No. 16-341

IN THE

Supreme Court of the United States

TC HEARTLAND, LLC, d/b/a
HEARTLAND FOOD PRODUCTS GROUP,

Petitioner,

v.

KRAFT FOODS GROUP BRANDS LLC,

Respondent.

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

BRIEF OF THE ELECTRONIC FRONTIER FOUNDATION AND PUBLIC KNOWLEDGE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
INTEREST OF *AMICI CURIAE* 1
SUMMARY OF ARGUMENT 2
ARGUMENT 5

I. Venue Law Is Concerned with Fairness, Especially for Those Who Do Not Choose the Forum 5
   A. General Venue Jurisprudence Regularly Appeals to Notions of Fairness 5
   B. The Development of Patent Venue Law Reflects This Concern for Fairness 7

II. Unfairness Is the Evident Result of Broad Patent Venue Under *VE Holding* 10
   A. Broad Venue Has Enabled Remarkable Forum Shopping in Patent Cases 11
   B. Broad Venue Has Encouraged Imbalance in Local Patent Procedural Rules 13
   C. Forum Shopping and Procedural Tilts Especially Harm Small Companies and Innovators . . 17

III. Policy Arguments and Interests of Patent Owners Do Not Outweigh These Fairness Concerns 19
   A. Multidistrict Litigation, Not Broad Venue, Is the Right Tool for Suing Multiple Infringers . . . 19
   B. Supposed Judicial Specialization Does Not Justify Forum Shopping 20
   C. Patent Owners Currently Do Not Often Depend on Benefits of Home District Litigation . . . 22

IV. Patent Law Merits Unique Venue Rules Distinct from Other Litigation 23

CONCLUSION 26

TABLE OF AUTHORITIES

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Acer America Corp., In re,
626 F.3d 1252 (Fed. Cir. 2010) 13

Alice Corp. Pty. Ltd. v. CLS Bank International,
134 S. Ct. 2347 (2014) 1, 24

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374 F. App'x 997 (Fed. Cir. 2010) 2

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581 F. App'x 886 (Fed. Cir. 2014) (per curiam) 13

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21 F.3d 1558 (Fed. Cir. 1994) 24

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452 F. App'x 986 (Fed. Cir. 2011) 13

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410 U.S. 484 (1973) 6

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No. 2:14-cv-760, 2015 WL 4638215 (E.D. Tex. Aug. 3, 2015) 17

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406 U.S. 706 (1972) 23

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499 U.S. 585 (1991) 5–6

Commil USA, LLC v. Cisco Systems, Inc.,
135 S. Ct. 1920 (2015) 12

Cortez Byrd Chips, Inc. v. Bill Harbert Construction Co.,
529 U.S. 193 (2000) 24

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387 U.S. 556 (1967) 5

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75 F. 609 (C.C.N.D. Cal. 1896) 7

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677 F.3d 1351 (Fed. Cir. 2012) 13

Eon-Net LP v. Flagstar Bancorp,
653 F.3d 1314 (Fed. Cir. 2011) 18

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353 U.S. 222 (1957) 9, 23, 25

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No. 1:13-cv-11794 (D. Mass. filed July 26, 2013) 2

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566 F.3d 1338 (Fed. Cir. 2009) 13

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287 U.S. 430 (1932) 8

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No. 2:14-cv-906, 2016 WL 1643313 (E.D. Tex. Apr. 26, 2016) 16

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588 F. App'x 988 (Fed. Cir. 2014) 13

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No. 15-138, 2015 WL 5294800 (Fed. Cir. July 16, 2015) 13, 16–17

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136 S. Ct. 1923 (2016) 1, 18, 25

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587 F.3d 1333 (Fed. Cir. 2009) 13

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150 U.S. 653 (1893) 7, 23

Iris Connex, LLC v. Dell, Inc.,
No. 2:15-cv-1915, 2017 WL 365634 (E.D. Tex. Jan. 25, 2017) 14, 16, 18

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160 U.S. 221 (1895) 7, 23

Leroy v. Great Western United Corp.,
443 U.S. 173 (1979) 6, 10, 19

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517 U.S. 370 (1996) 24

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134 S. Ct. 843 (2014) 23

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630 F.3d 1361 (Fed. Cir. 2011) 13

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No. BC499379 (Cal. Super. Ct. filed Jan. 17, 2013) 2

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72 F. 298 (C.C.S.D.N.Y. 1896) 7

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No. 12-cv-1106, 2013 WL 4479336 (N.D. Cal. Aug. 20, 2013) 22

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544 F. App'x 934 (Fed. Cir. 2013) 13

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134 S. Ct. 1749 (2014) 1, 16

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399 F. App'x 587 (Fed. Cir. 2010) 13

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v. ACE Broadcasting Network, LLC,
No. 2:13-cv-14 (E.D. Tex. filed Jan. 7, 2013) 2

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148 F.3d 1355 (Fed. Cir. 1998) 24

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580 F.2d 264 (7th Cir. 1978) 6

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365 U.S. 260 (1961) 9, 23

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315 U.S. 561 (1942) 9, 23

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543 F. App'x 1006 (Fed. Cir. 2013) 13

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917 F.2d 1574 (Fed. Cir. 1990) 10, 18–21, 25

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635 F.3d 559 (Fed. Cir. 2011) 13

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v. Great Northern Railway Co.,
88 F. 258 (2d Cir. 1898) 7

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609 F.3d 1378 (Fed. Cir. 2010) 13

STATUTES

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——— § 1295(a)(2)–(14) 21

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of the Judicial Code codified at 28 U.S.C. § 112 (1940)) . . . 7

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INTEREST OF *AMICI CURIAE*

The Electronic Frontier Foundation[1] ("EFF") is a nonprofit civil liberties organization that has worked for over 25 years to protect consumer interests, innovation, and free expression in the digital world. EFF and its more than 35,000 dues-paying members have a strong interest in helping the courts ensure that intellectual property law serves the public interest.

