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 A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF

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Respondent's Brief in Opposition makes three major arguments: (i) the Federal Circuit was correct in deviating from this Court's interpretation of 28 U.S.C. § 1400(b) (Opp. at 6–28); (ii) the issue should be left to Congress (Opp. at 28–33); and (iii) the Court should wait for some future "more suitable cases" to decide the Question Presented (Opp. at 34). We will address those arguments in turn below.

The most important feature of Respondent's brief, however, is what it is missing. Respondent does not dispute that the proper interpretation of 28 U.S.C. § 1400(b) is "a question of broad and general importance" (Pet. at 1); nor does it present any argument that, if certiorari were granted, this Court would face any jurisdictional or procedural impediment to deciding that question.

To the contrary, Respondent candidly acknowledges that it "disputes neither the existence of patent forum shopping nor the need for reform." Opp. at 28. That concession is necessary because of the immense and obvious importance of the issue, which has generated an outpouring of support for the Petition from a broad set of corporate, academic, and public interest amici. As those amici have told this Court, the Federal Circuit's post-1988 interpretation of § 1400(b) has:

- Resulted in "rampant and unseemly forum shopping" that "hampers innovation, generates erroneous results, and undermines respect for the rule of law." Brief of Amici Dell Inc. and the Software & Information Industry Association at 3, 6.
- "[L]ed to pervasive forum shopping" that "has fundamentally altered the landscape of patent litigation in ways detrimental to the patent system as a whole." Brief of Amici 32 Internet Companies, Retailers, and Associations at 3, 17 (citation omitted).
- Produced "a massive imbalance in the distribution of patent suits in the United

States" that undermines "core purposes underlying our patent laws." Brief of Amici American Bankers Association, the Clearing House Payments Company L.L.C., Financial Services Roundtable and Consumer Bankers Association at 8–9.

- Engendered abusive "forum shopping [of] the very sort" that "Congress sought to guard against when it adopted legislation limiting venue in patent litigation." Brief of Amicus Washington Legal Foundation at 14.
- Generated a "venue free-for-all" that "especially harms small companies and American consumers" and that "may be drawing courts into competition to *attract* patent owners—the ones with unilateral choice over forum—by adopting practices and procedures favorable to patent owners." Brief of Amici the Electronic Frontier Foundation and Public Knowledge at 3, 21.
- "[F]undamentally shaped the landscape of patent litigation in ways that harm the patent system, by enabling extensive forum shopping and forum selling." Brief of Amici 56 Professors of Law and Economics at 12.
- "[C]reated numerous practical negative consequences" including "concentration of most patent litigation [in] a select few district courts, which is bad for positive development of patent law." Brief of Amicus Paul R. Michel (retired Chief Judge of the Federal Circuit) at 1.

The immense dissatisfaction with the Federal Circuit's interpretation of the patent venue statute is so widely known that it has been acknowledged by the Director of the United States Patent and Trademark Office, Michelle K. Lee, who observed in a recent speech: "On venue, with nearly half of the patent cases filed in 2015 filed in a single district out of 94 federal judicial districts, it is easy for critics to

contend that plaintiffs seek out this district preferentially for the wrong reasons."[1] She pointedly noted that "the mere perception that there are advantages to be gained by forum-shopping challenges the public's faith in the patent system."[2]

When all of these voices are considered in light of (i) Congress's enactment and re-enactment of legislation restricting where venue is proper for patent infringement actions (Pet. at 9–12, 15–16); (ii) this Court's repeated past grants of certiorari to review and reverse lower decisions that threatened to undermine the venue limits of § 1400(b) and predecessor patent venue legislation (Pet. at 2–4, 12–16); (iii) the 2016 ABA House of Delegates Report and Resolution stating that the Federal Circuit's current interpretation of § 1400(b) is errant and contrary to this Court's patent venue precedents (Pet. at 16–17); (iv) the substantial body of academic literature ad-

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[1] Remarks by Director Michelle K. Lee at the IAM Patent Law and Policy Conference (Nov. 15, 2016), *available at* https://www.uspto.gov/about-us/news-updates/remarks-director-michelle-k-lee-iam-patent-law-and-policy-conference.

[2] *Id.* Director Lee also recognized that the patent venue was "likely" to be subject to "judicial" action. Director Lee is surely aware of the pendency of this case because, in the most recent oversight hearing for the USPTO held on September 13, 2016, by the House Judiciary Committee, Subcommittee on Courts, Intellectual Property and the Internet (video of hearing available at https://judiciary.house.gov/hearing/oversight-u-s-patent-trademark-office/), Subcommittee Chairman Issa described this case "T.C. Heartland v. Kraft" as "a big thing" (approximate time index in the hearing video: 41:20) and "a big deal" (42:50) and requested Director Lee to keep the Subcommittee informed as to developments in the case (43:38). In that hearing, PTO Director Lee agreed with Chairman Issa that the issue in this case is a "key, critical intellectual property issue" (42:40).

dressing and criticizing the Federal Circuit's current interpretation of § 1400(b) (Pet. at 17–19); and (v) the current grossly distorted allocation of patent suits among the district courts (Pet. at 5), it is easy to see why Respondent does not even attempt to argue that the Question Presented in this case lacks broad and general public importance or is otherwise unworthy of this Court's attention.

