

No. 26-1518

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**United States Court of Appeals  
for the Federal Circuit**

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RAI STRATEGIC HOLDINGS, INC., R.J. REYNOLDS VAPOR COMPANY, R.J.  
REYNOLDS TOBACCO COMPANY, RAI SERVICES CO.,

*Appellants*

v.

INTERNATIONAL TRADE COMMISSION,

*Appellee.*

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**Appeal from the United States International Trade Commission  
Investigation in No. 337-TA-1410**

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**APPELLANTS' MOTION FOR SUMMARY REVERSAL**

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**CERTIFICATE OF INTEREST**

**Case Number:** 26-1518

**Short Case Caption:** *RAI Strategic Holdings, Inc. v. ITC*

**Filing Party/Entity:** *RAI Strategic Holdings, Inc., R.J. Reynolds Vapor Company, R.J. Reynolds Tobacco Company, RAI Service Company*

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: March 16, 2026

Signature: /s/ Gregory A. Castanias  
Gregory A. Castanias

1. **Represented Entities:** Provide the full names of all entities represented by undersigned counsel in this case. Fed. Cir. R. 47.4(a)(1).

RAI Strategic Holdings, Inc.  
R.J. Reynolds Vapor Company  
R.J. Reynolds Tobacco Company  
RAI Service Company

2. **Real Party in Interest.** Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. Fed. Cir. R. 47.4(a)(2).

Reynolds Asia-Pacific Limited is the real party in interest for R.J. Reynolds Vapor Co.

3. **Parent Corporations and Stockholders.** Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. Fed. Cir. R. 47.4(a)(3).

Reynolds American Inc. (parent); British American p.l.c. (publicly traded/owns >10% stock in Reynolds American Inc.); RAI Innovations is a directly held subsidiary of Reynolds American Inc. and is the direct parent of R.J. Reynolds Vapor Co.

4. **Legal Representatives.** List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to

appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

**Jones Day:** Stephanie E. Parker, Ryan B. McCrum, John A. Marlott, Nicole M. Smith, Alexis Adian Smith, John M. Michalik, Robert M. Breetz, Maeve P. Dineen, Emily Towers, Jennifer L. Weizenecker, Rachel Kurtz, R. Levent Herguner, Nick J. Bagnolo, Jeffrey S. Messing

**Greenberg Traurig:** Harold Davis

5. **Related Cases.** Other than the originating case(s) for this case, are there related or prior cases that meet the criteria under Fed. Cir. R. 47.5(a)?

No.

6. **Organizational Victims and Bankruptcy Cases.** Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

None/Not Applicable.

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<b>EXHIBIT</b>	<b>DESCRIPTION</b>
A	United States Patent No. 11,925,202
B	Respondents' Post-Hearing Brief (EDIS Doc. ID 850848) (April 25, 2025)
C	Respondents' Prehearing Brief (EDIS Doc. ID 846154) (March 4, 2025)
D	Respondents' Petition for Review of the Initial Determination (EDIS Doc. ID 862753) (September 15, 2025)
E	Respondents' Initial Submission on Certain Issues under Review, and Remedy, Bond, and the Public Interest (EDIS Doc. ID 871143) (January 23, 2026)
F	Final Initial Determination on Violation (EDIS Doc. ID 862302) (August 29, 2025)
G	Response of the Office of Unfair Import Investigations to Respondents' Petition For Review Of The Initial Determination (EDIS Doc. ID 863937) (September 23, 2025)
H	Commission Determination to Review ID (EDIS Doc. ID 868519) (January 9, 2026)
I	Commission Opinion (EDIS Doc. ID 874979) (March 10, 2026)
J	Dr. Dean's Evidentiary Hearing Testimony (EDIS Doc. ID 848384 and EDIS Doc. ID 848624) (April 10-11, 2025)
K	Respondents' Reply Post-Hearing Brief (EDIS Doc. ID 851967) (May 9, 2025)

\* Given the emergency nature of this motion, Reynolds has submitted the public, non-confidential versions of these exhibits. Reynolds can prepare and submit confidential versions of these exhibits should the Court request.

**TABLE OF ABBREVIATIONS**

The following abbreviations are used throughout this motion:

<b>Abbreviation</b>	<b>Term</b>
APA	Administrative Procedure Act (5 U.S.C. §§ 551–559)
DI	Domestic Industry
FID	Final Initial Determination issued by the ALJ (EDIS Doc. ID 862302) (Aug. 29, 2025).
GEO	General Exclusion Order
Hearing	Evidentiary hearing for permanent-relief phase, held April 7-11, 2025
Kim	U.S. Patent Appl. Publ. No. 2006/0016453
Pienemann	International Patent App. Pub. WO 2000/028843
POSA	Person of ordinary skill in the art
Reynolds	Collectively, Complainants-Appellants RAI Strategic Holdings, Inc., R.J. Reynolds Vapor Company, R.J. Reynolds Tobacco Company, RAI Service Company
The 1410 Investigation	<i>Certain Disposable Vaporizer Devices</i> , Inv. No. 337-TA-1410
The '202 Patent	U.S. Patent No. 11,925,202

\*All emphasis added and internal citations omitted unless otherwise indicated.

