No. 26-316

In the Supreme Court of the United States

APPLE INC., PETITIONER

v.

INTERNATIONAL TRADE COMMISSION, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

Section 337 of the Tariff Act of 1930, 19 U.S.C. 1337, prohibits the importation of an article that infringes a United States patent, 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); see 19 U.S.C. 1337(a)(1)(B). That domestic-industry requirement can be satisfied, among other ways, by showing that "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). The questions presented are as follows:

1. Whether research-and-development labor is an "employment of labor or capital" "with respect to" the patent-protected articles. 19 U.S.C. 1337(a)(3)(B).

2. Whether the court of appeals upheld the United States International Trade Commission's application of Section 337 on grounds not invoked by the agency, in violation of the principle of administrative law announced in *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87-88, 92-95 (1943).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-38a) is reported at 169 F.4th 1363. The opinion of the International Trade Commission (Pet. App. 39a-182a) is available at 2023 WL 8109999. The final initial determination of the administrative law judge (Pet. App. 183a-574a) is available at 2023 WL 1965994.

JURISDICTION

The judgment of the court of appeals was entered on March 19, 2026. A petition for rehearing was denied on July 21, 2026 (Pet. App. 575a-576a). The petition for a writ of certiorari was filed on September 3, 2026. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 337 of the Tariff Act of 1930, 19 U.S.C. 1337, prohibits unfair practices in the import trade. As relevant here, it forbids the importation into the United States of articles that "infringe a valid and enforceable United States patent." 19 U.S.C. 1337(a)(1)(B)(i).

That ban on importation 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(b)(2). That requirement, known as the domestic-industry requirement, is often broken into two prongs: (1) the technical prong, which requires that the articles be "protected by the patent," and (2) the economic prong, which requires a domestic "industry" relating to the articles. *Ibid.*; see Pet. App. 9a. Section 337 specifies that the economic prong is satisfied if "there is in the United States, with respect to the articles protected by the patent," "(A) significant investment in plant and equipment; (B) significant employment of labor or capital; or (C) substantial investment in [the patent's] exploitation, including engineering, research and development, or licensing." 19 U.S.C. 1337(a)(3).

The United States International Trade Commission (ITC or Commission) conducts investigations and administrative adjudications to enforce Section 337. See 19 U.S.C. 1337(b) and (c). If the Commission finds a violation, it may order that the relevant articles "be excluded from entry into the United States." 19 U.S.C. 1337(d). The Commission's decision is subject to judicial review in the Federal Circuit. See 19 U.S.C. 1337(c).

2. In 2021, respondents Masimo Corp. and Cercacor Laboratories (collectively private respondents) filed a

complaint before the ITC against petitioner Apple. Pet. App. 1a-2a, 5a. Private respondents claimed that petitioner had violated Section 337 because petitioner's importation of certain versions of the Apple Watch, which included a feature that could estimate the wearer's blood oxygenation level, infringed private respondents' patents. *Id.* at 5a.

An administrative law judge (ALJ) ruled that petitioner had violated Section 337. Pet. App. 183a-574a. In analyzing the economic prong of Section 337's domestic-industry requirement, the ALJ found that private respondents' expenditures on the development of various "Masimo Watch prototype[s]" could properly be aggregated "because the prototypes were part of a continuous design and development effort towards a commercial product." *Id.* at 534a; see *id.* at 534a-536a. Based on those expenditures, the ITC affirmed the ALJ's finding that private respondents had "shown the existence of a domestic industry by way of significant employment of labor with respect to [private respondents'] investments in research and development for the Masimo Watch," *id.* at 116a-117a, and it issued an order barring importation of the infringing Apple Watches, *id.* at 39a-182a.

