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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

The Federal Circuit in this case wiped out the largest patent judgment in history, without even considering the merits, by misreading the recusal statute to place it at war with itself and then effectively nullifying this Court's on-point precedent. The relevant statutory provision, 28 U.S.C. §455(f), seeks to preserve judicial resources and avoid unnecessary recusals when a judge discovers a minor financial interest "after substantial judicial time has been devoted to [a] matter." The harmless-error principles adopted by this Court in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), work to the same end by ensuring that minor errors in the course of good-faith efforts to redress a financial interest do not end up wiping out years of judicial effort and party resources. In short, §455(f) and harmless-error doctrine both serve as safety valves to protect parties and the judiciary from the harsh consequences of unnecessary recusals.

The Federal Circuit's rigid new rule dealt a double blow to these ameliorative doctrines. The court construed §455(f) to forbid divestiture into a blind trust, even when that option avoids the appearance of impropriety caused by a judicial sale before an unfavorable ruling. And it doubled down by holding that a good-faith recusal error cannot be harmless if judicial stock ownership is in the news. Either error would strongly counsel in favor of review. That the Federal Circuit committed both in an opinion that conflicts with the decisions of other circuits confirms the urgent need for this Court's intervention.

I. The Federal Circuit's Interpretation Of Section 455(f) Conflicts With This Court's Caselaw And Renders The Statute A Nullity.

Cisco misdescribes the Federal Circuit's opinion and caricatures Centripetal's argument. In Cisco's telling, the court of appeals simply gave effect to the language of the statute, and Centripetal disregards text in favor of purpose. In reality, the court ignored a cardinal rule of "textual interpretation": Context is not only relevant in understanding the meaning of the text; "context is everything." Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 37 (1998). The Federal Circuit repeatedly ignored the limited context in which §455(f) applies and worried about the use of blind trusts in wholly inapposite contexts. That basic error led it to a fundamentally wrong result in interpreting the text of §455(f).

Section 455(f) does not apply in every case. It provides judges the option to "divest[]" themselves of a "financial interest" in a party before them *only* when they discover the interest "after substantial judicial time has been devoted to the matter" but before the case is over. 28 U.S.C. §455(f). In that context, selling stock outright will often give reasonable observers the impression that the sale was made with material nonpublic information, including the judge's insight into how she is likely to rule. If selling stock outright is the only way to comply with §455(f), then Congress unwittingly created a Catch-22, as employing §455(f)'s divestiture-by-selling option would create an appearance-of-impropriety problem, triggering the need to "disqualify" under §455(a). *Id.* §455(a) ("Any [federal] judge … shall disqualify himself in any

proceeding in which his impartiality might reasonably be questioned."). Yet disqualification at all costs is precisely what §455(f) is meant to prevent.

Cisco all but concedes this problem by contending that §455(f) might not provide a viable option "at all" when a judge "possess[es] material non-public information" because §455(f) does not reach interests that could be substantially affected by the outcome. BIO.25. Cisco declines "to press that argument" further, BIO.25, for good reason: Section 455(f) applies only when a judge "discover[s]" "a financial interest in a party" "*after substantial judicial time has been devoted to the matter*." It will be the rare case in which any reasonable observers will believe that a judge who has presided for a substantial amount of time knows *nothing* material about the parties that is nonpublic. But in a wide universe of cases, especially when the holding is less than $5,000, the impact of that information will not be substantial. Simply put, §455(f) was designed for cases just like this.

Cisco admits that §455(a) focuses on what "a reasonable person would conclude," BIO.25 n.8, but suggests it would be unreasonable to question the impartiality of judges who sell stock to comply with §455(f), BIO.24-25. That once again ignores the context of §455. If the public were credited with all the legal knowledge about the rules governing judges, including their oaths, then there would be no reason to avoid the appearance of partiality or to require recusals even for substantial financial holdings. The whole notion that judges must recuse based on appearances, rather than only for actual bias, presupposes that the reasonable observer is not fully

informed about judges' legal obligations or predisposed to give judges the benefit of the doubt. Cisco elides that context and attributes unreasonable degrees of trust to the reasonable observer.

