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# Patent Venue Exceptionalism after TC Heartland v. Kraft

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# Patent Venue Exceptionalism after *TC Heartland v. Kraft*

Ana Santos Rutschman\*

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## I. INTRODUCTION

In late 2016, the Supreme Court granted certiorari in *TC Heartland, LLC v. Kraft Foods Group Brands LLC*,<sup>1</sup> a case addressing the interpretation of the special patent venue and the general venue statutes. The case was brought by Heartland, a sweetener manufacturer organized as a limited liability company under Indiana law and headquartered in Indiana.<sup>2</sup> In 2014, Kraft sued Heartland for infringement of three patents on liquid water enhancers. Although Kraft is headquartered in Illinois, the lawsuit was brought in the District of Delaware, where Heartland is not registered to do business and does not have a regular or established place

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<sup>1</sup> *TC Heartland LLC v. Kraft Food Brands Grp.*, 821 F.3d 1338 (Fed. Cir. 2016), *cert. granted*, 137 S.Ct. 614 (U.S. Dec. 14, 2016) (No. 16-341).

<sup>2</sup> Brief for Petitioner at 16-17, *TC Heartland, LLC v. Kraft Foods Grp. Brands LLC*, No. 16-341 (Jan. 30, 2017) [hereinafter *Petitioner Brief*].

of business.<sup>3</sup> However, in 2013, some of Heartland's accused products (representing approximately 2% of Heartland's annual sales) were drop-shipped to locations in Delaware at the request of an Arkansas-based customer.<sup>4</sup> The court deemed this link sufficient to trigger personal jurisdiction in the patent lawsuit brought by Kraft.

A thinly construed nexus—chiefly through the sale of goods—is not uncommon in establishing personal jurisdiction for corporations in general,<sup>5</sup> and in patent infringement cases in particular. For the past quarter of a century, the Federal Circuit has interpreted the patent venue statute<sup>6</sup> permissively, enabling patentees to bring a lawsuit against a corporation in any district where personal jurisdiction arises.<sup>7</sup> In the case of national companies like Heartland, this permissive approach allows patent infringement lawsuits to be brought anywhere in the United States where a modicum of sales may occur.<sup>8</sup>

From a venue perspective, what sets patent infringement cases apart are the idiosyncrasies of forum shopping and forum selling created by permissive constructions of the patent venue statute. Among these idiosyncrasies, most notably, is the overwhelming volume of patent infringement cases being filed in the anomalous rural Eastern District of Texas.<sup>9</sup> *TC Heartland*, now before the Supreme Court, provides an opportunity to alter this scenario.<sup>10</sup>

In 2015, Heartland petitioned the Federal Circuit for a writ of mandamus directing the Delaware trial court to dismiss the Kraft lawsuit for lack of personal jurisdiction, or transfer the case to the Southern District of Indiana due to improper venue.<sup>11</sup> After the Federal Circuit denied the mandamus petition, Heartland filed a petition for a writ of certiorari in September 2016, which the Supreme Court granted in December.<sup>12</sup> If the Supreme Court rules in favor of Heartland, patent venue will be interpreted independently from the general venue statute,

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<sup>3</sup> *Petitioner Brief*, at 16-17.

<sup>4</sup> *Petitioner Brief*, at 18.

<sup>5</sup> *See* *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) (articulating the requirement of minimum contacts for a state to exercise personal jurisdiction over a corporation); *see also* *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985).

<sup>6</sup> 28 U.S.C. § 1400(b) (2012).

<sup>7</sup> *See infra*, note 35-41 and accompanying text.

<sup>8</sup> *See infra*, section I.B Effects of Permissive Patent Venue.

<sup>9</sup> *See infra*, note 42-47 and accompanying text.

<sup>10</sup> *TC Heartland LLC v. Kraft Food Brands Grp.*, 821 F.3d 1338 (Fed. Cir. 2016), *cert. granted*, 137 S.Ct. 614 (U.S. Dec. 14, 2016) (No. 16-341).

<sup>11</sup> *Petition for Writ of Mandamus, In re TC Heartland, LLC*, No. 16-105 (Fed. Cir. Oct. 23, 2015), ECF No. 2; *see also* 28 U.S.C. § 1406(a) (2012) (authorizing transfer of a case when venue is improper).

<sup>12</sup> *TC Heartland*, 821 F.3d at 1338.

which will result in a narrower construction of venue in patent infringement cases.<sup>13</sup> This, in turn, will likely lead to less patentee forum-shopping as well as a redistribution of patent litigation across the country.<sup>14</sup>

This Article explores the implications of the upcoming Supreme Court decision in *TC Heartland v. Kraft*. In Part II, this Article addresses the legislative history and interpretation of the patent venue statute by the Supreme Court and the Federal Circuit, as well as the effects that the Federal Circuit's permissive constructions of venue have had on patent litigation over the past 27 years. Part III looks at possible outcomes after the Supreme Court's decision in *TC Heartland v. Kraft*: it starts by discussing patterns of patent litigation redistribution in the event of a decision for Heartland, and then turns to alternative channels for achieving patent venue reform, should the Court side with Kraft. Finally, this Article concludes by positioning the outcome of the case into the larger ongoing debate surrounding patent exceptionalism.

