Appeal No. 2018-2420

IN THE UNITED STATES
COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CHRIMAR SYSTEMS, INC. d/b/a CMS Technologies, Inc.,
CHRIMAR HOLDING COMPANY, LLC,

Plaintiffs – Appellees,

v.

ALE USA INC. f/k/a Alcatel-Lucent Enterprise USA, Inc.,

Defendant – Appellant,

Appeal from the United States District Court for the Eastern District of Texas
No. 6:15-cv-00163-JDL
The Honorable John D. Love, Judge Presiding.

BRIEF OF *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND, IN SUPPORT OF PLAINTIFFS-APPELLEES AND IN SUPPORT OF THE PETITION FOR REHEARING *EN BANC*

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FORM 9. Certificate of Interest **Form 9**
Rev. 10/17

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CHRIMAR SYSTEMS, INC. **v.** ALE USA INC.

Case No. 2018-2420

CERTIFICATE OF INTEREST

Counsel for the:
☐ (petitioner) ☐ (appellant) ☐ (respondent) ☐ (appellee) ■ (amicus) ☐ (name of party)

Andrew L. Schlafly

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
Eagle Forum Education & Legal Defense Fund	Eagle Forum Education & Legal Defense Fund	None

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 **(and who have not or will not enter an appearance in this case)** are:

None.

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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 known to counsel.

11/3/2019
Date

s/ Andrew L. Schlafly
Signature of counsel

Please Note: All questions must be answered

Andrew L. Schlafly
Printed name of counsel

cc: _____

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Constitution and Rule

Other Authorities

IDENTITY, INTEREST, AND AUTHORITY TO FILE[1]

Amicus Eagle Forum Education & Legal Defense Fund has filed multiple briefs with the U.S. Supreme Court in defense of the rights of patent holders, rights for which *Amicus* advocates. *See, e.g.*, *Bilski v. Kappos*, 561 U.S. 593 (2010).

ARGUMENT

The three-judge panel held that:

> the now-affirmed unpatentability determinations by the [Patent Trial and Appeal Board of the Patent and Trademark Office] as to all claims at issue must be given effect in this case. Accordingly, the motion to terminate the appeal is denied, the final judgment and award of costs are vacated, and the case is remanded to the district court for dismissal.

Chrimar Sys. v. ALE United States, No. 2018-2420, 2019 U.S. App. LEXIS 28105, at *9 (Fed. Cir. Sept. 19, 2019) (applying *Fresenius USA, Inc. v. Baxter Int'l, Inc.*, 721 F.3d 1330 (Fed. Cir. 2013)). With that, the panel overturned a jury verdict in favor of a patent holder, not based on any error at trial but on an agency determination in a separate administrative proceeding. A mere agency decision, affirmed using a standard of deference to the agency and without a reasoned judicial opinion, should not cause the vacating and dismissal of a verdict rendered by an Article III court after a full trial before a jury.

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[1] Pursuant to FED. R. APP. P. 29(a)(4)(E), undersigned counsel certifies that: no counsel for a party authored this brief in any respect; and no party, party's counsel, person or entity – other than *Amicus*, its members, and its counsel – contributed monetarily to this brief's preparation or submission.

Two separate lines of precedent support granting the petition for rehearing *en banc*. First, there are clear Supreme Court precedents prohibiting interference with the judicial process by other branches of government, as occurred here when a jury verdict was essentially nullified by an agency decision. There has been unanimous support on the Supreme Court for the principle that in a proverbial lawsuit of *Smith v. Jones*, another branch of government cannot pick Smith as the winner. Yet that is what is happening under *Fresenius*, and that is what occurred here. It is time to reconsider this aberration, which violates separation of powers to allow an agency to override a verdict rendered by an Article III court.

