple argued that Masimo failed to provide a proper accounting of its investments, which the court found to be a challenge to the Commission's weighing of the evidence and the ALJ's credibility determinations. App.25a-26a. The court disposed of this argument, finding that Masimo offered sufficient documentary and testimonial evidence to prove the economic prong. *Id.*

7. The Federal Circuit Denies Apple's Rehearing Petition

Apple filed a combined petition for panel rehearing and rehearing en banc. As Apple represents, there Apple made its "lead argument" that "Subparagraph (B)'s general language cannot be read to cover 'research and development' costs, which are expressly listed only in Subparagraph (C)." Pet.17-18. But Apple fails to mention that this was the first time it made that argument. Both Masimo and the Commission filed responses rebutting Apple's statutory interpretation argument. But they also explained that Apple forfeited the argument because Apple did not raise the argument until its petition for rehearing. C.A. Dkt. 130 at 5-6; C.A. Dkt. 131 at 9-10. The Federal Circuit summarily denied Apple's petition. App.575a-576a.

III. REASONS FOR DENYING THE PETITION

A. Apple Did Not Present Its Statutory Interpretation Argument To The ALJ, To The Commission, Or To The Federal Circuit Panel

This Court should deny the petition because Apple has forfeited its statutory interpretation argument. Apple asserts that it is improper to read 19 U.S.C. § 1337(a)(3)(B) to cover Masimo's "significant employment of labor and/or capital" directed to research and development because such a reading would render the mention of "research and development" in 19 U.S.C. § 1337(a)(3)(C) superfluous. Pet.21. But Apple raised this "lead argument" for the first time in its rehearing request before the Federal Circuit. *See* Pet.18. Apple therefore failed to raise the argument

before the ALJ, the Commission, or the panel at the Federal Circuit. As a consequence, the Federal Circuit's opinion does not address this argument. App.8a-27a.

"Absent unusual circumstances," this Court "will not entertain arguments not made below." *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 38 (2015); *see also Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."). Because this is "a court of review, not of first view," Apple cannot now raise an argument not considered below. *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

Apple attempts to excuse its forfeiture by claiming that "any statutory interpretation arguments made at the panel stage would have been futile" in view of the Federal Circuit's decision in *Lashify*. Pet.28. Apple's argument makes no sense—Apple filed its opening brief at the Federal Circuit in April 2024, and the Federal Circuit decided *Lashify* in March 2025, almost one year later. Thus, at the time of Apple's opening appellate brief, any futility based on *Lashify* could not have been a factor in Apple's decision to stay silent on this statutory argument.

At the latest, Apple was on notice of this issue by the time of the ALJ's decision in January 2023. When explaining the domestic-industry requirement, the ALJ explicitly rejected the premise now put forward by Apple. The ALJ wrote that "[s]ubsections (A), (B), and (C) are listed in the disjunctive, and accordingly, the domestic industry investments in plant and equipment or labor and capital can include expenditures that relate to engineering

or research and development." App.205a. The ALJ followed that explanation by quoting a Commission decision stating that "the text of the statute, the legislative history, and Commission precedent do not support narrowing subsections (A) and (B) to exclude non-manufacturing activities, such as investments in engineering and research and development." *Id.* (quoting *In re Certain Solid State Storage Drives, Stacked Electronics Components, and Prods. Containing Same*, Inv. No. 337-TA-1097, 2018 WL 4300500, at *9 (ITC June 29, 2018)). Apple's argument to this Court directly contradicts this explanation. Apple had the opportunity to challenge this explanation before the Commission and the Federal Circuit; its failure to do so forfeits the argument.

B. *Lashify* Has No Relevance to This Case

Apple's petition reads as if it is seeking a writ of certiorari from the Federal Circuit's decision in *Lashify*. *See, e.g.*, Pet.19. Because of Apple's failure to raise its statutory argument before the Federal Circuit, neither the scope of Subsection (B) nor the court's decision in *Lashify* are properly before this Court. In *Lashify*, the Federal Circuit held that it was an error for the Commission to exclude labor or capital expenses related to sales, marketing, warehousing, quality control, and distribution when determining whether the patentee satisfied the economic prong under Subsection (B). 130 F.4th at 958-59. In explaining why the Commission erred, the court relied on the straightforward statutory language in 19 U.S.C. § 1337(a)(3) to hold that expenses directed to those uses were not precluded from the economic-prong analysis. *Id.*

The Federal Circuit's decision in this case did not interpret the scope of Subsection (B). In fact, other than quoting *Lashify* when introducing the three "potentially overlapping but independently sufficient bases" (App.20a) for finding the economic prong has been satisfied, the court said nothing about the breadth of the three subsections.