## II. EVOLUTION OF PATENT VENUE

### A. Legislative History and Statutory Interpretation of Patent Venue

Federal courts have exclusive subject matter jurisdiction over patent infringement cases.<sup>15</sup> For a plaintiff to successfully initiate a lawsuit, the court must have personal jurisdiction over the defendant,<sup>16</sup> and venue must be proper. In patent cases, the latter is governed by a special venue statute,<sup>17</sup> first enacted in 1897.<sup>18</sup> From 1789 to 1897, patent venue was governed by the general venue statute.<sup>19</sup> Under the general statute and successive amendments,<sup>20</sup> plaintiffs started bringing patent infringement lawsuits in almost anywhere in the Union.<sup>21</sup> Congress intervened in 1897,

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<sup>13</sup> See *infra*, note 78-82 and accompanying text.

<sup>14</sup> See *infra*, note 78-89 and accompanying text.

<sup>15</sup> 28 U.S.C. § 1338(a) (2012).

<sup>16</sup> See *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

<sup>17</sup> 28 U.S.C. § 1400(b) (2012).

<sup>18</sup> Act of Mar. 3, 1897, ch. 395, 29 Stat. 695.

<sup>19</sup> Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73 (1897) (limiting lawsuits to places where the defendant “is an inhabitant, or in which he shall be found”).

<sup>20</sup> See Act of Mar. 3, 1887, ch. 373, § 1, 24 Stat. 552.

<sup>21</sup> Plaintiffs in patent infringement cases took advantage of the fact that diversity lawsuits could now be brought in the place of residence of either the plaintiff or defendant. See Act of Mar. 3, 1887, ch. 373, § 1, 24 Stat. 552, at 552-53; see also Richard C. Wydick, *Venue in Actions for Patent Infringement*, 25 STAN. L. REV. 551, 553 (1973) (describing how the broad general venue statute led to situations of abuse beyond the sphere of patent lawsuits).

enacting a separate patent venue statute that limited venue<sup>22</sup> to two situations: 1) the place where the defendant inhabited; or 2) the place where the defendant committed infringing acts and had a place of business.<sup>23</sup>

Until the mid-twentieth century, the special statute applicable to patent venue remained fairly isolated from the legislative and interpretive changes affecting the general venue statute. In the 1942 *Stonite Products* case, the Supreme Court confirmed that the 1897 patent statute alone governed venue in patent infringement cases.<sup>24</sup> Six years later, however, as the Judicial Code was revised, Congress made textual changes that would affect venue.<sup>25</sup> Instead of limiting patent venue to the place where the defendant “inhabits”—per the 1897 text—the 1948 revisions introduced the word “resides.”<sup>26</sup> In its entirety, the newly codified section 28 U.S.C. § 1400(b) states “[a]ny 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.”<sup>27</sup> The text remains unchanged to this day.

The general venue statute also underwent changes 1948 when it was revised and codified as 28 U.S.C. § 1391.<sup>28</sup> In setting forth the residence criteria for purposes of general venue, Congress established in § 1391(c) that a corporate defendant could be sued in its place of incorporation or place of business, and that either locus would constitute corporate residence for venue purposes.<sup>29</sup> The general standard was thus broader than the patent venue standard, a phenomenon that once again prompted questions about the relationship between special and general venue.

The Supreme Court addressed these questions in 1957 in the *Fourco Glass* case, reaffirming the idea that there was no interplay between the two statutes.<sup>30</sup> Section 1400(b) remained a special statute governing

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<sup>22</sup> See Wydick, *supra* note 21, at 554-56.

<sup>23</sup> Act of Mar. 3, 1897, ch. 395, 29 Stat. 695

<sup>24</sup> *Stonite Prods. Co. v. Melvin Lloyd Co.*, 315 U.S. 561, 565, n.5, 566 (1942) (“Congress did not intend the Act of 1897 to dovetail with the general provisions relating to the venue of civil suits, but rather that it alone should control venue in patent infringement proceedings.”)

<sup>25</sup> See generally Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS. 216, 234-40 (1948).

<sup>26</sup> 28 U.S.C. § 1400(b) (2012) (“Words in subsection (b) ‘where the defendant resides’ were substituted for ‘of which the defendant is an inhabitant.’”).

<sup>27</sup> *Id.*

<sup>28</sup> 28 U.S.C. § 1391(c) (1948).

<sup>29</sup> 28 U.S.C. § 1391(c) (2012) (“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.”).

<sup>30</sup> *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222 (1957).

patents and, therefore, its scope had not been broadened by changes to general venue.<sup>31</sup> Under *Fourco Glass*, substituting “inhabits” with “resides” had no meaningful effect.