Public Knowledge is a non-profit organization that is dedicated to preserving the openness of the Internet and the public's access to knowledge, promoting creativity through balanced intellectual property rights, and upholding and protecting the rights of consumers to use innovative technology lawfully. Public Knowledge advocates on behalf of the public interest for a balanced patent system, particularly with respect to new and emerging technologies.

The Electronic Frontier Foundation and Public Knowledge have previously served as *amici* in patent cases. *E.g.*, *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923 (2016); *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 134 S. Ct. 2347 (2014); *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S. Ct. 2120 (2014); *Octane Fitness, LLC v. Icon Health & Fitness, Inc.*, 134 S. Ct. 1749 (2014).

[1]Pursuant to Supreme Court Rule 37.3(a), all parties received appropriate notice of and consented to the filing of this brief. Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity, other than *amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

As loud and bombastic as it may be while on the air, Adam Carolla's podcast is a small operation. Started in 2009 by the well-known comedian and friends, the Adam Carolla Show is recorded, produced, and distributed out of a studio in Glendale, California.

When in 2013 Personal Audio brought a patent infringement suit against Carolla's company, the ACE Broadcasting Network, the Southern District of California would have been a logical choice of venue. Or the District of Massachusetts, since Personal Audio's key employees and witnesses were there, Personal Audio itself was founded in Massachusetts, and the named inventors on the patent are three New Englanders.

Yet the venue of the suit was neither. *Personal Audio v. ACE Broadcasting* was filed over 1,500 miles from either California or Massachusetts, in a small Texas town perhaps best known for its annual Fire Ant Festival.[2]

It is almost comedic that for a lawsuit between a Massachusetts patent holder and a California audio show, the venue is Texas. It is a result that should not occur under this Court's precedents, which have sharply limited venue in patent cases for over a hundred years. Yet it is a result that happens every day now, because the Court of Appeals disregarded those controlling precedents and devised a new, far broader rule of patent venue.

[2]This account is drawn from court documents in *Pers. Audio, LLC v. ACE Broad. Network, LLC*, No. 2:13-cv-14 (E.D. Tex. filed Jan. 7, 2013), *Fox Broad. Co. v. Pers. Audio, LLC*, No. 1:13-cv-11794 (D. Mass. filed July 26, 2013), and *Misraje v. Carolla*, No. BC499379 (Cal. Super. Ct. filed Jan. 17, 2013). *See also In re Apple Inc.*, 374 F. App'x 997 (Fed. Cir. 2010); Yan Leychkis, *Of Fire Ants and Claim Construction*, 9 Yale J.L. & Tech. 193, 195 (2007).

Petitioner meticulously and correctly lays out the historical and statutory interpretation reasons for rejecting the Federal Circuit's attempt to rewrite patent venue law. But the error is reflected at another, more basic level: the underlying purpose of venue itself.

Venue law is intended to promote convenience for the parties and fairness in the adjudicatory system. But on the contrary, the Federal Circuit's decision enabling broad patent venue exacerbates unfairness and inconvenience. That decision should be reversed.

1. This Court has long recognized that venue should promote fairness. The case law reflects predominant concerns about convenience and reasonableness to parties, primarily defendants, who may be haled into a court unilaterally chosen by another litigant.

Patents are no exception to this accepted rationale for venue. The legislative history of the patent venue statute reflects Congress's objective of fairness, especially for defendants. This Court's analysis of that statute has drawn from that fairness reasoning as well.

2. Yet venue in patent cases today reflects anything but fairness. Patent owners have practically unfettered ability to choose the forum offering the most advantage. This ratchets up costs, particularly where judges have adopted procedural rules that impose those costs early and often. As a result, defendants—especially those of smaller means—often must settle patent lawsuits based on the cost of litigation rather than the merits. Such a result of broad venue is neither convenient nor fair.

A wide and growing body of evidence, reviewed in detail in this brief, reveals the remarkable scope of unfairness and prejudice engendered by broad patent venue. This strongly suggests that the patent venue statute, un-

der the Federal Circuit's interpretation, fails to live up to its intended purpose. A correct interpretation of that statute will thus realign statutory effect with intent.

3. Any supposed "benefits" of the Federal Circuit's misinterpretation of patent venue are of minimal consequence. The ability of patent owners to consolidate multiple defendants in a single proceeding, for example, is best left to multidistrict litigation procedure rather than broad venue. The value of district court "specialization" in patent law resulting from forum shopping is also better addressed by Congress, and indeed already has been addressed by act of Congress. And though one might worry about burdening patent owners with an obligation to travel to distant forums, the empirical evidence shows that patent owners themselves do not worry about this much, often voluntarily filing their cases in distant forums.

And lest it be wondered why patent law enjoys a special venue statute in the first place, there is good reason to treat venue in patent cases differently. The unique and complex nature of patent litigation, and in particular the distinct procedural rules applied only in patent cases, suggest a need for distinct venue rules.

Ultimately, the above attempts to save the Federal Circuit's rule do not outweigh the fundamental concern. Venue law in patent cases, which ought to promote fairness and convenience, now breeds forum shopping, questionable local rules, and twisted triangulations of court location like the California-Massachusetts-Texas situation of Adam Carolla. The error is easy to fix: This Court must simply apply its own precedents and reverse the Federal Circuit. Nothing should stand in the way of doing so.

