

No. 22-246

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**In the Supreme Court of the  
United States**

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CENTRIPETAL NETWORKS, INC.,  
*Petitioner,*

*v.*

CISCO SYSTEMS, INC.,  
*Respondent.*

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

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**BRIEF OF THE COMMITTEE FOR JUSTICE  
AND CONSERVATIVES FOR PROPERTY  
RIGHTS AS *AMICI CURIAE*  
IN SUPPORT OF PETITIONER**

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MATTHEW J. DOWD  
*Counsel of Record*  
ROBERT J. SCHEFFEL  
DOWD SCHEFFEL PLLC  
*1717 Pennsylvania Ave. NW  
Suite 1025  
Washington, D.C. 20006  
(202) 559-9175  
mdowd@dowdscheffel.com*

*Counsel for Amici Curiae*

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## TABLE OF CONTENTS

	Page
INTEREST OF <i>AMICI CURIAE</i> .....	1
SUMMARY OF THE ARGUMENT .....	2
ARGUMENT .....	3
I. As Property Rights Established by the Constitution, Patents and Copyrights Enable Innovators to Compete and Reshape Markets .....	3
A. The Intellectual Property Clause Embodies the Founding-Era Understanding of Patent and Copyright Rights.....	4
B. Modern Innovation Requires Reliable Intellectual Property Rights .....	6
II. The Federal Circuit’s Erroneous Analysis and Application of 28 U.S.C. § 455 Raise Questions of Exceptional Importance .....	9
A. Section 455 Provides a Reasoned Safeguard to Ensure that Speedy and Inexpensive Justice is Accomplished .....	9
B. The Federal Circuit’s § 455 Analysis Creates Conflicts with Decisions of This Court and Other Courts of Appeals .....	11
III. This Case Presents an Ideal Vehicle to Clarify the Law and Correct an Injustice Suffered by an American Innovator .....	14
A. Centripetal Networks Is a Verified Success Story of the American Intellectual Property System .....	14
B. The Outcome Here Will Disproportionately Harm Smaller Innovators and Will Create a Free Pass for Willful Infringers .....	16
CONCLUSION .....	19

## TABLE OF AUTHORITIES

Cases	Page(s)
<i>Adams v. Burke</i> , 84 U.S. (17 Wall.) 453 (1873).....	5
<i>Arnett v. Kennedy</i> , 416 U.S. 134 (1974) .....	9
<i>Baldwin Hardware Corp. v. Franksu Enterprise Corp.</i> , 78 F.3d 550 (Fed. Cir. 1996).....	13
<i>Bonito Boats, Inc. v. Thunder Craft Boats, Inc.</i> , 489 U.S. 141 (1989) .....	7
<i>Bridges v. California</i> , 314 U.S. 252 (1941) .....	10
<i>Caperton v. A. T. Massey Coal Co.</i> , 556 U.S. 868 (2009) .....	10
<i>Diamond v. Chakrabarty</i> , 447 U.S. 303 (1980) .....	7
<i>Eldred v. Ashcroft</i> , 537 U.S. 186 (2003) .....	4, 5
<i>Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.</i> , 535 U.S. 722 (2002) .....	7
<i>Goldstein v. California</i> , 412 U.S. 546 (1973) .....	7
<i>Horne v. Department of Agriculture</i> , 135 S. Ct. 2419 (2015) .....	8
<i>In re Certain Underwriter</i> , 294 F.3d 297 (2d Cir. 2002).....	13

<i>In re Literary Works in Electronic Databases Copyright Litigation,</i> 509 F.3d 136 (2d Cir. 2007) .....	9
<i>James v. Campbell,</i> 104 U.S. 356 (1881) .....	8
<i>Kidder, Peabody &amp; Co. v. Maxus Energy Corp.,</i> 925 F.2d 556 (2d Cir. 1991) .....	10
<i>Liljeberg v. Health Services Acquisition Corp.,</i> 486 U.S. 847 (1988) .....	12, 13, 18
<i>Republican Party of Minnesota v. White,</i> 536 U.S. 765 (2002) .....	10
<i>United States v. Atwood,</i> 941 F.3d 883 (7th Cir. 2019) .....	12
<i>United States v. Cerceda,</i> 172 F.3d 806 (11th Cir. 1999) .....	13
<i>United States v. Williams,</i> 949 F.3d 1056 (7th Cir. 2020) .....	10, 11
<i>Wheaton v. Peters,</i> 33 U.S. 591 (1834) .....	4
<i>Withrow v. Larkin,</i> 421 U.S. 35 (1975) .....	10
 <b>Constitution and Statutes</b>	
U.S. Const. art. I, § 8, cl. 8 .....	4
28 U.S.C. § 455 .....	<i>passim</i>
28 U.S.C. § 455(a) .....	11, 12
28 U.S.C. § 455(f) .....	<i>passim</i>
35 U.S.C. § 154 .....	6
Act of May 31, 1790, 1 Stat. 124 .....	5
Act of April 10, 1790, 1 Stat. 109 .....	5

