

No. 23-_____

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

IN RE CENTRIPETAL NETWORKS, LLC,

Petitioner.

On Petition for Writ of Mandamus to the
United States Patent and Trademark Office,
No. IPR2022-00182

PETITION FOR WRIT OF MANDAMUS

Matthew J. Dowd
Robert J. Scheffel
Dowd Scheffel PLLC
1717 Pennsylvania Ave., NW
Suite 1025
Washington, D.C. 20006
(202) 995-9175
mdowd@dowdscheffel.com
rscheffel@dowdscheffel.com

Counsel for Petitioner

CERTIFICATE OF INTEREST

Counsel for Petitioner certifies the following:

1. The full name of every party or amicus represented by me is:

Centripetal Networks, LLC

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

Not Applicable.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

CNI Holdings, Inc.

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

**Kramer Levin Naftalis & Frankel LLP: James Hannah,
Jeffrey H. Price, and Jenna Fuller**

**Banner & Witcoff, Ltd.: Bradley C. Wright, Scott M. Kelly,
and John R. Hutchins**

**Dowd Scheffel PLLC: Matthew J. Dowd and Robert J.
Scheffel**

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. See Fed. Cir. R. 47. 4(a)(5) and 47.5(b). (The parties should attach continuation pages as necessary):

None

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6): **None**

Date: March 23, 2023

/s/ Matthew J. Dowd

Matthew J. Dowd
Counsel for Petitioner

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INTRODUCTION

In our system of separation of powers, executive-branch officials sometimes perform adjudicatory tasks that have more in common with judicial proceedings than the discretionary responsibilities ordinarily associated with the executive. There are few better examples than proceedings before the Patent Trial and Appeal Board (“PTAB” or “Board”) and its Administrative Patent Judges (“APJs”). The stakes and procedures have more in common with a patent suit in federal court than a typical executive-branch action. Despite all that, the presumptively applicable disqualification provisions for APJs are the general rules that apply to all executive-branch officials, not the more stringent rules that apply to Article III adjudicators.

There is, however, one critical feature of the executive-branch rules that permits executive-branch officials, including APJs, to account for the distinct circumstances—and distinct appearance-of-partiality concerns—that arise when executive officials assume adjudicative roles similar to Article III judges: The Office of Government Ethics (“OGE”) regulations require recusal where, under the circumstances, there is a material risk of the appearance of partiality. Petitioner Centripetal Networks, LLC

(“Centripetal”) sought to invoke that provision but was punished for having the temerity to raise the issue. The Board’s response is such an extraordinary departure from basic fairness and the administration of justice that the extraordinary relief of mandamus is necessary.

The stakes and circumstances of this case demanded the Board’s nuanced consideration and perhaps an ounce of empathy. Centripetal received none of the above. Centripetal was not just any patent holder facing the prospect of proceedings to vitiate a hard-won patent (though that alone should suffice for APJs to consider perceptions of partiality with great care). Centripetal had already obtained an impressive and costly victory against a corporate behemoth in a patent infringement trial, only to lose it due to a judicial recusal oversight involving a financial interest in the infringer, Cisco Systems, Inc. (“Cisco”), worth less than \$5,000. The prospect of having one of the same patents from the trial canceled by APJs owning up to \$15,000 in Cisco stock struck Centripetal—and would strike any reasonable observer aware of the circumstances—not just as creating an appearance of partiality, but as well-nigh unfathomable, particularly in view of Cisco’s decision not to appeal the district court’s validity ruling.

Centripetal raised its concerns in a recusal motion in the context of an institution decision and Cisco's motion to intervene (the latter was filed because the time had long passed for Cisco to file its own IPR to challenge the patent). It would have been bad enough if the recusal motion had been denied without more, but what transpired next was far worse. Despite the extraordinary circumstances and the fact that the motion precipitated two APJs to recuse after voting to institute *inter partes* review and to allow Cisco to join the proceedings, Centripetal's motion was characterized as "frivolous," and Centripetal was chastised for having filed it. With that, the Board sent a message to the entire patent bar: Any attempt to hold APJs to standards comparable to those of Article III judges would be met with sanctions. Then, adding retaliation to injury, the reconstituted panel denied Centripetal its counsel of choice, in part because he signed the recusal motion while his unopposed *pro hac vice* motion was pending.

This extraordinary departure from basic elements of due process demands an extraordinary remedy. Indeed, mandamus is particularly appropriate here, as the reviewability of the failure to recuse at the institution stage on review of a final PTAB determination is unsettled, and

the misguided message sent to the PTAB bar should not go unremedied. The very fact that there is a PTAB bar to which attorneys can be denied admission underscores that the PTAB is no ordinary executive-branch component, and that its APJs are no ordinary executive-branch officials. It beggars belief that parties could be sanctioned and chastised for asking APJs to recuse themselves to avoid the appearance of partiality and for expecting that APJs be held to a higher standard than the lower, generally applicable safe harbor from criminal prosecution. The extraordinary decisions and orders here should not be allowed to stand.

JURISDICTIONAL STATEMENT

This Court has jurisdiction under the All Writs Act, 28 U.S.C. § 1651.

