No. 21-148

# United States Court of Appeals for the Federal Circuit

IN RE DISH NETWORK L.L.C.,

*Petitioner*,

*On Petition for Writ of Mandamus to the United States District Court for the Western District of Texas No. 6:19-cv-00716-ADA, Hon. Alan D Albright*

**BRIEF OF COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION, HIGH TECH INVENTORS ALLIANCE, AND R STREET INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER**

Joshua Landau
Computer & Communications Industry Association
25 Massachusetts Ave NW
Suite 300C
Washington, DC 20001
jlandau@ccianet.org
(202) 470-3622

Counsel for *Amici Curiae*

## CERTIFICATE OF INTEREST

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

Dated: June 1, 2021 */s/ Joshua Landau*

Joshua Landau

| **1. Represented Entities** | **2. Real Parties in Interest** | **3. Parent Corporations and Stockholders** |
|---|---|---|
| Computer & Communications Industry Association | Same | None |
| High Tech Inventors Alliance | Same | None |
| R Street Institute | 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 nearly fifty years, CCIA has promoted open markets, open systems, and open networks. CCIA members[1] employ more than 1.6 million workers, invest more than $100 billion in research and development, and contribute trillions of dollars in productivity to the global economy. CCIA regularly files *amicus* briefs in this and other courts to promote balanced patent policies.

The High Tech Inventors Alliance ("HTIA")[2] represents leading technology providers and includes some of the most innovative companies in the world. HTIA exists to promote innovation and American jobs through equitable patent policies and a more efficient, effective, and inclusive patent system. HTIA member companies are

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[1] CCIA's members are listed at https://www.ccianet.org/members. Petitioner DISH is a CCIA member but took no part in the preparation or funding of this brief.

[2] HTIA's members are listed at https://www.hightechinventors.com.

some of the world's largest funders of corporate research and development, collectively investing more than $140 billion in these activities annually. They are also some of the world's largest patent owners and have collectively been granted nearly 300,000 patents.

The R Street Institute is a nonprofit, nonpartisan public policy research organization. R Street's mission is to engage in policy research and educational outreach that promotes free markets as well as limited yet effective government, including properly calibrated legal and regulatory frameworks that support economic growth and individual liberty.

*Amici*'s members are frequently involved in patent litigation, where choice of forum plays a critical role. Forum also has significant influence over the number and quality of patent cases filed. The limited ability of parties to transfer cases out of the Waco Division of the Western District of Texas has contributed to a marked rise in abusive patent litigation against innovators of all sizes. Plaintiffs, and particularly non-practicing entities, have flocked to the Waco Division, filing cases that other courts might dismiss, narrow, or stay. Buoyed by

favorable statistics, these plaintiffs understandably anticipate a friendlier audience in that division.

Defendants have nearly universally found it all but impossible to get cases transferred from the Waco Division to another District. All too often, the district court's refusal to transfer is based on contacts with the venue that are tenuous at best, leading to plaintiffs filing an increasing number of lawsuits in the Division. *Amici* and their members are concerned by the ongoing systematic refusal to transfer cases even when the transferee forum is clearly more convenient and has a more significant relationship to the patent-in-suit.

Pursuant to Fed. R. App. P. 29(a)(4)(e), no counsel for a party to the case underlying the pending petition for writ of mandamus authored this brief in whole or in part, and no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to fund the preparation or submission of this brief.

## INTRODUCTION

Choice of forum plays a critical role in the outcome of patent litigation. The Western District of Texas is the new forum of choice for patent plaintiffs. In 2016 and 2017, the Waco Division of the Western District of Texas saw only one patent case filed each year. Jonas Anderson & Paul R. Gugliuzza, *Federal Judge Seeks Patent Cases*, 71 Duke L.J. at *27 (forthcoming 2021), https://ssrn.com/abstract=3668514. In 2020, 793 new patent cases were filed in Waco, an increase of more than 39,500%. *Id.*

There are many factors that have contributed to this, but the Waco Division's hostility to appropriately transferring cases is one of the most significant and has contributed directly to the meteoric increase in patent litigation in Waco.