3. The Federal Circuit affirmed. Pet. App. 1a-38a.

The court of appeals first addressed the technical prong of Section 337's domestic-industry requirement. Pet. App. 9a-20a. In analyzing that prong, the ITC had relied on three prototypes—known as RevA, RevD, and RevE—that private respondents had manufactured. *Id.* at 11a. Petitioner contended that the Commission should have restricted its analysis to the "particular physical units [of those prototypes] that happened to be produced in discovery." *Id.* at 15a. The court rejected

that contention, explaining that nothing in the relevant statutory provisions or agency rules suggests that "the technical prong 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." *Ibid.*

The court of appeals then turned to the economic prong. Pet. App. 20a-27a. The ITC had determined that private respondents had satisfied that prong by showing "significant employment of labor or capital" with respect to the patent-protected articles. 19 U.S.C. 1337(a)(3)(B); see Pet. App. 20a-21a. Petitioner argued that the Commission had acted improperly "by crediting [private respondents'] investments in" two articles (the Circle and Wings Sensors) that "do not practice the asserted claims of the [relevant] [p]atents." *Id.* at 21a, 22a. The court of appeals rejected that contention. *Id.* at 21a-27a. The court concluded that "substantial evidence supports the Commission's finding that [private respondents'] investments in the Circle and Wings Sensors were made as part of the same iterative design process [private respondents] undertook as part of [their] development of a single patent-practicing commercial product." *Id.* at 25a. The court determined that, for purposes of Section 337's economic prong, that ITC finding was a sufficient basis for concluding that private respondents' research-and-development expenditures were expenditures "with respect to" a patented article. *Ibid.*

ARGUMENT

Petitioner contends (Pet. 19-36) that the court of appeals (1) misconstrued the economic prong of Section 337's domestic-industry requirement and (2) violated the

principle of administrative law announced in *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87-88, 92-95 (1943), by sustaining the ITC's decision on grounds not adopted by the agency. Neither contention has merit or warrants this Court's review, and this case would be an unsuitable vehicle to consider the first contention. The petition for a writ of certiorari should be denied.

1. Petitioner contends that the court of appeals misconstrued the economic prong of Section 337's domestic-industry requirement. That contention does not warrant this Court's review.

a. Section 337 provides that the domestic-industry requirement's economic prong is satisfied "if there is in the United States, with respect to the articles protected by the patent":

> (A) significant investment in plant and equipment;
>
> (B) significant employment of labor or capital; or
>
> (C) substantial investment in [the patent's] exploitation, including engineering, research and development, or licensing.

19 U.S.C. 1337(a)(3). Relying on subparagraph (B), the ITC found a "significant employment of labor" based on private respondents' employment of "research and development engineers" in the United States. Pet. App. 117a. Petitioner contends (Pet. 21) that "research and development expenditures" are relevant only under subparagraph (C), not under subparagraph (B); but that contention is incorrect.

Subparagraph (B) requires a "significant employment of labor or capital" "with respect to" patent-protected articles. 19 U.S.C. 1337(a)(3). The phrase "with respect to" means "referring to," "concerning," or "regarding." *Montgomery* v. *Caribe Transport II, LLC*, 608 U.S. 219,

226 (2026) (citations omitted). The phrase "generally has a broadening effect, ensuring that the scope of a provision covers not only its subject but also matters relating to that subject." *Mullin* v. *Doe*, 609 U.S. 324, 339 (2026) (citation omitted). The hiring of engineers to conduct pertinent research and to develop an article readily qualifies as the "employment of labor" "with respect to" that article. 19 U.S.C. 1337(a)(3)(B).

Petitioner contends (Pet. 19) that research-and-development costs should be deemed non-cognizable under subparagraph (B) because subparagraph (C) "addresses the issue with greater particularity." Whereas subparagraph (B) requires a "significant employment of labor or capital," subparagraph (C) requires "substantial investment in [the patent's] exploitation," while identifying "research and development" as one example of the activities that might qualify. Petitioner contends (Pet. 4) that private respondents in this case could not have established the economic prong under subparagraph (C) because "that provision carries a demanding nexus standard that would have required [private respondents] to link research and development expenditures to a specific patent claim." But even assuming that is true, it simply highlights the fact that each of the two subparagraphs imposes a requirement—"significant employment of labor or capital" and "substantial investment in [the patent's] exploitation" respectively—that the other does not. And while only subparagraph (C) refers specifically to "research and development," only subparagraph (B) refers specifically to "employment of labor." In determining whether private respondents' expenditures for "research and development engineers" (Pet. App. 117a) can suffice to satisfy the eco-

nomic prong, there is no sound basis for limiting the inquiry to subparagraph (C).

