No. 16-341

In the Supreme Court of the United States

TC HEARTLAND LLC, D/B/A HEARTLAND FOOD PRODUCTS GROUP,
Petitioner,
v.
KRAFT FOODS GROUP BRANDS LLC,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

28 U.S.C. § 1400(b), the patent venue statute, provides that a defendant can be sued for patent infringement in any district in which it "resides" without defining that term. 28 U.S.C. § 1391(c) was revised by Congress in 1988 to define the residence of a corporate defendant "[f]or purposes of venue under this chapter"; "this chapter" to which § 1391(c) so referred was Chapter 87 of Title 28, which included (and still includes) § 1400(b). In 2011, Congress again amended § 1391(c) to extend the reach of its definition of corporate residence even further, such that the definition now applies "[f]or all venue purposes." Has the Federal Circuit nevertheless erred by holding that the definition of corporate residence in § 1391(c) applies to the term "resides" in § 1400(b)?

CORPORATE DISCLOSURE STATEMENT

Kraft Heinz Foods Co. is the parent company of Kraft Foods Group Brands LLC. No publicly traded company owns 10 percent or more of Kraft Foods Group Brands LLC's stock. Kraft Heinz Foods Co. is indirectly wholly owned by The Kraft Heinz Company, a publicly traded company.

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STATEMENT

Petitioner and the amici describe at length concerns with forum shopping in patent cases, primarily the disproportionate number of cases brought in the Eastern District of Texas, often by patent-assertion entities. Respondent does not dispute the existence of patent venue shopping. However, the task of patent venue reform lies squarely with Congress. The judiciary's role is to enforce the straightforward statutory framework currently in place, and the Federal Circuit decisions challenged here are scrupulously faithful to that framework. 28 U.S.C. § 1400(b), the patent venue statute, permits a defendant to be sued in any district where it "resides," without defining that term. Since 1988, 28 U.S.C. § 1391(c) has defined a corporation's residence as any district where it is subject to personal jurisdiction. There is no question that the § 1391(c) definition embraces § 1400(b). Congress's 1988 amendments to § 1391(c) made that provision apply "[f]or purposes of venue under this chapter" (*i.e.*, Chapter 87 of Title 28, which includes § 1400(b)). In 2011, Congress broadened the reach of § 1391(c) by making it apply "[f]or all venue purposes." In holding that § 1391(c) informs the meaning of "resides" in § 1400(b), the Federal Circuit has simply enforced the plain and unambiguous statutory text.

Petitioner incorrectly suggests that the Federal Circuit's decisions in this case and in *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574 (Fed. Cir. 1990), *cert. denied*, 499 U.S. 922 (1991), conflict with *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222 (1957). *Fourco* addressed the relationship

between § 1400(b) and the *then-current* version of § 1391(c). Section 1400(b) provided then (as it still does today) only two choices for where a patent infringement suit "may be brought," one of them being the district in which the defendant "resides." In contrast to the post-1988 versions of § 1391(c), the earlier version of that provision did not simply define corporate residence but actually designated the districts where a corporation generally "may be sued." *Fourco* addressed whether the additional venue options in § 1391(c) "supplemented" the two venue options in § 1400(b) and held that they did not.

However, *Fourco* did not address, much less somehow restrict, Congress's ability to change the *meaning* of "resides" in § 1400(b) by defining corporate residence in § 1391(c) and expressly extending that definition to a group of statutes that included § 1400(b). That is precisely what Congress did in 1988. Congress revised § 1391(c) and made it purely definitional—it now defined the residence of a corporation as any district in which it was amenable to personal jurisdiction. The provision no longer contained any substantive rules authorizing suit against corporations in certain venues. Crucially, Congress also added the phrase "[f]or purposes of venue under this chapter" immediately before the new definition of corporate residence, "this chapter" referring to Chapter 87 of Title 28, encompassing §§ 1391-1412, including § 1400.

In *VE Holding*, the Federal Circuit held that this language "clear[ly]" and "unambiguous[ly]" made the new § 1391(c) definition apply to § 1400(b). 917 F.2d at 1581. *Fourco*'s description of § 1400(b) as the "sole and exclusive provision controlling [patent] venue," 353

U.S. at 229, did not require the court to reach a contrary result. The 1988 amendments did not purport to divest § 1400(b) of that status, as it continued to "control[]" venue in patent infringement cases by providing the only two venue choices for such cases, the district where the defendant "reside[d]" being one of them. The new § 1391(c) operated only to *define* that term, which was not defined in § 1400(b) itself, and it did so by employing "classic and exact language of incorporation." *VE Holding*, 917 F.2d at 1579. Thus, for purposes of § 1400(b), a corporation now "reside[d]" not only in the state of its incorporation (the meaning attributed to "resides" by *Fourco*) but in any district where it was amenable to jurisdiction. Nothing in *Fourco* precluded Congress from changing the meaning of "resides" in this manner.

Petitioner's assertion that the Federal Circuit erred by construing "[f]or purposes of venue under this chapter" as embracing § 1400(b), Pet. 23-26, is meritless. Section 1400(b) plainly was, and still is, located in "this chapter." Indeed, the drafters of the 1988 amendments in the Judicial Conference, where the amendments originated, indisputably intended the amended § 1391(c) to apply to 1400(b). Petitioner does not identify any ambiguity in the statutory text or dispute that "[t]he legislative history of the 1988 amendment reveals *no* legislative intent . . . contrary to the [text's] plain meaning." *VE Holding*, 917 F.2d at 1580 (emphasis in original). It points out only that the legislative history did not expressly confirm what was already made unmistakably clear in § 1391(c)'s text. Pet. 24. Yet "legislative history need not confirm the details of changes in the law effected by statutory language before [this Court] will interpret that

language according to its natural meaning." *Morales v. TWA*, 504 U.S. 374, 385 n.2 (1992) (internal citations omitted).

The 2011 amendments to § 1391(c)—the subject of the decision below—reaffirm that § 1391(c) defines "resides" in § 1400(b). Contrary to Petitioner's assertion, Pet. 26, the 2011 amendments did not "repeal" the phrase "[f]or purposes of venue under this chapter." Though the Petition fails to mention this, Congress replaced that phrase with even broader language, "[f]or all venue purposes," and the accompanying House Report left no doubt that the amended § 1391(c) "would apply to all venue[]statutes," not just those in Chapter 87 of Title 28.

