2019-126

United States Court of Appeals for the Federal Circuit

IN RE: GOOGLE LLC,

Petitioner.

On Petition for Writ of Mandamus to the United States District Court for the Eastern District of Texas in Case Nos. 2:18-cv-00462, -00463 (consolidated), Hon. Rodney Gilstrap

RESPONDENT'S COMBINED PETITION FOR PANEL REHEARING OR REHEARING EN BANC

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Dated: March 16, 2020

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

In re: Google LLC

Case No. 2019-126

CERTIFICATE OF INTEREST

Counsel for the:
☐ (petitioner) ☐ (appellant) ☒ (respondent) ☐ (appellee) ☐ (amicus) ☐ (name of party)

Super Interconnect Technologies LLC

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held Companies that own 10 % or more of stock in the party
Super Interconnect Technologies LLC	Super Interconnect Technologies LLC	Acacia Research Group LLC
		Acacia Research Corporation

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (**and who have not or will not enter an appearance in this case**) are:

Wesley Hill and Andrea Leigh Fair of Ward, Smith & Hill, PLLC
Brian Herrmann (now of Nelson Bumgardner Albritton PC)

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. See Fed. Cir. R. 47. 4(a)(5) and 47.5(b).

Super Interconnect Technologies, LLC v. Google LLC, Nos. 2:18-cv-00462, -00463 (E.D. Tex.)

March 16, 2020
Date

/s/ Jeffrey R. Bragalone
Signature of counsel

Please Note: All questions must be answered

Jeffrey R. Bragalone
Printed name of counsel

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COUNSEL'S STATEMENT

Based on my professional judgment, I believe the panel decision is contrary to the following decision(s) of the Supreme Court of the United States or the precedent(s) of this court: *Intel Corp. Inv. Policy Comm. v. Sulyma*, 140 S. Ct. 768, 2020 WL 908881 (2020); *Matal v. Tam*, 137 S. Ct. 1744 (2017); *Hardt v. Reliance Stand. Life Ins. Co.*, 560 U.S. 242 (2010); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148 (1976); *Platt v. Minn. Min. & Mfg. Co.*, 376 U.S. 240 (1964); *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379 (1953); *In re HTC Corp.*, 889 F.3d 1349 (Fed. Cir. 2018).

Based on my professional judgment, I believe this appeal requires an answer to one or more precedent-setting questions of exceptional importance: whether 28 U.S.C. § 1400(b) "requires the regular, physical presence of an employee or other agent of the defendant conducting the defendant's business at the alleged 'place of business.'" ADD13.

/s/ Jeffrey R. Bragalone

ATTORNEY OF RECORD FOR RESPONDENT

INTRODUCTION

Mandamus is appropriate only in extraordinary circumstances, none of which are present in this case. This Court already reached that conclusion once in a decision involving the same facts and legal issues. Nothing exceptional has occurred since that decision. Google still has an adequate remedy on appeal. Only one district court has issued a ruling that even touches upon the specific factual and legal issues involved in this case. And there is no widespread split among district courts that was present in *In re Micron Tech., Inc.*, 875 F.3d 1091 (Fed. Cir. 2017). Critically, the panel failed to find any *clear and indisputable* error in the district court's analysis. Yet the panel disregarded this requirement and proceeded to address the merits.

As for the merits, rather than interpret the language of the statute, the panel's decision rewrites the law. The language of § 1400(b) is unambiguous. It covers any "regular and established place of business," regardless of whether that business has employees or agents regularly and physically present. The separate patent service statute does not compel a more restrictive interpretation. Congress' explicit reference to an agent in the service statute and *omission* of it in § 1400(b) cannot be presumed an accident. It was improper for the panel to assume that Congress meant to include a similar "employee or agent" requirement in both statutes, especially when Congress made clear in a recent amendment that § 1400(b) may cover unstaffed automated teller machines in certain patent suits. The panel's sparse and mistaken

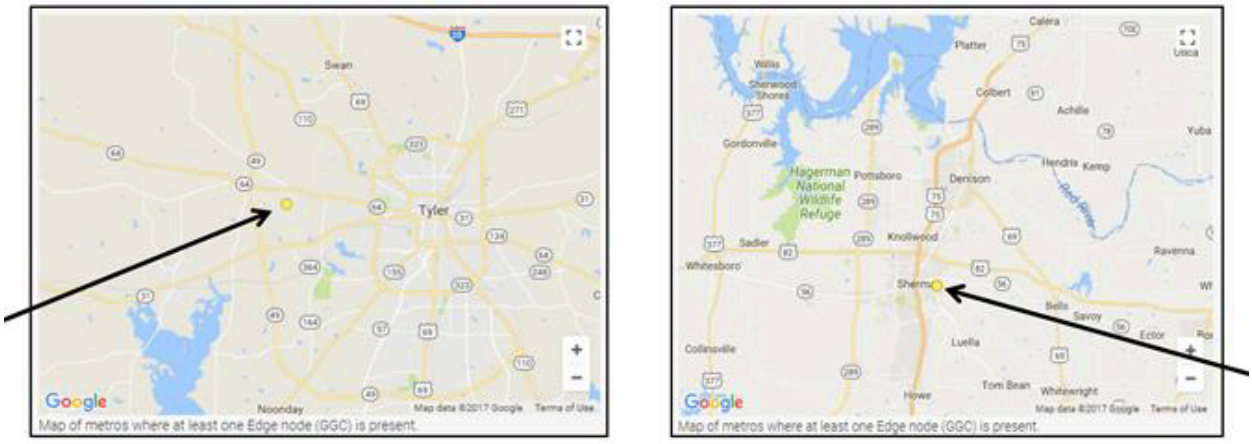
interpretation of the legislative history of the statutes does not warrant engrafting a brand-new requirement onto § 1400(b).

Even if the panel's novel interpretation of § 1400(b) were correct, it should have remanded the case to the district court for further proceedings in light of its newly announced interpretation and SIT's alternative request for targeted venue discovery. Instead, the panel usurped the function of the district court by making numerous findings of fact regarding the relationship between Google and the internet service providers ("ISPs") who, under Google's explicit direction and supervision, installed, serviced, and maintained Google's servers in the district.

As Google previously asserted in its prior petition for rehearing, the proper interpretation of "place of business" in § 1400(b) is a precedent-setting question of exceptional importance. This issue warrants consideration by the Court *en banc*.

