

No. 22-153

**United States Court of Appeals
for the Federal Circuit**

IN RE MONOLITHIC POWER SYSTEMS, INC.,

Petitioner.

*On Petition for Writ of Mandamus to the
United States District Court for the
Western District of Texas
No. 6:21-cv-00655-ADA, Hon. Alan D Albright*

**BRIEF OF
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION,
AS AMICUS CURIAE
IN SUPPORT OF REHEARING *EN BANC***

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CERTIFICATE OF INTEREST

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

Dated: December 14, 2022

/s/ Joshua Landau

Joshua Landau

1. Represented Entities	2. Real Parties in Interest	3. Parent Corporations and Stockholders
Computer & Communications Industry Association	Same	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 fifty years, CCIA has promoted open markets, open systems, and open networks. CCIA members¹ 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.

CCIA’s members are frequently involved in patent litigation, where choice of forum plays a critical role. The rules and practices of a given forum also have significant influence over the number and quality of patent cases filed. In at least one forum, this appears to include generating litigation that would not have otherwise occurred.

CCIA and its members are concerned by the ongoing attempts to expand the venue statute that Congress intended to be construed narrowly. Venue statutes generally are created to “protect the

¹ CCIA’s members are listed at <https://www.ccianet.org/members>.

defendant against the risk that a plaintiff will select an unfair or inconvenient place of trial.” *Leroy v. Great Western United Corp.*, 443 U.S. 173, 184 (1979). The patent venue statute was created specifically to ensure that patent cases would be heard not just at an established place of business of the defendant, but at a place of business where infringement had occurred. Ensuring that cases are heard at their “center of gravity”, as this Court phrases a similar concept in the context of § 1404 transfers, rather than simply because an engineer works from their home in the district and an act of infringement separately occurred in that district, comports with Congress’s intent and the Supreme Court’s understanding of venue. Doing so would also limit abusive patent litigation, or at least channel it to appropriate venues.

CCIA and its members are also concerned that the panel decision’s adoption of a ‘specialized equipment’ test will be interpreted to include ordinary tools like compilers or electronic design software, potentially including specialized software running in the cloud. This could create serious headwinds against remote work due to the risk of being hauled into an inconvenient forum.

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 *amicus* 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 Waco Division of the Western District of Texas saw only three or fewer patent cases filed each year. J. Jonas Anderson & Paul R. Gugliuzza, *Federal Judge Seeks Patent Cases*, 71 Duke L.J. 419, 451 (2021). In 2020, 793 new patent cases were filed in Waco, an increase of more than 39,500%. *Id.*

These cases are not simply instances in which a plaintiff elects to file in a more preferable forum. Recent empirical work suggests that the “increase in litigation was predominantly driven by an influx of cases that would not have been filed but-for the judge's appointment, rather than a geographic reallocation of cases that would have been filed regardless.” Brian J. Love & Christian Helmers, *Welcome to Waco! The Impact of Judge Shopping on Litigation* (forthcoming 2023), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4185189. And this increase reflects, in no small part, the way in which venue and transfer rules have been applied in the Waco

Division. Litigants are sophisticated actors and their choice of venue is intentional.

The panel decision has serious flaws. First, it creates serious concerns regarding remote work at the very moment that remote work has become of serious societal importance and value. Second, it ignores the clear Congressional statements regarding the relationship between the regular and established place of business and the acts of infringement. And finally, as Judge Lourie's dissent explains, it ignores this Court's precedent regarding what constitutes a regular and established place of business.

If the Court does not address these issues at the mandamus stage, petitioner has lost any realistic way to challenge the propriety of the venue, and future litigants are left in a state of uncertainty regarding what constitutes a proper venue. This will continue to generate wasteful litigation in the future, especially as remote work continues to increase. For all these reasons, the Court should take this case *en banc* to provide guidance on this issue, and ultimately should find that venue does not lie in these circumstances.

ARGUMENT

The present petition represents a clear case for *en banc* review. The district court has distorted this Court's case law, ignoring relevant precedent like *In re Cray Inc.*, 871 F.3d 1355 (Fed. Cir. 2017) and *Celgene Corp. v. Mylan Pharms. Inc.*, 17 F.4th 1111 (Fed. Cir. 2021). And it has done so in contravention of Congress's clear intent for the statute codified at 28 U.S.C. § 1400(b).

While the panel decision states that this error could be fixed during post-trial appeals, the cold reality is that this type of error will almost never be appealed. Companies will not spend their limited appellate time and page limit debating venue instead of arguing case-dispositive issues like infringement or validity.

Beyond the specific test applied here, this Court should consider taking this case *en banc* to determine if the acts of infringement must be related to the regular and established place of business in order for venue to lie. While this Court has to date not read § 1400(b) to require a relationship between the alleged acts of infringement and the regular

and established place of business,² the legislative history suggests that the statute was intended to require such a relationship. Such an interpretation would ensure that litigation takes place at the “center of gravity” of the alleged infringement, not in an inappropriate and irrelevant forum.

Finally, if it is to be used in the future, further guidance is sorely needed on the “specialized equipment” test used in the district court and adopted by the panel. This issue will continue to recur given the increasing prevalence of remote work, and will continue to generate litigation over proper venue. Without such guidance, the existing uncertainty will likely lead to headwinds against remote work.

² The panel decision states the Federal Circuit has held that “§ 1400(b) does not require a causal relationship between a defendant’s regular and established place of business and the acts of infringement.” However, this holding was in a non-precedential order and the order did not focus on this issue. Per Federal Circuit Rule of Appellate Procedure 32.1(d), this Court “will not give one of its own nonprecedential dispositions the effect of binding precedent.” *En banc* review would be appropriate to settle this issue of critical importance.