## Rules

Fed. R. Civ P. 1.....	10
Sup. Ct. R. 37.2.....	1
Sup. Ct. R. 37.6.....	1

## Other Authorities

5 Writings of Thomas Jefferson (Washington ed. 1871).....	7
Adam Mossoff, <i>Exclusion and Exclusive Use in Patent Law</i> , 22 Harv. J. Law & Tech. 321 (2009) .....	5
The Federalist No. 43 (Modern Library ed. 2001).....	5
H.R. Rep. No. 93-1453, <i>as reprinted in</i> 1974 U.S.C.C.A.N. 6351 .....	9
<i>Profile Cisco Systems</i> , Forbes, <a href="https://www.forbes.com/companies/cisco-systems/">https://www.forbes.com/companies/cisco-systems/</a> .....	16
President George Washington, First Annual Ad- dress to Congress (Jan. 8, 1790) .....	4
Ryan T. Holte, <i>The Misinterpretation of eBay v.</i> <i>MercExchange and Why: An Analysis of the</i> <i>Case History, Precedent, and Parties</i> , 18 Chapman L. Rev. 677 (2015) .....	18

## INTEREST OF *AMICI CURIAE*<sup>1</sup>

*Amici curiae* are the Committee for Justice and Conservatives for Property Rights. *Amici* are non-profit organizations that each have an interest in ensuring that the judicial process operates to achieve justice and protect property rights.

The Committee for Justice (“CFJ”) is a non-profit legal and policy organization founded in 2002. It is dedicated to promoting the rule of law and preserving the Constitution’s protection of individual liberty, including the fundamental civil right to the fruits of one’s own labor. CFJ believes that the Constitution’s protection of intellectual property and physical property has helped to make the United States the most prosperous society in the history of the world.

Conservatives for Property Rights is a coalition of organizations that stand for private property rights, whatever the type of property. Conservatives for Property Rights believes that property rights are divinely endowed and that private property is essential to the functioning of free enterprise, human flourishing, discovery and creativity, and the exercise of ordered liberty.

Consistent with their missions, CFJ and Conservatives for Property Rights file *amicus curiae*

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<sup>1</sup> Pursuant to Supreme Court Rule 37.2, counsel of record for all parties received notice at least 10 days prior to the due date of *Amici curiae*’s intent to file this brief. Respondent provided written consent to the filing of this brief through electronic mail, and Petitioner consented through their letter of blanket consent filed with the Court. Pursuant to Supreme Court Rule 37.6, *Amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief.

briefs in important cases and educate the American public and policymakers about the benefits of individual liberty, property rights, and the proper roles of our federal courts and administrative agencies.

### **SUMMARY OF THE ARGUMENT**

Protections for intellectual property, including patents and copyrights, serve to vindicate the fundamental civil right that inventors and authors have to the fruits of their labors. This is how the Founders understood these rights at the time they adopted the Constitution with its Patent and Copyright Clauses, and this Court has applied the same understanding.

With their constitutional basis, intellectual property rights serve to encourage investment of resources and creative efforts into beneficial innovation and creative works. Intellectual property rights work to reward inventors and creators so that they can reap the benefits of their investments. Intellectual property rights also seek to mitigate the damage associated with willful infringers—those who intentionally co-opt others' innovation without providing appropriate compensation.

Of course, intellectual property rights only work when those rights can be reasonably enforced through the judicial process, with a meaningful remedy. If a patent owner cannot obtain reliable redress for infringement through the judicial process, then the patent becomes an ornamental wall-decoration of little value.