ARGUMENT

I. Venue Law Is Concerned with Fairness, Especially for Those Who Do Not Choose the Forum

Fairness concerns have long guided judicial venue. Rules designating the appropriate forum for litigation seek to ensure convenience and reasonableness for the parties, especially defending parties who do not choose or negotiate for the desired forum. This Court's jurisprudence on general venue affirms this fairness principle, and the development of venue law specifically relating to patent cases comports with the fairness principle as well.

A. General Venue Jurisprudence Regularly Appeals to Notions of Fairness

The fundamental policy underlying venue is fairness and convenience to both sides of a civil suit. As this Court has said, "venue is primarily a matter of convenience of litigants and witnesses." *Denver & Rio Grande W.R.R. Co. v. Bhd. of R.R. Trainmen*, 387 U.S. 556, 560 (1967); *see also Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 167–68 (1939). "Venue rules traditionally have served to ensure that proceedings are held in the most convenient forum." Cass R. Sunstein, *Participation, Public Law, and Venue Reform*, 49 U. Chi. L. Rev. 976, 980 (1982); *see also Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991) (holding that even where parties agree to a venue by contract, "forum-selection clauses contained in form passage contracts are subject to judicial scrutiny for fundamental fairness" such as whether a particular forum was chosen "as a means of discouraging [plaintiffs] from pursuing legitimate claims").

Venue law is especially concerned with protecting parties without the means or ability to choose the forum, so those parties are not subject to lawsuits in unfair places. "In most instances, the purpose of statutorily specified venue is to protect the *defendant* against the risk that a plaintiff will select an unfair or inconvenient place of trial." *Leroy v. Great W. United Corp.*, 443 U.S. 173, 183–84 (1979) (citing, e.g., *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484, 493–94 (1973)); *see also Reuben H. Donnelley Corp. v. FTC*, 580 F.2d 264, 269 (7th Cir. 1978) ("Historically, venue has been geared primarily to the convenience of the defendant . . . ."); *cf. Carnival Cruise*, 499 U.S. at 595 (noting that fairness concerns may arise for the plaintiff where defendant seeks to enforce venue clause in form contract written by defendant).

In contrast, the convenience of the party choosing the forum is generally not considered sufficient to justify an expansive view of venue. For example, the fact that a patent owner may have to sue in multiple districts in order to reach all alleged infringers is not a concern traditionally addressed by venue. "The desirability of consolidating similar claims in a similar proceeding," this Court has said, does not justify interpreting a venue statute "to give the plaintiff the right to select the place of trial that best suits his convenience." *Leroy*, 443 U.S. at 184.[3]

Venue law thus aims to ensure fairness between the litigants in a case, and more specifically aims to protect defendants' interests in convenience and reasonableness of choice of forum.

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[3]Indeed, Congress recently enacted a law making it harder for patent owners to join multiple defendants into a single suit, a law certainly not enacted for the convenience of patent owners. *See* 35 U.S.C. § 299.

B. The Development of Patent Venue Law Reflects This Concern for Fairness

Venue in patent cases has been no exception to those general principles of fairness and protection of defendants. Appeals to fairness may be found both in the legislative history of patent venue law and in this Court's interpretation of that law.

1. The legislative history of patent venue adopts fairness toward defendants as a primary rationale. The statutory provision for patent venue, as Petitioner notes, originates in the Act of Mar. 3, 1897, which permitted a patent suit in the defendant's place of incorporation or in any of the defendant's places of business where infringement had occurred. Ch. 395, 29 Stat. 695; *see* Br. Pet'r 2–3.

Proponents of the 1897 Act viewed it as constricting patent venue. Up until then, venue in patent cases was arguably[4] based on the Judiciary Act of 1789, which broadly permitted suit against a defendant in any district "in which he shall be found at the time of serving

[4] Uncertainty arose in view of two intervening statutes that generally imposed even more limited venue than that in the 1897 Act. Act of Mar. 3, 1887, ch. 373, 24 Stat. 552 (formerly Sec. 51 of the Judicial Code codified at 28 U.S.C. § 112 (1940)); Act of Aug. 13, 1888, ch. 866, 25 Stat. 433. If those general venue statutes applied to patent cases, then the later 1897 Act would have acted as a broadening of venue. However, two cases cast into doubt the applicability of the 1887 and 1888 Acts to patent suits. *See In re Hohorst*, 150 U.S. 653, 661–62 (1893); *In re Keasbey & Mattison Co.*, 160 U.S. 221, 230 (1895). Lower courts thereafter generally did not apply the 1887 and 1888 Acts to patent cases. *See Nat'l Button Works v. Wade*, 72 F. 298, 299 (C.C.S.D.N.Y. 1896); *Noonan v. Chester Park Athletic Club Co.*, 75 F. 334, 335 (C.C.S.D. Ohio 1896); *Earl v. S. Pac. Co.*, 75 F. 609, 610 (C.C.N.D. Cal. 1896); *Westinghouse Air-Brake Co. v. Great N. Ry. Co.*, 88 F. 258, 261 (2d Cir. 1898). *But see Gorham Mfg. Co. v. Watson*, 74 F. 418, 418–19 (C.C.D. Mass. 1896).

the writ." Ch. 20, § 11(b), 1 Stat. 73, 79. During debate in the House, Representative Mitchell observed that "a great many patent lawyers" agreed that the bill to become the 1897 Act would "limit that jurisdiction" of the circuit courts in patent cases. 29 Cong. Rec. 1900 (Feb. 16, 1897). He later rebutted a contention that the bill would enlarge patent venue by saying that the bill "does not extend, but on the contrary that it defines, the jurisdiction of the courts." *Id.* at 1901.