RELIEF SOUGHT

Centripetal seeks a writ of mandamus instructing the PTAB to vacate, on an emergency basis, all decisions in IPR2022-00182, including the grant of institution and the joinder of Keysight Technologies, Inc., and Cisco Systems, Inc. The PTAB should be further instructed to constitute a new panel of APJs, free of any conflict, to reconsider the PAN IPR petition.

ISSUE PRESENTED

Do executive-branch regulations and appearance-of-impropriety concerns compel recusal and vacatur when, after this Court has reversed a multibillion-dollar willful-infringement judgment because the district court's wife held less than \$5,000 in stock in the infringer and the judge chose to divest the stock into a blind trust rather than via an outright sale, (1) an APJ votes to institute *inter partes* review on one of the same patents at issue in the district-court litigation while knowingly owning considerably more stock in the same party, (2) the same APJ votes to join the party in which he owns stock after being apprised of the issue, (3) the Board threatens sanctions in response to a good-faith recusal motion based on the financial interest, and (4) the Board refuses to admit the movant's counsel of choice to the PTAB bar in part because he signed the recusal motion?

BACKGROUND

I. The Litigation Between Cisco And Centripetal

Cisco and Centripetal have been litigating the validity and infringement of several Centripetal patents for years now. In the first round of litigation, Centripetal sued Cisco for its willful infringement of patents directed to “systems that perform computer networking security

functions.” *Centripetal Networks, Inc. v. Cisco Sys., Inc.*, 38 F.4th 1025, 1027 (Fed. Cir. 2022). The district court (Morgan, J.) presided over a 22-day bench trial that “included an over 3,507-page record, 26 witnesses, and over 300 exhibits.” *Id.* at 1028. Judge Morgan ultimately ruled “that Cisco willfully infringed the asserted claims of the ’856, ’176, ’193, and ’806 patents” and awarded Centripetal more than \$2 billion in damages and pre-judgment interest, plus a running royalty. *Id.* at 1029.

This Court reversed—but not on the merits. After trial ended but before he issued his opinion, Judge Morgan learned that his wife owned roughly \$4,500 of Cisco stock. *Id.* Judge Morgan immediately disclosed this to the parties, “explaining that the shares ‘did not and could not have influenced [his] opinion on any of the issues in this case’” because he was unaware of them, and advising the parties that “[a] full draft of [his] opinion had [already] been prepared” and that “[v]irtually every issue was [already] decided.” *Centripetal Networks, Inc. v. Cisco Sys., Inc.*, 492 F. Supp. 3d 615, 617 (E.D. Va. 2020). Judge Morgan then “divest[ed] the Cisco shares into a blind trust,” rather than sell them outright, as he thought “an outright sale” would create the “appear[ance]” that he had

secured a “benefit” by unloading Cisco stock on the eve of a substantial ruling against the company. *Id.* at 624.

On appeal, this Court reversed, holding that Judge Morgan should have sold the stock outright and that his decision to divest into a blind trust was not harmless under *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988). The Supreme Court denied certiorari, *Centripetal Networks, Inc. v. Cisco Sys. Inc.*, 143 S. Ct. 487 (2022), and the case is now on remand before a new district judge.

II. The Board Grants The IPR Petition Of Palo Alto Networks And Cisco’s Joinder Motion, Despite The APJ’s Stock Ownership In Cisco

Palo Alto Networks, Inc. (“PAN”) filed a petition for *inter partes* review (“IPR”) not long after Judge Morgan entered final judgment, alleging that claims 1, 24, and 25 of Centripetal’s ’856 patent are unpatentable over the same prior-art patents that were already litigated in the Cisco trial—despite the fact that the district court had upheld the ’856 patent’s validity over the same prior art. The petition, which PAN filed even though Centripetal has never asserted the ’856 patent against it, was assigned to a panel of three APJs: APJs McNamara, Amundson, and Moore.

See Appx026 (Paper 11).¹ The panel instituted IPR on May 25, 2022, finding that PAN showed a reasonable likelihood of proving claims 1, 24, and 25 unpatentable, again despite the district court having reached the exact opposite conclusion after considering the very same art upon which the PTAB instituted. Appx002 (Paper 55). Centripetal requested rehearing of that decision on June 8, 2022. *See* Paper 13.

A few months later, while its rehearing petition was still pending, Centripetal learned that APJ McNamara, one of the three panelists who had voted to institute (and ignored the evidence for non-institution from the Cisco trial), owns between \$1,001 and \$15,000 of stock in Cisco. While Cisco at this point was not a party in the IPR, it was a direct beneficiary of PAN's challenge to the '856 patent. That understates the point: As evidenced by the now-vacated district court judgment, Cisco's attempts to escape liability for willfully infringing Centripetal's patents—including the '856 patent—involve billions of dollars of potential liability, and Cisco will materially benefit if PAN's IPR results in canceling the '856 patent. Nevertheless, APJ McNamara has knowingly owned

¹ Docket entries in the IPR proceeding are cited as "Paper __" or "Ex. __" and are publicly available at <https://ptacts.uspto.gov/ptacts/ui/home>.

Cisco stock for years now, including in 2018, when he sat on every single panel deciding the fourteen IPR petitions Cisco filed against Centripetal. *See* Exs. 2030–2035; Ex. 2029 ¶¶2, 4.

