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 22 LAW, ECONOMICS AND BUSINESS PROFESSORS AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE

Amici are law, economics, and business professors who teach, research and write in the areas of patent law, civil procedure, and the policy, economics, and business of innovation.[1] The professors are committed to the development of patent law doctrine that best promotes innovation and competition. Amici have no personal interest in the outcome of this case. A full list of amici is appended to the signature page.

SUMMARY OF ARGUMENT

This case raises both statutory interpretation and policy issues regarding venue in patent lawsuits. The parties and other amici have sufficiently briefed the statutory interpretation issues. Amici here instead focus on the policy issues.

In short, the aims of patent law are better served under the Federal Circuit's rule—that a corporate defendant can be sued in any district in which personal jurisdiction lies—than a rule that limits

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[1] Pursuant to Supreme Court Rule 37.6, amici curiae state that no counsel for any party authored this brief in whole or in part. The Center for the Protection of Intellectual Property, an academic center at the Antonin Scalia Law School at George Mason University, paid for the printing and filing of this brief. No other person or entity, or its counsel, made a monetary contribution to the preparation or submission of this brief. Amici curiae gave timely notice to Petitioner and Respondent of their intent to file this brief, who have consented to the filing of this brief; their written consents are on file with the Clerk.

venue solely to those districts in which the defendant is incorporated or has a regular and established place of business and has committed acts of infringement. There are three major reasons supporting this position.

First, Petitioner and its supporting amici highlight the concentration of patent lawsuits in a small number of judicial districts. However, reversing the decision below would not change this concentration. Indeed, a rigorous academic study by one of Petitioner's own amici shows that adopting Petitioner's position would have no impact on the present concentration of roughly 60% of all patent cases in just five jurisdictions. Colleen V. Chien & Michael Risch, *Recalibrating Patent Venue*, at 36 (Working Paper, Oct. 6, 2016), https://ssrn.com/abstract=2834130. In other words, regardless of how this Court rules in this case, roughly 60% of cases will continue to be filed in the same handful of jurisdictions.

The same study shows that the only major shift in lawsuits would be from a single district to merely two other districts. Specifically, the Eastern District of Texas would drop from about 36% to 15% of all cases, and the Northern District of California and the District of Delaware would collectively rise from about 14% to 37% of all cases. *Id.*

No plausible argument can be made—and Petitioner and its amici have not offered an argument—that shifting cases from *one* district to *two* districts would result in a meaningful distribution of patent cases among the *ninety-four* federal district courts.

Second, Petitioner and its *amici* argue, directly or indirectly, that the Eastern District of Texas is too pro-patentee, particularly to patent owners that rely heavily on licensing to generate revenue, including so-called patent assertion entities (PAEs) and non-practicing entities (NPEs).[2] What Petitioner and its amici do not acknowledge is that the Northern District of California is on-the-whole less hospitable to patent owners, and the District of Delaware is less hospitable to non-pharmaceutical patent owners, especially NPEs.

Furthermore, adopting Petitioner's position would result in more than twice the number of cases being filed in the District of Delaware. Given the small size of that district's bench, this increase would almost certainly lead to much longer times to case resolution. Other than pharmaceutical companies involved in Hatch-Waxman actions seeking to prevent generic drugs from entering the market, delays in patent actions typically prejudice all types of patent owners. Tilting the playing field against patentees by reshuffling cases among a few districts does not

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[2] These terms are often misnomers because they are not used consistently and often refer to disparate types of entities—such as universities, individual inventors, research-focused companies, and patent aggregators—that may vary widely in their patent litigation and licensing behavior. *See*, *e.g.*, Christopher A. Cotropia, Jay P. Kesan & David L. Schwartz, *Unpacking Patent Assertion Entities (PAEs)*, 99 Minn. L. Rev. 649, 651-54 (2014); Kristen Osenga, *Sticks and Stones: How the FTC's Name-Calling Misses the Complexity of Licensing-Based Business Models*, 22 Geo. Mason L. Rev. 1001, 1002-04 (2015).

promote the goal of equitable case distribution.