Petitioner's assertion that the phrase "[e]xcept as otherwise provided by law" in new subsection (a) of § 1391 was meant to restore *Fourco*'s construction of "resides" to § 1400(b) is, as the decision below found, "utterly without logic or merit." App. 6a. That construction became obsolete in 1988 when Congress redefined "resides" in § 1400(b) by amending § 1391(c). It was *not* the "law" at the time of the 2011 amendments, and Petitioner has presented no evidence that Congress understood it to be the "law" or intended to restore it to that status.

Thus, Petitioner has presented no question of statutory construction that merits review. The policy concerns raised by Petitioner and the amici are properly addressed to Congress, which is acutely aware of such concerns. Congress has recently considered several legislative solutions, and proposed legislation is now pending in both the House and the Senate. Notably, the proposals offered in Congress and the

academic literature would not return patent venue to its pre-1988 state, though that is precisely what Petitioner urges this Court to do. Indeed, before the 1988 amendments, the patent venue regime was subject to widespread criticism (including from the American Bar Association) for leaving patent cases far behind the curve of evolving venue standards.

Finally, this case is a particularly poor vehicle for addressing these issues. Respondent developed and practices the patented technology. It filed suit not in the Eastern District of Texas but in Delaware, where it is incorporated and where Petitioner, a nationwide infringer, has directed infringing products. Moreover, a ruling on the merits by this Court is unlikely to affect the dispute between the parties. As a result of *Petitioner's* vigorous and successful opposition to *Respondent's* motion to stay the case pending the resolution of the parallel *inter partes* review of the patents-in-suit, the parties have now completed extensive discovery, and the trial is set for January 2017. Thus, largely due to Petitioner's own advocacy, the district is very likely to issue a final judgment long before this Court could consider the venue question on the merits.

REASONS FOR DENYING THE WRIT

I. The Federal Circuit Precedent Does Not Conflict With *Fourco* and Correctly Interprets the Post-1988 Statutory Framework.

A. *Fourco* Did Not Embed a Permanent Definition of Corporate Residence Into § 1400(b).

Petitioner suggests that *Fourco* essentially froze a particular restrictive meaning of corporate residence into § 1400(b). *See* Pet. 13-14. Taken to a logical extreme, Petitioner's argument would suggest that Congress could displace *Fourco*'s construction of "resides" only by making the definitional change explicit in § 1400(b) itself—that is, it could not accomplish the same result by defining corporate residence in § 1391(c) and incorporating that definition into § 1400(b). Petitioner misreads *Fourco*. That case did not purport to permanently insulate § 1400(b) from the reach of general venue definitions. Indeed, Petitioner has cited *no* case restricting Congress's ability to amend legislation in this manner. *Fourco* held only that the special patent venue rules in § 1400(b) designating where patent infringement cases "may be brought" were not "supplemented" by a venue rule in the then-current § 1391(c) that designated where a corporation generally "may be sued." *Fourco* did not speak to, much less restrict, Congress's ability to change the meaning of "resides" in § 1400(b), with respect to corporate defendants, by revising § 1391(c) to include a definition of corporate residence that expressly embraced § 1400(b).

At the time of *Fourco*, § 1391 (enacted as part of the 1948 revision and recodification of the Judicial Code) authorized venue in diversity cases in "any judicial district in which all of the plaintiffs or all of the defendants reside[d]" and, in federal-question cases, in "only the judicial district where all defendants reside[d]." These general venue rules for diversity and federal-question cases were set forth in subsections (a) and (b), respectively. 28 U.S.C. §§ 1391(a)-(b) (1958). Section 1391(c) made additional venue choices available in cases against corporations. It provided that "[a] corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes." Thus, under § 1391(c), a corporate defendant could be sued not only where it "resided" (*i.e.*, where it was incorporated)[1] but also where it was "licensed to do business" or was "doing business."

28 U.S.C. § 1400(b), the special patent venue statute, was also enacted as part of the 1948 Judicial Code. At the time of *Fourco*, it provided (as it does today) only two choices for where patent infringement cases "may be brought": "the judicial district where the defendant resides" and the district "where the defendant has committed acts of infringement and has a regular and established place of business." Section 1400(b) did not distinguish between individual and corporate defendants; the same venue choices applied in cases against either.

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[1] A corporation traditionally "resided" in the state of its incorporation. *See Shaw v. Quincy Mining Co.*, 145 U.S. 444, 448 (1892).

Fourco addressed whether § 1400(b)'s two options for where patent infringement cases "may be brought" were "supplemented" by the additional options in § 1391(c) for where a corporation generally "may be sued." *See Fourco*, 353 U.S. at 228. The respondents argued that § 1391(c) "should be read with, and as supplementing, § 1400(b)," because "its terms include[d] all actions—including patent infringement actions—against corporations"; that is, because it addressed where "[a] corporation may be sued" regardless of the cause of action. *Id.* *Fourco* held that the additional venue choices in § 1391(c) did not "supplement" the choices in § 1400(b), citing the principle that "[h]owever inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment." *Id.* at 228-29 (internal quotation marks and citations omitted).

The only matter "specifically dealt with" in § 1400(b) was the designation of districts where patent infringement cases "may be brought." Section 1400(b) did not "specifically deal[]" with the definition "resides" (and never has). *Fourco* thus held that the *substantive venue rule* in § 1400(b) providing two venues where patent cases "may be brought" were not "supplemented" by the substantive venue rule in the first clause of § 1391(c) providing where corporations generally "may be sued." *Fourco* did *not* directly address the import of § 1391(c)'s second, ostensibly definitional clause ("and such judicial district shall be regarded as the residence of such corporation for venue purposes"). Indeed, this second clause was essentially "surplusage since the term 'residence' was not used in the first clause as one of the bases for venue." *VE*

Holding, 917 F.2d at 1578. Thus, while the Second Circuit in *Fourco* had framed the question as whether "proper construction 'require[d] . . . the insertion in' § 1400(b) 'of the definition of corporate residence from' § 1391(c)," 353 U.S. at 223-22, this Court took a different approach, framing the issue as whether the substantive rule in the first clause of § 1391(c) addressing where "[a] corporation may be sued" supplemented the venue options available to a patent infringement plaintiff under § 1400(b).

