No. 22-246

In The Supreme Court of the United States

CENTRIPETAL NETWORKS, INC.,

Petitioner,

v.

CISCO SYSTEMS, INC.,

Respondent.

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

BRIEF AMICUS CURIAE ON BEHALF OF FAIR INVENTING FUND IN SUPPORT OF PETITIONER

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AMICUS CURIAE'S STATEMENT OF THE QUESTION PRESENTED

Whether the Federal Circuit's inconsistently-applied intolerance for the appearance of "judicial bias," in conflict with rulings of other circuits, undermines public confidence in that appellate court's decision making, evidences a two-class system, upends the *Liljeberg* harmless error analysis, and merits this Court's review.

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AMICUS CURIAE'S STATEMENT OF INTEREST

Amicus Fair Inventing Fund[1] was established in 2020 to advocate for the rights of people who invent but who are not equally and/or equitably represented in the patent ecosystem. Creating, commercializing, and patenting new technology is capital-intensive. That poses barriers for those without access to capital—disproportionately women, people of color, veterans, and people from socioeconomically disadvantaged areas—discouraging them from engaging in the patent ecosystem.

Petitioner is one of Amicus's constituents. Centripetal's COO Jonathan Rogers testified before the House of Representatives in June 2022 at a hearing explicitly focused on the impact of certain aspects of the patent system on small businesses: "The Patent Trial and Appeal Board After 10 Years: Impact on Innovation and Small Businesses." Mr. Rogers testified that he is a co-founder of Centripetal along with his father, and are each veterans who devoted their cryptography skills to protecting our nation. https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=4967 (testimony at 33:55-34.26) (last viewed Oct. 12, 2022). Mr. Rogers explained that Centripetal has

[1] Under this Supreme Court Rule 37.6, Amicus affirms that no counsel for any party authored this brief in whole or in part, and that no person other than Amicus, its members, and its counsel made a monetary contribution to its preparation or submission. Under Supreme Court Rule 37.2(a), the parties received timely notice and have consented to the filing of this brief. Under Supreme Court Rule 33.1, Amicus affirms that the instant brief does not exceed 6,000 words.

invested $200M in R&D, has 50 patents, and has 100 employees. (*Id.* at 34:50-35:15). When Centripetal files for patents, it properly claims entitlement to "small entity" status to obtain discounted government patenting fees.

Congress, on a bipartisan and bicameral basis, has recognized in the context of a user fee setting authority bill, the need to "promote the participation of women, minorities, and veterans in entrepreneurship activities and the patent system." SUCCESS Act, Pub. L. 115-273, 132 Stat. 4158 (2018). The United States Patent and Trademark Office ("USPTO") runs only on user fees, not taxpayer dollars. Both President Biden and former President Trump have embraced the SUCCESS Act, with President Trump having created a commission on diversity, equity and inclusion in the patent system and President Biden having continued and expanded it.

This appeal squarely implicates these interests. The innovative startup Petitioner asserting the patents-in-suit is a small company co-founded by veterans. The ruling under review sends a discouraging signal to all small innovative startups: if you win at the trial court, the appellate court will use arbitrary non-merits reasons outside of your control to take away your victory. Meanwhile, in the larger context of *all* judicial bias rulings from the Federal Circuit, the message to small innovators is discouragement. Such rulings risk imposing a burden on inventors that will fall inequitably on women, minority and veteran

inventors, and those from socioeconomically disadvantaged areas.

SUMMARY OF THE ARGUMENT

Amicus agrees with Petitioner that "the decision below [will] chill the enforcement of valid patents by small inventors," enhance the power of "entrenched incumbents" in a marketplace to impose "devastating burden[s] for innovative startups," and lead individual and startup innovators to "conclude that the deck is stacked." (Pet. 33). As Congress has recognized, burdens such as these rest disproportionately on the shoulders of previously underrepresented innovator groups. Data show that women, minorities and veterans continue to show only anemic progress in realizing the economic benefits of the patent system, such as access to capital to form new enterprises. Confidence degrades, and incentives to enter the patent system diminish, when an appeals court takes away an aggrieved small innovator's courtroom success for seemingly arbitrary reasons. If the deck is stacked against a Petitioner whose evidence led to the largest patent damages judgment in our nation's history (Pet. 33), it is even more so against previously underrepresented innovators.