Where, as here, distinct statutory provisions identify multiple ways of satisfying the same requirement, this Court has often read those provisions as "overlap[ping]," rather than as "governing different, mutually exclusive, spheres of conduct." *Lorenzo* v. *SEC*, 587 U.S. 71, 80 (2019). In such cases, "[e]ach succeeding" clause is often "meant to cover additional kinds" of conduct, "not to narrow the reach of prior" clauses. *Ibid.* (citation omitted). Here, subparagraph (C) merely specifies an additional way to satisfy Section 337's domestic-industry requirement. It does not narrow the scope of subparagraph (B), whose ordinary meaning encompasses "significant employment" of research-and-development workers.

That reading of subparagraphs (B) and (C) still leaves each provision with independent work to do. Contra Pet. 19-27 (arguing that the ITC's reading renders the provisions superfluous). For example, a company's hiring of workers to manufacture an article might qualify as a "significant employment of labor," but not as a "substantial investment" in "research and development." 19 U.S.C. 1337(a)(3)(B) and (C). Conversely, a university's investment in basic research might qualify as a "substantial investment" in "research and development," but not as a "significant employment of labor." *Ibid.* Because each provision still covers some activities that the other does not, subparagraph (C) provides no sound basis for adopting an artificially narrow reading of subparagraph (B).

Section 337's history confirms that understanding. Congress enacted subparagraphs (A)-(C) in 1988. See Omnibus Trade and Competitiveness Act of 1988, Pub.

L. No. 100-418, § 1342(a)(1), 102 Stat. 1212-1213. Before then, the ITC had construed the domestic-industry requirement's economic prong to incorporate the tests now codified in subparagraphs (A) and (B), but not the test now codified in subparagraph (C). See Pet. 8-9. The Commission had recognized, however, that research-and-development activities could qualify as a significant employment of labor. See, *e.g.*, *In re Certain Personal Computers and Components Thereof*, No. 337-TA-140, 1984 WL 15659, at *16 (Mar. 9, 1984); *In re Certain Inclined-Field Acceleration Tubes and Components Thereof*, No. 337-TA-67, 0080 WL 594319, at *9 (Dec. 1, 1980). Congress's codification of the Commission's existing tests, and its addition of subparagraph (C), show that Congress meant to expand the ways in which the economic prong could be satisfied, not to narrow the Commission's application of that prong.

Agency practice since 1988 reinforces that reading. Since 1988, the Commission has repeatedly recognized that labor expenditures for "research and development" can qualify as a significant employment of labor under subparagraph (B). *In re Certain Solid State Storage Devices, Stacked Electronics Components, and Products Containing Same*, No. 337-TA-1097, 2018 WL 4300500, at *9 (June 29, 2018); see, *e.g.*, *In re Certain Marine Sonar Imaging Devices, Including Downscan and Sidescan Devices, Products Containing the Same, and Components Thereof*, No. 337-TA-921, 2016 WL 10987364, at *39-*42 (Jan. 6, 2016), aff'd, 696 Fed. Appx. 989 (Fed. Cir. 2017); *In re Certain Ground Fault Circuit Interrupters and Products Containing Same*, No. 337-TA-739, 2012 WL 2394435, at *51-*52 (June 8, 2012), aff'd, 528 Fed. Appx. 993 (Fed. Cir. 2013). Such agency practice is "useful in determining the statute's

meaning." *Loper Bright Enterprises* v. *Raimondo*, 603 U.S. 369, 394 (2024).