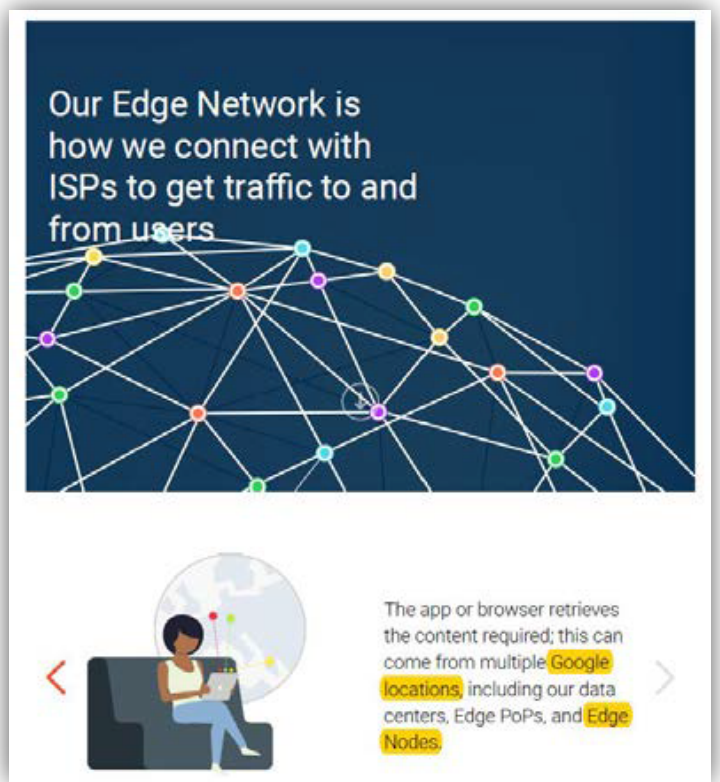
FACTUAL BACKGROUND

This mandamus proceeding arises from a patent lawsuit filed by SIT against Google in the Eastern District of Texas. Appx20. SIT alleges that venue is proper under § 1400(b) because Google maintains a regular and established place of business by contracting with ISPs to host Google's servers at various locations within the district, including Tyler and Sherman:



Appx21; Doc. 34-2 ("Supp.R.") at RAppx98-113, Appx158, Appx162, Appx200; SAppx97-101.

Google's servers autonomously store and deliver high-demand data to consumers in the district, and thereby conduct Google's business. Supp.R. at RAppx1-13, RAppx16-18, RAppx19-28, RAppx35-36, RAppx53-54, RAppx60, RAppx63-68, RAppx77, RAppx82-83, RAppx88-90, RAppx92-94, Appx149, Appx162, Appx177, Appx182-83, Appx185, Appx187, Appx189; SAppx97-101. Although Google's servers are located at buildings owned or leased by ISPs, Google publicly identifies these "Edge Nodes" as "**Google locations**":



Supp.R. at RAppx32-33.

All human, physical interactions with Google's servers are performed by ISP employees who are contractually obligated to follow Google's explicit instructions. Under its ISP contracts, Google maintains ownership over the servers; the ISPs install, move, maintain, and remove the servers, but only upon Google's express permission and direction. Doc. 32-2 at 1-7; Doc. 32-3 at 1-6. Without specific, step-by-step instructions from Google, the ISPs may not turn on the power to a server or even tighten screws or cable ties on a server. Doc. 32-2 at 6; Doc. 32-3 at 5. Given these facts, the ISP employees easily qualify as agents of Google under the ordinary test for agency. *See* Restatement (Third) of Agency § 1.01 (2006).

Google moved to dismiss SIT's complaint for improper venue. SIT opposed Google's motion based on the record developed in *SEVEN Networks, LLC v. Google LLC*, 315 F. Supp. 3d 933 (E.D. Tex. 2018), the district court's denial of an identical motion in *SEVEN*, and the Court's denial of Google's petition for writ of mandamus in *In re Google LLC*, No. 18-152, 2018 WL 5536478 (Fed Cir. Oct. 29, 2018), *reh'g denied*, 914 F.3d 1377 (Fed. Cir. 2019). *See generally Super Interconnect Techs. LLC v. Google LLC*, No. 2:18-cv-00463-JRG (E.D. Tex.), ECF 23. SIT alternatively requested that the court allow targeted venue discovery. *Id.* at 11. The district court denied Google's motion based on its decision in *SEVEN* and the "identical facts" in this case. Appx2.

The panel agreed with the district court that the rack space occupied by Google's servers constitutes a "place" under § 1400(b). ADD9-10. Nevertheless, the panel ruled that the statute requires the "regular, physical presence of an employee or other agent of the defendant conducting the defendant's business." ADD10-13. Rather than remand, the panel applied its new interpretation to the limited record before it, finding that the ISP employees did not qualify as agents because they perform installation and maintenance activities. ADD13-17. Accordingly, the panel granted mandamus and ordered dismissal or transfer of the case.

ARGUMENT

A. The Standard for Mandamus Is Not Satisfied.

Recently, this Court concluded that there were no extraordinary circumstances justifying mandamus where the *same* district court analyzed the *same* facts and reached the *same* conclusion as the district court in this case. *Google*, 2018 WL 5536478, at *2-3. The Court reasoned that, since the district court's analysis appeared to be highly dependent on the facts of the case, "it [was] not known if the district court's ruling involves the kind of broad and fundamental legal questions relevant to § 1400(b) that [the Court] ha[s] deemed appropriate for mandamus." *Id.* at *2. Further, the Court also noted that "the issue [does not] involve anything close to the kind of almost-even disagreement among a large number of district courts that was present in *Micron*," and "the paucity of district court cases that have so far addressed the issue suggest that the 'extraordinary remedy' of a writ of mandamus is not currently warranted." *Id.* at *3.

The panel did not disagree with any of the Court's conclusions in *Google*. Instead, it found that "three related developments have convinced us that mandamus is appropriate." ADD7. But these alleged "developments" do not present extraordinary circumstance justifying mandamus. *HTC*, 889 F.3d at 1352 ("[The] drastic remedy [of mandamus] is available only in extraordinary circumstances.").

First, the panel noted "that there are now a significant number of district court decisions that adopt conflicting views on the basic legal issues presented in this case." *Id.* The panel exaggerated the alleged conflict; all but two of the decisions identified by the panel issued ***before*** *Google*. *See id.* at n.2. And one of the "newer" decisions, *CUPP Cybersecurity LLC v. Symantec Corp.*, No. 3:18-cv-01554, 2019 WL 1070869 (N.D. Tex. Jan. 16, 2019), issued ***before*** the denial of Google's petition for rehearing in *Google*; it was even cited by the dissent. *See* 914 F.3d at 1380 (Reyna, J., dissenting). The other, *Rensselaer Polytechnic Inst. v. Amazon.com, Inc.*, No. 1:18-cv-00549, 2019 WL 3755446 (N.D.N.Y. Aug. 7, 2019), does not even concern remotely similar facts: it concerns Amazon's lockers at Whole Foods stores. These two decisions cannot transform the paucity of conflicting cases that existed at the time of *Google* into a "significant number" of decisions. Unlike *Micron*, there is no "almost-even disagreement among a large number of district courts." 2018 WL 5536478, at *3.

Second, the panel suggested that "experience has shown that it is unlikely that, as these cases proceed to trial, these issues will be preserved and presented to this court through the regular appellate process." ADD7-8. While some of the cases cited by the panel have settled, none have had a sufficient opportunity to reach the appellate stage. *See CUPP*, No. 3:19-cv-00298 (N.D. Cal.) (parties actively litigating); *Rensselaer*, No. 1:18-cv-00549 (N.D.N.Y.) (same); *Personal Audio LLC*

v. Google LLC, No. 1:17-cv-01751 (D. Del.) (same). The panel's prediction that the issues will not be preserved and presented in these cases through the regular appellate process is unsupported speculation that stands contrary to the facts.