In 1988, Congress amended general venue again.<sup>32</sup> For corporate defendants, § 1391(c) now equated venue with personal jurisdiction:<sup>33</sup>

For purposes of venue under this chapter, a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced.<sup>34</sup>

For parties in patent infringement lawsuits, the most relevant change introduced by the 1988 amendment to the general venue statute was, however, the inclusion of the words “under this chapter.” Because § 1400(b) falls under the same chapter as § 1391(c), in 1990, the Federal Circuit held in *VE Holding Corp. v. Johnson Gas Appliance Co.* that the amended § 1391(c) governed patent venue as well.<sup>35</sup> This meant that corporate residence attached to any place where there was personal jurisdiction, instead of only to the place of incorporation.<sup>36</sup> *VE Holding* thus ushered in an era of permissible patent venue and opened the door for extensive forum shopping in patent infringement cases, as described in the following section.<sup>37</sup>

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<sup>31</sup> *Id.* at 228 (“We think it is clear that § 1391(c) is a general corporation venue statute, whereas § 1400(b) is a special venue statute applicable, specifically, to *all* defendants in a particular type of actions, i.e., patent infringement actions.”).

<sup>32</sup> *See generally* Thomas W. Adams, *The 1988 Revision of 28 U.S.C. § 1391(C): Corporate Venue Is Now Equivalent to In Personam Jurisdiction Effects on Civil Actions for Patent Infringement*, 39 CLEV. ST. L. REV. 357 (1991).

<sup>33</sup> *Id.* at 363-65.

<sup>34</sup> Pub. L. No. 100-702, § 1013(a)-(b), 102 Stat. 4642 (1988) (codified as amended at 28 U.S.C. § 1391(c)).

<sup>35</sup> *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1583 (Fed. Cir. 1990).

<sup>36</sup> *Id.* (“[V]enue in a patent infringement case includes any district where there would be personal jurisdiction over the corporate defendant at the time the action is commenced. While this test is narrower than allowing venue wherever a corporate defendant could be served, it is somewhat broader than that encompassed by the previous standard of ‘place of incorporation.’”)

<sup>37</sup> *See infra*, note 47-55 and accompanying text. *See also* Kimberly A. Moore, *Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation*, 79 N.C. L. REV. 889, 897 (2001) (discussing how *VE Holding* “rendered superfluous the patent venue statute for corporate defendants” and enabled widespread forum-shopping among patentees).

General venue was last amended in 2011. Among other changes,<sup>38</sup> Congress replaced “under this chapter” with “for all venue purposes.”<sup>39</sup> This change did not substantially affect the *VE Holding*-enabled permissive approach to patent venue.

### *B. Effects of Permissive Patent Venue*

Permissive venue allows plaintiffs in patent infringement cases to engage in a particularly lenient form of forum shopping, as patentees have been able to sue in practically any federal court of their choosing for nearly three decades.<sup>40</sup> Forum shopping in patent litigation predated the 1988-1990 changes that broadened patent venue.<sup>41</sup> In fact, forum shopping was one of the concerns that led to the creation of the Federal Circuit in 1982.<sup>42</sup> Having jurisdiction that extends beyond patent appeals,<sup>43</sup> the Federal Circuit contributed to what is often called “patent exceptionalism”<sup>44</sup> at both substantive and (especially) procedural levels. But creation of a specialized appellate circuit for patent cases did not minimize the forum shopping problem,<sup>45</sup> which assumed new contours after the Supreme Court ruling in *VE Holding*.

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<sup>38</sup> See Pub. L. No. 112-63, § 202, 125 Stat. 758 (2011) (codified as amended at 28 U.S.C. § 1391(a)) (establishing that general venue now governs “all civil actions brought in district courts of the United States”); *id.* at § 202 (codified as amended at 28 U.S.C. § 1391(c)(2)) (establishing that the merging of venue and personal jurisdiction is no longer limited to corporations).

<sup>39</sup> *Id.* at § 202 (codified as amended at 28 U.S.C. § 1391(c)).

<sup>40</sup> See Jeanne C. Fromer, *Patentography*, 85 N.Y.U. L. REV. 1444, 1451 (2010).

<sup>41</sup> See *supra*, note 32-35 and accompanying text; see also *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574 (Fed. Cir. 1990).

<sup>42</sup> See Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (codified as amended in scattered sections of 28 U.S.C.); Comm’n on Revision of the Fed. Court Appellate Sys., *Structure and Internal Procedures: Recommendations for Change* (1975), reprinted in 67 F.R.D. 195; see also J. Jonas Anderson, *Court Competition for Patent Cases*, 163 U. PA. L. REV. 631, 633, n.6 (2015); see generally Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1 (1989).

