A Tale of Seven Districts: Reviewing the Past, Present and Future of Patent Litigation Filings to Form a Two-Step Burden-Shifting Framework For 28 U.S.C. § 1404(a)

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* Assistant Professor of Law, Oklahoma City University School of Law. This work is dedicated to Professor Dmitry Karshtedt (1977-2022) for his infinitely wise and generous mentorship as well as guidance in writing a draft of this paper initially for his "Advanced Topics in Patent Litigation" seminar course at George Washington University Law School. Very special thanks to the extraordinary work provided by my Research Assistant at Oklahoma City University School of Law, Michael J. Turner, in compiling detailed statistics on the mandamus orders discussed herein as well as synthesizing keen observations on various complex aspects of patent venue law. Special thanks also to James Choi at the U.S. Patent Trademark Office and the current Editor-in-Chief of the *Journal of the Patent and Trademark Office Society* for providing the exceptional map graphics showing the evolution of patent litigation filing activity over time generated by a software application of his own ingenious design. Sincere thanks also to Professor Kali Murray, Professor Nadelle Grossman, and Professor Bruce Boyden at Marquette University School of Law as well as Professor Charles Duan for providing their invaluable feedback on a later draft of this paper at the 2022 Marquette Law Junior Faculty Works-in-Progress Conference; Professor Xiyin Tang, Professor Tejas Narechania, Professor Tabrez Ebrahim and Professor Jacob Noti-Victor for giving exceptional guidance during the 2023 Junior Intellectual Property Scholars Association Winter Workshop at UCLA School of Law and generously hosted by the UCLA Institute for Technology, Law and Policy; Professor Mark Lemley, Professor Shubha Ghosh and Professor Saurabh Vishnubhakat for their extremely insightful feedback on drafts of this piece; and finally Professor Jeremy Telman, Professor Carla Spivack and Professor Maria Kolar at Oklahoma City University School of Law for their very helpful comments and support that shaped this paper into the form you are reading today.

Abstract

Current patent venue transfer laws under 28 U.S.C. § 1404(a), e.g., the *Gilbert* factors from *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), are too malleable in that they often lead to frequent mandamus orders from the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") overturning district court rulings on venue transfer motions. Thus, this paper proposes a more robust two-step burden-shifting framework that replaces the eight *Gilbert* factors. Moreover, a brief history of venue transfer patterns in the seven most active federal patent district courts is covered, with a special focus devoted to the venue transfer orders from Judge Alan D. Albright of the U.S. District Court for the Western District of Texas. A comprehensive data summary of forty-five case sets where the Federal Circuit ruled on writs of mandamus involving Judge Albright's transfer orders is subsequently provided, with coverage summaries of certain cases, including four precedential ones from the Federal Circuit. This proposed two-step burden-shifting framework is then applied to these venue transfer cases, as well as Federal Circuit mandamus orders ruling on those decisions. Finally, alternative approaches to remedying the frequent reversals of venue transfer decisions will be discussed, including potential legislative solutions, adjustments to common law approaches to venue transfer, deference to the inherent powers of an Article III U.S. District Judge, and a unified federal patent district court. Overall, this paper seeks to offer a more robust and consistent two-step burden-shifting framework for venue transfer and for the Federal Circuit to follow in administering mandamus orders, which might change somewhat in light of Western District of Texas Chief Judge Orlando Garcia's order on redistributing Judge Albright's patent cases.

> It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair, we had everything before us, we had nothing before us, we were all going direct to Heaven, we were all going direct the other way—in short, the period was so far like the present period, that some of its noisiest authorities insisted on its being received, for good or for evil, in the superlative degree of comparison only.
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> – Charles Dickens, opening of the novel *A Tale of Two Cities*[1]

"Jurisdiction is not given for the sake of the judge, but for that of the litigant."

– Blaise Pascal[2]

[1] CHARLES DICKENS, A TALE OF TWO CITIES 1 (Penguin English Library 2012) (1859).
[2] BLAISE PASCAL, PASCAL'S THOUGHTS - POLEMICAL FRAGMENTS 306 (Charles William Eliot ed., W.F.

Introduction

In 1859, Charles Dickens published *A Tale of Two Cities*: a historical novel set during the French Revolution of the late 1700s—a period of great political and societal upheaval. In the book's now legendary and quotable opening passage, Dickens wrote that it was "the best of times" and the "worst of times." No greater analogy to the current landscape of patent venue jurisprudence exists today, for both patent suit plaintiffs and defendants alike. However, to fully understand the tumult and tide changes to the saga of this ever-shifting field—from the emergence of patent case filings in Silicon Valley during the dot-com boom, to Judge T. John Ward bringing the Local Patent Rules to a sleepy East Texas town known as Marshall in the early 2000s leading to the rise of a legendary "rocket docket" that dealt with volumes of patent cases never seen before, to the Eastern District of Texas reaching its apex of activity as the nation's busiest patent court in 2014-2016 just before the U.S. Supreme Court ruling of *TC Heartland*, to the transfer of cases from that district to Delaware and then finally to Waco, where a new judicial figure and luminary of the patent litigation world named Alan Albright reigned, to a July 25, 2022 order from Western District of Texas Chief Judge Orlando Garcia, since unchallenged and unrevised, that brought an end to Judge Albright's rule and dominion, leaving open the possibility of a new heir to the throne—the true history, and story, of patent venue jurisprudence must be told.

A major part of that story is how, in recent years, the Federal Circuit has been asserting its writ of mandamus powers in resoundingly high frequency. Namely, the Federal Circuit has been utilizing mandamus orders to overrule judges' decisions (mainly from Eastern District of Texas Judges or Judge Albright in the Western District of Texas) and to keep certain cases in their courts, a practice that has become increasingly common in 2020 and 2021, according to various statistics. However, on the other hand, Professor Paul R. Gugliuzza has noted that this new "unprecedented" trend of Federal Circuit mandamus orders reversing the transfer decisions of Eastern and Western Texas judges is a stark "retreat from its original, restrained view of mandamus."[3] Furthermore, since *TC Heartland*, at least four mandamus orders have issued from the Federal Circuit directing Eastern Texas judges to transfer cases elsewhere.[4] Again, the main framework for determining if a venue transfer is warranted is the application of the eight *Gilbert* factors, which will be mentioned in detail later. While multi-factor tests are relatively prevalent in the law, some scholars such as Professor Barton Beebe have decried the usage of tests having *too many* factors, citing that many judges employ "fast and frugal" heuristics to "short-circuit"

Trotter trans., 1910).

[3] Paul R. Gugliuzza, *The New Federal Circuit Mandamus*, 45 IND. L. REV. 343, 343 (2012).

[4] J. Jonas Anderson & Paul R. Gugliuzza, *Federal Judge Seeks Patent Cases*, 71 DUKE L. J. 419, 444 n.151 (2021) (first citing In re Google LLC, 949 F.3d 1338, 1339 (Fed. Cir. 2020); then citing In re HP Inc., No. 2018-149, 2018 WL 4692486, at *1 (Fed. Cir. Sept. 25, 2018); then citing In re ZTE (USA) Inc., 890 F.3d 1008, 1010 (Fed. Cir. 2018); and then citing In re Cray Inc., 871 F.3d 1355, 1356–57 (Fed. Cir. 2017)).

these tests, in that a "few factors may prove to be decisive" while "the rest are at best redundant and at worst irrelevant."[5] This invariably leads to more subjective, outcome-oriented results, e.g., a judge having to "stampede" remaining factors to conform to a specified test outcome or reach "an end to the means" instead of weighing the factors deliberately and thoughtfully in a more careful "means to an end."[6] The eight *Gilbert* factors provide a clear example of how a high number of factors can lead to results that may not be fully thought out, as can be seen by the frequent mandamus orders the Federal Circuit is currently issuing with respect to Judge Albright's venue transfer decisions.

As a result, a more consistent analysis is lacking in current patent venue jurisprudence that would make venue transfer orders more consistently affirmed, instead of being constantly overturned by mandamus orders from the Federal Circuit. Thus, this paper proposes a more robust framework that will attempt to ameliorate the aforementioned perceived inconsistency problems within current patent venue jurisprudence, as specifically applied to the rules used to adjudicate venue transfer motions under 28 U.S.C. § 1404(a).

In Part I of this paper, an overview of patent venue law and jurisprudence will be provided, as well as a timeline of events in patent venue law leading up to today.

Part II of this paper will then discuss a brief historical overview of case law in the seven most active districts for patent litigation. However, because the case of *TC Heartland* had already been covered in-depth by many commentators, such an analysis of the case's holding and historical implications will not be repeated here. Instead, Part I will discuss patent litigation activity and filing trends leading up to and after *TC Heartland* in these seven districts, along with the eight *Gilbert* factors with respect to each district.

In Part III, the current jurisprudence surrounding 28 U.S.C. § 1404(a) "convenience" transfers and the *Gilbert* factors will be discussed.

In Part IV, various Federal Circuit mandamus orders overturning venue transfer motion rulings—particularly those of Judge Albright—will have their holdings summarized with an application of the eight *Gilbert* factors. Specifically, Part IV will feature comprehensive data analysis of forty-five case sets where the Federal Circuit issued mandamus orders ruling on Judge Albright's venue transfer decisions, and also provides a numerical metric for gauging the weight of each of the eight *Gilbert* factors (-3 representing strongly against transfer, -2 moderately against transfer, 1 slightly against transfer, 0 neutral, 1 slightly for transfer, 2 moderately for transfer, and 3 strongly for transfer). Narrative summaries of the four precedential cases in this forty-five case set will also be presented, as well as observations of trends from the eight *Gilbert* factors in all forty-five case sets overall.

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[5] Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 CALIF. L. REV. 1581, 1581 (2006).

[6] *See id.* at 1582.

In Part V, this paper will borrow a similar test from antitrust law and propose a robust two-step burden-shifting framework that effectively replaces the eight *Gilbert* factors to produce far more meaningful and robust results in terms of venue transfer analysis and consistency with Federal Circuit rulings. The data from Part IV will then be reanalyzed with the proposed two-step burden-shifting framework to observe the differences in application between the two standards, and the surprising advantages (and alignment) of the proposed burden-shifting framework with the Federal Circuit will be more fully discussed. This reapplication of the new proposed two-step burden-shifting test to the previously tabulated data will be performed primarily to confirm whether there are any differences in terms of consistency with the law (and any avoidance of the need to issue mandamus orders in the first place). The real policy considerations and motivations behind the *Gilbert* factors and this proposed two-step burden-shifting framework will be further discussed in order to determine which framework is a better fit with the complex legal and economic considerations implicit in the constantly evolving landscape of patent litigation venue jurisprudence in this day and age.

In Part VI, alternative potential solutions to the proposed burden-shifting framework that aim to prevent or lower the high numbers of Federal Circuit mandamus reversals of judges such as Judge Albright will be discussed. First, the constitutional rights granted to Article III judges and how Federal Circuit judges should defer to the expertise and power of a U.S. District Judge in being able to try a patent case however they think is best will be discussed. Second, the alternative solution of making it more difficult for Federal Circuit judges to administer writs of mandamus will then be explored. Third and finally, a proposal for a unified federal district patent court will be briefly and preliminarily outlined.

Therefore, the overall objective of this paper is also to provide judges, scholars, and practitioners with a more robust means of analyzing venue transfer issues under 28 U.S.C. § 1440(a) by proposing a two-step burden-shifting framework that will ideally replace the outdated and outmoded eight *Gilbert* factors. It is the hope of this paper that the proposed burden-shifting framework will be used by district courts in order to reach more consistent, predictable, and uniform results as instead of a series of constant reversals from mandamus orders.

I. An Overview & Timeline of Patent Venue Law

In Dickens's *A Tale of Two* Cities, the underlying historical backdrop was the upheaval and drastic change brought about by the French Revolution. The equivalent to the French Revolution here in the case of patent venue jurisprudence is the development of the law and the abrupt disruption of that law with the 2017 U.S. Supreme Court case of *TC Heartland* and the ensuing aftermath. To provide an introductory primer on the field of patent venue, plaintiffs are given the ability to select "whatever forum that they consider most advantageous" for the filing of civil

actions in federal court.[7] The U.S. Supreme Court has recognized this capacity, subject to the relevant restrictions under the "general venue statute" of 28 U.S.C. § 1391, as the "plaintiff's venue privilege."[8] Nonetheless, this "privilege" is somewhat constrained in that "the purpose of statutorily specified venue is to [actually] protect the defendant against the risk that a plaintiff will select an unfair or inconvenient place of trial."[9]

For patent suits, which can only be filed in federal court,[10] a specific statute governs venue limitations: the "patent venue statute" of 28 U.S.C. § 1400(b), which provides that "[a]ny civil action for patent infringement may be brought in the judicial district where the defendant *resides*, or where the defendant *has committed acts of infringement and has a regular and established place of business*."[11] The main conflict between this patent venue statute and the aforementioned general venue statute lies primarily in two seemingly contradictory provisions of 28 U.S.C. § 1391: first, 28 U.S.C. § 1391(a)(1), which seems to defer to the patent venue statute by stating that "[e]xcept as otherwise provided by law" (e.g., the patent venue statute), "this section [of § 1391] shall govern the venue of *all civil actions* brought in district courts of the United States," and second, 28 U.S.C. § 1391(c)(2) declaring:

> For all venue purposes, . . . an entity with the capacity to sue and be sued in its common name under applicable law, whether or not incorporated, shall be *deemed to reside, if a defendant, in any judicial district in which such defendant is subject to the court's personal jurisdiction* with respect to the civil action in question and, if a plaintiff, only in the judicial district in which it maintains its principal place of business.[12]

Thus, historically, most patent suits were initially filed in federal district courts where most high technology (high tech) companies or corporate defendants were based, most notably the U.S. District Court for the Northern District of California (NDCA), the seat of Silicon Valley. For similar reasons, high numbers of patent suits have been filed in other courts, such as the U.S. District Courts for the Central District of California (CDCA), the Southern District of California (SDCA), and the Northern District of Illinois (NDIL) due to the presence of aerospace, software and biotechnology companies there, as well as the U.S. District Court for the District of New Jersey (DNJ) specifically for Abbreviated New Drug Application (ANDA) pharmaceutical patent litigation cases as the state of New Jersey, being known as "the medicine chest of the world," is the situs of numerous "biopharmaceutical,

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[7] Atl. Marine Const. Co. v. U.S. Dist. Ct. for W. Dist. of Tex., 571 U.S. 49, 63 (2013) (citing Van Dusen v. Barrack, 376 U.S. 612, 635 (1964)).