This constriction of venue had a recognized purpose of protecting defendants in patent lawsuits. Representative Mitchell compared the 1897 Act to then-prevailing law and explained that "this act makes it easier for the defendant, and really limits to that extent the jurisdiction of the court." 29 Cong. Rec. at 1901. Representative Lacey, who introduced the bill, also noted that defendants would be safe from suits in undue places, as "[i]solated cases of infringement would not confer this jurisdiction." *Id.* at 1900.

The history of the 1897 Act thus reflects congressional intent to promote fairness in venue, particularly with respect to patent defendants. Since the language of that act is the basis of the current 28 U.S.C. § 1400(b), *see* Br. Pet'r 2–6, that legislative history continues to be relevant today.

2. This Court's decisions also confirm that fairness for defendants has motivated patent venue law. Patent venue "confers upon defendants in patent cases a privilege in respect of the places in which suits may be maintained against them." *Gen. Elec. Co. v. Marvel Rare Metals Co.*, 287 U.S. 430, 435 (1932). The key observation is that venue is a "privilege" for "defendants."

Stonite Products Co. v. Melvin Lloyd Co. recognized the importance of fairness to litigants in its comprehensive review of the history of venue law. *See* 315 U.S. 561, 563–66 (1942). Beginning with the broad venue provision of the 1789 Act that originally controlled patent cases, the Court observed that the "abuses engendered by this extensive venue" prompted Congress to enact "a restrictive measure," namely the 1897 Act specifically governing patent venue. *Stonite*, 315 U.S. at 563, 566.

A later case would put a gloss upon *Stonite*'s reference to "abuses engendered," connecting that concern with "the policy behind the applicable venue statute." *Schnell v. Peter Eckrich & Sons, Inc.*, 365 U.S. 260, 262 (1961) (quoting *Neirbo*, 308 U.S. at 168) (quotation marks omitted); *see also Pure Oil Co. v. Suarez*, 384 U.S. 202, 207 (1966) (discussing the "particular reasons why Congress had passed" the patent venue statute). *Stonite* and its progeny thus recognized that restrictive patent venue had the purpose of curbing abuses, presumably by patent plaintiffs bringing suits in inconvenient or inappropriate forums. And when this Court revisited the holding of *Stonite*, it cited with approval the "reasons and purposes for" the patent venue statute discussed therein. *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 225 (1957).

Legislative history and case law thus both tend to the conclusion that patent venue law, like all venue law, strives for fairness to litigants and especially to defendants. The Federal Circuit's abrogation of this Court's longstanding precedents on patent venue may thus be evaluated not only for errors of law but also for departing from this policy of fairness.

II. Unfairness Is the Evident Result of Broad Patent Venue Under *VE Holding*

Venue law's traditional concern for fairness is pointedly at issue in this case because experience has shown that the Federal Circuit's reinterpretation of venue, for patent defendants, is patently unfair.

In *VE Holding Corp. v. Johnson Gas Appliance Co.*, the Court of Appeals interpreted the patent venue statute "as a matter of first impression," disregarding as abrogated this Court's decades of consistent rulings on the subject. 917 F.2d 1574, 1579 (Fed. Cir. 1990). The result of that novel statutory interpretation was broad venue in patent cases: Under *VE Holding*, "corporate patent infringement defendants may be sued in an almost unlimited number of venues." John A. Laco, *Venue in Patent Infringement Actions:* Johnson Gas *Fouls the Air*, 25 Loy. L.A. L. Rev. 1107, 1131 & n.206 (1992) (citing *VE Holding*, 917 F.2d at 1584).

In the years since *VE Holding*, practical experience has shown what commentators predicted, that this expanded venue "increased the cost and inconvenience of litigation for corporate patent infringement defendants." Laco, *supra*, at 1131. This is a reversal of the ordinary role of venue in protecting defendants from increased costs and inconvenience. *See Leroy*, 443 U.S. at 184; Laco, *supra*, at 1131 n.207 (citing *Leroy*). *See generally* Section I *supra* p. 5.

Three elements of those practical consequences are addressed below: (1) rampant forum shopping in patent cases, (2) certain district courts' creation of local rules favoring patent owners and adverse to defendants, and (3) harms and difficulties imposed upon small companies sued in these procedurally-adverse forums.

A. Broad Venue Has Enabled Remarkable Forum Shopping in Patent Cases

It is common knowledge by now that patent litigation suffers from an unprecedented degree of forum shopping, and in particular shopping for one infamous forum: the Eastern District of Texas.

In 2015, almost 44% of patent cases were filed in that district, a sparsely populated area of Texas with little technology industry and no major city center. Brian C. Howard, *Announcing the Patent Litigation Year in Review 2015*, Lex Machina (Mar. 16, 2016), URL *supra* p. vii.[5] In 2016, that percentage dropped to 30% in the first quarter, but trended upwards to 40% by the end of the year. Brian C. Howard, *Lex Machina Q4 2016 Litigation Update*, Lex Machina (Jan. 12, 2017) [hereinafter Howard 2016], URL *supra* p. vii. Perhaps more remarkably, approximately 25% of all federal district court patent cases in 2015 and 2016 were heard by a single judge, whose docket reportedly saw over 1,600 patent cases in 2015, with an additional 1,119 cases in 2016.[6]

The concentration of patent cases in the Eastern District is made more remarkable by the concentration of particular types of plaintiffs in that district. Since 2014, over 90% of patent cases filed in the Eastern District are by non-practicing entities, those companies that make no products and have no business other than licensing and litigating their patents. 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,

[5] Lex Machina is a litigation analytics tool operated by LexisNexis Group, Inc. *See* Bloomberg Inc., *Company Overview of Lex Machina Inc.* (Jan. 17, 2017), URL *supra* p. vii.