This approach was consistent with *Stonite Products Co. v. Melvin Lloyd Co.*, 315 U.S. 561 (1942). *Stonite* addressed whether the venue choices in the special patent venue statute, then § 48 of the Judicial Code (the predecessor to § 1400(b)), were "supplemented" by additional venue choices then available under § 52 of the Judicial Code, a general venue provision. *Id.* at 561-62. Much like § 1400(b), § 48 authorized patent infringement suits "in the district of which the defendant is an inhabitant, or in any district in which the defendant . . . shall have committed acts of infringement and have a regular and established place of business." Meanwhile, § 52 permitted a defendant to be sued in a district where it did *not* reside provided a co-defendant resided in that district and both defendants resided in the same state. *Id.* at 562. *Stonite* held § 52 did not "supplement" § 48 by authorizing an additional venue alternative in patent cases involving multiple defendants. *Id.* at 566-67.

Fourco described the question presented as "not legally distinguishable" from the question in *Stonite*: it was once again whether the additional venue choices available under a general venue provision

"supplement[ed]" the choices available under the special patent venue statute. *Fourco*, 353 U.S. at 224. In particular, it was whether the rule in the then-current § 1391(c) that a corporation "may be sued" wherever it was "licensed to do business" or was "doing business" supplemented the venue choices provided in § 1400(b) in cases involving corporate defendants. *Fourco* held that the *substantive* venue rules in § 1400(b), the statute "specifically deal[ing] with" where a "civil action for patent infringement may be brought," were not "supplemented" by the additional venue alternatives in the first clause of § 1391(c).

In contrast, the issue here is not whether the substantive patent venue rules in § 1400(b) are "supplemented" by the substantive venue rules in § 1391. "[I]t is undisputed that § 1400[(b)] is a specific venue provision pertaining to patent infringement suits." App. 7a. This case instead addresses what the term "resides" in § 1400(b) means, *post-1988*, with respect to corporate defendants—a matter not "specifically dealt with" in § 1400(b). *See id.* *Fourco* provides no answer to that question. Contrary to Petitioner's assertion, it did not hold that the meaning of "resides" in § 1400(b) was fixed in stone. That *Fourco* attributed no significance to the superfluous language in the second clause of the then-current § 1391(c) does not suggest otherwise. At most, it reflects the fact that § 1391(c), as it then existed, was not sufficiently specific to displace the traditional definition of corporate residence that was historically applied in patent cases. *Fourco* cannot be read as embedding into § 1400(b) a permanent definition of corporate residence that would be impervious to future changes to § 1391(c).

B. *VE Holding* Correctly Held That Congress's 1988 Amendments to § 1391(c) Changed the Meaning of "Resides" in § 1400(b).

In 1988, Congress amended § 1391(c). *See* Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, § 1013, 102 Stat. 4642, 4669 (1988) (the "1988 Act"). Section 1391(c) now consisted of two sentences, the first of which read as follows:

> (c) *For purposes of venue under this chapter*, a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced.

Id. (emphasis added).[2] Thus, Congress changed § 1391(c) in at least three ways. First, the new § 1391(c) became purely definitional; it no longer contained any substantive venue rules authorizing plaintiffs to sue corporate defendants in certain districts. Second, the definition of corporate residence was broadened beyond the districts where the corporation was "incorporated," "licensed to do business," or "doing business" to include "any judicial district in which it is subject to personal jurisdiction." Third, Congress inserted the phrase "[f]or purposes of venue under this chapter" immediately before the new definition.

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[2] The second sentence addressed how the district in which a defendant corporation is subject to personal jurisdiction would be determined when the corporation was amenable to personal jurisdiction in a multi-district state.

In 1990, the Federal Circuit held that this new definition "clear[ly]" and "unambiguous[ly]" applied to § 1400(b), since that provision was part of Chapter 87 of Title 28 (the "chapter" referred to in the amended § 1391(c)). *VE Holding*, 917 F.2d at 1581. Accordingly, "the meaning of the term 'resides' in §1400(b) ha[d] changed" since *Fourco*. As applied to a corporate defendant, that term now encompassed not only the district where the corporation was incorporated but also any district where it was subject to personal jurisdiction. *Id.* at 1575.[3] This Court denied certiorari. *Johnson Gas Appliance Co. v. VE Holding Corp.*, 499 U.S. 922 (1991).

Petitioner criticizes *VE Holding* on two grounds. First, it asserts that *VE Holding* conflicts with *Fourco* because it held that, for purposes of § 1400(b), a defendant corporation could "reside" outside the state of its incorporation. Pet. 14-15. That *Fourco* and *VE Holding* reached different conclusions about the meaning of "resides" in § 1400(b) is indicative not of any conflict but rather the changes that Congress made to § 1391(c) in the intervening 33 years. Second, Petitioner asserts that *VE Holding* misread the import of the "[f]or purposes of venue under this chapter" language. It suggests this language did not require extending the § 1391(c) definition to § 1400(b). Pet. 23-26. However, Petitioner offers no plausible basis for

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[3] This change did not render superfluous the other choice of venue in § 1400(b): the district "where the defendant has committed acts of infringement and has a regular and established place of business." *VE Holding*, 917 F.2d at 1580 n.17. That alternative "remain[ed] operative with respect to defendants that are not corporations." *Id.*

interpreting the phrase as somehow embracing all of Chapter 87 of Title 28 *except* § 1400(b).

1. There Is No Conflict Between *VE Holding* and *Fourco*.

Petitioner accuses *VE Holding* of "openly reject[ing]" and even "overrul[ing]" *Fourco*. Pet. 14. *VE Holding* did no such thing. It determined only that *Fourco*'s interpretation of "resides" in § 1400(b) had been superseded by an act of Congress, namely the 1988 Act, which provided in "clear" and "unambiguous" terms that the revised definition of corporate residence in § 1391(c) would apply to *all* of Chapter 87 of Title 28. 917 F.2d at 1580. *Fourco* addressed the relationship between § 1400(b) and § 1391(c) when the language of § 1391(c) was too "non-specific" to permit the conclusion that Congress had intended for any definitional language in that provision to inform the meaning of "resides" in § 1400(b). *Id.* at 1579. After the 1988 Act, § 1391(c) "as it was in *Fourco* [was] no longer." *Id.* Congress had inserted the phrase "[f]or purposes of venue under this chapter"—the kind of "exact and classic language of incorporation" that was missing in the pre-1988 § 1391(c)—immediately before the new general definition of corporate residence, revealing "a clear intention" to apply that definition to § 1400(b). *Id.* at 1579-80.