[8] *Id.* at 55, 63.

[9] *Id.* at 63 n.7 (citing Leroy v. Great Western United Corp., 443 U.S. 173, 183–84 (1979)).

[10] 28 U.S.C. § 1338(a) ("The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks. Such jurisdiction shall be exclusive of the courts of the states in patent, plant variety protection and copyright cases.").

[11] 28 U.S.C. § 1400(b) (emphasis added).

[12] 28 U.S.C. §§ 1391(a)(1), 1391(c)(2) (emphasis added).

biotechnology, medical technology, medical device and diagnostic companies."[13]

Finally, partly for the reason that Delaware is proximate to New Jersey and all of their pharmaceutical and biotechnology companies but more due to the fact that many Defendants are incorporated in Delaware, numerous patent cases have also been filed in the U.S. District Court for the District of Delaware (DDEL), because the place a party is incorporated instantly satisfies the "resides" venue component of 28 U.S.C. § 1391(c)(2) when bringing a patent suit.

However, for reasons that have been documented in other prevalent literature, the U.S. District Court for the Eastern District of Texas (EDTX) soon became an active hotspot for patent litigation starting from the early 2000s, during which commenced the tenure of U.S. District Judge T. John Ward, who brought the Patent Local Rules from the NDCA to make the EDTX (and Marshall specifically) a veritable patent "rocket docket." Fast forward to 2015–2016, where nearly forty percent of the nation's patent cases were filed in EDTX courts. [14] The bulk of these new filings came from various non-practicing entities (NPEs) and patent assertion entities (PAEs), a large number of them pejoratively referred to as "patent trolls," who viewed the EDTX as their forum of choice due to various perceived procedural and jury-based advantages.[15] High and unrivaled numbers of patent case filings persisted in the EDTX until the U.S. Supreme Court case of *TC Heartland LLC v. Kraft Foods Group Brands LLC* was decided.[16] Perhaps the main reason for this pattern was that, before the *TC Heartland* opinion was issued in May of 2017, the U.S. Court of Appeals for the Federal Circuit consistently took and applied the definition of a "corporate resident" (or an "entity with the capacity to sue and be sued . . . whether or not incorporated") from the general venue statute provision of 28 U.S.C. § 1391(c)(2) to the specific patent venue statute provision of 28 U.S.C. § 1400(b).[17] Hence, it became much harder for plaintiffs to file patent infringement actions in their venue of choice (almost always the EDTX) after *TC Heartland* compared to before it, due to how personal jurisdiction could be more easily and readily established for sued corporate Defendants.[18]

For example, any corporation could be sued in any federal district court of a state merely because it possessed "minimum contacts" with that state sufficient for

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[13] Jean E. Dassie & Christine A. Gaddis, *Patent Litigation in the District of NJ After 'TC Heartland'*, N.J. L. J. (Sept. 18, 2017), https://www.law.com/njlawjournal/sites/njlawjournal/2017/09/18/patent-litigation-in-the-district-of-nj-after-tc-heartland.

[14] Timothy T. Hsieh, *Approximating a Federal Patent District Court After* TC Heartland, 13 WASH. J. L. TECH. & ARTS 141, 142–43, 159 (2018).

[15] *Id.* at 142–43.

[16] *See* 581 U.S. 258 (2017).

[17] Timothy P. McAnulty, David C. Seastrunk, & Max Miroff, *Patent Venue Law*, FINNEGAN (October, 2017), https://www.finnegan.com/en/insights/articles/patent-venue-law.html.

[18] Guang-Yu Zhu, David C. Seastrunk, & John M. Williamson, *How Does* TC Heartland *Affect Venue for Digital Distribution Companies?*, FINNEGAN (May 25, 2018), https://www.finnegan.com/en/insights/articles/how-does-tc-heartland-affect-venue-for-digital-distribution-companies.html.

establishing personal jurisdiction, and as various leading patent litigators have noted, the term "minimum" appropriately implied that such a test was "often [quite] easy to meet."[19]

Moreover, the holding of *TC Heartland* in large part was brought about by protests from legal academia and the high tech private sector, claiming that NPE/PAE plaintiff parties were taking advantage of the then-in-effect venue laws in order to engage in forum-shopping and selective litigation in districts that were perceived as "plaintiff-friendly." For example, courts could have had juries that often returned high, multi-million dollar verdicts in favor of plaintiffs nearly every other week or procedural advantages such as faster trial times, patent law expertise, and more "hoops to jump through" for defendants to file pleadings, such as motions to dismiss the asserted patent(s) as invalid due to having ineligible subject matter under 35 U.S.C. § 101. All of these factors added together in the aggregate to make plaintiff-friendly courts like the EDTX more attractive to plaintiff patent holders then defendant companies.[20] Thus, after *TC Heartland*, it became much more difficult for these plaintiff parties to file suit in the EDTX because the venue requirements suddenly became harder to satisfy. This led to a shift in case filings from the EDTX to DDEL, and most recently, a larger shift of cases to the U.S. District Court for the Western District of Texas (WDTX) when the Honorable Alan D Albright, a former renowned patent litigator and U.S. Magistrate Judge, was appointed a U.S. District Judge for the Waco Division in 2018.[21] Professors Paul Gugliuzza and Jonas Anderson have already provided an in-depth study of this recent shift of cases from2019 to 2021, commenting that during these recent years, "[t]he country's busiest patent court—by far—is in Waco, Texas."[22] "In 2019 and 2020, almost one thousand patent lawsuits have been filed there each year—an astronomical increase for a court that, as recently as 2016 and 2017, saw a total of *five* patent cases."[23]

One strategic "arrow in the quiver" for these aforementioned patent holder plaintiffs to fight or get around the venue laws post-*TC Heartland* (and for corporate defendants with respect to the venue laws pre-*TC Heartland*) would be to file a motion to transfer venue under 28 U.S.C. § 1404(a) to another district court, or division within a district court, perceived to be more favorable primarily because it granted defendant companies a literal "home court advantage."[24] In adjudicating such

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[19] *Id.*

[20] Hsieh, *supra* note 14, at 142–43 ("Because of the patent law expertise of the [d]istrict's judges, procedural advantages stemming from Local Patent Rules that tend to lead to faster trials, and the perception of the [d]istrict being plaintiff-friendly in awarding multiple multi-million dollar jury verdicts for patentees, it became the preferred choice of venue for many [of these Plaintiff NPE or PAE parties].").

[21] *Western District of Texas Just Overtook the District of Delaware as the Top Patent Venue*, RPX (Feb. 19, 2020), https://www.rpxcorp.com/data-byte/western-district-of-texas-just-overtook-the-district-of-delaware-as-the-top-patent-venue/.

[22] Anderson & Gugliuzza, *supra* note 4, at 421.

[23] *Id.*

[24] Robert L. Uriarte, *How to Get Out Of Dodge: Winning Patent Venue Transfer Strategies and the*

a § 1404(a) transfer motion, eight factors from the U.S. Supreme Court case of *Gulf Oil Corp. v. Gilbert* known as the "*Gilbert* Factors" are analyzed.[25] The eight *Gilbert* Factors comprise four "private interest" factors and four "public interest factors."

The four private interest factors are (1) the relative ease of access to sources of proof, (2) the availability of compulsory process to secure the attendance of witnesses, (3) the cost of attendance for willing witnesses, and (4) all other practical problems that make trial of a case easy, expeditious and inexpensive.[26] The four public interest factors are then (5) the administrative difficulties flowing from court congestion, (6) the local interest in having localized interests decided at home, (7) the familiarity of the forum with the law that will govern the case, and (8) the avoidance of unnecessary problems of conflict of laws or in the application of foreign law.[27]

Under the current trend of cases being filed in Judge Albright's court, a number of corporate defendants have filed motions to transfer from the Waco Division of the WDTX to more favorable venues such as their home states or cities. In ruling on these transfer motions, district court judges (and also Federal Circuit judges issuing mandamus orders overturning these district court rulings) must engage in a "weighing" of the aforementioned eight *Gilbert* factors to reach the conclusion of whether or not transferring to a different district court or division within the same district court is warranted. Only four years into his time on the bench, Judge Albright has already been faced with a plethora of such venue transfer motion filings. For example, Judge Albright issued a 17-page order denying Defendant SK hynix's motion to transfer venue to the CDCA or, alternatively, to the Austin Division of the WDTX in response to a mandamus order from the Federal Circuit granting SK hynix's petition for writ of mandamus to stay all proceedings until a ruling on the transfer motion was issued.[28] A similar situation happened before for a motion to transfer from the Waco Division to the Austin Division in the case of *VLSI v. Intel*,[29]

Federal Circuit, ORRICK (Mar. 19, 2014), https://www.orrick.com/en/Insights/2014/03/How-to-Get-Out-Of-Dodge-Winning-Patent-Venue-Transfer-Strategies-and-the-Federal-Circuit.

[25] *Id.* (citing Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947)).

[26] *Id.*

[27] *Id.*; *see also Gilbert,* 330 U.S. at 508–09.

[28] Mark Siegmund & Joseph M. Abraham, *Netlist, Inc v. SK hynix Inc – What Happened After the Federal Circuit's Mandamus?*, TEX. PAT. BLOG (Feb. 3, 2021), https://wdtxipblog.com/2021/02/03/netlist-inc-v-sk-hynix-inc-what-happened-after-the-federal-circuits-mandamus/. Other nuances in patent venue jurisprudence include the analysis of the "first to file" rule or presumption, which may analyze additional factors to the above, such as the extent of case overlap (usually under the fourth private interest factor or the first public interest factor as in this case).

[29] Mark Siegmund & Joseph M. Abraham, *The Federal Circuit Strikes Again – In re: Intel Corporation*, TEX. PAT. BLOG (Dec. 23, 2020), https://wdtxipblog.com/2020/12/23/the-federal-circuit-strikes-again-in-re-intel-corporation/; *see also* Mark Siegmund & Joseph M. Abraham, *Judge Albright Conditionally Transfers an Austin Case Back to Waco*, TEX. PAT. BLOG (Nov. 23, 2020), https://wdtxipblog.com/2020/11/23/judge-albright-conditionally-transfers-an-austin-case-back-to-waco/ (providing previous history).

which, in March of 2021, resulted in a $2.18 billion jury verdict in favor of VLSI.[30] Issues regarding venue transfer motions (and the Federal Circuit getting involved with mandamus orders) also happened in the case of *Uniloc v. Apple* (where the Federal Circuit issued a mandamus order involving Defendant Apple's motion to transfer to the NDCA),[31] in two cases filed by Plaintiff SynKloud Technologies against Defendants Adobe, Inc. and DropBox, Inc., in the case of *Cameron Int'l Corp v. Nitro Fluids*,[32] and in the two cases of *CloudofChange, LLC v. NCR Corp.* (which involved a motion to transfer to the U.S. District Court for the Northern District of Georgia) and *Parus Holdings Inc. v. LG Electronics, Inc.* (which involved another motion to transfer to NDCA).[33] This pattern continued, rarely relenting in intensity, from 2021 to 2022, leading to more than fourty Federal Circuit mandamus orders issued in response to Judge Albright's venue transfer orders, which are compiled and analyzed as data for this paper.

On November 2, 2021, Senators Thom Tillis and Patrick Leahy wrote a letter to Chief Justice Roberts decrying the "problems with forum shopping in patent litigation" where, in some judicial districts like the WDTX, "plaintiffs are allowed to request their case be heard within a particular division."[34] They added that, when that "requested division has only one judge, this allows plaintiffs to effectively select the judge who will hear their case" thereby creating "an appearance of impropriety which damages the federal judiciary's reputation for the fair and equal administration of the law" and leading certain individual judges "to engage in inappropriate conduct intended to attract and retain certain types of cases and litigants."[35] In that letter, they then singled out that the judge that they were discussing was indeed Judge Albright, who has seen a "consolidation of a large portion of patent litigation" due to the district hearing only two or three patent cases per year in 2016 and 2017, but in 2020, "nearly

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[30] Susan Decker & Matthew Bultman, *Intel Told to Pay $2.18 Billion After Losing Patent Trial*, BLOOMBERG (Mar. 2, 2021), https://www.bloomberg.com/news/articles/2021-03-02/intel-told-to-pay-2-18-billion-after-losing-texas-patent-trial.

[31] Mark Siegmund & Joseph M. Abraham, *Federal Circuit Mandamus Opinion in* In re: Apple: *Majority Opinion*, TEX. PAT. BLOG (Nov. 10, 2020), https://wdtxipblog.com/2020/11/10/federal-circuit-mandamus-opinion-in-in-re-apple-majority-opinion/; *see also* Mark Siegmund & Joseph M. Abraham, In re Apple – *Judge Moore's Dissent*, TEX. PAT. BLOG (Nov. 10, 2020), https://wdtxipblog.com/2020/11/10/in-re-apple-judge-moores-dissent/.

[32] Mark Siegmund & Joseph M. Abraham, *What Comes Next in Waco When the Federal Circuit Orders Venue Transfer?*, TEX. PAT. BLOG (Nov. 18, 2020), https://wdtxipblog.com/2020/11/18/what-comes-next-in-waco-when-the-federal-circuit-orders-venue-transfer/.