During the past year, this Court has issued a series of writs of mandamus to correct errors made by the sole judge hearing cases in Waco. In seven instances during that year, the Federal Circuit granted mandamus. *See, e.g.*, *In re Adobe Inc.*, 823 F. App'x 929 (Fed. Cir. 2020); *In re Apple Inc.*, 979 F.3d 1332 (Fed. Cir. 2020) ("*Apple II*"); *In re Intel Corp.*, No. 2021-105 (Dec. 23, 2020); *In re Nitro Fluids LLC*, 978

F.3d 1308 (2020); *In re SK hynix Inc.*, 835 F. App'x 600 (Fed. Cir. 2021); *In re Tracfone Wireless, Inc.*, No. 2021-118 (Fed. Cir. Mar. 8, 2021) ("*Tracfone I*"); *In re Tracfone Wireless, Inc.*, No. 2021-136 (Fed. Cir. Apr. 20, 2021) ("*Tracfone II*"). This represents a mandamus rate twice as high as when the Federal Circuit first began issuing mandamus orders to what Justice Scalia characterized as the "renegade jurisdiction" of the Eastern District of Texas. Transcript of Oral Argument at 11, *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006); *see also* Paul R. Gugliuzza, *The New Federal Circuit Mandamus*, 45 Ind. L. Rev. 343, 350 (2012). And in the most recent instance, *Tracfone II*, this Court was forced to issue a second mandamus order in the same case, suggesting that the Division has refused to apply binding precedent even when clearly instructed how to do so by a supervisory mandamus order.

Despite this Court's many orders, the Waco Division continues to ignore relevant precedent that requires transfer. Further, the Division continues to disregard this Court's clear instruction to give transfer motions the highest priority.

*Amici* feel compelled to file an *amicus* brief in this case not only to highlight that these errors continue despite repeated mandamus orders, but also to raise to this Court's attention that the Waco Division is extending those errors in a new way. Here, the district judge committed error (as in previous rulings) by disregarding the convenience of both party and non-party witnesses. But this ruling goes one step further: it blithely finds that witnesses may simply provide evidence via a videotaped deposition or remote testimony at trial, thus effectively erasing any need to consider witness convenience at all.

The large number of mandamus petitions arising out of the Waco Division is evidence there are legitimate concerns that "dozens of cases will proceed through motion practice, discovery, claim construction, or trial before potentially getting thrown out by a reversal of a ruling on a motion to dismiss for improper venue." *In re Google LLC*, 914 F.3d 1377, 1381 (Fed. Cir. 2019) (Reyna, J., dissenting).

Unfortunately, the only way for this Court to address this is to continue to grant writs such as the one sought in this case. It appears there is no alternative but this extraordinary remedy to deal with the lower court's unusual practices.

## ARGUMENT

The present petition represents yet another clear case for mandamus. The district court has again ignored relevant precedent and committed clear errors of analysis. And, as in prior cases, these systematic errors consistently favor one party—the plaintiff.

As a result of these errors, interdistrict transfer from the Waco Division of the Western District of Texas remains generally unavailable as a practical matter. The end result is an inconvenient court in which scores of defendants face litigation unrelated to their presence in the forum. This Court should grant mandamus and order transfer to continue its efforts to address this issue.

### I. The Waco Division's Transfer Jurisprudence Attracts Patent Plaintiffs By Limiting Transfer

Patent plaintiffs, like other plaintiffs, regularly seek to file suit in favorable jurisdictions, regardless of the convenience of the venue for the defendant. Transfers under 28 U.S.C. § 1404(a) are the mechanism by which defendants are entitled to obtain relief from the inconvenience and inappropriateness of a forum. When a district court seeks to attract a particular type of litigation—as is the case here—making

transfers difficult or impossible to obtain is a key tactic in attracting that litigation.