Importantly, the panel failed to identify any valid reason why appeal is not an adequate remedy. The panel simply stated that "the substantial expense to the parties that would result from an erroneous district court decision confirms the inadequacy of appeal in this case." ADD8. But this circumstance is no justification for the extraordinary writ. *See Bankers Life*, 346 U.S. at 383 ("[T]he extraordinary writs cannot be used as substitutes for appeals, even though hardship may result from delay and perhaps unnecessary trial ….") (citations omitted); *HTC*, 889 F.3d at 1353-54 (rejecting argument that a defendant "should 'not be forced to litigate this case in an improper venue through a final judgment before it can contest venue via appeal'"). It is well established that "whatever may be done without the writ *may not be done with it*." *Bankers Life*, 346 U.S. at 383 (emphasis added).

Third, the panel posited that the issue had sufficiently "percolate[d] in the district courts." ADD8. But, as discussed, only two other district court decisions have issued since *Google*. And none of the additional cases cited by the *amici* have resulted in conflicting interpretations of § 1400(b). *See* Doc. 15 at 12 n.3.

Finally, the panel failed to even address the second condition for mandamus: whether Google demonstrated "that the right to mandamus is 'clear and

indisputable.'" *HTC*, 889 F.3d. at 1354; *see generally* ADD1-17. For example, the panel did not, as it did in *Google*, analyze whether the district court's decision "finds at least a substantial basis in the language of the statute … and in various precedents following the text in that respect." 2018 WL 5536478, at *3. Although a panel might ultimately side with Google's arguments "in an ordinary appeal," those arguments, which required the panel to graft a new limitation onto § 1400(b), do not demonstrate a "clear and indisputable" right to mandamus. *See id.* Indeed, how could it possibly be "clear and indisputable," when another panel of this Court previously determined that the district court's analysis did not clearly involve a broad and fundamental legal question relevant to § 1400(b)?

B. The Panel Erroneously Grafted a New Limitation onto § 1400(b).

Section 1400(b) states: "Any civil action for patent infringement may be brought … where the defendant has committed acts of infringement and has *a regular and established place of business*." § 1400(b) (emphasis added). While § 1400 does not define "regular and established place of business," this text is clear and unambiguous. *See Schnell v. Peter Eckrich & Sons, Inc.*, 365 U.S. 260, 560 (1961) ("The language of this special statute is clear and specific."). The statute must therefore be enforced "according to its terms," "assum[ing] that the ordinary meaning of that language accurately expresses the legislative purpose." *Hardt*, 560 U.S. at 251. The statute does not carry a more limited construction. *See Shelton v.*

Schwartz, 131 F.2d 805, 808 (7th Cir. 1942) ("Nor should the term 'a regular and established place of business' be narrowed or limited in its construction. Why should it be? The words do not necessitate nor warrant it.").

The statute requires a "place of business" — not a place of *employment*. It "requires a 'place,' *i.e.*, '[a] building or a part of a building set apart for any purpose' or 'quarters of any kind' *from which business is conducted*." *In re Cray Inc.*, 871 F.3d 1355, 1362 (Fed. Cir. 2017) (emphasis added). The "of business" portion of the statute describes the "nature and purpose of the 'place.'" *See id.* Thus, so long as the defendant's "business" is being conducted from the "place," the statute is satisfied, regardless of whether that business is carried out by an employee, an agent, or some machine, such as a computer. "Regular" means that the *business* at the place must be regular and not "sporadic," *see id.* at 1362, not that employees or agents must be regularly present.

It is true that § 1400(b) was originally enacted in a provision coupled with the patent service statute. ADD10-11. But it is equally true that Congress deliberately separated that original provision into distinct statutes. *See* Act of June 25, 1948, ch. 646, 62 Stat. 936. While the current statutes both include the words "regular and established place of business," only the patent service statute includes any reference to "agent or agents conducting such business." 28 U.S.C. § 1694. Congress' explicit requirement of "agent or agents" in § 1694 must have been deliberate, as the

provision concerns the "service of process, summons or subpoena upon [a] defendant." *Id.* But it cannot be assumed that Congress meant to include a similar requirement by implication in § 1400(b). *See Intel*, 2020 WL 908881, at *5. Instead, the Court "generally presum[es] that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another." *Id.*

Neither case cited by the panel requires a different interpretation of § 1400(b). ADD11 (citing *United States v. Tinklenberg*, 563 U.S. 647 (2011); *United States v. Davis*, 139 S. Ct. 2319 (2019)). *Tinklenberg* does not support the panel's decision to read a limitation from one statute into another.[1] To the contrary, *Tinklenberg* supports interpreting statutes in a manner that "make[s] … sense in light of the context of the provision and the structure of the statute." 563 U.S. at 664 (Scalia, J., concurring). Nor does *Davis*. There, the Supreme Court held that a term should carry the same meaning throughout a statute. *See* 139 S. Ct. at 2328-29. Here, the district court adopted a singular interpretation of "place of business" that applies consistently in both § 1400(b) and § 1694. Under that interpretation, places of business may or may not have agents "conducting such business." Where places of business have agents, defendants can be served pursuant to § 1694. Where they do not, they can be served pursuant to the Federal Rules of Civil Procedure. *See Welch Sci. Co. v. Human Eng'g Inst., Inc.*, 416 F.2d 32, 34 (7th Cir. 1969) ("There is nothing in the language of

[1] The panel failed to note that it was relying on Justice Scalia's concurring opinion.

§ 1694 to indicate that Congress intended that section to provide the exclusive basis for service of process. Section 1694 … provides an additional method of obtaining service of process ….”). There is simply nothing in the “context of the provision or structure of the statute” that conflicts with the district court’s interpretation. *See Tinklenberg*, 563 U.S. at 664.

Nor can legislative history override the unambiguous text of § 1400(b). *See Hardt*, 560 U.S. at 251; *see also Matal*, 137 S. Ct. at 1756 (“As always, our inquiry into the meaning of the statute’s text ceases when ‘the statutory language is unambiguous and the statutory scheme is coherent and consistent.’”). Even if that were not the rule, nothing in the legislative history mandates a more limited reading of § 1400(b). No member of Congress stated that a “place of business” should be limited to places where employees or agents of the defendant are located. To the contrary, Rep. Lacey stated: “Why not have the trial where the transaction occurs? The jurisdiction under this bill only applies to the permanent *place of business*, or *where the business is in existence*.” 29 Cong. Rec. 1902 (1897) (emphasis added). Nor did Congress state that venue in patent cases should be limited to places where a defendant can be served through an agent conducting its business. Indeed, in passing the patent venue statute, Congress sought “to eliminate the ‘abuses engendered’ by previous venue provisions allowing such suits to be brought in any district in which a defendant could be served.” *Schnell*, 365 U.S. at 262. Thus,

Congress actually sought to *dissociate* venue from service, not tie them together as the panel erroneously concluded.