[33] Mark Siegmund & Joseph M. Abraham, *Convenience Transfers in the Waco Division: Then and Now*, TEX. PAT. BLOG (Sept. 14, 2020), https://wdtxipblog.com/2020/09/14/convenience-transfers-in-the-waco-division-then-and-now/.

[34] Letter from Sens. Thom Tillis and Patrick Leahy, Sen. Judiciary Comm., to Chief Justice John Roberts 1 (Nov. 2, 2021) [hereinafter Tillis Letter], https://patentlyo.com/media/2021/11/Letter-to-the-Chief-Justice-about-Judge-Albright.pdf.

[35] *Id.*; *see also* Gene Quinn & Steve Brachmann, *Criticism of Judge Albright Looms Large in Tillis Letters to Hirshfeld, Chief Justice Roberts*, IP WATCHDOG (Nov. 3, 2021), https://www.ipwatchdog.com/2021/11/03/criticism-judge-albright-looms-large-tillis-letters-hirshfeld-chief-justice-roberts/id=139581/ (analyzing and responding to the content of Tillis's letter).

800 patent cases were assigned to one judge in this district" (Judge Albright).[36] In 2021, that district was "on track to have more than 900 cases," meaning that "roughly 25% of all the patent litigation in the entire United States is pending before just one of the nation's more than 600 district court judges."[37] The letter also cited scholarship from Professor Gugliuzza and Professor Anderson, explaining that Judge Albright has "openly solicited" these patent cases—or "urged patent plaintiffs to file their infringement actions in his court."—at lawyers' meetings, at numerous patent bar events, and on law firm webcasts about patent litigation.[38] Indeed, in his 2021 Year-End Report on the Federal Judiciary, Chief Justice Roberts referenced Judge Albright in all but name when he promised to focus on the "arcane but important matter" of "judicial assignment and venue for patent cases in federal trial court."[39] Chief Justice Roberts went on to state that he would direct the Judicial Conference of the United States to address how venue is chosen for patent cases, acknowledging concerns from Senators (among other parties) that patentee plaintiffs are unduly funneling their cases into Judge Albright's federal court in Waco, Texas.[40] This call appeared to have been heeded because on July 25, 2022, Chief U.S. District Judge Orlando Garcia issued an order stating that all patent cases filed in the Waco Division of the WDTX on or after that date would no longer be automatically assigned to Judge Albright, but would instead be randomly assigned to one of twelve U.S. District Court judges in the WDTX, which included Judge Albright.[41] After the issuance of this Order, many commentators predicted that the number of WDTX patent case filings would plummet, which has not really proven to be true so far.[42] In fact, the headline of one recent article from RPX proclaims that "Despite Order Targeting Judge Albright,

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[36] Tillis Letter, *supra* note 34, at 1.

[37] *Id.*

[38] *Id.* (citing Anderson & Gugliuzza, *supra* note 4, at 421–22 (noting that Judge Albright "has spoken at patent law conferences, given speeches at dinners hosted by patent valuation companies, appeared on law firm webcasts about patent litigation, and presented at numerous patent bar events, all with the express purpose of encouraging patentees to file suit in his court")).

[39] Chief Justice John Roberts, *2021 Year-End Report on the Federal Judiciary*, SUPREME COURT OF THE UNITED STATES 5 (Dec. 31, 2021), https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf.

[40] Blake Brittain, *U.S. Chief Justice Roberts Pledges to Review Patent Venue Rules*, REUTERS (Jan. 3, 2022), https://www.reuters.com/legal/transactional/us-chief-justice-roberts-pledges-review-patent-venue-rules-2022-01-03/.

[41] Elaine Chow, *Chief Judge of the Western District of Texas Ends Automatic Assignment to Judge Albright of Patent Cases Filed in Waco Division: A Look at the Numbers*, LEX MACHINA BLOG (July 28, 2022), https://lexmachina.com/blog/chief-judge-of-the-western-district-of-texas-ends-automatic-assignment-to-judge-albright-of-patent-cases-filed-in-waco-division.

[42] Miranda Jones & Sarah Ring, *Short Order, Big Change Brought to Patent Docket of Western District of Texas*, JDSUPRA (July 28, 2022), https://www.jdsupra.com/legalnews/short-order-big-change-brought-to-5435762/ ("This [Chief Garcia Order] will drastically diminish the patent cases filed in the WDTX, almost immediately."); Mark Curriden, *Patent Lawyers: WDTX Waco Order Unfair, Misguided and Hypocritical*, TEX. LAWBOOK (July 28, 2022), https://texaslawbook.net/patent-lawyers-wdtx-waco-order-unfair-misguided-and-hypocritical/ ("Since the order was issued Monday, three patent infringement cases have been filed in Waco. One was assigned to Judge Albright and the two others were given to U.S. District Judge David Counts and U.S. District Judge Alia Moses.").

West Texas Patent Litigation Dipped Less than Expected in 2022," and another February 2023 article from Law360 states that "After Rules Shake-Up, Albright Remains The Top Patent Judge."[43] Consequently, there may be more of a shift of patent cases back to EDTX or DDEL due to the fact that there are more experienced patent judges in those courts as opposed to mainly Judge Albright in the WDTX. Nonetheless, Chief Judge Garcia's Order, which has remained unmodified ever since new Chief Judge Alia Moses took over as of December 2022,[44] has not solved the venue jurisprudence problem discussed above but instead kicked it down the road for later courts to deal with. Thus, the proposed solution in this paper remains relevant, more so now than ever. Although, there have been some interesting rulings from the Fifth Circuit having to do with venue generally, like the *Planned Parenthood* case,[45] that could change the discussion on § 1404(a) transfer motions, which the Federal Circuit has initially tried to side-step.[46] As a result, a historical overview of the most active patent courts is appropriate in order to more fully understand the whole context underlying adjudicating § 1404(a) transfer motions.

[43] *Despite Order Targeting Judge Albright, West Texas Patent Litigation Dipped Less than Expected in 2022*, RPX (Jan. 11, 2023), https://www.rpxcorp.com/data-byte/despite-order-targeting-judge-albright-west-texas-patent-litigation-dipped-less-than-expected-in-2022/; Ryan Davis, *After Rules Shake-Up, Albright Remains The Top Patent Judge*, LAW360 (Feb. 15, 2023), https://www.law360.com/articles/1573848/after-rules-shake-up-albright-remains-the-top-patent-judge ("U.S. District Judge Alan Albright of the Western District of Texas still got more patent cases in 2022 than any other judge and the district itself remained the nation's busiest patent venue even after it began randomly distributing patent cases, although the full effects of that change may not yet have been felt.").

[44] Ryan Davis, *New WDTX Top Judge Keeps Random Patent Suit Distribution*, LAW360 (Dec. 21, 2022), https://www.law360.com/articles/1560535/new-wdtx-top-judge-keeps-random-patent-suit-distribution.

[45] *See generally In re* Planned Parenthood Fed'n of Am., Inc., 52 F.4th 625 (5th Cir. 2022).

[46] Dennis Crouch, *Fifth Circuit Seems to Raise the Bar on Venue Transfer Mandamus*, PATENTLY-O (Nov. 29, 2022), https://patentlyo.com/patent/2022/11/circuit-transfer-mandamus.html; *Fifth Circuit Ruling May Impact Venue Transfer for Patent Cases in the Western District of Texas*, MAIER & MAIER (Dec. 2, 2022), https://maierandmaier.com/fifth-circuit-ruling-may-impact-venue-transfer-for-patent-cases-in-the-western-district-of-texas/; *Federal Circuit Sidesteps Fifth Circuit Ruling on Convenience Transfers*, RPX (Feb. 5, 2023), https://insight.rpxcorp.com/news/73826-federal-circuit-sidesteps-fifth-circuit-ruling-on-convenience-transfers.

II. A Tale of Seven Districts: A Historical Overview

Although the "two cities" in Charles Dickens's *A Tale of Two Cities* are undoubtedly London and Paris, the legendary writer Jorge Luis Borges commented: "Dickens lived in London. In his book *A Tale of Two Cities*, based on the French Revolution, we see that he really could not write a tale of two cities. He was a resident of just one city: London."[47] So, the same findings are also important for the "seven districts" that are historically identified as the seven most active districts for patent litigation, because the Western District of Texas is truly where most contemporary focus lies.

A. Pre-*TC Heartland* Patent Litigation Activity Trends

Upon examining data of patent filings from the year 1980 to 2016,[48] provided by the "Patent Litigation Dataset" of the U.S. Patent & Trademark Office ("USPTO"), various interesting trends can be observed.[49]

The primary fashion in which the data is organized is based on a comma-separated value (CSV) file that provides plot data organized by the federal U.S. district court where the case was decided but not divisions within a district court. Specifically, the categories of data in the CSV file provided by the USPTO's Patent Litigation Dataset are organized by the following factors: court filed, judge assigned, judge transferred to, date filed, date closed, demand amount, jury demand, federal jurisdiction basis, and grounds for case (*e.g.*, patent infringement for the most part). Importantly, this data reflects a patentee plaintiff's forum of choice after venue transfer motions were decided and ruled on.

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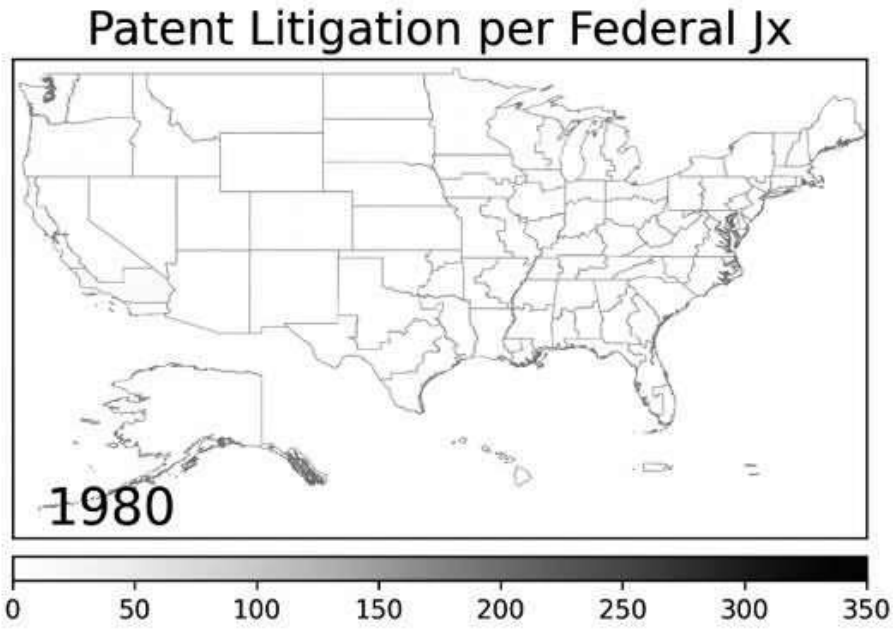
[47] JORGE LUIS BORGES, PROFESSOR BORGES: A COURSE ON ENGLISH LITERATURE 159 (Martín Arias & Martín Hadis eds., Katherine Silver trans., 2013).

[48] *Patent Litigation Data Through 2016 Now Available*, U.S. PAT. & TRADEMARK OFFICE (Jan. 16, 2020), https://www.uspto.gov/about-us/news-updates/patent-litigation-data-through-2016-now-available.

[49] *See generally Patent Litigation Docket Reports Data*, U.S. PAT. & TRADEMARK OFFICE, https://www.uspto.gov/learning-and-resources/electronic-data-products/patent-litigation-docket-reports-data (last visited May 14, 2023).

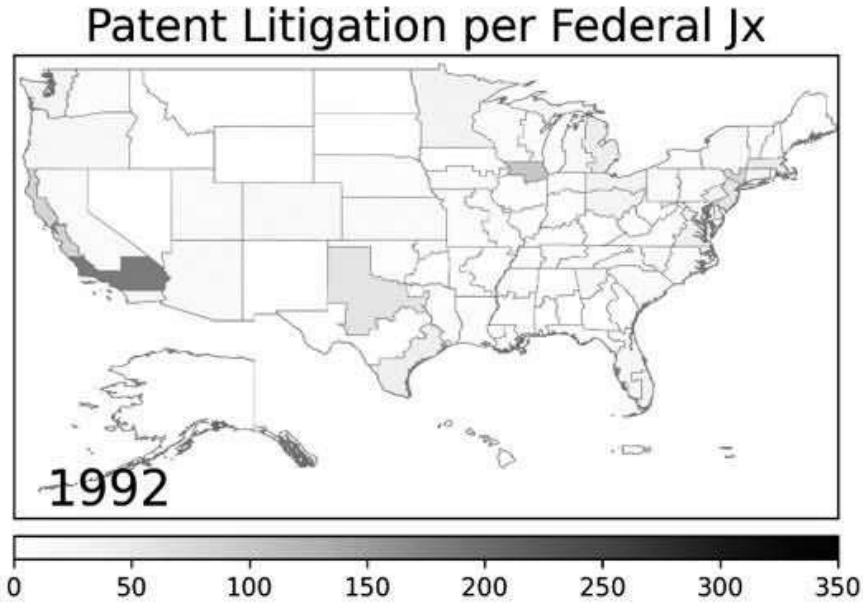
For example, the below screenshots of a national map of patent litigation activity provided by James Choi shows almost no patent litigation case filing, transferred and resolved activity ("patent litigation activity") from 1980 to 1989 (Figure 1 being representative of 1980):