APJ McNamara’s 2014–2019 financial disclosures further revealed that he has continued to receive an annual share of profits from the law firm Foley & Lardner LLP, *see* Ex. 2031 at 6; Ex. 2033 at 7 (disclosing “[c]ontinued participation in earnings of firm as retired partner” with amounts varying each year and ranging from \$30,000 to \$60,000); Exs. 2030–2035; Ex. 2029, ¶3, which represents Cisco in lobbying efforts, *see* Ex. 2037 at 15–16, Exs. 2038–2041; Ex. 2029, ¶6, and recently listed Cisco as its “most lucrative contract” in at least one state, Ex. 2037 at 15. Indeed, APJ McNamara was featured on the Foley website until June of last year. Ex. 2036. During that time, however, APJ McNamara decided numerous petitions brought by Cisco against Centripetal, as noted above.

In light of these discoveries, Centripetal filed a motion seeking recusal and vacatur of the decision to institute IPR, Paper 37, consistent with executive-branch regulations supporting recusal where an official’s “financial interest” in a party or case “is likely to raise a question in the mind of a reasonable person about his impartiality.” 5 C.F.R.

§ 2635.502(e); *see also id.* § 2635.502(a) (requiring employees to seek counsel when a matter “is likely to have a direct and predictable effect on [his] financial interest” and “the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality”). The motion argued that the “entire panel” was “tainted with APJ McNamara’s conflict,” Paper 37 at 2, and it was signed by Centripetal’s lead trial counsel, Paul J. Andre, who the day before had filed a standard, unopposed motion for *pro hac vice* admission to the PTAB to continue his representation of Centripetal now in Board proceedings.

While the motion for recusal and vacatur was still pending, the Board—including APJ McNamara—issued three orders on January 4, 2023. First, the Board denied Centripetal’s by-then-months-old request for rehearing of the panel’s initial institution decision. Paper 40. The Board also granted two motions for joinder in PAN’s IPR: one for Keysight (filed in IPR2022-01199), and the other for Cisco (filed in IPR2022-01151). *See* Papers 39, 41. Both Keysight and Cisco were time-barred under 35 U.S.C. § 315(b) from filing their own IPR petitions against the ’856 patent. But for the decision to institute IPR on PAN’s petition—which PAN filed even though Centripetal has never asserted

the '856 patent against PAN—neither Keysight nor Cisco would have been able to challenge the '856 patent. *See* IPR2022-01151, Ex. 2005 (Amended Complaint against Cisco, Mar. 29, 2018); IPR2022-01199, Paper 8 (Patent Owner's Opposition to Keysight's Motion for Joinder).

The day after signing onto these decisions (including the decision to join otherwise-time-barred Cisco), APJ McNamara abruptly withdrew from the panel. Paper 43. APJ McNamara did not deny his stock ownership; instead, he claimed that it “has been a matter of public record for ten years,” *id.* at 3, and tried to downplay the stock as “less than 0.04% of the value” of his disclosed assets, *id.* at 2 n.1. As to why he was withdrawing in response to a request he called “without merit,” APJ McNamara stated only that his withdrawal was to “reduce the number of issues and simplify the briefing.” *Id.* at 3.

APJ Amundson followed suit less than two weeks later, withdrawing from the panel—but only after he also gratuitously opined that Centripetal's motion “lacks merit” on both APJ McNamara's conflict and his influence on the remainder of the panel. Paper 47 at 3. APJ Amundson repeated APJ McNamara's unexplained “reduce the number of issues” basis for withdrawing. *Id.* But, like APJ McNamara, APJ Amundson

identified no issues that were now eliminated, given that APJ Moore—the third member of the original panel—did not withdraw.

After APJs McNamara and Amundson withdrew, the Board issued a Panel Change Order noting that the new panel would have two APJs not previously involved in the matter “[d]ue to” APJ McNamara and Amundson’s “unavailability.” Paper 51 at 2. Despite adding two new APJs (Khan and Wormmeester) alongside APJ Moore, the Panel Change Order made clear that “[a]ll prior decisions and orders” entered by the original panel “remain in effect.” *Id.* The newly constituted panel set oral argument for February 15, 2023. Paper 53 at 2.

III. The Board Denies Centripetal’s Vacatur Motion, Calling It “Highly Inappropriate”

On February 3, 2023, the newly constituted panel denied Centripetal’s motion for vacatur. Appx001 (Paper 55). The Board ruled that because (1) “Cisco was not a party to this proceeding at the time of the Institution Decision” and (2) the value of APJ McNamara’s holding in Cisco was sufficiently small to come within the executive-branch safe harbor from criminal prosecution, *see* 5 C.F.R. § 2640.202, the stock ownership was not disqualifying under the applicable ethics rules. Appx009–011, Appx016 (Paper 55). In so ruling, the Board said nothing the

original panelists’ knowledge that Cisco would immediately benefit from the decision of the now “unavailable” APJs to institute against Centripetal’s ’856 patent. Nor did it address the initial panel’s decision to grant Cisco’s own motion to join the proceedings on the way out the door after Centripetal had raised the stock-ownership and appearance-of-partiality issues.