Whatever one's position is on whether the Eastern District of Texas, the Northern District of California, or the District of Delaware best implements patent law, the proper *judicial* remedy for aggrieved parties to correct substantive and procedural "errors" in these districts is through the appellate process.[3] Of course, if Congress believed any district presented a sufficient cause for concern, it could legislatively restructure patent venue rules. Notably, despite numerous calls to do so, Congress has not imposed a single restriction on patent venue since the rise in patent litigation in the 1990s and 2000s, even as it substantially altered other portions of the patent statutes. Contrary to Petitioner's and its amici's allegations of bias, Congress effectively authorized the Eastern District of Texas to be part of the Patent Pilot Program, which is designed to channel cases to judges well-versed in patent law.

Third, corporate defendants often commit substantial and actionable harm in numerous jurisdictions. When a corporate defendant's level of harm and contacts with a jurisdiction are so substantial that a lawsuit in that jurisdiction would not offend "traditional conception[s] of fair play and substantial justice," *International Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945), Congress has determined that as a default rule for any type of civil case brought in federal court, venue is proper. In other

[3] Indeed, Congress created the Federal Circuit Court of Appeals in 1982 to increase the uniformity of decisions in patent cases. *See* Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25.

words, corporate defendants are generally subject in *any* civil complaint to venue in *any* district in which personal jurisdiction lies.

Thus, what Petitioner and its *amici* characterize as allegedly pernicious "forum shopping" and "forum selling" that must be eliminated is effectively a position that Congress has already rejected in its default rule governing venue for corporate defendants in essentially all federal civil cases. This decision is sound: a plaintiff should be entitled to seek redress in a district in which a corporate defendant has inflicted substantial harm—so substantial that the defendant "should reasonably anticipate being haled into court" in that district. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

Patent law is no different from other areas of law when it comes to so-called forum shopping—a plaintiff for any type of action will choose the forum that provides it the best opportunity for success. Contrary to the assertions of some of Petitioners' amici, there is no reliable evidence showing that NPEs typically bring baseless or weak claims to extract a nuisance settlement. Rather, like any area of law, some plaintiffs will bring meritless claims—and, in patent law, this includes NPEs and non-NPEs alike. And, like any area of law, courts and defendants have numerous tools to root out such claims. Importantly, this Court has consistently found that patent law is not an island to its own, especially in procedural matters. Affirming the opinion in this case merely maintains the alignment of patent venue with standard venue rules.

Even assuming that "forum shopping" in patent cases warranted exceptional treatment, only Congress can craft a solution that meaningfully distributes cases among the district courts and equitably treats patent owners and accused infringers alike. In contrast, by merely shifting cases from one jurisdiction that is relatively favorable to patent owners to two jurisdictions that are relatively less favorable, Petitioner's proposed venue rule is not only inequitable, but would very likely create serious impediments to innovative activity for many types of patent owners.

Innovators and their investors have long been vital to a flourishing innovation economy in the United States. Startups, venture capitalists, individual inventors, universities, and established companies often rely heavily on patents to recoup their extensive investments in both research & development and commercialization. By restricting the districts in which a patent owner can bring suit, the value of the patent itself is lessened, diminishing the economic incentives the patent system provides to spur innovation.

ARGUMENT

I. Adopting Petitioner's Position Would Not Meaningfully Distribute Patent Lawsuits Among The District Courts

Petitioner and its supporting amici argue that *VE Holding* and its progeny have led to a disproportionate share of patent lawsuits being filed in one judicial

district, namely, the Eastern District of Texas. *See* Pet. Br. 14-16, 37-39; ABA Br. 7-9; GPhA Br. 3, 11.

As a preliminary matter, Petitioner and its amici focus on the year 2015, highlighting that approximately 44% of all patent lawsuits were filed in the Eastern District of Texas in that year. Pet. Br. 15. Yet, in 2014, the Eastern District of Texas heard only 29% of all patent cases, and in 2016, it heard 36% of all patent lawsuits. Docket Navigator Analytics, New Patent Cases, https://www.docketnavigator.com/stats (visited Mar. 2, 2017). In 2017, so far the rate has remained at about 35%. *Id.*

Regardless of this decline, it remains clear that a substantial number of patent lawsuits are filed in just a handful of the ninety-four district courts. Specifically, five districts—the Eastern District of Texas, the District of Delaware, the Central District of California, the Northern District of California, and the District of New Jersey—accounted for roughly 60% of all patent cases filed in 2016. *Id.*

