No. 22-246

In The
Supreme Court of the United States

CENTRIPETAL NETWORKS, INC.,

Petitioner,

v.

CISCO SYSTEMS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF OF *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

The district judge discovered after a 22-day bench trial and after he had adopted his view of the case, that his spouse owned 100 shares of the defendant's stock, whom the judged planned to rule against. The stock was worth merely $4,687.99 in total, while the amount at stake in the case was nearly 1 million times as large.

The judge recognized that he could sell the stock but that such an action taken on the eve of issuing a large judgment adverse to the same company could itself create an appearance of impropriety. So the judge divested the stock by placing it into a blind trust. He then entered judgment for the plaintiff.

The Federal Circuit vacated that judgment by holding that use of a blind trust is not "divest[ment]" under 28 U.S.C. § 455(f). The court also held that the district judge's use of a blind trust was not harmless error.

The question presented is:

Whether placing stock in a blind trust satisfies §455(f) and, if not, whether placing a small amount of stock in a blind trust, in lieu of selling it outright, constitutes harmless error under *Liljeberg v. Health Services Acquisition Corp*., 486 U.S. 847 (1988).

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INTERESTS OF *AMICUS CURIAE*[1]

Amicus Curiae Eagle Forum Education & Legal Defense Fund ("Eagle Forum ELDF") was founded in 1981 by Phyllis Schlafly, who vocally defended traditional patent rights as at issue in the trial below. Eagle Forum ELDF advocates that the bedrock of our Nation's prosperity is our traditional American patent system. In addition to publishing materials on this topic, Eagle Forum ELDF has filed multiple *amicus*

[1] *Amicus* provided the requisite ten days' prior written notice to all the parties, who have all given their written consent for *Amicus* to file this brief. Pursuant to Rule 37.6, counsel for *amicus curiae* authored this brief in whole, no counsel for a party authored this brief in whole or in part, and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to the preparation or submission of this brief.

curiae briefs in this Court and elsewhere on the side of small inventors for more than a decade, including in *Bilski v. Kappos*, 561 U.S. 593 (2010).

Amicus therefore has strong interests in this Petition for a Writ of Certiorari.

SUMMARY OF ARGUMENT

The Federal Circuit wrongly precluded federal judges from using blind trusts to avoid a wasteful recusal after a lengthy trial. Blind trusts have long been encouraged to satisfy conflict-of-interest issues by other public officials, including presidents, because the beneficiaries of such trusts become unaware of how the property is invested. It was a legal error of national significance for the Federal Circuit to rewrite 28 U.S.C. § 455(f) to preclude use of blind trusts to resolve the issue of stock ownership by a spouse in a party. Blind trusts are increasingly accepted, and also an essential tool for families of judges to protect against politically motivated retaliation against their assets.

Surprisingly, this Court has never before addressed the valuable safeguard provided by a blind trust. This case is the perfect vehicle to do so. This Court should recognize here that the use of a blind trust fits comfortably within the framework of the congressional statute promoting judicial ethics, 28 U.S.C. § 455, and is an acceptable alternative to a forced sale of stock that itself would create an appearance of impartiality.

Unless corrected by this Court, the Federal Circuit mistake will hamstring federal judges nationwide who confront similar dilemmas, or who seek to use blind trusts for protection. By interpreting the statutory

term "interest" too broadly, and its related term "divests" too narrowly, the Federal Circuit has set an impractical precedent against proper use of blind trusts by family members of judges. Under the ruling below, no spouse of a federal judge can protect her assets with a blind trust.

This recurring problem of spousal ownership in stock of a party caused an issue at this Court in 2015 when Justice Stephen Breyer, after oral argument, was alerted by a *Bloomberg* reporter to ownership of stock by his wife in an energy company having a stake in the case before the court. Justice Sam Alito had recused himself from that same case, perhaps for a similar reason. "For court watchers …, the Breyer and Alito situations reveal the lack of uniformity on how the court deals with recusals."[2] An observer then lamented how relatively small stock ownership by a spouse has disrupted adjudication, potentially causing a 4-4 deadlock on this Court.