Fourco's description of § 1400(b) as "the sole and exclusive provision controlling [patent] venue," 353 U.S. at 229, does not suggest a conflict with *VE Holding*. Section 1400(b) still "control[s]" venue in patent infringement cases insofar as it provides the venue choices in such cases—any district where the defendant "resides" and any district where the

defendant "has committed acts of infringement and has a regular and established place of business." As amended in 1988, § 1391(c) did not "establish[] a patent venue rule separate and apart from that provided under § 1400(b)" but rather "only operate[d] to define a term in § 1400(b)" that was nowhere defined in § 1400(b) itself. *VE Holding*, 917 F.2d at 1580; *see also* App. 7a. Thus, nothing in *VE Holding* conflicts with the principle that § 1400(b) is "controlling" in patent infringement cases.

In any event, in the years after *Fourco*, this Court qualified *Fourco*'s description of § 1400(b) as "controlling." *Brunette Machine Works, Ltd. v. Kockum Industries, Inc.*, 406 U.S. 706, 706-07 (1972), held that § 1400(b) did *not* control venue in patent infringement cases in which the defendant was an alien. Instead, venue in such cases was governed by a general venue statute, 28 U.S.C. § 1391(d), which then provided that "an alien may be sued in any district." *Id.* *Brunette* distinguished *Fourco* on the grounds that § 1391(d) "stat[ed] a principle of broad and overriding application," whereas the version of § 1391(c) addressed in *Fourco* had "merely ma[de] an adjustment in the general venue statute." *Id.* at 714. A "principle of broad and overriding application" is exactly what Congress inserted into § 1391(c) in the 1988 Act by expressly providing that the revised definition of corporate residence would apply not just in cases governed by the general venue statute but also in any cases governed by any special venue statute contained in Chapter 87 of Title 28. *Brunette* confirms that *Fourco* does not deprive Congress of the ability to modify the meaning of words in § 1400(b) by these means.

To read *Fourco* as requiring any changes to the meaning of "resides" in § 1400(b) to be made explicit in the text of § 1400(b) itself, as Petitioner proposes, would impose a serious "disablement upon the Congress'[s] ability to enact or amend legislation." *VE Holding*, 917 F.2d at 1579. *Fourco* no more precluded Congress from redefining the meaning of "resides" via changes to § 1391(c) than it precluded a legislative redefinition of any other term or phrase in § 1400(b) (for example, "a regular and established place of business") by the same means.

2. *VE Holding* Correctly Interpreted the 1988 Revisions to § 1391(c).

Also meritless is Petitioner's suggestion that the Federal Circuit misinterpreted the 1988 amendments to § 1391(c). *VE Holding* faithfully applied the principle that "where . . . the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989). This Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992)). While Petitioner challenges *VE Holding*'s statutory interpretation on several grounds (none of them valid, as explained below), conspicuously missing from the Petition is a plausible *textual* basis for reading "[f]or purposes of venue under this chapter" to somehow mean "for purposes of everything in this chapter *except* § 1400(b)."

Petitioner surely would not challenge *VE Holding*'s result had the amended § 1391(c) begun with "[f]or purposes of venue under this chapter, including § 1400(b)." The absence of such obvious surplusage did not mean that § 1391(c) was inapplicable to § 1400(b). Rather, the lack of any clear indication in § 1391(c) that § 1400(b) *would be exempted* is conclusive evidence of congressional intent to apply the new definition of corporate residence to § 1400(b). "Certainly it would not be sensible to require Congress to say, 'For purposes of this chapter, *and we mean everything in this chapter . . .*,'" in order to accomplish this objective. *VE Holding*, 917 F.2d at 1579 (emphasis in original).

Petitioner dismisses the insertion of the "[f]or purposes of venue under this chapter" language as a "trivial stylistic language," because the phrase "for venue purposes" had appeared in the second clause of the pre-1988 version of § 1391(c) ("and such judicial district shall be regarded as the residence of such corporation for venue purposes"). Pet. 24. The change was neither "trivial" nor merely "stylistic." "For purposes of venue *under this chapter*" was the kind of "exact and classic language of incorporation" that made it unmistakably clear where the definition of corporate residence would apply. *VE Holding*, 917 F.2d at 1579 (emphasis added). In contrast, the vague and ambiguous pre-1988 phrase "[f]or venue purposes" found in the essentially superfluous second clause of § 1391(c), *see supra* at 8-9, did not amount to such "exact and classic language of incorporation" and left it unclear whether the second clause embraced only the general venue provisions of §§ 1391(a) and (b) (dealing with diversity and federal-question cases, respectively) or special venue provisions outside § 1391 as well.

Petitioner also suggests that the 1988 Act did not "clearly express[]" an intent to change the existing law. Pet. 24. "[T]he best evidence of Congress's intent is the statutory text." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2583 (2012). The phrase "[f]or purposes of venue under this chapter" provides an abundantly clear expression of congressional intent to extend the general definition of corporate residence to § 1400(b). *VE Holding*, 917 F.2d at 1581. Ultimately, Petitioner neither identifies any flaw in *VE Holding*'s textual analysis nor points to anything in the legislative history of the 1988 Act indicating that Congress meant to exclude § 1400(b) from the reach of § 1391(c). Indeed, the legislative history of the 1988 Act "reveals *no* legislative intent . . . contrary to the [statute's] plain meaning." *Id.* at 1580 (emphasis in original).

Petitioner suggests only that the legislative history did not expressly confirm what was already made clear in the statute's text. Pet. 24-25. However, "it would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute." *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 592 (1980). Accordingly, "legislative history need not confirm the details of changes in the law effected by statutory language before [this Court] will interpret that language according to its natural meaning." *Morales*, 504 U.S. at 385 n.2; *see also Whitfield v. United States*, 543 U.S. 209, 215-16 (2005) ("Given the clarity of the text, mere silence in the legislative history cannot justify reading an overt-act requirement, or a cross-reference to § 371, into § 1956(h).").

