No. 21-144

United States Court of Appeals for the Federal Circuit

IN RE GOOGLE LLC,
Petitioner,

On Petition for a Writ of Mandamus to the United States District Court for the Western District of Texas
No. 6:20-CV-00075-ADA
Judge Alan D. Albright

BRIEF OF COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION, ENGINE ADVOCACY, AND PROFESSOR MARK LEMLEY AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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CERTIFICATE OF INTEREST

I certify that the following information is accurate and complete to the best of my knowledge.

Dated: May 14, 2021 */s/ Joshua Landau*

Joshua Landau

1. Represented Entities	**2. Real Parties in Interest**	**3. Parent Corporations and Stockholders**
Computer & Communications Industry Association	None	None
Engine Advocacy	None	None
Professor Mark Lemley	None	None

4. Legal Representatives
Engine Advocacy, Abigail A. Rives Professor Mark Lemley

5. Related Cases
None

6. Organizational Victims and Bankruptcy Cases
Not Applicable

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STATEMENT OF INTEREST

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[1] employ more than 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 innovation.

Engine Advocacy is a nonprofit technology policy, research, and advocacy organization that bridges the gap between policymakers and startups, working with government and a community of growth-oriented startups across the nation to support the development of technology entrepreneurship. Engine's research, events, and advocacy educate elected officials, the entrepreneur community, and the general

[1] CCIA's members are listed at https://www.ccianet.org/members. Petitioner Google is a CCIA member, and is one among the companies and organizations that provide financial support to Engine, but took no part in the preparation or funding of this brief.

public on issues vital to fostering technological innovation. Part of amplifying startup concerns includes highlighting the unique challenges small startups face when confronted with abusive patent litigation and patent assertion.

Professor Mark Lemley has considerable experience with both patent practice and patent doctrine. He has no personal interest in the outcome of this litigation, but has a professional interest in seeing that the patent laws are applied in such a way as to provide incentives for innovation.

Choice of forum plays a critical role in the outcome of patent litigation, as well as in the number and quality of patent cases filed. Limiting transfer out of the Western District has directly contributed to a marked rise in the amount of abusive patent litigation against innovators of all sizes. Plaintiffs have flocked to the Western District, confident that cases that might fail in other jurisdictions will stay in the Western District.

Many companies with headquarters elsewhere maintain facilities in the Western District. An Austin facility may handle ancillary functions such as sales, or may be dedicated to products wholly

unrelated to those at issue in a given lawsuit. Despite this lack of relationship, an increasing number of lawsuits are being filed in Waco. Amici and their members are concerned by Judge Albright's unwillingness to transfer cases even when the transferee forum is clearly more convenient and has a more significant relationship to the patent-in-suit.

Pursuant to Fed. R. App. P. 29(a)(4)(e), no counsel for a party to the case underlying the pending petition for writ of mandamus authored this brief in whole or in part, and no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to fund the preparation or submission of this brief.

INTRODUCTION

Choice of forum plays a critical role in the outcome of patent litigation. The Western District of Texas is the new forum of choice for patent plaintiffs. In 2016 and 2017, the Western District of Texas saw a total of 123 patent case filings. The Waco division received two of those. Jonas Anderson & Paul R. Gugliuzza, *Federal Judge Seeks Patent Cases*, 71 Duke L.J. *27 (forthcoming 2021). That situation has changed. In the year 2020 alone, 793 new patent cases were filed in Waco, an increase of more than 39,500% over 2016 and 2017. *Id.*

During the past year, this Court has been forced to issue a series of writs of mandamus to correct errors made by the sole judge hearing cases in Waco, Judge Albright. In seven instances in that year, the Federal Circuit granted mandamus. *See, e.g.*, *In re Adobe Inc.*, 823 F. App'x 929 (Fed. Cir. 2020); *In re Apple Inc.*, 979 F.3d 1332 (Fed. Cir. 2020); *In re Intel Corporation*, No. 2021-105 (Dec. 23, 2020); *In re Nitro Fluids LLC*, 978 F.3d 1308 (2020); *In re SK hynix Inc.*, No. 2021-113 (Feb. 1, 2021); *In re Tracfone Wireless, Inc.*, No. 2021-118 (Fed. Cir. Mar. 8, 2021) ("*Tracfone I*"); *In re Tracfone Wireless, Inc.*, No. 2021-136 (Apr. 20, 2021) ("*Tracfone II*"). This represents a mandamus rate twice

as high as when the Federal Circuit first began issuing mandamus orders to the "renegade district" of the Eastern District of Texas. Transcript of Oral Argument at 11, *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006); *see also* Paul R. Gugliuzza, *The New Federal Circuit Mandamus*, 45 Ind. L. Rev. 343, 350 (2012). And in the most recent instance, *Tracfone II*, this Court was forced to issue a second mandamus order in the same case, suggesting that Judge Albright continues to fail to apply relevant precedent even when clearly instructed by a supervisory mandamus order.