[6] Data available from Lex Machina, last accessed January 30, 2016.

9 tbl.2 (2017); *cf. Commil USA, LLC v. Cisco Sys., Inc.*, 135 S. Ct. 1920, 1930 (2015) (expressing concern about systemic harms of non-practicing entities). In addition, "high-volume" plaintiffs, namely those who file more than 10 patent cases in a given year, markedly prefer the Eastern District of Texas, whereas patent holders filing lower numbers of lawsuits generally have not shown a particular tendency to file in any one district. Howard 2016, *supra*.

Patent forum shopping stands in marked contrast even to other types of intellectual property litigation. One study comprehensively reviewed geographic litigation trends among patent, trademark, and copyright cases between 1994 and 2014. *See* Matthew Sag, *IP Litigation in U.S. District Courts: 1994–2014*, 101 Iowa L. Rev. 1065, 1087 (2016). Venue in trademark and copyright cases could largely be explained in terms of general economic fundamentals, and patent venue also "would look remarkably stable"—except for the Eastern District of Texas, which went from the 50th most popular forum in 1994 to the dominant forum today. *Id.* at 1095, 1098.[7] Statistical analysis thus confirms what the raw numbers imply: that forum shopping in patent cases, particularly for one district court, is wholly unparalleled.

Perhaps the concentration of cases in the Eastern District of Texas would be acceptable if that court turned out to be the right venue, but often it is not. Since 2008, the Federal Circuit has granted mandamus petitions arising from that district relating to transfer under 35 U.S.C.

[7]The District of Delaware also notably rose in popularity, but the study found that the rise of the Eastern District of Texas "dwarfs all other changes." *Id.* at 1098.

§ 1404 at least 19 times.[8] That number is all the more remarkable given the "difficult burden" of obtaining mandamus relief relating to a statute that itself permits judicial discretion. *See In re TS Tech USA Corp.*, 551 F.3d 1315, 1322 (Fed. Cir. 2008). This strongly suggests that it is frequently improper, harmful even, for cases to be heard in a venue that has little or no connection to the underlying dispute.

B. Broad Venue Has Encouraged Imbalance in Local Patent Procedural Rules

Concerns about forum shopping are magnified by the growing body of evidence showing that district courts are encouraging forum shopping, through adoption of procedural rules that attract patent plaintiffs.

In complex litigation like patent cases, procedure and timing can have more substantive effect than the legal substance itself. The judge who presides over every

[8] *See In re Google Inc.*, No. 15-138, 2015 WL 5294800 (Fed. Cir. July 16, 2015); *In re Apple, Inc.*, 581 F. App'x 886 (Fed. Cir. 2014) (per curiam); *In re Nintendo of Am., Inc.*, 756 F.3d 1363 (Fed. Cir. 2014); *In re Toyota Motor Corp.*, 747 F.3d 1338 (Fed. Cir. 2014); *In re Toa Techs, Inc.*, 543 F. App'x 1006 (Fed. Cir. 2013); *In re Nintendo Co.*, 544 F. App'x 934 (Fed. Cir. 2013); *In re Google Inc.*, 588 F. App'x 988 (Fed. Cir. 2014); *In re Oracle Corp.*, 399 F. App'x 587 (Fed. Cir. 2010); *In re EMC Corp.*, 677 F.3d 1351 (Fed. Cir. 2012); *In re Genentech, Inc.*, 566 F.3d 1338 (Fed. Cir. 2009); *In re TS Tech USA Corp.*, 551 F.3d 1315 (Fed. Cir. 2008); *In re Hoffmann-La Roche Inc.*, 587 F.3d 1333 (Fed. Cir. 2009); *In re Nintendo Co.*, 589 F.3d 1194 (Fed. Cir. 2009); *In re Acer Am. Corp.*, 626 F.3d 1252 (Fed. Cir. 2010); *In re Zimmer Holdings, Inc.*, 609 F.3d 1378 (Fed. Cir. 2010); *In re Biosearch Techs., Inc.*, 452 F. App'x 986 (Fed. Cir. 2011); *In re Morgan Stanley*, 417 F. App'x 947 (Fed. Cir. 2011) (per curiam); *In re Verizon Bus. Network Servs. Inc.*, 635 F.3d 559 (Fed. Cir. 2011); *In re Microsoft Corp.*, 630 F.3d 1361 (Fed. Cir. 2011).

fourth patent case nationwide has observed that a patent lawsuit "often ends before it begins":

> Early disposition typically results from a settlement between the parties before there is any appearance by counsel in open court. Often the first and last filing requiring the Court's attention is the submission of an agreed order of dismissal.

Iris Connex, LLC v. Dell, Inc., No. 2:15-cv-1915, 2017 WL 365634, at *1 (E.D. Tex. Jan. 25, 2017). This sort of situation means that procedural rules even slightly favoring one side or the other will have important, potentially dispositive, effects on outcomes.

1. Legal scholars have devoted entire articles to reviewing these local procedural rules and practices, and their effect on the concentration of patent cases in one district. The conclusions they reach are concerning for a system that strives for fairness in litigation.

Most recently, two commentators conducted a holistic review of patent litigation procedure in a variety of districts, and concluded: "Rather than any one explanation, we conclude that what makes the Eastern District so attractive to patent plaintiffs is the accumulated effect of several marginal advantages—particularly with respect to the relative timing of discovery deadlines, transfer decisions, and claim construction—that make it predictably expensive for accused infringers to defend patent suits filed in East Texas." Love & Yoon, *supra*, at 1.