Second, the panel decision abrogates property rights previously determined by a jury, which is contrary to the Seventh Amendment and the tradition of private property. Patent rights are property rights, and a judgment by an Article III court concerning such rights should be as respected as other forms of property. A judicial ruling should be worth more than the paper it is written on, and should not be subject to the vagaries of administrative decisionmaking which can depend on a variety of unpredictable factors, including political winds that come and go.

Under *Fresenius*, courts are subjected to the whims not even of Congress, but of a federal agency unaccountable in any direct way to the electorate. The notion that a federal judicial proceeding may be nullified or invalidated, even post-verdict, by a decision rendered by a federal agency is contrary to Article III of the

Constitution and the Seventh Amendment. The requirement of *Fresenius* that court decisions be overruled by intervening Executive Branch actions is disruptive to the orderly administration of justice. Decisions by Article III courts should not be like houses built on straw in a flood plain, standing only until the next weather change. Put another way, an agency extends far beyond its constitutional moorings when it overturns decisions by Article III courts, and *en banc* review is necessary here to rein in that overreach.

I. An Agency Should Not, in Effect, Be Able to Override a Decision by an Article III Court.

Justice Ruth Bader Ginsburg, writing for the Supreme Court just three years ago, reiterated the longstanding principle that a statute would be unconstitutional if it "directs, in 'Smith v. Jones,' [that] 'Smith wins.'" *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1326 (2016). *See also Robertson* v. *Seattle Audubon Soc.*, 503 U.S. 429, 439 (1992) (implying, unanimously, that a statute would be unconstitutional if it "fail[s] to supply new law, but direct[s] results under old law"; this fundamental principle is also explained in R. Fallon, J. Manning, D. Meltzer, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 324 (7th ed. 2015)). Respect for the judiciary and the finality of its judgments requires that other branches of government do not interfere, post-judgment.

The narrow exceptions to this principle serve to reinforce the underlying rule. "[A] statute designed to aid in the enforcement of federal-court judgments – does not offend 'separation of powers principles ... protecting the role of the independent Judiciary within the constitutional design.'" *Bank Markazi*, 136 S. Ct. at 1329 (quoting *Miller* v. *French*, 530 U.S. 327, 350 (2000)). Where "respondents are judgment creditors who prevailed on the merits of their respective case, [the statute at issue] serves to facilitate their ability to collect amounts due to them from assets of the judgment debtor" and thus is constitutional. *Bank Markazi*, 136 S. Ct. at 1326 n.21. On that basis the Court upheld the statute in dispute, although Chief Justice Roberts and Justice Sotomayor felt the decision did not go far enough in protecting court rulings against interference by another branch of government, in that case Congress.

Similarly, "Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch." *Plaut v. Spendthrift Farm*, 514 U.S. 211, 218 (1995) (citing *Hayburn's Case*, 2 U.S. 409 (1792), and *Chicago & Southern Air Lines, Inc.* v. *Waterman S. S. Corp.*, 333 U.S. 103 (1948)). Yet the panel decision does essentially that, by allowing a federal agency, the Patent and Trademark Office, to overturn a final judgment by an Article III court upon a one-word affirmance of the agency decision by this Court. *En banc* review is necessary to correct this disruption and invalidation of Article III judgments.

The *Plaut* decision traced some of the history underlying this principle against interference with judicial proceedings by another branch of government:

> The Framers of our Constitution lived among the ruins of a system of intermingled legislative and judicial powers, which had been prevalent in the colonies long before the Revolution, and which after the Revolution had produced factional strife and partisan oppression. In the 17th and 18th centuries colonial assemblies and legislatures functioned as courts of equity of last resort, hearing original actions or providing appellate review of judicial judgments. Often, however, they chose to correct the judicial process through special bills or other enacted legislation. It was common for such legislation not to prescribe a resolution of the dispute, but rather simply to set aside the judgment and order a new trial or appeal. Thus, as described in our discussion of *Hayburn's Case*, such legislation bears not on the problem of interbranch review but on the problem of finality of judicial judgments.