To the extent that there was any dispute below as to what investments qualify as domestic-industry investments, it did not involve any objection by Apple to including Masimo's domestic labor expenditures in research and development. Instead, Apple argued that the only investments that can count under the economic prong are those directly tied to the same "article" that satisfies the technical prong. (Oral Arg. Rec. at 4:52-4:58 ("the article needs to be the same for the technical prong under (a)(2) and the economic prong under (a)(3)"); C.A. Dkt. 54-1 at 38 ("[T]he only investments that count under the economic prong are those made to support the same domestic industry 'article' that satisfies the technical prong.")) The court rejected that argument, explaining that, while the technical prong focuses on whether there is a patent-practicing article, the economic prong allows for a broader inquiry regarding investments made "with respect to" the patented articles. App.22a-23a. This is not the argument that Apple now raises before this Court.

Furthermore, Apple repeatedly relies on the Commission's petition for rehearing in *Lashify*. Pet.3-4,11,21-22,26-27. There, the Commission was objecting to the Federal Circuit's inclusion of sales and marketing expenses in the economic prong of domestic industry, where Lashify did not produce the patented articles in the United States. *See Lashify v. ITC,* Appeal No. 23-

1245, Dkt. 117. (Commission Petition for Rehearing). That objection has no bearing on the present case. Here, the Federal Circuit affirmed the Commission's reliance on Masimo's domestic labor investments in the research and development leading to the design and manufacture of the patented articles in California.

Accordingly, Apple's attack on *Lashify* does not support review of the current decision. Apple cannot genuinely use *Lashify* to generate any interest in the present case, when *Lashify* had no bearing on the outcome of this case.

C. Regardless, Apple's Statutory Interpretation is Contrary to the Plain Language of the Statute

Statutory construction begins with the language of the statute, "[a]nd where the statutory language provides a clear answer, it ends there as well." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999). This is so because "[t]he people are entitled to rely on the law as written, without fearing courts might disregard its plain terms based on some extratextual consideration." *Bostock v. Clayton Cnty.*, 590 U.S. 644, 674 (2020). Apple's statutory interpretation argument seeks to improperly narrow the plain language of the statute by limiting the types of employment of "labor or capital" that can be counted under Subsection (B). 19 U.S.C. § 1337(a)(3)(B). The Court need not go beyond the statutory language to reject Apple's position, as the statute itself provides a clear answer.

Under Subsection (B), "an industry in the United States shall be considered to exist if there is in the United States, with respect to the articles protected by the

patent * * * significant employment of labor or capital." 19 U.S.C. § 1337(a)(3)(B). Subsection (B) recites four straightforward statutory requirements: (1) significant employment of (2) labor or capital (3) in the United States (4) with respect to the articles protected by the patent. Subsection (B) "covers significant use of 'labor' and 'capital' without any limitation on the use within an enterprise to which those items are put, *i.e.*, the enterprise function they serve." *Lashify*, 130 F.4th at 958.[7] The Federal Circuit observed that "there is no carveout" for any particular function such as "marketing, warehousing, quality control, or distribution." *Id.* Nor is there anything in the statute mandating that the labor or capital be tied to manufacturing. *Id.* at 958-59. Because the statute itself has no further restrictions, the qualifying labor or capital is not restricted by the function performed. Qualifying employment of labor or capital can therefore be directed to any function, if it is done "with respect to the articles protected by the patent." *Lashify*, 130 F.4th at 957.

