Miscellaneous Docket No. 21-141

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

IN RE VULCAN INDUSTRIAL HOLDINGS, LLC, VULCAN ENERGY SERVICES, LLC, AND CIZION, LLC D/B/A VULCAN INDUSTRIAL MANUFACTURING, LLC,
Petitioners.

On Petition for a Writ of Mandamus to the
United States District Court for the
Western District of Texas
No. 6:20-cv-200-ADA

[CORRECTED] BRIEF OF CABLE TELEVISION LABORATORIES, INC., THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION, AND UNIFIED PATENTS, LLC AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR MANDAMUS

Jonathan Stroud
Principal Attorney
Unified Patents, LLC
5109 Sherier Place NW
Washington, DC 20016
(202) 805-8931

William G. Jenks
JENKS IP LAW PLLC
1629 K Street, NW
Suite 300
Washington, DC 20006
(202) 412-7964

Counsel for Amici Curiae

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 21-141

Short Case Caption In re Vulcan Industrial Holdings, LLC

Filing Party/Entity Cable Television Laboratories, Inc., Unified Patents, LLC, and Computer & Communications Industry Association

Instructions: Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box**. Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 04/30/2021

Signature: /s/ William Jenks

Name: William Jenks

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☑ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☐ None/Not Applicable
Cable Television Laboratories, Inc.		CTL: None
Computer & Communications Industry Association		CCIA: None
Unified Patents, LLC		Unified:
		Parents:
		UP HOLDCO INC.
		Unified Patents Holdings, LLC
		Unified Patents Acquisition, LLC
		Unified Patents Management, LLC
		No such public companies

☐ Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

☑ None/Not Applicable ☐ Additional pages attached

5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

☑ None/Not Applicable ☐ Additional pages attached

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

☑ None/Not Applicable ☐ Additional pages attached

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INTERESTS OF *AMICI CURIAE*[1]

Unified Patents, LLC is a membership organization dedicated to deterring abusive non-practicing entities, or NPEs, from extracting nuisance settlements from operating companies based on patents that are likely invalid. Unified's 3,000-plus members are Fortune 500 companies, start-ups, automakers, industry groups, cable companies, banks, credit card companies, technology companies, open source software developers, manufacturers, and others dedicated to reducing the drain on the U.S. economy of now-routine baseless litigations asserting infringement of patents of dubious validity. Unified also engages in public policy work, data services, consulting, and an array of independent services.

Cable Television Laboratories, Inc. ("CableLabs") is a nonprofit non-stock company qualified under the National Cooperative Research and Production Act. CableLabs has over 60 member companies worldwide, including members who represent approximately 85% of U.S. cable subscribers. The cable industry supports over 2.9 million jobs and contributes $421 billion to the U.S. economy. CableLabs' members have faced numerous NPE suits. They understand NPE

[1] Petitioners and Respondent have consented to the filing of this brief. *See* Fed. R. App. P. 29 (a)(2). No party's counsel authored this brief in whole or in part; neither party nor party counsel contributed money intended to fund preparing or submitting the brief; no person—other than the *amici curiae*, their members, or their counsel—contributed money intended to fund preparing or submitting the brief. *See* Fed. R. App. P. 29 (a)(4)(E).

litigation, the evolving NPE business model, and the need for a less expensive alternative to litigation provided by the PTO post-grant proceedings.

The Computer & Communications Industry Association ("CCIA") is an international nonprofit association representing a broad cross-section of communications and technology firms. For nearly fifty years, CCIA has promoted open markets, open systems, and open networks. CCIA members employ over 1.6 million workers, invest more than $100 billion in research and development, and contribute trillions of dollars in productivity to the global economy. CCIA regularly files amicus briefs in this and other courts to promote balanced patent policies that reward, rather than stifle, innovation.

Despite CCIA members being located in a number of areas around the country, lawsuits by NPEs against CCIA members are increasingly concentrating in the Western District of Texas. CCIA is concerned that the incorrect standards applied below will, if left unchecked, virtually eliminate the possibility of using PTO post-grant procedures as an alternative to more expensive litigation.

Unified files post-issuance petitions challenging NPE patents it believes are unpatentable or invalid. Thus, Unified is a deterrence entity that seeks to discourage the assertion of poor-quality patents. Unified acts and litigates independently from its members. In 2020, Unified was the fourth most frequent petitioner before the PTAB, and it was by far the leading third-party filer.