## LISTING OF THE CLAIMS

The claims at issue are claims 1, 4 and 12 of U.S. Patent No. 11,925,202.

These claims are reproduced below:

Claim 1 [preamble]: An electrically-powered, aerosol-generating smoking article comprising:

1[a]: an outer housing having two ends;

1[b]: a mouthpiece defined at one of the two ends;

1[c]: an electrical power source arranged within the outer housing;

1[d]: an electrical resistance heater positioned within the outer housing, the electrical resistance heater being configured for electrical connection with the electrical power source;

1[e]: a storage compartment defined within the outer housing, the storage compartment being configured for storage of a liquid aerosol-forming material and being arranged such that the liquid aerosol-forming material can be wicked into contact with the electrical resistance heater to volatilize the liquid aerosol-forming material;

1[f]: an air passageway through at least a portion of the outer housing, the air passageway being arranged so that air drawn into the outer housing combines with volatilized liquid aerosol-forming material to produce an aerosol that can be drawn

into the mouth of a user of the electrically-powered, aerosol-generating smoking article through the mouthpiece; and

1[g]: a controller configured to activate current flow through the electrical resistance heater in response to a draw on the electrically-powered, aerosol-generating smoking article.

Claim 4: The electrically-powered, aerosol-generating smoking article of claim **1**, wherein the aerosol that is produced passes at least partially through the storage compartment before exiting through the mouthpiece.

Claim 12: The electrically-powered, aerosol-generating smoking article of claim **1**, wherein the electrical resistance heater is configured to allow airflow therethrough.

## I. INTRODUCTION

Reynolds seeks summary reversal of the International Trade Commission's erroneous Final Determination, in which the Commission overturned the ALJ's determination that Respondents violated Section 337 by infringing Reynolds's '202 Patent.

Expedited, summary relief is necessary because the '202 Patent will expire in seven months (October 18, 2026), well before Reynolds could obtain relief under ordinary procedures. Reynolds diligently enforced its patent in the underlying Investigation—initiating it promptly after patent issuance, and succeeding before the ALJ to stop Respondents' rampant importation of infringing vaping devices. Worse, these vapes are marketed to target America's youth. By flooding the U.S. market with these infringing—and illicit—products, Respondents are undercutting the fairly earned market shares of Reynolds and other responsible companies. Without quick action from this Court, Reynolds will lose its ability to enforce its patent and stop importation of these infringing, illicit products.

Summary reversal is appropriate where (1) there is clear legal error, or (2) time is of the essence. Both considerations are present here.

The Commission's determination to overturn the ALJ's determination—which had been made on a full evidentiary record and supported by findings that Reynolds's expert was more credible than Respondents'—flouted the APA as well

as established precedent. The Commission concocted entirely new invalidity theories never raised by any party—a clear violation of the APA. *Axonics, Inc. v. Medtronic, Inc.*, 75 F.4th 1374 (Fed. Cir. 2023) (vacating PTAB decision adopting a new claim construction and ignoring petitioner’s rebuttal evidence because “a formal adjudication under the APA ... must ‘give all interested parties opportunity for ... the submission and consideration of facts [and] arguments’”); *see also Apple Inc. v. Corephotonics, Ltd.*, 81 F.4th 1353 (Fed. Cir. 2023) (similar). These entirely new theories were ones Respondents—who bore the clear-and-convincing burden to prove invalidity—had forfeited by never making them, never introducing evidence on them, and preventing competing evidence from being introduced. By deciding obviousness based on these theories after the evidentiary record closed, Reynolds was denied fair notice and a full opportunity to be heard.

Worse, the Commission’s new invalidity theories were demonstrably grounded in conclusory expert testimony. That is not “substantial evidence” at all, let alone clear-and-convincing evidence. *TQ Delta, LLC v. CISCO Sys., Inc.*, 942 F.3d 1352, 1359 (Fed. Cir. 2019) (reversing PTAB’s obviousness determination based on expert’s “unsupported” and “high-level” assertions of motivation to combine prior art that lacked “articulated reasoning with some rational underpinning”). And it misapplied *KSR*’s “common sense of a POSA” principle to

boot, viewing it as a license to *sua sponte* make up a new obviousness theory after the evidentiary record had closed.

To avoid further delay and prejudice, Reynolds requests that this Court (a) summarily reverse the Commission’s clearly erroneous ruling of obviousness, (b) rule as a matter of law that Reynolds has satisfied the economic prong of the DI requirement (an issue whose outcome is clear and indisputable on this record, but which the Commission expressly did not reach), and (c) direct the Commission to enter a finding of violation and appropriate remedial orders without further delay.

