

**EXAMINING THE SUPREME COURT'S TC  
HEARTLAND DECISION**

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**HEARING**  
BEFORE THE  
SUBCOMMITTEE ON  
COURTS, INTELLECTUAL PROPERTY,  
AND THE INTERNET  
OF THE  
COMMITTEE ON THE JUDICIARY  
HOUSE OF REPRESENTATIVES  
ONE HUNDRED FIFTEENTH CONGRESS

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# EXAMINING THE SUPREME COURT'S TC HEARTLAND DECISION

TUESDAY, JUNE 13, 2017

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON COURTS, INTELLECTUAL  
PROPERTY, AND THE INTERNET

COMMITTEE ON THE JUDICIARY

*Washington, DC*

The subcommittee met, pursuant to call, at 10:03 a.m., in Room 2141, Rayburn House Office Building, Hon. Darrell Issa [chairman of the subcommittee] presiding.

Present: Representatives Issa, Goodlatte, Collins, Smith, Chabot, Jordan, Poe, Marino, Labrador, Farenthold, Biggs, Nadler, Conyers, Johnson, Jeffries, Lieu, Schneider, and Lofgren.

Also Present: Representative Jackson Lee.

Staff Present: Joe Keeley, Chief Counsel, Zack Walz, Clerk; and Jason Everett, Minority Counsel.

Mr. ISSA. The Subcommittee on the Courts Intellectual Property and the Internet will please come to order. Today's hearing, "Examining the Supreme Court's Decision in TC Heartland Decision" will include, but certainly not be limited to the main question in everyone's mind here today: Have we fixed a pervasive problem that has gone on for a decade? Or have we half-fixed a pervasive problem? Or have we, in fact, fixed the problem in the most innovative, industrious and, perhaps, amazing and expensive lawyers will circumvent it before we are done?

As we speak, new cases have been filed against Apple, yes, in the Eastern District of Texas, and we are here today to say what has the Supreme Court done, and will it be enough?

Patent trolls, in my opinion, are the scourge of the patent world. We have, time and time again, attempted to stop patent trolls while, in fact, being objected to by genuine innovators who feel that they will be trampled in our effort to stop the worst of the worst.

Local hotel chains, restaurants, small startups, have spoken out against the impact of the demand letter, and the effect it can have on their expanding businesses and, in fact, an outright hold-up for extortion.

The bigger the legal bill—excuse me. A bigger legal bill is not the definition of innovation. Now that the Supreme Court has spoken in TC Heartland case, this subcommittee will hear testimony about

the impact of the decision and about what is left for Congress to do.

As a patent holder that has been both a defendant and a litigant in district court, in the ITC, and at the Fed circuit, I understand the importance of a strong patent system with strong patents that are not used to send endless streams of demand letters. For companies with no presence in eastern Texas, they are probably quite happy to be able to avoid Marshall, Texas, its fine hotels, and its predictable outcome, disproportionately in favor of the plaintiff.

The excellent research of Professor Chien shows that in the wake of TC Heartland, many patent cases will migrate to Delaware and California. No one should be able to—excuse me. No one should be able to set up a sham business in order to generate revenue in Tyler, Texas, or elsewhere.

I remain concerned that without reform, legitimate businesses in the Eastern District of Texas will now face the patent troll problem more directly. To the extent that the Eastern District of Texas has benefited from patent trolls, they will now suffer due to them. What business will want to set up in—excuse me. What business will want to set up shop in the Eastern District of Texas if it generates venue for the most abusive litigation tactics? The rule of law is key to preserving property rights, and nowhere is this more true than with respect to intellectual property.

Intellectual property has become the backbone of the last half of the 20th century, and without a doubt, will be the leading revenue generator in the 21st century. Strong and reliable IP protections depend on Congress getting the rules right to both encourage the development and production of the next generation of innovation, and to make sure that our lives are better because of it.

The court's recent decision is a tremendous step, in my opinion, in the right direction. However, additional efforts to reign in the abuse by our Nation's—of our Nation's patent system will need to happen. Today, we will hear recommendations.

And with that, I would ask that the ranking member be able to present his opening statement.

Without objection, the gentleman is recognized.

Mr. NADLER. I want to begin by thanking the chairman for saying how good on timing I am.

Thank you, Mr. Chairman.

Today, we consider the Supreme Court's recent decision in TC Heartland LLC versus Kraft Foods Group Brands LLC, a case which significantly narrowed the venues statute governing patent infringement cases. We are not here to question the court's analysis, but rather to examine the impact this case may have on patent litigation and on broader efforts to curb abusive lawsuits.

TC Heartland involved the relatively arcane subject of venue in patent infringement cases, but its potential impact on innovation and on economic growth should not be underestimated. If, as many people expect, it limits the flood of abusive patent litigation, it could enable businesses across the country to focus their resources on developing the next great invention, rather than on defending against the next costly frivolous lawsuit.

The issue in *TC Heartland* was how to define where corporations deem to reside and, therefore, where venue is proper in patent infringement cases.

In 1957 in *Fourco*, the Supreme Court held that under this statute, a corporation resides only in the State of incorporation. That was the law until 1990, when the Court of Appeals for the Federal Circuit in *VE Holding Corporation versus Johnson Gas Appliance Company* ruled that the definition of corporate residence contained in the general venue statute which governs most civil litigation applied to patent cases as well. Under that definition, the corporate defendant resides any place in which it is subject to a court's personal jurisdiction for that case.

In practice, as applied to patent cases, this meant that every business with the goods that entered the streams of commerce could be sued in nearly any jurisdiction. The *VE Holding* decision had a dramatic effect on patent litigation and led to significant forum shopping by plaintiffs seeking friendly jurisdictions for their claims.

Most notably, the Eastern District of Texas has developed a cottage industry of patent litigation, with more than a third of all patent cases between 2014 and 2016, for example, filed in just that one district, despite having no natural connection to patent intensive industries. Many of these cases are filed by entities that are often referred to as patent trolls, who use the courts as a weapon to extract settlements from innocent defendants.

In many of those cases, it does not make financial sense for a defendant to expend the resources necessary to litigate a claim all the way to trial, and it is willing to settle even a spurious claim.

Many defenders of the Eastern District argue that it is a popular forum not because of any bias towards plaintiffs but because its judges have developed expertise in the complex and technical field of patent litigation, and because they administer cases efficiently, and in a less costly manner than elsewhere.

Critics, however, argue that judges in the Eastern District are slow to act on motions to transfer venue, and that summary judgment motions are denied at nearly twice the rate of other courts, all of which puts pressure on litigants to settle, which is, of course, the desired outcome for a patent troll.

The Supreme Court's decision in *TC Heartland* made no mention of the Eastern District of Texas, or of the larger debate regarding abuse of patent litigation. The court simply reaffirmed the analysis defined in the *Fourco* decision and held, once again, that in patent infringement cases, corporations reside only in a State of incorporation, severely limiting where venue is proper.

But whether or not the court had the current policy debate in mind, many people believe that its decision will go a long way toward curbing the abuses we have seen in recent years in so-called patent troll litigation. On the other hand, other observers think the decision will only make a marginal difference, and instead of concentrating cases in the Eastern District of Texas, we will simply see those cases migrate to Delaware and the Northern District of California, although it should be noted that neither jurisdiction is known to be particularly welcoming to abusive litigation. More concerning is the possibility that patent trolls have simply adapted

their tactics in light of the decision by shifting their focus to the second part of the patent venue statute, which finds proper venue, quote, “where the defendant has committed acts of infringement and has a regular and established place of business,” close quote.

If so, large retailers and others with a national physical presence may continue to find themselves sued in any plaintiff jurisdiction where they have a location, such as the Eastern District of Texas.

Courts have held that physical presence is not even required to satisfy this test, and this could spur much litigation to find the boundaries of what constitutes a regular and established place of business. New defendants may also be targeted based solely on their presence in plaintiff-friendly jurisdictions. Before we move forward with further efforts to curb abusive patent litigation, it will be important to understand the practical impact of TC Heartland. Will it be a panacea that puts patent trolls out of business? Will it simply force them to adjust their practices as they continue business as usual? Or does the answer lie somewhere in between?

TC Heartland was decided just 3 weeks ago, and the ink is barely dry on the opinion, which may make it difficult to reach any solid conclusions today. But I hope our witnesses will help us think through some of the many questions this decision has raised.

I look forward to their testimony, and I yield back the balance of my time.

Mr. ISSA. I thank the gentleman.

Without objection, the chair may call a recess at any time.

And with that, we recognize the chairman of the full committee, the gentleman from Virginia, Mr. Goodlatte.

Chairman GOODLATTE. Well, thank you, Mr. Chairman. This committee has regularly heard from American businesses nationwide about the challenges that they face due to patent trolling behavior. Patents of questionable quality have been used to drag defendants into court, and loopholes in procedural rules have been used to ensure that these cases are brought in judicial districts that are favorable to these questionable claims.

For example, venue has been repeatedly found to exist based upon the creation of sham offices in what would appear to be simple warehouses with no one actually working in them. The Eastern District of Texas has been frequently cited by patent reform advocates as a judicial district that is very favorable to those with questionable patent claims.

In response to these challenges, the Judiciary Committee held several hearings to document patent litigation abuses, and in 2013, I authored the bipartisan Innovation Act that was cosponsored by 16 of my colleagues to reign in abuses of our patent laws. After several discussion drafts and hearings to improve the legislation, the Innovation Act was passed out of the Judiciary Committee by a bipartisan vote of 33-to-5. The legislation then passed the House by an overwhelming vote of 325-to-91.

Since the House passage of the Innovation Act, the courts have also taken some action, most recently by taking up the TC Heartland case concerning venue. In this case, the defendant headquartered in Indiana was sued in Delaware, despite the fact the defendant was not even registered to do business in Delaware and had no meaningful local presence there.



Much to the chagrin of patent trolls, the Supreme Court unanimously found that venue in patent cases is grounded in statute at 28 U.S.C. Section 1400. This means that a corporation resides only in the State of incorporation for patent venue purposes. This decision will close the door on a loophole that allows patent trolls to hand-pick courts that are favorable to them.

This morning's hearing has a range of witnesses who have experienced the patent troll problem firsthand, including a company that is faced with reducing its presence in the Eastern District of Texas in order to avoid patent trolls. As its testimony points out, patent trolls are causing direct economic harm to the districts in which it operates, and also to small startups whose company and resources are insufficient to indemnify purchasers of their products.

We also have a witness this morning who can speak to the expected change in filing patterns going forward, along with a witness who can speak to the patent world at large.

Finally, the minority has invited a witness who believes the Supreme Court has gone too far. I want to thank the witnesses for making themselves available this morning, and I yield back to the chairman.

Mr. ISSA. I thank the chairman.

We will recognize the ranking member, if he wants to be recognized, when he appears. He has been delayed at a conference.

Without objection, all other members will be able to have their opening statements placed in the record.

It is now my distinguished pleasure to introduce our panel. But, first, I would ask all witnesses to please rise, raise your right hand, to take the oath.

Do you swear that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth?

Please be seated.

Let the record indicate that all witnesses answered in the affirmative.

Our witnesses today include Mr. Steven Anderson, Vice President and General Counsel for Culver Franchising Systems, Inc.; Professor Colleen Chien, Associate Professor of Law at Santa Clara University School of Law; Professor Adam Mossoff, Professor of Law at—oh, at Antonin Scalia School of Law at George Mason, how appropriate; and Mr. John Thorne, partner at Kellogg, Hansen, Todd, Figel & Frederick, and probably several other people no longer with us, law firm. I am sorry, that is not right.

And as promised, it is now my pleasure to introduce the gentleman from Michigan, the ranking member of the full committee, for his insightful opening statement.

Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman, and my colleagues, and distinguished witnesses, and friends assembled. Our Nation's economic future depends on the ability of inventors to innovate and create, while at the same time being able to efficiently and effectively protect their products.