Unified studies the ever-evolving business models, financial backings, and practices of NPEs. Unified monitors ownership data, litigation financing, secondary-market patent sales, demand letters, post-grant procedures, and patent litigation to track NPE activity. *See, e.g.*, Unified Patents, Q1 2021 Patent Dispute Report, ("Unified Q1 Patent Report") *available at* https://www.unifiedpatents.com/insights/2021/3/31/q1-2021-patent-dispute-report.

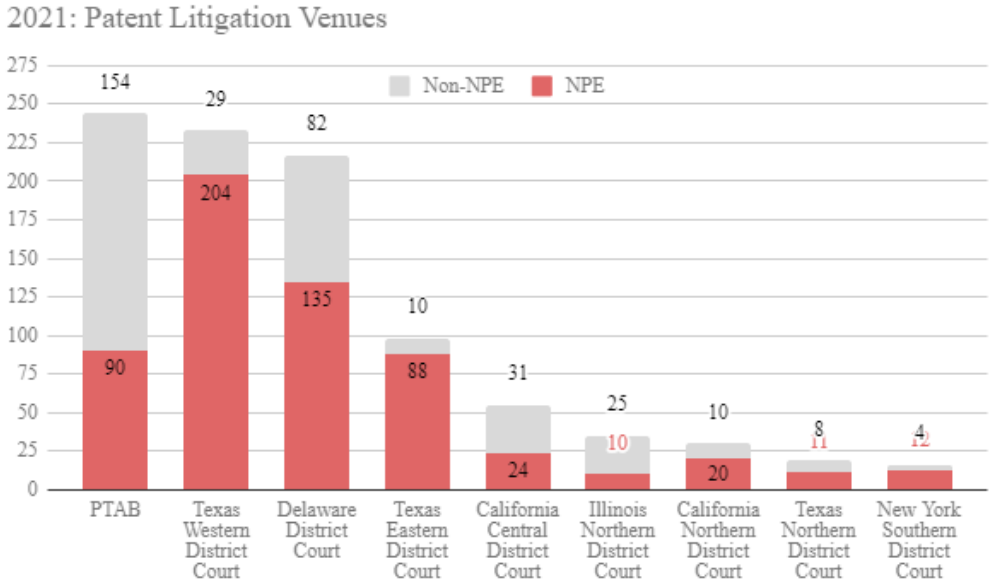
Unified has studied the rapid transformation of the Western District of Texas into the leading patent litigation venue in the United States. *See* Unified Patents, The Rise of the Super NPE and the Western District of Texas (Jul. 13, 2020) ("West Texas Report") *available at* https://www.unifiedpatents.com/insights/2020/7/13/the-rise-of-the-super-npe.

In addition, Unified's counsel has long made a particular study of district court stays pending PTAB proceedings. *See, e.g.*, Stroud, NFC Technology LLC v. HTC America, Inc.: *Judge Bryson's Sitting-By-Designation Guide to Securing Stays in Light of Inter Partes Reviews*, 65 American Univ. L. Rev. 1075 (2016); Stroud, *Staying Litigation for Covered Business Method Post-Grant Reviews*, 17 Colum. Sci. & Tech. L. Rev. 120 (2015) (cited in 29 A.L.R. Fed.3d Art. 9 (2018)); Stroud, Thayer & Totten, *Stay Awhile: The Evolving Law of District Court Stays in Light of Inter Partes Review, Post-Grant Review, and Covered Business Method Post-Grant Review*, 11 Buff. Intell. Prop. L.J. 226 (2015) (same).