The present case implicates important issues at the intersection of maintaining confidence in the judicial process while respecting fundamentally important intellectual property rights. The question presented by Petitioner is specific to the interpretation and application of 28 U.S.C. § 455, which works to ensure judicial impartiality. But the decision of the court of appeals goes too far and has broader implications. It will undermine

confidence in the judicial process and importantly will harm the innovation community, particularly the small to mid-sized entities that frequently must confront willful infringement committed by larger, better-resourced competitors.

The outcome of vacatur here represents another example of incumbent technology companies using all means possible to avoid paying for their use of the inventions and technology of smaller innovators. The current outcome enables large incumbent companies to trample on innovators' intellectual property rights and to avoid compensating the owners of patents and other intellectual property. Vacating an otherwise valid decision of patent infringement will impose significant costs on not only Centripetal Networks but also other emerging innovators who must battle companies—many with nearly limitless resources—simply to be compensated for the unauthorized use of their valuable inventions.

## **ARGUMENT**

### **I. As Property Rights Established by the Constitution, Patents and Copyrights Enable Innovators to Compete and Reshape Markets**

Intellectual property is rooted in the Constitution as the fuel that feeds our Nation's innovation economy. As such, intellectual property must be treated as a fundamental property right, consistent with the Constitution and the understanding of the founding era. Intellectual property rights also incentivize innovators to create new technology and creative works, which in turn disrupt entrenched markets—but only if those property rights are respected and the judicial system offers an efficient remedy for infringement.

### **A. The Intellectual Property Clause Embodies the Founding-Era Understanding of Patent and Copyright Rights**

The Constitution provides Congress with the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” Art. I, § 8 cl. 8. The Patent and Copyright Clauses grant the only individual rights in the original Constitution.

The Patent and Copyright Clauses empower Congress to protect an individual’s fundamental civil right to the fruits of his or her labor. *See Wheaton v. Peters*, 33 U.S. 591, 658 (1834) (“That every man is entitled to the fruits of his own labour must be admitted[.]”). Certainly, protecting such a fundamental civil right serves the purpose of furthering the arts and sciences, but this Court has warned against interpreting the Clauses’ purpose in a manner that unduly minimizes or eliminates the fundamental right they empower Congress to protect. *See, e.g., Eldred v. Ashcroft*, 537 U.S. 186, 212 n.18 (2003).

At the Nation’s outset, George Washington addressed Congress in January 1790 and, excited by the expected societal benefit, urged Congress to act by passing legislation to put into effect the Patent and Copyright Clauses. President Washington told Congress, “there is nothing which can better deserve [Congress’s] patronage than the promotion of Science and Literature.” President George Washington, First Annual Address to Congress (Jan. 8, 1790).<sup>2</sup> Within four months of his address, Congress established a system to protect patents

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<sup>2</sup> *See* Transcript, *January 8, 1790: First Annual Message to Congress Transcript*, University of Virginia, Miller Center, <https://millercenter.org/the-presidency/presidential-speeches/january-8-1790-first-annual-message-congress>.

and copyrights that, in many respects, remains in place today. *See* Act of Apr. 10, 1790, 1 Stat. 109; Act of May 31, 1790, 1 Stat. 124.

Importantly, the first four patent statutes, adopted in 1790, 1793, 1836, and 1870, defined patents as property rights in substantive terms, “securing the same rights to possession, use, and disposition traditionally associated with tangible property entitlements.” Adam Mossoff, *Exclusion and Exclusive Use in Patent Law*, 22 Harv. J. Law & Tech. 321, 340–41 (2009) (collecting the statutory provisions, and citing *Adams v. Burke*, 84 U.S. (17 Wall.) 453 (1873)). Nineteenth-century courts continued to follow the view, as espoused by Congress, that patents as property secured “substantive rights,” including the “right to manufacture, the right to sell, and the right to use” their inventions. *Id.* at 341.