Perhaps recognizing the dilemma the decision here creates by limiting compliance with §455(f) to a course that raises §455(a) problems, Cisco asserts that "[t]his case does not implicate 28 U.S.C. §455(a)." BIO.8 n.1. That disclaimer underscores the chasm between the Federal Circuit's decision and this Court's instructions. Section 455 only has six subsections, and only one—§455(f)—addresses the situation where the financial interest is discovered only after significant judicial effort has been invested in a matter. An interpretation of §455(f) that puts it on a collision course with §455(a) whenever substantial judicial time spent on a matter gives a judge material nonpublic information is not a sensible interpretation. To the contrary, it runs afoul of this Court's instruction that provisions "cannot be construed in a vacuum," and instead "must be read in their context and with a view to their place in the overall statutory scheme." *Sturgeon v. Frost*, 577 U.S. 424, 438 (2016).

Cisco also follows the decision below in misreading the opinion of the Codes of Conduct Committee. BIO.23, 33. The Committee has sensibly taken the view that judges cannot comply with their ethical obligations, including the obligation to "keep informed about the judge's personal and fiduciary financial interests," by placing every asset they own in a blind trust the day they receive their judicial commission. Advisory Op. 110, Comm. on Codes of Conduct, Jud. Conf. of the U.S., at 217-18 (Aug. 2013).

Centripetal has never argued otherwise; judges plainly cannot comply with their obligations to identify financial conflicts by placing all their assets in a blind trust and calling it a day. But that completely ignores the specific context addressed by §455(f)—namely, a judge who has *not* abdicated her duty to monitor her financial interests, but identifies one interest after substantial judicial time has been dedicated to a matter. Divesting into a blind trust in that context as a means of simultaneously complying with both subsections 455(a) and 455(f) raises none of the concerns that motivated the Committee.

As a last-ditch effort to contest the need for this Court's intervention, Cisco asserts that "a judge could 'give[] away' the stock, e.g., to a charity," which (it says) would defeat any appearance-of-impropriety concerns. BIO.24 (quoting App.11-12). That noblesse-oblige solution to the dilemma divorces Cisco from reality and underscores the flaw in the decision below. If the only way to comply with §455(f) without violating §455(a) is to donate stock to charity, then §455(f) is all but meaningless to any judge that lacks independent wealth. Nor is it clear a donation would actually pass muster under the Federal Circuit's rigid rule; if a judge claimed a tax deduction for the donation, reasonable observers may still perceive that the judge benefitted from her financial interest even in giving the interest away.

Congress added subsection (f) "to mitigate unnecessary restrictions on a judge's ability to hear cases" in the real world, *In re Literary Works in Elec. Databases Copyright Litig.*, 509 F.3d 136, 142 (2d Cir. 2007); *see* Pet.6, where stock ownership among judges

(and spouses) is commonplace and judicial salaries make donations to charity a wholly impractical solution. If the only two potential options for complying with §455(f) without creating a §455(a) problem are divesting stock into a blind trust or giving it away, then the decision below foreclosing the first option cannot be correct.

Cisco does not deny that the relevant legal and linguistic communities have long referred to placing assets in a blind trust as a form of divestment and have done so *in the specific context of government officials and their recusal obligations*. *See* Pet.22-23. Instead, Cisco faults Centripetal for not citing all these materials to the Federal Circuit. BIO.22. But Centripetal plainly preserved the argument that Judge Morgan complied with §455(f). And the Federal Circuit plainly passed on the argument below. That is more than enough to preserve an issue. If additional sources support the argument made and rejected below, that is all the more reason to grant review.[1]

II. The Federal Circuit's Harmless-Error Analysis Conflicts With This Court's Caselaw And Decisions Of Other Circuits.

Even if placing stock in a blind trust does not constitute divestment under §455(f), Judge Morgan's decision to use a blind trust to avoid appearance concerns is the archetypal harmless error. Under this Court's decision in *Liljeberg*, vacatur for non-recusal

[1] Cisco says "this case does not involve a true blind trust" because the settlor would be "inform[ed] … if the assets were sold." BIO.18. But that is how blind trusts work: The settlor cedes control and has no knowledge of how the assets are used or performing while they remain in the trust.

is appropriate only where the failure to recuse affected the parties' rights and where vacatur would promote justice and public perception. Neither is true here. The Federal Circuit's contrary conclusion effectively nullifies *Liljeberg* and conflicts with decisions of multiple other circuits properly applying it.