Moreover, limiting transfer out of the Western District is one among an interrelated constellation of tools used to attract litigation. It has contributed directly to a substantial increase in patent litigation against both large and small firms in the Western District.

In the present case, Judge Albright ignores relevant precedent that requires transfer, including ignoring prior mandamus orders. Further, Judge Albright has continued to ignore this Court's clear instruction to give transfer motions the highest priority.

Amici and amici's members remain concerned that Judge Albright's practices with regard to venue tilt against requestors, forcing

parties to litigate in inconvenient forums. Amici are also concerned that a failure to issue mandamus would result in continued error by Judge Albright with respect to transfer.

Failure to address this issue through mandamus would ensure that "dozens of cases will proceed through motion practice, discovery, claim construction, or trial before potentially getting thrown out by a reversal of a ruling on a motion to dismiss for improper venue." *In re Google LLC*, 914 F.3d 1377, 1381 (Fed. Cir. 2019) (Reyna, J., dissenting). Indeed, Judge Albright himself recently stated that he expects to receive this Court's guidance regarding whether his case management rules are in error and that, absent guidance, he will not change them. Ryan Davis, *Albright Says He'll Very Rarely Put Cases On Hold For PTAB*, Law360 (May 11, 2021), https://www.law360.com/articles/1381597/albright-says-he-ll-very-rarely-put-cases-on-hold-for-ptab.

Given the clear requirement for guidance from this court and the error apparent in the decision below, amici believe that a grant of mandamus is appropriate in this case.

ARGUMENT

The present petition represents a clear case for mandamus. The underlying decision illustrates that, realistically, transfer from the Western District of Texas remains unavailable. This unavailability is a result of Judge Albright's erroneous interpretation of case law and failure to consider relevant evidence. The end result is an inconvenient court in which defendants face litigation unrelated to their presence in the forum. This Court should grant mandamus and order transfer to continue its efforts to address this issue.

I. The EcoFactor Case Exemplifies Amici's Concern With Transfer Motions in the Western District

Patent plaintiffs, like other plaintiffs, regularly seek to file suit in favorable jurisdictions, regardless of the convenience of the venue for the defendant. Transfers under 28 U.S.C. § 1404(a) are the mechanism by which defendants can obtain relief from the inconvenience and inappropriateness of these forums. When a district court seeks to attract a particular type of litigation—as is the case here—making transfers difficult or impossible to obtain is a key tactic in attracting that litigation.

A. Judge Albright has openly sought to attract patent litigation to his court.

As the Waco Tribune stated, shortly after taking the bench, Judge Albright embarked on a tour of the country "drumming up business." Tommy Witherspoon, *Waco becoming hotbed for intellectual property cases with new federal judge*, Waco Tribune-Herald (Jan. 18, 2020), https://wacotrib.com/news/local/waco-becoming-hotbed-for-intellectual-property-cases-with-new-federal-judge/article_0bcd75b0-07c5-5e70-b371-b20e059a3717.html. During this tour, Judge Albright made it clear "in no uncertain terms that he would like his courtroom to become a hub for IP cases." Tommy Witherspoon, *New federal judge, high court ruling could make Waco hotbed for patent lawsuits*, Waco Tribune-Herald (Jan. 19, 2019), https://wacotrib.com/news/local/crime-and-courts/new-federal-judge-high-court-ruling-could-make-waco-hotbed-for-patent-lawsuits/article_9cc6d86c-8dfc-5fb6-800e-917dbd0107e3.html.

But to attract patent litigation you have to attract patent plaintiffs. And plaintiffs, who choose where to file, are attracted by favorable environments. *See, e.g.*, Kenneth Artz, *Surprise—Waco, Texas, is the Patent Litigation Capitol of the United States!*, Texas Lawyer (Oct. 8, 2020),

https://www.law.com/texaslawyer/2020/10/08/surprise-waco-texas-is-the-patent-litigation-capital-of-the-united-states/ ("[Albright]'s got to give patentees what they want, and he does.").

The desire to attract litigation appears to have resulted in an approach to patent litigation that disfavors defendants, as exemplified in this case by clear error in Judge Albright's handling of the motion to transfer.