## **II. FACTUAL BACKGROUND**

### **A. THE ASSERTED PATENT**

The ’202 Patent, entitled “Tobacco-Containing Smoking Article,” is directed toward fundamental vaping technology. Ex. A at 4:46-8:52. The patent issued on March 12, 2024, and claims priority to an application filed on October 18, 2006. *Id.* at 2. It is the great-great-grandchild of U.S. Patent No. 9,901,123 (“the ’123 Patent”), whose validity this Court upheld against multiple, similar validity challenges. *Philip Morris Prods. S.A. v. Int’l Trade Comm’n*, 63 F.4th 1328, 1347 (Fed. Cir. 2023) (affirming Commission’s determination that Respondents failed to prove obviousness); *Philip Morris Prods. S.A. v. RAI Strategic Holdings, Inc.*, No. 2022-1846, 2023 WL 5970786, at \*3 (Fed. Cir. Sept. 14, 2023) (affirming PTAB’s determination that challenger failed to show the ’123 Patent unpatentable).

## **B. THE 1410 INVESTIGATION**

During this Investigation, there were no genuine disputes that Respondents' products infringed the '202 Patent, that Reynolds's \$600+ million in investments for its Vuse<sup>®</sup> products satisfied the DI requirement, and that the public would not be harmed, but would be benefitted, by excluding these illicit, infringing disposable vaping devices from the market. Many Respondents *stipulated* that Reynolds's requested exclusion orders would not have any adverse effect on the public interest, and did not contest Reynolds's request for a GEO. And only one Respondent tried to challenge Reynolds's domestic-industry evidence with a competing opinion.

The dispute focused on Respondents' invalidity arguments. The relevant theory here is that the '202 Patent was allegedly obvious over Kim in view of Pienemann. Significantly, Respondents consistently argued that Kim *expressly discloses* all of the asserted claims' limitations except one: the "controller" in limitation 1[g]. Ex. B at 72. To fill this gap, Respondents asserted that "one of skill in the art would seek to modify Kim's device to use Pienemann's control system." *Id.*; *see also* Ex. C at 89; Ex. J at 802:1-11; Ex. D at 50 ("The only reason Kim does not anticipate the independent claim of the '202 patent is that it was activated by a mouthpiece pressure sensor, instead of a puff detector."); Ex. E at n.2 ("A POSA would have combined Pienemann with Kim to employ the

former's control system.”). Respondents never offered any theory or evidence that limitation 1[e] was satisfied through any sort of obviousness combination—not Kim with Pienemann, and not Kim with the knowledge and “common sense” of a POSA, the latter of which became the Commission's new ground for decision.

**C. THE ALJ'S INITIAL DETERMINATION THAT CLAIMS 4 AND 12 WERE NOT OBVIOUS**

At the evidentiary hearing, Respondents' expert, Dr. Dean, and Reynolds's expert, Mr. Alarcon, provided hours of testimony, after which the parties submitted hundreds of pages of briefing. The ALJ issued her FID on this extensive evidentiary record, finding claims 1, 4, and 12 of the '202 Patent *not obvious* based on Kim in view of Pienemann. Ex. F at 155, 174-176, 181-187. The ALJ based her conclusion on three grounds. *First*, she rejected Respondents' assertion that Kim expressly discloses Limitation 1[e]. *Id.* at 155. Focusing her analysis entirely on Kim's actual disclosures—Respondents' lone theory of prior disclosure—the ALJ concluded that Respondents had not clearly-and-convincingly demonstrated its presence in Kim, which requires a liquid aerosol material that can be wicked into contact with the electrical resistance heater. *Id.* at 164. *Second*, as to claim 4, the ALJ rejected Respondents' expert's interpretation of the claimed “aerosol,” finding it “at odds with the plain language of the claim, and thus fails to meet Respondents' burden of proof.” *Id.* at 176. *Third*, for claim 12, the ALJ found no evidence supporting Respondents' theory that “Kim discloses airflow through a

coil heater in Kim’s chip” and that Respondents’ expert had not performed the analysis necessary to establish obviousness. *Id.* at 187. In so holding, the ALJ made numerous credibility determinations, ultimately finding Mr. Alarcon more credible than Dr. Dean. *E.g.*, Ex. F at 166 (“Dr. Dean’s response to Mr. Alarcon’s contrary opinion ... was cursory, unsupported, and unpersuasive.”).

**D. THE COMMISSION’S REVIEW AND *SUA SPONTE* ADOPTION OF A BRAND NEW OBVIOUSNESS THEORY**

Respondents requested Commission review; specifically, the ALJ’s findings with respect to Kim and Pienemann. Ex. D. In their Petition for Review, Respondents addressed the purported express disclosures in Kim. As to limitation 1[e], they argued that the “laws of physics necessarily result in equalization (wicking) in the Kim chip.” *Id.* at 78. For claim 4, they argued that “air flows through Kim’s central axis, thereby delivering at least some aerosol to the mouthpiece, which is sufficient to disclose claim 4.” *Id.* at 82. And for claim 12, they asserted that “[t]he FID clearly erred in finding that the evidence did not show airflow through Kim’s heating coil.” *Id.* Each of Respondents’ arguments focused on what Kim *discloses*—not Kim in combination with any reference, and not Kim in combination with a POSA’s knowledge or “common sense.”