On its face, this concentration of lawsuits in just five districts could be a cause for concern. Yet, Petitioner's proposed solution in this case would not meaningfully disperse cases among all the district courts. A recent empirical study by one of Petitioner's own amici found that restricting venue in the manner advocated by Petitioner would still leave roughly 60% of all patent cases in the same five jurisdictions. Chien & Risch, *Recalibrating Patent Venue*, at 36. Rather, all that would result is a net shift from roughly 35% of cases being heard in the Eastern District of Texas to roughly 37% of cases being heard in the Northern District of California and the

District of Delaware.[4] *Id.* In other words about 21% of all cases would, on balance, be channeled from one district to two districts. *Id.*

No plausible argument can be made—and Petitioner and its amici have not offered one—why shifting the concentration of cases from *one* district to *two* districts would result in a meaningful distribution of patent cases among the *ninety-four* federal district courts. Even if one believed that substantial benefits would arise from the widespread distribution of patents cases, a reversal in this case would not achieve those benefits.

II. Petitioner's And Its Amici's Goal Is To Channel Patent Lawsuits To Jurisdictions That Are Generally More Favorable To Accused Infringers

As just explained, the policy argument that there is an unjustified concentration of patent lawsuits in one or two districts is a red herring in this case. This argument is intended to divert attention from a more understandable and prosaic goal: to make it more difficult for certain patent owners to win their lawsuits in district court.

It is well-known that the Eastern District of Texas is viewed favorably by patent owners. It is equally well-known that the Northern District of California is

[4] The study finds that for "NPE" cases, the Eastern District Texas would drop from 64% to 19% of all NPE cases, and the District of Delaware and Northern District of California would rise collectively from about 10% to 43% of all NPE cases. *Id.*

viewed less favorably by patent owners. Although the District of Delaware is sometimes considered to be favorable for patent owners, this view is mainly explained by the relatively large number of patent infringement cases filed there by pharmaceutical companies. When those cases are disregarded, the District of Delaware is much less favorable for patent owners, especially for NPEs, than the Eastern District of Texas. *See, e.g.*, John R. Allison, Mark A. Lemley & David L. Schwartz, *Our Divided Patent System*, 82 U. Chi. L. Rev. 1073, 1149 (2015) (showing in a full regression that controls for industry-type and for other relevant factors that there is no significant or substantial increased likelihood of a patent owner winning its suit from filing in the District of Delaware); PricewaterhouseCoopers LLP, 2016 Patent Litigation Study, at 16, Fig. 20 (May 2016), https://www.pwc.com/us/en/forensic-services/publications/assets/2016-pwc-patent-litigation-study.pdf (finding that from 1996-2015 the "NPE success rate" was 48% in the Eastern District of Texas, 27% in the District of Delaware, and 13% in the Northern District of California).

Moreover, if this Court adopts Petitioner's position, the District of Delaware will become even less favorable for non-pharmaceutical patentees because—given its small number of judges—times to resolution in this district are likely to increase substantially. Longer times to resolution increase not only litigation costs, but also the harms from a defendant's on-going infringement. The same studies cited above indicate caseloads in the district would more than double—from about 450 cases per year to 1070 cases. This is alarming for most patent owners,

as even in 2013, then-Chief Judge Sue Robinson testified to Congress that the district's patent docket was expanding quickly and the court could not "keep this level of work up indefinitely." *Federal Judgeship Act of 2013: Hearing Before the Subcomm. on Bankruptcy and the Courts of the S. Comm. on the Judiciary*, 113th Cong. 3 (2013).

It is unsurprising that large corporate defendants that often find themselves accused of patent infringement would undertake efforts to relocate their cases to jurisdictions in which they are more likely to obtain more favorable results through the costs of delay or judgments in their favor. Indeed, many of the same companies and industry associations that have submitted numerous amicus briefs in favor of Petitioner have been lobbying Congress for several years to pass laws, like the VENUE Act, S. 2733, 114th Cong. (2016),[5] which would similarly result in shifting patent cases from the Eastern District of Texas to the Northern District of California and the District of Delaware. *See* Chien & Risch, *Calibrating Patent Venue*, at 37. It is notable that, despite this