Preceding those commentators were two scholars of law and history, who reviewed patent practice in the Eastern District of Texas. They identified eight "procedural deviations" in that district, practices they called "fo-

rum selling." Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. Cal. L. Rev. 241, 250 (2016).[9] Ultimately, they determined that the "cumulative effect" of these practices "tilts the handling of patent cases in the Eastern District of Texas in favor of patentees." *Id.*

A further scholar reviewed the history of forum shopping in patent cases from 1970 through today. He concludes that "forum shopping in patent law is driven, at least in part, by federal district courts competing for litigants." J. Jonas Anderson, *Court Competition for Patent Cases*, 163 U. Pa. L. Rev. 631, 634 (2015).

Reviewing this and the previously discussed study, another scholar found the special procedural rules in the Eastern District of Texas so concerning that he described patent procedure as "an unimpeded field for federal district courts to 'race to the bottom' by selling their courts as plaintiff-friendly environments for patent litigation," a race held "at the expense of our national innovation policy." Sag, *supra*, at 1105.

2. In many cases, the patent owner benefits of the Eastern District of Texas arise not from its substantive decisions but from the timing of those decisions. The district is famous as a "rocket docket," demanding rapid discovery and trial from the parties. *See, e.g.*, Klerman & Reilly, *supra*, at 265–68. But not everything is rapid in the district: Certain motions that would otherwise save defendants substantial costs and resources are regularly

[9]These included summary judgment practice, predictable assignment of judges, liberal joinder of unrelated parties, case management rules unfavorable to joined defendants, refusal to transfer cases out for inconvenience, refusal to stay proceedings during copending reexamination of the patents, tight deadlines for discovery and other pretrial matters, and automatic rules requiring up-front, costly document production. *See id.* at 250–70.

delayed there. Summary judgment takes a median of 1053 days from case filing, compared to a national median of 911 days. *See* Love & Yoon, *supra*, at 10 tbl.6. In one extreme case, summary judgment of invalidity was granted *after* trial, despite a request to have that motion heard almost a year earlier. *Compare Gonzalez v. Infostream Group, Inc.*, No. 2:14-cv-906, 2016 WL 1643313 (E.D. Tex. Apr. 26, 2016), *with* Letter Brief Requesting Leave to File Summary Judgment of Invalidity, *Gonzalez*, 2016 WL 1643313 (July 16, 2015).

Delays in venue transfer motions under § 1404 are also troublingly long. The national average for deciding such motions is 232 days from case filing, but in the Eastern District of Texas the median is 340 days. *See* Love & Yoon, *supra*, at 17 tbl.5. That difference is more concerning because the judge with the largest patent docket in that district requires completion of discovery in 292 days from filing—meaning that the entire cost of discovery is often borne before a decision on whether the forum was inconvenient. *See id.* at 21 fig.1.

Case after case shows that § 1404 motions bear little fruit in this one district. In *Iris Connex*, a venue transfer motion sat pending and unresolved all the way through final judgment and even disposition of an attorney fee motion.[10] *See* 2017 WL 365634, at *27 n.16. In *In re Google Inc.*, the same district court sat on a transfer motion while

[10]The possibility of an attorney fee award does not alleviate the harms of improper venue. For one thing, another characteristic discrepancy of the Eastern District of Texas is that it does not award attorney fees with the same frequency as other districts. *See* Love & Yoon, *supra*, at 33 & tbl.13. Furthermore, attorney fee awards are only proper in "exceptional cases," and improper venue can cause costly harm even in mine-run cases. 35 U.S.C. § 285; *Octane Fitness, LLC v. Icon Health & Fitness, Inc.*, 134 S. Ct. 1749, 1756 (2014).

eight months of "extensive discovery" proceeded; it took a writ of mandamus from the appellate court to force a ruling on the transfer motion. No. 15-138, 2015 WL 5294800, at *1–2 (Fed. Cir. July 16, 2015); *see Brite Smart Corp. v. Google Inc.*, No. 2:14-cv-760, 2015 WL 4638215 (E.D. Tex. Aug. 3, 2015).

Procedural discrepancies like these force defendants to engage in litigation that could have been avoided and would have been avoided in other districts through quickly-disposed motion practice. Such discrepancies work to the advantage of patent owners, attracting them to the courts that offer those discrepancies.

No malice or ill intent need be ascribed to courts engaged in the practices thus described. But even absent bad faith, some district courts will inevitably tend to favor one side and some will tend toward the other. When patent owners have complete pick of the lot, the cases will inevitably gravitate to the most favorable forums.

This may be the natural result, but it is not a fair one. Venue law exists to remedy exactly this situation, and to strive toward ideals of fairness rather than tendencies of common nature.

C. Forum Shopping and Procedural Tilts Especially Harm Small Companies and Innovators

The concentration of cases in front of one court (and largely one judge) especially harms small innovators. Small companies, innovators, and end users are the ones least able to travel to a distant forum and learn the procedures of a new jurisdiction. They are thus most likely to succumb to undue settlement pressure made only greater by the ability of patent owners to forum-shop.

Patent litigation can be extremely costly. Even small lawsuits with less than $1 million in controversy can cost an average of $400,000 through discovery alone, by one estimate. *See* Am. Intellectual Prop. Law Ass'n, *2015 Report of the Economic Survey: Summary Report* 37 (2015), *available at* URL *supra* p. vii. Large companies can stomach these costs, however unpleasant they may be. But small companies often cannot.

As a result, patent owners force small defendants into settlements based on expected costs of litigation, even on the most borderline frivolous claims—a phenomenon that many courts have seen first-hand. *See Eon-Net LP v. Flagstar Bancorp*, 653 F.3d 1314, 1326 (Fed. Cir. 2011) (describing this practice as having "indicia of extortion"); *Iris Connex*, 2017 WL 365634, at *3, 14 (noting that 17 defendants had settled a case that was "not only implausible but nonsensical"); *see also Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1935 (2016) (describing entities who practice this strategy as "[t]rolls, in the patois of the patent community").