Plaut v. Spendthrift Farm, 514 U.S. 211, 220 (1995) (citations omitted). Indeed, the Constitution was ratified as a "reaction" against these developments:

> The vigorous, indeed often radical, populism of the revolutionary legislatures and assemblies increased the frequency of legislative correction of judgments. See also *INS* v. *Chadha*, 462 U.S. 919, 961, 77 L. Ed. 2d 317, 103 S. Ct. 2764 (1983) (Powell, J., concurring). "The period 1780-1787 ... was a period of 'constitutional reaction'" to these developments, "which ... leaped suddenly to its climax in the Philadelphia Convention." E. Corwin, The Doctrine of Judicial Review 37 (1914). Voices from many quarters, official as well as private, decried the increasing legislative interference with the private-law judgments of the courts. … A principal method of usurpation identified by the censors was "the instances ... of judgments being vacated by legislative acts." *Id.*, at 540.

Plaut v. Spendthrift Farm, 514 U.S. 211, 219-20 (1995) (citation omitted).

The Supreme Court thereby affirmed the Sixth Circuit, which likewise struck down "an unconstitutional usurpation of the judiciary power" by another

branch of government. *Plaut v. Spendthrift Farm*, 1 F.3d 1487, 1499 (6th Cir. 1993). The Supreme Court concluded that:

> We know of no previous instance in which Congress has enacted retroactive legislation requiring an Article III court to set aside a final judgment, and for good reason. ***The Constitution's separation of legislative and judicial powers denies it the authority to do so***.

Plaut, 514 U.S. at 240 (emphasis added).

The Federal Circuit is in conflict with other Circuits and the Supreme Court in allowing an agency to essentially invalidate decisions by Article III courts. Rehearing *en banc* is necessary here to rectify this error.

II. *Fresenius* Should Be Overruled for Allowing a Federal Agency to Wield More Power than a Proverbial "13th Juror."

Not even an Article III judge is allowed to exercise as much power as a proverbial "13th juror" in a jury trial. It makes even less sense – and would be even less constitutional – for a federal agency to wield more power than a 13th juror, and do so long after a jury verdict was rendered. Yet this is the anomalous consequence of *Fresenius*, and *en banc* review is warranted to reconsider it.

As explained by the Seventh Circuit, a judge can take testimony away from a jury only in the narrow instance of testimony contradicting laws of nature:

> The district judge can take away from the jury testimony that reasonable persons could not believe. *United States v. Kuzniar*, 881 F.2d 466, 471 (7th Cir. 1989). However, that exception is a narrow one, and can be invoked only where the testimony contradicts indisputable physical facts or laws. *Id.; see*

> *also id*. at 471 fn.1 ("Testimony which does not contradict the physical laws of nature cannot be shielded from the jury.")

Latino v. Kaizer, 58 F.3d 310, 315 (7th Cir. 1995).

Yet the expansive application of *Fresenius* adopted by the panel requires voiding a jury verdict below based on an action by the Executive Branch. This does not comport with "the rules of the common law," as required by the Seventh Amendment before overturning a jury verdict: "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. CONST. Amend. VII. Nor does this comply with precedents against allowing even a judge to interfere with a jury verdict.

The initial lack of protection of the right to a jury trial in civil cases was perhaps the single biggest objection to the ratification of the Constitution in 1788. "The objection to the plan of the convention, which has met with most success in this State, and perhaps in several of the other States, is *that relative to the want of a constitutional provision* for the trial by jury in civil cases." *The Federalist No. 83* (Hamilton, July 5, 1788) (emphasis in original).[2]

The Seventh Amendment was adopted to satisfy that demand. Any suggestion that the legislative or executive branches of the newly created federal government could overrule and nullify a jury verdict would have been repugnant to

[2] http://www.constitution.org/fed/federa83.htm (viewed Oct. 28, 2019).