B. Limiting transfer of cases is a key factor in attracting litigation.

Patent owners "are unlikely to file in [inconvenient forums] unless they are confident that their case will remain in the district long enough to obtain its benefits." *See* Daniel M. Klerman & Greg Reilly, *Forum Selling*, 89 Cal. L. Rev. 241, 260 (2016). As evidenced by the nearly 40,000% increase in litigation in Waco, the Western District's practice of severely limiting transfers attracts litigation.

Other factors, such as a rapid schedule with respect to all issues except for motions by defendants, which receive "egregious delay and blatant disregard for precedent," also attract plaintiffs. *In re SK hynix*, No. 2021-113. The present case illustrates this approach to scheduling. The motion to transfer was filed in June 2020 and not ruled upon until

April 2021, after significant discovery and claim construction has occurred, despite this Court's clear and repeated instruction that transfer motions should receive "top priority." *In re Apple Inc.*, 979 F.3d 1332, 1343 (Fed. Cir. 2020).

The limitation of transfers by Judge Albright is in large part due to clear and repeated errors in his application of the transfer factors. This case is one example.

II. The Patent Venue Statute Emphasizes the Importance of Local Interests in the Events Leading to a Suit

Venue in patent cases is controlled by 28 U.S.C. § 1400(b), which requires that a defendant both "have committed acts of infringement" and "has a regular and established place of business." When passed, the bill's sponsor stated that his intent was to provide "jurisdiction to the court where a permanent agency transacting the business is located, and that business is engaged in the infringement of the patent rights." 29 Cong. Rec. 1900 (1897) (statement of Rep. Lacey). Further, it was intended to avoid allowing an inconvenient forum to "work hardship by reason of the expense that it would cause of having to take depositions or transport witnesses a thousand miles in the trial of a case." *Id.* at 1902 (statement of Rep. Lacey).

In short, patent venue was intended in part to avoid the inconvenience of a lawsuit being filed far from where the relevant events had occurred. Reading 28 U.S.C. § 1404 in conjunction with the legislative history of 28 U.S.C. § 1400(b), the "convenience of parties and witnesses" includes that the trial be held where the allegedly infringing business is conducted.

At a minimum, the relationship between the regular and established place of business and the acts of infringement is a significant indicator of the strength of local interests in adjudicating a case. The venue where the two coexist is generally more likely to be interested in the topic than a venue where a place of business exists, but the business conducted there is unrelated to the relevant alleged infringement. This analysis would aid in applying the local interests factor of § 1404 transfer analysis.

Further, while this Court has to date read § 1400 not to require that the regular and established place of business have any relationship to the acts of infringement, the legislative text suggests that it was intended to. This Court should consider holding that the acts of

infringement must be related to the regular and established place of business in order for venue to lie.

III. Refusal to Transfer This Case Is a Clear and Repeated Violation of This Court's Previous Guidance to Judge Albright

In the present case, Judge Albright has repeatedly ignored precedent and this Court's guidance. This alone would justify mandamus in its supervisory capacity over lower courts.

A. Relative ease of access of documents turns on location, even if the documents are electronic.

As Judge Albright acknowledges in his own order, the physical location of electronic documents "does affect the outcome of this factor under current Fifth Circuit precedent." Order Denying Motion to Transfer, *EcoFactor, Inc. v. Google LLC*, Case No. 6:20-cv-00075-ADA, Dkt. No. 62 (W.D. Tex. Apr. 16, 2021). Despite his acknowledgement of this fact, Judge Albright relied on electronic accessibility of documents to find this factor neutral. *Id.* This ignores binding precedent from the Fifth Circuit and the instructions of this Court. *See, e.g.*, *in re Volkswagen of Amer., Inc.*, 545 F.3d 304 (5th Cir. 2008); *in re Genentech, Inc.*, 566 F.3d 1338, 1346 (Fed. Cir. 2009).

Further, Judge Albright asserts that Google made only conclusory assertions that physical documents and evidence were located in Palo Alto, California. However, Google provided a declaration stating clearly that the relevant Google documents and prototypes are stored and located in Google's facility in Mountain View, California.

Finally, while source code may be electronic evidence, because of the need to keep it tightly controlled and limit access it is typically not transmitted electronically but rather is physically transported to the location where source code review or trial will occur. Given the realities of how source code is handled, it should be treated as physical evidence, not as electronic evidence, for purposes of this factor.

Given that this factor turns on "relative ease of access," the location of the source code and physical evidence in California weighs strongly in favor of transfer. Judge Albright thus abused his discretion in finding it to be neutral.