### *A. The Waco Division openly seeks to attract patent litigation.*

In his own words, the sole district judge in the Waco Division assumed the bench to "establish a serious venue for sophisticated patent litigation" in Waco. Tommy Witherspoon, *Waco becoming hotbed for intellectual property cases with new federal judge*, Waco Tribune-Herald (Jan. 18, 2020), https://wacotrib.com/news/local/waco-becoming-hotbed-for-intellectual-property-cases-with-new-federal-judge/article_0bcd75b0-07c5-5e70-b371-b20e059a3717.html. To attract patent litigation, a judge has to give plaintiffs a reason to engage in forum shopping and select one court over another. *See* Anderson & Gugliuzza, *supra* at *13-14; *see also* Kimberly A. Moore, *Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation*, 79 N.C. L. Rev. 879, 899 (2001).

One carrot adopted in the Waco Division is a set of "local rules [intended to] knock down the average time to bring a patent case to trial from 2½ years to 18 months." *See* Witherspoon, *supra.* These local rules favor plaintiffs in concrete ways. For example, in *amici*'s

experience, the shortened and inflexible case schedule embodied in the district court's rules, combined with the court's heavy docket, leaves little room for consideration of meritorious case-dispositive motions and reduces the availability of *inter partes* review. Nor does the district court typically grant a stay of proceedings in favor of trial before the Patent Trial and Appeals Board ("PTAB"). These practices distort the patent litigation ecosystem and adversely impact the U.S. patent system, as explained in further detail in Section IV.B.

### *B. The Waco Division's local rules distort the entire U.S. patent system.*

This logjam also distorts the type of patent litigation brought to the courts. Prior to the rise of the Waco Division, non-practicing entities with weak patents often refrained from filing suit because infringement suits would regularly lead to review by the PTO. This review would often result in the appropriate invalidation of such weak patents. But since the Waco Division's unusual and unrealistic scheduling practices remove the likelihood of PTO review, plaintiffs with weak patents rush to the Waco courthouse.

These plaintiffs then use the expense of litigation, unmitigated by the possibility of PTO review, to extract settlements based on litigation

costs, which was one of the principal problems that Congress sought to remedy with the establishment of *inter partes* review in the America Invents Act ("AIA"). Many of these lawsuits are backed by private equity litigation funding, meaning that the patent system is no longer being used to advance the useful arts. *See, e.g.*, RPX Corp., *Q4 in Review: NPE Filings Rebound as Operating Company Litigation Declines* (Jan. 14, 2020) (describing an increase in prevalence of litigation funding entities), https://www.rpxcorp.com/intelligence/blog/q4-in-review-npe-filings-rebound-as-operating-company-litigation-declines/. Instead, patents and patent litigation are being treated as financial assets where the only progress being promoted is that of the bank accounts of the litigation's funders.

### *C. Limiting transfer of cases is a key factor in attracting litigation.*

Plaintiff-friendly local practice would be of little use if a defendant could readily transfer to a different venue. Patent owners "are unlikely to file in [inconvenient forums] unless they are confident that their case will remain in the district long enough to obtain its benefits." *See*

Daniel M. Klerman & Greg Reilly, *Forum Selling*, 89 Cal. L. Rev. 241, 260 (2016).

But the Waco Division rarely transfers cases to another district. *See* Anderson & Gugliuzza, *supra* at *40. This is in large part due to clear and repeated errors in its application of the transfer factors. This case provides yet another example of the Division's erroneous analysis.

## II. Refusal to Transfer This Case Is a Clear and Repeated Violation of This Court's Previous Guidance

The present case reflects a pattern of persistent and systematic disregard for precedent and this Court's guidance. This alone would justify the grant of mandamus.