OUII agreed with the ALJ and argued against Commission review: “The OUII does not believe the FID’s determination that Respondents failed to carry their burden of proof constitutes legal error.” Ex. G at 18. In particular, OUII

emphasized that the FID was well-supported by the record evidence, noting that it “went on to detail the competing expert testimony and other record evidence,” and recognizing that the ALJ had first-hand observations and resolved the issues by “judging the credibility of witnesses.” *Id.* at 17-18.

On January 9, 2026, the Commission determined to review, in part, the ALJ’s FID. Ex. H. It asked the parties to brief two questions relating to the Kim-Pienemann obviousness grounds:

- (1) Explain whether, at the time of the invention, it would have been obvious to a person skilled in the art to use a porous material capable of wicking liquid toward the heater element in view of Kim (U.S. Patent App. Pub. No. 2006/0016453) with Pienemann (International Patent Publication WO 00/28843). Explain whether it would have been obvious to use a porous chip that permits “the aerosol that is produced” (using the FID’s interpretation of that term) to pass at least partially through that chip, as recited in claim 4 of the ’202 patent.
- (2) Explain whether, at the time of the invention, it would have been obvious to a person skilled in the art to design a central channel with a heater coil or other heater element that permits airflow therethrough, as recited in claim 12 of the ’202 patent, in view of Kim with Pienemann.

***Id.* Each of these questions addressed obviousness theories that no party had ever raised before.** Reynolds addressed this forfeiture in its response. *See* Ex. I at 12-13.

On March 10, 2026, the Commission issued a Final Determination of No Violation. Ex. I. It reversed the ALJ’s FID, finding instead that claims 4 and 12, and claim 1 on which they depend, were invalid as obvious. Ex. I at 1. Central to

the Commission's decision was its conclusion that claim 1 is obvious based on Kim's teachings combined with the knowledge of a POSA. The Commission asserted that the "question is not limited to whether 'Kim discloses' wicking" or whether "wicking 'necessarily' occurs in Kim" but whether a "person skilled in the art would have found it obvious to use a wicking material in the porous chip, in view of Kim's teaching ...." *Id.* at 18. It dismissed Reynolds's arguments that Respondents had never argued obviousness of this limitation based on Kim combined with a POSA's knowledge by pointing to three isolated sentences from Respondents' invalidity expert's testimony. *Id.* at 13; Ex. J at 740:10-17, 825:20-826:1, 875:1-9. Each sentence was the expert's unreasoned response to questions asking what conclusion he reached:

- **"I've reached the conclusions that** the claims 1, 4, 9, 11, 12, and 15 of the '202 patent are anticipated or they're obvious with respect to the Takeuchi patent and that they are obvious in view of the combination of the Kim and Pienemann patents." Ex. J at 740:10-17.
- **"The conclusion is that** all the elements of independent claim 1 would be present in the combination of Kim and Pienemann." *Id.* at 825:20-826:1.
- **"The conclusion is that** the claims 1, 4, 9, 11, 12, and 15 of that '202 patent are obvious in view of the combination of Kim and Pienemann." *Id.* at 875:1-9.

On claims 4 and 12, the Commission ignored contrary record evidence and instead found that a POSA *could* design a heater and central channel that allowed airflow through. Ex. I at 22-28. The Commission also, while purporting to adopt

the ALJ's claim construction, dismissed the ALJ's finding that Dr. Dean's arguments were based on an incorrect application of that very claim construction.

Respondents' arguments before the ALJ, and the basis for the Commission's reversal of the FID, were different:

<b>'202 Patent Claim Limitation</b>	<b>Respondents' Argument</b>	<b>Commission's Finding</b>
Claim 1[preamble]	Expressly disclosed by Kim	
Claim 1[a]	Expressly disclosed by Kim	
Claim 1[b]	Expressly disclosed by Kim	
Claim 1[c]	Expressly disclosed by Kim	
Claim 1[d]	Expressly disclosed by Kim	
<b>Claim 1[e]</b>	<b>Expressly disclosed by Kim</b>	<b>Obvious in view of Kim in combination with knowledge of POSA</b>
Claim 1[f]	Expressly disclosed by Kim	
Claim 1[g]	Obvious in view of Pienemann	
<b>Claim 4</b>	<b>Expressly disclosed by Kim</b>	<b>Obvious in view of Kim in combination with knowledge of POSA</b>
<b>Claim 12</b>	<b>Expressly disclosed by Kim</b>	<b>Obvious in view of Kim in combination with knowledge of POSA</b>

Finally, the Commission decided to "take[] no position on whether Reynolds satisfied the economic prong of the domestic industry requirement." *Id.* at 34.