FIG. 1



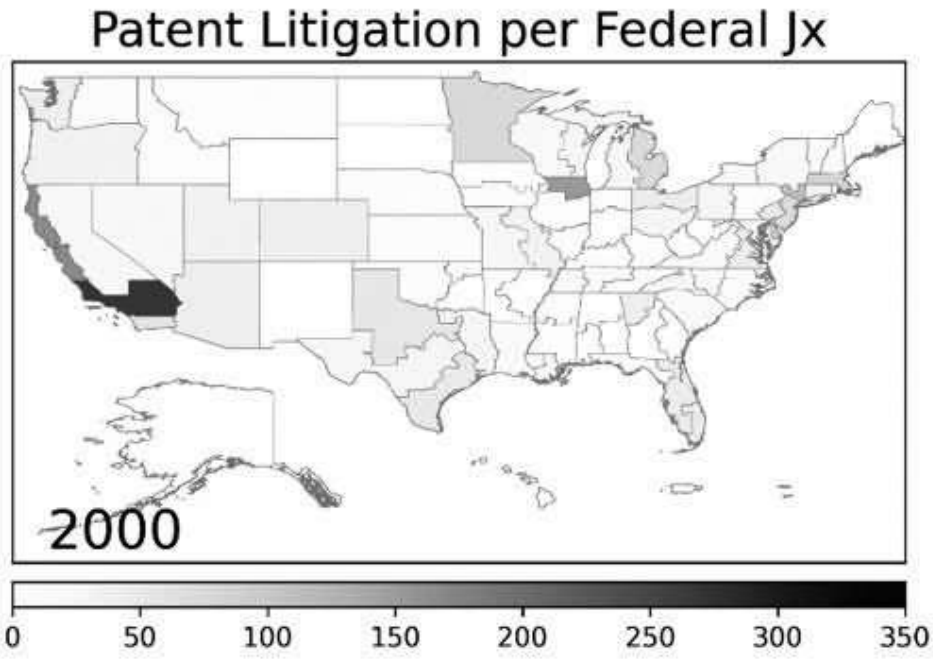
Not until 1990–1992 does some patent litigation activity become visible in the California region, mainly in the Central regions, and scattered across the East Coast (likely the U.S. District Court for the Southern District of New York (SDNY)) as well as even in some areas of Alaska. Thus, the CDCA appears to be the very "First District" out of the six districts to be covered. The 1992 graphic in Figure 2 is illustrative:

FIG. 2



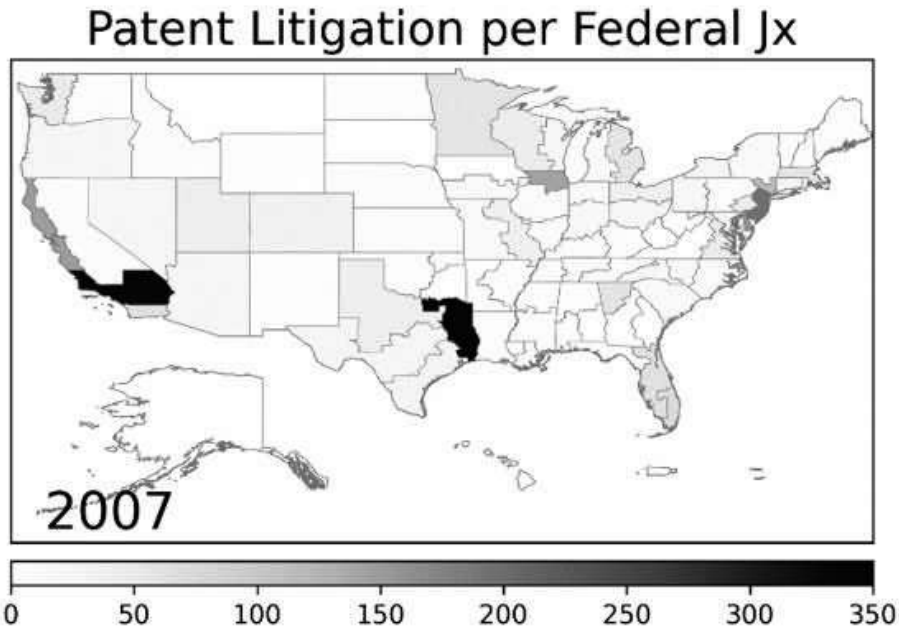
Patent litigation activity then also begins to intensify in California around 2000, more so in the "First District" of the CDCA and also in the Northern regions in the NDCA (the "Second District" out of the six that are covered in this article), which appropriately tracks the "dot-com boom" and the rise of internet and other electronics-based high tech companies, as shown in Figure 3 below:

FIG. 3



However, patent litigation activity began to pick up around 2005 in East Texas (the "Third District"), several years after Judge T. John Ward was "nominated to the district by President Bill Clinton on January 26, 1999, confirmed by the United States Senate on July 13, 1999, received his commission on July 15, 1999 and joined the bench in September 1999."[50] This spike in filings can also be explained by how in the EDTX's Tyler division, former Chief Judge Leonard Davis was "confirmed by the United States Senate on May 9, 2002, . . . received his commission on May 10, 2002, . . . [and] was sworn in on May 15, 2002."[51] Two years later, patent litigation activity saw a significant spike in 2007, with filings in the CDCA and then the NDCA following close behind, as can be seen by Figure 4 below:

FIG. 4

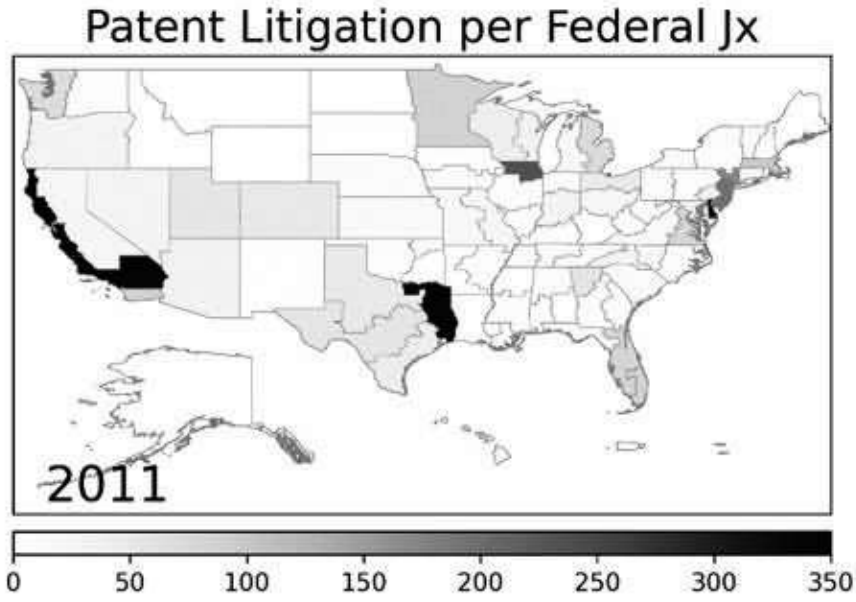


[50] *T. John Ward*, FEDERAL JUDICIAL CENTER, https://www.fjc.gov/history/judges/ward-t-john (last visited May 14, 2023).

[51] *Leonard Davis*, FEDERAL JUDICIAL CENTER, https://www.fjc.gov/history/judges/davis-leonard-e (last visited May 14, 2023).

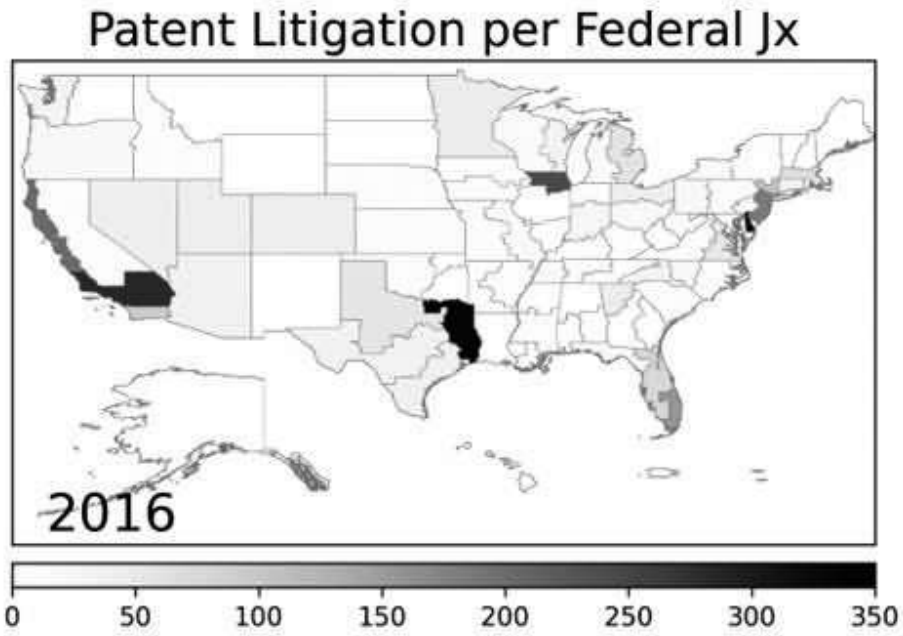
The year range of 2008 to 2011 also began to see the rise of Delaware (the "Fourth District"), New Jersey (the "Fifth District"), and the Northern District of Illinois ("the Sixth District") as patent hotbeds, with the EDTX, the CDCA and the NDCA maintaining their dominance in the listed order, as shown below in the graphic for the representative year of 2011 in Figure 5:

FIG. 5



Most interestingly, patent litigation activity remained concentrated in California (CDCA & NDCA), East Texas (EDTX), Delaware (DDEL) and New Jersey (DNJ) and Northern District of Illinois (NDIL) from 2012 to 2016, but the leading area clearly was East Texas or the EDTX. Figure 6 below shows patent filing trends in 2016, the year before *TC Heartland* was decided:

FIG. 6



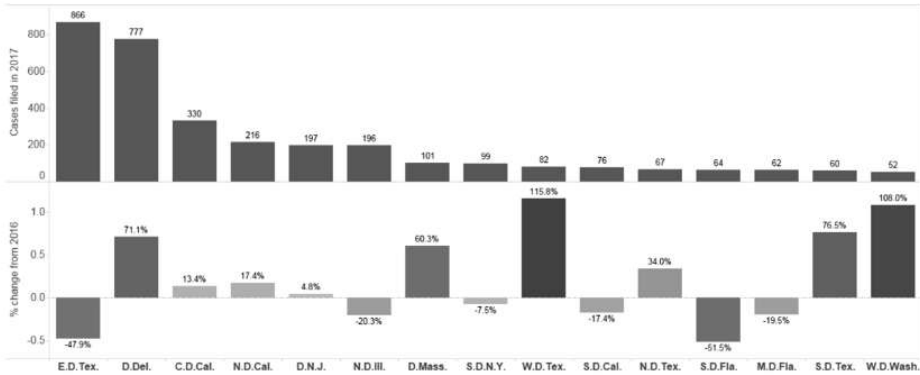
As can be seen by the above, the darkest spots are formed in Central/Southern California (near the Los Angeles area or the CDCA), in Northern California or the NDCA (around Silicon Valley), the EDTX, the NDIL, the DDEL, and the DNJ, with some activity in Southern Florida or the U.S. District Court for the Southern District of Florida (SDFL) as well. These trends also demonstrate how the EDTX has been the leader of patent filings from 2005 and 2007 to 2016.

B. Post-*TC Heartland* Patent Litigation Filing Trends

By analyzing data released from sources such as Lex Machina, after *TC Heartland* was decided on May 22, 2017, close to the middle of the year, there was a significant shift of patent litigation case filings from the EDTX to mainly the DDEL but also to some of the other top courts such as the CDCA, the NDCA, the DNJ, and the NDIL. Specifically, in 2017, although the EDTX was the leader with 866 cases, the court saw a 47.9% drop in filings from 2016, whereas the DDEL's 777 cases

represented a 71.1% increase. The number of patent filings in the other district courts can be seen in Figure 7 below, from the "Lex Machina Q4 2017 End of the Year Litigation Update":[52]

FIG. 7



In third and fourth place, were the CDCA and the NDCA with 330 (13.4% increase from 2016) and 216 (17.4% increase from 2016) total patent case filings, respectively. Following behind in (and almost tied at) fifth and sixth place were the DNJ and the NDIL, with 197 (4.8% increase from 2016) and 196 cases (20.3% decrease from 2016). The rest of the courts shared the other filings (all less than 100): the SDNY, the SDFL, and the U.S. District Courts for the District of Massachusetts (DMA), Southern District of California (SDCA), the Northern District of Texas (NDTX), the Middle District of Florida (MDFL), the Southern District of Texas (SDTX), and the Western District of Washington (WDWA). Interestingly enough, the WDTX had 82 filings (a 115.8% increase from 2016), but Judge Albright would not take the bench until 2018. Thus, these cases were likely filed in the Austin division.

2018, however, is when patent case filings experienced a drastic change because Judge Alan D Albright "received his judicial commission on September 10, 2018, and was sworn in by Chief Judge Orlando Luis Garcia on September 18, 2018."[53] Therefore, although case filings in the WDTX were growing in 2018 (89 cases) and 2019 (290 cases), they ended up being the highest in the country in 2020 (857 cases) based on the data in Table 1 below, which is taken from Figure 4 of the Lex Machina 2021 Patent Report.[54] Also, in 2016–2017, only *five* patent cases total (two in 2016 and three in 2017) were filed in the WDTX's Waco Division, which Judge Albright

[52] Owen Byrd, *Lex Machina Q4 2017 End of the Year Litigation Update*, LEX MACHINA (Jan. 16, 2018), https://lexmachina.com/blog/lex-machina-q4-litigation-update/.

[53] *Alan Albright*, FEDERAL JUDICIAL CENTER, https://www.fjc.gov/history/judges/albright-alan-d (last visited May 14, 2023).