Accordingly, Congress must continue to ensure that we promote policies that will provide for a strong patent system. As part of our ongoing oversight on this issue, today's hearing provides an excellent opportunity for us to consider the impact of the Supreme

Court's recent decision in TC Heartland versus Kraft Foods Group Brands on our patent system.

In the Heartland decision, the Supreme Court unanimously clarified the venue rules governing patent infringement litigation. The court held that a corporation is deemed to reside only in its State of incorporation in patent infringement cases.

As we consider the impact of this decision and the issue of abusive patent litigation, there are several factors to keep in mind. To begin with, one of the most effective steps we can take in responding to abusive patent litigation is making sure poor quality patents are not issued to begin with. To do that, patent examiners must have the resources to review and analyze the hundreds of thousands of complex and interrelated patent applications they receive every year.

If the Patent and Trademark Office receives all of its fees and is protected from the unpredictability of the annual appropriation cycle, this will encourage innovation and ensure that our patent system remains the envy of the world.

Secondly, we should examine how broad of an impact the Heartland decision will actually have. After the decision was issued, some have construed its impact as having a positive effect on abusive patent litigation because it, arguably, places tighter limits on where patent lawsuits may be filed.

But, on the other hand, there are those, including one of today's witnesses, who says this decision will have a limited impact.

To that end, I would appreciate the witnesses' thoughts on the following questions: Does TC Heartland sufficiently tighten the venue rules to prevent abusive patent litigation? Will this decision overly restrict the rights of patent owners? How will pending cases be affected where venue is no longer proper? And, finally, will plaintiffs be able to avail themselves of other avenues to continue forum shopping?

In addition, we should assess how this decision will affect litigation in the Eastern District of Texas, which as we have learned from our previous hearings, has spawned a growth of patent litigation in that district.

And, finally, we must take a cautious approach to any future legislative proposals.

For myself, I continue to support reasonable changes to improve and enhance the patent system, but cannot support any changes, which taken as a whole, will undermine our Nation's patent system.

Over the last several Congresses, we have been examining how to prevent abusive patent litigation generally and specifically with respect to the patent venue system.

The TC Heartland case was just handed down last month. Clearly, additional time will be needed to assess its ramifications and how it will be implemented.

I thank the chairman for holding this important hearing. I appreciate the witnesses for participating in this timely endeavor.

Thank you.

Mr. ISSA. I thank the gentleman. We now go to our witnesses. Under a 5-minute rule, we have a wonderful, highly automated system, but to keep it simple, stay as close as you can to those 5

minutes. And there is extra points for those who come in underneath.

Mr. Anderson.

**STATEMENTS OF STEVEN ANDERSON, VICE PRESIDENT AND GENERAL COUNSEL, CULVER FRANCHISING SYSTEM, INC.; PROFESSOR COLLEEN CHIEN, PROFESSOR, SANTA CLARA UNIVERSITY SCHOOL OF LAW; PROFESSOR ADAM MOSSOFF, PROFESSOR, ANTONIN SCALIA LAW SCHOOL, GEORGE MASON UNIVERSITY; AND JOHN THORNE, KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C.**

**STATEMENT OF STEVEN ANDERSON**

Mr. ANDERSON. Subcommittee Chairman—

Mr. ISSA. Oh, and microphone on is when we start the clock. If we don't hear you, we won't start the clock.

Mr. ANDERSON. Subcommittee Chairman Issa, Ranking Member Nadler, and members of this subcommittee, I am Steve Anderson, vice president and general counsel of Culver Franchising System Inc. Thank you for the opportunity to testify about the TC Heartland decision and the ongoing impact of abusive patent litigation on Culver's restaurants. My testimony, on behalf of Culver's today, also represents the views of the National Restaurant Association and the United For Patent Reform Coalition.

Culver's is a family business that opened its first restaurant in Sauk City, Wisconsin, in 1984. Today, there are over—there are 624 Culver's restaurants with a total of 24,000 employees serving customers in 24 States. All but eight of our Culver's restaurants are franchised, which means they are individually owned and operated family businesses.

Just 2 months ago, an infringement action was filed against Culver's in the Eastern District of Texas. The plaintiff claims their patents covering the very abstract idea of sending promotional offers to a mobile device. The plaintiff asserts that its principal place of business is in Plano, Texas, but when we had someone visit that address just last week, they found nothing but one locked room office with no one there.

As far as we can tell, plaintiff's principal place of business, you can see it right here, is nothing but an address from which to sue other companies. It is a mailbox with a door.

This is in stark contrast to our business, which has been located in Wisconsin for nearly 33 years, and we have 124 employees working there. Yet, in this suit, here we go again, being forced to use our time and resources to hire high-priced defense attorneys to defend another questionable patent infringement claim more than 1,000 miles away from our home office in a court that is known to be friendly to patent trolls, instead of using those resources to drive traffic to our franchisee's businesses.

I know the TC Heartland decision has been touted as a cure to rampant venue shopping by patent assertion entities. Unfortunately for us, venue—the patent venue statute still provides that patent infringement actions may be filed in the State where the defendant has a regular and established place of business.

For businesses that operate from bricks and mortar locations in multiple States such as Culver's and many other restaurants and retailer chains, this decision is likely to have no impact.

And what is our regular and established place of business in the Eastern District of Texas that subjects us to this jurisdiction? We have three Culver's, all of which are franchised, located in this district. And those three restaurants, collectively, generate less than one-third of 1 percent of our revenue. Despite this, we find ourselves back in the Eastern District of Texas.

With the patent venue statute and the TC Heartland decision as they stand to date, we will continue to see venue shopping and patent infringement claims against us as well as other bricks and mortar businesses. To avoid the seemingly inevitable situation, Congress must act swiftly to correct the inequity in the patent venue statute that was not fixed by the TC Heartland decision.

And while we support patent reform concerning venue, please know that this alone will not resolve the patent troll problem. I also urge you to revise patent litigation reform efforts to curb frivolous behavior and stiff—and shift the economic incentives away from patent trolls making baseless claims.

I do, however, want to address one development that has been particularly useful to businesses like ours in fighting patent trolls; that is, the U.S. Supreme Court decision in *Alice v. CLS Bank*. The decision created a two-step framework to distinguish low-quality patents for abstract ideas and activities done simply on a computer from high-quality claims.

In 2011, Culver's, along with dozens of other restaurants and retailers, was sued in the diet cola case in Eastern District of Texas. The plaintiff claimed that we infringed upon their patents simply by using an online calculator that added and subtracted nutritional information.

Thankfully, due to the *Alice* decision, the courts found that the diet cola patent was drawn to patent ineligible subject matter and was invalid, resulting in dismissal of the case against Culver's and other defendants.

The *Alice* decision gives Culver's a reasonable opportunity to defend against low-quality infringement claims before entering into the cost prohibitive discovery stage of litigation, which effectively forces a settlement.

In closing, let me be clear about one final and important point, Culver's fully supports the ability of individual inventors and legitimate patent holders to market their products and bring claims to protect their intellectual property. But we also believe that appropriate patent litigation reform can continue to protect incentives for innovation while discouraging the exploitation and abuse that runs rampant in the patent system today and actually stifles innovation.

Mr. ISSA. Thank you.

Mr. ANDERSON. Thank you once again.

Mr. ISSA. Thank you.

Professor Chien.

#### **STATEMENT OF COLLEEN V. CHIEN**

Ms. CHIEN. Chairman Issa, Ranking Member Nadler—

Mr. ISSA. If you could pull the microphone just a little closer. Thank you.

Ms. CHIEN. Here we go.

Chairman—

Mr. ISSA. And turn it on.

Ms. CHIEN. Oh, yes. That would help.

Mr. ISSA. Thank you.

Ms. CHIEN. On the third try.

Chairman Issa, Ranking Member Nadler, Chairman Goodlatte, and Ranking Member Conyers, thank you so much for inviting me to testify today. I will address three issues: The likely near-term impacts, possible long-term impacts, and opportunities and risks associated with the TC Heartland decision. In other words, what just happened? What will happen? And do we need to do anything about it?

My coauthor, Professor Michael Risch of Villanova is not here today, but he deserves much credit for the research I will present. The opinions I express are solely my own.

What just happened? The short answer is that the Supreme Court decided that the patent—that patent cases must be brought on defendants' turfs, not plaintiffs'. This is a sea change that will substantially curb forum shopping and impact every single patent case, but it is also a return to business as usual over the long arc of patent history. What do I mean?

For most of the 200-plus years of the patent system, the rule has been that patent holders can sue only where the defendant inhabits or is present. This was the law of all civil cases for the first 100 years or so. For the next 100 years, civil venue changed, but patent venue stayed the same.

But from about 1990 to about 3 weeks ago, things took a detour. The Federal circuit's decision flipped the rule, changing proper venue from defendant's turf to plaintiff's choice. I wanted to provide that context just so we understand that when the Supreme Court decided the TC Heartland decision it, in effect, restored the longstanding rule. That is what just happened.

The honest answer to the question what will happen after TC Heartland is, of course, no one really knows. But the upshot is that all plaintiffs will have fewer options. Patent trolls won't be able to file as easily in the Eastern District of Texas or wherever they want, but neither will California companies or individuals from Georgia.

Based on our number crunching, which we applied the new rule to about 1,000 cases, about 60 percent of patent trolls would need to move their cases, not all of them, but 60 percent. But 50 percent—51 percent of operating companies cases would also move as well. Individuals and universities would have to move less than either trolls or operating companies we found.

Defendants will benefit. After all, it is their turf now, but less uniformly. The smaller you are, the less likely you are to get dragged into an unfamiliar venue. That is good news for startups and small businesses, though it might mean going to Delaware instead of Texas.

But firms that are present all over like Culver's and others, retailers, can still be sued all over. Foreign defendants will get no relief.

What about the districts? Again, our best guess is that cases will be more evenly distributed, although still concentrated in the top three. The Eastern District will see hundreds fewer cases, and Delaware and districts in California will see many more, though not more than they have ever seen. We are already seeing this start to happen.

Now, how many cases are going to move? Specifically, it is hard to tell, and some cases are not going to survive that. But so far, based on the predictions we have made and looking at 2017 trends, things are moving in those directions.

But beyond less forum shopping, though, we should see other positive impacts. That is because in my personal opinion, the rise of the Eastern District has stunted other parts of the patent system. At most Federal, the things like interparty review, section 101, and the Alice decision that Mr. Anderson referred to, and even the patent pilot program, have been implemented differently in the Eastern District than in the rest of the country.

Lax venue has enabled parties to, in effect, select a different plaintiff-friendly version of the system. While differentiation is healthy, the districts' gamesmanship has not been. TC Heartland will have a positive multiplier effect, advancing not only patent law, but a more consistent, predictable, and uniformed patent system.

What might the subcommittee do? Well, what else might happen is anyone's guess. The subcommittee could keep its eye on three things, going to the questions presented by the chairman and Ranking Member Conyers.

First, we could see adaptation. Instead of going away, trolls may adapt their behavior. We have certainly seen this before with response to the joinder rules. They, in this case, could focus on foreign defendants and defendants with large footprints, like retailers and their customers. Customers' stay or other provisions may become more urgent.

You also may see a move from moderation. Patent holders may say that a more moderate rule is appropriate, because if the rule before was plaintiff-friendly, then the current rule, the century's old rule, could be considered defendant friendly with equity, perhaps, lying somewhere in between.

TC Heartland impacts all plaintiffs, but the Senate's VENUE Act, which we also modeled, takes a more surgical approach, impacting a majority of troll cases but only a minority of nontroll ones.

Finally, other problems can remain unresolved or get worse. The best options for small defendants, while less expensive than litigating in Texas, still costs tens or hundreds of thousands of dollars, making nuisance settlements attractive.