What the Board did say, however, is chilling. The Board decried Centripetal’s recusal-vacatur motion as “frivolous,” “glaringly deficient,” “lacking in substance,” without “competent, good faith argument,” and “highly inappropriate.” Appx013–014; Appx022. The Board also criticized Centripetal for filing its motion within three months—from September 2022, when it learned of APJ McNamara’s financial conflict, until December 2022—and suggested that Centripetal should have instead raised the matter “immediately,” Appx022, apparently without any due diligence and despite the fact that Centripetal still has not been able to obtain APJ McNamara’s more recent financial disclosures. And although it acknowledged Centripetal’s right “to be heard by a disinterested decision-maker,” the Board warned that, if Centripetal made further

arguments about the Board’s or the APJs’ conflict of interest, such “baseless” arguments “may be met with sanctions.” Appx014–015.

It did not take long for the Board to make good on that warning. On February 7, 2023, the Board rejected the motion for *pro hac vice* admission of Paul J. Andre, who sought to represent Centripetal in these Board proceedings, in part because Mr. Andre had signed the recusal motion—which it again described as “frivolous.” Paper 56 at 4. The Board did not explain how a motion based on a known stock-ownership conflict and that resulted in the self-withdrawal of two of the three APJs, *see* Papers 43 & 47, could be “frivolous”—especially against the backdrop of this Court’s vacatur of the district court’s multibillion-dollar judgment for a less serious conflict.

The Board is expected to issue a final written decision by May 25, 2023. *See* 35 U.S.C. § 316(a)(11) (requiring “final determination” within one year of instituting *inter partes* review); Appx026 (Paper 11) (instituting review on May 25, 2022).

STANDARD OF REVIEW

A party seeking mandamus under 28 U.S.C. § 1651(a) typically must show that (1) it has “no other adequate means to attain the relief

[it] desires”; (2) its right to relief is “clear and indisputable”; and (3) “the writ is appropriate under the circumstances.” *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 381 (2004); *see also Cobell v. Norton*, 334 F.3d 1128, 1139 (D.C. Cir. 2003) (collecting cases from various circuits applying mandamus to judicial recusals).

That said, there are “‘narrow circumstances’ in which mandamus relief is granted because ‘doing so is important to proper judicial administration.’” *In re Stingray IP Sols., LLC*, 56 F.4th 1379, 1383 (Fed. Cir. 2023) (quoting *In re Micron Tech., Inc.*, 875 F.3d 1091, 1095 (Fed. Cir. 2017)); *see also In re ZTE (USA) Inc.*, 890 F.3d 1008, 1011 (Fed. Cir. 2018) (granting a petition for mandamus that “present[ed] two such ‘basic’ and ‘undecided’ issues relating to proper judicial administration”).

In such cases, the court has “not separately required petitioners to show satisfaction of *Cheney*’s three requirements.” *Stingray*, 56 F.4th at 1382 (citing cases). This case plainly fits that bill. *See, e.g., In re Fed. Sav. & Loan Ins. Corp.*, 852 F.2d 565, 1988 WL 76272, at *4 (4th Cir. 1988) (table) (per curiam) (erroneous denial of recusal required court of appeals to exercise supervisory control by issuing mandamus). In all

events, Centripetal satisfies *Cheney*'s "demanding" three-part standard, 542 U.S. at 381, as set forth below.

ARGUMENT

I. Centripetal's Right To Relief Is Clear And Indisputable

After seeing its multibillion-dollar willful-infringement judgment against Cisco wiped away because the district judge's spouse owned less than \$5,000 in Cisco stock and the judge's chosen means of divestiture (a blind trust) was deemed insufficient to cure the conflict, the last thing Centripetal expected was to have a different adjudicator owning even more Cisco stock presiding over proceedings that could cancel one of the very same Centripetal patents upheld in the district-court litigation. It is difficult to imagine a party in that scenario not crying foul, or a reasonable observer not having concerns about the appearance of unfairness and partiality. It is even more difficult to imagine that the mere act of raising such concerns would be met with anything short of serious deliberation. Yet when Centripetal filed a good-faith motion for recusal and vacatur based on the stock ownership and appearance of partiality, the Board lambasted its motion as "frivolous," "baseless," and "highly inappropriate," Appx013–015 (Paper 55), warned that future efforts to raise

these issues “may be met with sanctions,” Appx022, and then denied the unopposed motion for admission to the PTAB bar of a lawyer who sought to represent Centripetal, in part because he signed the recusal motion, Paper 56 at 4. The message to Centripetal and the entire patent bar was unmistakable.

The Board apparently believed that Centripetal’s motion was frivolous because, in its view, the regulatory safe harbor from criminal liability under 18 U.S.C. § 208—under which “an officer or employee of the executive branch” commits a federal crime by “participat[ing] personally and substantially . . . in a judicial or other proceeding . . . in which, to his knowledge, he” or his family “has a financial interest” in a party before him—is the alpha and omega of the inquiry. *See* Appx009–Appx011 (Paper 55). That was a clear and unmistakable legal error. To be sure, 5 C.F.R. § 2640.202 insulates executive-branch officials from criminal punishment for working on a matter involving a party in which they own less than \$15,000 of stock. But the Office of Government Ethics (“OGE”) regulations do not stop there; they separately require executive-branch officials to recuse from matters where their participation raises concerns about an appearance of partiality. That obligation is independent of the

\$15,000 criminal safe harbor; indeed, because officials presumably wish to avoid criminal exposure, the appearance-of-partiality provision will have its principal application to financial holdings below the criminal threshold.