ARGUMENT

"[A]n unbiased tribunal is a necessary element in every case where a hearing is required. . . ." Henry J. Friendly, "Some Kind of Hearing," 123 U. PENN. L. REV. 1267, 1279 (1975). Amicus submits that the Federal Circuit has deepened an invidious, apparent bias with the decision under review, not cured one. The present case calls for Supreme Court intervention to ensure that Federal Circuit "bias" decisions themselves demonstrate lack of bias—what Judge Friendly labeled a "necessary element" for the cause of due process in a just civil society.

Granting the Petition in this case will correct preposterous notions that late-discovered stock ownership by a federal judge's wife, transferred to a blind trust, might diminish public confidence in the courts. All agree that such judge harbored no actual bias, and he ruled against the interests of his wife's company shares. Reversal of the Federal Circuit decision will breathe meaning into 28 U.S.C. § 455(f) (the recusal-exception statute). This Court's grant of the Petition will preserve and even restore confidence in our judicial institutions. Lifting of any barrier to small innovators making use of the patent system helps previously underrepresented groups to an even greater degree.

Granting the Petition will also allow the Court to examine an apparent anti-innovator tilt in Federal Circuit decision making. The Federal Court strains to find vacatur-worthy "bias" where there is none, when vacatur favors a technology incumbent. The same

court does nothing when shown proven actual financial bias by agency judges, when that judicial bias incentivizes patent rights degradation. This case is one of a series of outliers by the Federal Circuit on judicial bias. Several Federal Circuit judicial bias rulings have come down recently whose only consistent thread is that they disfavor the small innovator.[2] Judicial bias decisions should not be used as a one-way ratchet against small patentees. The Court should grant the Petition, in service of the sanctity of property rights, economic mobility, access to justice, and confidence in the courts.

I. The Year-End Report Underscores How This Case's Facts Did Not Generate Concerns that Would Warrant Recusal, Much Less Vacatur

The Federal Circuit vacatur here overcorrects against perceptions of judicial bias, even as the rest of its jurisprudence undercorrects against actual judicial bias when pointed out by patentees. To be sure, judicial bias is in the news. The public has an interest in fair proceedings in both federal and agency courts. But that

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[2] *See Centripetal Networks, Inc. v. Cisco Sys., Inc.*, 38 F.4th 1025 (Fed. Cir. 2022) (the instant case, finding trial judge apparent bias meriting vacatur); *In re B.E. Tech.*, No. 2022-114, 2022 U.S. App. LEXIS 3809 (Fed. Cir. Feb. 11, 2022) (denying mandamus petition against PTAB institution of IPR trial that showed structural due process financial bias based on patent judge payroll bonus incentives); *Mobility Workx, LLC v. Unified Patents, LLC*, 15 F.4th 1146 (Fed. Cir. 2021) (denying due process challenge against PTAB structure based on details of how it is a fee-generating business unit of the USPTO).

is little reason to jettison balance and accumulated wisdom when applying recusal law. This brief will contrast the Federal Circuit's anything-goes/nothing-to-see-here approach when *agency* proceedings are infected with *actual financial* bias against patentees, with the zero-tolerance result of the present case which involved *no* evidence of actual bias (*i.e.*, the two-class system). In this larger context, the appellate court discourages small innovators from meaningfully pursuing and exercising patent rights.

In his 2021 year-end report, Chief Justice Roberts turned focus to *Wall Street Journal* reports that had recently discussed nine years of stock ownership by federal judges. In 685 instances (0.03% of all cases in the period), federal judges presided incorrectly over cases in which they owned shares in a party. Chief Justice Roberts, 2021 Year-End Report on the Federal Judiciary, at 3. The Chief Justice noted that the judiciary has the capacity to address these issues with robust institutions already in place, which Chief Justice Taft first built in the early part of the 20th Century. *Id.* at 1-3.

Chief Justice Roberts made several salient points about the *Journal* report, underscoring that the concern surrounding stock ownership is a concern that potential rulings "actually financially benefitted the judge," while the main thrust of § 455 is "the public's confidence in the independence of the courts:"

- "I do want to put these lapses in context."
- "Those sorts of isolated violations likely entailed unintentional oversights in which the judge's conflict-checking procedures failed to reveal the financial conflict."
- "Significantly, for all the conflicts identified, the *Journal* did not report that any affected the judge's consideration of a case or that the judge's actions in any of those cases—often just routine docket management—actually ***financially benefited the judge***."
- "Our systems of conflict checking should make the most of technology to help prevent the kinds of problems that can impair ***the public's confidence in the independence of the courts***."[3]

Id. (emphasis added). The inquiry in these situations, therefore, should always be whether a reasonable perception exists about a judge *financially benefitting* from a ruling, and whether vacatur of rulings wrongly made actually degrades the public's *confidence in an independent judiciary*.