The small plaintiffs, likewise, who can't afford to defend against challenges to their patents, will have fewer options to sell them. Poor patent quality as well as changes to the law are expensive to keep up with, placing the smallest parties at a disadvantage. How we encourage innovation in the patent system through technology

transfer, licensing and commercialization, not litigation, should remain in the subcommittee's view.

I thank and commend the subcommittee for its commitment and attention to the proper functioning of the patent system.

Mr. ISSA. Thank you.

Professor Mossoff.

#### **STATEMENT OF ADAM MOSSOFF**

Mr. MOSSOFF. Chairman Issa, Ranking Member Conyers, Ranking Member Nadler, and members of the subcommittee, thank you for this opportunity to speak with you today about TC Heartland and its impact on the innovation economy.

My name is Adam Mossoff, and I would like to note that I am speaking in my personal capacity as a law professor at Antonin Scalia Law School at George Mason University, and not on behalf of my employer or of any other organization with which I am affiliated.

It is undeniable that there are a handful of bad actors in the patent system, just as there are in every other area of law. The important question is whether there is a systemic problem requiring legislation like the Senate's VENUE Act, or court decisions like TC Heartland that restrict rights for all patent owners, such as individual inventors, small businesses, universities, and even the long-established R&D intensive companies working in the high-tech and bio-pharmaceutical sectors.

These patent owners rely upon stable and effective property rights to create and commercialize new technological innovation. Unfortunately, the impact of the TC Heartland decision is that it further weakens the ability of all patent owners to protect their property rights against infringers.

In this context, TC Heartland is very concerning given the recent erosion of patent rights and many other Supreme Court decisions, and in legislation over the last decade that have consistently restricted and weakened all U.S. patent rights.

In the U.S. Chamber of Commerce's annual ranking of countries' IP systems, the U.S. patent system has now slipped this year from its long-held rank of number 1 in the world to number 10. Adding TC Heartland to this mix further contributes to this deeply concerning decline of what was once a gold standard patent system. Congress should care about this, because this imperils our innovation economy, threatening both jobs and economic growth.

The advocates for a more restrictive venue rule do not discuss or acknowledge the resulting costs to inventors, startups, small businesses, universities, and R&D intensive high-tech and bio-pharmaceutical companies. But like the economic law of supply and demand, refusing to acknowledge real-world costs neither negates them nor makes them go away as a policy concern.

The reason why there are high costs for all patent owners now in seeking protection of their property rights is that TC Heartland, like the VENUE Act, does not change the concentration of patent lawsuits in a few districts. As Professors Chien and Risch's study show, out of 94 total districts, it only shifts the lawsuits from one district to two: from the Eastern District of Texas to the Northern District of California and the District of Delaware.

The District of Delaware and Northern District of California are widely recognized as more friendly jurisdictions for defendants who are sued for patent infringement. This explains why the many amnesties who supported TC Heartland comprise mostly the same companies that have been lobbying for the Senate's VENUE Act.

High-tech companies and retailers with an online presence who were sued in the Eastern District of Texas, they responded to this through lobbying and strategic litigation. They want these lawsuits to be in districts that are more favorable to them, either the classic home-court advantage for the high-tech companies in Silicon Valley in the Northern District of California, or through the higher costs imposed on plaintiffs from the long delays of litigation in the District of Delaware.

This is significant for patent owners who are undercapitalized and are very sensitive to litigation costs. For example, Dallas inventor Josh Malone reports that he has already spent \$12 million of his own money suing numerous defendants selling pirated knockoffs of his patent invention. Now, as an aside, Josh Malone meets the definition of patent troll that is being used today by many of—by many people in the patent policy debates.

He told me last week that, quote, "Filing suit in every defendant's place of incorporation will be impossible to afford," unquote, and that, quote, "TC Heartland will be the nail in the coffin for any would-be inventors or startups that rely on patents to protect their technology," end quote.

The main takeaway from TC Heartland is that it is now more expensive for everyday patent owners to protect their property right against infringers. This weakening of U.S. patent rights by the Supreme Court undermines the foundations of the U.S. innovation economy, sinking economic growth and killing jobs.

The media is already reporting on venture capital going overseas to China. In an article published just 2 weeks—2 months ago, your next cancer drug may come from China, The Wall Street Journal reported on R&D investment shifting to China, given the inability of U.S. companies to get patents on their bio-tech drugs. Now that the TC Heartland decision has followed the same pattern of these many other Supreme Court decisions that narrowed or eliminated outright patent rights, Congress should take special care not to pursue any legislation that would further weaken inventors' abilities to protect their property rights.

There are tradeoffs in all changes to legal rules. As with all matters in which the innovation economy, economic growth, and jobs are at stake, the guiding principle for patent legislation ought to be, first, do no harm. Thank you.

Mr. ISSA. Thank you.

Mr. Thorne.

#### **STATEMENT OF JOHN THORNE**

Mr. THORNE. Mr. Chairman, Mr. Ranking Member, other members of the subcommittee, thank you for holding today's hearing.

I am a partner at a trial firm, and I have represented both plaintiffs and defendants in patent cases. I have been in the Eastern District of Texas on both sides. Today, I am expressing just my own



views, not the views of any clients or my law firm, to the extent that my law firm would have views here.

TC Heartland will have a positive effect on U.S. patent litigation and, therefore, a positive effect on real innovation. Going forward, we will not have 40 percent of all patent cases filed in a single district with 1 percent of the U.S. population. The citizens of Marshall, Texas, currently, until 3 weeks ago, were 500 times more likely to serve on a patent jury trial than an average U.S. citizen. They are going to get a reprieve.

Cases that remain in the Eastern District of Texas will now get more attention from the judges there who were overburdened by the docket. Going forward, for example, the Eastern District of Texas, judges might be able to reconsider their standing rules, which generally discourage any pretrial motions which will stop an unmeritorious case from going to trial.

So to echo the chairman's opening, I guess, venue issues are not over. There will be important fights on two fronts: First, what constitutes a regular and established place of business; and second, when, in the interests of justice, should a District Court transfer to a more convenient forum?

So just a word about TC Heartland itself as a decision. Professor Mossoff's testimony, written testimony, says TC Heartland was, quote—this is on page 1 of his testimony—“a result of extensive lobbying.” Quote, “TC Heartland arose from a coordinated campaign of lobbying, strategic litigation and public relations efforts.” On page 3 he says, “Heartland, TC Heartland, was hijacked by the campaign to weaken patent rights.” Nothing in the opinion supports those statements.

And as the ranking member said in his opening, TC Heartland doesn't talk about patent policy. The words “Texas” and “Marshall” don't appear in the opinion.

Professor Mossoff also says, “TC Heartland is one-sided and unbalanced in its result.” I think he is right there in the sense that all eight justices voted to bring the law back to what Congress had written originally. It was eight-to-zero, because Justice Gorsuch hadn't been appointed and confirmed quickly enough to be able to hear the case. But Justice Thomas' decision for the court cited Justice Scalia's work as further authority for the opinion. So if Justice Scalia were still with us, maybe it would have been nine-to-zero.

So a word or two about what hasn't finished. As the ranking member noted at the beginning, section 1400(b), the venue statute, has a second half. In addition to talking about where the defendant resides, venue may exist, quote, “where the defendant has, first, committed acts of infringement; and, second, has a regular and established place of business.” I looked, and I could not find any modern cases interpreting the second half of that provision. And the reason was you could find venue anywhere. You didn't need to focus on the more exacting standard.

So three ideas for how that ought to be interpreted by the courts and, perhaps, fixed by Congress if that becomes necessary:

First, 1400(b) should be interpreted according to its plain text and ordinary meaning. So regular and established should not be rendered meaningless. Some places of business, maybe the Culver restaurants, should be considered not sufficiently regular or estab-

lished to satisfy 1400(b), nor should courts ignore the term, “place of business.” Place is a physical place, it is not cyberspace.

Second idea, this is a venue statute. So it is not about the court’s power to reach conduct but the judgment of where should the courts take cases. That is about efficiency, convenience, and fairness.

In most patent cases, unlike the general run of commercial litigation, the evidence is in the hands of the defendant. The location of the evidence will drive the efficiency and the convenience and the fairness of the case, meaning you want to hear the case where the product was manufactured or designed. So selling a product from one State to another, and having the product delivered shouldn’t create venue. In fact, that is the exact conduct that TC Heartland said didn’t create venue here.

And last, and I will stop and say more maybe in response to questions, it is important for 1400(b) to be interpreted to avoid perverse incentives on business. It didn’t used to matter where—in the TC Heartland world, it didn’t matter how you thought about regular established business. You could be found any place if residence just meant personal jurisdiction’s reach.

But now going forward, companies are going to be faced with a choice, do we keep our restaurants in the Eastern District of Texas? Do we allow workers to work remotely in places that would be unfavorable forums? If the courts are not careful, the incentives will be against employees, against growth, against building things, and the correct way to look at this is where is the evidence necessary to have a fair and efficient trial? That is the proper place for venue.

And so, just one more word, which is, I think I agree with the sentiments that have been expressed that it is just too soon following TC Heartland for Congress to intervene, but I would urge you to monitor this.

And thank you, again, for the opportunity to be here.

Mr. ISSA. Thank you. And I would suspect that there may be less need for fast food restaurants in Marshall pretty soon anyway.

With that, it is my pleasure to go to the chairman of the full committee for his round of questionings. The gentleman from Virginia is recognized, Mr. Goodlatte.

Chairman GOODLATTE. Thank you, Mr. Chairman.

Mr. Anderson, thank you for your testimony. Can you tell the committee in some more detail how patent trolling discourages you from buying products from smaller companies and startups?

Mr. ANDERSON. Sure. We have had four instances with patent trolls, which cost our company hundreds of thousands of dollars. As a result, we shy away from technology. Our customers want the use of technology. And when I say technology, I am talking website, social media; not high technology, just basic technology. But we shy away from it because we have been stung four times, I anticipate it will happen again, using things like cell phones and social media and website-type things. So when my marketing department comes to me with an idea, even though our customers want technology, through mobile ordering and things like that, our guests certainly do and our franchisees do, and we owe it to our franchisees, we take a step back, and we are very careful, because there is no way

to check ahead of time before we engage. And when we do, we are very wary of the small provider who we would love to give the business to, but who can't indemnify us from a patent troll.

Chairman GOODLATTE. Thank you.

Mr. Mossoff, I get your concern about what is going to happen with how cases are heard elsewhere around the country, but I can't believe you think it is acceptable for one judge to hear 25 percent of all the patent cases in the country, and they go to him not because it is a special patent court but because the historic results there are especially pleasing to one form of party in the patent cases. That is not a good solution, is it? The current environment?

Mr. MOSSOFF. Well, thank you, chairman, because that does give me an opportunity to expand more upon the data that I actually talked about in my written testimony.

There are—there have been a lot of allegations that the Eastern District of Texas was pro-patent, but if you look at whether there is any actual rigorous, data-driven statistical studies that confirm this claim, one will find them wanting. There is one informal study that looked at 18 cases that drew a conclusion from 18 cases in one year that they had a higher reversal rate at the Federal Circuit. But what you find, actually, with longer studies by—for instance, PricewaterhouseCoopers did a much longer study, which found that the Eastern District of Texas had affirmative rates largely in line, slightly below the rest—other districts throughout the rest of the country.

So it is a little unclear, exactly, why we ended up in the Eastern District of Texas. I think some of the indications that—of why this happened may have been already raised by Chairman Issa in the sense that the judges, for instance, decided after the Supreme Court handed down the slew of what are known as the 101 decisions, the patentable subject matter decisions as to what counts as a patentable invention, they said, Well, we can't assess whether this covers an unpatentable invention until we know what the patent covers.

Chairman GOODLATTE. Let me—I have only got so much time.

Mr. MOSSOFF. Okay.

Chairman GOODLATTE. Accepting your argument, then why would the Supreme Court decision moving these cases around the country necessarily be anti-patent holder?