In addition, the panel overlooked the significance of Congress' recent amendment to § 1400(b). That amendment provides that "an automated teller machine shall not be deemed to be a regular and established place of business for purposes of section 1400(b)" in an infringement action involving a covered business method ("CBM") patent. Leahy-Smith America Invents Act ("AIA"), Pub. L. No. 112-29, § 18(c), 125 Stat. 284, 331 (2011). The panel dismissively disregarded this amendment because it did not mention "an employment or agent requirement." ADD12-13. But that is the point. Section 1400(b) has no such requirement.

Section 1400(b) must be read *in pari materia* with the AIA amendment and must be interpreted in a way that does not render the amendment superfluous. *See Radzanower*, 426 U.S. at 153 ("Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment."). The panel's interpretation violates this canon of statutory construction. If § 1400(b) required the presence of an employee or agent at a "place of business," there would be no reason to exclude ATMs, since they are *automated* and operate without the presence of an employee or agent of the financial institution. Moreover, the amendment excludes ATMs *only* in the context of CBM patents. It does not prevent ATMs from being a "place of business" in a non-CBM patent

lawsuit. Congress' decision to exclude ATMs only in this limited context must have been intentional; yet the panel's interpretation renders the distinction — as well as the entire ATM amendment — meaningless.

Finally, the panel further imposed an unreasonably restrictive interpretation of "business," concluding that "maintenance activities cannot, standing alone, be considered the conduct of Google's business." ADD15. But nothing in the text of the statute limits the type of "business" that must be conducted at a "place." Relevant dictionary definitions from the time do not place such a limitation on "business." *See, e.g.*, William Dwight Whitney, 1 *The Century Dictionary* 732 (Benjamin E. Smith, ed. 1911) (defining "business" as "trouble, pains, labor, diligence, busyness"); *Black's Law Dictionary* 134 (1st ed. 1891) ("This word embraces everything about which a person can be employed."). Nothing in the statute's context or structure requires a more restrictive interpretation. It was therefore erroneous for the panel to rely on its view of legislative history to impose a more restrictive interpretation of "business" than the unambiguous text requires. *See Hardt*, 560 U.S. at 251; *Matal*, 137 S. Ct. at 1756.

Even if it were appropriate to consider the legislative history, nothing in that history indicates that Congress intended to *exclude* "maintenance" activities from the statute. Such activities were never mentioned by members of Congress. *See* 29 Cong. Rec. 1900-02 (1897). While certain business activities were discussed, they

were merely illustrative examples that were referenced for the purpose of explaining the effect of the statute. *See id.* Naturally, Congress could not have imagined in 1897 the different types of businesses that might arise in the future. Therefore, Congress sensibly did not attempt to define what types of business activities would be subject to the statute. A fair reading of the legislative history indicates that Congress intended to include *all* types of business activities, so long as they are "regular and established" at a "place." Indeed, it is clear from the AIA that Congress believes that an ATM can be a "place of business" in non-CBM patent cases, even though the only employees or agents of financial institutions interacting with the machine would be installation and maintenance personnel (e.g., to install, maintain, and refill the machine). Such persons play an essential role in the business operations of ATMs, just as the ISP employees assist in ensuring that the servers conduct Google's business. *Cf. Anderson v. Scandrett*, 19 F. Supp. 681, 684 (D. Minn. 1937) (interpreting the patent service statute to permit service on a railroad company freight agent, even though he did not "furnish or maintain" infringing parts).

C. The Panel Erroneously Engaged in Factfinding Reserved for the District Court.

The panel also erred by applying its novel interpretation of § 1400(b) without first remanding the case to the district court. Whether "Google had an employee or agent with a regular, physical presence at its 'place of business' and whether that employee or agent was conducting Google's business" are questions of fact reserved

for the district court. ADD13. But the district court never addressed these fact issues. *See SEVEN*, 315 F. Supp. 3d at 961-62. Instead, the panel analyzed them in the first instance, failed to view the facts in the light most favorable to SIT, as required by Fifth Circuit law,[2] and ordered the district court to dismiss or transfer the case. *See* ADD13-17. This improperly usurped the factfinding function of the district court. At most, the panel should have vacated the court's decision with instructions to apply its new interpretation of § 1400(b) to the facts of the case. *See Platt*, 376 U.S. at 245-46 (reversing and remanding mandamus where court of appeals engaged in improper factfinding reserved for the district court).

The panel's error is especially egregious considering that SIT had requested that the district court allow targeted venue discovery if it was inclined to grant Google's motion. By granting mandamus and ordering the court to dismiss or transfer the case, the panel precluded the district court from considering that alternative relief. This error was *not* harmless. SIT's opposition relied on the record from *SEVEN*. SIT did not have an opportunity to develop additional evidence regarding issues that the panel deemed relevant to determining whether Google had a "place of business" in the district, including the scope and frequency of ISP employees' interactions with Google and its servers, or other important details about Google's business operations that bear on whether end users are agents of Google

[2] *Noble Drilling Servs., Inc. v. Certex USA, Inc.*, 620 F.3d 469, 473 (5th Cir. 2010).

"by virtue of voluntarily or involuntarily sharing information generated on Google's servers." ADD19.

CONCLUSION

Congress chose unambiguous language in § 1400(b) that applies to all places "of business," including new businesses that utilize technology rather than traditional employees. Ironically, after grafting new restrictions onto the statute, the panel directed those dissatisfied with its decision to Congress. But given the statute's clear text, Google — not SIT — should be seeking a congressional remedy.

For the foregoing reasons, SIT respectfully requests that the Court grant panel rehearing or rehearing *en banc*.

Dated: March 16, 2020

Respectfully submitted,

/s/ Jeffrey R. Bragalone

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ADDENDUM

United States Court of Appeals for the Federal Circuit

IN RE: GOOGLE LLC,
Petitioner

2019-126

On Petition for Writ of Mandamus to the United States District Court for the Eastern District of Texas in Nos. 2:18-cv-00462-JRG, 2:18-cv-00463-JRG, Judge J. Rodney Gilstrap.

ON PETITION

THOMAS SCHMIDT, Hogan Lovells US LLP, New York, NY, argued for petitioner. Also represented by NEAL KUMAR KATYAL, KEITH O'DOHERTY, Washington, DC.

JEFFREY BRAGALONE, Bragalone Conroy PC, Dallas, TX, argued for respondent Super Interconnect Technologies LLC. Also represented by THOMAS WILLIAM KENNEDY, JR., DANIEL FLETCHER OLEJKO.

CLEMENT ROBERTS, Orrick, Herrington & Sutcliffe LLP, San Francisco, CA, for amici curiae Acushnet Company, BigCommerce, Inc., ChargePoint, Inc., Check Point Software Technologies, Inc., DISH Network, L.L.C., eBay Inc., Fitbit, Inc., Garmin International, Inc., High Tech Inventor's Alliance, HP Inc., L Brands, Inc., Netflix, Inc., Quantum Corporation, RingCentral, Inc., Twitter, Inc.,

Walmart, Inc., Williams-Sonoma, Inc. Also represented by ABIGAIL COLELLA, New York, NY; ERIC SHUMSKY, Washington, DC.

