No. 16-341

In the Supreme Court of the United States

TC HEARTLAND LLC, PETITIONER

v.

KRAFT FOOD BRANDS GROUP LLC

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

BRIEF FOR THE STATES OF TEXAS, ARIZONA, COLORADO, CONNECTICUT, HAWAI'I, ILLINOIS, IOWA, MAINE, MARYLAND, MICHIGAN, NEBRASKA, NORTH CAROLINA, OHIO, SOUTH CAROLINA, VERMONT, VIRGINIA, AND WISCONSIN AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

Amici are the States of Texas, Arizona, Colorado, Connecticut, Hawai'i, Illinois, Iowa, Maine, Maryland, Michigan, Nebraska, North Carolina, Ohio, South Carolina, Vermont, Virginia, and Wisconsin. Amici have an interest in protecting their citizens from abusive claims of patent infringement, which businesses and residents confirm are a drag on economic growth.[1] Many of these States have taken steps in recent years to address certain aspects of abusive patent suits and demand letters.[2]

[1] *See, e.g.*, Comments Nos. PAEW-0026, PAEW-0027, PAEW-0028, PAEW-0029, PAEW-0031, PAEW-0038, and PAEW-0040 before the U.S. Federal Trade Commission and U.S. Department of Justice Patent Assertion Entities Activities Workshop, https://www.justice.gov/atr/events/public-workshop-patent-assertion-entity-activities (comments from numerous Texas residents on abusive patent claims).

[2] *See, e.g.*, Tex. Bus. & Com. Code §§ 17.951–17.955.

But part of this problematic activity is fueled by the Federal Circuit's departure from this Court's interpretation of the patent venue statute, which has allowed forum shopping by patentholders seeking to influence the outcome of cases with their venue choices. Amici write to highlight the forum shopping enabled by the Federal Circuit's expansion of patent venue and emphasize how the current venue system fosters nuisance litigation and impairs the judicial system's reputation for the neutral administration of law.

SUMMARY OF ARGUMENT

This Court has held that 28 U.S.C. § 1400(b) is the sole and exclusive statute governing venue over corporations in patent cases and is not supplemented by the general venue provisions of 28 U.S.C. § 1391(c). The Federal Circuit erred in departing from that holding based on amendments to the general venue statute that are irrelevant to this Court's reasoning on the issue.

That departure has frequently allowed plaintiffs a nearly unlimited choice of where to hale corporations into federal court on claims of patent infringement. Plaintiffs have largely chosen the Eastern District of Texas, where local practices and rules depart from national norms in ways attractive for incentivizing settlement for less than the cost of litigating the early stages of patent cases. The Federal Circuit's expansion of patent venue has thus allowed rampant forum shopping, which makes abusive claims of patent infringement more potent. This Court's original, binding interpretation of the patent venue statute reduces this harmful forum shopping.

ARGUMENT

I. The Federal Circuit's Interpretation of 28 U.S.C. § 1400(b) Conflicts with this Court's Precedent and Frequently Allows Patent Plaintiffs to Sue Corporations Almost Anywhere in the Country.

Over a century ago, Congress enacted a patent venue statute "to eliminate the 'abuses engendered' by previous venue provisions." *Schnell v. Peter Eckrich & Sons, Inc.*, 365 U.S. 260, 262 (1961) (quoting *Stonite Prods. Co. v. Melvin Lloyd Co.*, 315 U.S. 561, 563 (1942)). Section 48 of the Judiciary Act of 1911 granted jurisdiction over patent cases only in districts that the defendant either inhabited or had a place of business and committed infringing acts in. § 48, 36 Stat. 1087, 1100.

In 1942, this Court held that "Section 48 is the exclusive provision controlling venue in patent infringement proceedings." *Stonite*, 315 U.S. at 563. Section 48, the Court explained, was crafted "to define the exact jurisdiction of the federal courts in actions to enforce patent rights" and "not . . . to dovetail with the general provisions relating to the venue of civil suits." *Id.* at 565-66.

Six years later, in 1948, Congress "placed the venue provisions . . . of old § 48, with word changes and omissions later noted," in 28 U.S.C. § 1400(b). *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 226 (1957) (citation omitted). That provision has not been changed since. It still tracks old § 48 of the Judiciary Act of 1911 and provides: "Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular

and established place of business." 28 U.S.C. § 1400(b); *accord* Act of June 25, 1948, 62 Stat. 869, 936.