Mr. MOSSOFF. Well, as I indicated in my written testimony and as—as well, the—is that both the Northern District of California and the District of Delaware are recognized as being more defendant-friendly jurisdictions counter to the Eastern District of Texas, which is perceived, for some reason, to be pro-patent.

Chairman GOODLATTE. So, if we wanted to make sure that the cases were not forum shopped by either the plaintiffs or the defendants, then I think your answer would be, we shouldn't rest with the Supreme Court's decision; we should look beyond it and see what the implications are of the decision as it has been made, because that is now the law of the land. The Congress has to decide whether or not we need to do something further with regard to venue to make sure that there is a balanced approach, and that both plaintiffs and defendants feel like they are going to have a fair oppor-

tunity to be heard in a jurisdiction that has a reputation for fairness.

Mr. MOSSOFF. Well, I think that the exact issue here is that we need to be concerned about the unintended consequences and the costs imposed by the innovators.

Chairman GOODLATTE. No question about it. That is why we are having the hearing.

Mr. MOSSOFF. Yes.

Chairman GOODLATTE. But if you have some ideas on what this committee should do beyond the Heartland case, we would definitely welcome those.

Mr. MOSSOFF. I would—my recommendation would be to pause, and to take and wait for the data on the impact of all of the legislation and the Supreme Court decisions of the past 10 years, which have excessively limited, narrowed and consistently come out, as I mentioned, limiting or narrowing the patent rights of owners of patents in this country, which highly affects, as I say, individual startups, small businesses, universities, and the bio-pharmaceutical industry.

Chairman GOODLATTE. I get that, but I would just say that with regard to this particular venue case, I am not sure I buy your argument. If you are citing data that says that this court in eastern Texas is more balanced than the public perception has been, and now the question is, okay, the court has made the decision that has narrowed the places where plaintiffs can seek redress, what should we do about it? What should we do in response? Are we going to wait for years to see, or should we look at the arguments that you and others are making and decide what response Congress should make to a court decision, that Congress has the ultimate legislative authority here?

Thank you, Mr. Chairman. I appreciate it.

Mr. ISSA. I thank you, Mr. Chairman. And I might note that you have pending legislation that lies somewhere between do nothing at all and overreact. So hopefully, that middle ground is coming this year.

And with that, I recognize the ever smiling and jovial ranking member and former chairman of the full committee, Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman.

Let me start off with Professor Mossoff. Can you explain, sir, why you believe the TC Heartland decision restricted patent rights for all patent owners?

Mr. MOSSOFF. It impact—yes, because it changes the ability to file patent infringement lawsuits for all patent owners—no, it changed the law with respect to venue for all patent owners under section 1400 of the U.S. Code. And so it applies to Josh Malone, the Dallas-based inventor, for instance, just as much as it applies to other companies and individuals. And it applies to all universities, all startups, all small businesses, and the bio-pharmaceutical industry, who actually engages in significant litigation in the Hatch-Waxman regime, and this will actually make it more costly for them as well as a result.

Mr. CONYERS. So is legislation still necessary, in your view, to make the venue statute more fair to patent holders?

Mr. MOSSOFF. I believe that the legislation is necessary to balance out the patent system in what has become an unbalanced and biased system against patent owners. We need to have broad-ranging, balanced system to promote innovation.

And as I mentioned, a significant number of decisions from the U.S. Supreme Court, both on what counts as a patentable invention, how you license patent inventions, how you litigate, and what remedies you give have consistently come out in favor of defendants and accused infringers and not in favor of patent owners, and this has led to the situation that I mentioned in my opening remarks how we have now slipped from number 1 to number 10th in the world in U.S. Chamber's famous ranking of IP systems.

Mr. CONYERS. And why do you believe that the Heartland decision will impose higher costs on all innovators?

Mr. MOSSOFF. So, for instance, Josh Malone, to come back to my individual inventor who I would recommend and commend as a witness, perhaps, to understand the impact of potential future legislation and the TC Heartland decision, now has to file suit in Delaware and/or in the Northern District of California where the—where the defendants would be incorporated. And he can't file suit in Texas, where he is based and where they may or may not be doing business under what is a highly variable and unsettled definition of regular and established business in the case law.

So he—so unlike before, he now has to hire counsel in Delaware to represent him, and he has to travel to Delaware, and the same as hiring counsel in California. So this just imposes an additional cost on top of the \$12 million that he has already spent to defend his patents, even in Texas.

Mr. CONYERS. Okay. Very good.

Mr. Thorne, what questions are unresolved, in your view, after the Heartland decision? Do you think that how to determine venue for foreign corporations, including those in—those with U.S. subsidiaries remains unresolved?

Mr. THORNE. Thank you for that question. Foreign defendants currently can be sued wherever they can be found, and that may be clear, and it may require additional clarification. We will have to see on that. But the most important unresolved question, though, is one you touched on in your opening remarks, which is, what should count as a regular and established place of business?

And the courts are going to work that out in—at the District Court level, I hope, in the next few weeks and months, and we will probably see from the Federal Circuit in the next year to 2 years what the Federal Circuit thinks on that issue.

My experience is that in patent cases, the defendants, or the defendant's supplier, tends to have the evidence that is necessary to determine whether there is an infringement. And the most efficient way to make that determination is filing someplace you can get that evidence. And the plaintiff's side of it is important too, but it is typically right that a plaintiff's side of the case has been submitted to the patent office with the application. The patent itself describes what the patent covers, and it has the prior art that the inventor had. So the plaintiff has less to do and in the case of a non-practicing entity, there may be a door with a number on it like what you saw in the picture, but not much more. The NPEs, the

non-practicing entities, don't have much evidence to bring to bear. So their location matters less to the efficient, fair resolution.

Mr. CONYERS. Thank you.

Squeezing one in for Professor Chien. In your testimony, ma'am, you noted that no one really knows what will happen after the Heartland case. Do you believe that all plaintiffs will have fewer options for where to file?

Ms. CHIEN. Yes. Thank you for the question, Mr. Conyers.

The decision essentially goes from being a rule where plaintiffs could file anywhere they want to now having to file on defendant's turf. So that will mean fewer options for all plaintiffs.

However, against certain defendants, they are still going to have a lot of options. So if you are a retailer, and you have places of business everywhere, which is what we want to encourage, and we want to encourage employment in every district, that also subjects you to jurisdiction in all these different places. If you are foreign, that is the case. But if you are small, you don't have very many places of business. You will likely be sued only in your own areas, and near your headquarters.

Mr. CONYERS. Thank you so much.

Thank you, Mr. Chairman.

Mr. ISSA. Thank you, Mr. Ranking Member.

With that, we go to the gentleman from Pennsylvania, Mr. Marino.

Mr. MARINO. Chairman, may I reserve at this point?

Mr. ISSA. Absolutely.

We—the gentleman from another part of Texas, then, Mr. Farenthold.

Mr. FARENTHOLD. Thank you very much. And I don't represent the Eastern District of Texas. I would rather be—

Mr. ISSA. And I want to thank you for that.

Mr. FARENTHOLD. All right. I do have a couple of questions.

Mr. Mossoff, you indicated that the studies showed that, actually, the Eastern District of Texas reversal rate was only substantially—was only slightly higher than other districts over a longer term. Is that correct?

Mr. MOSSOFF. It was framed in terms of affirmance rates from PricewaterhouseCooper's. It was—the affirmance rate was slightly less than other districts, yes.

Mr. FARENTHOLD. All right. So based on the number of patent cases that are heard there, it would seem like that court would have developed a level of expertise where they wouldn't be being reversed as often. How would you explain that other than, perhaps, they are a little more plaintiff-friendly?

Mr. MOSSOFF. It is—from what I understand, and I have not gone into the details behind the PricewaterhouseCooper's number and methodology. It is a statistically relatively insignificant difference. So it is not something that you can draw any systemic inference about—about a—as an institutional matter or practice.

Mr. FARENTHOLD. And the chairman asked Mr. Anderson about the impact on startups. I would like to ask a similar question to Ms. Chien.

What effect does the NPE problem or issue, depending on how you look at it, what effect do you see that having on startups?

Ms. CHIEN. So there are a number of different ways in which it is harder in the system if you are a little guy. If you are a defendant and faced with a suit, then that is something that ends up taking up a lot of your time, a lot of your management, attention. And essentially, when startups are young, they are very fragile. So any sort of disruption like this can be very devastating. So in a survey that I did in 2012 and 2013, several surveys, I was surprised to see that startups said that they would make huge changes in response to getting a letter. And it is not dissimilar to what Mr. Anderson talked about, pivoting the products, changing the course of the business, delaying hiring, and making substantial changes in order to pay for and deal with litigation.

And in that light, you can see why settlement is very attractive. Using settlements of below 10,000, you know, are something that are still happening.

And so, I want to actually take this opportunity to address the questions that were asked earlier about whether or not the Eastern District, in fact, is more favorable to plaintiffs. And Professor Mossoff is correct that the rates in terms of reversals and affirmances may not show a huge spread, but what we found—and this is detailed in my paper with Professor Risch—is that there is this perception of more friendliness based on the favorable ways and procedures that the district takes out.

So the substantive law is not different, but the procedures are different. So you won't get your 101 motion heard in a timely matter, the relief that Mr. Anderson talked about. You won't get your case stayed for the patent office to revisit its validity.

So if you look at the report actually done on a totally separate topic, the patent pilot program, last year at its 5-year mark, they mention all the ways in which litigating in the Eastern District is different. Only 1 percent of eastern district cases reach a judgment as compared to 7 percent nationwide because people are looking for these quick settlements. If I am a startup, I am not going to want to go ahead and spend my time litigating this case all the way, and then get it appealed.

Mr. FARENTHOLD. Startups work at warped speed. I understand. I have got one more question for you, and I am running out of time. I don't mean to cut you short. I saw some of that data in your written material, so.

Mr. FARENTHOLD. Over the past several years, the Judiciary Committee has examined the rise in venue abuse, not within the district courts, but also the rise of the ITC as an alternative forum for these types of disputes. I have introduced legislation, along with Congressman Cardenas, called the Trade Protection Not Troll Protection Act, which basically deals with the ITC jurisdiction.

Do you see TC Heartland increasing or decreasing ITC litigation as forum shopping, and what do you see happening there?

Ms. CHIEN. That is a great question. I think we will have to keep our eye on that. But I will say that one development that has been interesting is thinking about the different options that the committee and Congress have created through inter partes review, the ITC, the district court, and the different options there, now you see a lot of folks electing into using inter partes review at the PTO. So some of the competition, I think, that has been created through

that new procedure has migrated traffic towards there and perhaps away from the ITC to some degree.

Mr. THORNE. May I add a word to that?

Mr. FARENTHOLD. My time has expired. With the chairman's indulgence, I will be happy to let Mr. Thorne answer.

Mr. ISSA. The gentlemen certainly may answer.

Mr. THORNE. I have seen in the past 3 weeks patent plaintiffs looking at the ITC as an alternative to the Eastern District of Texas and also Germany. There is a chance that Germany may also become one of the next forums of choice.

Mr. FARENTHOLD. Thank you very much. My time has expired.

Mr. ISSA. We go to the gentlemen from New York, the ranking member of the subcommittee, Mr. Nadler.

Mr. NADLER. Thank you very much, Mr. Chairman.

Mr. Anderson, press reports immediately after the decision labeled it a clear victory over patent trolls and declared that it would be a death knell for patent litigation in the Eastern District of Texas.

Your testimony indicates that, for many brick-and-mortar businesses with locations in the Eastern District, it may continue to be business as usual. Is there a danger that we will see two classes of defendants, those of proper venue in Texas and those without? Will we see new classes of defendants facing litigation merely because venue is proper against them in plaintiff-friendly jurisdictions?