We now turn to the arguments the in Brief in Opposition, none of which present a ground for denying certiorari.

I. THE FEDERAL CIRCUIT'S INTERPRETATION OF § 1400(b) CONFLICTS WITH THIS COURT'S INTERPRETATION.

Respondent does not deny that, under the Federal Circuit's prevailing precedent, this Court's decision in *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222 (1957), is a dead letter. Respondent's argument is instead that the Federal Circuit was correct in deviating from *Fourco*. That contention can be quickly dispatched. Despite the liberal use of the words "clear" and "clearly" in its Opposition (*see* Opp. at 2, 3, 12, 13, 16, etc.), Respondent is unable to cite even a single source other than the challenged Federal Circuit decisions themselves to support its view that the lower court's position is correct.

By contrast, the House of Delegates of the American Bar Association, 56 Law and Economics Professors, and a former Chief Judge of the Federal Circuit are among the many, many neutral third parties who have supported Petitioner's position (Pet. at 23–30) that the Federal Circuit's current interpretation of § 1400(b) is legally wrong and that, if anything, the correct interpretation is clearly against the Federal Circuit's position. *See* SEC. INTELL. PROP. L., AM. BAR ASS'N, REPORT 108C at 2, *available at* http://www.americanbar.org/news/reporter_resources/annual-meeting-2016/house-of-delegates-resolutions/108c.html (stating that *VE Holding* and the decision below in this case "misinterpret the

venue statutes and do not follow Supreme Court precedent"); 56 Professors Br. at 2–5 (setting forth reasons to believe that the Federal Circuit's position is "incorrect" and is based on a rejection of this Court's precedent); Michel Br. at 2 (arguing that § 1400(b) is "clear" and that amendments to § 1391(c) provided no basis to abandon this Court's interpretation of § 1400(b)).

II. SPECULATION ABOUT POTENTIAL CONGRESSIONAL ACTION PROVIDES NO REASON TO DENY CERTIORARI.

Respondent argues the Question Presented is "properly left to Congress," Opp. at 28–33, but for at least four reasons, that argument is not a valid basis for avoiding certiorari.

First, speculation that Congress could, potentially, enact clarifying legislation to resolve disputes about statutory interpretation could be made in almost any non-constitutional case. Indeed, the more important an issue is, the more likely it becomes that some members of Congress will have considered the issue and introduced bills on the matter. Thus, considering the pendency of legislation as a factor *against* certiorari would have the perverse effect of directing this Court's time and attention *away from* important statutory issues.

Second, this Court has routinely disregarded speculation about potential future legislation in exercising its certiorari powers in past cases generally, and in patent cases in particular. Patent law involves substantial economic interests relevant to the nation's modern economy, and thus it is often true that one or more pending patent reform bills might affect the relevant issue presented in a petition for certiorari. In at least three patent cases from just the past few years, respondents have unsuccessfully urged this Court to deny certiorari on the grounds that the issues presented could possibly be addressed in one or more introduced bills. *See, e.g.*, Br. for Resp't in Opp'n at 17, Cuozzo Speed Techs. LLC v.

Lee, 136 S. Ct. 2131 (No. 15-446) (unsuccessfully urging this Court to deny certiorari on the grounds that the matter could be addressed by pending legislation); Br. in Opp'n at 41, Highmark Inc. v. Allcare Health Mgmt. Sys. Inc., 134 S. Ct. 1744 (2014) (No. 12-1163) (arguing, unsuccessfully, that pending bills were "much preferable vehicles" for addressing the legal issue presented); Br. in Opp'n at 33, Microsoft Corp. v. i4 Ltd. P'ship, 131 S. Ct. 2238 (2011) (No. 10-290) (arguing, unsuccessfully, that then-pending patent reform legislation provided a reason to deny certiorari).

Third, in this particular instance, there is no reason to think that congressional action is likely any time soon. Bills concerning patent venue have been pending in Congress for a decade; none have been enacted.

Finally, to the extent that they are at all relevant to this case, developments on Capitol Hill suggest that members of Congress are looking to this Court and this case to decide definitively the current state of the law on patent venue. In the oversight hearing for the USPTO held on September 13, 2016, the Chairman of the House Subcommittee on Courts, Intellectual Property and the Internet suggested that, to address the patent venue issue, Congress needed more "finality" than merely a decision by a "three-judge panel." *See* Video of Hearing, *available at* https://judiciary.house.gov/hearing/oversight-u-s-patent-trademark-office/ (approximate time index: 43:30). While the case for certiorari here is strong even without this Court considering the current state of affairs on Capitol Hill, recent developments there merely confirm the importance of this case and the issue it presents.