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[3] President Biden signed into law the Courthouse Ethics and Transparency Act on May 13, 2022 (Pub. L. 117-125) to establish a more robust public database to assist in judicial conflicts-checking, and to enhance public confidence in the Courts. It was a Republican-led bill that passed the Senate with no opposition, and the House adopted the Senate bill with no opposition.

The Federal Circuit lost sight of these aims. As Petitioner supports, the judge in the present case obtained no financial benefit. He likely spent as much money on his personal lawyer to create the blind trust as the 100 Cisco shares were worth. By comparison, those shares (worth between $4,000 and $5,000) fell far below the $15,000-value reporting threshold applicable to general government employees who are not federal judges. 5 C.F.R. § 2640.202(a)(2). Just as much, nothing about the facts in this case called into question the independence of the judge, whom Petitioner convincingly argues had, to a near certainty, already made up his mind about the case outcome before his discovery of his wife's shares.

But enter the Federal Circuit, which applied an extraordinary zero-tolerance policy.[4] Zero tolerance of recusal-worthy stock ownership is a lofty goal. But the recusal exception provision of § 455(f) shows Congress's concern that such strong medicine might be worse than the disease. Specifically, as long as there is prompt "divestment" of the asset, a judge who has

[4] Petitioner explains cogently how the Federal Circuit in the instant case deepened a conflict with other appeals courts in its application of § 455. (Pet. 28-30). The Federal Circuit's use of patent-specific rules to split from other circuits when applying general federal law is a recognized recurring problem. Paul R. Gugliuzza, *The Supreme Court Bar at the Bar of Patents*, 95 NOTRE DAME L. REV. 1233, 1234-35 (2020) ("[T]he Supreme Court's recent patent decisions read like a campaign to eliminate what is often referred to as 'patent exceptionalism'—rulings (usually by the Federal Circuit) that exempt patent law from transsubstantive principles of jurisdiction, procedure, and remedies that govern in other areas of federal litigation.").

performed substantial work in the case does not need to order a recusal.

Similarly, even where a judge has not strictly complied with § 455, harmless error analysis is required under *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988). *Liljeberg* shows that the law does not always require unflinching vacatur. When a record lacks any whiff of the main concern of the recusal statute (*financial benefit* to a judge who rules in favor of his or her asset), and when that record never created an appearance that the *independence of the courts* was in jeopardy, the appeals court errs to require recusal and/or to vacate.

With no small irony, the Federal Circuit's ruling purporting to *protect* the justice system from bias actually underscores *Federal Circuit* apparent bias against small innovators. Recent revelations about the Patent Trial and Appeal Board ("PTAB") (part of the USPTO that presides over patentability trials) have (unlike the present case) revealed actual financial judicial bias problems within the administrative agency. But did the Federal Circuit respond with vacatur orders? Resoundingly not.

- A 2022 Government Accountability Office report to Congress described PTAB management secretly, without attribution and without knowledge by the adversarial parties, forcing changes to particular decisional outcomes—exposing Soviet-style "telephone justice" inconsistent with

traditional notions of due process. *See* https://www.ipwatchdog.com/2022/09/14/amici-cite-relevance-gao-report-empirical-data-new-visions-claim-aia-review-structure-violates-due-process/id=151362/ (last visited Oct. 2, 2022).

- Statistical analyses of PTAB financial operations and salary structures have emerged that reveal incentives PTAB judges have to rule against patent owners. PTAB judges have an annual average pecuniary bias totaling $5,760 out of an average annual bonus of $21,166 in favor of anti-patentee rulings. Ron D. Katznelson, "The Pecuniary Interests of PTAB Judges—Empirical Analysis Relating Bonus Awards to Decisions in AIA Trials" (2021), available at https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3880715_code706742.pdf?abstractid=3871108&mirid=1 (last visited Oct. 5, 2022).[5]

- A different set of statistical analyses of judging behavior by PTAB judges demonstrates an unusual "October Effect," whereby the change of the fiscal year (which coincides with resetting to zero one of the metrics governing performance

[5] The study reports that PTAB patent judges receive bonuses potentially above $40,000 per year. The PTAB is fee-based and pays such bonuses from petition fees. A two-phase payment structure at the PTAB guarantees a much larger retained fee upon institution of a PTAB trial (triggering high probability of patent cancellation) versus denial of an PTAB trial (rejection of a patentability challenge).