The Commission has consistently recognized that research and development expenses may be considered under Subsection (B), including in cases where Apple was relying on these expenses to satisfy domestic industry. "Since the 1988 Act, the Commission has permitted expenditures on plant and equipment and labor and capital employed in engineering, and research and development activities to support a domestic industry under subsections (A) and (B), so long as the asserted

7. The Federal Circuit has defined "labor" as "human activity that produces goods or provides the services in demand in an economy" and "capital" as "a stock of accumulated goods." *Lelo Inc. v. ITC*, 786 F.3d 879, 883 (Fed. Cir. 2015) (quoting Webster's Third New International Dictionary (1986)).

expenditures satisfy the plain language of the statutory text." *In re Certain Solid State Storage Drives, Stacked Electronics Components, and Prods. Containing Same*, Inv. No. 337-TA-1097, 2018 WL 4300500, at *7 (ITC June 29, 2018) (reviewing cases where the Commission found that research and development expenses satisfied Subsections (A) or (B)); *see also In re Certain Digital Imaging Devices and Related Software,* Inv. No. 337-TA-717, 2011 WL 2742200, at *157 (ITC May 12, 2011) ("Apple asserts that its investments in labor and capital related to the domestic industry products are significant not only in an absolute sense, but they are also significant because these R&D-related labor investments are critically important to the domestic industry products."); *In re Certain Mobile Devices and Related Software*, Inv. No. 337-TA-750, 2011 WL 11684509, at *1 (ITC Sept. 15, 2011) ("Apple also argues it has made significant labor investments including its [] employees in the United States dedicated to research and development on the iPhone 4 . . . and Mac OS X."); *In re Certain Electronic Imaging Devices*, Inv. No. 337-TA-850, 2018 WL 11201935, at *55 (ITC Nov. 1, 2018) (rejecting the argument that "research and development investments should be considered under subsection 337(a)(3)(C) and not under subsection 337(a)(3)(B)"); *In re Certain Ground Fault Circuit Interrupters and Prods. Containing Same*, Inv. No. 337-TA-739, 2012 WL 2394435, at *51-52 (ITC June 8, 2012) (finding that labor expenses directed to engineering, research, and development satisfied Subsection (B)). The Commission has even found that a complainant satisfied the economic prong under Subsections (A) and (B) through investments in the development, production, and testing of prototype products, akin to Masimo's investments. *In re Certain Wireless Commc'n Devices, Portable Music and Data*

Processing Devices, Computers and Components Thereof, Inv. No. 337-TA-745, 2012 WL 4174869, at *54-55 (ITC Sept. 17, 2012).

Here, there can be no genuine dispute that Masimo met the statutory requirements. The Federal Circuit found that substantial evidence supported the ALJ's finding that Masimo satisfied Subsection (B) through the significant domestic employment of people working on the development of the Masimo Watch, including the RevA, RevD, and RevE devices. App.26a. Masimo demonstrated significant employment of labor by relying on the number of employees working on the Masimo Watch, the monetary investments in the Masimo Watch, and the fact that all the research and development for the Masimo Watch occurred in the United States. App.20a.[8] Moreover, Apple did not dispute that, if properly credited, Masimo's domestic investments were significant. App. 21a.

Apple's argument presupposes that the Federal Circuit's interpretation of Subsection (B) renders Subsection (C) superfluous because Subsection (C) references "research and development." Pet.20-21. But the statutory language says otherwise. Subsection (B) requires significant employment of labor or capital relating to articles protected by the patent. On the other hand, Subsection (C) is directed to "industries that [are] based

8. The amicus briefs filed in support of Apple miss the mark. First, none of the briefs acknowledge that Apple has failed to preserve its statutory interpretation argument. Second, the briefs seek to use this case as a vehicle to keep non-practicing entities out of the ITC. But Masimo is not a non-practicing entity; it is a pioneering medical device company that has made significant domestic investments with regard to the patented articles.

on the creation and exploitation of intellectual property even if they [do] not produce the ultimate products that embodied that technology." *InterDigital*, 707 F.3d at 1300; *see* Pet.8-9 (citing *InterDigital* and recognizing Subsection (C) was added for non-manufacturing entities who license and research).

With Subsection (C), Congress broadened the class of domestic patentees that could seek relief from the Commission. *InterDigital*, 707 F.3d at 1300-02; H. Rep. No. 100-40 at 22 (1987) (stating that the amendment to add Subsection (C) sought to retain the domestic industry requirement "with an expanded definition"). Specifically, the addition of Subsection (C) focused on domestic entities like universities that perform research and development work and then license their patents to others for the purpose of commercializing the technology. H. Rep. No. 100-40 at 157 (1987); S. Rep. No. 100-71 at 129 (1987). It is therefore entirely reasonable for a patentee's research and development expenses to qualify under Subsection (B) but not Subsection (C) if the expenses are directed to labor or capital with respect to the protected articles, but the research and development does not constitute exploitation of the patent. *See, e.g.*, App.22a-24a (explaining how investments directed to components that do not themselves practice a patent may still qualify as investments made "with respect to the articles protected by the patent").