<sup>43</sup> 28 U.S.C. § 1295 (2012); see LAWRENCE BAUM, *SPECIALIZING THE COURTS* (2011); Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENVTL. L. REV. 1, 12 (2009) (describing how multiple-goal institutions tend to underperform in “goals that are hard to measure”); see also R. Polk Wagner & Lee Petherbridge, *Is the Federal Circuit Succeeding? An Empirical Assessment of Judicial Performance*, 152 U. PA. L. REV. 1105 (2004) (discussing overall performance of the Federal Circuit in patent and non-patent cases).

<sup>44</sup> See *infra*, note 100 and accompanying text.

<sup>45</sup> See Kimberly A. Moore, *Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation*, 79 N.C. L. REV. 889, 892 (2001) (providing data that shows that this occurs before and after the creation of the Federal Circuit).

Empirical research has shown that the distribution of patent cases among the ninety-four judicial districts is so uneven that it cannot possibly be attributable to the relative size of civil dockets.<sup>46</sup> In 2015, 44% of all 5,830 patent cases filed in the United States were brought in the Eastern District of Texas, with the District of Delaware a distant second (9%), followed by the Central and North Districts of California (with 5% and 4%, respectively).<sup>47</sup>

The popularity of Texas—and of the predominantly rural Eastern District in particular—cannot be explained by geographical clustering of patent-intensive industries, as major technology hubs are located elsewhere as well.<sup>48</sup> What, in fact, explains the anomalous rates of patent cases filed in the Eastern District of Texas is the patentee-friendly reputation of the district, attracting litigation through favorable procedural and administrative practices in patent cases.<sup>49</sup> As corporate venue was interpreted to expand nationally, Texas became the preferred target for patent forum shopping.<sup>50</sup> With forum shopping in patent cases on the rise since the early 1990s,<sup>51</sup> the Eastern District of Texas went from a total of 14 patent cases in 1999 to nearly 200 patent cases a year by the mid-2000s;<sup>52</sup> in 2012 that number skyrocketed to 1,247, while in 2015 it more than doubled to a grand total of 2,540.<sup>53</sup> Between 2007 and the first half of 2016, the Eastern District of Texas attracted 20% of national patent litigation, followed by Delaware (12%) and the Central District of California (8%).<sup>54</sup>

Among the practices that propelled the Eastern District of Texas to forum shopping prominence, scholars identified several factors that set the

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<sup>46</sup> *Id.*

<sup>47</sup> See Colleen V. Chien & Michael Risch, *Recalibrating Patent Venue*, 77 MD. L. REV. (forthcoming 2018) (manuscript at 13) (Santa Clara Univ., Legal Studies Research Paper No. 10-1). Early data for 2017 show the rate for the Eastern District of Texas at 35%. See *Brief of 22 Law, Economics and Business Professors as Amici Curiae in support of Respondent* (Mar. 8, 2017), at 3 (quoting from Docket Navigator Analytics, *New Patent Cases*, <https://www.docketnavigator.com/stats>).

<sup>48</sup> See J. Jonas Anderson, *Court Competition for Patent Cases*, 163 U. PA. L. REV. 631, 632-33 (2015) (noting that neither Texas nor Delaware are “home to a major technology industry”).

<sup>49</sup> *Id.* at 634.

<sup>50</sup> See generally Yan Leychkis, *Of Fire Ants and Claim Construction: An Empirical Study of the Meteoric Rise of the Eastern District of Texas As a Preeminent Forum for Patent Litigation*, 9 YALE J. L. & TECH. 193 (2007).

<sup>51</sup> Kimberly A. Moore, *Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation*, 79 N.C. L. REV. 889, 901 (2001).

<sup>52</sup> See Chien & Risch, *supra* note 47, at 12.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*



district apart.<sup>55</sup> One of the most relevant is the Eastern District of Texas's hostility to summary judgment,<sup>56</sup> which traditionally favors defendants in patent lawsuits.<sup>57</sup> As patent cases go to trial more often in Eastern Texas than elsewhere in the country, patentees also encounter more sympathetic juries; plaintiffs win 72% of jury trials in this district, as opposed to the national average of 61%.<sup>58</sup> The district has also historically resisted the transfer of patent cases.<sup>59</sup> Between 1991 and 2010, transfer motions had a 34.5% success rate in the Eastern District of Texas, well below the 50% average in districts with long-established patent litigation.<sup>60</sup>

In addition to a generally more favorable litigation atmosphere, in the Eastern District of Texas there is the possibility for plaintiffs to learn in advance the identity of the judge assigned to their case—a feature that has been described as “judge-shopping.”<sup>61</sup> This happened in the wake of the implementation of the Patent Pilot Program in 2011.<sup>62</sup> The Program was designed to increase patent expertise among federal judges<sup>63</sup> by allowing reassignment of patent cases to “designated judges”—judges who volunteered to receive patent cases from non-program judges in the same district, or to receive randomly assigned patent cases.<sup>64</sup> For participating districts, the probability of a specific judge being assigned to a patent case is less than one-third.<sup>65</sup> The Eastern District of Texas, however, implemented the program in the way that greatly increases these odds:

In contrast to the random assignment norm, the Eastern District of Texas assigns cases based on the division in which they were filed and, more importantly, specifies ex

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<sup>55</sup> In addition to hostility to summary judgment and transfer, “judge-shopping” and quick scheduling, described in this section, Klerman & Reilly have identified additional areas setting the Eastern District of Texas apart as pro-plaintiff: loose interpretation of joinder rules; pro-plaintiff management of multi-Defendant cases; refusal to stay pending reexaminations; adoption of procedural rules that speed up discovery. Daniel Klerman & Greg Reilly, *Forum Selling*, 99 S. CAL. L. REV. 241, 257-70 (2016).

<sup>56</sup> *See id.* at 251-52 (noting that going to trial usually bolsters the plaintiff's chances of winning a case).

<sup>57</sup> *See id.* at 251 (quoting John Allison et al., *Understanding the Realities of Modern Patent Litigation*, 92 TEX. L. REV. 1769, 1787-90 (2014)).

<sup>58</sup> *See id.* at 254 (quoting Allison et al., *supra* note 57, at 1793-94).

<sup>59</sup> *Id.* at 260-63.

<sup>60</sup> *See* Andrei Iancu & Jay Chung, *Real Reasons the Eastern District of Texas Draws Patent Cases—Beyond Lore and Anecdote*, 14 SMU SCI. & TECH. L. REV. 299, 315 (2011).

<sup>61</sup> Klerman & Reilly, *supra* note 55, at 251.

<sup>62</sup> Patent Cases Pilot Program, Pub. L. No. 111-349, 124 Stat. 3674 (2011) (codified as amended at 28 U.S.C. § 137).

<sup>63</sup> *See generally* MARGARET S. WILLIAMS ET AL., FED. JUDICIAL CTR., PATENT PILOT PROGRAM: FIVE-YEAR REPORT (Apr. 2016).

<sup>64</sup> *Id.* at 2.

<sup>65</sup> Klerman & Reilly, *supra* note 55, at 254-57.

ante via a public order the allocation of cases filed in each division. For example, in 2006 at the outset of the Eastern District's popularity, patentees filing in the Marshall division were told they had a 70% chance of being assigned to Judge Ward, those filing in Tyler a 60% chance of Judge Davis, those filing in Sherman a 65% chance of Judge Schell, and those filing in Texarkana a 90% chance of Judge Folsom.<sup>66</sup>

In addition to the aforementioned factors, the Eastern District of Texas also boasts a reputation for swiftness, having one of the fastest patent dockets in the country.<sup>67</sup> Median time to trial was 1.8 years during the early to mid-2000s, an average that increased to 2.3 years between 2008 and 2015 as the patent caseload ballooned.<sup>68</sup>

The convergence of these pro-plaintiff factors has thereby made the Eastern District of Texas the preferred forum for patentees. To be sure, forum shopping is not specific to patent litigation and the case of the Eastern District presents extreme characteristics. But it is a case where the outcomes disproportionately impact patent law, both procedurally and substantively. Jeanne Fromer, building on then professor and now Federal Circuit judge Kimberly Moore's empirical work, summarized the detrimental effects of forum shopping associated with patent litigation:<sup>69</sup> 1) patentees are more likely to win a case for procedural reasons (e.g. transfer of a motion) than through application of substantive patent law, a phenomenon that impacts both the "normative force" of patent law and patent policy as a whole;<sup>70</sup> 2) the legal system is manipulated by plaintiffs, bringing into question fundamental notions of justice;<sup>71</sup> and 3) significant resources are consumed by litigation on forum choice instead of (or before getting to) substantive issues, impacting economic efficiency.<sup>72</sup>

Patent forum shopping, while unavoidable to some extent, is ultimately undesirable at the scale reached in the Eastern District of Texas. As permissive patent venue greatly enabled forum shopping among patentees, the impending Supreme Court decision in *TC Heartland v. Kraft* has the potential to change the landscape in patent infringement litigation. This is not to say that, if the Court sides with Heartland, patent forum

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 21-22.

<sup>68</sup> *Id.*

<sup>69</sup> See Fromer, *supra* note 40, 1464-65; but see Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 CORNELL L. REV. 1507 (1995) (weighing the potential benefits and costs of forum-shopping).

<sup>70</sup> Fromer, *supra* note 40, at 1464-65.

<sup>71</sup> *Id.* at 1465; see also Anderson, *supra* note 48, at 637.

<sup>72</sup> Fromer, *supra* note 40, at 1464-65.

shopping would end.<sup>73</sup> But litigation would drift away from fora like Eastern Texas and, in this sense, would align patent venue patterns with those observed under general venue rules.