### III. ARGUMENT

#### A. SUMMARY REVERSAL IS WARRANTED WHEN, AS HERE, TIME IS OF THE ESSENCE AND THE COMMISSION'S ERROR IS CLEAR AND BEYOND DISPUTE

Federal Rule of Appellate Procedure 2(a) provides that “a court of appeals may—to expedite its decision or for other good cause—suspend any provision of these rules in a particular case and order proceedings as it directs.” Invoking this authority, this Court often summarily disposes of appeals. *Joshua v. United States*, 17 F.3d 378, 380 (Fed. Cir. 1994) (collecting cases).

There are at least two circumstances where summary reversal is necessary and proper. “The first comprises those cases where time is truly of the essence. This includes situations where important public policy issues are involved or those where rights delayed are rights denied.” *Groendyke Transport, Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969) (cited in *Joshua*, 17 F.3d at 380).

The second is “when the position of one party is so clearly correct as a matter of law that no substantial question regarding the outcome of the appeal exists.” *Joshua*, 17 F.3d at 380; *Barrera v. Gober*, 122 F.3d 1030, 1032 (Fed. Cir. 1997) (summary reversal required when governing law controlled the outcome).

Summary reversal is warranted on both grounds. Reynolds’s patent will expire very soon, and the Commission decision is manifestly erroneous and contrary to law.

**B. WITHOUT SUMMARY REVERSAL, ANY RELIEF REYNOLDS IS ENTITLED TO WILL BE DENIED**

This case presents exactly the situation “where rights delayed are rights denied.” *Groendyke*, 406 F.2d at 1162. Reynolds’s ’202 Patent will expire in *just seven months*, long before an appeal under this Court’s ordinary timeline could take place. Reynolds has been diligently enforcing its patent since its March 2024 issuance. Despite its diligence, Reynolds has suffered significant delay attributable to ALJ-self-granted extensions, and a lengthy government shutdown. Over those 100-plus days of delay, it is estimated that more than 30 million infringing disposable vaping devices were sold in the United States. Now, due to the Commission’s *ultra vires* ruling, it now faces the threat of no vindication at all with patent expiry looming in October 2026. Summary reversal is the only path to a meaningful remedy that can rectify the Commission’s erroneous determination and salvage Reynolds’s property rights.

**C. THE COMMISSION PATENTLY ERRED BY FINDING CLAIMS 1, 4 AND 12 OF THE ’202 PATENT OBVIOUS**

The Commission’s Final Determination directly contradicts numerous of this Court’s well-established legal precedents. Contrary to the APA and the principle of party presentation, it embraced and made outcome-determinative an obviousness theory that no party put forth—or presented evidence on. It ran roughshod over basic principles of forfeiture and waiver, which similarly protect

parties from being blindsided by new arguments. And by justifying its actions by pointing to three conclusory sentences from Respondents' expert's testimony, it violated the well-established rule that conclusory expert testimony is not substantial evidence, and cannot carry a party's burden of proof, especially where that burden is measured by the clear-and-convincing-evidence standard. These patently obvious errors necessitate summary reversal as quickly as possible.

**1. The Commission Relied on Obviousness Arguments That Respondents Forfeited And Waived**

“[T]his court need not engage in an obviousness inquiry when [Respondent] did not assert relevant obviousness arguments at the proper time.” *Kyocera Wireless Corp. v. Int’l Trade Comm’n*, 545 F.3d 1340, 1352 (Fed. Cir. 2008) (refusing to consider obviousness argument not asserted until after the ALJ’s initial determination); *Kinik Co. v. Int’l Trade Comm’n*, 362 F.3d 1359, 1367 (Fed. Cir. 2004) (upholding waiver when arguments not included in prehearing briefs).

Respondents’ obviousness theory was consistent throughout the entire case: Kim *explicitly discloses* nearly every element of claims 1, 4 and 12. Section II.B., *supra*. Respondents’ pre-hearing briefs, expert reports, hearing testimony and post-hearing briefs all made this exact argument—and *only* this argument. No party ever argued that a POSA would modify Kim, using either another reference or “common sense,” to use a wicking material. **Yet this became the Commission’s ground of decision.**

In finding claim 1 obvious, the Commission stated that “[w]icking materials were well-known in the art” and that “‘logic, judgment, and common sense’ would direct a skilled artisan to consider the use of wicking materials in Kim’s porous chip.” Ex. I at 19. Based on these conclusions, unargued by Respondents, unsupported by Respondents’ evidence, and with Reynolds having had no reason or opportunity to meet this nonexistent theory and evidence with competing evidence, the Commission reversed the FID because supposedly “the use of a wicking material required by limitation 1[e] would have been obvious in view of Kim in the context of the prior art and the skilled artisan’s logic and common sense.” *Id.* at 22.

