Nos. 22-108, -109.

IN THE

United States Court of Appeals for the Federal Circuit

IN RE VOLKSWAGEN GROUP OF AMERICA, INC.,

Petitioner.

IN RE HYUNDAI MOTOR AMERICA,

Petitioner.

On Petition for a Writ of Mandamus to the
United States District Court for the Western District of Texas
Case Nos. 6:20-cv-01131; 6:20-cv-1125
Hon. Alan D Albright

BRIEF OF ALLIANCE FOR AUTOMOTIVE INNOVATION AS AMICUS CURIAE IN SUPPORT OF MANDAMUS PETITION

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 22-108

Short Case Caption In re Volkswagen Group of America, Inc.

Filing Party/Entity Amicus Curiae

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

Date: 11/05/2021

Signature: /s/ Mark S. Davies

Name: Mark S. Davies

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
Alliance for Automotive Innovation		

☐ 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).

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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).

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In Re Volkswagen Group of America, Inc., No. 21-149 (Fed. Cir. 2021)	StratosAudio, Inc. v. Hyundai Motor America, No. 6:20-CV-01125-ADA (W.D. Tex.)	In re Hyundai Motor America, No. 22-109 (Fed. Cir.)

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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STATEMENT OF INTEREST[1]

Alliance for Automotive Innovation (Auto Innovators) is the principal advocacy group and trade association for the auto industry. Its members include auto manufacturers who together produce nearly 99 percent of the cars and light trucks sold in the United States. Those vehicles are sold in independent franchise dealerships throughout the country, including in many venues where amicus's manufacturer members have no regular and established place of business. Amicus and its members have a strong interest in rules that tailor venue to the manufacturer's place of business—the place alleged infringements would occur—as Congress provided for in the Patent Act. The approach adopted by the district court in the related decisions below undermines that vital interest.[2]

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[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), amicus states that no party's counsel authored this brief in whole or in part. No party, party's counsel, or any person other than amicus and its members or its counsel contributed money intended to fund preparing or submitting this brief.

[2] Amicus is filing this brief in the related cases *In re Volkswagen Group of America*, No. 22-108, and *In re Hyundai Motor America*, No. 22-109.

INTRODUCTION

Most of the cars on the road today are produced by a few dozen auto manufacturers. Those cars are sold to consumers throughout the United States in large part by independent franchise dealers. The work of manufacturers and dealers is complementary: Manufacturers make the cars; dealers buy and then sell them. But manufacturers and dealers are entirely separate entities. Each has their own corporate form and area of business.

Yet in an ongoing series of venue disputes in infringement actions against auto manufacturers, the U.S. District Court for the Western District of Texas has stretched the Patent Act's venue provision to subject manufacturers to suit in any district where an independently owned franchise dealer sells cars.[3] That result is untenable: Dealerships number well over 16,000. While "the Supreme Court has cautioned against a broad reading of the [patent] venue statute," *In re*

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[3] This brief uses "manufacturer" as shorthand to refer to auto manufacturers, distributors, and importers.

Google, 949 F.3d 1338, 1346 (Fed. Cir. 2020), the district court's logic renders venue virtually limitless.

Mandamus is necessary to correct the court's clear error and prevent widespread harm in the auto industry. A writ issues only where (1) the petitioner has no "other adequate means to attain … relief," (2) the right to mandamus is "clear and indisputable," and (3) the court is "satisfied that the writ is appropriate under the circumstances." *Id.* at 1341 (quotation marks omitted). As this Court recently explained, those requirements "are satisfied" when the district court's decision raises "basic," "undecided," and "recurring" legal questions. *Id.* (quotation marks omitted). Questions concerning patent venue in the wake of *TC Heartland LLC v. Kraft Foods Group Brands LLC*, 137 S. Ct. 1514 (2017), have repeatedly met that bar. *See Google*, 949 F.3d at 1341; *In re BigCommerce, Inc.*, 890 F.3d 978, 981 (Fed. Cir. 2018); *In re ZTE (USA) Inc.*, 890 F.3d 1008, 1011 (Fed. Cir. 2018); *In re Cray Inc.*, 871 F.3d 1355, 1358-59 (Fed. Cir. 2017).