Along similar lines, the Founders viewed the Copyright Clause as empowering Congress to protect an author’s right to the fruits of his or her labor, even if the Clause also includes the stated purpose of furthering the “Science,” understood today as arts and literature. James Madison’s comments on the Copyright Clause in *The Federalist* focus on the practical advantages of the Clause for the public at large. *See* *The Federalist* No. 43, at 274 (Modern Library ed. 2001) (“The utility of this power will scarcely be questioned.”). Yet Madison also took pains to emphasize that “[t]he public good fully coincides . . . with the claims of individuals.” *Id.* In other words, he viewed no inconsistency between the Copyright Clause having the stated purpose of furthering “Science” and, at the same time, empowering Congress to protect fundamental property rights of individual authors. In recognizing Madison’s views, this Court has rejected the argument that copyright law must serve exclusively public, as opposed to private, goals. *See Eldred*, 537 U.S. at 212 n.18.

Even today, patents and copyrights have the characteristics of private property rights. Under the current Patent Act, for instance, patent rights include the fundamental “right to exclude,” which is the *sine qua non* of a property right. See 35 U.S.C. § 154 (“Every patent shall . . . grant to the patentee, his heirs or assigns, of the right to exclude others from making, using, offering for sale, or selling the invention throughout the United States or importing the invention into the United States, and, if the invention is a process, of the right to exclude others from using, offering for sale or selling throughout the United States, or importing into the United States, products made by that process, referring to the specification for the particulars thereof.”).

The property-right nature of intellectual property—including its genesis in the Constitution—must be a fundamental consideration when devising policies that may impact intellectual property rights. This includes due process considerations associated with judicial proceedings. Legislative and judicial decisions must be cognizant of any decision-making’s impact on these constitutional rights. Otherwise, willful infringers may, to the detriment of individual rights, be allowed to trample on the fundamental civil rights guaranteed by the Intellectual Property Clause and made effective through the Patent and Copyright Acts.

### **B. Modern Innovation Requires Reliable Intellectual Property Rights**

Concomitant with the private-rights aspect of intellectual property is its utilitarian role. This Court has, time and again, recognized the importance of reliable intellectual property rights for incentivizing societal progress.

As a tool to encourage and promote innovation, the exclusive right of a patent and its “boundaries should be

clear,” as this Court explained in *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 730–31 (2002) (citing *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 150 (1989)). The Court continued and observed:

This clarity is essential to promote progress, because it enables efficient investment in innovation. A patent holder should know what he owns, and the public should know what he does not. . . . [I]nventors . . . rely on the promise of the law to bring the invention forth, and the public . . . should be encouraged to pursue innovations, creations, and new ideas beyond the inventor’s exclusive rights.

*Id.* Indeed, the original Patent Act embodied Thomas Jefferson’s philosophy that “ingenuity should receive a liberal encouragement.” *Diamond v. Chakrabarty*, 447 U.S. 303, 308–09 (1980) (quoting 5 Writings of Thomas Jefferson 75–76 (Washington ed. 1871)).

Similarly, copyrights encourage the production of creative works—literature, art, movies, music. Copyright protection acts as the fuel for the engines of creativity. The exclusive rights associated with copyrights work to ensure that free riders cannot later pirate creative efforts without acknowledging the value of the property right. Copyrights respect the fundamental nature of an individual’s labors and thus incentivize individuals to create something that did not exist, but for that individual’s creative labors. *See Goldstein v. California*, 412 U.S. 546, 555 (1973) (“[T]o encourage people to devote themselves to intellectual and artistic creation, Congress may guarantee to authors and inventors a reward in the form of control, over the sale or commercial use of copies of their works.”).

Patents and copyrights achieve their innovation-incentivizing roles primarily through the force of the

exclusive right contemplated by the Founders and specified in the Constitution. This Court has recognized the same. *E.g.*, *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2427 (2015) (stating that a patent “confers upon the patentee an exclusive property in the patented invention” (quoting *James v. Campbell*, 104 U.S. 356, 358 (1882))). The right to exclusivity is what ultimately enables a patentee or a copyright owner to reap the full reward of his or her innovative efforts.

If patent and copyright owners cannot exclude infringers (as the Constitution contemplated), then infringers will continue to pirate others’ innovations without fully compensating up-and-coming inventors and creators. The lack of a reliable and timely remedy reduces the likelihood that investors will fund the innovation our Nation needs to remain competitive. The lack of a reliable and timely remedy for infringement also undermines confidence in the patent and copyright systems.