ARGUMENT

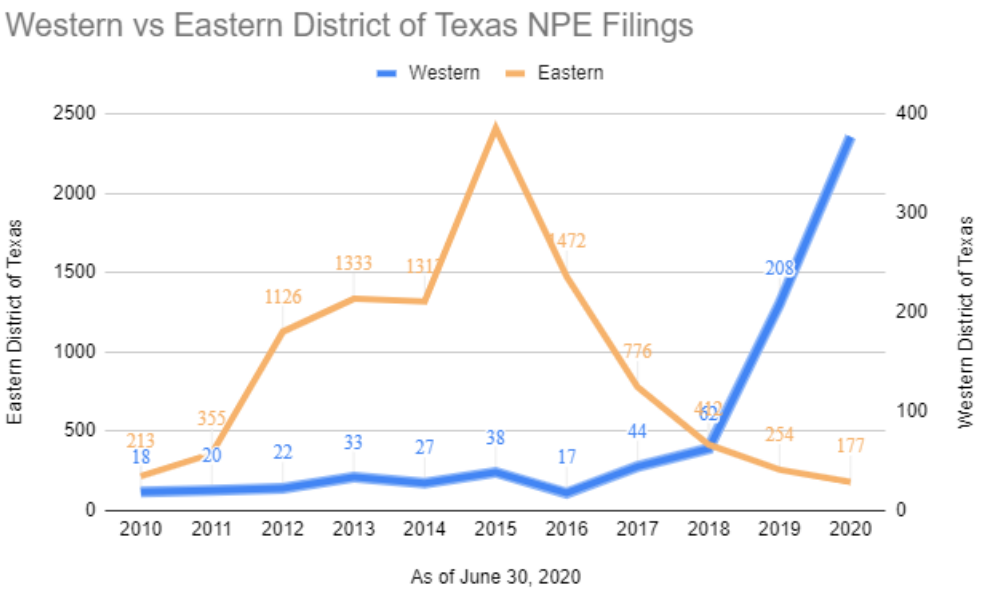
I. The Stay Standards in the Western District of Texas are of Exceptional Importance

Plaintiffs now file one-quarter of all U.S. patent cases in the Western District of Texas. *See* Unified Q1 Patent Report. To be precise, 233 of the 937 new U.S. District Court patent cases were assigned to a judge in the Western District during the first quarter of 2021. *Id.* Two hundred thirty-three is an astounding number of cases in three months, given that only 120 patent cases were filed in the Western District in 2016 and 2017, combined. *See* Docket Navigator, *Analysis of Patent Litigation in the Western District of Texas* 4 (Jul. 8, 2020) ("Docket Navigator Report") *available at* https://brochure.docketnavigator.com/analysis-of-patent-litigation-in-the-western-district-of-texas/.



NPEs dominate patent filings in the Western District. NPEs filed 204 of 233 Western District patent cases through the first quarter of 2021. *See* Unified Q1 Patent Report at Fig. 3 (reproduced above).

NPE filings likewise drive the district's annual growth. The blue line in the chart below tells the story. *See* West Texas Report, Fig. 1. Three years ago, NPEs were relatively inactive in the Western District. But they have set a new record each year since. This year, NPE and overall filings have in a single quarter essentially matched 2019's then-record filings and are on pace to break 2020's record number of suits.



Given this surge in cases filed by NPEs, the standards applied in the Western District are important. NPEs typically select venues with plaintiff-friendly rules, including favorable rulings regarding stays.

Remarkably, this growth in the Western District is attributable to one judge: Judge Albright, the sole judge in the Waco division, and the judge below. *See* Docket Navigator Report at 2. As one set of scholars concluded, Judge Albright appeals to patent plaintiffs through, *inter alia*, his reluctance to stay litigation:

> The Western District of Texas is winning the most recent round of court competition for patent cases. The district's success is largely the result of Judge Albright's appeal to patent plaintiffs—especially NPEs. Plaintiffs like that they can select Judge Albright and avoid having their case randomly assigned among various judges. Plaintiffs like the speed with which Judge Albright churns through his patent docket, forcing defendants to make settlement decisions earlier. Plaintiffs like Judge Albright's personal attention to patent cases. Judge Albright's reluctance to transfer cases out of West Texas is another selling point, as is his willingness to transfer cases within the division while still retaining the case. Plaintiffs also like knowing that Judge Albright is reluctant to stay litigation, even for a patent validity challenge at the PTAB.

Anderson & Gugliuzza, *Federal Judge Seeks Patent Cases*, 71 Duke Law Journal, 61 Forthcoming, *available at* SSRN: https://ssrn.com/abstract=3668514 (emphasis added) ("Anderson & Gugliuzza"). As the local press unreservedly put it, Judge Albright has been "drumming up business" for the Waco Division of West Texas:

> With Albright traveling the country drumming up business and patent attorneys spreading the word that Waco's new federal judge, a longtime patent litigator, will provide the expertise to create an efficient and welcoming environment in Waco, the response in the past year actually exceeded those predictions.