Cisco does not (and cannot) dispute that, by the time Judge Morgan learned that his wife owned Cisco stock worth less than $5,000, "(1) [he] had already prepared a 'full draft' of his opinion, (2) '[v]irtually every issue was decided,' and (3) the 'shares did not and could not have influenced his opinion on any issues in th[e] case.'" BIO.4-5 (first alteration added) (quoting App.3); *see* BIO.24. That—plus the fact that Cisco conceded below that Judge Morgan was not biased against it, *see* CAFC.Oral.Arg.Tr.0:21-1:12—belies any suggestion that non-recusal materially affected Cisco's rights.[2]

It also underscores the conflict among the circuits. The First Circuit correctly recognized in *In re Allied Signal Inc.*, 891 F.2d 974, 975 (1st Cir. 1989), that actual bias (or its absence) is highly relevant to the harmless-error inquiry. The Federal Circuit held the opposite. *See* App.23. Cisco does not deny this. Instead, it tries to distract from the conflict by erecting a straw man, pointing out that neither *Allied Signal* nor any of Centripetal's other cases "requir[ed] proof of 'actual bias' as a condition for vacatur." BIO.30. True enough—but that simply reflects that harmless-error review under *Liljeberg* is supposed to eschew

[2] Cisco tries to walk back its concession (at 30), but the transcript speaks for itself.

inflexible rules. Other circuits apply the doctrine accordingly. The Federal Circuit apparently has not gotten the message, despite this Court having already once reversed it for committing this very error. *See Shinseki v. Sanders*, 556 U.S. 396 (2009); Pet.27-28.[3]

The Federal Circuit likewise gave short shrift to the undeniable reality that vacatur stands to cause substantial prejudice to Centripetal and give Cisco a massive windfall. Pet.26-28. Cisco breezes past this point—just like the Federal Circuit, which elided *Liljeberg*'s instruction that vacatur is inappropriate where "it would … be unfair to deprive the prevailing party of its judgment." 486 U.S. at 868. Other circuits pay meaningful "'attention to the prejudice' that vacatur would cause the party that won below." BIO.15. The Federal Circuit does the opposite.

Cisco would discount the relatively trivial amount of the financial interest—and the fact Judge Morgan ruled contrary to his supposed financial interest—in the harmless-error analysis. But that ignores both the rules applicable to other federal officials and common sense. Federal regulations permit government employees to participate in matters involving parties in which they possess a financial interest if (1) "[t]he securities are publicly traded" (or are long-term government bonds) and (2) the value of the interest "does not exceed $15,000." 5 C.F.R. §2640.202(a). This rule by its terms *applies to the PTAB and its APJs*. If it is acceptable for APJs to have triple the amount of stock in Cisco (a publicly traded company)

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[3] Cisco's repeated assertion that this issue is "factbound," BIO.2, 13, 20, is thus not just mistaken, but the height of irony.

that Judge Morgan's wife held without even triggering a recusal obligation, how can it be harmful error to use a blind trust in lieu of an outright sale for a spousal holding worth less than $5,000? Moreover, if the ultimate concern is the public's perception of fair justice, how can it be acceptable for an APJ to rule in favor of a company in which he holds $14,999 in stock, but irrelevant that Judge Morgan ruled *against* his *much smaller* financial interest?

This problem is not hypothetical, let alone "rare." BIO.2, 20. Centripetal recently discovered that an APJ *in this case* held a financial interest in Cisco—but failed to notify the parties of the interest, let alone divest or recuse. And that APJ repeatedly ruled in Cisco's favor and against Centripetal's patents, including a patent at issue in this very case.