the Founders, and contrary to the respect for jury verdicts today. "We hold a jury's verdict to be sacrosanct." *United States v. Felton*, 239 F. Supp. 2d 122, 124 (D. Mass. 2003). In England, from where we inherit our legal tradition, "there is no appeal from the jury's verdict as such," at least not in criminal cases. Lord Goff of Chieveley, "The Future of the Common Law," *International and Comparative Law Quarterly* 46, at 745-60 (1997). Appeals are allowed here from jury verdicts, but nullification of them by an agency outside of the legal process is contrary to the Seventh Amendment. *Cf. Hana Fin., Inc. v. Hana Bank*, 135 S. Ct. 907, 912 n.2 (2015) (rejecting an attempt to deny a right to a jury trial on a trademark issue).

Patent rights are property rights, and they should vest in Article III judgments. As explained by a leading expert on patent law, Professor Mossoff, property rights were central to all four original patent statutes:

> The first four patent statutes – adopted in 1790, 1793, 1836, and 1870 – ***all 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 (Spring 2009) (collecting the statutory provisions, and citing *Adams v. Burke*, 84 U.S. (17 Wall.) 453 (1873), emphasis added).

The Supreme Court has held that Congress cannot take away patent rights by subsequently repealing a patent statute. *See McClurg v. Kingsland*, 42 U.S. (1

How.) 202, 206 (1843) ("This repeal, however, can have no effect to impair the right of property then existing in a patentee, or his assignee."). Likewise, an agency should not be able to take away patent rights which have vested in an Article III judgment.

Seventh Circuit Judge Frank Easterbook has observed how patent rights are like other property rights:

> Patents are not monopolies, and the tradeoff is not protection for disclosure. Patents give a right to exclude, just as the law of trespass does with real property. Intellectual property is intangible, but the right to exclude is no different in principle from General Motors' right to exclude Ford from using its assembly line, or an apple grower's right to its own crop.

Frank H. Easterbrook, "Intellectual Property is Still Property," 13 Harv. J.L. & Pub. Pol'y 108, 109 (1990) (quoted in Mossoff, "What is Property?", 45 Ariz. L. Rev. 371, 414 (2003)). The Framers deemed patent rights to be so important that they receive the only explicit reference to "right" in the entire body of the original Constitution. U.S. CONST. Art. I, Sec. 8, cl. 8 ("To 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") (emphasis added).

Patent rights adjudicated by Article III trial courts should therefore be as robust as any other property right adjudicated by such courts. In a different context, Justice Kennedy emphasized for a unanimous Supreme Court the need for

"clarity" in patent rights, which implies a value in minimizing uncertainties in process too:

> The [patent] monopoly is a property right; and like any property right, its boundaries should be clear. ***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, which should be encouraged to pursue innovations, creations, and new ideas beyond the inventor's exclusive rights.

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), emphasis added).

The clarity necessary to realize the potential of patents should extend to judicial process, and include the same enforceability of Article III judgments. The subjugation of Article III trial courts and even juries to determinations made by an administrative agency is contrary to the Seventh Amendment and inconsistent with many precedents treating patent rights as property rights. The petition for rehearing *en* banc should be granted both to protect jury verdicts and restore clarity to adjudicated patent rights.

CONCLUSION

For the reasons set forth in this brief and the underlying petition, the petition for rehearing *en banc* should be granted.

Respectfully submitted,

/s/ Andrew L. Schlafly

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Dated: November 4, 2019

CERTIFICATE OF SERVICE

I, Andrew L. Schlafly, counsel for Eagle Forum Education & Legal Defense Fund, hereby certify that on November 4, 2019, I electronically filed the foregoing document with the Clerk of the Court using the Electronic Case Filing (ECF) system, which I understand causes service on counsel for all parties.

/s/ Andrew L. Schlafly
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Attorney for *Amicus Curiae*
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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(A) and Fed. Cir. R. 35(g) because it contains 2,594 words. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft® Word in Times New Roman 14-pt font.

Dated: November 4, 2019

/s/ Andrew L. Schlafly
Andrew L. Schlafly