### *A. The district court's analysis of the witness factors is clearly erroneous.*

As in prior transfer decisions, the district court misapplies the witness standards and, in particular, the factors relating to witness convenience and the availability of compulsory process. Most concerning is the district court's conclusion that the "convenience of party witnesses is given little weight." Appx9 (citing no authority other than similarly flawed decisions by the same judge). This is simply incorrect. *See In re Genentech*, 566 F.3d 1338, 1343-45 (Fed. Cir. 2009) (discussing

convenience of witnesses and granting mandamus in similar case). Indeed, this Court previously characterized that statement as a "discordant proposition." *In re Apple Inc.*, Case No. 20-127 (Fed. Cir. June 16, 2020) ("*Apple I*").

The proposition is discordant because it so clearly contradicts the text of the transfer statute. 28 U.S.C. § 1404(a) notes that a transfer may be granted "for the convenience of parties and witnesses." The convenience of party witnesses falls squarely within *both* of these statutory considerations. And in analyzing convenience, this Court has given significant weight to the convenience of party witnesses. *See Genentech* at 1345. This practice of dismissing party witnesses is new—the Western District historically gave weight to the convenience of party witnesses. *See, e.g.*, *Coleman v. Trican Well Serv., LP*, 89 F. Supp. 3d 876, 883 (W.D. Tex. 2015).

Contrary to the district court's apparent view, even if the convenience of non-party witnesses is given more weight than that of party witnesses, it does not mean that the convenience of party witnesses can be effectively disregarded. This error is not limited to this case. The district court's false premise that the convenience of

party witnesses can effectively be ignored has found its way into numerous decisions by the district court, sweeping aside the legitimate interests of defendants in having disputes adjudicated in a convenient forum.[3] This error, in and of itself, makes this an appropriate case for mandamus.

A similarly concerning (and similarly persistent) error is the district court's failure to give any weight to the potential need for compulsory process unless the party seeking transfer can prove a witness is unwilling. Appx6-7. But as this Court has previously noted, "when there is no indication that a non-party witness is willing, the witness is presumed to be unwilling." *In re HP Inc.*, Case No. 18-149 at *6 (Fed. Cir. Sept. 25, 2018).

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[3] *See, e.g.,* Order Denying Defendant's Motion to Transfer at 14, *Koss Corporation v. Apple, Inc.*, No. 6:20-cv-665 (W.D. Tex. Apr. 22, 2021), ECF No. 76; Order Denying Defendant's Motion to Transfer at 11, *Sito Mobile R&D IP v. Hulu, LLC*, No. 6:20-cv-472 (W.D. Tex. Mar. 24, 2021), ECF No. 66; Order Denying Motion to Transfer Venue at 9-10, *Ecofactor, Inc. v. Google LLC*, No. 6:20-cv-75 (W.D. Tex. Apr. 16, 2021), ECF No. 62; Order Denying Motion to Transfer Venue at 12, *Ikorongo Texas LLC v. LG Electronics Inc.*, No. 6:20-cv-257 (W.D. Tex. Mar. 1, 2021), ECF No. 76.

Finally, the district court blithely asserts that witnesses may simply provide evidence via a videotaped deposition or remote testimony at trial and that this effectively erases any need to consider witness convenience at all. A videotaped deposition or remote testimony is, at best, an inferior substitute for live testimony. "[T]o fix the place of trial at a point where litigants cannot compel personal attendance and may be forced to try their cases on deposition, is to create a condition not satisfactory to court, jury or most litigants." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 511 (1947). Relying on this imperfect substitute when live testimony would be conveniently available in a different forum is similarly unfair and unwarranted.

The district court has repeatedly and improperly employed the three fallacies discussed above to effectively write the witness convenience and compulsory process factors out of the transfer analysis. It will continue to do so unless this Court corrects these errors through mandamus.