The wording of the subsections reveals another distinction. Subsections (A) and (B) "both refer directly and only to concretely identified inputs for an enterprise's functioning (plant, equipment, labor, and capital), but they do not limit what enterprise functions the inputs must be

used to perform." *Lashify*, 130 F.4th at 959. Subsection (C) is different because it "does not specify particular inputs but instead speaks only of a functionally defined enterprise activity (whatever inputs are used)." *Id.* Subsection (C) is therefore directed to "efforts focused directly on putting a patent into practice in the various ways that is done" but Subsections (A) and (B) do not include such functional language. *Id.* For example, there may be expenditures on research and development that are not properly classified as "investments in plant and equipment" or "employment of labor or capital" that qualify only under Subsection (C).

Apple's petition highlights the Federal Circuit's observation that there may be some potential overlap between Subsections (A), (B), and (C). Pet.16-17 (citing App.20a). But that is not a cause for concern or a sign that the court erred; this Court has found that there is no requirement for each subsection in a statute to "have wholly independent meaning." *Mullin v. Al Otro Lado*, 609 U.S. 258, 273 (2026); *see also United States Postal Serv. v. Konan*, 607 U.S. 391, 406 (2026) ("We think Congress likely used broad, overlapping terms to better keep complaints about mail delivery out of court."). In fact, a main premise of Apple's argument—that the Federal Circuit incorrectly interpreted a statutory subsection to render another subsection superfluous—is not the rigid rule that Apple makes it out to be. *Al Otro Lado*, 609 U.S. at 273 ("We have acknowledged that Congress sometimes 'enacts provisions that are superfluous.'") (citation omitted). Here, Apple's superfluity argument simply cannot overcome the "cardinal canon" that "a legislature says in a statute what it means and means in

a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).[9]

D. The Federal Circuit Did Not Violate *Chenery*.

This Court has long held that "a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency." *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947); *see also Calcutt v. FDIC*, 598 U.S. 623, 624 (2023) (reversing the court of appeals and remanding the case when the court affirmed the agency's decision "based on a legal rationale different from the one adopted by" the agency). Apple incorrectly contends that the Federal Circuit affirmed the Commission's decision on grounds not adopted by the Commission. The Federal Circuit's decision relies on the same rationales as adopted by the Commission. Because the Federal Circuit did not violate *Chenery*, this Court should not summarily reverse the Federal Circuit.

1. Apple's "Representative" Argument is Factually Incorrect

Apple's first *Chenery* argument relates to five physical prototype devices that Masimo produced during discovery during the investigation and presented at the evidentiary

9. Apple argues Masimo "has not disputed that its reading of Subparagraph (B) raises a massive superfluidity problem." Pet.21. Apple ignores that it never raised its statutory interpretation argument until after the Federal Circuit's affirmance. So Masimo had no "massive superfluidity" argument to dispute.

hearing. Specifically, Masimo presented one RevA device, one RevD device, and three RevE devices. App.11a. According to Apple, none of these prototypes practiced the Poeze patents. Pet.32. Apple asserts that the Federal Circuit still found that Masimo met the technical prong because the prototypes were "representative" of some hypothetical, unproduced device that practiced the patents. *Id.* Apple argues that this was a *Chenery* violation because it was a new rationale not adopted by the agency. Pet.33.

Apple's argument misrepresents the record before the Commission and the Federal Circuit. Apple asserts that "Masimo was unable to identify a single device that practiced every limitation of the two patents at issue," and that "the ALJ did not find that any of them practiced a key patent limitation, namely measuring blood oxygen." Pet.32; *see also* Pet.14. But the ALJ found that the RevD and RevE devices practice the '502 patent and that the RevA, RevD, and RevE devices practice the '648 patent. App.266a-282a. The ALJ further found that Masimo has "shown by a preponderance of the evidence that the RevA, RevD, and RevE devices measure blood oxygen saturation." App.257a; *see also* App.266a; App.278a. The ALJ found Masimo's fact and expert witnesses to be credible, citing testimony from multiple witnesses that the prototypes measure blood oxygen saturation. App.257a-259a.