Moreover, while the contemporaneous legislative materials did not belabor the point made explicit in the amended § 1391(c)'s text, the amendment's evolution in the Judicial Conference of the United States, where it originated, demonstrates that its drafters intended it to accomplish exactly what *VE Holding* said. In 1984, the Judicial Conference's Subcommittee on Federal Jurisdiction circulated a draft proposal for amending § 1391(c) to address perceived problems with corporate venue.[4] In addition to expanding the definition of a corporation's residence to "any judicial district in which it is subject to personal jurisdiction," the initial proposal would have inserted the phrase "[f]or purposes of Subsections (A) and (B)" (*i.e.*, §§ 1391(a) and (b), dealing with venue in diversity and federal-question cases, respectively) immediately before the new definition.[5] The full Subcommittee adopted the substance of the proposal but, notably, replaced the prefatory language with "for purposes of venue under this chapter" before submitting it to Congress.[6]

As noted in *VE Holding*, Professor Edward H. Cooper, the Subcommittee's official reporter, confirmed in a memorandum to the Subcommittee that the new definition would apply to § 1400 and the rest of Chapter 87:

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[4] *See* Alan B. Rich et al., *The Judicial Improvements and Access to Justice Act: New Patent Venue, Mandatory Arbitration and More*, 5 BERKELEY TECH. L.J. 311, 317 (1990).

[5] *Id.* at 318.

[6] *Id.* at 319.

> The [new] definition of corporate residence in § 1391(c) now provides a basis for applying the substantial number of venue statutes enacted as part of various substantive federal laws. As a matter of caution, the proposal limits its definition of residence to the venue provisions gathered in Chapter 87 of the Judicial Code, *28 U.S.C. §§ 1391 through 1412*.

917 F.2d at 1574 (emphasis in original). The drafters of the amended § 1391(c) unquestionably intended the new definition of corporate residence to apply to all of Chapter 87 of Title 28, with no exception for § 1400(b). Their views are entitled to no less weight than those of the drafters of the 1948 revisions of the Judicial Code, on which *Fourco* placed heavy emphasis. *See* 353 U.S. at 226-29 (discussing Revisers' Notes).

Petitioner faults *VE Holding* for assuming the existence of "an elephant in a mousehole," the supposed "elephant" being the forum-shopping abuses allegedly made possible by that "revolution[ary]" decision. Pet. 24-25. However, Petitioner is able to discern this "elephant" only with hindsight. When *VE Holding* was decided in 1990, the notion that Congress would bring patent venue in closer harmony with general venue standards could hardly be described as "revolution[ary]." Indeed, as early as 1972, this Court observed that "changes in the general venue law ha[d] left the patent venue statute far behind." *Brunette*, 406 U.S. at 713 n.13; *see also infra* at 31-32.

The disproportionate concentration of patent cases in the Eastern District of Texas—the main criticism leveled at the current regime by Petitioner and the amici—has resulted from a combination of several post-

VE Holding developments, including the adoption of plaintiff-friendly local patent rules in that district and the proliferation of patent-assertion entities that manufacture transparently opportunistic connections to that jurisdiction in order to avail themselves of plaintiff-friendly rules and juries.[7] Indeed, it was not until the past decade that the Eastern District blossomed into a dominant destination for patent infringement plaintiffs.[8] In 1988, legislators could not have foreseen this forum-shopping "revolution." However, this does not suggest that Congress meant something other than what it said in unmistakably clear terms in the 1988 Act. Congress sometimes enacts statutes that have unintended consequences. When this happens, it is the task of Congress, not the judiciary, to revisit and revise the statute.

Citing *Wachovia Bank v. Schmidt*, 546 U.S. 303, 315-16 (2006), Petitioner invokes the canon *in pari materia*, under which "statutes addressing the same subject matter generally should be read as if they were one law." Pet. 25. Petitioner suggests that *VE Holding*

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[7] This proliferation is a relatively recent phenomenon. *See, e.g.*, Colleen V. Chien, *From Arms Race to Marketplace: The Complex Patent Ecosystem and Its Implications for the Patent System*, 62 HASTINGS L.J. 297, 311 (2010) (describing the "recent" "proliferation of companies focused on the assertion, rather than the commercialization, of patents they acquire").

[8] *See* Yan Leychkis, *Of Fire Ants and Claim Construction: An Empirical Study of the Meteoric Rise of the Eastern District of Texas as a Preeminent Forum for Patent Litigation*, 9 YALE J.L. & TECH. 193, 2004 (2007) (describing the rise of the Eastern District of Texas from "almost complete judicial obscurity only five years ago").

conflicted with this canon by according "the term 'resides' in § 1400(b) a different meaning than the term 'resident' in [28 U.S.C.] § 1694." *Id.* However, §§ 1400(b) and 1694 do not address "the same subject matter." Section 1694, located in Chapter 113 of Title 28, is not a venue provision; instead, it addresses personal jurisdiction. Specifically, it authorizes a patent infringement plaintiff to serve a defendant with process in a district "where the defendant is not a resident but has a regular and established place of business." 28 U.S.C. § 1694.

Wachovia itself made clear that the canon is inapplicable to statutes addressing venue and jurisdiction. *Wachovia* held that the statute prescribing venue for suits involving national banks was *not* to be read *in pari materia* with the statute conferring subject-matter jurisdiction over such suits. 546 U.S. at 315-16. *Wachovia* distinguished venue, "largely a matter of litigational convenience," from subject-matter jurisdiction, a "far weightier" matter concerning "a court's competence to adjudicate a particular category of cases." *Id.* Similarly, personal jurisdiction rules implicate far more than "litigational convenience," as they touch on the fundamental question of the court's power to bind the litigants before it. *Wachovia*'s logic is equally applicable here.

In any case, even if §§ 1400(b) and 1694 addressed the "same subject matter," the *in pari materia* canon could not override a clear statutory command. This canon "is resorted to for the purpose of ascertaining the meaning of a statute, when explanation is necessary." *Coosaw Mining Co. v. South Carolina*, 144 U.S. 550, 560 (1892). In contrast, "where the statute is itself

plain, the rule cannot be resorted to." *Id*. Section § 1391(c), as amended in 1988, fell squarely into this category.