In 1948, Congress also enacted 28 U.S.C. § 1391, a general provision setting out residency-based rules for venue in civil actions. 62 Stat. at 935. Its subsection (c) addressed venue for corporate defendants: "A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes." *Id.*

In 1957, this Court held "that 28 U.S.C. § 1400(b) is the sole and exclusive provision controlling venue in patent infringement actions" and is not "supplemented by the provisions of 28 U.S.C. § 1391(c)." *Fourco*, 353 U.S. at 229. The Court recognized that § 1391(c)'s "for venue purposes" language is "clear and unambiguous and that its terms include all actions—including patent infringement actions." *Id.* at 228. But the Court rejected that point as controlling. It reasoned that the "question is not whether § 1391(c) is clear and general, but, rather, it is, pointedly, whether § 1391(c) supplements § 1400(b), or, in other words, whether the latter is complete, independent and alone controlling in its sphere as was held in *Stonite*." *Id.*

The Court held that § 1400(b) alone controls patent venue because it is substantively identical to the patent venue statute held to be exclusive in *Stonite* and because general statutory provisions do not govern a matter specifically dealt with elsewhere in a statute. *Id.* The Court thus held that a defendant's residency under § 1400(b), "in respect of corporations, mean[s] the state of incorporation only" and not the broader § 1391(c) meaning that embraced any district "where it is doing business." *Id.* at 224, 226 (quotation marks omitted).

In 1990, the Federal Circuit nevertheless departed from this Court's established precedent by holding that § 1391(c)'s broader definition of corporate residency applies to the patent venue statute. *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1580 (Fed. Cir. 1990). It justified that departure from this Court's precedent because 1988 amendments rephrased § 1391(c) from defining residence "for venue purposes" to defining residence "[f]or purposes of venue under this chapter." Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, tit. X, § 1013(a), 102 Stat. 4642, 4669 (1988). Nothing indicates that this ministerial change was meant to affect patent venue. *See* H.R. Rep. No. 100-889, at 70 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5982, 6031, 1988 WL 169934 (no mention of patent venue or *Fourco*); *cf. Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976) (holding in a venue case: "It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum.").

The Federal Circuit erred in departing from this Court's holding in *Fourco*. The Federal Circuit drew a distinction between § 1391(c)'s scope language at the time of *Fourco* and its "clear language" after the 1988 amendments. *VE Holding*, 917 F.2d at 1578. But no real distinction exists. *Fourco* itself recognized § 1391(c)'s language as "clear" and "inclusive." *Fourco*, 353 U.S. at 228. *Fourco* held, however, that this scope language does not overcome other interpretive principles. The minor phrasing change of 1988 does not affect this Court's reasoning, so that change provides no basis for distinguishing this Court's holding. *Cf. Whitman v. Am. Trucking Ass'n, Inc.*, 531 U.S. 457, 468 (2001) (Con-

gress "does not, one might say, hide elephants in mouseholes"). The Federal Circuit should have adhered to this Court's holding that "the residence of a corporation for purposes of § 1400(b) is its place of incorporation." *Brunette Mach. Works, Ltd. v. Kockum Indus., Inc.*, 406 U.S. 706, 707 n.2 (1972) (citing *Fourco*, 353 U.S. 222).

The Federal Circuit's use of the general venue statute's broader definition frequently allows corporations to be sued for patent infringement anywhere in the Nation. The general statute's definition allows venue in any district in which a corporate defendant is "subject to the court's personal jurisdiction." 28 U.S.C. § 1391(c)(2). And the Federal Circuit holds that specific personal jurisdiction over a corporate defendant exists in a district, even with respect to discrete items shipped to other districts, if the corporation shipped the same type of allegedly infringing item into the forum district through an established distribution channel. *See Acorda Therapeutics Inc. v. Mylan Pharms., Inc.*, 817 F.3d 755, 763 (Fed. Cir. 2016); *Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558, 1560, 1565-66 (Fed. Cir. 1994). Given today's norm of national distribution networks and Internet ordering, the Federal Circuit's case law means that plaintiffs can often bring patent lawsuits in any district in the country.

II. The Eastern District of Texas Has Become Patent Plaintiffs' Preferred Venue Due to Local Practices and the Forum Shopping Allowed by the Federal Circuit's Statutory Interpretation.