Mandamus is warranted here. These petitions present the question whether venue is proper when a manufacturer is sued for patent infringement in a district where it has no business of its own,

but an independently owned franchise dealership can be found. The answer should be no. In general civil litigation, venue is proper anywhere a defendant has "the minimum contacts necessary for establishing personal jurisdiction or for satisfying the doing business standard of the general venue provision, 28 U.S.C. § 1391(c)." *Cray*, 871 F.3d at 1361 (quotation marks omitted). But the patent venue statute is deliberately narrower: Because Congress sought to limit patent venue to districts where the defendant is principally infringing, venue is proper only "where the defendant … has a regular and established place of business," 28 U.S.C. § 1400(b). *Cray*, 871 F.3d at 1361-62. The manufacturer defendants have no factories or corporate offices in the Western District of Texas. The only "place[s] of business" the district court relied on to find venue proper are independent franchise dealerships. That holding mistakes the reality of the automotive economy; disregards the law on what it means for a "regular and established" place of business to belong to "the defendant," *Andra Group, LP v. Victoria's Secret Stores, LLC*, 6 F.4th 1283, 1290 (Fed. Cir. 2021); and undoes the "intentional narrowness" of patent venue in doing so, *ZTE*, 890 F.3d at 1014.

The venue question raised by these petitions is a "basic" one, as this Court has recognized, *see, e.g.*, *Google*, 949 F.3d at 1341-43, and the district court has twice erred in answering it. There can be no doubt the situation "will inevitably be repeated," *BigCommerce*, 890 F.3d at 981—two petitions raise the same question here, seven substantially similar patent venue challenges are pending in district court right now, *see* Volkswagen Pet. at 2 n.2, and three additional manufacturers have been sued in the Western District of Texas by the plaintiffs in these related cases, *see* Hyundai Pet. 8. The stakes are high. The decisions below expose manufacturers to suit almost anywhere in the United States. Review of this issue cannot wait. *See Google*, 949 F.3d at 1342-43 (recognizing preservation of patent venue issues through the regular appellate process is "unlikely" and expense to the parties "substantial").

ARGUMENT

I. The District Court's Venue Holding Is Based On A Fundamental Misunderstanding Of The Relationship Between Auto Manufacturers And Independent Franchise Dealers.

Under this Court's decisions in *Cray* and *Google*, "there are three general requirements to establishing that the defendant has a regular and established place of business" that make venue proper: First,

"there must be a physical place in the district." *Google*, 949 F.3d at 1343 (quotation marks omitted). Second, that place must "be a regular and established place of business," with the defendant's "employee or agent regularly conducting its business" at that place. *Id.* at 1343, 1347 (quotation marks omitted). And third, "it must be the place of the defendant." *Id.* at 1343 (quotation marks omitted).

In the related decisions below, there is no dispute that the manufacturer defendants had no offices, factories, or other business places of their own in the district. The district court determined venue was proper under the second and third requirements based solely on the physical presence of local dealerships.[4] But an independent franchise dealership is not a manufacturer's regular and established place of business: That is not how the automobile economy works, § I.A, nor is it consistent with governing law, § II.B.

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[4] While the district court conducted its agency analysis as an independent fourth requirement for venue, this Court in *Google* explained that agency arises under the second *Cray* factor. 949 F.3d at 1345.

A. Manufacturers and independent franchise dealers are functionally and legally distinct entities.

Two key players get a vehicle from raw material to the car parked outside: manufacturers and dealers.

Manufacturers—international companies like Volkswagen, Hyundai, and amicus's other members—design and build cars and parts. They sell those cars and parts to a particular kind of customer: dealers. A consumer who showed up to a manufacturer's place of business and asked to buy a car would be flat out of luck. All they would see are office buildings or factories.

Dealers—think "Hewlett Volkswagen" or "Greg May Hyundai," running commercials during the local news—sell cars to consumers. As those ads often tout, dealerships tend to be independently owned. Manufacturers generally do not own or lease dealership locations.[5] Instead, individuals who want to become dealers negotiate arms-length agreements with manufacturers to set up a dealership, buying a manufacturer's products to stock. Dealers, in other words, are

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[5] The limited circumstances in which some state laws allow manufacturers to sell directly to consumers are not implicated by either Petition.

manufacturers' customers, not their employees. And dealers conduct their sales business autonomously. They own the cars that they sell, and they sell those cars without approval from the manufacturer. *See, e.g.*, Hyundai Appx133. Similarly, dealers perform all the business operations at their dealerships—engaging with potential customers, hiring and firing employees, securing the premises, and so forth. *See, e.g.*, Volkswagen Pet. 15; Hyundai Pet. 7-8 (describing dealers' independent operations).

As amicus's members can attest, manufacturers have no ability to control or oversee the daily goings on at any particular dealership. A manufacturer has no input in a dealer's staffing decisions and does not manage the lot. Nor do manufacturers determine all the products a dealer sells; a dealer may offer vehicle customizations that the manufacturer has no knowledge of, stock a used car inventory that spans various manufacturers, and even sell vehicles produced by different manufacturers.

