August 1, 2016

The Honorable Chuck Grassley
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Patrick Leahy
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Bob Goodlatte
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

The Honorable John Conyers
Ranking Member
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Grassley, Ranking Member Leahy, Chairman Goodlatte, and Ranking Member Conyers:

As legal academics, economists, and political scientists who conduct research in patent law and policy, we write to express our concerns about the recent push for sweeping changes to patent litigation venue rules, such as those proposed in the VENUE Act.[1] These changes would vastly restrict where all patent owners could file suit—contrary to the general rule that a plaintiff in a civil lawsuit against a corporate defendant can select any court with jurisdictional ties to the defendant.[2]

Given the recent changes in the patent system under the America Invents Act of 2011 and judicial decisions that have effectively weakened patent rights,[3] we believe that Congress should adopt a cautious stance to enacting additional changes that further weaken patent rights, at least until the effects of these recent changes are better understood.

Proponents of amending the venue rules have an initially plausible-sounding concern: the Eastern District of Texas handles a large percentage of patent infringement lawsuits and one judge within that district handles a disproportionate share of those cases. The reality is that the major proponents of changing the venue rules are primarily large high-tech companies and retailers with an online presence sued in the Eastern District of Texas that would rather litigate in a small number of more defendant-friendly jurisdictions.

[1] Venue Equity and Non-Uniformity Elimination Act, S.2733, 114th Cong. (2016), https://www.congress.gov/114/bills/s2733/BILLS-114s2733is.pdf.
[2] *See* 28 U.S.C. § 1391(c)(2). *See generally* Ferens v. John Deere Co., 494 U.S. 516, 527 (1990) ("a plaintiff . . . has the option of shopping for a forum with the most favorable law").
[3] These include, among others: (1) administrative procedures for invalidating patents created by the America Invents Act, which have had extremely high invalidation rates, leading one former federal appellate judge to refer to these procedures as "death squads," and (2) several decisions by the Supreme Court and the Federal Circuit that have drastically curtailed patent rights for many innovators. *See* Adam Mossoff, *Weighing the Patent System: It Is Time to Confront the Bias against Patent Owners in Patent 'Reform' Legislation*, WASHINGTON TIMES (March 24, 2016), http://www.washingtontimes.com/news/2016/mar/24/adam-mossoff-weighing-the-patent-system/.

Indeed, the arguments in favor of this unprecedented move to restrict venue do not stand up to scrutiny. Specifically:

- Proponents for the VENUE Act argue that "[t]he staggering concentration of patent cases in just a few federal district courts is bad for the patent system."[4] As an initial matter, data indicates that filings of patent lawsuits in the Eastern District of Texas have dropped substantially this year—suggesting a cautious approach until trends have stabilized.[5]

- Contrary to claims by its proponents, legislative proposals like the VENUE Act would not spread lawsuits throughout the country. In fact, these same proponents have found that restricting venue in a manner similar to the VENUE Act would likely result in concentrating more than 50% of patent lawsuits in just two districts: the District of Delaware (where most publicly traded corporations are incorporated) and the Northern District of California (where many patent defendants are headquartered).[6] Instead of widely distributing patent cases across numerous districts in order to promote procedural "fairness," the VENUE Act would primarily channel cases into only two districts, which happen to be districts where it is considered much more difficult to enforce patent rights.[7]

- Proponents for the VENUE Act have argued that the Eastern District of Texas is reversed more often by the Federal Circuit than other jurisdictions, claiming that in 2015 the Federal Circuit affirmed only 39% of the Eastern District of Texas's decisions but affirmed over 70% of decisions from the Northern District of California and District of Delaware.[8] These figures are misleading: they represent only one year of data, mix trials and summary judgment orders, and fail to take into account differences in technology types and appeals rates in each district. In fact, a more complete study over a longer time period by Price Waterhouse Coopers found that the Eastern District of Texas affirmance rate is only slightly below the national average for all districts.[9]

---

[4] Colleen Chien & Michael Risch, *A Patent Reform We Can All Agree On*, WASH. POST (June 3, 2016), https://www.washingtonpost.com/news/in-theory/wp/2015/11/20/why-do-patent-lawyers-like-to-file-in-texas/.

[5] *See* Michael C. Smith, "Hot But No Longer Boiling" - EDTX Patent Case Filings Down almost Half; New Case Allocation and Procedures (No More Letter Briefing for SJ motions), EDTexweblog.com (July 21, 2016), http://mcsmith.blogs.com/eastern_district_of_texas/2016/07/edtx-patent-case-filing-trends-new-case-allocation-and-procedures.html.

[6] Colleen Chien & Michael Risch, *What Would Happen to Patent Cases if They Couldn't all be Filed in Texas?*, PATENTLY-O (March 11, 2016), http://patentlyo.com/patent/2016/03/happen-patent-couldnt.html. This study also finds that 11% of cases would continue to be filed in the Eastern District of Texas, concentrating nearly two-thirds of all cases in three districts. *See id.* The authors of this study are presently expanding their investigation to an enlarged data set, which will also capture additional aspects of the VENUE Act. Neither the data nor their results are available yet. However, we have no reason to believe that the expanded data or analysis will produce results other than what has already been shown: a high concentration of patent cases in a small number of districts.