The Federal Circuit's permissive approach to patent venue has allowed rampant forum shopping. The federal Judiciary is divided into 94 judicial districts, but a quarter or more of patent cases filed in recent years have been brought in just one district: the Eastern District of Texas.[3] Indeed, a single district judge in Marshall, Texas (population 23,523)[4] had a remarkable 941, 982, and 1,686 new patent cases assigned to him in 2013, 2014, and 2015 respectively—the most of any district judge and more than double the second-ranking district judge each year.[5]

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[3] Of all federal patent cases, the percentage filed in the Eastern District of Texas was 25% for 2013, 28% for 2014, 44% for 2015, and 35% for 2016 (first three quarters). *See* Brian C. Howard, *2016 Third Quarter Litigation Trends* at fig. 5 (Oct. 11, 2016), lexmachina.com/2016-third-quarter-litigation-trends/; Brian C. Howard & Jason Maples, *Lex Machina: Patent Litigation Year in Review 2015* at i (2016), http://pages.lexmachina.com/rs/098-SHZ-498/images/2015%20Patent%20Litigation%20Year%20in%20Review.pdf; Brian C. Howard, *Lex Machina: 2014 Patent Litigation Year in Review* at 1, 5 (2015), http://pages.lexmachina.com/rs/lexmachina/images/2014%20Patent%20Litigation%20Report.pdf; Owen Byrd & Brian Howard, *Lex Machina: 2013 Patent Litigation Year in Review* at 1, 2 (2014), http://pages.lexmachina.com/rs/lexmachina/images/LexMachina-2013%20Patent%20Litigation%20Year%20in%20Review.pdf.

[4] U.S. Census Bureau, American FactFinder: Marshall City, Texas, https://factfinder.census.gov/bkmk/cf/1.0/en/place/Marshall%20city,%20Texas/population/decennial_cnt (2010).

[5] Howard & Maples, *Lex Machina: Patent Litigation Year in Review 2015*, *supra*, at ii; Howard, *Lex Machina: 2014 Patent Lit-*

Marshall is so popular for patent suits that a hotel there got a PACER subscription and offered this electronic access to federal court dockets to help sell rooms to lawyers.[6] A technology company that finds itself sued frequently in Marshall has seen fit—in an apparent effort to bolster its reputation in town—to sponsor nearly every major festival plus an ice-skating rink in front of the Marshall courthouse.[7] Another company facing a patent trial in Marshall bought the grand champion steer in a local livestock auction and took out an advertisement in the town paper trumpeting the cattle purchase, in another apparent effort to improve the company's local standing.[8]

This remarkable situation exists because the Federal Circuit's departure from this Court's precedent gives plaintiffs "so many potential venues for bringing suit" and thus "increases the ability of parties to forum shop."[9] Several factors have made the Eastern District of Texas the top forum for patent plaintiffs.

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igation Year in Review, *supra*, at 15; Byrd & Howard, *Lex Machina: 2013 Patent Litigation Year in Review*, *supra*, at i.

[6] Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. Cal. L. Rev. 241, 273 (2016).

[7] Bruce Berman, *For Samsung Charity Begins at "Home," Marshall, Texas* (Feb. 25, 2015), https://ipcloseup.com/2015/02/25/for-samsung-charity-begins-at-home-marshall-texas/; Zusha Ellison, *IP Trial Strategy: Buying Tivo's Bull*, The Recorder, June 26, 2009, http://www.dailyreportonline.com/id=1202431771710/IP-Trial-Strategy-Buying-Tivos-Bull?slreturn=20170010170254.

[8] Ellison, *supra.*

[9] Kimberly A. Moore, *Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation?*, 79 N.C. L. Rev. 889, 892 (2001).

Most notably, in the Eastern District of Texas, "patent plaintiffs will find that local rules and procedural orders tilt in their favor with respect to the pace of litigation, the scope of discovery, the availability of summary judgment, the availability of stays pending reexamination, as well as the joinder and consolidation of tenuously related defendants."[10] For example:

- The district is known for its hostility to summary judgment. Patent cases in the Eastern District of Texas are almost three times more likely to reach trial than the national average for patent cases.[11] That is partly because judges there are much less likely to enter summary judgment for an accused infringer than are judges outside the district.[12] In addition, the court "takes an unusually long time to grant summary judgment" when it is granted.[13]

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[10] Matthew Sag, *IP Litigation in U.S. District Courts: 1994-2014*, 101 Iowa L. Rev. 1065, 1099 (2016).

[11] Mark A. Lemley, *Where to File Your Patent Case*, 38 A.I.P.L.A. Q.J. 401, 411, 413 & tbl. 4 (2010) (8.0% in Eastern District of Texas versus 2.8% average for all federal judicial districts with 25 or more outcomes).