I. Issues of Venue Are Best Addressed Early, Rather Than Relying on an Unlikely Appeal After Final Decision

The panel decision states “post-judgment appeal is often an adequate alternative means for attaining relief.” *In re Monolithic Power Systems, Inc.*, 50 F.4th 157, 159 (Fed. Cir. 2022). But such an approach unnecessarily multiplies the cost and amount of litigation, resulting in duplicate cases. Millions of dollars and thousands of hours of party and judicial time will be spent on an initial trial that, if venue turns out to have been improper after all, is a nullity. Contributing to court congestion and increasing the cost of patent litigation helps neither the parties nor the court. Pinning a defendant in an improper venue, under the logic that the defendant can obtain a ruling of improper venue on appeal in order to have the case reheard in a new venue, simply ignores the realities of modern litigation. Indeed, at least three members of this Court, Judges Lourie, Newman, and Reyna, have previously expressed concerns regarding exactly this issue. *See In re Google LLC*, 914 F.3d 1377, 1381 (Fed. Cir. 2019) (Reyna, J., dissenting).

This is particularly concerning given that venue exists to “protect the defendant against the risk that a plaintiff will select an unfair or

inconvenient place of trial.” *Leroy v. Great Western United Corp.*, 443 U.S. 173, 184 (1979). Defendants generally do not seek to incur the millions of dollars in additional expense that a second trial in a different court would create by arguing improper venue after a full trial has concluded, opting instead to spend their limited time, resources, and page count on critical issues like non-infringement and invalidity. It is thus unsurprising that CCIA was able to identify only a single case in the five years since *T.C. Heartland* in which a district court determination that venue was proper was reviewed on final appeal, despite the innumerable number of motions for dismissal and transfer on this topic. *See BASF Plant Science v. CSIRO*, 28 F.4th 1247 (2022).

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 an action for infringement be brought either in the district in which a defendant resides or in a district where the defendant both “has committed acts of infringement” and “has a regular and established place of business.” That exact phrase, as it was originally enacted in 1897, was intended to make “a man punishable at the place where he commits the wrong.” 29 Cong. Rec. 1902 (1897) (statement of

Rep. Dalzell). In doing so, Congress sought to ensure that venue would be appropriate “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) (emphasis added). Monolithic has allegedly committed acts of infringement; Monolithic allegedly has a place of business in the Western District of Texas in the form of the homes of four employees. Bel Power’s venue filing made no attempt to show any link between the alleged infringement and any of the employee’s homes, and the district court neither required nor found such a link.

Further, the patent venue statute 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). The Senate concurred in this understanding, stating that it would allow patent owners to sue locally when a defendant was “infringing *in a business* established near the plaintiff.” 29 Cong. Rec. 2719 (1897) (statement of Sen. Platt) (emphasis added).

In short, patent venue was intended to help avoid the inconvenience of a lawsuit being filed far from where the relevant events had occurred. This case represents an example of precisely what the venue statute was intended to avoid.

The simplest remedy for this is for this Court, acting *en banc*, to restore that original understanding of the patent venue statute, requiring not just that an act of infringement have occurred and a regular and established place of business exist in a location, but that the business itself be related to the act of infringement. This alone would simplify much of the analysis regarding what constitutes a regular and established place of business. An employee's home would be irrelevant unless the infringement actually occurred in their home or as a result of that employee's actions. The Court could also note that a venue where the two elements coexist will have significantly stronger interests 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 interest factor of § 1404 transfer analysis.

The Court’s guidance, applied to the facts of this case, would provide much-needed certainty to companies that make products and reduce wasteful disputes over this question. A clearer understanding of how the presence of sales employees or sales offices affects venue is critically important for an issue, like this one, that will recur frequently.

Under either approach, a clear link between the two elements of § 1400(b) would help to reduce the number of complex, fact-specific determinations that seek mandamus review, and would provide additional clarity and certainty for plaintiffs and defendants alike.

III. The Panel Decision’s Interpretation of the Venue Statute Creates Serious Uncertainty Regarding Remote Work

In the past three years, the existing trend towards remote work has only accelerated. But treating an employee’s home as a “regular and established place of business” creates the potential for a serious negative impact on employers. Employers will likely limit or eliminate remote work if they face uncertainty regarding appropriate venue as a result. This is particularly likely given that employers see relatively fewer benefits from remote work compared to their employees, while they would experience all of the harms of such a rule.

In addition, the panel decision raises new concerns and complications. The panel relied on the fact that some of the equipment is of a type “which is not typically found in a generic home office.” However, that logic applies far more broadly than is appropriate. For example, if a remote employee uses electronic design software for semiconductor design, or compilers to create specialized programs for customers, that would seem to meet the loose test proposed by the panel decision. Specialized document management systems for lawyers and chemical compound libraries used by biochemists would qualify under this test. A test chef’s office would include cookware and appliances, also atypical in a generic home office. Indeed, most remote employees will utilize some form of specialized software or equipment. A test that turns on the presence of such equipment is either overbroad or completely indeterminate. Neither outcome is good for the development of the law or for the increasing prevalence of remote work.

CONCLUSION

A well-known proverb, dating back to at least 1546 in one form or another, is “if you give them an inch, they’ll take a mile.” John Heywood, *Proverbs Part 2*, Ch. IX (1546). An inch of venue in this case will lead to a mile of plaintiffs trying the same approach.

This Court should grant Monolithic’s petition for *en banc* review in order to correct the clear errors of the district court and the panel decision, and to further clarify the limited scope of the patent venue statute by explicitly linking the “regular and established place of business” and “acts of infringement” requirements.

December 14, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2022, I caused the foregoing **Brief of the Computer & Communications Industry Association as *Amicus Curiae* in Support of En Banc Rehearing** 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.

December 14, 2022

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