Of course, confidence in the intellectual property system necessarily depends on confidence in the judicial system. The former cannot exist without the latter, especially in a modern innovation-based society. If the judicial process is not fair and impartial—or does not appear to be fair and impartial—then intellectual property owners will lack any confidence that their patents and copyrights can be effectively enforced against infringers.

Justice must also be efficient and timely. If a smaller patent owner is required to devote enormous resources to patent-enforcement litigation, only to have a successful action thrown out on specious grounds that have no impact on the case’s merits, then the net result is a serious diminution in the value of the patent rights—not just for the specific case at issue but for patent owners writ large.

It becomes a situation where “justice delayed may well be justice denied.” *Arnett v. Kennedy*, 416 U.S. 134, 221 (1974).

## **II. The Federal Circuit’s Erroneous Analysis and Application of 28 U.S.C. § 455 Raise Questions of Exceptional Importance**

In the present case, under the aegis of upholding judicial impartiality, the Federal Circuit vacated the trial court’s ruling of willful patent infringement. The court’s analysis and application of 28 U.S.C. § 455 in this case creates substantial uncertainty and apparent conflicts with the decisions of this Court and other courts of appeals. Ensuring confidence in the judicial process is the ultimate goal of § 455, but if that statute is interpreted and applied in a manner that undermines the reliable enforcement of intellectual property rights (enshrined in the Constitution), then the ultimate objective of § 455 is missed.

### **A. Section 455 Provides a Reasoned Safeguard to Ensure that Speedy and Inexpensive Justice is Accomplished**

Judicial impartiality and the appearance thereof form foundational principles of the U.S. legal system. Without the judicial system appearing impartial, litigants can have little confidence of achieving justice, including innovative companies seeking to enforce their intellectual property rights. Congress and the courts have adopted various safeguards to ensure that impartial justice is achieved, in a timely and efficient manner.

Section 455 was “designed to ‘promote public confidence in the impartiality of the judicial process.’” *In re Literary Works in Elec. Databases Copyright Litig.*, 509 F.3d 136, 140 (2d Cir. 2007) (quoting H.R. Rep. No. 93-1453, reprinted in 1974 U.S.C.C.A.N. 6351, 6355). Furthermore, § 455(f) was enacted to address a situation

where a judge discovers a financial interest after the court has devoted substantial time and resources to the case. *See Kidder, Peabody & Co. v. Maxus Energy Corp.*, 925 F.2d 556, 561 (2d Cir. 1991) (“We think that section 455(f) directly applies to this situation. Nearly three years of the litigants’ time and resources and substantial judicial efforts have been devoted to the litigation.”).

At the same time, it is understood and accepted that “[t]here is a ‘presumption of honesty and integrity in those serving as adjudicators.’” *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 891 (2009) (Roberts, C.J., dissenting) (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). As is plain, “[a]ll judges take an oath to uphold the Constitution and apply the law impartially, and we trust that they will live up to this promise. *Id.* (citing *Republican Party of Minn. v. White*, 536 U.S. 765, 796 (2002) (Kennedy, J., concurring) (“We should not, even by inadvertence, ‘impute to judges a lack of firmness, wisdom, or honor.’” (quoting *Bridges v. California*, 314 U.S. 252, 273 (1941))).

Furthermore, the appearance of judicial impartiality is not—and cannot be—the only consideration when ensuring justice after the courts and the parties have expended substantial time and resources on legal matters. Time and expense are separate and important factors, on par with the “justness” of a process. Fed. R. Civ. P. 1 (“[The Rules] should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.”).

For that reason, Congress and this Court have instructed that time and expense considerations are equally important when assessing whether a judicial process satisfies due process and its impartiality requirement. *See* 28 U.S.C. § 455(f); *United States v.*

*Williams*, 949 F.3d 1056, 1063 (7th Cir. 2020) (“Not every violation of § 455(a) warrants a drastic remedy, like a new trial.”).

Such considerations are particularly important when adjudicating property rights, rooted in the Constitution such as patent rights. Vacating a complete adjudication of patent claims, which resulted here in a finding of willful infringement and damages of over a billion dollars, is an extraordinarily drastic result for what appears to be one of the slightest of violations of § 455.

**B. The Federal Circuit’s § 455 Analysis Creates Conflicts with Decisions of This Court and Other Courts of Appeals**

The Federal Circuit’s decision warrants review and this Court’s clarification on two issues. The first is whether a blind trust satisfies the statutory requirement of § 455(f). The second is whether the appeals court’s harmless-error analysis comports with this Court’s precedent. Both issues are of exceptional importance.