Witherspoon, *Waco becoming hotbed for intellectual property cases with new federal judge*, Waco Tribune-Herald (Jan. 18, 2020) *available at*

https://wacotrib.com/news/local/waco-becoming-hotbed-for-intellectual-property-cases-with-new-federal-judge/article_0bcd75b0-07c5-5e70-b371-b20e059a3717.html.

II. This Court Should Grant the Writ to Supervise the District Court

A. Supervisory Mandamus is Available to Correct a District Court

Mandamus is appropriate "to decide a 'basic and undecided' legal question when the trial court abused its discretion by applying incorrect law. *In re Cray Inc.*, 871 F.3d 1355, 1359 (Fed. Cir. 2017) (quoting *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964)). "Further, writs of mandamus are supervisory in nature and are particularly appropriate when the issues also have an importance beyond the immediate case." *See In re Volkswagen of Am., Inc.*, 545 F.3d 304, 319 (5th Cir. 2008) (en banc) (citing *United States v. Bertoli,* 994 F.2d 1002, 1014 (3d Cir.1993)); *see also United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1540 (2018) ("Supervisory mandamus refers to the authority of the Courts of Appeals to exercise 'supervisory control of the District Courts' through their 'discretionary power to issue writs of mandamus.'") (quoting *La Buy v. Howes Leather Co.,* 352 U.S. 249, 259–260 (1957)). Here, the availability of PTAB proceedings as an alternative to litigation in one-fourth of all U.S. patents cases is at stake. The court need not await developments.

The court has sufficient jurisprudence, including *VirtualAgility* and the numerous district court orders that followed, to properly instruct the district court on the standards governing its discretion. *VirtualAgility* applied four statutory factors to consider stays related to an instituted CBM. *VirtualAgility Inc. v. Salesforce.com, Inc.*, 759 F.3d 1307, 1309 (Fed. Cir. 2014).

District courts generally apply the first three *VirtualAgility* factors when considering stays pending other post-grant proceedings before the PTAB:

> District courts typically analyze stays under a three-factor test: "(i) whether a stay would unduly prejudice or present a clear tactical disadvantage to the non-moving party; (ii) whether a stay will simplify the issues in question and trial of the case; and (iii) whether discovery is complete and whether a trial date has been set."

Murata Mach. USA v. Daifuku Co., 830 F.3d 1357, 1361 (Fed. Cir. 2016) (quoting pre-AIA cases); *see also NFC Technology LLC v. HTC America, Inc.*, 2015 WL 1069111 at *2 (E.D. Tex. Mar. 11, 2015) (Bryson, C.J., sitting by designation) (applying the first three *VirtualAgility* factors and collecting cases); *Brit. Telecommunications PLC v. IAC/InterActiveCorp.*, 2019 WL 4740156 (D. Del. Sep. 11, 2020) (Bryson, C.J., sitting by designation) (reexam context); *Princeton Digit. Image Corp. v. Konami Dig. Entm't Inc.*, 2014 WL 3819458, at *2 (D. Del. Jan. 15, 2014) (citing cases).

A stay is particularly justified when "the outcome of a PTO proceeding is likely to assist the court in determining patent validity or eliminate the need to try

infringement issues." *NFC Tech*, 2015 WL at *1 (citing cases). There is a robust pattern of district courts consistently using this standard, because "the benefits of inter partes review are the same as those served by CBM review." *See Brit. Telecommunications*, 2019 WL at *3. Therefore, "courts have concluded that the 'liberal policy' in favor of stays in CBM cases also applies to stays pending instituted IPR proceedings." *Id.* (collecting cases across multiple districts). This reasoning applies to the post-grant review here because of the relationship between CBMs and PGRs.

Here, the lower court addressed three related factors: Prejudice to Kerr caused by a stay, hardship to Vulcan if there were no stay, and judicial economy. *See* Appx3-5. But, as Vulcan's petition demonstrates, the lower court failed to grapple with many of the critical components of the *VirtualAgility* factors. Petition at 16-17. It particularly misapplied the question whether the stay would simplify issues and the potential trial by ignoring the guidance discussed above and casting the PTAB proceeding as "added complexity." Petition at 19-20; Appx4-5 ("even though the instant litigation *might* be simplified, Vulcan invited this added complexity by unilaterally seeking parallel litigation in the PTAB"). In addition, the opinion "reiterates" impermissible reasons for denying the stay—including "the Court believes in the Seventh Amendment"—that should not be weighed in the analysis. Appx6.