A patent owner seeking a higher settlement payout, then, would seek to ratchet up the cost of litigation, and one of the easiest ways to do so is to file suit in a distant and costly venue. This is exactly what happens today. Of patent case defendants making less than $10 million in revenue a year, 69% should have had their cases filed elsewhere under this Court's controlling precedents. Colleen V. Chien & Michael Risch, *Recalibrating Patent Venue* 42 (Santa Clara Univ. Legal Studies, Research Paper No. 10-1, Oct. 6, 2016), *available at* URL *supra* p. vii. Yet due to *VE Holding*, these small defendants are stuck in a wrong and inconvenient forum, often the Eastern District of Texas.

A small defendant stuck there has little hope of getting out. As noted above, venue transfer under § 1404 is a losing cause in the Eastern District of Texas. Well-funded companies can pay for mandamus petitions and attendant jurisdictional discovery to force a venue transfer, but small companies—who in all likelihood have the most meritorious cases for transfer—may not be able to afford the costs.

Erroneously broad venue thus plays directly into the ongoing problem of abusive patent assertion that undermines small businesses and innovators. This practical consequence of *VE Holding* bolsters the need to reverse that decision and return to this Court's previously controlling precedents.

III. Policy Arguments and Interests of Patent Owners Do Not Outweigh These Fairness Concerns

Respondent and supporting *amici* will likely proffer policy justifications for acquiescing in the Federal Circuit's error enabling broad patent venue. But these arguments do not withstand scrutiny, especially in light of the harms of forum shopping and forum selling.

A. Multidistrict Litigation, Not Broad Venue, Is the Right Tool for Suing Multiple Infringers

There is a legitimate concern that patent owners, facing multiple infringers in different locations, may need to file lawsuits in multiple districts in order to obtain relief. However, this Court has already rejected a bid to interpret venue permissibly to accommodate this exact concern. *See Leroy*, 443 U.S. at 184 (discussed *supra* p. 6).

Instead, Congress currently provides a mechanism to lessen these risks: multidistrict litigation. *See* 28 U.S.C. § 1407. "When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to *any* district for coordinated or consolidated pretrial proceedings." § 1407(a).

Multidistrict litigation procedure was designed with patent cases in mind. Prior to *VE Holding*, the Executive Attorney for the Judicial Panel on Multidistrict Litigation listed "patent, copyright, [and] trademark" as among the "[t]ypical subject-matter areas of Panel involvement." *See* Robert A. Cahn, *A Look at the Judicial Panel on Multidistrict Litigation*, 72 F.R.D. 211, 214 (1977).

Importantly, the Judicial Panel on Multidistrict Litigation helps ensure fairness in venue to both sides of the "*v*": it considers the "convenience of parties and witnesses" in choosing a consolidated pre-trial forum. 28 U.S.C. § 1407(a). It also ensures no one forum is overwhelmed with patent cases. *See* § 1407(b). Thus, besides addressing patent owners' multiple-lawsuit concern, multidistrict litigation further emphasizes the relevance of fairness in venue law.

B. Supposed Judicial Specialization Does Not Justify Forum Shopping

One might see a silver lining in the concentration of patent cases into a single judicial district: That district court would develop specialization in patent law. Yet, even assuming that this is true and assuming that the resulting "specialization" would be unbiased, judicial specialization would not justify a rewriting of venue law because Congress has specifically sought to avoid single-tribunal specialization.

In 2011, Congress created the "patent pilot program," designed to "encourage enhancement of expertise in patent cases among district judges." Patent Cases Pilot Program Act, Pub. L. No. 111-349, pmbl., 124 Stat. 3674 (2011) (codified at 28 U.S.C. § 137, hist. n.). Significantly, the Act guarantees a diversity of opinions and venues: The Act requires the program to encompass at least six different districts from at least three different judicial circuits. *Id.* § 1(b).

The Federal Circuit may be cited as another example of judicial specialization in patent law, but legislative intent belies that assumption. In establishing the new appeals court, the House report specifically took note that:

> The proposed new court is not a "specialized court." Its jurisdiction is not limited to one type of case, or even to two or three types of cases. Rather, it has a varied docket spanning a broad range of legal issues and types of cases.

H.R. Rep. No. 97-312, at 19 (1981). Consistent with this, the Federal Circuit also hears appeals of veterans' cases and certain administrative agency appeals. *See* 38 U.S.C. § 7292(c); 28 U.S.C. § 1295(a)(2)–(14). The creation of the Federal Circuit shows that Congress viewed specialist courts as undesirable and a thing to be avoided.

Subject matter expertise is certainly valuable, but so is diversity of thought and breadth of knowledge. Congress has worked to ensure that different voices can raise differing ideas regarding the sometimes idiosyncratic rules of patent litigation. By concentrating a fourth of cases in front of a single judge, the judicially-created venue rule of *VE Holding* works to undermine Congress' measured approach.

C. Patent Owners Currently Do Not Often Depend on Benefits of Home District Litigation

It might be argued that expansive venue is needed in patent cases to assist small inventors unable bear the high costs of bringing an infringement lawsuit in a foreign district. Obviously the small-entity concern cuts both ways—narrow venue assists small business defendants lacking funds to defend in a foreign district—but it is worth considering whether the value of home-district litigation to patent owners might outweigh the costs of unfairness and inconvenience to defendants.

But the empirical data tells an opposite story, that home-district advantage is of minimal value to patent owners. A recent study estimated that operating companies asserting patents sue in their own district less than half the time. Chien & Risch, *supra*, at 31.