On the first issue, this Court has not answered the question of whether a “blind trust” satisfies the statutory requirement to “divest.” *See* 28 U.S.C. § 455(f). As Petitioner explains, there are good reasons to hold that the statute permits divestiture via a blind trust, particularly in this case. *See* Pet. 16. A blind trust divests an individual of any power of control, distribution, or disposition over the property contained in the trust. Such a position would seem to satisfy the objective of the statute. And the late Judge Henry Coke Morgan, Jr. in the present case used the blind trust in a manner that appeared to moot any question of impartiality.

Specifically, the controlling language of § 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.” Petitioner reasonably argues that the proper interpretation of this provision would require the divesting of all cognizable interests in stock of a party, where cognizable interests consist of those which the judge controls or knows of. When stock exists in a blind trust, the beneficiary has neither knowledge nor control of the trust’s holdings. It should therefore not be a cognizable interest within the meaning of § 455(f), and thus a blind trust appears to satisfy § 455(f). At a minimum, the Court ought to resolve this question to provide clarification for well-intentioned judges stuck between the choice of using a blind trust and of selling the stock after having knowledge of the decision in the case.

On the second issue, the appeals court’s harmless-error analysis is unmoored from the framework this Court offered in *Liljeberg v. Health Acquisition Corp.*, 486 U.S. 847 (1988). There, the Court recognized that a judge’s violation of § 455(a) is assessed for harmless error. In determining whether a § 455 violation is harmless, courts consider: (1) the risk of injustice to the parties in the particular case, (2) the risk that the denial of relief will produce injustice in other cases, and (3) the risk of undermining the public’s confidence in the judicial process. *Liljeberg*, 486 U.S. at 864; *United States v. Atwood*, 941 F.3d 883, 885 (7th Cir. 2019).

From the perspective of rights-holders (including patent owners), it is hard to conceive of an outcome more unjust than the present one. Here, the risk of injustice to the patent holder is enormous. Cisco is a big company with substantial resources at its disposal, while Centripetal is a small innovator. After expending untold resources to secure a judgment of willful infringement, that work is tossed aside, despite the acceptance by the parties involved that the identified violation could not have had any adverse effect on the result of the

infringement finding. Such an outcome will not strike a proper balance, as is required by *Liljeberg* and other appellate cases. See *In re Certain Underwriter*, 294 F.3d 297, 304–05 (2d Cir. 2002); *Baldwin Hardware Corp. v. Franksu Enter. Corp.*, 78 F.3d 550, 555–56 (Fed. Cir. 1996) (substantial judicial time was expended by the time the discovery of a conflicting interest came during the trial).

Moreover, the six-week trial involved incredibly complex technology. Any decision forcing a patent owner to relitigate a case that involves highly technical subject matter must adequately address the issue of trial complexity. See, e.g., *United States v. Cerceda*, 172 F.3d 806, 815 (11th Cir. 1999) (en banc) (per curiam) (“[T]he government would face great hardship if forced to conduct a new trial . . . because of the complexity of the case (a 78-count, complex white-collar prosecution the trial of which lasted two-and-a-half months).”). In this instance, the technical nature of the trial should weigh strongly towards a ruling of harmless error.

As to the public’s confidence in the judicial process, the vacatur decision accomplishes the exact opposite of what the appeals court apparently intended to achieve. The public will have little confidence in a judicial process when an appeals court discards the results of a fairly litigated trial, lasting six weeks, involving hundreds of exhibits and thousands of record pages, merely because the presiding trial judge discovered, after the fact, that his spouse owned a trivial amount of stock of the losing party. This outcome will leave the public scratching its collective head, wondering what other minor missteps can undo just and speedy trials proving willful infringement by dominant industry giants who face dynamic competition from small innovators on account of their patent rights.

### **III. This Case Presents an Ideal Vehicle to Clarify the Law and Correct an Injustice Suffered by an American Innovator**

This case presents exceptionally important questions about balancing the interest of ensuring the appearance of an impartial judicial process with ensuring that justice is achieved. In this case, justice was denied, and a small innovator's expenditure of substantial resources was rendered a nullity by the appeals court's decision to vacate the district court's ruling of patent infringement. The case is an ideal vehicle to decide the proper balance between applying 28 U.S.C. § 455(f) and achieving justice with respect to property rights, including patent rights.