This court has the authority to correct those legal errors before they persist and end the possibility of the litigation alternative Congress envisioned for one-fourth of all U.S. patent cases. *See* H.R. Rep. No. 112-98 at 48 (2011) (describing "the purpose of the section" creating post-grant proceedings as "providing quick and cost effective alternatives to litigation").

B. Judge Albright's Demonstrated Reluctance to Stay Cases Suggests This Court's Involvement is Necessary

Anderson & Gugliuzza's earlier conclusion that Judge Albright is "reluctant" to stay cases was based on their finding that "he [Judge Albright] has denied all four contested motions to stay pending *inter partes* review that we have been able to find." Anderson & Gugliuzza at 44.

Using the Docket Navigator database to update that research, Amici could not identify a single grant of a contested stay motion by Judge Albright. In the span from 2019 through 2021, Judge Albright has apparently denied every contested motion to stay in view of PTAB proceedings. The only grants uncovered resulted from joint or unopposed motions to stay.

Including consolidated cases, Judge Albright has denied at least six contested motions for stay in view of PTAB proceedings and granted at least ten joint/uncontested motions. The orders denying contested motions can rely on, as is the case here, Judge Albright's strong belief in the Seventh Amendment. *See* Appx6; *Continental Intermodal Group–Trucking LLC v. Sand Revolution LLC*,

No. 7-18-cv-00147 (W.D. Tex. Jul. 22, 2020) Dkt. No. 104, following ("The Court strongly believes the Seventh Amendment"). Or they may deny the motions for reasons stated at the hearing. *See, e.g.*, *Solas OLED Ltd. v. Dell Technologies Inc.*, No. 19-cv-00514 (W.D. Tex. Jun. 23, 2020) Dkt. No. 55, following ("for the reasons stated by the Court in the hearing"); *Solas OLED Ltd. v. Google, Inc*., No. 19-cv-00515 (W.D. Tex. Jun. 23, 2020) Dkt. No. 72, following (same).

Judge Albright's zero-for-six record contrasts with a nationwide average granting roughly 60% of contested motions for both IPRs and the slower *ex parte* reexaminations, and almost 80% for motions in general, since *SAS Institute*. *See SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1359 (2018) ("SAS is entitled to a final written decision addressing all of the claims it has challenged."); McClellen, Wilson and Armond, *How Increased Stays Pending IPR May Affect Venue Choice*, Law360 (Nov. 15, 2019) *available at* https://www.law360.com/articles/1220066/how-increased-stays-pending-ipr-may-affect-venue-choice?copied=1.

It also stands in stark contrast with other judges in the Western District of Texas. Despite having a tiny fraction of Judge Albright's patent docket, these judges have granted contested stay motions in multiple cases. *See Aquila Innovations, Ltd. v. Adv. Micro Devices, Inc.*, No. 18-cv-554, Dkt. No. 60 (W.D.

Tex. Jun. 10, 2020); *Anza Technology, Inc. v. Avant Technology,Inc.*, No. 17-cv-01193, Dkt. No. 116 (W.D. Tex. Nov. 15, 2018).

III. The Court Should Issue the Writ to Correct the District Court's Clear Abuse of Discretion

Petitioners have shown that they may have the writ due to the lower court's clear abuse of discretion. *See* Petition at 10-22. "It is, of course, well settled, that the writ is not to be used as a substitute for appeal." *Schlagenhauf*, 379 U.S. at 110 (citing *Ex parte Fahey*, 332 U.S. 258, 259-260 (1947)). "The writ is appropriately issued, however, when there is 'usurpation of judicial power' or a clear abuse of discretion." *Id.* (quoting *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383 (1953)).

What constitutes a "clear" abuse of discretion is not well defined, but Vulcan's brief demonstrates the lower court made multiple serious errors across the relevant factors. That should allow this court to issue the writ.