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[5] *See, e.g.*, Ryan Davis, *Senate Judiciary Leader Won't Consider Patent Venue Bill*, Law360, May 13, 2016, https://www.law360.com/articles/796196/senate-judiciary-leader-won-t-consider-patent-venue-bill (listing Intel, the Electronic Frontier Foundation, and Public Knowledge as supporting the VENUE Act); United for Patent Reform, *Letter to Senators Flake, Gardner, and Lee*, Mar. 18, 2016, http://www.unitedforpatentreform.com/files/final-upr-venue-intro-letter1213646601.pdf (listing National Association of Realtors, Engine Advocacy, and Software & Information Industry Association as supporting the VENUE Act).

extensive lobbying, the only action Congress has taken with respect to the Eastern District of Texas was to effectively authorize it for its Patent Pilot Program, which is designed to channel cases to judges well-versed in patent law.[6]

It is important to recognize that corporate defendants are not left without recourse under current law. First, if a patentee has truly filed a frivolous suit, defendants may seek attorneys' fees and costs, particularly under this Court's recent decisions that liberalized the legal standards in these circumstances. *See Highmark Inc. v. Allcare Health Management System, Inc.*, 134 S. Ct. 1744 (2014); *Octane Fitness LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749 (2014).

Second, if an aggrieved party believes that a district court wrongly decided an issue, failed to adhere to procedural dictates, and the like, that party may of course raise the issue in an appellate court. And litigants who are sued in the Eastern District of Texas are not without remedy. For example, in *In re Google, Inc.*, Case No. 2017-107 (Fed. Cir. Feb. 23, 2017), following a denial of a transfer motion in the

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[6] Although the Administrative Office of the U.S. Courts nominally selected the district courts for the program, Congress authorized selection from among the 15 district courts with the largest number of patent cases and those with local patent rules. The Eastern District of Texas satisfied both criteria, and—given active lobbying relating to patent venue issues from the mid-2000s to 2011—Congress was presumably well-aware of that fact when it passed the authorizing Act. *See* Patent Pilot Program Act of 2011, Pub. L. No. 111-349, 124 Stat. 3674.

Eastern District of Texas, the Federal Circuit granted Google's mandamus petition to transfer the case to the Northern District of California. The Federal Circuit has similarly granted mandamus petitions in other actions, including cases filed in the Eastern District of Texas.[7]

Although the appellate process may be more costly than winning in the first instance,[8] as the next section explains, this is a cost that Congress has long tolerated in its policy choices regarding venue selection.

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[7] *See, e.g.*, *In re Toyota Motor Corp.*, 747 F.3d 1338 (2014); *In re Apple, Inc.*, 581 Fed. Appx. 886 (2014); *In re WMS Gaming, Inc.*, 564 Fed. Appx. 579 (2014); *In re TOA Techs., Inc.*, 543 Fed. Appx. 1006 (2013); *In re Verizon Bus. Network Servs.*, 635 F.3d 559 (2011); *In re Genentech*, 566 F.3d 1338 (2009); *In re TS Tech United States Corp.*, 551 F.3d 1315 (2008).

[8] Despite these reversals, there is no evidence that the Eastern District of Texas exhibits a substantially higher reversal rate than average. According to a study by PricewaterhouseCoopers, from 2006 to 2012, the Eastern District of Texas was fully affirmed 42% of the time, compared with 48% for all districts. PricewaterhouseCoopers LLP, 2015 Patent Litigation Study, at 21 (May 2015), https://www.pwc.com/us/en/forensic-services/publications/assets/2015-pwc-patent-litigation-study.pdf. Given the variation in the types of cases and issues appealed from different districts—for instance, the Eastern District of Texas typically handles a large number of software cases, which tend to have higher reversal rates on issues like claim construction—this difference is not particularly meaningful, much less large.

III. The General Rule In Civil Cases That Plaintiffs May Sue Corporate Defendants In Any District In Which Personal Jurisdiction Lies Is Sensible For Patent Actions

Petitioner and its amici complain of "forum shopping" and "forum selling" that allegedly occurs in patent actions. *See, e.g.*, Pet. Br. 37-39; SIAA Br. 19-25. Several amici further complain that districts other than where the defendant is incorporated or has a regular and established place of business and commits acts of infringement have "little connection to the defendant or its alleged infringement.".[9] SIAA Br. 21. What these arguments overlook is that the default venue rule in all federal actions against corporate defendants is that *they may be sued in any district in which personal jurisdiction lies*. *See* 28 U.S.C. § 1391(b), (c)(2) (2012).