### III. OUTCOME OF *TC HEARTLAND V. KRAFT* AND FORESEEABLE CONSEQUENCES

#### A. *Potential Impact of TC Heartland v. Kraft*

The question presented in *TC Heartland v. Kraft* is “[w]hether 28 U.S.C. § 1400(b) is the sole and exclusive provision governing venue in patent infringement actions and is not to be supplemented by 28 U.S.C. § 1391(c).”<sup>74</sup> Contrary to the position embraced by the Federal Circuit in *VE Holding*,<sup>75</sup> *Heartland* argues that the two provisions should not be read together.<sup>76</sup> Should this view prevail, the Supreme Court would essentially exhume its own 1957 *Fourco Glass* decision and overturn the Federal Circuit; § 1400(b) would once again govern patent venue alone, without § 1391(c) broadening the definition of residence.<sup>77</sup> Consequently, a Supreme Court reversal of the Federal Circuit means that § 1391(c) (general venue) would no longer expand § 1400(b) (patent venue) to include any district where a corporation might have minimum contacts. Instead, patent venue for corporations would only be proper in one of two scenarios: 1) place of residence (i.e. incorporation) of the defendant; or (2) place where the defendant committed infringing acts and maintains a regular place of business.<sup>78</sup>

Under the scenario in which plaintiffs have a more limited choice of fora in which to sue for patent infringement, there would be significant redistribution of patent cases across districts. Even before *TC Heartland v. Kraft* made its way to the Supreme Court, there was a consensus that a more restrictive approach to patent venue would lead to geographical clustering of patent litigation based on types of technology.<sup>79</sup> Already in 2010, Jeanne Fromer predicted that, if patent venue were restricted to the principal place of business of a corporation, “pharmaceutical suits w[ould] likely cluster in the District of New Jersey, and software patent suits

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<sup>73</sup> See *infra*, note 90-92 and accompanying text.

<sup>74</sup> *Petitioner Brief*, *supra* note 2, at i.

<sup>75</sup> See *supra* note 35-41 and accompanying text.

<sup>76</sup> *Petitioner Brief*, *supra* note 2, at 20.

<sup>77</sup> *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 223-224 (1957).

<sup>78</sup> Act of Mar. 3, 1897, ch. 395, 29 Stat. 695.

<sup>79</sup> See Fromer, *supra* note 40, at 1447.

w[ould] likely group themselves in the Northern District of California, the District of Massachusetts, and the Western District of Washington.”<sup>80</sup>

This approach would still translate into a limited number of courts deciding a high number of technology-specific patent cases.<sup>81</sup> It would, however, exclude clustering in districts with no sizeable patent-driven industries and eliminate incentives for courts to compete for patent cases in these geographical areas.

Recent empirical research maps out further implications of a potential win by *Heartland*.<sup>82</sup> Looking at data from 2015 as a comparison point, if the Supreme Court’s decision were to lead to a restriction of patent venue, 52% of corporations would be forced to choose a different district in which to sue for patent infringement.<sup>83</sup> Overall, smaller defendants would benefit the most from a restrictive approach to venue, as the combination of regular place of business and districts where infringing acts occur—the only venue-triggering mechanism in addition to place of incorporation—would likely span across more limited geographical areas.<sup>84</sup> In fact, predictions show that nearly half of defendants (46%) would be sued in their principal place of business.<sup>85</sup>

Empirical models also show that the type of technology around which companies cluster would play a role in the aftermath of a reversal of the Federal Circuit in *TC Heartland v. Kraft*. “*TC Heartland* would provide venue relief to over 50% of the defendants in all major sectors except finance and biopharma. The defendant industries that would experience the greatest relief, as measured by the proportion of migrating cases, under *TC Heartland* would be services, finance and tech.”<sup>86</sup>

Predictably, the face of this patent litigation redistribution would be the Eastern District of Texas. Patent caseload in the District would drop from the 2015 high of 44% to 14.7%.<sup>87</sup> Still, with reference to 2015 numbers, the District of Delaware would climb from 9% to 23.8%.<sup>88</sup> The Northern District of California would also see a significant increase, from 4% to 13%, while the Central District of California (5% to 6.1%) and the

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 1147-148 (stating that proponents of generalist courts (as opposed to specialized patent courts) argue that industry concentration would eventually lead to a natural specialization of judges and juries in these areas); *see generally* DAN L. BURK & MARK A. LEMLEY, *THE PATENT CRISIS AND HOW THE COURTS CAN SOLVE IT* (2009).

<sup>82</sup> *See* Chien & Risch, *supra* note 47.

<sup>83</sup> *Id.* at 34.

<sup>84</sup> Chien & Risch, *supra* note 47, at 41 (noting that smaller defendants would benefit the most from venue relief because they have “relatively smaller footprints”).

<sup>85</sup> *Id.* at 35.

<sup>86</sup> *Id.* at 43.

<sup>87</sup> *Id.* at 37.