[54] LEX MACHINA, 2021 LEX MACHINA PATENT LITIGATION REPORT 6 (2021).

presides over, compared to 248 cases filed in 2019, which is a 8,166% increase from the three cases filed in 2017.[55]

Table 1

District	2018	2019	2020	Percent
W.D.Tex.	89	290	**857**	21.1%
D.Del.	875	1,001	**742**	18.3%
E.D.Tex.	504	332	**395**	9.7%
C.D.Cal.	305	346	**298**	7.3%
N.D.Cal.	329	240	**272**	6.7%
N.D.Ill.	122	143	**186**	4.6%
D.N.J.	193	145	**153**	3.8%
S.D.N.Y.	109	103	**112**	2.8%
N.D.Tex.	102	55	**86**	2.1%
S.D.Tex.	47	49	**74**	1.8%

Breaking down the other data from Table 1, the EDTX remained roughly in second to third place for national patent filings from 2018 to 2020, with the DDEL being the nation's leader from 2018 to 2019, but the DDEL was usurped and sent down to second place by the WDTX in 2020. The CDCA wavered from fourth to third and back to fourth, and the NDCA followed a similar pattern in fluctuating from third to fifth from 2018 to 2020. In the 2018–2020 year range, the DNJ and NDIL also went from fifth and sixth to sixth and seventh, respectively, and then flipping from the DNG in seventh and the NDIL in sixth. The lower rung of courts, having 100 or fewer total patent case filings, were the SDNY and the two other districts from Texas, the NDTX and the SDTX. There can be several historical explanations for the trends in this data. The initial conglomeration of patent filings in California can be readily explained by the presence of high technology companies. However, what is interesting is that there was a higher concentration of case filings in the CDCA than the NDCA in the early 2000s, perhaps signaling that the CDCA federal courts might have been preferred patent litigation forums instead of the NDCA. Additionally, there might have always been a constant presence of high tech companies in the aerospace defense space (e.g., Northrop Grumman, Boeing, Lockheed, Hughes Aircraft Company) versus the more recent software, social media, and semiconductor companies based in Silicon Valley.[56] This same explanation can also be applied to

[55] Anderson & Gugliuzza, *supra* note 4, at 448.

[56] Ashleen Knutsen, *The History and Revival of Southern California's Aerospace Industry*, KCET (July 9, 2019), https://www.kcet.org/shows/blue-sky-metropolis/the-history-and-revival-of-southern-californias-aerospace-industry; Hadley Meares, *How the Aviation Industry Shaped Los Angeles*,

the presence of those same companies as well as corporations in the pharmaceutical and healthcare industries based (or incorporated) in the DNJ,[57] the DDEL,[58] and the NDIL.[59]

As the brunt of patent cases shifted to the EDTX in 2007, to the DDEL in 2017, and then to the WDTX in 2019 and 2020, the concentration of filings also decreased in those other districts. It will be interesting to see future filing patents, considering the current "mass exodus" of high tech companies from California to Austin and Miami, which are situated in the WDTX and the SDFL respectively and could further increase patent filings in those areas.[60]

C. Weighing the Gilbert Factors in Each District

For each of the "Seven Districts" (CDCA, NDCA, EDTX, DDEL, DNJ, NDIL and WDTX), and runner-up district courts such as the SDFL, the SDCA, the DMA, the SDTX, the NDTX, etc., there are explainable and identifiable reasons as to why patent filings have been historically higher.

In his seminal 2010 paper "Where to File Your Patent Case," Professor Mark Lemley asserts that forum shopping "is alive and well in patent law" and that "[d]espite the existence of a unified court of appeals that hears virtually all patent cases"—the Federal Circuit— "patent plaintiffs—and those who might become patent defendants—spend a great deal of time and effort worrying about where to file their case."[61] Patent plaintiffs aim to win in a pro-patentee court, or, at the least, to

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CURBED LA (July 8, 2019), https://la.curbed.com/2019/7/8/20684245/aerospace-southern-california-history-documentary-blue-sky; Samantha Masunaga, *Southern California's Aerospace Industry, Long in Decline, Begins to Stir*, L.A. TIMES (July 22, 2016), https://www.latimes.com/business/la-fi-socal-aerospace-20160723-snap-story.html.

[57] *See* Dassie & Gaddis, *supra* note 13 ("New Jersey is a popular venue for filing patent infringement lawsuits. As the 'Medicine Chest of the World,' comprising thousands of biopharmaceutical, biotechnology, medical technology, medical device and diagnostic companies, the District of New Jersey (D.N.J.) is the logical forum for many life science patent suits.").

[58] Adam Houldsworth, *Delaware is the US's go-to Venue for Pharma Patent Litigation, but There Could Be Trouble Ahead*, IAM MEDIA (May 11, 2018), https://www.iam-media.com/litigation/delaware-uss-go-venue-pharma-patent-litigation-there-could-be-trouble-ahead ("The [2018 Hatch-Waxman ANDA Litigation Report] reveals that 2017 saw a significant increase in filings for patent lawsuits between branded and generic pharmaceutical companies, with the District of Delaware – already the country's most popular venue for such litigation – pulling away from the pack and recording its highest ever number of filings.").

[59] Chris Kolmar, *The 100 Largest Companies in Illinois for 2023*, ZIPPIA (Apr. 14, 2023), https://www.zippia.com/advice/largest-companies-in-illinois/ (listing Accenture (software and financial services), Boeing (defense and aerospace) and Abbott Laboratories (healthcare) as three of the fifteen largest companies in Illinois, each located in Chicago, spanning three top fields); *see also* Gugliuzza, *supra* note 3, at 377 (describing the Northern District of Illinois (Chicago) as a "large, urban federal judicial district[] that [is a] technology center").

[60] Cyrus Farivar, *Tech Flight: Why Silicon Valley is Heading to Miami and Austin, Texas*, NBC NEWS (Jan. 24, 2021), https://www.nbcnews.com/business/business-news/tech-flight-why-silicon-valley-heading-miami-austin-texas-n1255330.

[61] Mark Lemley, *Where to File Your Patent Case,* 38 AIPLA Q.J. 401, 403–04 (2010).

get to trial in a speedy fashion, and infringement-accused patent defendants aim to find "defense-favorable jurisdictions in which to file declaratory judgment actions" or a court that "regularly rules for defendants, is unlikely to send cases to jury trial, and takes a long time to do both."[62] This is so that they may have enough time to "design around the patentee's invention" or to wait for "market changes that render the patented invention less valuable." This is, in other words, effectively "the opposite of what plaintiffs want."[63]

Professor Lemley wrote his article in 2010, and tracking the above-noted data, from 2000 to 2010, the EDTX ranked fourth amongst all judicial districts in the number of patent cases litigated, the DDEL ranked sixth, the CDCA ranked first, the NDCA ranked second, the NDIL ranked third, and the SDNY ranked fifth.[64] That would change from 2011 to 2016, when the EDTX became the nation's leader in patent filings, and in 2015, a record-setting 44.2% of new patent cases were filed in the EDTX.[65] Indeed, the map data above from the USPTO Patent Litigation Dataset also tracks the top five courts with the most patent litigation activity as being: the EDTX, DDEL, NDIL, NDCA, and CDCA, respectively.[66] Thus, patent plaintiffs have clear motivations for filing in or, more importantly, transferring to (or fighting transfer motions from) the Seven Districts, as explained by Professor Lemley. Thus, the eight *Gilbert* factors and their importance will be weighed for each District.

1. The First District: The Central District of California

The private interest factors that would likely be weighed heavier for transfer to or against transfer from the CDCA would likely be (1) the relative ease of access to sources of proof (due to the presence of more company or corporate defendants in the Los Angeles or Orange County area), (2) the availability of compulsory process to secure the attendance of witnesses (due to the employees more likely being in the same area), (3) the cost of attendance for willing witnesses (for the same reason), and (4) all other practical problems that make trial of a case easy, expeditious, and inexpensive (e.g., having federal courts in big cities such as Los Angeles and relatively easy access to major international airports such as LAX). However, for a busy civil trial court located close to the major metropolitan city of Los Angeles, three of the four public interest factors will not likely be weighed as heavily. Specifically, (1) the administrative difficulties flowing from court congestion (e.g., the CDCA is a busy court but not known to suffer from any particular congestion or concentration of filings), (3) the familiarity of the forum with the law that will govern the case (the

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[62] *Id.*
[63] *Id.*
[64] Gugliuzza, *supra* note 3, at 392 n.360.
[65] DOCKET NAVIGATOR, 2017 RETROSPECTIVE 17 (2017), https://compass.docketnavigator.com/api/documents/report/65862.
[66] Alan C. Marco et al., *Patent Litigation Data from US District Court Electronic Records (1963-2015)* 30–32 (USPTO Econ. Working Paper, Paper No. 2017-06, 2017), https://ssrn.com/abstract=2942295.

CDCA has been historically familiar with patent cases and was an early adopter of the Patent Pilot program[67] (there is even a specific Patent Pilot law clerk that handles patent cases in the district),[68] and (4) the avoidance of unnecessary problems of conflict of laws or in the application of foreign law (there are not any unusual conflict of laws issues that face the CDCA that any other federal court would not face). However, the public interest factor of (2) the local interest in having localized interests decided at home might be weighed slightly heavier due to the presence of high tech companies (e.g., engineering and aerospace companies, etc.) in the area.

2. The Second District: The Northern District of California

Similar to the analysis above for the CDCA, the private interest factors that would be weighted more heavily for transfer to or against transfer from the NDCA would most likely be (1) the relative ease of access to sources of proof (due to the presence of many high tech companies in Silicon Valley), (2) the availability of compulsory process to secure the attendance of witnesses (due to the employees more likely being in Silicon Valley as well), (3) the cost of attendance for willing witnesses (for the same reason), and (4) all other practical problems that make trial of a case easy, expeditious, and inexpensive (e.g., having federal courts in big cities such as San Francisco and San Jose and relatively easy access to major international airports such as SFO or the Oakland or San Jose Airports). Moreover, similar to the above analysis for the CDCA, for the busy trial courts in San Francisco, Oakland and San Jose, three of the four public interest factors will not likely be weighted as heavily. Specifically, (1) the administrative difficulties flowing from court congestion (e.g., the NDCA is a busy court but does not appear to experience congestion more than the average busy federal trial court), (3) the familiarity of the forum with the law that will govern the case (the NDCA has also been historically very familiar with patent cases; in fact, the Patent Local Rules were birthed there and created by U.S. District Judge Ronald Whyte),[69] and (4) the avoidance of unnecessary problems of conflict of laws or in the application of foreign law (there are not any unusual conflict of laws issues facing the NDCA). However, the public interest factor of (2) the local interest in having localized interests decided at home might have more significance because of the dominant presence of high tech company defendants being located in Silicon Valley or San Francisco or even the East Bay (Berkeley, Oakland) areas.

3. The Third District: The Eastern District of Texas

In stark contrast to the above analysis for the CDCA and the NDCA, the private interest factors that would be counted more towards transfer out of the district versus

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[67] *Patent Program*, U.S. DIST. CT. FOR CENT. DIST. OF CALIFORNIA, https://www.cacd.uscourts.gov/judges-requirements/court-programs/patent-program (last visited May 14, 2023).

[68] Colin Bosch, *The Patent Pilot Program: What Is It, Is It Successful, and Should It Even Exist?*, 22 UCLA J. L. & TECH. 1, 23 (2018).

[69] Dennis Crouch, *Northern District of California's New Patent Rules*, PATENTLY-O (Feb. 3, 2008), https://patentlyo.com/patent/2008/02/northern-distri.html.

transferring to the district are seemingly inversely proportional for the EDTX. For example, (1) the relative ease of access to sources of proof (there are practically no high tech companies based in the EDTX, aside from the presence of some companies such as Texas Instruments that might be considered residents of the Dallas/Plano division of the EDTX),[70] (2) the availability of compulsory process to secure the attendance of witnesses (due to many employees not living in or living far away from divisions in the EDTX (e.g., even if they lived in Dallas, that is more than a two hour drive from Marshall),[71] (3) the cost of attendance for willing witnesses (for the same reason), and (4) all other practical problems that make trial of a case easy, expeditious and inexpensive (e.g., the federal courthouse in Marshall, again, is at least a two hour drive from the Dallas Fort Worth or DFW Airport).

Furthermore, opposite to how the four private interest factors are weighed for the NDCA and the CDCA, the public interest factors are more of a toss-up and can be argued either way. For instance, for (1) the administrative difficulties flowing from court congestion, parties wanting to transfer out can argue that the EDTX is congested due to having to hear so many patent cases, while parties wanting to stay can argue that the EDTX is not more congested compared to any other normal federal court—and may even be less congested due to not having to deal with large volumes of criminal cases. Also, for (2) the local interest in having localized interests decided at home, parties wanting transfer out of the EDTX can argue that there are no local interests being furthered because no high tech companies or corporations are even in the district, whereas NPE/PAE parties can argue that there are significant local interests because they are based there (albeit on a somewhat manufactured basis). Indeed, Apple shut down two stores in the Dallas suburbs (the Plano division of the EDTX) and opened stores closer to downtown Dallas just to avoid being sued in the EDTX.[72] For (3) the familiarity of the forum with the law that will govern the case, parties wanting the case to stay in the EDTX may have the advantage because they can argue that the EDTX is very familiar with patent law due to the high number of patent cases filed in courts there,[73] while those wanting to transfer out of the EDTX may have a harder time convincing a judge that another court may somehow be more knowledgeable. It appears that the public interest factor of (4) the avoidance of unnecessary problems of conflict of laws or in the application of foreign law can be ignored in the analysis because there are not any unusual conflict of laws issues facing the EDTX.

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[70] Matthew Zorn, *Venue Transfers Within East Texas: The Case To Know*, LAW360 (Oct. 11, 2017), https://www.law360.com/articles/973244/venue-transfers-within-east-texas-the-case-to-know.

[71] *Distance from Dallas to Marshall*, TRIPPY, https://www.trippy.com/distance/Dallas-to-Marshall-TX (last visited May 15, 2023).