Petitioner also invokes the canon that, "[h]owever inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment," implying that § 1391(c)'s general definition of corporate residence cannot apply to § 1400(b) because that issue is already "specifically dealt with" there. Pet. 25 (internal quotation marks and citations omitted). To the contrary, § 1400(b) has never contained a definition of the term "resides" with respect to either corporations, unincorporated businesses, or individuals. As such, this provision has never "specifically dealt with" the issue expressly addressed by the 1988 revisions to § 1391(c).

Nor is there any merit to Petitioner's assertion that a corporate defendant can "reside[]" in only one district for purposes of § 1400(b) because the first definite article "the" in the phrase "the judicial district where the defendant resides" supposedly "connotes a *particular* district." Pet. 23 (emphasis in original). The pertinent part of § 1400(b) reads in full: "*the* judicial district where the defendant resides, *or* where the defendant has committed acts of infringement and has a regular and established place of business." (Emphasis added.) By Petitioner's logic, "the judicial district . . . where the defendant has committed acts of infringement and has a regular and established place of business" would also have to refer to one particular district. Yet a defendant can obviously infringe and have a regular and established place of business in any

number of jurisdictions. The definite article "the" in the phrase "the judicial district" does not have the suggested restrictive connotation.

In short, Petitioner has neither shown a conflict between *VE Holding* and *Fourco* nor offered any plausible criticism of *VE Holding*'s interpretation of the 1988 Act.

C. The 2011 Amendments Confirm That the Definition of Corporate Residence in § 1391(c) Applies to § 1400(b).

Petitioner suggests that the Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, § 202, 125 Stat. 758, 763 (2011) (the "2011 Act"), "removed any possible basis" for applying § 1391(c)'s definition of corporate residence to § 1400(b). Pet. 26. If anything, the 2011 Act strongly reaffirmed Congress's intention to define "resides" in § 1400(b) through § 1391(c). In the 2011 Act, Congress replaced the phrase "[f]or purposes of venue under this chapter" at the beginning of § 1391(c) with even broader language: "[f]or all venue purposes."[9] The legislative history left no doubt that the proposed § 1391(c) "would apply to *all* venue[]statutes, including venue provisions that appear elsewhere in the United States Code." H.R. REP. NO. 112-10, at 20 (2011) (emphasis added). Indeed, the 2011 Act makes Petitioner's assertion that *VE Holding* was wrongly decided irrelevant; even if it were true that Congress

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[9] Congress placed the definition of corporate residence in paragraph (2) of § 1391(c). New paragraphs (1) and (3) define the residence of natural persons and aliens, respectively.

did not intend to extend the § 1391(c) definition of corporate residence to patent venue in 1988, it clearly intended to do so in 2011.

The amended § 1391(c)'s text and legislative history confirm its universal applicability in no uncertain terms. Remarkably, the Petition states unequivocally that the phrase "[for] purposes of venue under this chapter" was "repealed" in the 2011 Act without mentioning the introductory clause that replaced it or the accompanying explanation in the House Report. The phrase was not "repealed" but only broadened: whereas the 1988 Act made § 1391(c)'s definition applicable to all venue statutes in Chapter 87 of Title 28, the 2011 Act made it applicable to "all" venue statutes in the U.S. Code. *See* App. 5a.

Petitioner suggests the new § 1391(c) nonetheless excludes § 1400(b) because of changes to § 1391(a). Previously, § 1391(a) dealt with venue in diversity cases; that issue is now addressed in § 1391(b), which now covers both diversity and federal-question cases. The new § 1391(a) reads, in relevant part:

> (a) Applicability of Section.—Except as otherwise provided by law—
>
> > (1) this section shall govern the venue of all civil actions brought in district courts of the United States; and
> >
> > (2) . . . .

According to Petitioner, the phrase "[e]xcept as otherwise provided by law" makes the definition of corporate residence in § 1391(c)(2) inapplicable to § 1400(b). *See* Pet. 26-28. Petitioner identifies no

statutory "law" besides § 1391(c)(2) that expressly defines the residence of a corporation for purposes of § 1400(b). Rather, Petitioner suggests that *Fourco* is the "law" that provides "otherwise," as those words are used in § 1391(a). *See id.*

The decision below rejected this argument as "utterly without merit or logic," and rightly so. App. 6a. *Fourco*'s construction of "resides" had long ceased to have the force of law by the time of the 2011 Act. It was made obsolete by the 1988 Act, which expressly extended the modern statutory definition of corporate residence to § 1400(b) and the rest of Chapter 87. *VE Holding*, 917 F.2d at 1579; App. 6a-7a. Petitioner has presented no evidence that, notwithstanding the 1988 Act and *VE Holding*, Congress somehow understood *Fourco*'s construction to be the prevailing law. In fact, both "before and after these [2011] amendments, in the context of considering amending the patent venue statute, Congressional reports have repeatedly recognized that *VE Holding* is the prevailing law." App. 7a (citing various House and Senate reports). Nor has Petitioner shown that Congress intended in 2011 to *restore* the *Fourco* definition of corporate residence to the status of the prevailing law. The 2011 Act's text and legislative history conclusively show the opposite; Congress intended the new § 1391(c) to apply to "all" venue statutes. *See supra* at 23-24.

By ignoring the wording and history of the 2011 amendments, Petitioner proceeds as if legislative intent does not matter. However, "[i]n the interpretation of statutes, the function of the courts is . . . to construe the language so as to give effect to the intent of Congress." *United States v. Am. Trucking Ass'ns*, 310

U.S. 534, 542 (1940); *see also Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975) ("Our objective . . . is to ascertain the congressional intent and give effect to the legislative will."); *Griffin v. Oceanic Contractors*, 458 U.S. 564, 570 (1982) ("Our task is to give effect to the will of Congress[.]").