<sup>88</sup> *Id.*

District of New Jersey (5% to 5.3%) would experience less perceptible changes in patent litigation volume.<sup>89</sup>

The following section situates these potential shifts in the context of the broader discussion of patent cases as outliers in the judicial system. It should be noted, however, that giving special treatment to patent venue—as opposed to broadening it through general venue—has the effect of bringing patent litigation into consonance with patterns observed in non-patent litigation in general, where courts in the District of Delaware play a preponderant role.<sup>90</sup> Although paradoxical, this is not necessarily an undesirable effect; for example, as seen above, restrictive patent venue would be protective of smaller defendants. Nevertheless, the possibility of a reconfiguration of patent litigation across the United States raises several policy questions that might have motivated the Supreme Court to grant certiorari to *TC Heartland v. Kraft*.

### *B. Patent Venue Exceptionalism in the Aftermath of TC Heartland v. Kraft*

Patent venue reform does not depend exclusively on the Supreme Court ruling in favor of Heartland in the upcoming decision of *TC Heartland v. Kraft*. In fact, there have been multiple proposals to address this issue through legislative approaches.<sup>91</sup> The most recent attempt at reforming patent venue dates to March 2016, when the Venue Equity and Non-Uniformity Elimination Act (“VENUE Act”) was introduced in Congress.<sup>92</sup> The proposed bill would require that:

Any civil action for patent infringement or any action for a declaratory judgment that a patent is invalid or not infringed ( . . . ) be brought only in a judicial district

- (1) where the defendant has its principal place of business or is incorporated;
- (2) where the defendant has committed an act of infringement of a patent in suit and has a regular and

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<sup>89</sup> *Id.*

<sup>90</sup> See Klerman & Reilly, *supra* note 55 (describing Delaware as a “magnet jurisdiction” for bankruptcy cases.).

<sup>91</sup> See generally Xuan-Thao Nguyen, *Justice Scalia’s “Renegade District”: Lessons for Patent Law Reform*, 83 TUL. L. REV. 111, 141, 145-151 (2008) (providing an account of attempts to reform patent venue through legislative action up to 2008).

<sup>92</sup> Venue Equity and Non-Uniformity Elimination Act of 2016, S.2733, 114th Cong. (2016) [hereinafter *VENUE Act*].

established physical facility that gives rise to the act of infringement;

(3) where the defendant has agreed or consented to be sued in the instant action;

(4) where an inventor named on the patent in suit conducted research or development that led to the application for the patent in suit;

(5) where a party has a regular and established physical facility that such party controls and operates, not primarily for the purpose of creating venue, and has—

(A) engaged in management of significant research and development of an invention claimed in a patent in suit prior to the effective filing date of the patent;

(B) manufactured a tangible product that is alleged to embody an invention claimed in a patent in suit; or

(C) implemented a manufacturing process for a tangible good in which the process is alleged to embody an invention claimed in a patent in suit; or

(6) in the case of a foreign defendant that does not meet the requirements of paragraph (1) or (2), in accordance with section 1391(c)(3).<sup>93</sup>

For the past year, the VENUE Act has lingered in the Senate Judiciary Committee,<sup>94</sup> from which it may not emerge,<sup>95</sup> especially if the holding in

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<sup>93</sup> *VENUE Act*, Sec. 2(b).

<sup>94</sup> *Actions Overview: S.2733—114th Congress (2015-2016)*, LIBRARY OF CONGRESS, <https://www.congress.gov/bill/114th-congress/senate-bill/2733/actions> (last visited Mar. 3, 2017).

<sup>95</sup> It has been reported that the chairman of the Senate Judiciary Committee has chosen not to support the VENUE Act in favor of pursuing legislative options offering larger scale changes to patent law and policy. See Michael Rosen, *Another Patent Reform Bill Just Died in Congress*, TECHPOLICYDAILY.COM (May 19, 2016, 6:00 A.M.), <http://www.techpolicydaily.com/technology/another-patent-reform-bill-just-died-congress/> (last visited Mar. 3, 2017) (quoting Kate Tummarello & Alex Byers, *Zuckerberg: Facebook Wants to Meet With Conservatives*, POLITICO (May 13, 2016, 10:09 AM), <http://www.politico.com/tipshe>

*TC Heartland v. Kraft* results in a narrowing of patent venue that would significantly overlap with the scope of the bill.

In any event, even if the Supreme Court chooses not to overturn the Federal Circuit on this issue, there appears to be sufficient momentum behind patent venue reform to trigger a landscape change in the near future. The fact that the Eastern District of Texas is now the poster child for venue abuse beyond the legal and scholarly milieu, capturing popular and political discourse has greatly advanced this cause.<sup>96</sup> Whether venue reform will come in the form of a Supreme Court decision that is favorable to Heartland, through ad hoc legislative action, or bundled with broader reforms of patent law, however, still remains to be seen.