[72] Anderson & Gugliuzza, *supra* note 4, at 434 (citing Sarah Perez, *Apple Confirms its Plans to Close Retail Stores in the Patent Troll-Favored Eastern District of Texas*, TECHCRUNCH (Feb. 22, 2019), https://techcrunch.com/2019/02/22/apple-confirms-its-plans-to-close-retail-stores-in-the-patent-troll-favored-eastern-district-of-texas/).

[73] Hsieh, *supra* note 14, at 142–43.

4. The Fourth District: The District of Delaware

The District of Delaware involves an interesting analysis of the eight *Gilbert* factors because it is somewhat of a hybrid between an inconvenient locale for most high tech companies (e.g., those that mostly do not have presences in the area) and a convenient locale for perhaps financial, pharmaceutical, and healthcare companies (due to their stronger presence in the surrounding areas, e.g., New Jersey and Pennsylvania). Thus, the private interest factors might be weighed more similar to how they are considered in the EDTX for non-finance or non-pharmaceutical companies, but they would follow the analysis from NDCA/CDCA for finance, pharmaceutical, and healthcare companies. For example, (1) the relative ease of access to sources of proof (standard software or electronics high tech companies may not have much presence in the district, but pharmaceutical, finance and healthcare companies do), (2) the availability of compulsory process to secure the attendance of witnesses (for the same reasons, typical high tech companies vs. pharmaceutical, finance, or healthcare ones), (3) the cost of attendance for willing witnesses (for the same conflicting reason), and (4) all other practical problems that make trial of a case easy, expeditious, and inexpensive (e.g., the federal courthouse in Wilmington, Delaware is close enough to major airports, and although smaller, handles complex patent cases just as efficiently as larger courts such as the NDCA/CDCA and all the divisions of the EDTX).

The four private interest factors for the DDEL may also be weighed similar to how they are in the EDTX in that there are close arguments existing on both sides. For instance, for (1) the administrative difficulties flowing from court congestion, parties wanting to transfer out of Delaware may argue that the DDEL is, like the EDTX, congested due to having to handle so many patent cases, while parties wanting to stay in Wilmington can argue that the DDEL is as congested as your average federal court, but it may also have to deal with its fair share of other cases (e.g., finance-related cases and criminal cases). Also, for (2) the local interest in having localized interests decided at home, electronics or software high tech companies wanting transfer out of the DDEL can argue that no local interests exist due to their lack of presence, while pharmaceutical, finance, and healthcare companies can argue that there are significant local interests because of the fact they have been historically established in the district or nearby. For (3) the familiarity of the forum with the law that will govern the case, parties wanting the case to stay in the DDEL may have a similar advantage to the similar EDTX parties because they can argue that the DDEL, like the EDTX, is very familiar with patent law due to the high number of cases filed in courts there, while those wanting to transfer out of the DDEL may have a harder time convincing a judge that another court (aside from the EDTX, where they also may not want to transfer to) may somehow be more knowledgeable. However, it appears that the private interest factor of (4) the avoidance of unnecessary problems of conflict of laws or in the application of foreign law can be ignored in the analysis, like for most courts, because there are not any unusual conflict of laws issues facing the DDEL.

5. The Fifth District: The District of New Jersey

The analysis for the DNJ is very similar to the above analysis for the District of Delaware due to the overwhelming presence of pharmaceutical and healthcare companies in New Jersey, which is often called the "medicine chest of the world."[74] As a result, the analysis of both the private interest and public interest factors are nearly identical to the analysis of the same for the DDEL, except the differences would be between pharmaceutical and healthcare companies (not necessarily finance companies) versus traditional high tech companies in the electronics, communications, and software spaces. As a result, a redundant analysis will not be performed. However, it is to be noted that ANDA patent cases are the primary types of cases filed in the DNJ (as well as the DDEL), with the timing requirements (e.g., Orange Book considerations, etc.) being different for those patent infringement suits versus standard ones.

6. The Sixth District: The Northern District of Illinois

Because Chicago is very similar to other major metropolitan centers with thriving technology industries such as San Francisco, San Jose, and Los Angeles, the analysis of the private and public interest factors for the NDIL is nearly identical to the CDCA and the NDCA above. Hence, such a similar analysis will not be repeated. Of note, however, is that Chicago has perhaps a broader spectrum of industries compared to the NDCA (predominantly software and electronic high tech companies), the CDCA (aerospace and electronic high tech companies), DDEL (financial, healthcare and pharmaceutical companies), and the DNJ (healthcare and pharmaceutical companies) and encompasses all of the aforementioned markets.[75]

[74] Dassie & Gaddis, *supra* note 13.

[75] *See* Hannah Loftus, *Chicago's Regional Economy*, VENNGAGE INC. (Dec. 2022), https://infograph.venngage.com/pl/yC4Ogz5vuo.

7. The Seventh District: The Western District of Texas

FIG. 8[76]

Last, but certainly not least (in fact, likely the most important district with respect to the analysis of this paper), the WDTX is a fascinating hybrid of all of the aforementioned districts. This is the case because unlike the EDTX, the WDTX contains Austin, which is home to many emerging high tech companies (and is considered a high tech hub) and large cities such as San Antonio and El Paso.[77] Yet,

[76] Patent Memes (@PatentMemes), TWITTER (Oct. 7, 2021, 8:54 AM), https://twitter.com/PatentMemes/status/1446111702676742159.

[77] Anderson & Gugliuzza, *supra* note 4, at 446 ("Apple has about 7,000 employees in Austin and, in 2019, broke ground on a $1 billion dollar campus that will house up to 15,000 more. Austin also has major campuses for IBM, Amazon, Google, Facebook, Tesla, and many others, lending it the

similarly to the Marshall and Tyler divisions of EDTX, the Waco division (where Judge Albright presides in) encompasses a smaller city that contains less of a high tech company presence.[78] Thus, the weighing of both the private and public interest factors becomes much more interesting and nuanced compared to the above-discussed courts, leading to motivations for intra-division transfer within the WDTX.[79]

Specifically, for the private interest factors, (1) the relative ease of access to sources of proof (there are certainly more high tech companies based in Austin, which is similar to the NDCA, CDCA, NDIL, DNJ, and DDE, vs. Waco, which is similar to the EDTX's Marshall division—but this difference may be negligible because it is just a 1.5 hour drive between those two cities),[80] (2) the availability of compulsory process to secure the attendance of witnesses (the same considerations would apply based on the location of witnesses or employees), (3) the cost of attendance for willing witnesses (for the same reasons), and (4) all other practical problems that make trial of a case easy, expeditious, and inexpensive (e.g., the federal courthouse in Waco is close to a small local airport, but Austin, as well as San Antonio and El Paso, are close to larger, international airports).

Additionally, analyzing the public interest factors for the WDTX also involves consideration of arguments that can be advanced either way. For instance, for (1) the administrative difficulties flowing from court congestion, parties wanting to transfer out of the WDTX can now argue that the WDTX is congested due to having to hear so many patent cases, while parties wanting to stay can argue that the WDTX is not more congested compared to any other normal federal court—and only recently experienced a higher volume of patent cases.[81] Also, for (2) the local interest in having localized interests decided at home, parties wanting transfer out of the WDTX can only argue transfer from Waco to Austin because there is no high tech presence in Waco. For (3) the familiarity of the forum with the law that will govern the case, parties wanting the case to stay in the WDTX have the advantage of arguing for Judge Albright's expertise in patent law and can also point to the recent high number of cases filed there,[82] while those wanting to transfer out of the WDTX may have a harder time convincing a judge that another court (aside from the EDTX or DDEL)

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nickname of 'Silicon Hills.'").

[78] *Id.* at 448 ("Waco, Texas (population 139,236) . . . is small compared to the other cities in the Western District . . . [and has an] economy [that] partially depends on crops and livestock, though manufacturing and service industry positions have enhanced its economic base.").

[79] *Cf. id.* at 454, 464–65 (arguing that division transfers do not really affect plaintiff motivations because they are primarily engaging in "judge shopping" in selecting Judge Albright, which can be easily and automatically done by simply selecting "Waco" from a drop-down menu of divisions on the WDTX electronic case filing system; even though a case may be transferred from the Waco division to the Austin division, Judge Albright may still preside over the case after transfer).

[80] *Distance Between Austin and Waco*, TRIPPY, https://www.trippy.com/distance/Austin-to-Waco (last visited May 15, 2023).

[81] Anderson & Gugliuzza, *supra* note 4, at 450–51.

[82] *Id.* at 450.

may somehow have more patent law knowledge, experience, or expertise. Like all the courts above, it appears that the public interest factor of (4) the avoidance of unnecessary problems of conflict of laws or in the application of foreign law can be ignored in the analysis and should very likely be thrown out altogether.

III. An Overview of Relevant Patent Venue Jurisprudence for 28 U.S.C. § 1404(a)

Similarly to how the predominant regime of the monarchy and the Estates General of 1789 prevailed in the historical backdrop of the French Revolution during Dickens's *A Tale of Two Cities*,[83] the eight *Gilbert* Factors have been the prevalent analysis framework for patent venue ever since the late 1940s. Yet, in order to overthrow this outdated and ineffectual regime, it must first be truly understood.

A. The 28 U.S.C. § 1404(a) "Convenience" Factors

The doctrine of forum non conveniens is a "court's discretionary power to decline to exercise its jurisdiction where another court, or forum, may more conveniently hear a case."[84] In the 1947 U.S. Supreme Court case of *Gulf Oil Corp. v. Gilbert*, the issue to be decided was whether a federal district court (in this case, the SDNY) abused its discretion in applying the doctrine of forum non conveniens to dismiss a property-fire-damage negligence suit brought by a Virginia resident against a corporation doing business in both Virginia and New York, when all the events leading to the litigation had taken place in Virginia.[85] The Court ultimately concluded that the SDNY did not abuse its discretion in dismissing the case and properly applied the law of forum non conveniens.[86] In determining whether the doctrine of forum non conveniens was properly applied, Justice Jackson devised four "[i]mportant considerations" with respect to "the private interest of the litigant": "[1] the relative ease of access to sources of proof; [2] availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; [3] possibility of view of premises, if view would be appropriate to the action; and [4] all other practical problems that make trial of a case easy, expeditious and inexpensive."[87] Justice Jackson then laid out four additional "[f]actors of public interest" which comprised considering:

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[83] *See A Tale of Two Cities: Historical Context*, DISCOVERING DICKENS, https://dickens.stanford.edu/dickens/archive/tale/historical_context.html (last visited May 15, 2023).

[84] Legal Info. Inst., *Forum Non Conveniens*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/forum_non_conveniens (last visited May 15, 2023).

[85] 330 U.S. 501, 502–03 (1947).

[86] *Id.* at 511–12.

[87] *Id.* at 508.

> [1] [a]dministrative difficulties . . . for courts when litigation is piled up in congested centers instead of being handled at its origin . . . [2] a local interest in having localized controversies decided at home . . . [3] having the trial of a diversity case in a forum that is at home with the state law that must govern the case . . . [and] [4] [trying the case in a familiar court] rather than . . . in some other forum [that must] untangle problems in conflict of laws, and in law foreign to itself.[88]

This precedent later evolved into eight *Gilbert* factors split into four "private interest" factors and four "public interest" factors, which will be analyzed further below.[89]

B. The *Gilbert* Factors

The eight *Gilbert* factors discussed above were eventually split into four "private interest" factors and four "public interest" factors. The four "private interest" factors are:

(1) the relative ease of access to sources of proof;

(2) the availability of compulsory process to secure the attendance of witnesses;

(3) the cost of attendance for willing witnesses; and

(4) all other practical problems that make trial of a case easy, expeditious and inexpensive.[90]

The four public interest factors are:

(5) the administrative difficulties flowing from court congestion;

(6) the local interest in having localized interests decided at home;

(7) the familiarity of the forum with the law that will govern the case; and

(8) the avoidance of unnecessary problems of conflict of laws or in the application of foreign law.[91]

In adjudicating any motion to transfer venue under 28 U.S.C. § 1404(a), which provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought,"[92] judges engage in a weighing of these eight factors to ultimately determine whether or not transfer to a requested district court or division is warranted.

In its 2008 decision of *In re TS Tech*, the Federal Circuit handed down a series of opinions granting mandamus relief and analyzing the eight *Gilbert* factors to

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[88] *Id.* at 508–09 (remarking also that "[j]ury duty is a burden that ought not to be imposed upon the people of a community that has no relation to the litigation").
[89] Uriarte, *supra* note 24.
[90] *Gilbert*, 330 U.S. at 508–09.
[91] *Id.*
[92] 28 U.S.C. § 1404(a); *see also* Uriarte, *supra* note 24.

overturn district court judge rulings on venue transfer under § 1404(a).[93] Professor Gugliuzza remarks that "[t]his use of mandamus to repeatedly overturn discretionary, non-appealable rulings of one district court is unprecedented in any federal court of appeals."[94] From 2008 to 2012, the Federal Circuit granted several mandamus petitions to overturn transfer decisions from the EDTX.[95] Eventually, this pattern stopped and the success rate of mandamus petitions at the Federal Circuit declined.[96] Notably, former Federal Circuit Chief Judge Randall Rader remarked at a conference that the Federal Circuit had "passed the baton" back to district courts.[97] However, in 2014, this pattern of using mandamus orders to reverse district judge venue transfer rulings started to pick up again, resulting in the cases of *In re Barnes & Noble*, *In re Apple, Inc.*, and *In re Emerson Electric Co.*[98] This trend grew from 2014 to 2017 when *TC Heartland* was decided, where afterwards the Federal Circuit issued at least four mandamus orders directing EDTX judges to transfer cases.[99]

In the WDTX, the Federal Circuit overturned several of Judge Albright's venue transfer orders including in the cases of *In re SK hynix Inc*. and *In re Intel Corp*.[100] Other recent Federal Circuit orders doing the same include *Uniloc v. Apple* (where the Federal Circuit issued a mandamus order involving Defendant Apple's motion to transfer to the NDCA); two cases filed by Plaintiff SynKloud Technologies against

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[93] *See* Uriarte, *supra* note 24 (first citing *In re* TS Tech USA Corp., 551 F.3d 1315 (Fed. Cir. 2008); then citing *In re* Genentech, Inc., 566 F.3d 1338 (Fed. Cir. 2009); then citing *In re* Nintendo Co., 589 F.3d 1194 (Fed. Cir. 2009); then citing *In re* Hoffmann-La Roche Inc., 587 F.3d 1333 (Fed. Cir. 2009); then citing *In re* Zimmer Holdings, Inc., 609 F.3d 1378 (Fed. Cir. 2010); then citing *In re* Acer Am. Corp., 626 F.3d 1252 (Fed. Cir. 2010); and then citing *In re* Microsoft Corp., 630 F.3d 1361 (Fed. Cir. 2011)).