Petitioner's sole argument is that the Federal Circuit "ha[d] no authority to overrule" *Fourco*, and thus the *Fourco* definition of "resides" remains the "law" within the meaning of the phrase "[e]xcept as otherwise provided by law." Pet. 27. *VE Holding* did not purport to "overrule" *Fourco*; it held only that the *Fourco* definition had been superseded by congressional action. App. 6a (explaining that, "[i]n 1988, the common law[10] definition of corporate residence for patent cases was superseded by a Congressional one"). *Fourco* interpreted the statutory framework as it existed in 1957; Congress revised that framework in 1988; and *VE Holding* simply gave effect to the clear statutory language extending § 1391(c)'s definition of corporate residence to § 1400(b). This Court denied certiorari, *Gas Appliance*, 499 U.S. at 922, and *VE Holding* (a decision of the Court of Appeals with exclusive jurisdiction over appeals from civil actions "arising under" federal patent law) has since then stood as settled, authoritative, and controlling law. Petitioner essentially argues that Congress's

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[10] Petitioner takes issue with the Federal Circuit's description of *Fourco* as a "common-law" decision and suggests the meaning of "resides" in § 1400(b) is better thought of as a matter of statutory interpretation. Pet. 26. Irrespective of these labels, it was clearly within Congress's authority to override *Fourco*'s construction of "resides," which is precisely what it did in the 1988 Act.

amendment of a statute that, in clear terms, supersedes this Court's interpretation of an earlier version of the statute cannot carry the force of law until this Court grants certiorari and expressly confirms what is already apparent from the face of the amendment. Petitioner cites no authority for this novel proposition.

The import of the phrase "[e]xcept as otherwise provided by law" is far more straightforward than Petitioner suggests. That phrase has always been in § 1391. Before 2011, it was found in both §§ 1391(a) and (b), which provided the generally applicable venue choices for diversity and federal-question cases, respectively. Thus, § 1391(b) provided that a federal-question case "may, except as otherwise provided by law, be brought only in" enumerated districts (*e.g.*, one "in which a substantial part of the events or omissions giving rise to the claim occurred"). Section 1391(a) included identical language. 28 U.S.C. §§ 1391(a)-(b) (2006). This phrase clarified that the venue choices generally available under §§ 1391(a) and (b) did not displace the venue choices set forth in special venue statutes; for example, a patent infringement case could not be brought in a district where "a substantial part of the events or omissions giving rise to the claim occurred" unless that district also happened to meet the § 1400(b) criteria.

In the 2011 Act, Congress consolidated the venue rules for diversity and federal-question cases in § 1391(b) and placed the phrase "[e]xcept as otherwise provided by law" in § 1391(a). As indicated in the legislative history, § 1391(a) would simply "follow current law in providing the general requirements for

venue choices, but would not displace the special venue rules that govern under particular Federal statutes." H.R. REP. NO. 112-10, at 18. That is, a patent infringement plaintiff must still look to § 1400(b) to determine where venue would be proper. However, the *meaning* of "resides" in § 1400(b)—or any number of other special venue statutes that use the term without expressly defining it—is governed by § 1391(c), which defines residency "[f]or all venue purposes" and was intended by Congress to "apply to all venue[]statutes." *Id.* at 20.

The statutory framework is as clear now as it was before 2011. Section 1391(c) continues to define the term "resides" in § 1400(b) with respect to corporate defendants. The Petition presents no question worthy of review.

II. Patent Venue Reform Is Properly Left to Congress.

Petitioner and the amici criticize the current patent venue rules for enabling forum-shopping, highlight the disproportionate concentration of patent cases (many of them brought by patent-assertion entities) in the Eastern District of Texas, and urge this as evidence that the Court should hear this case. Respondent disputes neither the existence of patent forum-shopping nor the need for reform. However, the current statutory scheme is clear: a corporate infringer can be sued in any district where it is subject to personal jurisdiction. In matters of statutory interpretation, the Court finds itself "in no position to judge the comparative force of . . . policy arguments." *Microsoft Corp. v. i4i Limited Partnership*, 564 U.S. 91,

113 (2011). Any recalibration of patent venue remains in Congress's hands.

Leaving the issue to Congress is not only a matter of the constitutional allocation of legislative and judicial responsibilities but is also compelled by prudential considerations. However flawed the current status quo may be, reverting to the pre-1988 patent venue regime, whereby many nationwide infringers could be sued only in their home court, is by no means the ideal solution. "Congress has the prerogative to determine the exact right response—choosing the policy fix, among many conceivable ones, that will optimally serve the public interest." *Kimble v. Marvel Entertainment, LLC*, 135 S. Ct. 2401, 2414 (2015).

Congress is aware of the need for reform. A bill currently pending in the House would allow venue in patent cases in a carefully tailored range of jurisdictions: (1) where the defendant has its principal place of business or is incorporated, (2) where the defendant committed an infringing act and has a regular established physical facility, (3) where the defendant has consented to suit, (4) where an inventor conducted research and development that led to the patent, or (5) where any party has a physical facility where certain specified activity took place. H.R. 9, 114th Cong. § 3(g) (Jul. 29, 2015). A similar proposal is pending in the Senate as the Venue Equity and Non-Uniformity Elimination Act of 2016. S. 2733, 114th Cong. § 2 (2016).

The contrast between these nuanced proposals and the dramatic reversion to the pre-1988 regime urged by Petitioner is striking. In fact, Congress has rejected *less* drastic proposals precisely because of concerns that

they were too favorable to accused infringers. For example, the House considered amending § 1400(b) to allow venue in any district where *either* party "resides" and adding a § 1400(c) providing that a corporation is deemed to "reside" for purposes of subsection (b) in its state of incorporation *and* the district in which it has its principal place of business. H.R. 1908, 110th Cong. § 10 (Apr. 18, 2007). The bill passed the House, but the venue provision was eliminated and replaced with a seven-part test. *See* H.R. 1908, 110th Cong. § 11 (Sept. 7, 2007). Notably, the House Judiciary Committee "believe[d] that simply returning to the 1948 venue framework would be too strict for modern patterns of technology development and global commerce." H.R. REP. NO. 110-314, at 40 (2007).

A venue provision identical to the provision originally introduced in the House was also introduced in the Senate. S. 3818, 109th Cong. § 8 (2006); S. 1145, 110th Cong. § 10 (2007). It too was met with concern that it was unduly defendant-centric. *See, e.g.*, S. RPT. NO. 110-259, at 53 (2008) (additional views of Sens. Feingold and Coburn) (stating the provision was "skewed heavily in favor of infringer-defendants" and would "deter the filing of legitimate infringement suits"); 157 CONG. REC. S1030, 1033 (2011) (statement of Sen. Coons) (noting that companies that "initially supported legislative reform of venue, now fear that this provision will do more harm than good").