When petitioner has previously sought to protect its own patents before the ITC, it has relied on research-and-development labor to satisfy subparagraph (B). See *In re Certain Digital Imaging Devices and Related Software*, No. 337-TA-717, 2011 WL 2742200, at *157 (May 12, 2011) ("Apple asserts that its investments in labor and capital are significant * * * because these R&D-related labor investments are critically important to the domestic industry products."); *In re Certain Mobile Devices and Related Software*, No. 337-TA-750, 2011 WL 11684509, at *1 (Sept. 15, 2011) ("Apple also argues that it has made significant labor investments including * * * employees in the United States dedicated to research and development on the iPhone 4."). But the statute cannot mean one thing when petitioner seeks to protect its own patent and another when it infringes someone else's patent. "[T]he validity of a doctrine does not depend on whose ox it gores." *Wells* v. *Simonds Abrasive Co.*, 345 U.S. 514, 525 (1953) (Jackson, J., dissenting).

b. Petitioner links (Pet. 19) the decision below to the Federal Circuit's decision in *Lashify, Inc.* v. *ITC*, 130 F.4th 948 (2025), but the cases involve different issues. In *Lashify*, the Federal Circuit held, contrary to the ITC's view, that expenditures on "sales and marketing" can satisfy subparagraph (B)'s significant-employment-of-labor test. *Id.* at 956 (citation omitted); see *id.* at 957-964. This case, by contrast, involves expenditures on labor for research and development, not expenditures on sales and marketing.

The ITC's arguments in *Lashify* are consistent with its arguments in this case. Contra Pet. 3. In *Lashify*,

the Commission argued that the ordinary meaning of the term "industry" generally does not cover sales and marketing; that decades of agency practice supported the exclusion of sales and marketing expenditures; and that considering such expenditures would render the domestic-industry requirement meaningless because foreign industries routinely sell and market their products in the United States after importation. See Gov't C.A. Pet. for Reh'g at 6-19, *Lashify*, *supra* (No. 23-1245). None of those arguments suggests that the research-and-development expenditures at issue here should be excluded. In particular, whereas the *Lashify* court's treatment of "sales and marketing" costs reflected a departure from established ITC practice, the Commission has long taken the view that expenditures for labor on research and development may be used to satisfy Section 337's economic prong under subparagraph (B). See pp. 8-9, *supra*.

The ITC's arguments for rehearing en banc in *Lashify* also do not suggest that the petition for certiorari in this case should be granted. Contra Pet. 27-28. The Commission argued that *Lashify* "pose[d] a question of exceptional importance," namely, "whether 'labor or capital' includes *only* labor or capital that establishes an 'industry.'" Gov't C.A. Pet. for Reh'g at 3, 19, *Lashify*, *supra* (No. 23-1245). The Commission expressed the view that the Federal Circuit's resolution of that question, and the resulting treatment of sales and marketing expenditures as satisfying the domestic-industry requirement, had "upend[ed]" Section 337's "careful balance between U.S. industries and importers" and had overturned well-established agency practice. *Id.* at 3; see *id.* at 12-13. The court of appeals' decision in this case, by contrast, is fully consistent with

the understanding that "'labor or capital' includes *only* labor or capital that establishes an 'industry.'" *Id.* at 19. The decision below also does not upend the existing balance between U.S. industries and importers; to the contrary, it is consistent with the Commission's (and petitioner's own) longstanding reading of the statute. See pp. 8-9, *supra*.

c. This case would in any event be a poor vehicle for considering petitioner's statutory contention because petitioner has not properly preserved that contention. Petitioner argued below that in analyzing the economic prong, the ITC had "erred in two respects": "by crediting investments in [certain] non-patent practicing articles" and "by relying on purportedly improper investment accountings." Pet. App. 21a. Petitioner did not argue to the court of appeals that the Commission should have excluded research-and-development expenditures, and the court accordingly did not consider that issue. Nor did petitioner raise that issue before the Commission. *Lashify* does not excuse that failure, since *Lashify* was decided after the close of briefing in this case, see Pet. 16, and (as explained above) concerned a distinct legal issue.

This Court is "a court of review, not of first view." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005). The Court usually does not consider issues that were "not pressed or passed upon" in the court of appeals. *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (citation omitted). Nor does it consider issues that were not properly raised before agencies. See *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952). Nothing about this case warrants a departure from the Court's usual practice of considering a legal issue only after it has been "fully litigated" below. *FDA* v. *R.J.*

Reynolds Vapor Co., 606 U.S. 226, 240 (2025) (citation omitted).