#### **A. Centripetal Networks Is a Verified Success Story of the American Intellectual Property System**

Petitioner Centripetal Networks is the type of success story that the Founders could have envisioned when drafting and adopting the Patent Clause. The *quid pro quo* of the patent system encouraged Centripetal to innovate and disclose its inventions. In exchange, Centripetal was awarded several patents granting it the right to exclude others from using its inventions, unless being fairly compensated.

Centripetal was founded in 2009 by Steve Rogers, a pioneer of intelligence-based cyber defense with extensive experience developing secure communications systems, including for the U.S. Air Force. Centripetal invested in R&D and its business for several years before selling its internet-security products and services to its first customer in 2015. Since then, Centripetal has become a trusted leader in internet security with its patented technology and its CleanINTERNET<sup>®</sup> service that protects against network infiltration and data exfiltration by cybercriminals.

In years past, innovation like that of Steve Rogers and his company would have been praised throughout the country. Individuals such as Thomas Edison, Alexander Graham Bell, Nikola Tesla, and others exemplify the continuing thread of creative development that turned the United States into an innovation powerhouse of the 19<sup>th</sup> and 20<sup>th</sup> centuries. Earlier in our Nation's history were the likes of Benjamin Franklin (a prolific inventor), Thomas Jefferson (known for his many inventions, including the original "polygraph"), and Abraham Lincoln (the only President named as an inventor on a patent). More recently, luminaries such as Stephanie Kwolek (the inventor of Kevlar) and Jennifer Doudna (an inventor of Nobel Prize-winning CRISPR technology) have maintained the common thread of innovation running through our Nation's history.

The Nation's economic progress rests on the continued beneficial disruption caused by the innovation of individual inventors and smaller companies. Patents can act as an effective counterbalance to over-concentrated market power and stagnation attributable to entrenched incumbents. Patents enable new innovators to disrupt the market with their out-of-the-box thinking (just as Centripetal has done). Patents also encourage investments in developing technologies and companies. Notably, Amazon's current empire traces its roots to its early "1-Click" patent, which gave it a competitive edge over other online sellers, as well as traditional brick-and-mortar retailers. Google also started its rise to dominance based on computer-search innovation that was protected by U.S. patents, including some filed by its founders Larry Page and Sergey Brin.

In recent years, however, there has been a remarkable decline in the respect for innovators and patent rights. Where there was once praise for those who earned patents, there is now palpable disdain, with

accusations of “patent trolls” and “patents kill.” The current narrative is a far cry from the Founders’ view of patents being important property rights that emerged from one’s individual labors and were critical to promoting technological and societal progress.

The outcome in this case, if not reconsidered, will unfortunately add to the decline in the respect for intellectual property rights—both as a property right and as a tool to incentivize innovation. While the appeals court’s attempt to ensure absolute judicial impartiality was well-intentioned, the outcome defeats § 455(f)’s overall objective of providing justice that is “speedy” and “inexpensive.” The appeals court’s vacatur of the decision finding willful infringement unnecessarily delayed and will cause another obstacle to protecting innovation.

**B. The Outcome Here Will Disproportionately Harm Smaller Innovators and Will Create a Free Pass for Willful Infringers**

The outcome here will disproportionately harm smaller and emerging innovators. The widespread ownership of market-dominating companies like Cisco increases the risk that otherwise-valid findings of patent infringement, including willful infringement, will be undone by unknown ownership of trivial amounts of stock that had no effect on a judge’s decision-making process.

In 2018, after learning that Cisco was using its technology without paying, Centripetal sued Cisco for patent infringement, seeking redress for the apparent unauthorized use of Centripetal’s inventions. At a six-week trial in 2020, Cisco was found to be a willful infringer, and it was ordered to compensate Centripetal \$3.2 billion for its unauthorized use of Centripetal’s patents. While that is a substantial dollar award, Cisco has a market capitalization of over \$165 billion with annual revenue of over \$50 billion, based on public reports.

*Profile*            *Cisco*            *Systems,*            Forbes,  
<https://www.forbes.com/companies/cisco-systems/>.