Although non-practicing patent owners bring suit more often in their home district, the numbers are likely inflated by the well-known practice of patent owners setting up sham offices in the Eastern District of Texas. *Id.*; *see* Edgar Walters, *Tech Companies Fight Back Against Patent Lawsuits*, N.Y. Times, Jan. 23, 2014, at A23A, *available at* URL *supra* p. viii (describing "empty offices with telephone lines that no one answers"); *Network Prot. Scis., LLC v. Fortinet, Inc.*, No. 12-cv-1106, 2013 WL 4479336, at *7 (N.D. Cal. Aug. 20, 2013) (patent owner "rented a windowless file-cabinet room with no employees in Texas"); *When Patents Attack!*, This Am. Life (July 22, 2011), URL *supra* p. viii. Venue gamesmanship like this contradicts the idea that patent owners derive substantial benefit from bringing suit in their home districts.

IV. Patent Law Merits Unique Venue Rules Distinct from Other Litigation

Certainly as a general matter patent law is not exceptional, and rules of general applicability ordinarily should apply equally to patent law. *See Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 134 S. Ct. 843, 849 (2014). But in the case of venue, there is good reason to abide by the longstanding view that patent cases are treated under a different rule than general litigation.

1. At the outset, it must be observed that the divergence of patent venue from general venue enjoys a long, unbroken pedigree. This Court first suggested that patent cases might fall under a different venue rule than other cases in *In re Hohorst*, 150 U.S. 653 (1893), and *In re Keasbey & Mattison Co.*, 160 U.S. 221 (1895). The lower courts thereafter treated venue in patent cases under different rules than the general venue statute. *See* note 4 *supra* p. 7. Congress responded to this development by enacting a patent venue statute specifically designed to diverge from, not reconcile with, the general venue law. Act of Mar. 3, 1897, ch. 395, 29 Stat. 695.[11]

Thereafter, this Court has consistently held that "Congress placed patent infringement cases in a class by themselves, outside the scope of general venue legislation." *Brunette Mach. Works, Ltd. v. Kockum Indus., Inc.*, 406 U.S. 706, 713 (1972); *see Stonite*, 315 U.S. at 566–67; *Fourco*, 353 U.S. at 228–29; *Schnell*, 365 U.S. at 262;

[11] In debate over that act, Representative Payne was "not able to see why cases of infringement of patents should be taken out of the law and a special rule adopted as to them." 29 Cong. Rec. at 1901. The bill's sponsor did not dispute this, but contended that the divergence of patent venue was useful in view of economic development in the western United States; this observation apparently satisfied the criticism. *See id.* at 1902 (statements of Reps. Lacey and Payne).

Pure Oil, 384 U.S. at 206–07; *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193, 204 (2000).

Given this century-long line of law, *stare decisis* and the aversion to implicit legislative abrogation suffice to affirm this line and to reverse the Federal Circuit.

2. But it is not just judicial history and practice that favor reversal: The unique nature of patent cases also suggests a need for unique venue rules. Petitioner identifies at least two attributes of patent litigation supporting this result, namely the Federal Circuit's expansive rules of personal jurisdiction,[12] *see* Br. Pet'r 35–36, and the strict liability nature of patent infringement, *see id.* at 33–34. A third reason may be found in the special patent rules that many district courts apply.

Patent-specific procedural rules are pervasive in district courts. Congress has encouraged adoption of patent local rules, and at least eleven district courts have them.[13] These rules are unsurprising, given the litany of special proceedings and hearings in patent cases: *Markman* hearings,[14] invalidity and infringement contentions, motions to dismiss under *Alice*,[15] and so on.

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[12]To elaborate briefly: The Federal Circuit expansively construes personal jurisdiction with regard to alleged infringers, but narrowly construes personal jurisdiction with regard to declaratory judgment defendants. *See Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558, 1566 (Fed. Cir. 1994); *Red Wing Shoe Co. v. Hockerson-Halberstadt, Inc.*, 148 F.3d 1355, 1361 (Fed. Cir. 1998). These two decisions enhance the patent plaintiff's power to control choice of forum. *See generally* Br. Am. Cur. EFF & PK (Pet. Stage) 7–14.

[13]Patent Cases Pilot Program Act § 1(b)(2)(A)(ii); *see* James Ware & Brian Davy, *The History, Content, Application and Influence of the Northern District of California's Local Patent Rules*, 25 Santa Clara Computer & High Tech. L.J. 965, 1012 (2009).

[14]*Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996).

[15]*Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 134 S. Ct. 2347 (2014).

Experience and dialogue among the courts is what allows procedural rules to develop and evolve to levels of fairness for all parties. With general-purpose rules of procedure, all district courts participate in and contribute to that experience and dialogue. But with local patent rules, only those courts that are actually trying patent cases will learn how those rules may be improved.

That learning depends on a diversity of forums before which patent cases are tried. Patent venue law applied under *Fourco* and its precedents helps to guarantee that diversity, but broad venue under *VE Holding*, which encourages forum shopping and gravitation to a single tribunal of plaintiffs' choice, does not.

In a patent case decided last Term, this Court recognized that judicial discretion could lead to unfairness and abuses, but felt confident that case law development would "channel the exercise of discretion" to avoid unfair results. *Halo*, 136 S. Ct. at 1935. That channel can be hewn only through a national conversation among courts, a conversation cut short when venue law instead channels all patent cases into one courthouse and all exercises of discretion into a handful of judges. Limited patent venue, as prevailed for a century before *VE Holding*, encourages that conversation, encourages practices that balance the interests between patent plaintiffs and defendants, and ultimately encourages fairness and justice for all.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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