BRENT P. LORIMER, Workman Nydegger, Salt Lake City, UT, for amicus curiae Merit Medical Systems, Inc.

Before DYK, WALLACH, and TARANTO, *Circuit Judges*.

Order for the court filed by *Circuit Judge* DYK.

Concurrence filed by *Circuit Judge* WALLACH.

DYK, *Circuit Judge*.

O R D E R

Google LLC ("Google") petitions for a writ of mandamus ordering the United States District Court for the Eastern District of Texas to dismiss the case for lack of venue. *See Super Interconnect Techs. LLC v. Google LLC*, No. 2:18-CV-00463-JRG, 2019 U.S. Dist. LEXIS 132005 (E.D. Tex. Aug. 7, 2019). We hold that mandamus is warranted and order that the case either be dismissed or transferred.

BACKGROUND

Super Interconnect Technologies LLC ("SIT") sued Google for patent infringement in the Eastern District of Texas. Under the patent venue statute, 28 U.S.C. § 1400(b), "[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." SIT filed its suit after the Supreme Court's decision in *TC Heartland LLC v. Kraft Foods Group Brands LLC*, 137 S. Ct. 1514, 1517 (2017), which held that "a domestic corporation 'resides' only in its State of incorporation for purposes of the patent venue statute," and this court's decision in *In re Cray, Inc.*, 871 F.3d 1355, 1360

(Fed. Cir. 2017), which held that a "regular and established place of business" under the patent venue statute must be: (1) "a physical place in the district"; (2) "regular and established"; and (3) "the place of the defendant."

SIT alleged that "venue is proper . . . under 28 U.S.C. § 1400(b) because Google has committed acts of infringement in the District and has a regular and established place of business in this District." *Super Interconnect*, 2019 U.S. Dist. LEXIS 132005, at *3. Google's business includes providing video and advertising services to residents of the Eastern District of Texas through the Internet. SIT's allegation of venue was based on the presence of several Google Global Cache ("GGC") servers, which function as local caches for Google's data.[1]

The GGC servers are not hosted within datacenters owned by Google. Instead, Google contracts with internet service providers (ISPs) within the district to host Google's

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[1] Google later withdrew its servers from the district but concedes that "Google's subsequent removal of the GGC servers from service in the Eastern District of Texas does not impact venue in this case." Pet. at 6. The regional circuits appear to be split on the exact timing for determining venue. *See, e.g.*, *Flowers Indus., Inc. v. FTC*, 835 F.2d 775, 776 n.1 (11th Cir. 1987) (holding that "venue must be determined based on the facts at the time of filing"); *Welch Sci. Co. v. Human Eng'g Inst., Inc.*, 416 F.2d 32, 35 (7th Cir. 1969) (holding that venue is proper if the defendant had a "regular and established place of business at the time the cause of action accrued and the suit is filed within a reasonable time thereafter"). We need not decide the correct standard, because the GGC servers were present in the district both at the time the cause of action accrued and at the time the complaint was filed. For convenience, we refer to the facts relating to Google's servers in the district in the present tense throughout this opinion.

GGC servers within the ISP's datacenter. When a user requests Google's content, the ISP attempts to route the user's request to a GGC server within its own network (within the district) before routing the request to Google's central data storage servers (outside the district). The GGC servers cache only a small portion of content that is popular with nearby users but can serve that content at lower latency—which translates to shorter wait times—than Google's central server infrastructure. This performance benefit is in part due to the physical proximity of the GGC servers to the ISP's users. This arrangement allows Google to save on bandwidth costs and improve user experience on its various platforms.

At the time of the complaint, Google had entered into contracts with two ISPs to host GGC servers owned by Google in the Eastern District of Texas: Cable One Inc. ("Cable One") and Suddenlink Communications ("Suddenlink"). The contracts provided that the ISPs would host Google's GGC servers in their data centers. Specifically, the GGC servers are installed in the ISP's server racks, which are cabinets that accept standard server components. Each contract states that the ISP must provide "[r]ack space, power, network interfaces, and IP addresses," for the GGC servers, and provide "[n]etwork access between the [GGC servers] and [the ISP's] network subscribers." Supplemental Record, Dkt. 31, Ex. A, at 1; *id.*, Ex. B, at 1. The contracts permit the ISPs to select the rack space for the GGC servers, but they tightly restrict the ISPs' ability to relocate the servers without Google's permission once a location is selected. *Id.*, Ex. A, at 2; *id.*, Ex. B at 2. The contracts also strictly limit any unauthorized access to the space used by Google's servers. *Id.*, Ex. A, at 6–7; *id.*, Ex. B, at 5. The contracts state that the ISPs are required to provide "installation services," i.e., installing the GGC servers in the server racks. *Id.*, Ex. A, at 1; *id.*, Ex. B at 1. While the contracts forbid the ISPs to "access, use, or dispose of" the GGC servers without

Google's permission, *id.*, Ex. A, at 2; *id.*, Ex. B at 2, they also require the ISPs to provide "[r]emote assistance services," which "involve basic maintenance activities" performed on the GGC servers by the ISP's on-site technician, if requested by Google, *id.*, Ex. A, at 1, 6; *id.*, Ex. B, at 1, 5. It is undisputed that no Google employee performed installation of, performed maintenance on, or physically accessed any of the GGC servers hosted by Cable One or Suddenlink.

Google moved to dismiss the complaint for improper venue under 28 U.S.C. § 1406(a) and Federal Rule of Civil Procedure 12(b)(3). The district court denied Google's motion and, relying on its previous decision in *SEVEN Networks LLC v. Google LLC*, 315 F. Supp. 3d 933 (E.D. Tex. 2018), found that the GGC servers qualified as Google's "regular and established place of business" under the test articulated in *Cray*.

Google now petitions for a writ for mandamus directing the district court to dismiss the case for lack of venue under § 1400(b). Acushnet and 17 other companies filed an amicus brief in support of Google's petition. This court heard oral argument on December 13, 2019.

DISCUSSION

I

This court "may issue all writs necessary or appropriate in aid of [its] jurisdiction[] and agreeable to the usages and principles of law" under the All Writs Act. 28 U.S.C. § 1651(a). The Supreme Court has held that three conditions must be met before a writ may issue: (1) the petitioner "[must] have no other adequate means to attain . . . relief," (2) the petitioner must show that the right to mandamus is "clear and indisputable," and (3) the court must be "satisfied that the writ is appropriate under the circumstances." *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380 (2004) (first alteration in original) (internal quotation marks and citations omitted).