### *B. Relative ease of access of documents turns on location, even if the documents are electronic.*

In the case below, contrary to the instructions of this Court and the Fifth Circuit, the district court insists that the "focus on physical

location of electronic documents is out of touch with modern patent litigation" and thus should be given little weight in deciding transfer motions. Appx5. While the district court appears to acknowledge the inconsistency with binding Fifth Circuit precedent, it has repeatedly refused to give any weight to this factor. *See* Appx5-6.

The most critical evidence in a case—evidence like source code, semiconductor masks, or electronic schematics—is often the kind of "crown jewel" information that is typically produced under significant restrictions and is rarely transmitted electronically. The district court is wrong to discount the location of such critical evidence.

## III. The Patent Venue Statute Emphasizes the Importance of Local Interests in the Events Leading to a Suit

Venue in patent cases is controlled by 28 U.S.C. § 1400(b), which requires that a defendant both "have committed acts of infringement" and "has a regular and established place of business." When § 1400(b)'s original text was passed, the bill's sponsor stated that his intent was to provide "jurisdiction to the court where a permanent agency transacting the business is located, and that business is engaged in the infringement of the patent rights." 29 Cong. Rec. 1900 (1897) (statement of Rep. Lacey). Further, it was intended to avoid allowing

an inconvenient forum to "work hardship by reason of the expense that it would cause of having to take depositions or transport witnesses a thousand miles in the trial of a case." *Id.* at 1902 (statement of Rep. Lacey).

In short, patent venue was intended in part to avoid the inconvenience of a lawsuit being filed far from where the relevant events had occurred. Reading 28 U.S.C. § 1404 in conjunction with the legislative history of 28 U.S.C. § 1400(b), the "convenience of parties and witnesses" includes that the trial be held where the allegedly infringing business is conducted.

At a minimum, the relationship between the regular and established place of business and the acts of infringement is a significant indicator of the strength of local interests in adjudicating a case. The venue where the two coexist is generally more likely to be interested in the topic than a venue where a place of business exists, but the business conducted there is unrelated to the relevant alleged infringement. This analysis would aid in applying the local interest factor of § 1404 transfer analysis.

Further, while this Court has to date read § 1400 not to require that the regular and established place of business have any relationship to the acts of infringement, the legislative history suggests that it was intended to. This Court should consider holding that the acts of infringement must be related to the regular and established place of business in order for venue to lie. This analysis is particularly relevant to the case at hand, in which the alleged infringement has effectively no relationship whatsoever to the venue selected by the plaintiff.

## IV. Failure to Grant Mandamus Would Harm the Patent System and Burden Defendants Generally, Reducing Investment in Product Development

Limiting transfer out of inconvenient forums has a range of negative effects including harming the public perception of the patent system, aiding actual plaintiff-biased policies, significantly restricting access to the *inter partes* review ("IPR") system, and reducing economic investment and innovation by productive firms such as high-tech, high-growth startups.

### *A. Allowing plaintiffs to avoid transfer protects pro-plaintiff procedures.*

The actual procedures employed in the Waco Division of the Western District of Texas appear to be designed "mainly to process

cases as quickly as possible—except when it is defendants who want a quick dismissal," Anderson & Gugliuzza, *supra* at *55, or when ruling on a transfer motion, *In re SK hynix Inc.*, 835 F. App'x at 600-01 (noting the district court's "egregious delay and blatant disregard for precedent" in connection with its handling of a motion to transfer). The delay of defendants' motions and the swift processing of the remainder of the case favors plaintiffs over defendants. *See* Anderson & Gugliuzza, *supra*, at *34-38.

### *B. These procedures also undermine the inter partes review system.*

Congress intended *inter partes* reviews to be a fast and efficient alternative to expensive district court patent validity determinations. The Waco Division's atypical scheduling practices, particularly its use of unrealistically fast trial schedules, often defeats the availability of *inter partes* review as these unrealistic trial dates are increasingly used as grounds to deny review by the PTO. Further, as noted above, the district court has staunchly refused to stay cases pending IPR. Ronald Lemieux & Steven Auvil, *Move Over Marshall, There's a New Sheriff in Town—The Rise of Waco and the Western District of Texas*, National Law Review (March 28, 2021),

https://www.natlawreview.com/article/move-over-marshall-there-s-new-sheriff-town-rise-waco-and-western-district-texas.