Mr. ANDERSON. Well, I am not sure I understand the question. I am certainly concerned, from our standpoint, in any bricks-and-mortar businesses that have any presence in the Eastern District of Texas. And I do—the decision may be good for Internet businesses and businesses that don't have physical presence, but bricks-and-mortar businesses, I don't see any change. It all comes down to, from my understanding, the regular established place of business and the lack of the definition—

Mr. NADLER. Your answer is essentially yes. And now you urge Congress to pass legislation to correct this inequity that you identified, whereby only certain types of defendants will benefit from TC Heartland, internet and so forth. Do you have a specific proposal in mind?

Mr. ANDERSON. I don't have a specific proposal, but if we—one thing is if we defined regular and established place of business—we saw a picture of where, what we believe, is our regular and established place of business, and that is where I go to everyday when I am not here. And if we were to define that more narrowly versus any of our 624 restaurants are located, which promotes venue shopping, and retailers and bricks-and-mortar businesses are all going to be in the same situation as we are.

Mr. NADLER. Thank you.

Ms. Chien—Professor Chien, your study suggested that a substantial number of cases that are currently filed in Texas would simply move to Delaware and the Northern District of California. I have two questions for you on this.

One, the second part of this statute, which was quoted by Mr. Thorne, I think, finds proper venue where the defendant has committed acts of infringement and has a regular and established place



of business, closed quote. Why will that prevent forum shopping into the Eastern District of Texas? Why won't—can't they simply rely on that language and keep doing business as usual?

Ms. CHIEN. So I think the answer that Mr. Anderson gave earlier is that some companies—for some companies and defendants, the answer is yes, they will still be able to be sued in the Eastern District. But for many—under what we looked at, when we looked for where they were incorporated, where they had established places of business, it was primarily in other locations. So, for those defendants, they won't be seeing cases in the same place.

Now, they will still have to travel, if they are not based in Delaware, to Delaware, but the Delaware court does not have the same plaintiff-friendly procedure, so they can expect to get a more fair outcome.

Mr. NADLER. So what you are really suggesting is that we will now have three districts: Eastern District of Texas for some, the Delaware for some, and northern California for some. Now, if cases being—end up being concentrated in three districts rather than just one, will this decision be considered a success in curbing abusive litigation? Or are the judges in two of those jurisdictions likely to approach patent cases in a—well, you have already stated that they are likely to approach cases in a meaningfully different way than in Texas. But are we likely to end up being in three districts rather than just one, with some of them getting the advantage of being in the other two districts?

Ms. CHIEN. Well, that is one thing to consider, which is dynamic effects. Certain cases are not going to survive the transfer. They only made sense when they were filed in Texas and you could get a certain amount of settlement just from the threat of being there.

Second of all, though, you will see then the sort of dispersion—yes, still a high concentration within the three districts, but what you will see is cases that are based more on the merits and less on where you were able to get venue. And so I think that is a healthy outcome, even if there still is concentration in the top three.

Mr. NADLER. Thank you.

Mr. Thorne, your testimony describes many of the reasons that plaintiffs favor the Eastern District of Texas and the reasons defendants may find it unfair.

Setting aside this particular jurisdiction, however, is there a value in concentrating patent cases in one or a limited number of jurisdictions? Given the complex and technical nature of these cases, should Congress consider selecting certain courts to hear all patent cases or consider encouraging more cases to be filed with courts participating in the Patent-Pilot program?

Mr. THORNE. So I am a big fan of the Patent-Pilot program. I think that is a great idea. That is in 13 different district courts. As a general rule, not just for patent cases but for all sorts of cases, you have got a concentration of power to make the laws; that happens here. The application, if possible, ought to be dispersed. Dispersal is better; it is healthier.

Mr. NADLER. Why?

Mr. THORNE. Because different judges will have different experiences. And in the case of patents where—I really do think it is

where the evidence is that makes the case most efficient. The evidence is going to be where the companies decide to build their products. So that will be dispersed. By the way, I don't agree that all the cases are going to the Northern District of California and Delaware. The most prolific patent filer—I cited this in my testimony—in the last couple weeks filed five cases in Illinois.

Mr. NADLER. Four districts. Thank you very much. My time has expired.

Mr. ISSA. I thank the gentleman.

We now go to the gentleman from Arizona, Mr. Biggs.

Mr. BIGGS. Thanks, Mr. Chairman.

Mr. Thorne, in your testimony, you conclude by saying that maybe Congress should not do anything at this time, and yet you talked about 1400(b), and it needs to be accurately interpreted and particularly with the clause regular and established. Tell me if Congress maybe should weigh in on that and expand the definition for some kind of predictability.

Mr. THORNE. My advice is to give it a little bit of time. Even Professor Mossoff, in his letter to Congress a year ago, suggested on the topic of venue, give it a little bit of time. I think if Congress has to weigh in, you will be able to better tailor whatever is needed.

Mr. BIGGS. Thanks.

Mr. Anderson, back to you. This gets to what the gentleman from New York, Mr. Nadler, was talking about, I think when he said two types of plaintiffs really or defendants; you have a two-tier system basically where you have those who have brick-and-mortar and places of business where you can identify, like in your instance, three actual Culver's in the Eastern District of Texas versus cyberspace. Do you have any language or what do you think is the sweet spot there? How do you resolve the difference in those two types of litigants?

Mr. ANDERSON. Professor Thorne talked about it a little in his paper as well. The venue statute for patents is different than venue in the nonpatent arena. And in the nonpatent arena, you are looking for efficiency and convenience and fairness, because the patent statute talks about the regular and established place of business.

I would like to see the patent statute for venue read more like other cases. And, again, Mr. Thorne has summed it up pretty well. So you will be where the evidence—where the witnesses are and be more like a regular case.

Mr. BIGGS. And, Professor Chien, when you—in your statement, you were talking about this is a return to business as usual over the long arc of patent history, and you explained that. What do you say to businesses like Culver's or defendants like Culver's?

Ms. CHIEN. I personally don't believe that they should be dealing with patent litigation assertions. They are a retail business. They are selling products. They are supporting their franchisees. They are adopting technology, but they are not on the cutting edge of developing it. So I don't think they should be dealing with suits in the Eastern District or in Wisconsin.

And the question is, how do we get the market and the law to get us to that result, and part of it is the question of making sure that people that they work with are providing the protections, that

suits are properly against the maker of the technology, and that there are customer stays. So, even though we have gotten back to the old established rule, I think adapting to the business model and making sure that we are aligned with—making sure that businesses like theirs can focus on what they are good at, pushing out a product, developing and pleasing customers, and not involving patent litigation, that is where we need to be moving.

Mr. BIGGS. So what is your remedy for—what is Congress' role in that remedy, because you propose something remedial, so what would Congress' role be in that?

Ms. CHIEN. Well, I think we need to take a look at what is going to be happening now as the case law has carried itself out and the decisions the companies are making and stay in close touch with these businesses to figure out, again, how to come up with a solution.

So I really commend the committee for paying attention—and continue to pay attention to these issues. I think we need to still see how things are going to settle after this case develops and then see if intervention perhaps laser focused on customer stays or other interventions will still be appropriate.

Mr. BIGGS. And then, Professor Mossoff, I am just curious about your testimony. And where do we find the sweet spot in protecting patent holders and also protecting against frivolous lawsuits?

Mr. MOSSOFF. Thank you for that question, Congressman, because that allows me to get to I think a really important point, which is that you don't have any actual rigorous studies that follow standardized norms and statistical analysis that have concluded anything about widespread systemic abusive patent litigation. So no studies on that.

Moreover, the debate and the discussion, even about the Eastern District of Texas, is just as much about patent litigation more generally, is really infected with a lot of just rhetorical epithets, like the term troll. Everyone thinks of troll as a bad person, but when you look at the definitions of what people include under those terms, such as the definition used by Unified Patents used in Professor Chien and Risch's paper and used by Professor Chien in other papers, it includes individual inventors, it includes startups who have patents, it includes small businesses, it includes manufacturers actually who sometimes license, it includes licensing companies: long established drivers of innovation in this country. And this is exactly licensing, not manufacturing, is a key component of what has been the success of the U.S. patent system in driving our innovation economy for well over 200 years. This has repeatedly been shown by economists and historians, that the licensing activity in secondary markets and patents was fundamental in the 19th century and the 20th century. It was used by Thomas Edison and Nikola Tesla and others. So these are the people that we are condemning as trolls.

Mr. BIGGS. I hate to cut you off, but we are out of time. But I am still looking for that answer of where the sweet spot really is between the two ends of the spectrum there.

Mr. ISSA. I thank the gentleman. I lived a long time; I never thought I would hear Edison called a troll in a hearing before Congress.

With that, we go to the gentleman from Georgia, Mr. Johnson.  
Mr. JOHNSON. Thank you, Mr. Chairman.

Mr. Thorne, you state in your testimony that you have, over your 30-year-plus legal career, represented parties in more than 100 patent disputes, both on the side of the patent holder and on the side of the accused infringer. Is it fair to conclude that most of your cases have involved your representation of accused infringers?

Mr. THORNE. I actually have not counted. Some of my favorite cases were on the plaintiff's side. We brought a case—

Mr. JOHNSON. I am just—

Mr. THORNE. In Virginia. And then we got an injunction to shut down Vonage.

Mr. JOHNSON. I know that there have been cases on both sides, but my question is whether or not most of your cases have involved representing accused infringers. Isn't that correct?

Mr. THORNE. As I said, I have not counted the number. Again, I think I was the first to bring a large commercial lawsuit in the Eastern District of Texas.

Mr. JOHNSON. I don't think you want to answer that question.

Let me move on to Professor Mossoff. But before I go to Professor Mossoff, he states in his testimony, Mr. Thorne, that TC Heartland is just one case in a—what he calls, quote, pattern of incremental erosion of patent rights by the U.S. Supreme Court and the Congress which imperils our innovation economy and contributes to the decline of what was once a gold standard or gold-standard-plated system in the United States, end quote.

Do you take issue with that?

Mr. THORNE. Mr. Johnson, I do. Two examples. One is in the Eye for Eye Microsoft case, the Supreme Court decided that unlike all other property rights cases, which are decided based on a preponderance of the evidence, in the patent system, there would be a higher burden of proof to invalidate a patent, in Eye for Eye. And that was not withstanding something like \$3 trillion of companies urging that the normal burden of proof—and more recently in the Halo case—

Mr. JOHNSON. Well, I don't want you to give me a background. I just want you answer my question.

Let me ask Professor Mossoff—and I am sorry for interrupting, but my time is limited.

Professor Mossoff, what do you mean when you say that the TC Heartland case is just one step in an incremental erosion of patent rights and the impact that that has on our patent system in this country and our ability to be competitive as a country?

Mr. MOSSOFF. Thank you, Congressman, for the question. And the United States Supreme Court has been engaging with the patent system in terms of hearing cases at a rate that we have not seen for well over a century. And a substantial majority of those decisions, contrary to a couple of cases identified by Mr. Thorne, have come out in terms of weakening, eliminating, or narrowing patent rights, whether you are talking about making it harder to get injunctions on eBay, harder to license and engage with commercialization through MedImmune, through Quanta, and the recent decision in Impression Products, whether you are talking about the four cases that have substantially restricted the ability

to obtain actual patents on innovation, and the statistics continually are showing more and more that this is a rising concern for the innovators who are driving this country, the inventors and the heavy R&D-intensive companies that produce patented innovation. Just to take a quick moment as an example to show, if I may, that we—I have a paper coming out this month of—where we talk about 1,700 patent applications on the same invention.

Patent applications were filed in China, in the European Union, and the United States. All 1,700 patent applications were granted in China and the European Union, and they were denied in the United States for being unpatentable inventions under the new Supreme Court rulings, the four cases that address the 101 issue, patent eligibility. These are inventions on radical diagnostic methods for treating cancer, diabetes, and whatnot.