Manufacturers and dealers define their working relationship through contract. Several kinds of contractual provisions commonly appear in franchise dealer agreements. For instance, dealers frequently

agree to abide by certain quality control or brand protection measures (as franchisees in other industries frequently do, too). Manufacturers and dealers also typically agree that the franchise does not create any kind of agency relationship between the two parties.

The provisions in Volkswagen and Hyundai's agreements are representative in this regard of industry norms: "Dealer Not an Agent. Dealer will conduct all Dealer's Operations on its own behalf and for its own account. Dealer has no power or authority to act for the Manufacturer," Volkswagen Appx88; dealer has "complete authority to make all decisions on behalf of DEALER with respect to DEALER's operations," Hyundai Appx133. *See also* Volkswagen Pet. 25 & n.17; Hyundai Pet. 7-8; Hyundai Appx168.

The bright line dividing manufacturers from dealers is written into law. Direct vehicle sales to drivers involve a host of complicated issues and most state legislatures regulate those sales in some way. States like Texas expressly preclude manufacturers from directly selling vehicles to consumers, instead reserving that role for dealers: A "manufacturer or distributor" cannot "own an interest in," "operate or control," or "act in the capacity of" a "franchised dealer or dealership."

Tex. Occ. Code § 2301.476(c); *see also* Tex. Occ. Code § 2301.252(a) (only a "franchised dealer" may "engage in the business of buying, selling, or exchanging new motor vehicles"). State laws also prevent manufacturers from exercising other forms of control over dealers and dealerships; in Texas, for instance, manufacturers have little ability to prevent dealers from selling competing products out of the same dealership, Tex. Occ. Code § 2301.472, and cannot "impair the ability of a franchised dealer to use the dealership property as the dealer considers appropriate," *id.* § 2301.4671. Dozens of states have similar laws that reserve direct sales for dealers and police the line between a manufacturer's and a dealer's role. *See, e.g.*, Mich. Comp. Law § 445.1574(1)(i); Ga. Code Ann. § 10-1-664.1(a). By law, as in practice, the business of manufacturers and the business of dealers are discrete.

B. Independent franchise dealerships are not regular and established business places of manufacturers.

Understood properly, the relationship between manufacturers and dealers precludes the district court's conclusion that a dealership is a "regular and established place of business … *of the defendant*" manufacturers. *Cray*, 871 F.3d at 1363 (emphasis added) (quotation

marks omitted). The district court committed two errors, first on ratification and second on agency, in finding otherwise:

First, the district court was wrong to conclude that dealerships are the business places "of the defendant" under the third *Cray* requirement. Volkswagen Appx4-8; Hyundai Appx391-397. Dealerships are not *manufacturers'* places of business—they are the business places of independent franchise dealers.

The "threshold inquiry when determining whether the place of business of one company can be imputed to another, related company is whether they have maintained corporate separateness." *Andra*, 6 F.4th at 1289. Respect for the corporate form is "deeply ingrained in our economic and legal systems," and courts must not collapse the distinction between two separate entities, like manufacturers and dealers, absent exceptional circumstances. *United States v. Bestfoods*, 524 U.S. 51, 61 (1998) (quotation marks omitted). Any discussion of whether a franchisee's dealership belongs to a manufacturer must begin from the foundational premise that manufacturers like Volkswagen and Hyundai are distinct entities from the dealers that sell their cars in the

district. Indeed, Texas law requires the distinction. *See* Tex. Occ. Code § 2301.476(c).

Wholly ignoring that "threshold inquiry," the district court asked only whether the manufacturers had "ratified" dealerships as their own place of business. Volkswagen Appx4-5; Hyundai Appx391-392. *Cray* laid out four relevant considerations for ratification. Applying them illustrates just how far removed manufacturers are from dealerships:

First, manufacturers do not "own[] or lease[]" dealerships, nor do they "exercise[] other attributes of possession or control" over the physical dealership. *Cray*, 871 F.3d at 1363. Texas law limits the ability of a manufacturer to control "the dealership property," Tex. Occ. Code § 2301.4671(1); and as a practical matter, if a manufacturer's employee showed up to a dealership after hours, they wouldn't have a key to open the gate. The second consideration—"whether the defendant conditioned employment on an employee's continued residence," *id.*—does not even apply to manufacturers and dealers. Dealers are manufacturers' customers, not their employees. Third, manufacturers do not "represent[]" that dealerships are their own "place of business in the district," *id.* at 1363-64. No customer expects

to show up at a dealership and find a manufacturing plant in the back. That also speaks to the fourth consideration, "the nature and activity of the alleged place of business of the defendant in the district *in comparison with* that of other places of business of the defendant in other venues," *id.* at 1364. The places manufacturers conduct their business of producing cars are factories and offices, all outside the district.