“Consistent with the fundamental principle that public service is a public trust,” OGE regulations require all federal employees, not just officers wielding significant federal power or those acting in an adjudicative capacity, to “comply with the requirements of government ethics laws and regulations, including any applicable financial disclosure requirements,” and to ensure that they do not “los[e] impartiality or appear[] to lose impartiality in carrying out official duties.” 5 C.F.R. § 2638.102 (emphasis added); *see also id.* § 2635.101 (“Employees shall not hold financial interests that conflict with the conscientious performance of duty.”).

The regulations further provide that all federal employees likewise must “take[] appropriate steps to avoid an appearance of loss of impartiality in the performance of [their] official duties,” including by, among other things, “not participat[ing] in a particular matter involving specific parties which [they] know [are] likely to affect the financial interests of a

member of [their] household . . . if [they] determine[] that a reasonable person with knowledge of the relevant facts would question [their] impartiality in the matter.” *Id.* § 2635.501(a).

While the OGE regulations in general, and the appearance-of-partiality restrictions in particular, apply to all executive-branch officials, the latter apply with particular force to executive-branch officials discharging adjudicatory functions. Indeed, the Due Process Clause requires as much. One can fully accept that APJs are executive-branch officials and different from Article III judges yet still recognize that their adjudicative role necessitates some meaningful opportunity to raise concerns about the appearance of partiality that may be created by ownership of a party’s stock—even if the amount in question is below the safe harbor from criminal prosecution and may not create an appearance problem for the mine run of executive-branch officials—without worrying that merely raising those concerns will be seen as “inappropriate.” *See Commonwealth Coatings Corp. v. Cont’l Cas. Co.*, 393 U.S. 145, 150 (1968) (“[A]ny tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias.”).

The circumstances here plainly raise appearance-of-partiality concerns of the first order. APJ McNamara (and the rest of the Board) knew full well that this Court had just thrown out a multibillion-dollar judgment for Centripetal because the district judge's wife's sub-\$5,000 Cisco stock holding was deemed too significant an interest even to be placed in a blind trust. APJ McNamara also knew of Cisco's interest in the '856 patent, as that was one of the patents found to be willfully infringed in the federal-court action. Given that context, sitting on the panel that would decide whether to institute IPR on the '856 patent while knowingly holding up to three times as much Cisco stock as proved disqualifying for the district judge plainly would raise an appearance of unfairness and partiality in the eyes of the reasonable observer. And the appearance problem only became more glaring when, after Centripetal filed its recusal motion, APJ McNamara voted to join Cisco to the IPR.

In fact, even APJ McNamara apparently saw enough of an issue with his continued participation in the proceedings to withdraw. Yet he delayed his withdrawal until after he voted to grant Cisco's motion to join. No reasonable observer would fail to see a problem (and an improper effort to shield these issues from appellate review) with that vote-

first-recuse-later course of conduct. After all, if there was a basis to recuse, then APJ McNamara had zero business ruling on the joinder motions and the request for rehearing of the institution decision; and if there was no basis to recuse, then he should not have withdrawn, *see Maier v. Orr*, 758 F.2d 1578, 1583 (Fed. Cir. 1985) (“Absent a factual showing of a reasonable basis for questioning his or her impartiality . . . a judge should participate in cases assigned.”). Whichever it is, joining panel decisions that decide critical issues in the teeth of an asserted conflict—and deciding them in favor of Cisco—and then withdrawing from the case the next day is not a valid way to handle Centripetal’s valid concerns. It reinforces, rather than remedies, the appearance of partiality.

In these circumstances, the reasonable observer to whom the OGE regulations look would have little to no confidence that Centripetal was receiving a fair shake. Yet the Board gave appearance considerations the back of the hand in denying Centripetal’s motion, castigating Centripetal for even raising the conflict issue. Indeed, its opinion wholly ignored the appearance-of-partiality issue.

The Board apparently believed that the amount of stock APJ McNamara owned was of no consequence because it fell within the safe

harbor. But while OGE regulations provide a safe harbor from criminal liability when a “financial interest” in a party that is “publicly traded . . . does not exceed \$15,000,” 5 C.F.R. § 2640.202; *see* Appx009–011, 016 (Paper 55), they do not allow officials to ignore appearance concerns raised by smaller holdings. In fact, the regulations go on to clarify that federal employees should recuse when a financial holding would, under the circumstances, “raise a question in the mind of a reasonable person about [their] impartiality,” even if the holding is small enough that not recusing “would not violate 18 U.S.C. 208(a).” 5 C.F.R. § 2635.502(d); *see also id.* § 2635.502(e) (counseling recusal where “a member of the employee’s household” has a “financial interest” that “is likely to raise a question in the mind of a reasonable person about his impartiality”).