So we repeatedly have seen this, that inventors are going overseas now and obtaining patents in other countries, such as China and Europe. And if that is the case, that is where their venture capital funding will go; that is where businesses will be set up, and manufacturing and licensing will occur, and they will benefit from that with their economic growth and their innovation economies, just like the United States did with stable and effective property rights and innovation for a very long—for the first 200 years of this country.

Mr. JOHNSON. Thank you.

I yield back.

Mr. ISSA. Thank you.

I will now note that I have now heard that China is the country where we are going to base the high mark of patent tolerance on.

Mr. Thorne, you had something that you wanted to complete, and I will give you time to complete it if you can be brief.

Mr. THORNE. I will be very brief. The other case recently that I wanted to mention that came out in favor of stronger patent enforcement is the Halo case, which gave district courts more discretion to award enhanced damages than the Federal circuit had previously allowed. So it is not correct, as Professor Mossoff says, that the Supreme Court has been biased in favor of infringers. I think they are biased in favor of reading the statutes that Congress has passed. And to the extent there is any leeway in the statutes, they are biased, just like we are, in favor of innovation.

Mr. ISSA. Thank you.

The gentleman from Texas, Mr. Poe.

Mr. POE. I thank the chairman.

Thank you all for being here.

In my other life, I was a judge in Texas for 22 years, and I tried felony cases—only felony cases, everything from stealing to killing and everything in between. So I understand the concept of having a specialized court, for example.

When I first got elected, I represented Jefferson County, Texas, where the Eastern District of Texas holds court from time to time. You go through Jefferson County, Port Arthur-Beaumont, and you see everywhere billboards for attorneys, for patent attorneys, for plaintiffs' attorneys, torts attorneys. Any type of lawyer, there are billboards there. And there are storefronts with, in my opinion, very little activity, but it is a storefront for lawyers.

After redistricting took place, the powers that be redistricted me out of Jefferson County and sent me to the Houston area. I don't think that is because of the plaintiffs' lawyers in the county, but anyway.

Mr. Anderson, you represent Culver's. There is a Culver's down the street from me. And listening to y'all's testimony just makes me wonder whether the Reuben sandwich, which is great, happens to pass just through my county and goes on to some other county, does that give jurisdiction or venue, rather, because the sandwich happened to pass through the county that I am in? It is a difficult question. And it concerns me that—this whole issue concerns me.

We have a lot of issues, but the bottom line is Congress many times passes legislation and makes the matter worse, not better. I think we have done that. I am not saying we have done it here, but we have the courts that have ruled, and we follow the courts' rulings. And the question is, should we just not do anything and let the courts figure it all out down the road, or should we set a standard and try to make the issue better and resolve the problems that have been mentioned here by all of you all, or stay out of it?

So I will ask the two professors that question. Should Congress get involved and make a standard on this issue?

Mr. MOSSOFF. Thank you for the question, Congressman. I believe it is always dangerous to ask professors what should—

Mr. POE. I know, because you all are always asking the questions. When I was in law school, I wasn't prepared enough; I admit that. So I am just asking you the question now.

Mr. MOSSOFF. I mean—Congress should set and has set historically the standards in enacting the legislation. And in your example that you gave, I don't believe it would fall even under the second prong of section 1400(b), because it says, where the acts of infringement occurred and where you have a regular and established place of business. So a single sandwich passing through a district could not be the basis.

Mr. POE. Would a single burger—would a single Culver's in the district be enough?

Mr. MOSSOFF. You know, this is one of the issues, I believe, why, in *VE Holding*, the Federal circuit went with the standards set forth in 1391 was precisely because of the competing definitions in the case law and the lack of certainty in the case law at the time about what counted as regular and established place of business.

But the ongoing introduction of bills over the past 5 or 6 years, combined with the impact—the substantial majority of the Supreme Court decisions that I have highlighted in my past answers has created a lot of uncertainty for patent owners who do not have stable and effective property rights in innovation right now.

Mr. POE. So you think we should get involved and make it clearer?

Mr. MOSSOFF. Well, if Congress gets involved, it should also address the pressing areas concerned in 101, and it should address other areas or pressing concerns, such as remedies and damages, among others, yes.

Mr. POE. Okay.

Ms. CHIEN. I would say, in this case, we should still continue talking to constituents and seeing how this is affecting their busi-

ness. That is the bottom line. And so what professors say from the view—the high up and can kind of see the cases, that is one perspective, but really talking to constituents and figuring out what impact they are seeing on the ground, again, as I had mentioned before, adaptations, as trolls change their business models, or some patent holders not being able to bring their suits anymore; these are the folks that we are going to have to be consulting with.

So I think there is certainly a service in having the hearings because this helps the judiciary understand what is actually happening as well on the ground and then adapting their case law. I think in terms of the back and forth, you see a lot of issues that have been surfaced here taken on by the courts, and so I think that is a healthy dynamic.

Mr. POE. Thank you all for being here.

Thank you, Mr. Chairman. I will yield back the rest of my time.

Mr. ISSA. The gentleman is very generous with the rest of his time.

We now go to the gentleman from Brooklyn, New York, Mr. Jeffries.

Mr. JEFFRIES. Thank you, Mr. Chairman.

And I thank the witnesses for your presence here today.

Mr. Anderson, in your testimony, you mentioned that you are at a disadvantage in being able to, I think, anticipate, plan, and react to the demands of patent trolls. Is that right?

Mr. ANDERSON. That is correct.

Mr. JEFFRIES. And would the disadvantage be anchored in the fact, in your view, that you represent a brick-and-mortar business?

Mr. ANDERSON. The disadvantage is that we are not intentionally playing in an intellectual property and patent troll arena. We have been hit with patent troll demands for things such as using hyperlinks in emails, something everybody does. And we have been told that is a violation of the patent. We also have been hit with a patent troll demand that says having time content in something we send out, “Get your ButterBurger today,” violates a patent because we used the word “today,” or we say, “The deal is good until 3 o’clock.” We have no idea how to compete with that.

So I mentioned earlier, our marketing department, we are up in arms because we know we are going to be sued no matter what we do. So that is a real disadvantage to us.

Mr. JEFFRIES. Now, you testified that addressing the patent troll problem will, in your view, require shifting the economic incentives away from advancing baseless claims. Is that right?

Mr. ANDERSON. That is correct.

Mr. JEFFRIES. And are you familiar with the Supreme Court decision in Octane Fitness that lowered the bar for attorneys’ fees to prevailing parties in patent litigation?

Mr. ANDERSON. I am not.

Mr. JEFFRIES. Okay. Well, in Octane Fitness, pursuant to, I believe, section 285, the Supreme Court indicated that the standard for awarding attorneys’ fees that had been applied actually was too rigorous in terms of prevailing defendants in patent litigations and, as a result, I believe has opened up the opportunity for additional attorneys’ fees to be awarded in patent litigation cases.

I don’t know. Professor Chien, can you speak to that issue?

Ms. CHIEN. Yes. I think this is a promising development that, in a case where you feel like the patent assertion was brought against you baselessly, then you could try to recover your fees. But, in practice, it is a lot more difficult to actually count on that reimbursement at the bottom line at the end of the suit, first, because the Supreme Court can only go as far as the statute does. It doesn't enforce or make shifting automatic; it is still in the discretion of the Court for the more egregious cases.

Second of all, to actually withstand a whole litigation, go all the way, and then finally try to get a motion for fees together is still a lot of stress and distraction for companies. They would rather just settle in most cases. I don't think that that set of Court decisions has necessarily shifted the balance substantially.

Mr. JEFFRIES. To the extent that you think there is room for reform, would you say that it would be anchored in the discovery area and the high cost of discovery in patent litigations, which seems to be uniquely prohibitive in some instances?

Ms. CHIEN. I think, in a lot of cases, that is very daunting. So a company will get involved—a defendant in a case and say, "We are pretty sure we don't infringe this, or "The patent isn't valid," but once they get to the discovery phase and get a six or seven figure estimate for how much it is going to cost, it is clearly a settlement discussion.

So I have seen the congressional proposals around streamlined discovery and have seen those as being very productive. What I think, though, has also given relief to parties aside from discovery reform is sort of having these—if the patent is clearly not valid under Alice, now being able to bring these one on one motions that we have talked about, and now the Eastern District of Texas not being as popular, more courts, given that, there will be relief as well.

Mr. JEFFRIES. Professor Mossoff, do you think that there is room to do anything to make sure that we strike the right balance between a robust patent litigation system that is not abused but that does allow small inventors and tech entrepreneurs and startups to vindicate any rights that may be infringed?

Mr. MOSSOFF. Thank you for that question, Congressman, because I think the best thing that Congress can do is to stabilize and sit back and, in fact, either try to have balanced legislation, not the entirely one-sided legislation that continually looks at so-called abuses by patent owners, but recognizes abuses and costs on both sides of the equation.

But I would also like to just, if I may, answer your question about the attorneys' fees because, actually, we do have the data after the Octane Fitness decision, and motions for attorneys' fees dramatically went up and so did the awards. And rightly so. Because this is traditionally and historically exactly what the court should be allowed to do, they control their own docket. This is classic Article III power. And so that is what—and that is what they have been doing now.

Mr. JEFFRIES. Thank you. If the chairman would indulge one final question. You made the point that this venue decision may simply just result in continued concentration of cases, perhaps from the Eastern District of Texas, where currently you see a high con-



centration of these actions brought to the Northern District of California and the District of Delaware, and you expressed concern with that. But I am just wondering, do you have any empirical evidence—I didn't see any in your testimony—that a shift to those two jurisdictions would actually result in changes in substantive decisions that are made as opposed to your concern with Delaware, for instance, that the docket may simply be overwhelmed?

Mr. MOSSOFF. Congressman, that is a great question, because it gets at the exact issue, because when you are talking about these issues about, is it bad, the question is always, as compared to what? And we don't have any indications substantively that the decisions in the Eastern District of Texas are bad as compared to what or good as compared to what.

All we know through Professor Chien and Professor Risch's study is that if continued litigation practices remain the same, that you will see the shift. But the assertion is always concentration is bad for the system, as Chien and Risch said in an op-ed about a year ago. But why is concentration bad for the system, especially when you are talking about 94 districts shifting from 1 to 2 districts, it isn't a change in concentration; that is a shift from 1 percent to 2 percent. And there hasn't been an argument yet as to, what difference does that make? And so then you have to ask, what is the elephant in the room? Why go to the District of Delaware and the Northern District of California? And those are just—as I mentioned, those are districts widely viewed, as Professor Chien said, the Eastern District of Texas was widely perceived to be favorable to plaintiffs. The District of Delaware and the Northern District of California are widely recognized as being more favorable to defendants.

Mr. JEFFRIES. I thank the witness. I thank the chair. And I would just point out that it will be useful if there is any empirical evidence suggesting that the decisions in those two venues are substantively different, because I haven't seen any. Thank you.

Mr. ISSA. I thank the gentleman. I might note that, in TC Heartland, it is leaving Delaware and going to Indiana, if I am correct.

With that we go to the other gentleman from Georgia, Mr. Collins.

Mr. COLLINS. Thank you, Mr. Chairman.

I think one of the issues—and I think this—I am glad we are discussing this today, but I think it is in a different context after the Heartland decision now, I think, you know, we sort of leave it to where the courts have now said we are going to go. Whether it is, in the good professor's determination, that you are just bringing it to a smaller—you know, maybe just a percentage higher, or is it going to actually, you know, make a difference in some other areas, I think we will deal with that.

But I want to get back to, ultimately, I believe that legitimate litigants benefit from lower costs. Whether it is a big, you know, a large company, a small company, the startup inventor, the tech company, the content—this is an issue that we have got to deal with because I firmly believe, and if you have ever -- if you have listened to some of my concerns here, is that you got to protect content. You got to protect the patentability. You got to protect those

issues. Subject matter is going to be an issue here; how do we determine that?