That underscores just how strongly the second and third *Liljeberg* considerations support a finding of harmless error here and the need for this Court's review. Because small inventors are rarely publicly traded, the only parties that stand to benefit from the relaxed stock-ownership rules APJs appear to enjoy under 5 C.F.R. §2640.202(a) are behemoths like Cisco that do not need any more advantages. Wiping out the largest patent-damages award in history on a technicality is not likely to enamor the federal court system to the public when that award was entered against such a behemoth and in favor of a company that, as Cisco gleefully points out, has had to rely on outside financing just to make it this far. *See* BIO.17-18, 30.

Finally, Cisco makes the remarkable argument that Judge Morgan did not take the late-discovered

financial interest seriously, and argues that vacatur was therefore necessary to "send [a] message." BIO.32. That flouts the record and needlessly besmirches a public servant. Cisco does not (and cannot) deny that Judge Morgan not only emailed the parties about the stock within a day of discovering it and recognized that "the simplest thing would be to sell the stock," but eschewed that "simple[]" option only because of appearance concerns and a desire to live up to "the purpose of section 455." App.5.

Cisco simply disputes that a blind trust counts as divestment under §455(f). Even if Cisco is right about that, that says nothing about the remedy, harmless error, justice, or public perception. This Court has already recognized that "revers[ing] in cases where, in fact, the error is harmless … diminishes the public's confidence in the fair and effective operation of the judicial system." *Shinseki*, 556 U.S. at 409. The only "message" that needs to be "sen[t]," BIO.32, is from this Court to the Federal Circuit.

III. The Questions Presented Are Important, And This Case Is An Ideal Vehicle.

Unable to deny the Federal Circuit's errors or the importance of getting the federal-judicial-recusal issue right, Cisco tries to dispute that "the question whether holding stock in a 'blind trust' constitutes 'divest[ment]' under Section 455(f)" is "even cleanly presented here." BIO.2. That ignores reality. The primary question the Federal Circuit addressed was "whether [the] placement of the stock in a blind trust qualified as divestment" under §455(f). App.9-10. The court (erroneously) answered that question in the negative, "hold[ing] that placing assets in a blind trust

is not divestment under §455(f)." App.15. Indeed, *even Cisco later admits this*. BIO.8. That is unsurprising, as the first half of the court's opinion is devoted entirely to that (erroneous) holding. *See* App.11-14 (declining to "constru[e] 'divest' to include placement of stock in a blind trust" on the martinet theory that "to 'divest' oneself of 'ownership' of a legal or equitable interest is possible only if one is 'deprived or dispossesse[d]' of ownership—something that is possible only if the interest is sold or given away").

The other half of the opinion was equally flawed and no less important. As explained, the decision below not only saps §455(f) of its ameliorative promise, but doubled down on the error by depriving *Liljeberg* of its ameliorative force. If a good-faith error in the mechanism for unloading a relatively trivial financial interest before a ruling against that financial interest is not harmless error, then *Liljeberg* exists in name only in the Federal Circuit.

The interlocutory posture of the decision below, *see* BIO.19, is no hurdle to review. The Federal Circuit's failure to even consider the merits—an exercise that would have only underscored that any error was harmless—is part and parcel of its error. Moreover, the parties deserve to know now whether a new judge needs to be empaneled. A remand that may produce the same substantive result furthers Cisco's strategy of making any infringement victory against it Pyrrhic, but does not serve the interests of innovation or justice. *See* Committee.for.Justice.Br.16-19; USIJ.Br.3-4; Fair.Inventing.Br.11-12.

In the end, there is no denying the importance of this case, as the multiple amici attest. The judicial-

recusal statute is no ordinary statute. It contributes directly to the public's trust in the fairness of the judicial system. What erodes confidence in the system is one-sided results that flunk the test of common sense—a judge ruling against a relatively trivial financial interest is not what the public is concerned with—but benefit the largest of companies. The stakes in getting §455 right are simply too high to let the decision below stand.

CONCLUSION

The Court should grant certiorari.

Respectfully submitted,

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