B. The balance of potential witnesses favors transfer to California.

As in *Genentech*, no third-party witness is located in the Western District of Texas. In contrast, Google identified potential non-party witnesses located in the Northern District of California who are subject

to compulsory process there. Further, while EcoFactor identified several potentially relevant Google employees in Austin, Google provided a declaration regarding those witnesses and noted that "the engineers and managers who work on the Nest Learning Thermostat functionality at issue are located in the Mountain View area." As this Court has noted in the past, when the transferee forum contains a high concentration of relevant party witnesses, that factor "tips significantly in [defendant]'s favor." *In re Google Inc.,* Case No. 17-107 at *6 (Fed. Cir. Feb. 23, 2017).

Again, Judge Albright ignored relevant precedent in order to find the witness factors to be neutral.

C. Judge Albright committed clear error in giving weight to co-pending litigation given that transfer was also requested in those cases.

EcoFactor has filed three cases in the Western District; against Google, ecobee, and Vivint. In all three cases, transfer was requested. Per this Court, "nothing favors the transferor forum" when the other cases were filed simultaneously as part of one litigation campaign, as is the case here. *In re Toyota Motor Corp.*, 747 F.3d 1338, 1340–41 (Fed. Cir. 2014). As this Court noted, it is "improper for a district court to

weigh the judicial economy factor in a plaintiff's favor solely based on the existence of multiple co-pending suits, while the remaining defendants have similar transfer motions pending seeking transfer to a common transferee district." *Google*, Case No. 17-107 at *7.

Yet that is exactly what Judge Albright did here, finding this factor "strongly weighs against transfer." Order Denying Motion at 10. This is one of only two factors weighing against transfer, and was manifestly incorrectly analyzed according to this Court's precedent.

D. When the transfer motion was filed, as now, there was no reason that the transferee forum would have a later trial date.

When analyzing a motion for transfer, the analysis is to be conducted based on "the situation which existed when suit was instituted." *In re HP Inc.*, No. 20-0140 (Fed. Cir. Sept. 15, 2020) (quoting *Hoffman v. Blaski*, 363 U.S. 335, 343 (1960)). This applies with equal force to all factors, including the court congestion factor. In January 2020, when the lawsuit was filed, there were no COVID-19 protocol orders in place in either the Northern District of California or the Western District of Texas, and no reason to think it would affect either court's operations. And while Judge Albright has set an

aggressive trial schedule, this Court has noted "a district court cannot merely set an aggressive trial date and subsequently conclude" that the congestion factor favors their district. *In re Apple*, 979 F.3d at 1344.

Further, any delay that might result if the case was transferred would be due to Judge Albright's action in ignoring precedent instructing him to address the transfer motion before the merits of the case. The *Apple* decision, relying on Judge Albright's delay in addressing the transfer motion, issued in November 2020. Despite the clear relevance of the *Apple* order requiring Judge Albright to address transfer before substantive case events like Markman hearings to this case, Judge Albright subsequently proceeded to do exactly what this Court had instructed him not to do—postpone ruling on a motion to transfer while continuing substantive case events, including holding a Markman hearing.

As a result, there is no reason that this factor would weigh against transfer, and applying precedent, it is at most neutral.

E. The local interest is much stronger in the Northern District of California, as the product was designed there and relevant events occurred there.

It is undisputed that the allegedly infringing device, the Nest Thermostat, was designed in Mountain View. In fact, it is so representative of California design that the San Francisco Museum of Modern Art featured a Nest Thermostat alongside Eames chairs and the first iPod in an exhibition entitled *Designed in California*. Gabe Meline, *OK Google, Tell Me About 'Designed in California' at SFMOMA*, KQED (Feb. 8, 2018), https://www.kqed.org/arts/13823866/google-tell-me-about-the-exhibit-designed-in-california-at-sfmoma.

While Google maintains a campus in Austin, that campus has no significant connection to the Nest device at issue, meaning that there are no "significant connections between a particular venue and the events that gave rise to a suit." *In re Apple*, 979 F.3d at 1345. As discussed in Section II, *supra*, the legislative history of the patent venue statute suggests that the relationship between the venue and the events that gave rise to a suit deserves special consideration. Here, there is no relationship between the two. The product was designed in California and there is no evidence of any significant connection between the

product and the Western District. The sole basis for connection appears to be sales and offers for sale. Such a non-particularized interest cannot outweigh the strong interest a venue has in adjudicating cases involving work performed in that venue, such as the Northern District of California has here.

Accordingly, this factor also should weigh in favor of transfer. Given that all but one factor should weigh in favor of transfer, and the remaining factor is at worst neutral, this case represents an instance in which the transferee forum is clearly more convenient.