But, also, how do we make sure that the protection of that is also good for the process as a whole? So my concern is dealing with things as we look beyond venue and forum shopping to the real things that I have talked to, whether they be tech companies, traditional companies, or the smaller companies that end up on the lower end of some of these cases and being dragged into them.

My question has become more of, why can't we begin to look at what many general counsels offline will begin to talk about. They want to talk about expedited Markman hearings. They want to talk about discovery reform. They want to talk about subject-matter issues. They want to talk about motion practices in general. Let's look at customers today. Let's look at those kinds of things. Because, at the end of the day, we are going around the edges of something that is, frankly—and whether it be—and I appreciate my friend, and I do believe that there is a punitive nature to attorney fees, and that is fine. But at the end of the day, most companies—and if you took—and there are a lot of representing companies of tech and everybody else; I can see you in the room—which would you rather do, worry about getting your attorneys' fees and slapping at the end of the thing, or getting this thing stopped early? Getting a frivolous lawsuit out of the system early so that we can get to legitimate cases that do need to be solved and do need to be settled, litigants benefit from that.

So, Ms. Chien, take that—I am sort of opening up—you had a lot of specifics today. I am sort of opening this up a little bit more, and I would like you, Professor, to start—talk about some of those—actually, if you talk to GCs, if you talk to general counsels in many of these companies, this is where they would rather us focus. What are your thoughts?

Ms. CHIEN. So it is a great question, and I think, again, what companies want is certainty, and they want to be able to report up to their CEOs that this is what we are looking at in terms of exposure. And they don't want to say that this case is hinging on, again, this luck of having been—this bad luck of being sued in this one district. It is really not about the concentration issue that is the issue. The issue is that, once you know you are stuck in the Eastern District, that is going to be a certain amount of money you pay; no matter how bad the suit is, you are just going to be stuck with that bill.

And it is outrageous for a lot of firms that feel like they would rather fight the suit, but they can't because it makes a lot more sense to settle it. So that is what creates the, I guess, incentive for companies to continue coming up with business creative approaches, having the least cost, you know, operations, and still be able to bring their suits there.

So I think that, you know, what I can see, though, in terms of all the different interventions Congress has come up with, again, going back to IPR, thinking about joinder, thinking about what the courts have done, what companies gravitate towards is certainty and efficiency. So whether it is a Alice 101 motion for a patent that clearly should not have been issued and is no longer patentable and be able to get in there and get out in 50- to 100,000 dollars

early. Or it is being able to say: Well, I know I am going to be in inter partes review, and it is going to be an 18-month period, that is certain; I know that. Or even the ITC provides that certainty in terms of timeframe. I think that is what firms are looking for. They want to be able to get on with the business of what they are doing, innovating, rather than trying to figure out how to manage this lawsuit—

Mr. COLLINS. Mr. Anderson, I want you to jump in and just answer this.

But I want to take something you just talked about. Just briefly touch this, because I have touched on this and you would believe the sort of the hair that went up on the back of some folks; when you just simply talked about subject matter 101, Alice, you start looking at this and saying—but the question is—I think that we are getting into a conflation here of 101, 102, 103, 112. We're getting to, how do determine that patentability issue?

And, look, I am not wanting just to throw this out, but I think that is a discussion to be had. So I appreciate you bringing that concern up.

Mr. Anderson, you had a—

Mr. ANDERSON. Well, you are asking what general counsels are thinking. I am one, a general counsel of a small company. I will tell you what: My biggest concern is we cannot afford to try one of these cases. I am told they are 3-, 4-, 5million dollars. We cannot afford it. So we need a way to get out early. And the 101 Alice is one of those.

But when someone says, "You can't put the day or a time in a text message that goes out, you are violating our patent," and I say, "That can't be true," and they say, "Well, let's go to trial," I need this to be able to challenge that. And if we can't get rid of that case early, we can't afford to challenge it. In that particular case, we paid them—I can't tell you how much—a large amount of money for that silly patent claim. We had no choice.

Mr. COLLINS. So, at the end of day, it doesn't—and we can talk about a lot of issues and attorneys' fees and all these that are always talked about, but at the end of day, for you, that is an irrelevant issue for you. And in some ways, if you could punish—because you can't go through the process to get—

Mr. ANDERSON. We can't go through the process. We can't go through the process. The attorneys—the attorney we hired right now, \$900 an hour.

Mr. COLLINS. I appreciate the chairman and the subcommittee chairman and also both members of the aisle—sides of this aisle, this is an issue that we want to address in a proper way. And I think, frankly, the issue here is we can deal in the pieces, but at the end of the day, we got to start on what actually—it is like almost another issue we have around the healthcare: What are you doing to bend the cost curve? What are we actually doing to get litigants protected, the small vendor protected from the big, and the big protected from just frivolous suits? And I think we got to go to some issues. Venue was definitely an issue. The Supreme Court has addressed it. Now, I think some of these, discovery, motions, practice, customer stay, Markman hearings, all get to what you are looking at, and I appreciate it.

Mr. ANDERSON. Extremely important, yes.

Mr. COLLINS. I appreciate it.

Mr. Chairman, I yield.

Mr. ISSA. I thank the gentleman.

And, Mr. Anderson, if we could just have had you here pursuant to subpoena, then you could be compelled to answer that question, and we would be delighted to hear it. But my parliamentarian reminds me that you are here voluntarily. Next time.

Mr. ANDERSON. Thank you.

Mr. ISSA. And now the gentlelady from Texas, who has been patiently waiting. Ms. Jackson Lee.

Ms. JACKSON LEE. Let me thank the chairman and the ranking member for their courtesies and courtesies of the full committee chairman and ranking member. I have served on this committee in sessions back and continue to have, coming from the 18th Congressional District in Houston, where there are any number of patent holders through the Texas Medical Center, research, and, of course, energy.

I think I am going to be limited to the context in which we as Members of Congress function, and that is, we hold a hearing. And as we hold that hearing, we project how we can, as legislators, ultimately be helpful. And I think, as I have listened to my colleagues, a number of them have weaved through the question of how we can be effective in responding to this.

What I see is the conflicting—and a confliction on a number of court of appeals decisions and Supreme Court decisions on the question of venue, which can, I believe, some of the witnesses might suggest make or break a case. I have also made an assessment as a litigator, a time or two in the courtroom myself, that a court having knowledge and expertise may help my presentation of the facts because the court understands it, particularly in cases of complexity that we see in a lot of district courts.

So I am just going to ask each person, what is the direct action you want from the United States Congress? What would be helpful? I think, Professor, you indicated that is a wrong direction for a professor, but I am going to ask you to do so. And the other is to not counter, but to sort of answer my point that expertise in the court is helpful to both plaintiff and defendant. As I looked at some numbers, I saw that the percentages weren't that extreme. It was suggesting a numbers difference in the Eastern District, for example, that seems to be in the midst of the storm of a difference between 34 percent—let me read it correctly: 94 Federal district courts in the United States; 34 percent of all patent suits were filed in the Eastern District. It is not 50 percent, but it is certainly a decent number. And I think I saw a number of 70 and 89 percent.

But, in any event—here it is. In 2015 to 2016, 89 percent of the cases in the Eastern District settled compared to 70 percent in all other courts. So, if you would answer those two questions: How we can be best effective as we deliberate; and, number two, the issue of expertise does not help in the overall scheme of patent law.

Mr. Anderson.

Mr. ANDERSON. Well, I will answer the expertise first. I certainly agree that it is complicated. These are all IP attorneys; I am not. It is incredibly complicated. If it was a fair playing field, aside from

convenience, I would agree. But I also hear that summary judgment is very difficult to get to. There are all kinds of procedural things that happen in the Eastern District of Texas that make it a disadvantage to litigate as a defendant.

Let me state: We would never intentionally violate a patent. We have people that violate our trademarks. What I do when somebody does that, I pick up the phone and I call them and we work out a solution. We don't sue them for millions of dollars. That is just the way we do things.

Ms. JACKSON LEE. What would you want us to do?

Mr. ANDERSON. What I would like you to do is—first off, as far as the not do, the 101 or Alice motion, please don't change that. That gives us somewhat of a chance. I am told in our current case, the attorney, this abstract idea of sending a promotional item to a mobile device, that we might prevail on that. Please don't take that away from us. It is our only chance to fight these things. If we lose that, we have to settle. That is what we hope you don't do.

As far as doing, anything that stays the discovery so that—we are the end user of any of this technology—so that the provider of this technology can litigate and determine prior—and we can stay out of the case until that is resolved would be wonderful.

Ms. JACKSON LEE. If the chairman would indulge me, my time is running out.

If you could quickly go through, Professor Chien.

Ms. CHIEN. I believe that the system should be designed to be more fit towards specific business models. And so what I mean by that is proportionality. One problem is that we have a one-size-fits-all patent system that has to work for all different industries, but, more importantly, it has to work for all different business models. If we could try to introduce more proportionality in the system so that companies that don't infringe intentionally are not put in the same boat as those who infringe unintentionally, that those who are small defendants versus large defendants are treated differently, then I think this would go far to resolving the issues at hand.

Ms. JACKSON LEE. Thank you, Professor.

Mr. MOSSOFF. Thank you, Congresswoman.

I think the most important thing that Congress can keep in mind is that legislation with respect to the patent system affects dynamic innovation, what is coming tomorrow. And you are, instead, framing based upon what has happened in the past and what we know today. So the laws often have unintended consequences, like what the America Invents Act did by creating the Patent Trial and Appeal Board, and by the prohibition on joinder defendants.

And so, in talking with high-tech—representatives from high-tech industry and biotech industry who invest billions of dollars to create innovation that they need to secure through the patent system through licensing and manufacturing and through all different business models, they say that they need security and stability. They need to be able to license freely. They need to be able to get the injunction against trespassers, regardless of what those trespassers might be on their rights. And they need to go back to the very strong and stable patent rights that drove innovation in this country for 150 years. We have, I mean, smartphones came from

the system that we are now moving away out of, and I think that we should always keep that in mind.

Ms. JACKSON LEE. Mr. Thorne.

Mr. ISSA. The gentleman can answer briefly.

Ms. JACKSON LEE. Thank you, Mr. Chairman.

Mr. THORNE. My experience has been very similar to what you described. I think expertise on the part of the judge is a benefit to both sides, plaintiffs and defendants. The Patent-Pilot program in 13 district courts is an example of where that is working now. So my experience is the same, that expertise is important.

I did not come prepared to recommend any legislative action. But I would like to note that, yesterday morning, the Supreme Court granted certiorari review in a case called Oil States Energy Services against Greene's Energy Group. One of the most significant things Congress has done in the 2011 America Invents Act was create a more efficient way to challenge bad patents at the patent office.

The Supreme Court is now going to review in this next term whether Congress had power to do that, whether the Congress had power, or is canceling a bad patent an example of deprivation of property rights that can't be done by an Article III court—

Mr. ISSA. Can only be done by an Article III court.

Mr. THORNE. Right. I point that out as a concern, a potential loss of something important that Congress has done.

Ms. JACKSON LEE. Thank you very much.

Thank you, Mr. Chairman. I yield back.

Mr. ISSA. Thank you.

Every once in a while, I pull this off the wall and bring it. And I know that you all can read from here. This is patent No. 1, bearing the signature of both George Washington and Thomas Jefferson, then, I guess, Secretary of State. And any time somebody wants to talk about 101 and Alice, I am always reminded that it is a 227-year-old standing of what Thomas Jefferson believed it should be.

And I always ask a question, and maybe I will ask each of you that question as my opening salvo. After 227 years of 101 being what Thomas Jefferson thought it should be, have we had too little innovation as a result of that standard?

Mr. Anderson, in your nonpatent lawyer opinion.

Mr. ANDERSON. I think the United States is doing pretty well in that category.

Mr. ISSA. Professor Chien?