First, Congress has already determined that in essentially all types of actions—consistent with due process requirements and the possibility of transfer—a plaintiff may select any forum in a suit against a corporate defendant. Thus, what Petitioner labels "forum shopping" is essentially the long-chosen federal policy in suits against corporate defendants. *See Goad v. Celotex Corp.*, 831 F.2d 508, 512 n.12 (4th Cir. 1987) ("There is nothing inherently evil about

[9] On Petitioner's view, even suit in a district in which an accused infringer is headquartered would be improper unless acts of infringement occurred there. *See* Resp. Br. 49-50 (describing this result).

forum-shopping. . . . [C]omplaints about forum shopping expressly made possible by statute are properly addressed to Congress, not the courts.").

It is now well-settled that "the plaintiff is the master of the complaint," *Caterpillar Inc. v. Williams*, 482 U.S. 386, 398-99 (1987), and that it can ordinarily bring suit in any jurisdiction in which a corporate defendant has committed substantial harm. 14D Charles Alan Wright *et al*., Federal Practice and Procedure §§ 3805, 3811 (4th ed. 2016). According to the leading civil procedure treatise, Congress has "nearly eliminate[d] venue as a separate restriction in cases against corporations." *Id.* § 3802.

In general matters of litigation, such as procedural rules, there is typically no reason to treat patent law differently from other areas of law. This Court has repeatedly recognized as much in its recent decisions. *See, e.g.*, *Halo Electronics, Inc. v. Pulse Electronics*, 136 S. Ct. 1923 (2016) (enhanced damages); *Octane Fitness LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1758 (2014) (abrogating patent-specific rules on fee shifting under § 285 of the Patent Act by reference to "comparable fee-shifting statutes" in other areas of law); *Gunn v. Minton*, 133 S. Ct. 1059 (2013) (subject matter jurisdiction); *Medimmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007) (rejecting special rule for patent cases in declaratory judgment actions); *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 388 (1996) (holding that construction of patents is a legal question because, among other reasons, the "construction of written instruments is one of those things that judges often do and are likely better to do than juries

unburdened by training in exegesis"); *Dennison Mfg. Co. v. Panduit Corp.*, 475 U.S. 809, 810-11 (1986) (holding that the Federal Circuit must follow FRCP 52(a)'s standard of review of factual determinations by district courts in patent cases). *Cf. eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006) (injunctions).

The policy concerns raised by Petitioner and its amici so as to justify a restricted rule of venue for patent actions are either unsubstantiated or are no different from concerns arising in other areas of civil litigation. First, there is the concern about individuals and companies pejoratively known as "patent trolls" or by the allegedly more neutral-sounding terms "patent assertion entities" (PAEs) or "non-practicing entities" (NPEs). The implicit allegation is that a very large percentage of cases brought by NPEs are essentially baseless or weak cases.

However, there is no valid empirical evidence that supports such an assertion. *See* Adam Mossoff & Ted M. Sichelman, *Letter to Congress from 28 Law Professors & Economists Urging Caution on the VENUE Act* (Aug. 1, 2016), http://ssrn.com/abstract=2816062; John R. Allison, Mark A. Lemley & David L. Schwartz, *How Often Do Non-Practicing Entities Win Patent Suits?*, at 52-54 (Working Paper, Apr. 22, 2016), https://ssrn.com/abstract=2750128 (finding that once other explanatory factors, such as jurisdiction and technology, were taken into account, "[o]perating companies . . . were not demonstrably more likely than

NPEs to win their patent cases").[10] Like any area of law, a small percentage of cases will be frivolous or weak (*i.e.*, have a low probability of success). There is no reliable evidence that patent law has a greater percentage of frivolous or weak cases than other complex areas of the law, such as securities and products liability.