The Supreme Court has confirmed that the requirements for mandamus are satisfied when the district court's decision involves "basic" and "undecided" legal questions. *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964). In such situations, a district court's order may constitute a "clear abuse of discretion" for which mandamus relief is the only adequate relief. *Id.* Applying *Schlagenhauf*, we have found mandamus "necessary to address the effect of the Supreme Court's decision in *TC Heartland*, which itself was yet another [improper-venue] case." *In re BigCommerce, Inc.*, 890 F.3d 978, 981 (Fed. Cir. 2018); *see also In re ZTE (USA) Inc.*, 890 F.3d 1008, 1011 (Fed. Cir. 2018); *In re Micron Tech., Inc.*, 875 F.3d 1091, 1095 (Fed. Cir. 2017); *Cray*, 871 F.3d at 1359.

In *SEVEN Networks*, the same district court found that venue was proper under what the district court characterized here as "identical facts." *Super Interconnect*, 2019 U.S. Dist. LEXIS 132005, at *4. Google also petitioned for mandamus in that case, and this court denied that petition on the ground that Google failed to show that the district court's ruling implicated the "special circumstances justifying mandamus review of certain basic, unsettled, recurring legal issues over which there is considerable litigation producing disparate results." *In re Google LLC*, No. 2018-152, 2018 U.S. App. LEXIS 31000, at *6 (Fed. Cir. Oct. 29, 2018) (citation omitted).

Our previous denial of mandamus was based on (1) our observation that "it [was] not known if the district court's ruling involves the kind of broad and fundamental legal questions relevant to § 1400(b) that we have deemed appropriate for mandamus," and (2) the lack of "disagreement among a large number of district courts." *Id.* We concluded that "it would be appropriate to allow the issue to percolate in the district courts so as to more clearly define the importance, scope, and nature of the issue for us to review." *Id.* Judge Reyna dissented from our decision, *id.*, at *10 (Reyna, J., dissenting), and dissented to the court's denial

of rehearing en banc, joined by Judge Newman and Judge Lourie, *In re Google LLC*, 914 F.3d 1377, 1378 (Fed. Cir. 2019) (Reyna, J., dissenting).

Since our decision in *Google*, three related developments have convinced us that mandamus is appropriate to resolve this venue issue. First, the prediction of our dissenting colleagues has proven accurate, and there are now a significant number of district court decisions that adopt conflicting views on the basic legal issues presented in this case.[2] Second, experience has shown that it is unlikely

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[2] *In re Google LLC*, 914 F.3d 1377, 1380 (Fed. Cir. 2019) (Reyna, J., dissenting); *see, e.g.*, *CUPP Cybersecurity LLC v. Symantec Corp.*, No. 3:18-CV-01554, 2019 U.S. Dist. LEXIS 37960, at *7–8 (N.D. Tex. Jan. 16, 2019) (holding that the defendant's servers hosted in an datacenter operated by a third party were not a regular and established place of business); *CDX Diagnostic, Inc. v. US Endoscopy Grp., Inc.*, No. 13-CV-5669, 2018 U.S. Dist. LEXIS 87999, at *7 (S.D.N.Y. May 24, 2018) (holding that the defendant's storage units had "no 'employee or agent'" conducting business and were therefore not regular and established places of business); *Peerless Network, Inc. v. Blitz Telecom Consulting, LLC*, No. 17-CV-1725, 2018 U.S. Dist. LEXIS 49628, at *9 (S.D.N.Y. Mar. 26, 2018) (holding that a regular and established place of business "requires some employee or agent of the defendant to be conducting business at the location in question"); *Tinnus Enters., LLC v. Telebrands Corp.*, No. 6:17-CV-00170, 2018 U.S. Dist. LEXIS 79068, at *14 (E.D. Tex. Mar. 9, 2018) (holding that the defendant's leased shelf space in the district was a regular and established place of business where the defendant paid "agents to monitor, clean, restock, and affix price signage" to the shelf space); *Automated Packaging Sys. v. Free-Flow Packaging Int'l, Inc.*, No. 5:14-cv-2022, 2018 U.S. Dist.

that, as these cases proceed to trial, these issues will be preserved and presented to this court through the regular appellate process. "[W]hile an appeal will usually provide an adequate remedy for a defendant challenging the denial of an improper-venue motion, there may be circumstances in which it is inadequate." *In re HTC Corp.*, 889 F.3d 1349, 1354 (Fed. Cir. 2018). While not alone sufficient to justify mandamus, the substantial expense to the parties that would result from an erroneous district court decision confirms the inadequacy of appeal in this case. *See In re BP Lubricants USA, Inc.*, 637 F.3d 1307, 1313 (Fed. Cir. 2011) ("Not all circumstances in which a defendant will be forced to undergo the cost of discovery and trial warrant mandamus."). Finally, the wisdom of our decision to allow the issues to "percolate in the district courts" has been borne out, *Google*, 2018 U.S. App. LEXIS 31000, at *8, as additional district court decisions have crystallized and brought clarity to the issues: (1) whether a server rack, a shelf, or analogous space can be a "place of business" and (2) whether a "regular and established place of business" requires the

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LEXIS 5910, at *27–28 (N.D. Ohio Jan. 12, 2018) (holding that the defendant's equipment that was "moved onto the customer's property, and may be removed by [the defendant] or relocated by the customer with [the defendant]'s permission, precludes any finding that this equipment could serve as a physical, geographical location" for purposes of establishing venue under § 1400(b)); *Pers. Audio, LLC v. Google, Inc.*, 280 F. Supp. 3d 922, 935 (E.D. Tex. 2017) (holding that Google's GGC servers were not regular and established places of business). *See also Rensselaer Polytechnic Inst. v. Amazon*, No. 1:18-cv-00549, 2019 U.S. Dist. LEXIS 136436, at *34, *36 (N.D.N.Y. Aug. 7, 2019) (noting that "[t]he Federal Circuit has not decided whether a natural person must conduct business at the location for it to be a 'place of business'").

regular presence of an employee or agent of the defendant conducting the business.[3] The district courts' decisions on these issues are in conflict. This court has not addressed this fundamental and recurring issue of patent law. We thus conclude that mandamus is an available remedy.

II

Under *Cray*, there are three general requirements to establishing that the defendant has a regular and established place of business: "(1) there must be a physical place in the district; (2) it must be a regular and established place of business; and (3) it must be the place of the defendant." 871 F.3d at 1360. Google's petition advances arguments addressed to the first and second *Cray* factors. First, it argues that a "place" must have the characteristics of a real property or leasehold interest. Second, it argues that a "place of business" requires a place where an employee or agent of the defendant is conducting the defendant's business.