The Commission’s opinion on dependent claims 4 and 12 followed the same impermissible path. Respondents had uniformly argued that Kim’s *existing, unmodified structure* disclosed the airflow as claimed in the ’202 Patent. Ex. D at 80-82; *see also* Ex. B at 86 (arguing for claim 4 that “[t]his additional limitation is disclosed in Kim.”), and 91 (arguing for claim 12 that “Kim therefore discloses the additional limitation of claim 12.”); Ex. K at 38-40. During the hearing, Respondents’ expert repeated this same opinion. Ex. J at 827:2-7, 865:8-12, 871:5-8. Respondents *never* argued that a POSA would have found it obvious to design a central channel with a modified heater configuration.

Again, despite Respondents' failure to advance this theory or provide clear-and-convincing evidence supporting it, the Commission found that a POSA could have designed a heater and central channel that allowed airflow through, and "would have found it obvious to design Kim's device such that it can draw a mixture of vaporized liquid and air down the channel." Ex. I at 23; *see also id.* at 28 ("In this case, forming a heating coil and channel wide enough to permit airflow in claim 12 ... is obvious because it represents a combination of familiar elements that yields predictable results, with no change in their respective functions.") Here, the Commission ignored the ALJ's finding, based on first-hand oversight of the Investigation for over a year, and her express credibility determinations, that "Respondents d[id] not assert an obviousness argument for the added limitation of claim 12." Ex. F at 186 n.105.

The Commission nonetheless said that Dr. Dean's "testimony regarding the various parameters known to persons skilled in the art" was not limited to "Kim's existing structure." Ex. I at 27 n.12. But Dr. Dean gave no testimony about modification. Rather, he described only how Kim's *existing* structures work, not how a POSA could modify Kim by designing a hypothetical new heater having a central channel. Ex. J at 868:7-871:8 (referencing Figure 4 and 5 of Kim and describing how "air flows through the central channel in the Kim porous chip.").

An agency, like the Commission, “must base its decision on arguments that were advanced by a party.” *In re Magnum Oil Tools Int’l, Ltd.*, 829 F.3d 1364, 1381 (Fed. Cir. 2016) (reversing PTAB decision). *Magnum* held, invoking the APA (5 U.S.C. § 554(b)(3)), that an agency (there, the PTAB) may not “adopt arguments on behalf of petitioners that could have been, but were not, raised by the petitioner.” *Id.* The Commission is governed by the same APA (*see* 19 U.S.C. § 1337(c)) and must likewise limit itself to arguments actually “advanced by a party.” The Commission was barred by law from adopting arguments for reversal not raised by any party.

Additionally, the Commission was “not ‘free to overturn an administrative judge’s demeanor based credibility findings merely because it disagrees with those findings.’” *Leatherbury v. Dep’t of the Army*, 524 F.3d 1293, 1304 (Fed. Cir. 2008). “This requirement to defer to the AJ’s credibility findings ‘spring[s] from a fundamental notion of fairness ... [that] great deference must be granted to the trier of fact who has had the opportunity to observe the demeanor of the witnesses, whereas the reviewing body looks only at ‘cold records.’” *Id.*

## **2. By Adopting A New Obviousness Theory, The Commission Deprived Reynolds Of Due Process**

The Due Process Clause, the APA, the principle of party presentation, and this Court’s jurisprudence on forfeiture and waiver all protect parties like Reynolds from being sandbagged as it was here. The Due Process Clause guarantees that no

person shall be deprived of property—and patents are property rights, *see* 35 U.S.C. § 261; *Brown v. Duchesne*, 60 U.S. 183, 197 (1856)—without due process of law. The APA imposes independent due-process constraints on agencies like the Commission—requiring that agency action be based *on the record* compiled during the proceeding, and that parties be given fair notice and opportunity to address the issues the agency will decide. 5 U.S.C. § 554; *Belden Inc. v. Berk-Tek LLC*, 805 F.3d 1064, 1080-81 (Fed. Cir. 2015).

“[I]nvestigations under Section 337 require adequate notice, cross-examination, presentation of evidence, objection, motion, argument, and all other rights essential to a fair hearing.” *Suprema, Inc. v. Int’l Trade Comm’n*, 796 F.3d 1338, 1346 (Fed. Cir. 2015); *see also* 19 C.F.R. § 210.36(d). Consequently, “‘an agency may not change theories in midstream without giving respondents reasonable notice of the change’ and ‘the opportunity to present argument under the new theory.’” *SAS Inst., Inc. v. ComplementSoft, LLC.*, 825 F.3d 1341, 1351 (Fed. Cir. 2016), *rev’d and remanded sub nom. SAS Inst., Inc. v. Iancu*, 584 U.S. 357 (2018).