Those regulations are designed to apply to all executive-branch officials and all the myriad situations that the vast federal bureaucracy may confront. Both law and logic compel the conclusion that what may “raise a question in the mind of a reasonable person about [an official’s] impartiality” will depend on the circumstances of the case, the role of the official, and the nature of the proceedings. What may create an unacceptable appearance of impropriety may thus be different from one case

to the next. And while executive-branch adjudicators may not be subject to the same recusal requirements as Article III judges, it cannot be denied that the unique role of executive-branch adjudicators justifies a particular emphasis on appearance concerns above and beyond what may apply to prosaic federal employees or exempt them from criminal prosecution. After all, the vast majority of executive-branch officials are not deciding questions of law that just as easily could be (and often are) resolved in an Article III court. Likewise, most federal agencies and divisions do not require those exercising their petition rights to be a member of a “bar” or otherwise file a *pro hac vice* motion to appear before them.

Proceedings before APJs have many of these trappings of Article III proceedings for good reason—they reflect the stakes and the heightened need to convey the appearance and reality of impartiality before someone is deprived of a valued property interest. Those considerations can properly shape both the perceptions of the reasonable observer to whom the regulations look—and even the constitutional analysis.

For example, the reason that administrative law judges and presumably APJs enjoy absolute judicial immunity, rather than the qualified immunity of most executive-branch officials, is because their role “is

‘functionally comparable’ to that of a judge.” *Butz v. Economou*, 438 U.S. 478, 513 (1978). Similarly, the States’ Eleventh Amendment immunity extends to a proceeding before the Federal Maritime Commission because “such a proceeding ‘walks, talks, and squawks very much like a lawsuit.’” *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 757 (2002). The similarities extend to the heightened need for impartiality by administrative judges. *Id.* at 758 (“[T]he role of the ALJ, the impartial officer designated to hear a case, . . . is similar to an Article III judge.” (footnote omitted)).

Thus, the appearance-of-partiality concerns reflected in the OGE regulations apply with particular force to the APJs. After all, “confidence in the objectivity of adjudication is critical to a nation ruled by law.” *Mobility Workx, LLC v. Unified Patents, LLC*, 15 F.4th 1146, 1162 (Fed. Cir. 2021) (Newman, J., concurring in part and dissenting in part). Put differently, since appearance-of-partiality problems matter for everyday federal employees under OGE regulations, basic principles of due process require that they matter all the more so to—and be given all the more serious consideration by—those acting in an adjudicative capacity. *See Gibson v. Berryhill*, 411 U.S. 564, 579 (1973) (emphasizing “the

prevailing view that “[m]ost of the law concerning disqualification because of interest” for Article III judges “‘applies with equal force to . . . administrative adjudicators”’ (latter two alterations in original; citation omitted)); *cf. Washington v. Dep’t of the Interior*, 81 M.S.P.R. 101, 104 (1999) (“There is no requirement that the Board be bound by the federal judicial rule, inasmuch as it is not a court, but . . . we see no reason not to look to the rule and case law arising from 28 U.S.C. § 455, where relevant[.]”).

Given this context, the technicalities on which the Board relied in not just denying Centripetal’s motion, but chastising it for filing it, do not come close to dispelling the appearance concerns created by APJ McNamara’s stock ownership or the need for recusal and vacatur. Indeed, the justification is transparent enough to reinforce a sense of partiality. For example, the Board relied on the fact that Cisco was not a formal party to this IPR at the time of the panel’s institution decision. *See* Appx011 (Paper 55). But that ignores both that the original panelists that decided to institute knew full well about Cisco’s financial interest in the ’856 patent, and that APJ McNamara joined a decision adding Cisco as a party to this very IPR the day before recusing himself. *See* Paper

39; Paper 43. The Board also relied on the amount of stock being below the criminal safe harbor. But, again, that ignores the appearance of impartiality being a separate ground for recusal under the regulations that will almost always be invoked in situations where recusal is not independently compelled by a financial holding valued above the criminal safe harbor.

It also misses the broader context of this case. Every patent holder deserves the appearance of impartiality in a proceeding that risks invalidating a patent that is “presumed valid.” 35 U.S.C. § 282. But a party that has just lost a substantial infringement verdict based on a holding of less than \$5,000 in Cisco stock surely deserves a proceeding free from adjudicators holding larger amounts of Cisco stock, and it equally surely deserves a respectful hearing rather than a scolding and the loss of its counsel of choice. A reasonable observer aware of all the circumstances would expect nothing less. Yet instead of taking Centripetal’s concerns seriously, the Board not only chastised Centripetal for raising them, but gratuitously denied an unopposed pro hac vice motion to join the PTAB bar by the lawyer who signed the recusal motion. The clear message to

the entire PTAB bar is that future identification of APJ financial conflicts will be met not with indulgence, but with retaliation.

In sum, Centripetal’s entitlement to relief here is clear and unmistakable, as the Board’s decisions and actions in these proceedings are fundamentally inconsistent with the rules APJs are bound to follow. The Board’s extraordinary response to Centripetal’s good-faith motion underscores the need for this Court’s intervention—both to correct the dangerous message to the PTAB bar and to order these proceedings to begin anew before an untainted panel and with Centripetal’s counsel of choice.