It is thus no surprise that multiple district courts have determined venue in infringement suits against manufacturers based on dealership locations is inappropriate. *See Omega Patents, LLC v. Bayerische Motoren Weke AG*, 508 F. Supp. 3d 1336, 1342-43 & n.24 (N.D. Ga. 2020); *W. View Rsch., LLC v. BMW of N.A., LLC*, No. 16-2590, 2018 WL 4367378 (S.D. Cal. Feb. 5, 2018); *see also* Volkswagen Pet. 10-21; Hyundai Pet. 27-32.

The district court departed from that established view. Relying on one decision from the Eastern District of Texas, it found ratification based on franchise agreement provisions concerning quality control, for instance, over trademark use and premises maintenance; and based on a search feature on the manufacturers' websites that identified

dealership locations. *See* Volkswagen Appx5-8; Hyundai Appx392-396 (discussing *Blitzsafe Texas, LLC v. Bayerische Motoren Werke AG*, No. 17-cv-00418, 2018 WL 4849345 (E.D. Tex. Sept. 6, 2018), *vacated sub nom. Blitzsafe Texas, LLC v. Mitsubishi Elec. Corp.,* 2019 WL 3494359 (E.D. Tex. Aug. 1, 2019)). Precedent says otherwise. Recognizing that sharing a trademark is a common practice for cooperating businesses, many courts have concluded that it does not give rise to proper venue. *See* Volkswagen Pet. 16 n.14 (collecting cases). The district court's reasoning, moreover, is flatly inconsistent with this Court's recent *Andra* decision, as Petitioners both explain. *See* Volkswagen Pet. 13, 15-16; Hyundai Pet. 31-32. "[T]hat the entities work together in some aspects," enjoy "shared use" of a brand name, require compliance with certain measures of uniformity, and offer a "Find a Store" search on their website "does not detract from the separateness of their businesses." *Andra*, 6 F.4th at 1289-90.

Second, for similar reasons, the court erred in imputing dealerships to manufacturers on the theory that dealers are manufacturers' agents. Volkswagen Appx8-10; Hyundai Appx397-399. This Court explained in *Google* that a "place of business" under the

second *Cray* requirement "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.'" 949 F.3d at 1344-45. Recognizing that dealers are not manufacturers' employees, the district court determined that dealers were agents. That was error.

This Court assesses agency through a three-part test: "(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." *Id.* at 1345 (quotation marks and alterations omitted). That analysis is straightforward here, where each manufacturer-dealer agreement includes a standard provision that expressly provides dealers are "not … agent[s]" for manufacturers. Volkswagen Appx88; *see* Hyundai Appx168. Those agreements speak to all three agency factors. They demonstrate that the parties have not contracted for the kind of control necessary to establish agency under the first prong and that neither party intended to establish an agency relationship under prongs two and three. The contracting parties' practices confirm this commonsense conclusion. As Petitioners explain, they cannot hire or fire any dealers'

employees—an "essential element of an agency relationship," *Andra*, 6 F.4th at 1289—and dealers do not act with manufacturers' authority. *See* Hyundai Pet. 7.

Relying again on the various quality control provisions in the franchise dealership agreements, the district court found the agency conditions satisfied. But again, *Andra* disposes of that reasoning: A company's "close control of its products … does not equate to 'the right to direct or control' employees at the physical … locations in the District." 6 F.4th at 1289; *see* Volkswagen Pet. 22-23; Hyundai Pet. 21-23. The district court's determination also contradicts a wealth of precedent from across the law holding that dealers are not manufacturers' agents. *See, e.g.*, *Bushendorf v. Freightliner Corp.,* 13 F.3d 1024, 1026 (7th Cir. 1993) ("[A]n automobile dealer[,]" who "merely buys goods from manufacturers … for resale to the consuming public," is "not [the manufacturer's] agent."); Volkswagen Pet. at 23 (collecting cases holding dealers are not agents of manufacturers). The district court's reasoning suffers from yet another fatal flaw. It runs headlong into the Texas laws prohibiting manufacturers from operating or controlling dealerships and voiding any contractual agreements to the

contrary. Tex. Occ. Code §§ 2301.476(c), 2301.003(b); *see* Hyundai Pet. 23-24.