[12] Brian J. Love & James Yoon, *Predictably Expensive: A Critical Look at Patent Litigation in the Eastern District of Texas*, 20 Stan. Tech. L. Rev. 1, 17 (2017); *see also* Arthur Gollwitzer III, *Local Patent Rules—Certainty and Efficiency or a Crazy Quilt of Substantive Law?*, Engage, March 2012, at 95 ("some courts have applied the Supreme Court's recent *Twombly* and *Iqbal* decisions governing minimum pleading and Rule 12(b)(6) leniently in patent cases because those courts have local rules which require early identification of infringement and invalidity contentions").

[13] Love & Yoon, *supra*, at 17.

- A preference for trial has manifested itself not only in unwritten norms but in patent-specific "screening procedures" that require parties to file briefs seeking advance permission to file a motion for summary judgment—notwithstanding Federal Rule of Civil Procedure 56(a)'s explicit direction that a party "may move" for that relief.[14]

- Patent rules in the Eastern District of Texas require broader document production, under more stringent timelines, than in most districts.[15] As a result, "parties sued for infringement in the Eastern District begin to incur discovery costs—the single largest expense in patent litigation—faster than similarly situated defendants litigating elsewhere in the country."[16]

- Eastern District of Texas judges take longer than their colleagues elsewhere to rule on a motion for discretionary venue transfer.[17] The typical timing means that defendants sued there will, before any eventual transfer for lacking a real connection to the forum, have fully completed discovery under the district's local rules for patent cases.[18]

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[14] *See* Hon. Leonard Davis, Standing Order Regarding Letter Briefs, Motions *in Limine*, Exhibits, Deposition Designations, and Witness Lists at 1 (Apr. 23, 2014).

[15] Love & Yoon, *supra*, at 22-25; Sag, *supra*, at 1099-1100.

[16] Love & Yoon, *supra*, at 22.

[17] *Id.* at 16, 22.

[18] *Id.* at 22.

- In 2011, to curb excesses in patent litigation, Congress expanded administrative procedures for challenging patents.[19] Defendants regularly move to stay litigation pending such agency proceedings, thereby avoiding the cost of discovery on weak patent claims. But the Eastern District of Texas has one of the lowest reported grant rates for such stays, ensuring that defendants are more likely to accrue litigation costs early in patent cases.[20]

- Plaintiffs have good reason to prefer that their initial choice of forum is the final forum.[21] And discretionary venue transfers in patent cases are granted less often in the Eastern District of Texas than the national average.[22] Notably, the Federal Circuit has taken the extraordinary step of ordering transfer out of the Eastern District of Texas four times since

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[19] Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011); *see Protecting Small Businesses and Promoting Innovation by Limiting Patent Troll Abuse: Hearing on S. 23 Before the U.S. Senate Judiciary Committee*, 113th Cong. 186-213, 193 (2013) (testimony of Q. Todd Dickinson, Executive Director, American Intellectual Property Law Association).

[20] Love & Yoon, *supra*, at 27; *see also id.* at 33-34 ("while both Congress and the Supreme Court have modified patent law and procedure in ways that tend to benefit accused infringers, the manner in which cases are conducted in the Eastern District of Texas has dulled the effects of these modifications").

[21] *See* Kimberly A. Moore, *Judges, Juries, and Patent Cases—An Empirical Peek Inside the Black Box*, 99 Mich. L. Rev. 365, 368 (2000) (finding that patentholders won 68% of jury trials when they were plaintiffs but only 38% when they were defendants in declaratory judgment actions).

[22] Love & Yoon, *supra*, at 16-17; J. Jonas Anderson, *Court Competition for Patent Cases*, 163 U. Pa. L. Rev. 631, 675 (2015).

> 2014—something that has occurred just once in the same period with respect to other districts.[23]

Moreover, to the extent that such case-administration practices may vary judge-to-judge, the Eastern District of Texas has a "unique judge assignment system for patent cases" that results in a "predictable formula litigants can use to select their preferred jurist."[24] The accumulated effect of these local rules and practices incentivizes the forum shopping allowed by the Federal Circuit's permissive venue interpretation.[25]

On top of those differences in case administration, juries in the Eastern District of Texas find for patent plaintiffs more frequently than the national norm.[26] When that happens, patent plaintiffs enjoy not only the distinct possibility of massive damages—the district's average patent damages award is $38 million above the average outside that district—but also the assurance of a median patent damage award close to the national median: in other words, a large upside with a minimal

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[23] Love & Yoon, *supra*, at 16.