[94] Gugliuzza, *supra* note 3, at 343, 347.

[95] *Id.* at 346 (first citing *In re* Biosearch Techs., Inc., 452 F. App'x 986 (Fed. Cir. 2011); then citing *In re* Morgan Stanley, 417 F. App'x 947 (Fed. Cir. 2011) (per curiam); then citing *In re* Verizon Bus. Network Servs. Inc., 635 F.3d 559 (Fed. Cir. 2011); then citing *Microsoft*, 630 F.3d at 1361; then citing *Acer*, 626 F.3d at 1252; then citing *Zimmer*, 609 F.3d at 1378; then citing *Nintendo*, 589 F.3d at 1194; then citing *Hoffmann-La Roche*, 587 F.3d at 1333; then citing *Genentech*, 566 F.3d at 1338; and then citing *TS Tech*, 551 F.3d at 1315); *see also In re* Oracle Corp., 399 F. App'x 587, 590 (Fed. Cir. 2010) (granting mandamus, ordering the Eastern District of Texas to conduct a new § 1404(a) analysis under the proper legal standard).

[96] Uriarte, *supra* note 24.

[97] *Id.*

[98] *Id.* ("On February 27, 2014, the Federal Circuit issued two opinions denying mandamus petitions regarding transfer motions, *In re Barnes & Noble*, 2014 U.S. App. LEXIS 3788 (Fed. Cir. 2014) and *In re Apple Inc.*, 2014 U.S. App. LEXIS 3787 (Fed. Cir. 2014). In both cases, the Federal Circuit emphasized the moving parties' failure to carry their respective burdens in the district court. The Federal Circuit denied another venue mandamus petition on March 13, 2014, again noting the movant's failure to adduce sufficient evidence in the district court to require transfer. *In re Emerson Electric Co.*, 2014-108.").

[99] Anderson & Gugliuzza, *supra* note 4, at 444 n.151 (first citing *In re* Google LLC, 949 F.3d 1338, 1347 (Fed. Cir. 2020); then citing *In re* HP Inc., No. 2018-149, 2018 WL 4692486, at *4 (Fed. Cir. Sept. 25, 2018); then citing *In re* ZTE (USA) Inc., 890 F.3d 1008, 1016 (Fed. Cir. 2018); and then citing *In re* Cray Inc., 871 F.3d 1355, 1367 (Fed. Cir. 2017)).

[100] *Id.* at 463 nn.259–60 (citing *In re* Intel Corp., No. 2021-105, 2020 WL 7647543, at *3 (Fed. Cir. Dec. 23, 2020)); *In re* SK hynix Inc., No. 2021-113, 2021 WL 321071, at *1 (Fed. Cir. Feb. 1, 2021).

Defendants Adobe, Inc. and DropBox, Inc.; *Cameron Int'l Corp v. Nitro Fluids*; *CloudofChange, LLC v. NCR Corp.* (which involved a motion to transfer to the U.S. District Court for the Northern District of Georgia); and *Parus Holdings Inc. v. LG Electronics, Inc.* (involving another motion to transfer to NDCA).[101] Suffice to say, the overturning of Judge Albright's venue transfer orders seem to be problematic due to their frequency, and it is something that should be corrected. However, what should be examined in making this correction?

IV. Comprehensive Analysis of The 45 Case Sets

Forty-five sets of Judge Albright cases paired with Federal Circuit mandamus orders ruling on venue orders from those cases will now be analyzed. After a high-level summary of some of those forty-five cases, a detailed table of data summarizing the application of the *Gilbert* factors will then be provided, with a numerical metric suggested in weighing each *Gilbert* factor.

A. High Level Case Summaries

Several example mandamus orders issued with respect to some of Judge Albright's venue transfer orders out of the forty-five total will now be analyzed under the old framework applying the eight *Gilbert* factors.

In the case of *SK hynix*, the Federal Circuit denied a mandamus petition, holding that Judge Albright did not clearly abuse his discretion in weighing the eight *Gilbert* factors to ultimately decide against transfer to the CDCA.[102] If the facts of the case were reweighed under the new proposed framework, Judge Albright's decision would be affirmed, because the first factor would be against transfer,[103] the second factor would also be against transfer (the WDTX has more patent cases and hence more familiarity with patent law than the CDCA), and the third factor would also support a decision against transfer (SK hynix and Netlist are both corporations).

In the case of *In re Apple Inc.*, the Federal Circuit issued a mandamus order requiring Judge Albright to transfer a patent case against Apple to the NDCA. However, the Federal Circuit criticized Judge Albright's focus on how an "aggressive trial date" alone cannot justify denial of transfer and that the presence of unrelated employees in Austin should not be given weight in the venue transfer analysis.[104] Under the proposed framework, however, Judge Albright's decision to keep the case in the WDTX would be supported because the first factor would establish Apple's presence in the WDTX, the second factor would affirm the WDTX as having more patent cases filed in the district versus the NDCA (although both forums are more or

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[101] *See* Siegmund, *supra* note 31 (discussing the *Uniloc,* the *SynKloud*, and *Cameron* cases); Siegmund, *supra* note 32 (discussing the *CloudofChange* and *Parus Holdings* cases).

[102] *In re* SK hynix Inc., 847 F. App'x 847 (Fed. Cir. 2021).

[103] *Id.* at 851 ("SK hynix had no presence in [the CDCA], but it did have an office and a major customer in . . . Texas . . . .").

[104] Gugliuzza, *supra* note 4, at 463.

less at the same level of knowledge/expertise in patent cases), and the third factor would generally support it because both Uniloc and Apple are companies, hence their interests should be equally gauged—but they both have presences in the WDTX, hence the first factor would tip over towards staying in the WDTX.

Another interesting point to note in the *Apple* case was Judge Moore's dissent, who castigated the majority for "usurp[ing] the district court's role in the transfer process," "disregard[ing] [the Federal Circuit's] standard of review," and "invit[ing] further petitions based almost entirely on ad hominem attacks on esteemed jurists."[105]

In the case of *Cloudof Change, LLC v. NCR Corp*.,[106] defendant NCR sought transfer to the Northern District of Georgia. The Western District of Texas determined that "the access to proof [private interest factor one] and localized interests [public interest factor two] weighed in favor of transfer while court congestion [public interest factor one] weighs against transfer with the other factors being neutral." However, after balancing these factors, the court determined that the Northern District of Georgia was not clearly more convenient. Therefore, NCR did not meet its "heavy burden" for transfer.[107] If this decision were challenged via a writ of mandamus, it would likely be reversed on private interest factor one (access to proof) and public interest factor two (localized interests) which weigh in favor of transfer, and public interest factor one (court congestion), which weighs against. However, under the newly proposed framework, two factors—(a) location and presence of parties, which incorporates private interest factor one, access to proof, as well as public interest factor two, localized interests and (b) accuracy or consistency of patent law decisions, which incorporates public interest factor one, court congestion—would weigh in favor of transfer, leading to a decision not likely to be reversed by the Federal Circuit. If the weighing of newly proposed factors (a) and (b) led to the result of denying transfer, it would make for stronger proof in encouraging a Federal Circuit affirmance instead of reversal.

Additionally, in the case of *Parus Holdings Inc. v. LG Electronics*,[108] defendant LG sought to transfer to the Northern District of California. Judge Albright walked through all of the *Gilbert* factors before determining that:

> (1) access to proof [private interest factor one], cost of attendance of witnesses [private interest factor three], and local interests [public interest factor two] [weigh] slightly or very slightly in favor of transfer; (2) court congestion [public interest factor one] weighs against transfer; and (3) all other factors [are] neutral. [Accordingly,] the Court finds that LG has met its burden to demonstrate that NDCA is "clearly more convenient."[109]

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[105] *Id.* at 463.
[106] CloudofChange, LLC v. NCR Corp., No. 6:19-CV-00153, 2020 WL 6439178 (W.D. Tex. Mar. 17, 2020).
[107] *Id.* at *7.
[108] Parus Holdings Inc. v. LG Elecs. Inc., No. 6:19-CV-00432-ADA, 2020 WL 4905809 (W.D. Tex. Aug. 20, 2020).
[109] *Id.* at *8.

If the three new proposed factors were applied, then that would make for a stronger case in favor of transfer because access to proof and cost of attendance of witnesses (private interest factors one and three) would be combined into factor (a), location and presence of parties, and court congestion and local interests (public interest factors one and two) would be combined into factor (b), accuracy and consistency of patent law decisions, to make for a more robust decision either in favor of or against transfer. This would have a lower likelihood of being reversed by the Federal Circuit via a writ of mandamus order.

Furthermore, with regards to a district court judge's ability to manage their docket for new proposed factor (c), Judge Albright issued an order on November 20, 2020 in the case of *Intel v. VLSI*, relying on two bases to retransfer the trial from Austin back to Waco. The first basis was grounded in Federal Rule of Civil Procedure 77(b),[110] and the second basis was provided by Albright's inherent authority for docket management as an Article III U.S. District Judge. The Federal Circuit disagreed, and in their Order granting mandamus, it stated that various statutes, including 28 U.S.C. § 124(d)(1) and § 1404(a), simply left "no room" to invoke Judge Albright's docket management authority here.[111]

Similar outcomes result when other cases, such as the venue transfer orders from the cases of *Cameron Int'l Corp v. Nitro Fluids*, *SynKloud Techs.*, *LLC v. Adobe, Inc.*, and *SynKloud Techs., LLC v. DropBox, Inc.* are analyzed using the proposed framework versus the old framework with the *Gilbert* factors.[112]

Even when analyzing Federal Circuit mandamus orders that overturn venue transfer rulings from the EDTX after *TC Heartland*, results that would have prevented reversal and that would have been consistent with the original district court decisions are maintained most of the time.[113] The reason for this is because having more of a presence in Texas and being an entity that is closer to a company (the ideal scenario)—or having less or more of a Texas presence but being more or less of a company or PAE than NPE—tends to tip the scale.

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[110] Fed. R. Civ. P. 77(b) ("Every trial on the merits must be conducted in open court and, so far as convenient, in a regular courtroom. Any other act or proceeding may be done or conducted by a judge in chambers, without the attendance of the clerk or other court official, and anywhere inside or outside the district.").

[111] *In re* Intel Corp., 841 F. App'x 192, 194 (Fed. Cir. 2020).

[112] *See* Siegmund, *supra* note 31.

[113] *See In re* Google LLC, 949 F.3d 1338, 1343 (Fed. Cir. 2020); *In re* HP Inc., No. 2018-149, 2018 WL 4692486, at *1 (Fed. Cir. Sept. 25, 2018); *In re* ZTE (USA) Inc., 890 F.3d 1008, 1010 (Fed. Cir. 2018); *In re* Cray Inc., 871 F.3d 1355, 1362 (Fed. Cir. 2017).

B. Comprehensive Analysis of 45 Judge Albright & Federal Circuit Case Sets

Utilizing Docket Navigator, a total of forty-five cases were found, including the cases discussed above, that involved a § 1404(a) venue transfer order from Judge Albright and a corresponding Federal Circuit mandamus order that was either granted against Albright, reversing his venue transfer, or in much rarer circumstances denied in favor of Albright, affirming his venue transfer order.

1. Tabulated Data of 45 Case Sets

Specifically, each case set comprises a Judge Albright venue transfer order and a Federal Circuit mandamus order that either grants or denies the petition for writ of mandamus. Each case was analyzed to determine the level of weight each of the eight *Gilbert* factors was given.

For the convenience of analysis and for immediate comparison with the table below, recall that the eight *Gilbert* factors discussed above are split into four "private interest" factors and four "public interest" factors.[114] All eight factors are tabulated again below, with their accompanying descriptions.

The Four Private Interest Factors	
1	The relative ease of access to sources of proof
2	The availability of compulsory process to secure the attendance of witnesses
3	The cost of attendance for willing witnesses
4	All other practical problems that make trial of a case easy, expeditious and inexpensive
The Four Public Interest Factors	
5 (1)	The administrative difficulties flowing from court congestion
6 (2)	The local interest in having localized interests decided at home
7 (3)	The familiarity of the forum with the law that will govern the case
8 (4)	The avoidance of unnecessary problems of conflict of laws or in the application of foreign law

In other sources and also in the analysis below, factors (5), (6), (7) and (8) are sometimes synonymously referred to as public factors (1), (2), (3), and (4) (indicated by the parenthesis above) and private factors (1), (2), (3), and (4) are simply referred to as factors (1), (2), (3), and (4).

Specifically, the forty-five case sets below were analyzed in order to determine how much weight was given to each of the eight factors. A metric was then assigned to this weight according to a range spanning from "-3" for a weight reflecting "heavily

[114] Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508–09 (1947).

against transfer" to "3" for a weight reflecting "heavily *for* transfer." A "0" value means a neutral weight or that the factor was simply not analyzed. Hence, the full scale of the metric that is utilized to determine how heavily weighted a given *Gilbert* factor is as follows:

Number	Meaning
-3	Strongly against transfer
-2	Moderately against transfer
-1	Slightly against transfer
0	Neutral or not analyzed
1	Slightly for transfer
2	Moderately for transfer
3	Strongly for transfer

Moreover, applying the above metric for each of the eight *Gilbert* factors yielded the results below for each of the forty-five case sets, with each case set comprising (1) a Judge Albright venue transfer order and (2) a Federal Circuit mandamus order—each order with a given outcome (deny, transfer (xfer), moot, stayed, and vacate).