In this regard, the assertion that the venue rules applying to *all* patent owners should be severely restricted given the actions of *some* patent owners is not only ill-advised but fundamentally unfair to those patent owners who file good faith claims. For example, it would serve no legitimate purpose to deny Respondent Kraft Foods—a manufacturer who is certainly *not* a "troll" and who did not file a lawsuit in the Eastern District of Texas—the ability to choose a

[10] Of course, it is always possible to divide up the category of NPEs more and more finely in order to find a class of defendants that appear to abuse the system. For example, relying on a recent report by the Federal Trade Commission, some of Petitioners' amici allege that "litigation PAEs"—an NPE sub-group consisting of patent aggregators that appear to frequently litigate the patents they own—often file nuisance suits. Prof. Law. Econ. Br. 9. As an initial matter, these amici loosely sprinkle the terms "troll," "PAE," and "litigation PAE" together, when "litigation PAE" is but a distinct subclass of NPEs. In any event, even if such assertions are true—though, to be certain, no reliable, systematic empirical evidence exists to substantiate such claims—there is no compelling reason why the abusive behavior of a relatively narrow sub-class of patent owners should dictate a policy regarding venue that affects all patent owners, including not only those NPEs that are not "litigation PAEs" but also operating companies. *See infra*.

suitable forum, just like plaintiffs suing corporate defendants in nearly all other areas of law.

Second, there is the allegation that some district courts are "forum selling" by intentionally making their jurisdiction more attractive to plaintiffs. *See, e.g.*, Prof. Law. Econ. Br. 6-10. Like "forum shopping," allegations of "forum selling" are common in many areas of civil litigation. *See Tyler v. Michael Stores, Inc.*, 150 F. Supp. 3d 53, 66 n.29 (D. Mass. 2015) (discussing in a class action case that the problem of forum selling "is applicable to district courts generally"); Todd J. Zywicki, *Is Forum Shopping Corrupting America's Bankruptcy Courts?*, 94 Geo. L.J. 1141, 1144-45 (2006) (discussing how forum selling led to a concentration of bankruptcy cases in the Southern District of New York and the District of Delaware in the 1980s and 1990s); Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. Cal. L. Rev. 241, 285-99 (2016) (tracing forum selling to the seventeenth and eighteenth centuries and gathering recent examples such as mass torts, class actions, bankruptcies, and domain name dispute resolutions).[11]

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[11] Much of the early literature on a forum adapting its law and procedures to generate business in the jurisdiction concerns Delaware's corporation-friendly legal environment. *See, e.g.*, William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 Yale L.J. 663, 663 (1974) ("Delaware is both the sponsor and the victim of a system contributing to the deterioration of corporation standards."). Ironically, the very corporations that have actively benefited from such "forum selling" in the corporate law context now seek to limit patent venue—

Similar to the allegations about problems from "trolls," there is no reliable, rigorous study that proves that forum "shopping" or "selling" is occurring in any significant manner in patent cases that would justify systemic deviation from the general venue rule. But even if such concerns justified an exceptional approach, this Court cannot change the existing venue rule in a way that meaningfully distributes cases among the district courts and equitably treats patent owners and accused infringers alike.

Specifically, the relevant statutory provisions leave this Court with no more than a simple, binary choice: maintain the existing rule or adopt Petitioner's narrow construction. As explained earlier, rather than reallocate cases among many jurisdictions in an equitable manner, Petitioner's approach would merely result in a shift of cases from one jurisdiction that is relatively favorable to patent owners to two jurisdictions that are relatively less favorable. To the extent there is a problem in need of a solution, only Congress has the flexibility to craft an appropriate set of rules.

The inequities of adopting Petitioner's position are readily apparent in this case. Respondent Kraft Foods sued Petitioner TC Heartland in the District of Delaware for the same reason patent owners are suing in the Eastern District of Texas: that is where a substantial amount of alleged infringing acts occurred and where Kraft Foods believes it is likely to succeed on the merits. There is nothing unfair about this choice. TC Heartland purposefully availed itself of

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so as to channel many of their cases to Delaware—to combat "forum selling" in the patent litigation context.

substantial financial benefits in Delaware by selling its allegedly infringing products there, such that Delaware's jurisdiction over it comports with notions of "fair play and substantial justice."[12] *International Shoe*, 326 U.S. at 320. In choosing its forum, Respondent Kraft Foods has engaged in conduct that is "no different from the litigation strategy of countless plaintiffs who seek a forum with favorable substantive or procedural rules or sympathetic local populations." *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779 (1984).

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Federal Circuit should be affirmed.

Respectfully submitted,

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[12] Notably, Petitioner did not appeal the Federal Circuit's denial of mandamus on the ground of lack of personal jurisdiction. *See* Pet. i.

APPENDIX

APPENDIX

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