Ms. CHIEN. I would have to agree.

Mr. ISSA. We are on a roll. How about it?

Mr. MOSSOFF. Mr. Chairman, our patent system has been fantastic. Unfortunately, that very first patent, which is for a method of making potash is probably now not patentable under the patentable jurisprudence decisions that the Supreme Court has handed down.

Mr. ISSA. You know, with the knowledge of the time and the innovation of the time, I think even the patent No. 5, the improvement of rye whiskey distillation probably would still be patentable. One would have to go back and look at those of ordinary skill in the art at the time, including George Washington as a distiller.

Mr. Thorne.

Mr. THORNE. Our patent system is second to none, and innovation is what is going to drive our economy.

Mr. ISSA. Well, thank you. I opened up with that because, you know, when everyone is asked the questions and all questions have been answered, one has to be a little innovative to try to close out the hearing, and I am going to try and do that.

I am going to ask you—first of all, I am going to ask you to all revise and extend with your thoughts, because as Mr. Thorne said, you didn't come here expecting to tell us how to legislate to deal with TC Heartland and other issues. But let me just go through a couple of words for a moment that might help you in both in a short answer today and then extending on it.

If we do look—and, by the way, Mr. Thorne, you are now my favorite witness because I think you said Patent-Pilot was great about 20 times. As the author of Patent-Pilot, I am very proud that it is being used. We have extended it. And the vision always was to have every judge who regularly takes cases and chooses to take them have the expertise he needs.

And I might note that Justice Breyer, who considers himself the author of the Fed circuit during his time in the Senate as a staffer, also has a similar opinion, which is we must maintain a robust ability to decide cases closest to the defendant, or there is no reason to have cases decided in District Court. And Justice Breyer always muses that he considered, instead of the Fed circuit, he considered just simply moving it to D.C. and having a single court here. And if we had a single court here, it would be a court, an Article III court of jurisdiction. And for some reason, just as a school kid in me, Marshall, Texas, 23,000 people—God bless God for putting it there; there is a special reason—or Washington, D.C., which one seems to be more logical considering the expertise?

But leaving that aside. If we were to revise the test—recognizing that small businesses are the majority of businesses and they do not reside in Tyler, Texas; Washington, D.C.; or, for that matter, the Northern District of California—if our test was, first of all, based on the corporate headquarters as a consideration, the number of employees, the likelihood of who was going to be discovered or deposed in the process, based on elements such as the decision to infringe—and I bring up the decision to infringe, having been sued both corporately and personally in the past, and not released all the way through the Fed circuit, I might mention, on an individual capacity, the decision to infringe is certainly an element. And then the comparative balance between the harm to the plaintiff, the harm to the defendant of a particular jurisdiction. If we were to take all of those—and, Mr. Anderson, you brought this out earlier—it would effectively eliminate the double standard. You would be taking the standards, and maybe enhancing them, that we have for nonpatent cases.

What do you think if those and other tests were to be part of it? Would that give us the diversity, taking places to the appropriate venue, which would likely not be in Delaware, simply as a matter of incorporation, not be in Marshall, simply as a result of three of your franchises there, and I might say, not always in the Northern District of California—being in the Southern District of California,

the second most prolific biocenter in the country, I kind of think some of it might come to us. By the way, we are one of those 13 districts that are in Patent-Pilot, but go ahead.

Mr. ANDERSON. Well, in trying to be your favorite witness, I would agree with everything you just said. I certainly agree with that. No question about it. And, by the way, we don't do business and we aren't in California and we aren't in Delaware, so I don't think all the cases are going to be in California or Delaware.

I certainly agree, where the headquarters are and where the witnesses are and where the decisions are made, those decisions—and, again, we never intentionally would violate a patent or anybody else's intellectual property—but those decisions, those marketing decisions, are made in Prairie du Sac, Wisconsin. They are not made by our franchisees. They are not made at the restaurant level. They are made where I work. And, again, we are not trying to violate, but if there is an action brought, it should be brought where we are and where the witnesses are and where the decisions are made and not in the Eastern District of Texas.

Mr. ISSA. Following up on that. In the case in suit that you were referring to, I would assume that they subpoenaed a number of people for depositions. Is that correct?

Mr. ANDERSON. They will. It was just filed 2 months ago. We just filed our answer. So we are early in the process. Again, we will try the 101—

Mr. ISSA. Do you have anyone in Marshall or Tyler, Texas, that would be deposed there?

Mr. ANDERSON. No. No. They are all in Wisconsin.

Mr. ISSA. Professor Chien.

Ms. CHIEN. I would agree with the commonsense venue reform that you have outlined, that it should be based on where it makes sense. That said, I think that it is important to try to make sure that parties have the certainty of knowing that ahead of time and not get involved in a mini litigation each time just on the subject of venue. And so that is, I think, something to also consider.

Mr. ISSA. Now, normally, of course, let's say it was copyright or trademark, and you have been involved in that, first to file is pretty common. You know, you start off wherever you file. If I am filing a DJ because I believe you threatened me versus you filing because you believe I infringed, the presumption is, it starts where it was filed based on the first to file, and then you must overcome that. Would that standard give you the level of certainty, assuming that there is a series of tests that would allow you to overcome that?

Ms. CHIEN. I think the convenience of the parties, both on the plaintiffs' side and defendant, it will depend on the nature of the suit a bit. So I think it shouldn't necessarily be about who is rushing to forum quickly, although in the patent case it's the patentee who will do that, unless there is grounds for declaratory judgment, but—

Mr. ISSA. If you are foolish enough to send me a letter, there is.

Ms. CHIEN. I think the issue for the parties I have talked to is that they don't necessarily know all the details about who is on the other side even of who is bringing the suit. So they don't know where those parties' witnesses might be ahead of time. So an early disclosure might obviate the need for mini satellite litigation on



this. So I think getting that—those details correct is very important.

Mr. ISSA. And, Professor, since the University of California files a lot of cases through their proxies in Marshall, Texas, you mentioned the little guy and so on. And, you know, they—and you mentioned universities, and I found that interesting, because why is it that the University of California doesn't file, or cause their licensees to file in California?

Mr. MOSSOFF. I don't know.

Mr. ISSA. Could it be that, in fact, Marshall, Texas just seems like a great place to win?

Mr. MOSSOFF. You would need to ask someone from the University of California. But as a professor, I don't have any particular insights or expertise about how patent litigation and venue choices should work. What I would think the Congress should particularly do in considering these issues is speak with the people who are the primary users and creators of patent innovation and commercialization in this country.

As I mentioned, the individual inventors, the startups, the small businesses, and the research intensive companies in the bio-pharmaceutical sectors, and even in the high-tech sectors and speak with them about what is efficient and best secures their property rights.

Mr. ISSA. Thank you.

Mr. Thorne, I gave a whole litany of hypotheticals, you know, where you are headquartered, where you are incorporated, where witnesses would likely come from both for deposition and trial. I wasn't doing that to be an exhaustive list, but the approach of three or more balancings to overcome the location in which it is filed, does that work for you as a litigant, particularly if we order that that—that there be a stay until that is discovered and there be expedited discovery? Because I think without bifurcation, we could end up exactly back where we are in Marshall, right?

Mr. THORNE. So I would like to think just a little more about the factors you articulated. But on first hearing, I thought they sounded great. And my second thought was, why don't we have that already? Because I think 1400(b), the second half of it that is—still, that is now prominent, I think that can be interpreted to encompass those factors. I will cite as an example, Fortress Investment Group, a pretty very large hedge fund, filed a case against Apple in the District of New Jersey following TC Heartland describing factors similar to that. Where—their allegation of venue now says that they have sued where the field engineers, the managers, the other employees directly involved in the direct infringement are located, that is why they said New Jersey was the right place for that new case.

Mr. ISSA. Because, although there may—there is almost infinite cases in which Apple has substantial and regular with their stores, that isn't necessarily where expertise is, right?

Mr. THORNE. That is correct. And then, of course, the other—the other safety valve that can achieve the factors that you described is the discretionary transfer under 1404. If there are several places the defendant could have been sued, there may be one of them that

is clearly more convenient and more efficient, and it should be transferred there.

Mr. ISSA. Okay. I am going to—and I appreciate that.

I am going to close with a question for probably all three of you, but Mr. Thorne, you will probably be the one most aware of it, since you mentioned it.

With the TC Heartland decision, I am going to predict that we do have some devolving of the concentration that there will not be 40 percent in Delaware, for example, that we will tend to have—we will have more in Marshall, I predict, 2 years from now than its fair share based on corporate presence.

But when we look at patent pilot that is in 13 locations right now, it had some provisions to stop concentration, essentially, referral to only one judge, should we consider expanding it to where it is anywhere that there is likely to be a judge whose expertise needs to have clerical assistance, which is one of the keep elements in patent pilot?

Mr. THORNE. I would be strongly in favor of expanding the patent pilot program any place that made sense, whether a judge is interested or where the cases tend to gravitate towards that. That is something—again, I actually didn't realize you were the author of it, but I think—

Mr. ISSA. It was a long time ago.

Mr. THORNE [continuing]. That is a program that deserves expansion.

Mr. ISSA. Professor?

Mr. MOSSOFF. I—certainly, I mean, if it is something that is shown to bring additional expertise to patent litigation and to the—and to the adjudication of cases, then certainly, we should expand it.

Mr. ISSA. Well, they use it a lot in Marshall. You said that is working out good.

Professor Chien?

Ms. CHIEN. The patent pilot project offers litigants, judges who want their cases and offers some specializations. That has been attractive, but it has been hard to compete with plaintiff-friendly jurisdiction in Texas. With that removed as a factor, I think the next 5 years can be very different than the first. We really have a chance to see whether specialization can reach its potential.

What I think would be extremely important as the program I do support it being expanded and growing, is to really try to think about the factors that are being introduced, like technical advisers, like other procedures, and try to test how those are doing. I think right now we are—the sample size is too small. There is one paper that says there isn't necessarily a higher rate of success, necessarily, in these cases. But I think with expansion of program, we can really see this and test this.

What I do think we also are seeing is that there are many studies of judges having more expertise, but still not necessarily getting better success rates. But we do know that technical expertise, for example, in the PTAB has been viewed favorably.

So I think there is a lot of innovation that can happen in this program, and I look forward to seeing it reach that potential.

Mr. ISSA. Thank you.

Mr. Anderson, any thoughts?

Mr. ANDERSON. I will defer to my fellow witnesses on this one.

Mr. ISSA. Well, thank you.

You know, it is—I remember when there was a 40 percent reversal rate at the Fed circuit, and then the Supreme Court reminded us the Fed circuit got it wrong in some of those reversals. So we never had patent pilot for the Supreme Court, but it has been suggested.

I want to thank my witnesses today. I will ask you, both as intellectuals, as somewhat of a victim, and as a practicing attorney in the field, if you would submit to the greatest extent you can, some of those elements to 1400 that you think would go into part B. Because I think, as we look, and the chairman—the chairman is here again, and he will speak for himself better than I shall, but I think as we look at making sure that what is left in venue has a meaning that is definable, consistent, and if there is an argument, can be adjudicated fairly by an Article III judge.

Lastly, I am very interested in the case they just took up. I am a strong believer that for decades, we have had ex parte PTO re-examination that invalidated all or some of the claims. So I will be submitting an amicus in that case, without a doubt, based on the question of is—are these administrative law judges under the PTO doing something different than was done for decades, and if the interparty re-examination is invalid, then is the ex parte re-examination invalid, and if that is the case, then is the Article III judge to continue to use a deferral standard to an entity that is not allowed to correct what might be their own mistake based on less knowledge than they would have presented to them at a later date. That may just be my entire amicus.

Mr. Chairman, do you have any further comments?

With that, I thank you. We stand adjourned.

[Whereupon, at 12:06 p.m., the subcommittee was adjourned.]