The Federal Circuit found that substantial evidence supported the finding that Masimo satisfied the technical prong. App.18a-19a. As part of its technical prong analysis, the court explicitly found that substantial evidence supported the ALJ's finding that the RevA,

RevD, and RevE devices measure oxygen saturation. App.19a.

Apple wrongly accuses the Federal Circuit of holding that the five specific prototypes were "representative" of a different patent-practicing product not produced in discovery. Pet.32-33. Never did the panel suggest some other different, unproduced article existed. *See* App.18a (rejecting Apple's assertion that the Commission relied on a "hypothetical" article). Rather, the court held the technical-prong analysis need not be confined to only individual devices produced in discovery, "as opposed to treating such devices as representative embodiments of the broader domestic industry article they are found to reflect." App.15a. As Masimo showed in opposing Apple's rehearing petition, this statement reflects the fact that Masimo made numerous other devices for each prototype version. C.A. Dkt. 130 at 3. The prototypes introduced at the evidentiary hearing were representative of the other devices that Masimo also created of that prototype version (*e.g.*, the RevA device produced in discovery was representative of the numerous RevA devices created by Masimo). *Id.*

With those factual corrections, Apple's *Chenery* argument falls apart. Contrary to Apple's suggestion, the Federal Circuit did not rely on a hidden or hypothetical domestic industry device that Masimo failed to produce. The Federal Circuit did not rely on a non-patent-practicing item as representative of a patent-practicing one. And the Federal Circuit did not create a "new representativeness test" that merits a remand for clarification. Pet.33. Instead, the Federal Circuit upheld the ALJ's finding that the five specific prototypes themselves were "physical

articles practicing the asserted claims, thereby satisfying the technical prong's requirement that a material patent-practicing article exist at the time of the complaint." App.17a-18a.

2. The Federal Circuit and the Commission Analyzed the Circle and Wings Prototypes Identically

Apple's second *Chenery* argument focuses on the economic prong of the domestic-industry requirement. Apple asserts that the Federal Circuit adopted a new rationale when addressing Masimo's expenditures related to the Circle and Wings prototypes. Pet.34-35. But the record says otherwise.

Circle and Wings were two prototype sensors that Masimo developed during the iterative design process App.535a-536a. Masimo never contended that Circle or Wings practiced the Poeze patents. *Id.* Instead, Masimo argued that expenditures related to Circle and Wings should count toward the domestic industry analysis because the work on Circle and Wings led to the development of significant features of the patent-practicing Rev devices. *Id.*

The ALJ agreed with Masimo, finding that "Masimo's investments in the development of Masimo Watch prototypes can be aggregated for the economic prong analysis." App.535a. The ALJ explained that "the evidence indicates that the Masimo Watch prototypes are merely 'iterations' of a product design that was continuously developed in the years leading up to the filing of the [ITC] complaint." *Id.* Even though Masimo

did not assert "that the Circle sensor or the Wings sensor practice claims of the Poeze Patents * * * the record show[ed] that the development of these prototypes led to the development of the RevA, RevD, and RevE prototypes" that Masimo relied on as the domestic-industry articles. App.536a.

The Federal Circuit held that the Commission properly adopted the ALJ's findings and reasoning on this point, holding that "[s]ubstantial evidence, including the development timeline of the devices and witness testimony, supports the ALJ's finding that the Circle and Wings led to the development of significant features of the patent-practicing devices." App.24a. The ALJ's rationale and the Federal Circuit's rationale are the same—the investments tied to Circle and Wings were investments made "with respect to" the patented articles because Masimo iteratively built on the advances in Circle and Wings to arrive at the patent-practicing devices. *Compare* App.22a-25a *with* App.534a-536a.

According to Apple, the Federal Circuit adopted a new argument simply because the court cited its *Motorola* decision to support the Circle and Wings determination and the ALJ did not. Pet.34-35. Specifically, the Federal Circuit cited *Motorola* for the proposition that "investments or employment directed to significant components, specifically tailored for use in an article protected by the patent" can be relied on to satisfy the economic prong. App.23a (quoting *Motorola*, 737 F.3d at 1351). As explained above, the Commission and the Federal Circuit cited the case to reject Apple's symmetry argument it made at oral argument and in its supplemental brief to the Federal Circuit after argument.