The articles on forum-shopping cited by Petitioner also do not call for a return to the pre-1988 venue regime but discuss a wide range of alternative proposals, including (1) reforming § 1400(b) in more nuanced ways, (2) creating specialized patent trial

courts, (3) using a pool of specialized patent trial judges who would be assigned new cases at random or by an assignment panel, (4) requiring random assignment of patent cases within the jurisdictions in which they are filed, or (5) creating nationwide uniform patent rules.[11] Nor do these articles blame the Federal Circuit for the forum-shopping ills, contrary to Petitioner's suggestion. While the excerpts quoted by Petitioner acknowledge that *VE Holding* reflected a shift in patent venue law, *see* Pet. 18 nn.6, 7, they do not pass judgment on the merits of *VE Holding*'s analysis of the 1988 Act, *much less* criticize that analysis.

There are good reasons why the proposals debated in Congress and the academic literature do not call for returning the pre-1988 regime. Indeed, that regime was widely criticized for being outdated and unduly restrictive. *See VE Holding*, 917 F.2d at 1583-84. As early as 1972, this Court observed that "changes in the general venue law ha[d] left the patent venue statute far behind." *Brunette*, 406 U.S. at 713 n.13. This was "ironic[]," because making venue in patent cases more restrictive than in other civil cases was *not* the intention behind Congress's enactment of the special patent venue statute in 1897—quite the opposite. *See id.* At the time, the general venue statute restricted

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[11] *See* Jeanne C. Fromer, *Patentography*, 85 N.Y.U. L. REV. 1444, 1480 (2010) (discussing first possibility); Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. CAL. L. REV. 241, 304 (2016) (discussing first and third possibilities); Leychkis, *supra* note 8, at 225-30 (discussing second, third, and fifth possibilities); J. Jonas Anderson, *Court Competition for Patent Cases*, 163 U. PA. L. REV. 631, 693, 695-96 (2015) (discussing third, fourth, and fifth possibilities).

venue in federal-question cases to the district where the defendant was an "inhabitant." *Id.* at 712. The special patent venue statute "gave patent claimants an advantage by authorizing as an additional venue alternative any district where the defendant maintained a regular place of business, and committed acts of infringement."[12] *Id.* at 713 n.13. The anachronistic state of patent venue that prevailed until Congress's 1988 amendments to § 1391(c) was in tension with the liberal spirit of § 1400(b)'s statutory predecessor. As far back as 1974, the ABA Section of Patent, Trademark and Copyright Law urged an amendment to § 1400(b) that would expressly extend the § 1391(c) definition of corporate residence to patent cases.[13] Other commentators advocated a complete repeal of § 1400(b), seeing no reason for placing patent cases outside the general venue laws.[14]

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[12] Although *Stonite* referred to the special patent venue statute as a "restrictive measure," 315 U.S. at 566, it was "restrictive" only in a limited sense. In the few years before 1897, patent infringement cases could be brought *anywhere* as a result of *In re Hohorst*, 150 U.S. 653, 661-62 (1893), which held that the general venue provisions "did not affect" cases over which federal courts had exclusive rather than concurrent jurisdiction. *Brunette* 406 U.S. at 712. The special patent venue statute "was of course more restrictive than the law as it was left by *Hohorst*, but it was rather less restrictive than the general venue provision then applicable to claims arising under federal law." *Id.* at 712-13.

[13] Albin H. Gess, *Desirability of Initiating Patent Litigation Wherever the Defendant is Found*, 1974 A.B.A. SEC. PAT. TRADEMARK AND COPYRIGHT L. 114, 115.

[14] *See, e.g.*, Richard C. Wydick, *Venue in Actions for Patent Infringement*, 25 STAN. L. REV. 551, 557-58 (1973) ("With the enactment of liberalized general venue laws, the patent venue

This widespread criticism of the pre-1988 regime demonstrates that it is not the solution to the forum-shopping problems of today. More importantly, given the clarity with which Congress has expressed its intention that §§ 1400(b) and 1391(c) be read together, it is not a solution that this Court has the prerogative to choose. However urgent the issue of patent venue reform may be, it is an issue that must be left to Congress.

III. This Case Is a Poor Vehicle to Address the Question Presented.

Even if this Court were inclined to wade into the patent venue dispute, this case would be a poor vehicle. It presents none of the forum-shopping concerns discussed by Petitioner. Respondent developed and practices the patented inventions and sued Petitioner, a nationwide infringer, not in Texas but in the jurisdiction where Respondent is incorporated and suffered injury and where Petitioner purposefully directed sales of its infringing product. App. 2a. It is telling that Petitioner could muster no more than a cursory argument in favor of a § 1404(a) discretionary venue transfer. *See* App. 42a n.11.

Moreover, a ruling on the venue question is unlikely to affect the actual dispute between these parties. This case is proceeding to trial in January 2017. *See Kraft Foods Group Brands LLC v. TC Heartland LLC et al.*,

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statute has long since outlived its original purpose."); 15 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3823 (1990) ("[Section 1400(b)] ought to be repealed, and patent cases treated in the same fashion as federal question cases generally.").

No. 14-28-LPS (D. Del.) ("District Court Case"), ECF. No. 38. This is due primarily to *Petitioner's* strenuous opposition to *Respondent's* motion to stay the case pending the resolution of the parallel *inter partes* review of the patents-in-suit by the Patent Trial and Appeal Board, which prompted the district court to deny the stay and keep the original trial date. District Court Case, ECF No. 149. Since then, the parties have engaged in extensive discovery and trial preparation, and the case in all likelihood will be tried to a final judgment *before* this Court could consider the venue question on the merits. Even if this Court were to rule in Petitioner's favor, that would not justify setting aside the district court's judgment. Unless Petitioner lost at trial *and* showed that it would have won the case had it been tried in the proper venue, the trial court's denial of the motion to transfer venue would have to be deemed no more than a harmless error. *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 318-19 (5th Cir. 2008) (en banc); *In re Nat'l Presto Indus., Inc.*, 347 F.3d 662, 663 (7th Cir. 2003).

Finally, the Court need not be concerned that the issue will permanently escape its review. As Petitioner notes, there has been "an explosion of motions for discretionary transfers of venue under 28 U.S.C. § 1404 and petitions for appellate review of such orders." Pet. 22. This "explosion" will likely present the Court with other, more suitable cases for addressing the question presented.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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