[24] Anderson, *supra*, at 672; *see, e.g.*, *id.* at 673 ("[S]ince 1999, Data Treasury Corporation, Orion IP, and IAP Intermodal have collectively filed thirty-seven patent suits in the district. Each company has filed every one of their lawsuits before a single judge: Data Treasury's cases have all been heard by Judge Folsom, Orion's by Judge Davis, and IAP's by Judge Ward.").

[25] Love & Yoon, *supra*, at 1.

[26] *Id.* at 18.

downside.[27] Unsurprisingly, then, "Eastern Texas patent cases tend to settle early (and at high rates)."[28]

All of this ensures that "forum shopping is alive and well in patent law."[29] The most prolific forum shoppers in patent cases are companies that do not produce patented technologies but rather were set up to secure patent licenses.[30] Royalties paid on those licenses are often less than the "lower bound of early-stage litigation costs of defending a patent infringement suit"[31]—a fact consistent with nuisance litigation and earning those companies the label "patent troll."[32]

This phenomenon is extremely troubling. It perpetuates economic waste by extracting licensing fees simply to avoid the high cost of litigation, regardless of the merits of a claim.[33] And this business model imposes the

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[27] *Id.* at 18-19 n.52 & tbl. 7 ("East Texas juries are responsible for six of the thirteen largest jury verdicts awarded in patent cases since 1995").

[28] *Id.* at 13.

[29] Lemley, *supra*, at 402.

[30] *See* Love & Yoon, *supra*, at 8-9 & tbl. 2 (reporting that over 90% of Eastern District of Texas patent cases were brought by patent assertion entities).

[31] Federal Trade Commission, *Patent Assertion Entity Activity: An FTC Study* at 4 (Oct. 2016), https://www.ftc.gov/system/files/documents/reports/patent-assertion-entity-activity-ftc-study/p131203_patent_assertion_entity_activity_an_ftc_study_0.pdf (discussing business model).

[32] *Id.* at 17; Colleen V. Chien, *Of Trolls, Davids, Goliaths, and Kings: Narratives and Evidence in the Litigation of High-Tech Patents*, 87 N.C. L. Rev. 1571, 1574 (2009).

[33] *See* Eric Rogers & Young Jeon, *Inhibiting Patent Trolling: A New Approach for Applying Rule 11*, 12 Nw. J. Tech. & Intell. Prop. 291, 294 (2014); Benjamin J. Bradford & Sandra J. Durkin, *A*

most devastating costs on those who can least afford it: small businesses.[34] Upon receiving letters demanding license payments—letters easy to send in mass[35]—entrepreneurs must decide whether to resolve the demand for less than the cost of litigating under plaintiff-chosen local procedures or whether to pay to litigate in a forum often far from their place of business. In short, the patent-troll business model encouraged by permissive venue is vexing to economic growth in the States.

Even apart from economic waste, the forum shopping incentivized by the Federal Circuit's expansion of patent venue is problematic for clogging the courts in certain judicial districts.[36] And it has the pernicious effect of reducing confidence in the fairness and neutrality of the Nation's justice system. For example, despite the Eastern District of Texas being the most popular venue for patent cases, less than 8% of its patent cases were against defendants with a corporate office in the district (much less accused activity there) and less than 2% of its patent cases assert patents to technology in-

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Proposal for Mandatory Patent Reexaminations, 52 IDEA: The Intell. Prop. L. Rev. 135, 137 (2012).

[34] *See* Executive Office of the President, *Patent Assertion and U.S. Innovation* at 7 (June 2013) (describing a generalized demand letter sent to hundreds of small businesses regarding copier machines with network-integrated scanner functionality).

[35] *See id.* at 6 (finding "an increasingly large number of suits threatened" against "an unusually large set of potential defendants," with threatened suits estimated to range from 60,000 to over 100,000 in 2012).

[36] *See* Federal Judicial Center, *Patent Pilot Program: Five-Year Report* at 38 (2016), http://go.usa.gov/x97BU (noting that patent cases were 49% of the Eastern District of Texas's civil caseload in 2015).

vented in the district.[37] When a single district court hears so many cases, not because of convenience or connection to the dispute, but because it is chosen by litigants on one side, the perception of a neutral justice system is undermined. That harm can be reduced by correcting the Federal Circuit's departure from this Court's original, binding interpretation of the patent venue statute.

CONCLUSION

The Court should reverse the decision of the court of appeals.

Respectfully submitted.

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[37] Love & Yoon, *supra*, at 10.

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