Undue prejudice

Vulcan moved with alacrity and created the model situation supporting a stay:

- On March 19, 2020, Kerr filed suit; the patent was two days old; Petition at 29;
- On May 26, 2020, Vulcan filed a PGR petition, challenging every claim. Appx84. *Compare NFC Tech.* at 4 ("a delay of seven and

one-half months from the filing of the complaint is not unreasonable.");

- On Dec. 3, 2020, the PTAB instituted Vulcan's PGR; Appx281;
- On Dec. 16, 2020, Vulcan moved to stay in view of the PTAB's institution decision; Appx55.

The court below, however, "sees the pursuit of a stay as a delay tactic that would only benefit Vulcan." Appx4. This is plainly incorrect. Preparing a successful PGR petition two and one-half months from grant reflects diligent, vigorous work. It is difficult to envision a course of action that Vulcan could have taken that would have been more respectful of the court and the defendant's time while still using the PTAB proceedings as Congress intended.

Simplifying the issues and trial

The lower court addressed whether the stay would simplify issues and the potential trial by casting the PTAB proceeding as added complexity. Appx4-5 ("even though the instant litigation *might* be simplified, Vulcan invited this added complexity by unilaterally seeking parallel litigation in the PTAB"). This was error. The "added complexity" of seeking PTAB proceedings is not a factor courts should consider when determining whether that proceeding will simplify issues in the district court proceeding.

Further, a PGR decision *will* undoubtedly simplify proceedings in this case. As the district court noted in *NFC Technology*, this is "the most important factor," one met in that case because:

> If the proceedings before the PTAB result in confirmation of the patent claims being asserted in court, the defendant will be estopped from challenging the validity of the claims on any ground that was, or could reasonably have been, asserted in the inter partes proceeding. 35 U.S.C. § 315(e)(2). On the other hand, if the proceedings result in cancelation of some or all of the asserted claims, either some portion of the litigation will fall away, or the litigation will come to an end altogether.

NFC Tech., 2015 WL at *4

Here, a successful PGR would likewise render all claims of the asserted patent invalid. A partially successful PGR would remove some claims from the proceeding and the trial. Even a failed PGR—one where each instituted claim is confirmed patentable—will simplify issues in this proceeding through estoppel. *See* 35 U.S.C. § 325(e).

The state of district court proceedings

The main things the lower court weighed against Vulcan was the court's early trial date and the work invested by the court. But here again the lower court erred. It relied on discovery hearings and the time to trial as of the decision. *See* Appx5 ("Since the claim construction hearing and the issuance of a claim construction Order, the Court has conducted two discovery hearings and is five

months away from trial.") But "[g]enerally, the time of the motion is the relevant time to measure the stage of litigation." *VirtualAgility*, 759 F.3d at 1317. At the time of filing, discovery was further from completion, and the trial date was three and one-half months further away. While a court can consider some later developments, *id.* at 1317 n.6, those developments should not be the result of mere delay between motion and decision.

In addition, this court has noted the "speculation" involved in setting trial dates in the venue-transfer context, where the "court's general ability to set a fast-paced schedule is not particularly relevant" to the court-congestion factor of that analysis. *In re Apple Inc.*, 979 F.3d 1332, 1344 (Fed. Cir. 2020); *id.* n.5. Likewise, here, the mere setting of an ambitious trial date, while a factor, should not unduly outweigh other factors.

IV. The Court Should Grant the Petition to Correct the Lower Court's Application of its Beliefs to a Question Requiring its Judgment

The District Court includes among its "applicable reasons" for denying the stay that "the Court <u>believes</u> in the Seventh Amendment." Appx6 (emphasis added). The lower court's belief in the Seventh Amendment apparently means that, regardless of the potential elimination of issues before the court, patent validity should be decided by a jury rather than the expert judges of the Patent Office. *See* Anderson & Gugliuzza at 39 ("In his [Judge Albright's] view, patentees are entitled to a jury trial on validity in most cases.") (citing *Continental*

Intermodal Group, *supra.*). In this, the opinion below is at odds with Congress and the Supreme Court. *See* 35 U.S.C. §§ 311-329; H.R. Rep. No. 112-98 at 48; *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1370 (2018) (holding that *inter partes* review violates neither Article III nor the Seventh Amendment).

Judicial belief is not ordinarily part of legal analysis. As the Supreme Court notes, there is "good authority that 'a motion to a court's discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be based on sound legal principles.'" *Martin v. Franklin Cap. Corp.*, 546 U.S. 132, 139 (2005) (quoting *United States v. Burr,* 25 F.Cas. 30, 35 (No. 14,692d) (CC Va. 1807) (Marshall, C. J.)). The same goes for a court's "belief."