> reviews and bonuses) shows statistically significant changes in judging behavior. *See* https://www.ipwatchdog.com/2020/08/07/us-inventor-amicus-new-vision-gaming-october-effect-subjective-apj-evaluations-support-due-process-argument-ptab/id=123858/ (last visited Oct. 2, 2022) (identifying behaviors to "refill their decisional unit pipeline" with grants of trial institution to guarantee work, and thus good performance reviews, for the upcoming year).

The Federal Circuit has fielded due process challenges raising most of these aspects of agency adjudication judicial bias. In each case so far, the Federal Circuit has refused all relief, brushing aside disturbing facts and giving the agency ample leeway to do as it pleases. *In re B.E. Tech.*, No. 2022-114, 2022 U.S. App. LEXIS 3809 (Fed. Cir. Feb. 11, 2022); *Mobility Workx, LLC v. Unified Patents, LLC*, 15 F.4th 1146 (Fed. Cir. 2021).

The takeaway for small innovators is discouraging. Compare the outcome of the present case with the outcome in each of the PTAB bias cases so far. At the Federal Circuit, if a patentee overcomes all obstacles to win at trial, the appeals court will strain to apply § 455 to take away that Article III award on the slightest non-merits provocation, even when all parties and all jurists acknowledge no actual bias exists. Yet if a patent owner has lost its property right entirely at the PTAB, and seeks to remedy a due process deprivation arising out of demonstrated actual bias within that institution, the same court withholds relief. This is a

one-way ratchet. The decision in the present case proves that judicial bias decisions at the Federal Circuit seem to go in only one direction: against the small innovator.

II. Patents Are a Key to Economic Mobility for Small Innovators, And Previously Underrepresented Groups Have Still Not Realized Their Promise

This *Federal Circuit's* apparent bias when dealing with bias weakens the United States patent system in ways that disproportionately harm women, minorities, veterans and people from socioeconomically disadvantaged areas. This unnecessarily adds another level to the struggle for such groups to realize their rightful share of benefits from the patent system. From its earliest days, the patent system held great promise to lift up minorities and women. Its implementation has been a different story altogether.

The Patent Act of 1790 was only the third Act of Congress ever passed. Its text contains a strikingly modern concept—men, women and inventor-groups can obtain patents (inventors may be "he, she, or they"), without any textual filter or bar concerning race, background or status of servitude. Patent Act of 1790, Ch. 7, 1 Stat. 109-112 (Apr. 10, 1790). The first Patent Act was a highlight for our new government: The first session of the 1st Congress took place in 1789 and focused on simply getting the new legislature up and running. President Washington delivered his first

State of the Union speech to Congress on January 8, 1790. His speech was only 1,096 words but he devoted 77 words to patents and he stressed the need to have the patent system reach all Americans, especially those in far-flung, hard to reach communities:

> The advancement of agriculture, commerce, and manufactures by all proper means will not, I trust, need recommendation; but I can not forbear intimating to you the expediency of giving effectual encouragement as well to the introduction of new and useful inventions from abroad as to the exertions of skill and genius in producing them at home, and of facilitating the intercourse between the distant parts of our country by a due attention to the post-office and post-roads.

"From George Washington to the United States Senate and House of Representatives, 8 January 1790," available at https://founders.archives.gov/documents/Washington/Washington/05-04-02-0361 (last viewed Oct. 10, 2022).

When amended in 1793, the Act preserved gender neutrality (now reciting "any person or persons"). But it added a United States citizenship requirement. Sec. 1, Patent Act of 1793, Ch. 11, 1 Stat. 318-323 (Feb. 21, 1793). This excluded African-Americans held in involuntary servitude, since they could not be citizens and indeed would not be recognized as able to own property. Shontavia Jackson Johnson, "The Colorblind Patent System and Black Inventors," Landslide (Mar./Apr.

2019).[6] The infamous *Dred Scott* decision in 1857 went further, by calling into question whether any Black person (even freed slaves) could rightfully obtain a patent (at least until the passage of the Thirteenth and Fourteenth Amendments), on grounds that such persons would not be construed as citizens of the United States. *Id.*

But by then, the USPTO had already granted the first patent to a Black man. Thomas Jennings received that award in 1821 for an innovative dry cleaning method, one that proved lucrative for him and led him to own one of New York City's largest clothing stores. *Id.* Meanwhile, Mary Kies was the first woman in the United States awarded a patent, an invention for weaving straw with silk, granted in 1809. *See* https://www.invent.org/inductees/mary-dixon-kies (last visited Oct. 2, 2022).[7]

From an economic perspective, it is understandable why Blacks and women bought into the promise of

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[6] Available at https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2018-19/march-april/colorblind-patent-system-black-inventors/ (last visited Oct. 2, 2022).