The first question is whether the rack space occupied by the GGC servers constitutes a "place" under § 1400(b) as interpreted in *Cray*. As the court in *Cray* emphasized, "the first requirement [under § 1400(b)] is that there 'must be a physical place in the district.'" 871 F.3d at 1362. A "place" merely needs to be a "physical, geographical location in the district from which the business of the defendant is carried out." *Id.*

Google's petition suggests that a court's inquiry into whether the defendant has a physical "place of business" should focus on whether the defendant has real property ownership or a leasehold interest in real property. We hold that a "place" need not have such attributes. In *Cray*, we rejected the notion that a "virtual space" or "electronic

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[3] *See also* Br. of Amicus Curiae Acushnet et al., at 12 n.3 (collecting cases involving these issues).

communications from one person to another" could constitute a regular and established place of business. 871 F.3d at 1362. Here, the GGC servers are physically located in the district in a fixed, geographic location. Indeed, *Cray* itself recognized that a "place of business" is not restricted to real property that the defendant must "own[] or lease," and that the statute could be satisfied by any physical place that the defendant could "possess[] or control." *Id.* at 1363 (discussing the third *Cray* factor). For example, a defendant who operates a table at a flea market may have established a place of business; the table serves as a "physical, geographical location . . . from which the business of the defendant is carried out." *Id.* at 1362; *see also In re Cordis Corp.*, 769 F.2d 733, 735, 737 (Fed. Cir. 1985) (suggesting that defendant's employees' homes, which were used to store the defendant's "literature, documents and products," could constitute a "regular and established place of business"). Similarly, leased shelf space or rack space can serve as a "place" under the statute, as two district courts have found. *See Tinnus Enters., LLC v. Telebrands Corp.*, No. 6:17-CV-00170, 2018 U.S. Dist. LEXIS 79068, at *14 (E.D. Tex. Mar. 9, 2018), *report and recommendation adopted*, 2018 U.S. Dist. LEXIS 78342 (E.D. Tex. May 1, 2018) (holding that "premium shelf space" leased by the defendant constituted a regular and established place of business); *Peerless Network, Inc. v. Blitz Telecom Consulting, LLC*, No. 17-CV-1725, 2018 U.S. Dist. LEXIS 49628, at *8–9 (S.D.N.Y. Mar. 26, 2018) (holding that shelf space constituted a "place" under the first factor of the *Cray* test).

We agree, however, with Google's alternative argument that under the second *Cray* factor, a "place of business" generally requires an employee or agent of the defendant to be conducting business at that place. This is apparent from the service statute for patent cases, now codified at 28 U.S.C. § 1694. That provision originally appeared as the second sentence of a two-sentence statutory section whose first sentence is now the patent venue

statute, 28 U.S.C. § 1400(b). Thus 54 Cong. Ch. 395, 29 Stat. 695 (1897), provided:

> [I]n suits brought for the infringement of letters patent the circuit courts of the United States shall have jurisdiction, in law or in equity, in the district of which the defendant is an inhabitant, or in any district in which the defendant, whether a person, partnership, or corporation, shall have committed acts of infringement and have a regular and established place of business. If such suit is brought in a district of which the defendant is not an inhabitant, but in which such defendant has a regular and established place of business, service of process, summons, or subpoena upon the defendant may be made by service upon the agent or agents engaged in conducting such business in the district in which the suit is brought.

54 Cong. Ch. 395, 29 Stat. 695 (1897) (emphasis added).[4] Thus, the venue and service provisions were not just enacted together but expressly linked, and both have always required that the defendant have a "regular and established place of business." *Id.*

What the service statute indicates about that phrase must inform the proper interpretation of the same phrase in the venue statute. Interpretation of a provision must take due account of "neighboring statutory provisions," *see United States v. Tinklenberg*, 563 U.S. 647, 664 (2011), and "we normally presume that the same language in related statutes carries a consistent meaning," *United States v. Davis*, 139 S. Ct. 2319, 2329 (2019). Here, those principles require that the service and venue statutes "be read

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[4] The currently codified venue and service statutes use "resides" and "resident" in place of "inhabitant." *See* 28 U.S.C. §§ 1400(b), 1694.

together." *Id.* at 2330. The service statute plainly assumes that the defendant will have a "regular and established place of business" within the meaning of the venue statute only if the defendant also has an "agent . . . engaged in conducting such business." Likewise, the provision that "service . . . may be made by service upon the agent" and the "regular and established" character of the business assumes the regular, physical presence of an agent at the place of business. In the absence of a contrary indication, these assumptions must govern the venue statute as well.

There is no contrary indication. Indeed, "[t]o the extent any doubt remains about Congress' intent, the legislative history confirms what the plain text strongly suggests." *Boumediene v. Bush*, 553 U.S. 723, 778 (2008). The Congress that enacted the venue statute stated that the "main purpose" of the statute was to "give original jurisdiction to the court where a permanent agency transacting the business is located." 29 Cong. Rec. 1900 (1897) (statement of Rep. Lacey) (emphasis added). Furthermore, that Congress explained that only a "permanent agency"—and not "[i]solated cases of infringement"—would be enough to establish venue. *Id.* Congress' characterization of a "regular and established place of business" for venue purposes as a "permanent agency" reinforces the applicability to venue of the agent requirement of the neighboring service provision.

SIT argues that an amendment to the venue statute in the America Invents Act ("AIA"), Pub. L. 112-29, § 18(c), suggests that the venue statute has no requirement that an employee or agent must be present at the defendant's place of business at all, much less regularly conducting that business. The amendment states that for a patent infringement action involving a covered business method patent, "an automated teller machine shall not be deemed to be a regular and established place of business" for the purposes of establishing venue under § 1400(b). AIA § 18(c). We do not see why this amendment, which makes no

mention of an employment or agent requirement, should alter our analysis.

We conclude that a "regular and established place of business" requires the regular, physical presence of an employee or other agent of the defendant conducting the defendant's business at the alleged "place of business."

III

The question then is whether Google had an employee or agent with a regular, physical presence at its "place of business" and whether that employee or agent was conducting Google's business. The record is clear that there is no Google employee conducting business in the Eastern District of Texas. However, there is nonetheless the question of whether the ISPs are acting as Google's agent.

An agency relationship is a "fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents to act." Restatement (Third) of Agency § 1.01. The essential elements of agency are (1) the principal's "right to direct or control" the agent's actions, (2) "the manifestation of consent by [the principal] to [the agent] that the [agent] shall act on his behalf," and (3) the "consent by the [agent] to act." *Meyer v. Holley*, 537 U.S. 280, 286 (2003).

Google contracted with two ISPs, Cable One and Suddenlink, to host its GGC servers. The contracts stated that, for each ISP, Google would provide the ISP with GGC server equipment, which the ISP would install and host in server racks within its datacenter. The contracts contemplated that the ISP would perform three functions.

First, the ISP provides the GGC servers with network access, i.e., a connection to the ISP's customers, as well as the public Internet. The ISP provides Google with a service, and Google has no right of interim control over the

ISP's provision of network access beyond requiring that the ISP maintain network access to the GGC servers and allow the GGC servers to use certain ports for inbound and outbound network traffic. In this respect, the ISPs are not agents of Google. *See* Restatement (Third) of Agency § 1.01 cmt. f(1) ("The power to give interim instructions distinguishes principals in agency relationships from those who contract to receive services provided by persons who are not agents.").

Second, the ISP performs installation of the GGC servers. The contracts with the ISPs stated that the ISP was responsible for the installation of the GGC servers, including "[c]o-ordination with logistics and shipping personnel; inventory of equipment received; [u]npacking equipment; [a]ssembling equipment based on information and instructions provided by Google; . . . [c]onnecting equipment to power strip(s) and Ethernet cable(s); [and] [p]owering up equipment & executing installation scripts configuring IP address information." Supplemental Record, Ex. A at 6; *id.*, Ex. B at 5. Although these provisions may be suggestive of an agency relationship, we do not consider the ISPs performing these installation functions to be conducting Google's business within the meaning of the statute. The installation activity does not constitute the conduct of a "regular and established" business, since it is a one-time event for each server.