Neither the ratification nor agency holdings can be squared with the reality of the auto industry or governing law, and their consequence is stark: The decisions below establish nationwide venue, in direct conflict with the "narrow[]" and "limit[ed]" venue provision Congress enacted. *Cray*, 871 F.3d at 1361.

II. Mandamus Is Necessary To Preserve The Narrow Scope Of The Patent Venue Statute.

Over a century ago, Congress determined venue should be more narrowly circumscribed in patent suits than in general civil litigation. *See TC Heartland*, 137 S. Ct. at 1518-19. The "broader" general venue rule engendered "abuses" by allowing suit where only "isolated cases of infringement" occurred, so Congress "restrict[ed]" venue to districts where infringement occurs in main: those in which a defendant has a "permanent" business location. *Cray*, 871 F.3d at 1361 (quotation marks and alteration omitted). Since then, the "Supreme Court has cautioned against a broad reading of the [patent] venue statute." *Google*, 949 F.3d at 1346. It has instructed that "[t]he 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." *Schnell v. Peter Eckrich & Sons, Inc.*, 365 U.S. 260, 264 (1961) (quotation marks omitted). This Court has repeatedly issued the same warning. *See Andra*, 6 F.4th at 1287; *Google*, 949 F.3d at 1346-47; *Cray*, 871 F.3d at 1361.

The decisions below flout the well-established rule that venue in patent cases should be carefully bounded. Courts to consider venue for action against a manufacturer based on dealership locations have recognized that "[a] finding that venue is proper … would … significantly expand the scope of § 1400(b)." *Omega*, 508 F. Supp. 3d at 1343. Manufacturers dedicate great care to where they establish their places of business, setting up in select locations. But dealerships are everywhere: There are over 16,000 of them in the United States.[6] For Volkswagen brands alone, approximately 650 dealerships are located across the country. Volkswagen Appx20. The district court's rule could make venue proper in any district where one of those hundreds of

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[6] *See* NADA Data, *National Automobile Dealers Association*, https://www.nada.org/nadadata/ (last visited Nov. 3, 2021) (counting 16,658 franchised dealers in mid-2021).

dealers sells a manufacturer's cars, gutting the limits Congress enacted into the patent venue statute.

The consequences of this limitless venue rule have been immediate and severe. This Court has admonished district courts to "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." *Google*, 949 F.3d at 1347. But the decisions below issued a blank check for venue, and plaintiffs are already lining up to cash it. At least seven "threshold" venue motions based on dealership locations are currently pending in district court. *See* Volkswagen Pet. 2 n.2 (collecting cases). And the plaintiff in these cases filed suit against three additional manufacturers, claiming venue is proper based on their dealerships. *See* Hyundai Pet. 8.

On top of generating proscribed litigation burdens, the decisions below muddy the waters of the auto ecosystem. Manufacturers and dealers are distinct and separate entities. The relationships between them are the product of complex negotiations involving state law and arms-length bargaining between manufacturers and dealers. The

district court's decision intrudes in those relationships without care. It treads on the policy of respect for the corporate form by forcing relationship between separate manufacturers and dealers. If the district court's approach is allowed to stand, every arms-length dealer franchise agreement will need to manage exposure to far-flung patent suits and do so on the complex backdrop of state laws. *See, e.g.*, Tex. Occ. Code §§ 2301.453, 2301.455 (restricting manufacturers' ability to manage exposure by closing dealerships); 2301.4671 (restricting manufacturers' ability to manage exposure by controlling dealership premises).

The decisions' effects also create uncertainty beyond the patent venue context. They cast doubt, for instance, on the patent service schema. Under 28 U.S.C. § 1694, which must be read consistently with the patent venue provision, process may be served on an "agent" at the defendant's "regular and established place of business." *See Google*, 949 F.3d at 1344-45 (quotation marks omitted). The district court's agency rulings may suggest manufacturers are susceptible to service at any one of their hundreds of affiliated dealerships. That would be completely unworkable. Beyond the patent context, the court's agency analysis

could open the door to claims of liability against manufacturers for acts of dealers that they have no right or ability to control. *See* Hyundai Pet. 14.

The district court's decision exposes manufacturers to nationwide venue, disrupts the private contracts of manufacturers and dealers, interferes with state law, and throws significant uncertainty into settled processes and relationships. This Court should issue a writ of mandamus to prevent these immediate and threatening consequences.

CONCLUSION

For the foregoing reasons and those set forth in both Petitions, the Court should issue a writ of mandamus vacating the decision and direct the district court to dismiss or transfer the actions.

Dated: November 5, 2021

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This brief complies with the type-volume limitation of Fed. Cir. R. 21(e), because this brief contains 3,824 words.

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