Regardless of how it occurs, an upcoming reform is poised to break the 27-year link between patent and general venue.<sup>97</sup> As explained above, shrinking patent venue would produce several desirable effects, curbing forum shopping by patentees to a certain extent and shielding smaller defendants from litigation in remote districts.<sup>98</sup> Paradoxically, however, allowing patent venue to once again be solely governed by a special venue provision will reinscribe patent litigation into generic corporate litigation trends—patentees will flock primarily to the reemerging District of Delaware, and secondarily to jurisdictions with technology-intensive industries.<sup>99</sup>

Patent law has a storied and controversial reputation for being exceptional,<sup>100</sup> a byproduct of its underlying technical complexity. Yet a reform of patent venue along the lines discussed above, and irrespective

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ets/morning-tech/2016/05/zuckerberg-facebook-wants-to-meet-with-conservatives-grassley-open-to-house-ecpa-reform-bill-comment-backlog-at-the-fcc-214288)(last visited Mar. 3, 2017).

<sup>96</sup> See e.g., Julie Creswell, *So Small a Town, So Many Patent Suits*, N.Y. TIMES (Sept. 24, 2006); Daniel Nazer & Vera Ranieri, *Why Do Patent Trolls Go to Texas? It's Not for the BBQ*, ELECTRONIC FRONTIER FOUNDATION (Jul. 9, 2014), <https://www.eff.org/deeplinks/2014/07/why-do-patent-trolls-go-texas-its-not-bbq>; *Last Week Tonight with John Oliver: Patents* (HBO television broadcast Apr. 19, 2015), [https://www.youtube.com/watch?v=3bxcc3SM\\_KA](https://www.youtube.com/watch?v=3bxcc3SM_KA).

<sup>97</sup> *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1583 (Fed. Cir. 1990).

<sup>98</sup> See *supra*, note 78-89 and accompanying text.

<sup>99</sup> See *supra*, note 83-89 and accompanying text.

<sup>100</sup> See Peter Lee, *The Supreme Assimilation of Patent Law*, 114 MICH. L. REV. 1413, 1415 (2016) (noting that “[a]lthough tensions between universality and exceptionalism apply throughout law, they are particularly relevant to patent law”); see also James Donald Smith, *Patent Exceptionalism with Presidential Advice and Consent*, 65 DUKE L.J. 1551 (2016) (stating that the Federal Circuit—in itself an example of an exceptional entity in the configuration of the United States judicial system—is often singled out as the ultimate embodiment of patent exceptionalism, not only because of its stand-alone institutional design, but also (and primarily so) because of its procedural decisions on patent appeals).

of its agent, would result in de facto unexceptional behavior through restrictive application of a special patent procedural provision. Aberrant forum shopping, as embodied by the current patent litigation cluster in the Eastern District of Texas, would greatly diminish. Patent forum shopping would fall to levels that match forum shopping in other areas of the law, with the unsurprising resurgence of the District of Delaware—a district that has historically been a stalwart of different types of corporate litigation. In sum, treating patent venue *specialy* would potentially contribute to *normalize* patentee forum shopping, eradicating some of the most outrageous side effects of the permissive approach to venue that has marked the past 27 years.<sup>101</sup>

Patent law as a whole—or even the subset of procedural patent law—will not become more or less exceptional because of the Supreme Court decision in *TC Heartland v. Kraft*. But whether reform comes via the Supreme Court or a different channel, patent venue per se is likely to become less aberrant and, in this sense, will produce considerably fewer extreme and exceptional results.

#### IV. CONCLUSION

For nearly three decades, patent venue was interpreted through a connected reading of the special patent venue statute and the general venue statute. This led to a permissive delineation of venue in patent infringement lawsuits, which in turn generated extreme forms of patentee forum shopping, as well as detrimental court competition for patent litigation.

In *TC Heartland v. Kraft*, the Supreme Court has a chance, and is expected, to overturn the Federal Circuit's approach to venue. If the Court sides with Heartland, plaintiffs will have a more limited choice of fora in patent infringement lawsuits and patent litigation will see a redistribution across districts. The Eastern District of Texas will lose much of its patent caseload, which will migrate to the District of Delaware as well as districts in areas with significant technology hubs.

Even if the Supreme Court upholds the Federal Circuit's position, there is still room for (and some momentum behind) patent reform through legislative action. When reform does occur, venue in patent lawsuits will begin to realign with trends in other fields. Reform will not eradicate

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<sup>101</sup> The most well-known of these being perhaps the construction of an ice rink by Samsung in front of the Marshall, Texas courthouse, where Samsung has repeatedly been sued for patent infringement, in attempt to maintain a positive image of the company among potential jurors. See *Last Week Tonight with John Oliver: Patents* (HBO television broadcast Apr. 19, 2015), [https://www.youtube.com/watch?v=3bxcc3SM\\_KA](https://www.youtube.com/watch?v=3bxcc3SM_KA) at 8:08.



forum shopping, however, but it will prevent exceptional forms of forum shopping like the ones that led to the rise of the Eastern District of Texas as the premier patent district in the country.