II. Centripetal Has No Other Obvious Means Of Relief

Under 35 U.S.C. § 314(d), the “determination by the Director whether to institute” an IPR is “final and nonappealable.” Nonappealable orders are classic candidates for mandamus. *In re BP Lubricants USA Inc.*, 637 F.3d 1307, 1310 (Fed. Cir. 2011); *In re Princo Corp.*, 478 F.3d 1345, 1357 (Fed. Cir. 2007) (one whose rights “cannot be vindicated by direct appeal” “lacks adequate alternative means to obtain the relief sought”). That said, and despite the text of § 314(d), the Supreme Court has gone out of its way not to “categorically preclude review” of decisions to institute IPR in cases where there may be a crosscutting “problem with

the entire proceeding.” *Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261, 275 (2016).

Centripetal thus faces a Catch-22. While Centripetal certainly views an improper failure to recuse in light of an appearance of partiality as a crosscutting problem that taints the whole proceeding, the Supreme Court has left unresolved “the precise effect of § 314(d)” in cases where a challenge to institution raises “constitutional questions,” “depend[s] on other less closely related statutes,” or “present[s] other questions of interpretation that reach, in terms of scope and impact, well beyond” the substance of § 314. *Cuozzo*, 579 U.S. at 274–75. Moreover, it is likely that at least one of the opposing parties will argue that a recusal error at the institution stage cannot be remedied on review from the final decision in light of § 314(d). The analysis is further complicated by the decision of the APJs to withdraw after the institution and joinder decisions in a self-proclaimed effort to limit the issues in the case. It is thus unclear at this stage whether an improper failure to recuse on an institution decision could be reviewed on an appeal from a final PTAB decision

invalidating the '856 patent, or whether mandamus now is Centripetal's only recourse.²

What is crystal clear is that there is no further path for relief for Centripetal at the PTO. The Board has already threatened Centripetal and its counsel with sanctions if they continue to raise conflicts concerns, and the Board has disqualified Centripetal's counsel of choice. Appx014 (Paper 55). And on top of everything else, the PTO Director has a Cisco conflict of her own. *See* Paper 31 at 1 n.1. If Centripetal is to secure relief before further injury is inflicted, it will come only from this Court.

In the meantime, the statutory deadline for a final written decision on PAN's IPR is imminent, and the Board is pressing on full steam ahead with an APJ from the original panel that improperly granted Cisco's motion for joinder. As explained, not only will the ultimate decision inevitably be tainted, but an adverse decision regarding the patentability of the '856 patent would cast a pall over the district-court proceedings on

² While the Court has denied a mandamus petition that raised a constitutional due process argument, *see In re B.E. Tech., L.L.C.*, No. 22-114, 2022 WL 421186 (Fed. Cir. Feb. 11, 2022) (non-precedential), the Court has not yet settled whether a party can have its rights later vindicated upon direct appeal under the circumstances presented here.

remand from this Court’s decision vacating Judge Morgan’s non-recusal order, potentially severely prejudicing Centripetal as it seeks reinstatement of the large willful-infringement judgment. Waiting until a potential appeal from the final written decision would not provide adequate relief in these circumstances. And while this case is ongoing, Centripetal wishes to continue its good-faith press of its recusal claim rather than “wait [to] decide whether [it] likes the treatment that [it] receives.” *United States v. Owens*, 902 F.2d 1154, 1155 (4th Cir. 1990) (citing *In re United Shoe Mach. Corp.*, 276 F.2d 77, 79 (1st Cir. 1960)).

III. The Writ Is Appropriate Under The Circumstances

A writ of mandamus is appropriate and necessary here. Less than one year ago, this Court rejected arguments regarding “de minimis” financial conflicts and wiped out a judicial decision confirming the validity and willful infringement of the ’856 patent by Cisco. Rejecting Centripetal’s arguments, this Court held that “[i]t simply cannot plausibly be argued that public confidence in the judiciary will be degraded by a decision that vacates a judge’s rulings rendered while he had a known financial interest in one of the parties.” *Centripetal*, 38 F.4th at 1039. The decision to institute *inter partes* review of the ’856 patent and join otherwise time-

barred party Cisco to the proceeding by an APJ with known financial ties to Cisco suffers from the same basic problems. Moreover, the juxtaposition of the two decisions makes the result below—and the tongue-lashing Centripetal received for having the temerity to raise it—all the more inexplicable. The Board created an undeniable appearance of partiality when it allowed an APJ, tainted by Cisco stock ownership, to institute a proceeding that could cancel a patent looming large over Cisco’s infringement liability—all after this Court vacated Centripetal’s infringement verdict based on an amount of Cisco stock far lower than the APJ’s and that the district judge did not even know about until after he had written most of his opinion.

In rejecting Centripetal’s motion, the Board raised timeliness concerns and chastised Centripetal for not filing its motion sooner, without acknowledging the diligence and investigation needed to more fully understand the financial-interest details. *See* Appx021–022 (Paper 55). According to the Board, the three months between receiving copies of APJ McNamara’s 2014–2019 financial disclosures and filing the motion for recusal and vacatur was “highly inappropriate” and apparently so “unjustified” as to “bar the relief now being sought” all by itself. *Id.* But

unlike the litigants in the cases the Board cited, Centripetal did not wait for the Board to render a decision before seeking recusal, *see Owens*, 902 F.2d at 1156 (Owens “chose to wait to seek . . . recusal until after he learned what sentence the judge imposed”), or sit on disqualifying information for years, *see United Shoe Mach.*, 276 F.2d at 79. To the contrary, Centripetal filed its motion before the Board issued any further rulings or orders in the IPR proceeding.