Stay decisions are typically within the sound discretion of the district court. But "[d]iscretion is not whim, and limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike." *Martin v. Franklin Cap. Corp.*, 546 U.S. 132, 139 (2005); *see also Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1931 (2016) (quoting *Martin*, 546 U.S. at 139).

Judge Albright has repeated these sentiments outside formal decision-making as part of forum-selling the Western District to patent plaintiffs.

The Waco Patent Blog, which began shortly after Judge Albright's appointment, calls this the "Albright Doctrine." *See* Waco Patent Blog, The Strengthening of the "Albright Doctrine" re IPRs at the PTAB (May 16, 2020) *available at* https://www.wacopatentblog.com/waco-patent-blog/the-strengthening-of-the-albright-doctrine-re-iprs-at-the-ptab. The blog highlighted an exchange Judge Albright had with IAM:

> Richard Lloyd (of IAM): You're one of the judges who hears a lot of patent cases who has tended not to stay cases pending a PTAB decision – why is that?
>
> Judge Albright: You know, I have done that because I think that people have a constitutional right to assert their patent. I mean patents are in the Constitution, the right to a jury trial is in the Constitution. I am not taking away anyone's right to go to the PTAB, but I think people ought to have a jury trial.

Id. To the blog's author, largely through this practice, "Judge Albright has single-handedly changed the tenor of patent litigation." *Id.* To Amici, however, Judge Albright's statements signal the prejudging of motions to stay for reasons disconnected from Congressional intent or case law.

Indeed, "Judge Albright has also publicly stated that he will not stay cases pending the outcome of *inter partes* reviews (IPRs) absent special circumstances, as he believes that patent owners deserve jury trials in federal court." RPX Blog, Q1 in Review: New Uncertainties Spark Further Change as Reform Momentum

Builds (Apr. 30, 2019) *available at* https://www.rpxcorp.com/intelligence/blog/q1-in-review-new-uncertainties-spark-further-change-as-reform-momentum-builds/.

Amici are troubled by these and similar public statements that smack of prejudgment. One prominent law firm's website hosted an hour-long video of Judge Albright explaining his "general approach on rulings on motions to stay":

> If the case is filed, and after the case is filed, there is an effort to institute an IPR … in those situations, I almost will never stay my case because my trial will happen before the resolution of the IPR.

Views from the Top: Conversation with Judge Alan D. Albright, Sept. 9, 2020 (video recording at 27:50-30:25), *available at* https://www.akingump.com/a/web/dpKG4oSeP2Q7jnUNk6ZCvi/event-with-judge-albright.m4v; s*ee also* Views from the Bench: Q&A Session with Judge Alan Albright, Baker Botts, Nov. 16, 2020 (video recording at at 47:30-49:10), *available at* https://www.youtube.com/watch?v=9_Or0cFwCN0 (Regarding IPRs, interviewer: "Your position on stay of the district court proceedings in light of pending PTAB proceedings is also pretty clear for the bar … are there any instances where you would consider given perhaps … an instance where the IPR was filed before litigation began?" responding only with examples where IPR was filed well before the complaint).

CONCLUSION

The court should issue the requested writ.

Respectfully submitted,

By */s/ William G. Jenks*
William G. Jenks
wjenks@jenksiplaw.com
JENKS IP LAW PLLC
1629 K Street, NW
Suite 300
Washington, DC 20006
(202) 412-7964

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. Cir. R. 35(g)(3). It contains 3,848 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Fed. Cir. R. 32(b)(2).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font.

/s/ William G. Jenks
William G. Jenks

CERTIFICATE OF SERVICE

I hereby certify that, on Apr. 30, 2021, I caused to be electronically filed the foregoing [CORRECTED] BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONER'S using the court's CM/ECF filing system.

I certify that all counsel of record in the case are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system. *See* Fed. R. App. P. 25(d); Fed. Cir. R. 25(e).

A copy of the foregoing was also provided to the district court judge via UPS:

Hon. Alan D Albright
United States District Court for the Western District of Texas
800 Franklin Avenue, Room 301
Waco, Texas 76701

/s/ William G. Jenks
William G. Jenks