Whether the ALJ relied on or even considered *Motorola* is irrelevant; the only question is whether the court adopted a rationale not found in the agency's decision. As described above, the Federal Circuit adopted the identical rationale for counting investments in Circle and Wings that the ALJ and the Commission used. That rationale rests on the finding that the Circle and Wings led to the development of the patent practicing articles, whether as "precursors," "early iterations," "specific components," or as "specifically tailored" devices. The investments were made "with respect to" the patent practicing articles. The court's citation of case law to support and confirm the ALJ's rationale, regardless of the exact phrasing, does not somehow create a new rationale.

Apple now suggests that it had no opportunity to address *Motorola* before the Federal Circuit because the Commission's counsel raised it for the first time at oral argument. Pet.15-16. Apple ignores that it addressed *Motorola* both during oral argument (Oral Arg. Rec. at 38:00-38:33) and months later in the same supplemental brief it references in its petition (Pet.16 (citing C.A. Dkt. 104 at 8-9)).[10] Moreover, during the oral argument, Circuit Judges Stark and Reyna suggested that *Motorola* demonstrates that, contrary to Apple's assertion, there is

10. Apple briefed the *Motorola* issue in its supplemental brief even though the Federal Circuit requested briefing only on an issue concerning its jurisdiction. *Compare* C.A. Dkt. 102 at 2 (requesting briefing on "whether the Commission's institution of a combined modification and enforcement proceeding concerning the Apple Redesign 2 Watch affects this court's review of the Limited Exclusion Order currently on appeal") *with* C.A. Dkt. 104 at 8-9 (arguing domestic industry in view of *Motorola*).

no symmetry between the technical and economic prongs. Oral Arg. Rec. at 38:00-39:40.

E. This Case Does Not Warrant Further Review

Contrary to Apple's assertion (Pet.27-28), this is not a case of exceptional importance. Apple's alleged "pure question of law" raised in the petition is instead a contrived legal argument put forward in attempt to undo a finding that Apple violated Section 337.[11]

Apple also alarmingly claims that this may be "the last meaningful opportunity for this Court" to address the scope of the domestic-industry statute. Pet.29. Apple has no factual basis to make such a drastic claim—it is Apple's pure speculation that the Federal Circuit can, by issuing summary affirmances, somehow insulate its decisions from this Court's review. *Id.* Not only is there no support for such a claim, but this Court does hear cases in situations where the court of appeals issues a summary affirmance. *See, e.g.*, *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 584 U.S. 325, 333 (2018) (noting that "[t]he Federal Circuit summarily affirmed the Board's decision in this case"); *Farmer v. Brennan*,

11. In an attempt to excuse its infringing activity, Apple has long been on a crusade to change the law empowering the Commission. *See* Tripp Mickle, *Apple Keeps Losing Patent Cases. Its Solution: Rewrite the Rules*, New York Times (Mar. 19, 2024), available at https://www.nytimes.com/2024/03/19/technology/apple-patents-lobbying.html. At the Federal Circuit, Apple argued that that the statutory word "article" should be limited to only commercially available or "finished" articles. *See* C.A. Dkt. 63 at 5, 7. Apple shifts its statutory argument here.

511 U.S. 825, 832 (1994) (noting that the court of appeals "summarily affirmed without opinion").

Moreover, a decision by this Court will have a limited impact on Apple. As Apple mentions (Pet.15), the Poeze patents will expire in August 2028. So, any decision by this Court would come roughly one year before Apple is no longer bound by the Commission's exclusion order. And, contrary to what Apple implies in its petition (Pet.15), the Commission's importation ban has *not* prevented Apple from selling products including blood oxygen functionality. As mentioned above, Apple does import a redesigned watch that includes such functionality, having received permission from U.S. Customs to import such a device.[12]

12. Masimo asserts that the redesigned watch also infringes the Poeze patents and is pursuing that claim in the stayed district court action. *See supra* note 2.

IV. CONCLUSION

For the foregoing reasons, Apple's petition for writ of certiorari should be denied.

Respectfully submitted,

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