These policies results either in a denial of institution under the PTAB's precedential decision in *Apple v. Fintiv*, IPR2020-00019, Paper 11 (P.T.A.B. Mar. 20, 2020), or in parallel proceedings continuing before both the district court and the PTAB. Either outcome undermines Congress's intent for IPR to "establish a more efficient and streamlined patent system that will improve patent quality and limit unnecessary and counterproductive litigation costs." *See* 157 Cong. Rec. S1361 (daily ed. Mar. 8, 2011) (statement of Sen. Leahy).

The Division's approach, combined with the PTO's policy of denying review based on scheduled trial dates that are rarely met, frustrates the policy decisions that Congress made when it enacted the AIA.

### *C. Increased patent litigation reduces productive economic activity by operating companies.*

It is well-established that firms reduce innovative activity when targeted by patent lawsuits. *See, e.g.*, Filippo Mezzanotti, *Roadblock to Innovation: The Role of Patent Litigation in Corporate R&D*, Management Science (forthcoming 2021). And it is also increasingly

well-established that *inter partes* review has positive economic benefits, providing increased employment and R&D investment. *See* Unified Patents, *Unified's Patent Quality Initiative (PQI) Releases Economic Report Showing the AIA Led to over 13,000 Jobs and Grew the U.S. Economy by $3 Billion since 2014* (June 24, 2020), https://www.unifiedpatents.com/insights/2020/6/23/the-perryman-group-releases-economic-report-an-assessment-of-the-impact-of-the-america-invents-act-and-the-patent-trial-and-appeal-board-on-the-us-economy.

The Waco Division's practice of limiting transfer of cases from the Western District of Texas has increased overall patent litigation, not merely substituted litigation there for litigation elsewhere. In particular, litigation targeting productive firms has increased and access to IPR has been reduced.

The net result of limiting transfer, supported by empirical evidence, is that productive firms are likely to reduce their innovative activity and employment, harming the overall progress of the useful arts. U.S. Const. Art. I, § 8, cl. 8.

Interpretations of intellectual property statutes should take into account the impact on the Constitutional purpose those statutes serve. *Cf. Google LLC v. Oracle America, Inc.*, No. 18-956 at *34 (U.S. Apr. 5, 2021). And here, the evidence strongly suggests that a failure to allow transfer in situations where the transferor forum has no significant contacts with the alleged infringement would negatively impact economic and scientific progress.

## CONCLUSION

This Court should grant DISH's petition for mandamus in order to correct the clear errors of the district court.

June 1, 2021

Respectfully submitted,

/s/ Joshua Landau

Joshua Landau
Computer & Communications Industry Association
25 Massachusetts Ave NW
Suite 300C
Washington, DC 20001
202-470-3622
Counsel for *Amici Curiae* Computer & Communications Industry Association, High Tech Inventors Alliance, and R Street Institute

United States Court of Appeals
for the Federal Circuit
*In re DISH Network LLC, 21-148*

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION**

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June 1, 2021 /s/ Joshua Landau

Joshua Landau
Counsel for *Amici Curiae*
Counsel for *Amici Curiae*
Computer & Communications
Industry Association,
High Tech Inventors Alliance,
and R Street Institute

## CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2021, I caused the foregoing **Brief of the Computer & Communications Industry Association, High Tech Inventors Alliance, and R Street Institute as *Amici Curiae* in Support of Petitioner** to be electronically filed with the Clerk of the Court using CM/ECF, which will automatically send email notification of such filing to all counsel of record.

June 1, 2021 /s/ Joshua Landau

Joshua Landau
Counsel for *Amici Curiae*
Computer & Communications
Industry Association,
High Tech Inventors Alliance,
and R Street Institute