Third, the contracts provide that "Google may from time to time request that [the ISP] perform certain services" involving "basic maintenance activities" with respect to the GGC servers. *Id.*, Ex. A at 6; *id.*, Ex. B at 5. The contracts provided examples of these activities:

> physical switching of a toggle switch; power cycling equipment . . . ; remote visual observations and/or verbal reports to Google on its specific collocation [sic] cabinet(s) for environment status, display lights, or terminal display information; labeling

> and dress-up of cabling within cabinet; tightening screws, cable ties, or securing cabling to mechanical connections, plug[s]; replacing existing plug-in only hardware such as circuit cards with spares or upgrades.

Id., Ex. A at 6; *id.*, Ex. B at 5. The ISP's conduct as to these activities is permitted "only with specific and direct step-by-step instructions from Google." *Id.*, Ex. A at 6; *id.*, Ex. B at 5. The ISP is also prohibited from "access[ing], us[ing], or dispos[ing] of the [GGC servers], in whole or in part" without Google's prior written consent. *Id.*, Ex. A at 2; *see also* Ex. B at 2.

Although the maintenance provision, like the provision on installation, may be suggestive of an agency relationship, SIT has not established that the ISPs performing the specified maintenance functions are conducting Google's business within the meaning of the statute. The better reading of the statute is that the maintenance activities cannot, standing alone, be considered the conduct of Google's business.

Maintaining equipment is meaningfully different from—as only ancillary to—the actual producing, storing, and furnishing to customers of what the business offers. In 1897, Congress focused on the latter sorts of activities as the conduct of business. *See* 29 Cong. Rec. 1900 (1897) (statement of Rep. Lacey) (discussing venue in the context of agents performing traditional business functions, such as manufacturing, sales, or direct customer services); *id.* at 1902 (discussing similarities to a law conferring "jurisdiction" to sue agents of an insurance company). There is no suggestion in the legislative history that maintenance functions that existed at the time, such as the maintenance of railways or telegraph lines, constituted "conducting [the defendant's] business" within the meaning of the statute. *See id.* at 1900–02.

We reach our conclusion bearing in mind that, as we noted in *Cray*, the Supreme Court has cautioned against a broad reading of the venue statute. 871 F.3d at 1361; *Stonite Prods. Co. v. Melvin Lloyd Co.*, 315 U.S. 561, 566 (1942) (interpreting the venue statute as "a restrictive measure"); *Schnell v. Peter Eckrich & Sons, Inc.*, 365 U.S. 260, 264 (1961) ("The requirement of venue is specific and unambiguous; it is not one of those vague principles which, in the interest of some overriding policy, is to be given a liberal construction." (quoting *Olberding v. Ill. Cent. R. Co.*, 346 U.S. 338, 340 (1953)) (internal quotation marks omitted)). We also bear in mind the importance of relatively clear rules, where the statutory text allows, so as to minimize expenditure of resources on threshold, non-merits issues, of which venue is one. *See Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1321 (2017); *Hertz Corp. v. Friend*, 559 U.S. 77, 94–95 (2010); *United States v. Sisson*, 399 U.S. 267, 307 (1970). Those principles, and the clear intent of Congress in enacting the statute to restrict venue to where the defendant resides or is conducting business at a regular and established place of business, with agents there regularly conducting that business, lead us to our conclusion. The venue statute should be read to exclude agents' activities, such as maintenance, that are merely connected to, but do not themselves constitute, the defendant's conduct of business in the sense of production, storage, transport, and exchange of goods or services.

If there is dissatisfaction with the resolution we reach, "[t]he remedy for any dissatisfaction with the results in particular cases lies with Congress and not with [the courts]. Congress may amend the statute; we may not." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 576 (1982); *see also BigCommerce, Inc.*, 890 F.3d at 985 ("We cannot ignore the requirements of the statute merely because different requirements may be more suitable for a

more modern business environment. Such policy-based arguments are best directed to Congress.").

We conclude that the Eastern District of Texas was not a proper venue because Google lacked a "regular and established place of business" within the district since it has no employee or agent regularly conducting its business at its alleged "place of business" within the district.

IV

To be clear, we do not hold today that a "regular and established place of business" will always require the regular presence of a human agent, that is, whether a machine could be an "agent." Such a theory would require recognition that service could be made on a machine pursuant to 28 U.S.C. § 1694. Nor do we decide what might be inferred in this respect from Congress' amendment to the venue statute in the AIA concerning automated teller machines. *See* AIA § 18(c).

IT IS ORDERED THAT:

The petition is granted, and the district court is directed to dismiss or transfer the case as appropriate under 28 U.S.C. § 1406(a).

FOR THE COURT

February 13, 2020
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

United States Court of Appeals for the Federal Circuit

IN RE: GOOGLE LLC,
Petitioner

2019-126

On Petition for Writ of Mandamus to the United States District Court for the Eastern District of Texas in Nos. 2:18-cv-00462-JRG, 2:18-cv-00463-JRG, Judge J. Rodney Gilstrap.

WALLACH, *Circuit Judge*, joining and concurring.

I join with the majority's order, but I write separately to raise questions about Google's business model. During oral argument, Google did not answer, when asked, the question of what its main source of business is in the Eastern District of Texas. Google simply explained that it does not "actively do[] anything. In other words, there's no evidence of any employee or agent . . . being present in the district." Oral Arg. at 51:55–52:15, http://oralarguments.cafc.uscourts.gov/default.aspx?fl=2019-126.mp3.

When asked again, "what do you do in the Eastern District?," Google responded that "what Google does in the District will depend on what the subject of that verb is," and "when you look at the service statute the subject of that verb has to be 'employees' or 'agents' in the District." *Id.* at 52:30–52:53. Finally, Google was asked "when you gather information, from customers, which is part of your

business, you agree. How does that get passed back to Google? It goes through the server?" *Id.* at 58:59–59:10. Google's counsel responded stating: "I am not aware. There's nothing in the record that I'm aware of on that point, your Honor." *Id.* at 59:11–59:14.

Given the absence from the record of information sufficient to understand Google's business model, the question remains for the District Courts to determine whether Google's end users become agents of Google in furtherance of its business by virtue of voluntarily or involuntarily sharing information generated on Google's servers. If, for example, by entering searches and selecting results a Google consumer is continuously providing data which Google monetizes as the core aspect of its business model, it may be that under the analysis in which I today join, Google is indeed doing business at the computer of each of its users/customers. Because this is a question I believe should be entertained by District Courts, I concur.

CERTIFICATE OF SERVICE

On **March 16, 2020**, I caused the foregoing document to be electronically filed with the Clerk of Court using the CM/ECF System, which will serve via e-mail notice of such filing to all counsel registered as CM/ECF users, including any of the following:

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