In any event, it is hard to blame Centripetal for any “delay” here. Despite being characterized as “public,” APJs’ financial disclosures are not publicly posted anywhere. Nor are they easily accessed: When Centripetal formally requested the APJs’ financial disclosures—and explained the purpose for seeking the records—the government responded by warning Centripetal about potential criminal liability related to requesting such records for “commercial use.” *See* 5 U.S.C. § 105(d)(1)(B). The agency’s attempt to keep its “public” records inaccessible, not any purported dilatoriness by Centripetal, was the source of any delay.

The unexplained withdrawals of APJs McNamara and Amundson, their actions taken under the shadow of the recusal request, the Board’s dismissive and derisive treatment of Centripetal’s motion, and the

Board's subsequent retaliation against Centripetal's lead counsel only exacerbate the due process concerns at play in this case. Without this Court's intervention, other parties will hesitate to flag any potential conflict, no matter how legitimate, for fear of retribution. *But see United States v. Cooper*, 872 F.2d 1, 5 (1st Cir. 1989) ("Lawyers using professional care, circumspection and discretion in exercising that right need not be apprehensive of chastizement or penalties for having the advocative courage to raise such a sensitive issue to assure the client's right to a fair trial and the integrity of our system for administering justice.").

CONCLUSION

For the reasons set forth above, this Court should issue a writ of mandamus to the Board to vacate all decisions in IPR2022-00182, including the decision to institute and the decisions to grant the motions for joinder. The Board should be further ordered to constitute a new panel of APJs who are confirmed to be clear of any conflicts in order to reconsider the IPR petition filed by Palo Alto Networks.

Date: March 23, 2023

Respectfully submitted,

By: /s/ Matthew J. Dowd

Matthew J. Dowd

Robert J. Scheffel

Dowd Scheffel PLLC

1717 Pennsylvania Avenue, NW

Suite 1025

Washington, D.C. 20006

mdowd@dowdscheffel.com

rscheffel@dowdscheffel.com

Counsel for Petitioner

Centripetal Networks, LLC

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Rule 21(d)(1) of the Federal Rules of Appellate Procedure because it contains 6,661 words, excluding the parts exempted by Rule 32(f) of the Federal Rules of Appellate Procedure and Rule 32(b) of the Federal Circuit Rules.
2. This brief complies with the typeface and typestyle requirements of Rules 32(a)(5) & 32(a)(6) of the Federal Rules of Appellate Procedure because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Century Schoolbook font.

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By: /s/ Matthew J. Dowd

Matthew J. Dowd

Dowd Scheffel PLLC

1717 Pennsylvania Avenue, NW
Suite 1025

Washington, D.C. 20006

mdowd@dowdscheffel.com

rscheffel@dowdscheffel.com

rscheffel@dowdscheffel.com

Counsel for Petitioner

Centripetal Networks, LLC

CERTIFICATE OF SERVICE

I hereby certify that on March 23, 2023, I electronically filed the foregoing with the United States Court of Appeals for the Federal Circuit by using the CM/ECF system, and that the following counsel of record was served on March 23, 2023, via overnight delivery by Federal Express:

Scott A. McKeown (scott.mckeown@ropesgray.com)
Mark D. Rowland (mark.rowland@ropesgray.com)
James Batchelder (james.batchelder@ropesgray.com)
Andrew Radsch (andrew.radsch@ropesgray.com)
Keyna Chow (keyna.chow@ropesgray.com)
ROPES & GRAY LLP
2099 Pennsylvania Avenue NW
Washington, D.C. 20006
Counsel for Palo Alto Networks, Inc

Gerard M. Donovan (gdonovan@reedsmith.com)
Peter J. Chassman (pchassman@reedsmith.com)
Jonathan I. Detrixhe (jdetrixhe@reedsmith.com)
Sidharth Kapoor (skapoor@reedsmith.com)
REED SMITH LLP
1301 K Street, N.W.
Suite 1000 – East Tower
Washington, D.C. 20005
Counsel for Keysight Technologies, Inc.

Theodore M. Foster (ipr.theo.foster@haynesboone.com)
David L. McCombs (david.mccombs.ipr@haynesboone.com)
Gregory P. Huh (gregory.huh.ipr@haynesboone.com)
HAYNES AND BOONE, LLP
675 15th St.
Suite 2200
Denver, CO 80202
Counsel for Cisco Systems, Inc.

I further certify that, on March 23, 2023, in accordance with 37 C.F.R. § 104.2 and Federal Rule Appellate Procedure 25(c)(1), the foregoing was served by U.S.P.S. Express Mail on:

Office of the General Counsel
United States Patent and Trademark Office
P.O. Box 1450
Alexandria, VA 22313-1450

Office of the Solicitor
United States Patent and Trademark Office
Mail Stop 8
P.O. Box 1450
Alexandria, VA 22313-1450

By: /s/ Matthew J. Dowd
Matthew J. Dowd
Dowd Scheffel PLLC
1717 Pennsylvania Avenue, NW
Suite 1025
Washington, D.C. 20006
mdowd@dowdscheffel.com

Counsel for Petitioner
Centripetal Networks, LLC