[7] *See* PricewaterhouseCoopers LLP, 2015 Patent Litigation Study (May 2015) ("PWC Study"), http://www.pwc.com/us/en/forensic-services/publications/assets/2015-pwc-patent-litigation-study.pdf.

[8] Ryan Davis, *EDTX Judges' Love of Patent Trials Fuels High Reversal Rate*, LAW360 (Mar. 8, 2016), http://www.law360.com/articles/767955/edtx-judges-love-of-patent-trials-fuels-high-reversal-rate.

[9] *See* PWC Study, *supra* note 7 (finding an average affirmance rate of 48% for all districts, compared to an affirmance rate of 42% for the Eastern District of Texas).

- The Federal Circuit recently confirmed in *In re TC Heartland* (Fed. Cir. Apr. 29, 2016) that 28 U.S.C. § 1400(b) provides that a corporate defendant in a patent case—like corporate defendants in nearly all other types of cases—may be sued in any district in which personal jurisdiction lies. Constitutional due process requires a "substantial connection" between the defendant and forum.[10] Thus, contrary to its title and the claims of its proponents, the VENUE Act does not re-establish a "uniform" litigation system for patent rights by requiring substantial ties to the forum. Instead, the Act thwarts the well-established rule that plaintiffs can bring suit in any jurisdiction in which a corporate defendant has committed substantial violations of the law.[11]

- The VENUE Act would raise costs for many patent owners by requiring them to litigate the same patent against multiple defendants in multiple jurisdictions, increasing patent litigation overall. In recent years, the America Invents Act's prohibition on joinder of multiple defendants in a single lawsuit for violating the same patent has directly resulted in increased lawsuits and increased costs for patent owners.[12] Moreover, the VENUE Act would also result in potentially conflicting decisions in these multiple lawsuits, increasing uncertainty and administration costs in the patent system.

- The VENUE Act encourages the manipulation of well-settled venue rules across all areas of law by the self-serving efforts of large corporate defendants who seek to insulate themselves from the consequences of violating the law. By enacting the VENUE Act, Congress would send a strong signal to corporate defendants that they can tilt the substantive playing field by simply shifting cases to defendant-friendly jurisdictions.

Innovators and their investors have long been vital to a flourishing innovation economy in the United States. Startups, venture capitalists, individual inventors, universities, and established companies often rely heavily on patents to recoup their extensive investments in both R&D and commercialization. We urge you to exercise caution before enacting further sweeping changes to our patent system that would primarily benefit large infringers to the detriment of these innovators and, ultimately, our innovation economy.

Sincerely,

Christopher A. Cotropia
University of Richmond School of Law

Gregory Dolin
University of Baltimore School of Law

---

[10] *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985).
[11] *See generally* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947) ("[T]he plaintiff's choice of forum should rarely be disturbed.").
[12] *See* Christopher A. Cotropia, Jay P. Kesan & David L. Schwartz, *Unpacking Patent Assertion Entities (PAEs)*, 99 MINNESOTA LAW REVIEW 649 (2014), http://www.minnesotalawreview.org/wp-content/uploads/2015/02/REVISEDSchwartzetal_MLR.pdf.

Richard A. Epstein
New York University School of Law

Chris Frerking
University of New Hampshire School of Law

Shubha Ghosh
Syracuse University College of Law

Richard Gruner
John Marshall Law School

Stephen Haber
Stanford University
Department of Political Science

Hugh Hansen
Fordham University School of Law

Chris Holman
UMKC School of Law

Gus Hurwitz
Nebraska College of Law

B. Zorina Khan
Bowdoin College
Department of Economics

Megan M. La Belle
Columbus School of Law
The Catholic University of America

Kristina M. Lybecker
Colorado College
Department of Economics & Business

Damon C. Matteo
Fulcrum Strategy
Tsinghua University, Graduate School of Economics and Business

Adam Mossoff
Antonin Scalia Law School
George Mason University

Xuan-Thao Nguyen
Robert H. McKinney School of Law
Indiana University-Purdue University Indianapolis

Sean O'Connor
University of Washington School of Law

Seth C. Oranburg
Duquesne University School of Law

David Orozco
Florida State University
The College of Business

Kristen Osenga
University of Richmond School of Law

Jillian Popadak
Duke University
The Fuqua School of Business

Mark Schultz
Southern Illinois University School of Law

Ted Sichelman
University of San Diego School of Law

David O. Taylor
SMU Dedman School of Law

David J. Teece
University of California at Berkeley
Haas School of Business

Shine Tu
West Virginia University College of Law

Saurabh Vishnubhakat
Texas A&M University School of Law

R. Polk Wagner
University of Pennsylvania Law School

cc: The Honorable Mitch McConnell
Majority Leader
United States Senate
Washington, DC 20510

The Honorable Harry Reid
Minority Leader
United States Senate
Washington, DC 20510

The Honorable John Cornyn
Majority Whip
United States Senate
Washington, DC 20510

The Honorable Richard J. Durbin
Minority Whip
United States Senate
Washington, DC 20510

The Honorable Paul Ryan
Speaker
United States House of Representatives
Washington, DC 20515

The Honorable Nancy Pelosi
Minority Leader
United States House of Representatives
Washington, DC 20515

The Honorable Kevin McCarthy
Majority Leader
United States House of Representatives
Washington, DC 20515

The Honorable Steny Hoyer
Minority Whip
United States House of Representatives
Washington, DC 20515

Members of the United States Senate and United States House of Representatives