No. 21-147

United States Court of Appeals for the Federal Circuit

IN RE APPLE INC.,
Petitioner,

On Petition for a Writ of Mandamus to the
United States District Court for the Western District of Texas
No. 6:20-CV-00665-ADA
Judge Alan D. Albright

BRIEF OF COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION, ENGINE ADVOCACY, AND ACT | THE APP ASSOCIATION 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 24, 2021 */s/ Joshua Landau*

Joshua Landau

1. Represented Entities	**2. Real Parties in Interest**	**3. Parent Corporations and Stockholders**
Computer & Communications Industry Association	n/a	None
Engine Advocacy	n/a	None
ACT | The App Association	n/a	None

4. Legal Representatives
None

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.

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 public on issues vital to fostering technological innovation. Part of

[1] CCIA's members are listed at https://www.ccianet.org/members.

amplifying startup concerns includes highlighting the unique challenges small startups face when confronted with abusive patent litigation and patent assertion.

ACT | The App Association is an international not-for-profit grassroots advocacy and education organization representing more than 5,000 small business software application developers and technology firms that create the apps used on mobile devices and in enterprise systems around the globe. Today, ACT represents an ecosystem valued at approximately $1.7 trillion and responsible for 5.9 million American jobs. ACT members lead in developing innovative applications and products across consumer and enterprise use cases.

Choice of forum plays a critical role in the outcome of patent litigation. Likewise, forum has importance influence over 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. Non-practicing entities have flocked to the Western District, with confidence that cases that might fail in other jurisdictions will stay in the Western District and progress more quickly to settlement.

All too often, refusal to transfer is based on contacts with the venue that are tenuous at best. 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.* And in 2016, only five patent cases were filed against small or medium-sized entities in the Western District. In 2020, there were 95, an increase of 1800%.

Limiting transfer is one among an interrelated constellation of tools used to attract litigation to the Western District. It has contributed directly to the substantial increase in patent litigation in the Western District.

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) ("*Apple II*"); *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.

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. For example, in the present case, Judge Albright has again relied on the "heavy burden" placed on transfer requests, despite this court's repeated instruction that this characterization is incorrect. *See* Order Denying Defendant's Motion to Transfer, *Koss Corp. v. Apple Inc.*, Case No. 6:20-CV-00665-ADA, Dkt. No. 76 (W.D. Tex. Apr. 22, 2021); *contra In re Western Digital Techs.*, Case No. 21-137 (Fed. Cir. May 10, 2021).

The large number of mandamus petitions regarding Judge Albright's transfer motion policy is evidence that the concern 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" is not an empty

concern. *In re Google LLC*, 914 F.3d 1377, 1381 (Fed. Cir. 2019) (Reyna, J., dissenting).

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. Judge Albright continues to ignore relevant precedent and commit clear errors of analysis. And these errors always cut in one direction—against transfer.

As a result of these errors, transfer from the Western District of Texas realistically remains generally unavailable. 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 Western District's Transfer Jurisprudence Attracts Patent Plaintiffs By Limiting Transfer

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. To attract patent litigation, you have to attract patent plaintiffs. And plaintiffs, who choose where to file, are attracted by favorable environments. *See* Anderson & Gugliuzza, *supra* at *13-14; *see also* Kimberly A. Moore, *Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation*, 79 N.C. L. Rev. 879, 899 (2001).

The desire to attract litigation appears to have resulted in an approach to patent litigation that disfavors defendants, as exemplified by Judge Albright's repeated instances of ignoring prior mandamus rulings and continued clear errors in handling motions 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 December 2020 and not ruled upon until April 2021, after significant discovery and claim construction had occurred, despite this Court's clear and repeated instruction that transfer motions should receive "top priority." *Apple II* at 1343.

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 history 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.

Judge Albright continues to insist, contrary to the instructions of this Court and the Fifth Circuit, that the "physical location of electronic documents bears little weight in the determination of a convenient venue." Order Denying Defendant's Motion at 7-8. While Judge Albright acknowledges that he must obey binding precedent, he continues to give little weight to this factor.

This is particularly concerning because while much of the evidence in a case may be produced electronically, the most critical evidence—evidence like source code, semiconductor masks, or electronic schematics—is the kind of "crown jewel" information that is almost always produced under more significant restrictions.

For example, 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. *See, e.g.*, E.D. Tex., *Sample Protective Order for Patent Cases* 5-7 (barring electronic transport of source code), https://www.txed.uscourts.gov/sites/default/files/judgeFiles/Sample_Prot

ective_Order_Patent_Cases_%28April%202019%29.docx. And source code review requires the maintenance of a suitable location for review for an extended period of time, which can be inconvenient when a company does not ordinarily maintain that source code in a given location or if that location is distant from the offices of its primary counsel.

Given the realities of how source code and similar critical non-infringement evidence is handled, such evidence should be treated as physical, not 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 district court's analysis of the witness factors is self-contradictory and legally erroneous.

With regard to the witness factors, Judge Albright repeatedly rejects Apple's arguments, while accepting Koss's use of the exact same argument. This apparent lack of neutrality is identified by other

commenters as a key concern with forum shopping. Anderson & Gugliuzza, *supra*, at *14; Moore, *supra*, at 924.

For example, Judge Albright disregards the availability of compulsory process with respect to Apple's prior art witnesses in the Northern District of California because he thinks those witnesses are unlikely to testify at trial. *See* Order Denying Defendant's Motion at 12. But Judge Albright weighs the availability of compulsory process for one of Koss's witnesses in the Western District against transfer, despite Judge Albright's acknowledgement that he too is unlikely to testify at trial. *See id.* at 13.