[7] The Great Emancipator, President Abraham Lincoln, fled poverty and judicial corruption in land surveying and property recordation in rural Kentucky to pursue a law career in rural southern Illinois, including litigating patent cases. The income he made defending inventors fueled his first political campaign in which he ran for the U.S. House of Representatives. President Lincoln remains the first and only president to be an inventor and patent owner. https://www.ipwatchdog.com/2016/02/25/ted-cruz-has-much-in-common-with-abraham-lincoln-thanks-to-patents/id=66515/ (last visited Oct. 5, 2022).

the early patent system, tentative and sputtering though it was. Property ownership is a recognized generator of social and economic mobility among previously underrepresented groups. *See* Justin T. Callais and Vincent Geloso, "Economic Freedom Promotes Upward Income Mobility," in *Economic Freedom of the World: 2021 Annual Report* 189, 201 (Fraser Institute, 2021) ("Over 77% of the variation in social mobility can be explained by the quality of legal systems and protection of property rights."). Patent ownership is one such type of property ownership that can potentially aid social mobility, as Mr. Jennings' success as a clothing merchant bears out. Congress clearly thinks so. It enacted the SUCCESS Act, Pub. L. 115-273, 132 Stat. 4158 (2018), in an effort to document the issues faced by previously underrepresented inventors in obtaining such properties, such as non-White, female, military veteran and innovators living in socioeconomically challenged communities.

In October 2019, the USPTO released its "Report to Congress Pursuant to Pub. L. 115-273, SUCCESS Act." (hereafter, "USPTO SUCCESS Report"). The USPTO SUCCESS Report noted the "impediments" that African-American inventors have traditionally faced "including the lack of financing for development and commercialization of inventions[.]" USPTO SUCCESS Report, at 12. This trend continues today as "Blacks or African Americans and Hispanics born in the U.S. are significantly underrepresented among innovators" when compared to their white counterparts. *Id.* (noting that, "Blacks or African

Americans represent 11.3% of U.S.-born Americans and only 0.3% of the innovators who responded to their survey."). And, the USPTO further noted "that observed gaps in patenting rates between Whites and racial/ethnic minorities cannot be explained by differences in parental income or performance on school tests." *Id*. The statistics regarding participation of African-Americans are troubling: "African-Americans make up 13% of the U.S. native-born population but comprised less than 1% of the U.S.-born innovators it surveyed." Matthew Bultman, *For Black Inventors, Road to Owning Patents Paved with Barriers*, BLOOMBERG LAW (2020).

In a companion report, in February 2019, the USPTO also noted such disparities between males and females in a report titled "Progress and Potential: A profile of women on U.S. patents" (from the Office of the Chief Economist). The report observed that female participation is small—in 2016 only 12.1% of all inventors on U.S. patents. *Id*. at 3. In a 2020 update that added three more years of data, the USPTO noted that this rate "improved from 12.1% in 2016 to 12.8% by 2019," but also noted that the "share of male science and engineering job holders who are inventor patentees was three times higher" than the share of women, meaning that welcoming more women into science and engineering jobs alone "is not sufficient to increase the participation of women and inventor-patentees." "Progress and Potential: 2020 update on U.S. women inventor-patentees" (from the Office of the Chief Economist, July 2020). Additional studies demonstrate that women's

patent applications were "more likely to be rejected than those filed by teams of men." Jyoti Madhusoodanan, *Why Do Women Inventors Win Fewer Patents?* YALE INSIGHTS, Apr. 09, 2018 (last visited Oct. 5, 2022) (available at https://insights.som.yale.edu/insights/why-do-women-inventors-win-fewer-patents) ("Essentially women inventors must pass greater degrees of scrutiny.").

In its otherwise-bleak reporting, the USPTO recognized the extraordinary and essential role that patenting plays for small startups generally, while correctly linking those same small startup interests to the interests of minorities, women and military veterans.