The Petition presents an excellent opportunity to embrace the use of blind trusts as an efficient, lawful option for federal judges to address potential conflicts of interest relating to stock ownership in parties before a federal court. Blind trusts can also protect judicial families against unfair financial retaliation. Federal judges should be able to use this option rather than force their spouses to sell small amounts of stock in a party on the eve of rendering a decision, which would create a worse appearance of impropriety. This Court should reverse the Charles Dickens-like ruling by the

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[2] Cristian Farias, "Justice Breyer Won't Sit Out Big Energy Case Where He Had Conflict Of Interest," *HuffPost* (Oct. 17, 2015) https://www.huffpost.com/entry/stephen-breyer-conflict-of-interest_n_562134eee4b08589ef472dd8 (viewed Oct. 2, 2022).

Federal Circuit that overturned a billion-dollar verdict after a multi-million-dollar legal effort, based on the mere technicality of minuscule stock ownership by the trial judge's wife.

ARGUMENT

The ruling below against the use of blind trusts is unsupported by the federal statute or any equitable argument. The use of blind trusts by judges is to be encouraged, not prohibited by a wooden misinterpretation of the statute. The Petition presents a recurring problem within the federal judiciary and this case provides an ideal opportunity for resolving it.

I. The Federal Circuit Decision Has an Unjustified Effect of Banning the Use of Blind Trusts by Spouses of Federal Judges.

The Federal Circuit held that a federal judge does not properly divest of his interest in his wife's stocks by placing them in a blind trust, and the impact of this is to ban the use of blind trusts by spouses of federal judges. This unnecessarily causes havoc and potentially strife in families where a spouse prefers to use a blind trust for some or all of his or her assets. Indeed, in this era of politically motivated retaliation against families based on controversial performance of a spouse's official duties, blind trusts also offer an excellent way to protect against financial retaliation.[3]

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[3] *See, e.g.*, James Taylor, "*Kelo* Decision Motivates Plan for 'Lost Liberty Hotel,'" *The Heartland Institute* (Aug. 1, 2005) (describing a proposal to invoke *eminent domain* for a private purpose against a Supreme Court Justice's home after a controversial decision upholding that type of a taking).

Blind trusts are universally accepted today as an efficient, effective way of eliminating conflicts-of-interest by public officials. Many states have legal authority encouraging the use of some kind of blind trust, as cataloged online by the National Conference of State Legislatures.[4] It seems inevitable that a federal judge somewhere will have a spouse who works as a public official in a state that encourages, and perhaps one day even requires, use of a blind trust. Yet the Federal Circuit decision has the effect of prohibiting that, thereby requiring that either the federal judge or his spouse to quit their job over this misinterpretation by the Federal Circuit of Section 455 to ban blind trusts.

The controlling provision of 28 U.S.C. § 455(f) requires that a judge, after an unexpected discovery of stock ownership by a family member late in the adjudication of a case, "divests himself or herself of the interest that provides the grounds for the disqualification." The proper interpretation of this would be to require the divesting of all *cognizable* interests in stock of a party, where cognizable interests consist of which the judge has knowledge or control. When stock is in a blind trust, the beneficiary has neither knowledge nor control of the holdings. It is not a *cognizable* interest within the meaning of Section 455(f), and thus use of a blind trust should suffice.

Legislative history from 1976 suggests that a judge himself cannot use a blind trust and still comply with a related provision, 28 U.S.C. § 455(c). "The House

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https://www.heartland.org/news-opinion/news/kelo-decision-motivates-plan-for-lost-liberty-hotel (viewed Oct. 3, 2022).

[4] https://www.ncsl.org/research/ethics/blind-trusts.aspx (viewed Oct. 2, 2022).

Judiciary Committee Report on this legislation noted that this duty 'precludes use of a so-called blind trust.'" James M. Anderson, Eric Helland, & Merritt McAlister, "Measuring How Stock Ownership Affects Which Judges and Justices Hear Cases," 103 *Geo. L.J.* 1163, 1209 (2015) (quoting H.R. Rep. No. 93-1453, at 6-7 (1974)). That legislative history is not expressed in the statute itself, and apparently neither the full Senate nor the President endorsed it. Nor was it embraced by the subsequent amendment that added Section 455(f), which enables a judge to take action to cure a belated discovery of stock ownership by his wife, as the trial judge properly cured here.