Contrary to petitioner's contention (Pet. 28-29), denying review here would not insulate the court of appeals' interpretation of subparagraph (B) from this Court's review. If, in a future case, the court of appeals concludes under *Lashify* that subparagraph (B) covers sales and marketing expenditures—or if it concludes that subparagraph (B) covers expenditures for research and development—then an aggrieved party could seek certiorari at that time. Even if, as petitioner speculates (Pet. 29), the court affirms an agency order without issuing an opinion, the court's judgment would still be subject to review. See *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956) ("This Court * * * reviews judgments, not statements in opinions.").

2. Petitioner's contention that the court of appeals violated *Chenery* also does not warrant further review. *Chenery* establishes that, in general, a reviewing court may uphold an agency action only on "the grounds upon which the [agency] itself based its action." 318 U.S. at 88. Contrary to petitioner's suggestion (Pet. 31-36), the decision below comports with that principle.

Petitioner argues (Pet. 32) that a complainant must provide the Commission with a "physical" item that practices the patent; that the prototypes provided by private respondents did not practice their patents; and that the court of appeals excused that failure on a ground never adopted by the Commission by treating private respondents' prototypes as "representative" of "some unidentified patent-practicing device." That argument reflects a misreading of both the court of appeals' and the Commission's decisions. The Commission and ALJ found that private respondents' proto-

types *did* practice the asserted patents. See Pet. App. 116a-118a, 205a-255a. And the court concluded that sufficient evidence supported the Commission's finding that the prototypes were "representative embodiments" of the articles that private respondents manufacture. *Id.* at 15a. Neither the court nor the Commission ever suggested that "a device that does not practice an asserted patent could be 'representative' of a device that does." Pet. 32.

Petitioner separately argues (Pet. 33-35) that the court of appeals violated *Chenery* by upholding the ITC's consideration, in analyzing the economic prong, of expenditures on "two items (Wings and Circle) that do not practice the patents." That argument lacks merit. An expenditure counts toward the economic prong if it is "with respect to the articles protected by the patent." 19 U.S.C. 1337(a)(3). Consistent with *Chenery*, the Federal Circuit relied on substantially the same analysis as the ITC in concluding that the "with respect to" requirement was satisfied here.

Though Wings and Circle are not themselves patent-protected, the ALJ found that the expenditures made on researching and developing those sensors were expenditures "with respect to" other articles that *were* patent-protected, because the unpatented articles were developed as part of a continuous process that culminated in the production of patented goods. See Pet. App. 535a (ALJ "finds that [private respondents'] investments in the development of Masimo Watch prototypes," including the Circle and Wings sensors, "can be aggregated for the economic prong analysis" because "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 complaint."). The Commission affirmed the ALJ's economic-prong analysis. See *id.* at 116a-118a. The court of appeals determined that substantial evidence supported the Commission's finding that private respondents' expenditures in developing the unpatented articles "were made as part of the same iterative design process" that ultimately resulted in "a single patent-practicing commercial product." *Id.* at 25a. The court concluded on that basis that private respondents' research-and-development expenditures for the Circle and Wings sensors were investments "with respect to" the later patent-protected article. *Id.* at 24a, 25a; see p. 13, *supra*. The court thus upheld the agency's action on grounds stated by the agency, consistent with *Chenery*.

In other cases, the Federal Circuit, citing *Chenery*, has refused to uphold agency actions on grounds that "the agency itself did not invoke." *Tau-Ken Temir LLP* v. *United States*, 147 F.4th 1363, 1377 (2025); see, *e.g.*, *Lessors of Abchakan Village* v. *Secretary of Defense*, 137 F.4th 1301, 1316 (2025). In this case, the court did not dispute the principle announced in *Chenery*, but simply determined that the ITC *had* invoked the grounds on which it later relied in litigation. Petitioner's fact-bound claim that the court misapplied *Chenery* does not warrant further review, much less summary reversal. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of * * * the misapplication of a properly stated rule of law.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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