IV. Failure to Grant Mandamus Would Harm the Patent System and Burden Defendants Generally, Reducing Investment in Product Development

Limiting transfer out of inconvenient forums has a range of negative effects including harming the public perception of the patent system, aiding actual plaintiff-biased policies, significantly restricting access to the *inter partes* review (IPR) system, and reducing economic investment and innovation by productive firms such as high-tech, high-growth startups.

A. Routine refusal to transfer reduces trust in the courts.

Forum shopping triggers a host of concerns about the legal system. Our legal system centers on the notion that "the law ought not be manipulable and that its application ought to be uniform." Kimberly A. Moore, *Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation*, 79 N.C. L. Rev. 879, 924 (2001). While achieving this ideal might be impractical, the law should not encourage manipulation and non-uniformity.

Encouragement would "erode[] public confidence in the law and its enforcement and create[] doubt about the fairness of the system." *Id.* This erosion of confidence is all the greater when courts are actively courting litigants and litigation, leading to questions about their neutrality. *See* Anderson & Gugliuzza, *supra*, at 15–16.

B. Allowing plaintiffs to avoid transfer protects pro-plaintiff procedures and undermines the inter partes *review system.*

The actual procedures employed in the Western District of Texas appear to be designed "mainly to process cases as quickly as possible—except when it is defendants who want a quick dismissal" or, as this Court has observed in recent cases, when defendants want a ruling

without "egregious delay and blatant disregard for precedent." *Id.* at 55; *In re SK hynix*, No. 2021-113. The delay of defendants' motions and the swift processing of the remainder of the case generally favors plaintiffs over defendants. *See* Anderson & Gugliuzza, *supra*, at 34–38.

These procedures also undermine the IPR system. Under the current *NHK Spring/Fintiv* regime, IPRs are extremely likely to be denied if a co-pending litigation's scheduled trial date pre-dates the predicted final written decision date. Filing in the Western District of Texas "essentially eliminates the prospect of PTAB review." *Id.* at 47. This provides an additional benefit to plaintiffs who remain in Judge Albright's courtroom, while removing the potential for defendants to use the efficient and accurate IPR system that Congress created.

C. Increased patent litigation reduces productive economic activity by operating companies.

It is well-established that firms reduce innovative activity when targeted by patent lawsuits. *See, e.g.*, Filippo Mezzanotti, *Roadblock to Innovation: The Role of Patent Litigation in Corporate R&D*, Management Science (forthcoming 2021). And it is also increasingly well-established that *inter partes* review has positive economic benefits, providing increased employment and R&D investment. *See Unified's*

Patent Quality Initiative (PQI) Releases Economic Report Showing the AIA Led to over 13,000 Jobs and Grew the U.S. Economy by $3 Billion since 2014, Unified Patents (June 24, 2020), https://www.unifiedpatents.com/insights/2020/6/23/the-perryman-group-releases-economic-report-an-assessment-of-the-impact-of-the-america-invents-act-and-the-patent-trial-and-appeal-board-on-the-us-economy. Limiting transfer of cases from the Western District of Texas has increased overall patent litigation, not merely substituted litigation there for litigation elsewhere. In particular, litigation targeting productive firms has increased and access to IPR has been reduced. This is a particular challenge for startups and small companies. The high costs of patent litigation are especially difficult for these entities to cover. *See* Colleen Chien, *Startups and Patent Trolls*, 17 Stan. Tech. L. Rev. 461, 472 (2014).

The net result of limiting transfer, supported by empirical evidence, is that productive firms are likely to reduce their innovative activity and employment, harming the overall progress of the useful arts. U.S. Const. Art. I, § 8, cl. 8.

Interpretations of intellectual property statutes should take into account the impact on the Constitutional purpose those statutes serve. *Cf. Google LLC v. Oracle America, Inc.*, No. 18-956 at *34 (U.S. Apr. 5, 2021). And here, the evidence strongly suggests that a failure to allow transfer in situations where the transferor forum has no significant contacts with the alleged infringement would negatively impact economic and scientific progress.

CONCLUSION

This Court should grant Google's petition for mandamus in order to correct the clear errors of the district court.

May 14, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

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May 14, 2021 /s/ Joshua Landau

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Computer & Communications Industry Association, Engine Advocacy, and Professor Mark Lemley

CERTIFICATE OF SERVICE

I hereby certify that on May 14, 2021, I caused the foregoing **Brief of the Computer & Communications Industry Association, Engine Advocacy, and Professor Mark Lemley as *Amici Curiae* in Support of Petitioner** to be electronically filed with the Clerk of the Court using CM/ECF, which will automatically send email notification of such filing to all counsel of record.

May 14, 2021 /s/ Joshua Landau

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