II. The Federal Circuit Misconstrued Section 455(f) in a Manner that Encroached on Separation of Powers.

The federal judiciary is a separate branch of government that should, for the most part, police itself so that it remains efficient and fair to litigants. Congressional authority should be limited in encroaching upon the internal workings of the judiciary, particularly in this case concerning a minuscule potential conflict-of-interest by a judge's wife.

"[T]he Constitution prohibits one branch from encroaching on the central prerogatives of another." *Miller v. French*, 530 U.S. 327, 341-42 (2000) (citing *Loving v. United States*, 517 U.S. 748, 757 (1996); *Buckley v. Valeo*, 424 U.S. 1, 121-122 (1976) (per curiam, citations omitted)). "[W]e should not construe a statute to displace courts' traditional equitable authority absent the "clearest command," *Califano* v. *Yamasaki,* 442 U.S. 682, 705

(1979), or an "inescapable inference." *Porter* v. *Warner Holding Co.,* 328 U.S. 395, 398 (1946).

Novelist Charles Dickens would have had a field day here: reversal of a multi-billion-dollar judgment and the waste of many millions of dollars in legal fees because of the discovery of less than $5,000 in stock owned by the judge's wife, acquired on the advice of her stock-broker, which the judge had promptly disposed of in a blind trust to satisfy any possible conflicts of interest. *Centripetal Networks, Inc. v. Cisco Sys., Inc.*, 38 F.4th 1025, 1028 (Fed. Cir. 2022). In his famous novel *Bleak House*, Dickens wrote against what was his perception of English law:

> The one great principle of the English law is to make business for itself. There is no other principle distinctly, certainly, and consistently maintained through all its narrow turnings. Viewed by this light it becomes a coherent scheme and not the monstrous maze the laity are apt to think it.

Charles Dickens, *Bleak House*, Ch. XXXIX, Attorney and Client (1853).[5] *See also Hughes Tool Co. v. TWA*, 409 U.S. 363, 393 (1973) (Burger, C.J., dissenting) ("To describe this litigation as a 20th-century sequel to Bleak House is only a slight exaggeration.").

Federal courts know best how to conduct proceedings fairly and with minimal bias, compared with staffers to a congressional committee in the House of Representatives. Federal courts are in a far better position to ensure that the proverbial trains run on time in the federal judiciary. No one doubts that Congress has enormous authority over the courts, but

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[5] https://www.gutenberg.org/files/1023/1023-h/1023-h.htm (viewed Oct. 2, 2022).

there are limits on that authority if separation of powers doctrine is to have any continuing vitality.

This Court itself, in a memorandum signed by Chief Justice Rehnquist and six additional justices three decades ago, set forth its own recusal policy and emphasized that "[e]ven one unnecessary recusal impairs the functioning of the Court."[6] The requirement of a one-size-fits-all recusal rule, as promulgated by the Federal Circuit based on its questionable reading of a statute that does not speak directly to this issue, is too much interference with the authority of trial judges to decide for themselves how best to handle their own potential conflicts.

This holding by the Federal Circuit against a spouse of a federal judge having stock in a blind trust is not something Congress mandated, or even has the authority to mandate. Just as individual justices of the Supreme Court have long been their own sole authority on the issue of recusal for themselves, the presiding trial judge should ordinarily decide whether use of a blind trust for a small amount of stock owned by his wife satisfies conflict-of-interest issues.

III. This Recurring Issue in the Federal Judiciary Has National Importance Justifying Granting this Petition.

Family members of federal judges have a right to own stock in publicly traded companies, and to enjoy the benefits of such stock ownership. It is neither fair nor justified to compel a rushed sale of such stock by a

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[6] Statement of Recusal Policy by the Supreme Court of the United States 1 (Nov. 1, 1993) https://eppc.org/docLib/20110106_RecusalPolicy23.pdf (viewed Oct. 2, 2022).

family member merely because a judge, whose impartiality cannot seriously be doubted, is presiding over a case concerning such a publicly traded company. Nor is it proper to prohibit a family member of a federal judge from ever using a blind trust.

Before more judges feel like they are required to bail out of cases post-trial (or post-oral argument at the Supreme Court) because of a belated discovery of a small ownership of stock by a spouse or minor child, this Court should grant certiorari and clarify that the trial judge's approach below was lawful, ethical, and eminently reasonable.

CONCLUSION

For the foregoing reasons and those stated in the Petition, this Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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