Similarly, Judge Albright disregards Apple's statement that the Northern District witnesses are unwilling, while crediting Koss's statement that the Western District of Texas witnesses are unwilling. *See id.* at 12-13. But as this Court has previously noted, "when there is no indication that a non-party witness is willing, the witness is presumed to be unwilling." *In re HP Inc.*, Case No. 18-149 at *6 (Fed. Cir. Sept. 25, 2018). Judge Albright commits both legal error in ignoring this Court's prior statements and abuses his discretion by treating the two parties differently on the same issue.

In a further example, Judge Albright erroneously weighted the convenience of witnesses who would be forced to travel to either venue. In the case of Koss's third-party inventor witnesses, he found that it would be significantly more convenient for them to travel the 1,000 miles from Illinois or Wisconsin to Texas than the 2,000 miles to California. Order Denying Defendant's Motion at 20. But in analyzing this factor with respect to Koss's witnesses, also located in Wisconsin, he finds that those witnesses would find both venues to be equally convenient. *Id.* at 19. To add to the incoherence, Judge Albright also finds that Apple witnesses would not find it significantly more burdensome to travel the 1400 miles from Los Angeles to Waco than to travel the 400 miles from Los Angeles to San Francisco. *Id.* at 17. Under this Court's caselaw, none of these trips are significantly more convenient or inconvenient than the other. *See*, *e.g.*, *In re Genentech, Inc.*, 566 F.3d 1338, 1348 (Fed. Cir. 2009).

In each instance, Judge Albright erred, applying different rules to each party's contentions. That differential application always tilted in favor of avoiding transfer. Whatever the rule may be with respect to

any given factor, it is unquestionable that it must be applied equally to all parties.

C. Judge Albright erroneously asserts that the convenience of party witnesses is given "little weight."

Judge Albright has regularly asserted in transfer orders that the "convenience of party witnesses is given little weight." Order Denying Defendant's Motion at 16. This assertion has no support in case law outside of Judge Albright's courtroom. Indeed, this Court previously characterized that statement as a "discordant proposition." *In re Apple Inc.*, Case No. 20-127 (Fed. Cir. June 16, 2020) ("*Apple I*").

The proposition is discordant because it so clearly contradicts the text of the transfer statute. 28 U.S.C. § 1404(a) notes that a transfer may be granted "for the convenience of parties and witnesses." The convenience of party witnesses is not excluded. And in analyzing convenience, this Court has given significant weight to the convenience of party witnesses. *See Genentech* at 1345. Historically, the Western District has also given weight to the convenience of party witnesses. *See, e.g.*, *Coleman v. Trican Well Serv., LP*, 89 F. Supp. 3d 876, 883 (W.D. Tex. 2015).

Even if the convenience of non-party witnesses is given more weight than that of party witnesses, it does not mean that the convenience of party witnesses is given little weight. And where, as here, the vast majority of party witnesses would either find the Northern District of California significantly more convenient or at worst no less convenient than Waco, the convenience of willing witnesses should be weighed in favor of transfer.

D. Judge Albright erroneously asserts that Apple's Austin facility mitigates any inconvenience to Apple's witnesses.

Judge Albright relies on Apple's Austin facility, claiming that Apple witnesses could work from Austin. Setting aside whether working 1500 miles from the rest of your team members is truly as convenient as work alongside them, this analysis ignores that *Volkswagen* addressed "the personal costs associated with being away from work, **family,** and **community.**" *In re Volkswagen of Amer. Inc.*, 545 F.3d 304, 317 (5th Cir. 2008) (emphasis added).

Even if Apple's witnesses can work remotely, they will be separated from their families, friends, and communities for an extended period of time during a trial. And while Apple's Austin facility is closer

to the Waco courthouse than its Cupertino facility, the trip between Waco and Austin still involves multiple hours each day in a car. In contrast, if the trial were in the Northern District of California, those witnesses would be with their co-workers, families, and communities, and would not be faced with the prospect of driving 200 miles each day.

Given these circumstances, it is an "obvious conclusion" that it would be far more convenient for Apple's witnesses to testify at home in the Northern District of California. *In re Volkswagen* at 318.

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. 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.

B. 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). And startups accused of infringement by NPEs report significant operational impacts—delayed hiring, changes in product, difficulty attracting customers and investors, shutting down business lines, or shutting down entire businesses. *Id.* at 461-62; Colleen Chien, *Of Trolls, Davids, Goliaths, and Kings: Narratives and Evidence in the Litigation of High-Tech Patents*, 87 N.C. L. Rev. 1571, 1587-88 (2009) (describing strategic use of patents to prey on smaller companies). For startups reliant on venture capital, the consequences can be even more significant. A survey of venture capital funders found that 100% might refrain from investing in a startup because of a pending patent assertion demand against it. Robin Feldman, *Patent Demands & Startup Companies: The View from the Venture Capital Community*, 16 Yale J.L. & Tech. 236, 243 (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 Apple's petition for mandamus in order to correct the clear errors of the district court.

May 24, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

This brief was printed using a 14 point Century Schoolbook font. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 27. According to Microsoft Word 2019, the word processing system used to prepare this document, the brief contains 3874 words, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f).

May 24, 2021 /s/ Joshua Landau

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CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2021, I caused the foregoing **Brief of the Computer & Communications Industry Association, Engine Advocacy, and ACT | The App Association 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 24, 2021 /s/ Joshua Landau

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