That might have been a reasonable outcome, but the appeals court vacated the liability decision based on, in its opinion, the trial judge's violation of 28 U.S.C. § 455. Cisco convinced the appeals court that the trial judge should have recused himself because he learned—after the trial and after writing most of the ruling against Cisco—that his spouse owned less than \$5,000 worth of Cisco stock and because putting the stock in a blind trust was not an adequate divestment. Recusal and vacatur of the infringement decision were required, in Cisco's view, despite the significant investment of time and resources by the trial court and the parties and despite the fact that the judge had already decided nearly every issue and drafted the large majority of the opinion.

Centripetal's case is a poster child of a willful infringer using an apparent technicality to avoid or delay liability for willful patent infringement. Four years after being sued, Cisco was able to undo the district court's ruling after a six-week bench trial, based on its judicial-recusal argument. Cisco suffered no actual harm here based on the alleged § 455 violation, as Cisco acknowledged on appeal. The appeals court did not rule on the merits of Cisco's willful patent infringement, and it did not even entertain any discussion of the issue during oral argument. The end result is that any justice Centripetal can receive for Cisco's willful infringement will be delayed at least several more years.

Without doubt, Cisco should be permitted to establish genuine error with the trial court's decision on the merits. If there is error in the ruling that Cisco willfully infringed Centripetal's patents, then the appeals court can make the appropriate rulings. But liability for willful infringement should not be evaded through an unduly narrow reading

of § 455 and a flawed application of the *Liljeberg* harmless-error analysis. It is difficult enough for emerging innovators to succeed in markets occupied by entrenched market-dominant companies. Vacating an otherwise valid decision of patent infringement will deter emerging innovators from trusting the legal system, where they must battle corporations with nearly limitless resources.

The strategy of delay and avoidance is far too frequent when it comes to patent infringement by larger companies. That strategy has been facilitated by a string of decisions by the appeals courts that have weakened the exclusive patent right. *See, e.g.*, Ryan T. Holte, *The Misinterpretation of eBay v. MercExchange and Why: An Analysis of the Case History, Precedent, and Parties*, 18 Chapman L. Rev. 677, 682 (2015) (explaining how courts are “improperly following Justice Kennedy’s concurrence” in *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006), as “precedent” and how *eBay* “has been misinterpreted by trial courts and others for a variety of reasons”). After *eBay*, there is a smaller likelihood of obtaining an injunction, even after a complete adjudication of infringement. This new trend runs counter to the intent of the Constitution, with its emphasis on the “exclusive” right.

A typical strategy by infringers is to prolong litigation and make it more expensive, in part by launching multiple attacks against patents through the Patent Trial and Appeal Board’s (“PTAB”) post-grant review process. In the current dispute, Cisco has used the PTAB’s lower burden of proof to cancel patent claims and circumvent the district court adjudication of them. Centripetal’s district court action against Cisco started in February 2018, alleging patent infringement of eleven patents. Rather than adjudicate all patents in the district court proceeding, Cisco sought the relief of the PTAB and

its lower evidentiary burden. As of the filing of this brief, Cisco has filed at least fifteen petitions at the PTAB for *inter partes* review, amounting to attacks on ten of Centripetal's eleven patents asserted in its district court action against Cisco.

Most recently, in June 2022, Cisco again expanded the litigation battlefield and joined an existing *inter partes* review of one of the patents it was found to have willfully infringed in the present case. Cisco is thus seeking a second bite at the apple, which will likely further delay final resolution for Centripetal. The PTAB process has become a major tool for large companies to make patent enforcement more expensive than it should be. Cisco's continued attack through the PTAB may well render the district court trial a nullity when combined with the appeals court's unnecessary vacatur of the willful infringement ruling.

### CONCLUSION

For the foregoing reasons, *Amici* the Committee for Justice and Conservatives for Property Rights submit that this Court should grant the writ of certiorari.

Respectfully submitted.

MATTHEW J. DOWD  
*Counsel of Record*  
ROBERT J. SCHEFFEL  
DOWD SCHEFFEL PLLC  
*1717 Pennsylvania Ave.,  
NW  
Suite 1025  
Washington, D.C. 20006  
(202) 559-9175  
mdowd@dowdscheffel.com*

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