In adopting entirely new theories of obviousness after the record closed and the ALJ had issued her FID, the Commission changed theories not midstream, but at the finish line, affording Reynolds no meaningful opportunity to respond. Because Respondents never raised these theories, Reynolds had *no opportunity* to:

(1) seek any discovery on this theory from fact witnesses or expert witnesses; (2) cross-examine Respondents' expert, Dr. Dean; (3) put forward any of its own expert testimony; or (4) respond to this new theory in its post-hearing briefing.

This is exactly the administrative-law error that led to reversals in *Apple*, 81 F.4th at 1353 and *Axonics*, 75 F.4th at 1374, among others. In *Apple*, the PTAB based its decision on “typographical error” that was “never identified by the parties as a dispositive issue,” and additional “inconsistencies” that were never mentioned by the parties. *Apple*, 81 F.4th at 1357, 1361. This Court reversed.

Similarly, in *Axonics*, this Court vacated a PTAB decision because it injected a new claim construction post-institution. This Court explained that “a formal adjudication under the APA ... must ‘give all interested parties opportunity for ... the submission and consideration of facts [and] arguments’” and also “permit parties ‘to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.’” *Id.* at 1381. This Court also confirmed that the APA forbids agency sandbagging: “We are reluctant to adopt a construction of the APA and the Board’s rules that would permit such gamesmanship.” 75 F.4th at 1384.

The Commission’s request for briefing on certain questions related to the Kim reference in view of Pienemann (Ex. H at 4) did not put Reynolds on notice that the Commission would adopt entirely new invalidity theories unraised by the

parties and unventilated during the evidentiary portion of the case. Nor did it give Reynolds opportunity to present evidence on those heretofore unraised theories. It was not sufficient to satisfy the necessary “rights essential to a fair hearing.”

*Suprema*, 796 F.3d at 1346.

Raising such questions after the Respondents had presented their obviousness theories, after evidence was closed, and when the Investigation was all but completed, was anything *but* fair. Like in *Apple*, the Commission constructed entirely new obviousness theories for limitations Respondents only ever argued were expressly disclosed by Kim. Further, because of this improper procedure, and the lack of party presentation, the Commission’s new obviousness theory has no testimonial or other evidentiary support in the record—no evidence of modifications to Kim, reasonable expectation of success in making those modifications, or any motivation for a POSA to do so. And the Commission never even determined that the record contained clear-and-convincing evidence of obviousness. By so departing from regular order, the Commission overlooked those issues, and thereby excused Respondents of their burden to prove obviousness by clear-and-convincing evidence.

Finally, like in *Axonics*, 75 F.4th at 1384, Reynolds had no opportunity to develop the record in light of the Commission’s new theories—through fact or expert discovery, or by cross-examining Respondents’ expert. The Commission’s

sandbagging is at least as bad as the PTAB “gamesmanship” that led to reversal in *Axonics*.

The Commission’s process here demonstrably violated Reynolds’s due-process rights. It is reversible error.

**3. The Commission Decision Impermissibly Relies On Conclusory Expert Testimony And Unsubstantiated Agency Speculation About “Common Sense”**

The Commission’s obviousness determination cannot be sustained on its merits, either. “[A] defendant seeking to overcome this presumption [of validity] must persuade the factfinder of its invalidity defense by clear and convincing evidence.” *Microsoft Corp. v. i4i Ltd. P’ship*, 564 U.S. 91, 97 (2011). And: “[c]onclusory expert testimony does not qualify as substantial evidence.” *TQ Delta*, 942 F.3d at 1358. Expert testimony must provide specific factual support explaining how prior-art references would be combined and why a POSA would be motivated to make such combinations. *ActiveVideo Networks, Inc. v. Verizon Commc’ns, Inc.*, 694 F.3d 1312 (Fed. Cir. 2012) (“[T]he expert’s testimony on obviousness was essentially a conclusory statement that a person of ordinary skill in the art would have known, based on the ‘modular’ nature of the claimed components, how to combine any of a number of references to achieve the claimed inventions. This is not sufficient and is fraught with hindsight bias.”).

In concluding that the Respondents “did not waive obviousness” and that their arguments were not solely tethered to what Kim discloses, the Commission cited three single-sentence conclusions from Respondents’ expert. Ex. I at 13. As noted above, the expert testified that he “reached the conclusions” that “claims 1, 4, 9, 11, 12, and 15 of the ’202 patent are anticipated or they’re obvious with respect to the Takeuchi patent and that they are obvious in view of the combination of the Kim and Pienemann patents.” Ex. J at 740:10-17. His other two single-sentence conclusions are essentially the same. *Id.* at 825:20-826:1, 875:1-9. No elaborations, no explanations, nothing but bare unreasoned conclusions—the epitome of conclusory evidence. The 24 lines of testimony highlighted by the Commission, across hundreds of pages of transcript, are not substantial evidence of obviousness. Nor could generic testimony that claims are “obvious in view of the combination of Kim and Pienemann” rise to level of *clear-and-convincing* evidence.