> Applying for and receiving a patent confers many potential benefits to individual inventors and to the companies they own or work in. Inventor-patentees may experience personal benefits, including improved prestige, income and job-related opportunities. Applying for and obtaining a patent helps individuals and companies gain access to financial capital, find licensees, stimulate innovation, and facilitate growth. Some of these benefits are documented by empirical studies, but few studies characterize these benefits specifically for women, minorities, or veterans, or for the companies women, minorities, or veterans own.

USPTO SUCCESS Report, at 2. But disappointingly, the USPTO SUCCESS Report did not address the impact of legal rulings of the recent past that diminish

the strength of the patent right for all stakeholders. Instead, it recommended no changes to patent law, or adjustments of errant court decisions. Among its recommendations to promote inclusion of previously underrepresented groups, the USPTO recommended that the government "[c]reate a commemorative series of quarters and postage stamps to be placed in circulation" that would "feature a spectrum of American inventor-patentees from a variety of backgrounds, including those from underrepresented groups." *Id.* at 3.

It might have been more helpful for the USPTO to look in the proverbial mirror than ponder new designs for quarters and stamps. Simultaneous with its SUCCESS Act work, the USPTO has amplified threats to the interests of small startup inventors within its PTAB adjudicatory branch. As mentioned, the PTAB administers "trials" under the America Invents Act, such as Inter Partes Review. *See* 35 U.S.C. § 311 *et seq*. As well documented, the PTAB is an agency tribunal that operates as a "patent death squad," with invalidation rates in instituted trials hovering around 84%. https://usinventor.org/assessing-ptab-invalidity-rates/ (last visited Oct. 5, 2022) (methodology for calculating the statistic); https://www.ipwatchdog.com/2014/03/24/ptab-death-squads-are-all-commercially-viable-patents-invalid/id=48642/ (last visited Oct. 5, 2022) ("death squad" label coined by Federal Circuit Chief Judge); *see also Oil States Energy Svcs., LLC v. Greene's Energy Group, LLC*, 138 S. Ct. 1365, 1380 (2018)

(Gorsuch, J., dissenting) ("Consider just how efficient the [PTAB] statute before us is.").

Neither the PTAB in its SUCCESS Report, nor the Federal Circuit in its *B.E. Tech.* and *Mobility Workx* rulings that turn a blind eye to PTAB judicial financial bias, offer anything meaningful to help women, minorities and veterans navigate or circumvent this 84% death squad invalidation rate. Instead, the Federal Circuit plows ahead with rulings such as that on review. Something is broken when a double standard over judicial bias almost always, somehow, leads to rulings that favor large technology incumbents over small innovators.

This is the broader context within which to understand the Federal Circuit's mishandling here of harmless error. Under *Liljeberg*, one of the three key factors for a court to consider in deciding harmless error is whether vacatur would improve or impair public perception of the courts. *Liljeberg*, 486 U.S. at 864. Here, small innovators and previously underrepresented innovator groups cannot win. When the most successful among them in court loses its judgment on flimsy grounds where no real threat to judicial independence was ever possible, that sends a discouraging message. When in different cases, the same court shuts its ears to proven financial bias that operates against a small innovator, that drives the point home. Bias rulings only favor large technology incumbents. The patent system is unwelcoming and hostile, at least as communicated in Federal Circuit rulings.

Amicus therefore agrees with Petitioner that a proper *Liljeberg* analysis should result in a conclusion of harmless error here. The Federal Circuit's ruling signals to small innovators (especially those made up of previously underrepresented groups) to keep away from patenting. The deck is stacked. No matter how good your case when you discover infringement, the hurdles put in your way will be arbitrary and unfair. This is precisely the opposite message from that which the courts should send, and contrary to the sense of Congress under the SUCCESS Act. Under *Liljeberg*, it is ***non***-vacatur (as opposed to vacatur) that will send a message of fairness and balance to improve public perception of the courts.

CONCLUSION

Nothing could be more important than an unbiased judiciary. But when actual bias is absent, Congress established 28 U.S.C. § 455(f) as a safe harbor to preserve balance and protect against unneeded overcorrection of an otherwise well-functioning judicial process. The Federal Circuit failed to heed either the letter or spirit of § 455(f). Viewed in context of its anything-goes approach to proven, actual, financial bias at the PTAB, only one conclusion is apparent to Amicus and its constituency—*it is the Federal Circuit* who demonstrates bias that undermines public confidence in the justice system, degrading further an already-hostile environment favoring incumbents over innovative startups.

The Court should grant the writ of certiorari.

Respectfully submitted,

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