III. THIS CASE IS AN EXCELLENT VEHICLE FOR RAISING THE QUESTION PRESENTED.

In the final two pages of its brief, Respondent argues that this case purportedly is "a poor vehicle" for raising the Question Presented (Opp. at 33–34), but

not one of Respondent's arguments even purports to demonstrate that, if certiorari were granted, this Court would face any impediment to deciding the Question Presented in the Petition. Respondent's arguments are also wrong.

Respondent first asserts that this case purportedly does not involve "forum-shopping" (Opp. at 33), but the proper interpretation of 28 U.S.C. § 1400(b) is in no way dependent on whether the choice of an illegal forum is characterized as "forum-shopping" or something else. Even if Respondent's self-serving characterization of its litigation conduct were correct, that characterization would not affect the Court's ability to decide the Question Presented.

Respondent next asserts that "a ruling on the venue question is unlikely to affect the actual dispute between these parties." Opp. at 33. Even if this assertion were correct (and it is not),[3] it would mere-

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[3] Respondent mistakenly cites decisions involving the effect of district court orders denying transfers from one *proper* venue to another under 28 U.S.C. § 1404(a). Opp. at 34. In this case, by contrast, venue is contended to be *improper*, and a defendant sued in violation of a venue statute is entitled to relief on that ground alone, including after judgment on the merits. *See, e.g.*, *Leroy v. Great W. United Corp.*, 443 U.S. 173, 183–87 (1979); *Olberding v. Ill. Cent. R. Co.*, 346 U.S. 338, 340–42 (1953). Post-trial appellate review of venue defects is such a poor remedy that pre-trial review by mandamus petition has long been the traditional and preferred mechanism for testing whether venue is proper in a case. *See, e.g.*, *Atl. Marine Constr. Co. v. U.S. Dist. Court for W. Dist. of Tex.*, 134 S. Ct. 568, 581–84 (2013) (granting mandamus to correct erroneous venue ruling); *Hoffman v. Blaski*, 363 U.S. 335, 336–44 (1960) (same); *see also In re Volkswagen of Am., Inc.*, 545 F.3d 304, 319 (5th Cir. 2008) (en banc) (noting that an appeal after trial is a poor remedy for a venue defect because "the prejudice suffered cannot be put back in the bottle").

ly amount to a claim that Respondent could somehow *escape* the effect of a loss in this Court on the venue question. The assertion provides no basis for concluding that the Court will be unable to *decide* the Question Presented.[4]

Respondent finally asserts that "the Court need not be concerned that the issue will permanently escape its review." Opp. at 34. But if the Court denies certiorari in this case despite the vast array of corporate, academic, and public interest amici supporting certiorari (plus a resolution by ABA House of Delegates supporting the merits of Petitioner's argument), it is very, very difficult to imagine a future party undertaking the cost and risk of bringing this issue up to the Court with merely the hope that the certiorari process might produce a different result.

As multiple amici point out, seeking appellate review of a venue issue is a costly and arduous task

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[4] Contrary to the impression that Respondent attempts to create (Opp. at 33–34), Petitioner has never wavered in its objection to this case being tried in Delaware. In December 2014, over Petitioner's opposition, Respondent successfully urged the Delaware district court to move ahead with pre-trial proceedings notwithstanding Petitioner's then-pending motion to dismiss for improper venue. *See* Dist. Ct. Docket Items 30, 31. Only much later, when evidence of patent-defeating inequitable conduct emerged through discovery, did Respondent then abruptly reverse field and unsuccessfully urge the district court to halt pre-trial proceedings. It was not inappropriate for the district court to direct the parties to proceed with *pre-trial* proceedings despite the pending and unresolved venue issue, for pre-trial discovery would be usable at any trial of this case in the Southern District of Indiana. But there is every reason to believe that, if this Court grants certiorari, the district court will put off *trial* proceedings in this case because the results of any such trial could be rendered voidable by this Court's decision.

that many litigants will be in no position to undertake. Future litigants will also be aware that their only chance for a favorable ruling will be to litigate all the way to this Court, for the harsh language of the decision below provides a good indication of the Federal Circuit's likely reaction to any future challenge to a lower court's venue precedent. And it is especially difficult to imagine any future parties taking on that cost and risk if they will be confronted with the argument (as suggested by Respondent) that even a victorious party in this Court will not get any practical relief if a trial in the wrong district has already occurred, over objection, in the meanwhile.

Finally, Respondent does not suggest any other good reason for this Court to wait for the next case. There is no possibility of an inter-circuit split on this issue because of the Federal Circuit's national jurisdiction, and there is no prospect of meaningful additional percolation of the issue. The patent venue issue has been thoroughly studied from the standpoint of statutory interpretation, history, and policy. Waiting longer is pointless.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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