In *TQ Delta*, the Court reversed a PTAB obviousness determination because the patent challenger’s expert offered only “unsupported” and “high-level” assertions that a POSA would have been motivated to combine the prior art, without tying that conclusion to any actual evidence in the record. 942 F.3d at 1362. The Court held that obviousness rejections require “some articulated reasoning with some rational underpinning,” and that this requirement is “rooted in

the Administrative Procedure Act, which ensures due process and non-arbitrary decisionmaking, as it is in § 103.” *Id.* at 1359. Dr. Dean’s bare conclusions, unsupported by any limitation-specific analysis, are even more conclusory than the “unsupported” and “high-level” assertions held inadequate in *TQ Delta*. This record contains no “articulated reasoning with some rational underpinning”—the APA’s minimum requirements—that a POSA would modify Kim in the way the Commission determined. This, too, is reversible error.

Nor can the Commission’s reliance on “common sense” obviousness arguments—arguments never presented by Respondents—save it from reversible error. *See* Ex. I at 19 (“‘logic, judgment, and common sense’ would direct a skilled artisan to consider the use of wicking materials in Kim’s porous chip”). This Court has been particularly vigilant in policing such over-aggressive use of “common sense” obviousness arguments. In *Arendi S.A.R.L. v. Apple Inc.*, this Court held that “references to ‘common sense’—whether to supply a motivation to combine or a missing limitation—**cannot be used as a wholesale substitute for reasoned analysis and evidentiary support**, especially when dealing with a limitation missing from the prior art references specified.” 832 F.3d 1355 (Fed. Cir. 2016). That is exactly what the Commission did here. That overstepping, too, was reversible error.

**D. REYNOLDS HAS CLEARLY ESTABLISHED DOMESTIC INDUSTRY AND NO FURTHER REVIEW IS REQUIRED**

In finding no violation because claims 1, 4 and 12 were obvious, the Commission “t[ook] no position on whether Reynolds satisfied the economic prong of the domestic industry requirement.” Ex. I at 34. Should this Court agree the Commission clearly erred in finding the ’202 Patent invalid for obviousness, the Court should not allow a remand to let this case languish until patent expiration.

Reynolds made \$600+ million in domestic investments in its Vuse<sup>®</sup> products, the ALJ made thorough and uncontested findings on economic DI—and most Respondents did not even challenge this conclusion. Reynolds presented comprehensive evidence establishing this vast domestic-industry investment. The parties all had a full opportunity to present evidence and argument on the issue. The ALJ conducted a thorough evidentiary analysis, including supplementing the record in light of this Court’s March 2025 *Lashify* decision. Ultimately, the ALJ concluded that Reynolds had satisfied economic DI, even in the undisputed relevant timeframe of March 12, 2024, to June 11, 2024. Ex. F at 96-120.

No Respondent requested the Commission to review the domestic-industry determination. Respondents thus waived any challenge to it. 19 C.F.R. § 210.43(b).

Remand is inappropriate when the record permits only one resolution of a factual issue. Where, as here, the factual record is complete, the ultimate finding is uncontested, and any challenges have been waived, this Court may properly direct entry of judgment without remand. *Richardson v. Suzuki Motor Co.*, 868 F.2d 1226, 1240 (Fed. Cir. 1989) (explaining remand is unnecessary when “the record permits only one resolution of the factual issue”) (citing *Pullman-Standard v. Swint*, 456 U.S. 273, 291-292 (1982)).

The agency context does not change that analysis. Domestic industry is governed by statute. It is not “a determination of policy or judgment which the agency alone is authorized to make,” *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943); the parties had all fair notice and opportunity to respond in the hearing; no party sought Commission review on DI; and the answer is clear as a matter of law. Thus, “[i]t would be wasteful to send’ the case back to the agency for a determination.” *In re Comiskey*, 554 F.3d 967, 975 (Fed. Cir. 2009). That is especially crucial here, where remand proceedings on the DI requirement would further waste Reynolds’s diminishing property rights.

#### **IV. CONCLUSION**

The Court should summarily reverse the Commission's Final Determination.

Dated: March 16, 2026

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the undersigned hereby certifies that this motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2).

1. Exclusive of the exempted portions of the motion, as provided in Federal Rule of Appellate Procedure 27(a)(2)(B), the motion contains 5,197 words.
2. The motion has been prepared in proportionally spaced typeface using Microsoft Word 2016 in 14 point Times New Roman font. As permitted by Federal Rule of Appellate Procedure 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

Dated: March 16, 2026

/s/ Gregory A. Castanias  
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**CERTIFICATE OF SERVICE**

I hereby certify that on March 16, 2026, I caused the foregoing MOTION FOR SUMMARY REVERSAL to be electronically filed via CM/ECF with the U.S. Court of Appeals for the Federal Circuit, which electronically served the brief on all counsel of record.

In addition, I certify that courtesy copies of the foregoing were served by email as follows:

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