#	Controversy	1	2	3	4	5	6	7	8	Σ	Xfer?
1	*In re Apple Inc.*, No. 2020-104, 2019 WL 13095535 (Fed. Cir. Dec. 20, 2019)	0	0	0	0	0	0	0	0	0	deny
	Fintiv, Inc. v. Apple, Inc., No. 6:18-CV-372-ADA, 2019 WL 4743678 (W.D. Tex. Sept. 13, 2019)	1	0	0	0	0	-2	0	0	-1	deny
2	*In re Adobe Inc.*, 823 F. App'x 929 (Fed. Cir. 2020) (unpublished)	2	2	2	0	0	0	0	0	6	xfer
	SynKloud Techs., LLC v. Adobe, Inc., No. 6:19-CV-527-ADA (W.D. Tex. Nov. 3, 2020)	2	1	0	0	-2	0	0	0	1	deny
3	*In re Apple Inc.*, No. 2020-127, 818 F. App'x 1001 (Fed. Cir. June 16, 2020)	2	0	2	0	0	-2	0	0	2	deny
	STC.UNM v. Apple Inc., No. 6:19-CV-428-ADA, 2020 WL 4559706 (W.D. Tex. Apr. 1, 2020)	2	0	2	0	0	-2	0	0	2	deny

#	Controversy	1	2	3	4	5	6	7	8	Σ	Xfer?
4	*In re Dropbox, Inc.*, 814 F. App'x 598 (Fed. Cir. 2020) (unpublished)	0	0	0	0	0	0	0	0	0	deny
	SynKloud Techs., LLC v. Dropbox, Inc., No. 6:19-CV-526-ADA, 2020 WL 2528545 (W.D. Tex. May 18, 2020)	1	0	0	-2	-2	0	0	0	-3	deny
5	*In re Dropbox, Inc.*, 814 F. App'x 598 (Fed. Cir. 2020) (unpublished)	0	0	0	0	0	0	0	0	0	deny
	SynKloud Techs., LLC v. Dropbox, Inc., No. 6:19-CV-525-ADA, 2020 WL 2494574 (W.D. Tex. May 14, 2020)	1	0	0	-2	-2	0	0	0	-3	deny
6	***In re Apple Inc.*, 979 F.3d 1332 (Fed. Cir. 2020) (precedential)**	2	0	1	1	0	1	0	0	5	xfer
	Uniloc 2017 LLC v. Apple Inc., No. 6:19-CV-532-ADA, 2020 WL 3415880 (W.D. Tex. June 22, 2020)	1	0	0	-3	-2	0	0	0	-4	deny
7	***In re Nitro Fluids L.L.C.*, 978 F.3d 1308 (Fed. Cir. 2020) (precedential)**	0	0	0	0	0	0	0	0	0	vacate
	Cameron Int'l Corp. v. Nitro Fluids L.L.C., No. 6:20-CV-125-ADA, 2020 WL 3259809 (W.D. Tex. June 16, 2020)	2	0	0	-3	-2	1	0	0	-2	deny
8	*In re Intel Corp.*, 843 F. App'x 272 (Fed. Cir. 2021) (unpublished)	0	0	0	0	0	0	0	0	0	moot
	VLSI Tech. LLC v. Intel Corp., No. 1:19-CV-977-ADA, 2020 WL 8254867 (W.D. Tex. Dec. 31, 2020)	0	0	0	2	2	-2	0	0	2	xfer
9	*In re SK hynix Inc.*, 835 F. App'x 600 (Fed. Cir. 2021) (unpublished)	0	0	0	0	0	0	0	0	0	stayed
	Netlist, Inc. v. SK hynix Inc., No. 6:20-CV-194-ADA, 2021 WL 2954095 (W.D. Tex. Feb. 2, 2021)	-1	0	0	-2	-2	-2	0	0	-7	deny
10	*In re SK hynix Inc.*, 847 F. App'x 847 (Fed. Cir. 2021) (unpublished)	0	0	0	0	0	0	0	0	0	deny
	Netlist, Inc. v. SK hynix Inc., No. 6:20-CV-194-ADA, 2021 WL 2954095 (W.D. Tex. Feb. 2, 2021)	-1	0	0	-2	-2	-2	0	0	-7	deny

#	Controversy	1	2	3	4	5	6	7	8	Σ	Xfer?
11	*In re ADTRAN, Inc.*, 840 F. App'x 516 (Fed. Cir. 2021) (unpublished)	0	0	0	0	0	0	0	0	0	deny
	Correct Transmission LLC v. ADTRAN, Inc., No. 6:20-CV-669-ADA, 2021 WL 1967985 (W.D. Tex. May 17, 2021)	2	3	2	2	0	2	0	0	11	xfer
12	*In re TracFone Wireless, Inc.*, 852 F. App'x 537 (Fed. Cir. 2021) (unpublished)	0	0	0	0	0	0	0	0	0	xfer
	Precis Grp., LLC v. TracFone Wireless, Inc., No. 6:20-CV-303-ADA, 2021 WL 932046 (W.D. Tex. Mar. 11, 2021)	1	0	-2	0	1	0	0	0	0	deny
13	*In re True Chem. Sols., LLC*, 841 F. App'x 240 (Fed. Cir. 2021) (unpublished)	0	0	0	0	0	0	0	0	0	deny
	True Chem. Sols., LLC v. Performance Chem. Co., No. 7:18-CV-78-ADA, 2021 WL 860009 (W.D. Tex. Mar. 8, 2021)	0	0	2	3	2	-2	0	0	5	xfer
14	*In re Apple Inc.*, 844 F. App'x 364 (Fed. Cir. 2021) (unpublished)	0	0	0	0	0	0	0	0	0	deny
	Koss Corp. v. Apple Inc., No. 6:20-CV-665-ADA, 2021 WL 5316453 (W.D. Tex. Apr. 22, 2021)	1	-3	-2	-1	-2	-1	0	0	-8	deny
15	*In re TracFone Wireless, Inc.*, 852 F. App'x 537 (Fed. Cir. 2021) (unpublished)	0	0	2	0	0	0	0	0	2	xfer
	Precis Grp., LLC v. TracFone Wireless, Inc., No. 6:20-CV-303-ADA, 2021 WL 932046 (W.D. Tex. Mar. 11, 2021)	1	0	-2	0	1	0	0	0	0	deny
16	*In re W. Digital Techs., Inc.*, No. 2021-137, 2021 WL 1853373 (Fed. Cir. May 10, 2021)	0	0	0	0	0	0	0	0	0	deny
	Kuster v. W. Digital Techs., Inc., No. 6:20-CV-563-ADA, 2021 WL 466147 (W.D. Tex. Feb. 9, 2021)	1	-3	-3	0	-2	0	0	0	-7	deny
17	***In re Samsung Elecs. Co., Ltd.*, 2 F.4th 1371 (Fed. Cir. 2021) (precedential)**	2	0	3	0	0	2	0	0	7	xfer

#	Controversy	1	2	3	4	5	6	7	8	Σ	Xfer?
	Ikorongo Tex. LLC v. Samsung Elecs. Co., Ltd., No. 6:20-CV-259-ADA (W.D. Tex. Mar. 1, 2021)	1	0	1	-2	-2	0	0	0	-2	deny
18	*In re Samsung Elecs. Co., Ltd.*, 2 F.4th 1371 (Fed. Cir. 2021)	2	0	3	0	0	2	0	0	7	xfer
	Ikorongo Tex. LLC v. Samsung Elecs. Co., Ltd., No. 6:20-CV-257-ADA (W.D. Tex. Mar. 1, 2021)	1	0	1	-2	-2	0	0	0	-2	deny
19	*In re Hulu, LLC*, No. 2021-142, 2021 WL 3278194 (Fed. Cir. Aug. 2, 2021)	0	2	2	0	2	0	0	0	6	xfer
	SITO Mobile R&D IP v. Hulu, LLC, No. 6:20-CV-472-ADA, 2021 WL 1166772 (W.D. Tex. Mar. 24, 2021)	1	-2	-2	0	-2	1	0	0	-4	deny
20	*In re Google LLC*, 855 F. App'x 767 (Fed. Cir. 2021) (unpublished)	0	0	0	0	0	0	0	0	0	deny
	EcoFactor, Inc. v. Google LLC, No. 6:20-CV-75-ADA, 2021 WL 1535413 (W.D. Tex. Apr. 16, 2021)	-2	0	0	-3	-3	0	0	0	-8	deny
21	*In re Apple Inc.*, 855 F. App'x 766 (Fed. Cir. 2021) (unpublished)	0	0	0	0	0	0	0	0	0	deny
	Koss Corp. v. Apple Inc, No. 6:20-CV-665-ADA, 2021 WL 5316453 (W.D. Tex. Apr. 22, 2021)	1	-3	-2	-1	-2	-1	0	0	-8	deny
22	*In re DISH Network L.L.C.*, 856 F. App'x 310 (Fed. Cir. 2021) (unpublished)	0	0	0	0	0	0	0	0	0	deny
	Broadband iTV, Inc. v. DISH Network L.L.C., No. 6:19-CV-716-ADA, 2021 WL 1566455 (W.D. Tex. Apr. 20, 2021)	0	0	1	-3	-3	0	0	0	-5	deny
23	*In re Uber Techs., Inc.*, 852 F. App'x 542 (Fed. Cir. 2021) (unpublished)	0	0	0	0	0	0	0	0	0	xfer
	Ikorongo Tex. LLC v. Uber Techs., Inc., No. 6:20-CV-843-ADA, 2021 WL 2143740 (W.D. Tex. May 26, 2021)	0	0	1	-2	-2	0	0	0	-3	deny
24	***In re Juniper Networks, Inc.*, 14 F.4th 1313, 1315 (Fed. Cir. 2021) (precedential)**	2	0	3	0	0	2	0	0	7	xfer

#	Controversy	1	2	3	4	5	6	7	8	Σ	Xfer?
	WSOU Invs. LLC v. Juniper Networks Inc., No. 6:20-CV-812-ADA (W.D. Tex. June 23, 2021)	0	-1	1	0	-2	-2	0	0	-4	deny
25	*In re Intel Corp.*, No. 2021-168, 2021 WL 4427875 (Fed. Cir. Sept. 27, 2021)	0	0	0	0	0	0	0	0	0	deny
	Demaray LLC v. Intel Corp., No. 6:20-CV-634-ADA (W.D. Tex. July 29, 2021)	0	0	0	-3	-3	0	0	0	-6	deny
26	*In re Intel Corp.*, No. 2021-168, 2021 WL 4427875 (Fed. Cir. Sept. 27, 2021)	0	0	0	0	0	0	0	0	0	deny
	Demaray LLC v. Samsung Elecs. Co., Ltd., No. 6:20-CV-636-ADA, 2021 WL 5316455 (W.D. Tex. July 29, 2021)	0	0	0	-3	-3	0	0	0	-6	deny
27	*In re Google LLC*, No. 2021-170, 2021 WL 4427899 (Fed. Cir. Sept. 27, 2021)	2	1	3	0	0	0	0	0	6	xfer
	Sonos, Inc. v. Google LLC, No. 6:20-CV-881-ADA (W.D. Tex. Aug. 2, 2021)	-2	-1	-2	0	-2	1	0	0	-6	deny
28	*In re Google LLC*, No. 2021-171, 2021 WL 4592280 (Fed. Cir. Oct. 6, 2021)	2	0	2	0	2	3	0	0	9	xfer
	Jenam Tech, LLC v. Google LLC, No. 6:20-CV-453-ADA, 2021 WL 2870694 (W.D. Tex. July 8, 2021)	-2	1	-2	0	-2	-2	0	0	-7	deny
29	*In re Pandora Media, LLC*, No. 2021-172, 2021 WL 4772805 (Fed. Cir. Oct. 13, 2021)	0	3	2	0	0	2	0	0	7	xfer
	Bluebonnet Internet Media Servs., LLC v. Pandora Media, LLC, No. 6:20-CV-731-ADA, 2021 WL 3134262 (W.D. Tex. July 22, 2021)	2	0	-2	0	0	1	0	0	1	deny
30	*In re NetScout Sys., Inc.*, No. 2021-173, 2021 WL 4771756 (Fed. Cir. Oct. 13, 2021)	1	0	2	2	0	2	0	0	7	xfer
	PacSec3, LLC v. NetScout Sys., Inc., No. 6:20-CV-914-ADA, 2021 WL 3478221 (W.D. Tex. July 27, 2021)	0	0	0	-3	-3	2	0	0	-4	deny
31	*In re G&H Diversified Mfg., LP*, 859 F. App'x 905 (Fed. Cir. 2021) (unpublished)	0	0	0	0	0	0	0	0	0	deny

#	Controversy	1	2	3	4	5	6	7	8	Σ	Xfer?
	DynaEnergetics Eur. GMBH v. Yellow Jacket Oil Tools, LLC, No. 6:20-CV-1110-ADA (W.D. Tex. June 22, 2021)	1	0	0	0	-2	-2	0	0	-3	deny
32	*In re Atlassian Corp. PLC*, No. 2021-177, 2021 WL 5292268 (Fed. Cir. Nov. 15, 2021)	2	2	2	2	0	2	0	0	10	xfer
	Express Mobile, Inc. v. Atlassian Corp. PLC, No. 6:20-CV-805-ADA, 2021 WL 3355375 (W.D. Tex. Aug. 2, 2021)	1	0	0	0	-3	0	0	0	-2	deny
33	*In re Google LLC*, No. 2021-178, WL 5292267 (Fed. Cir. Nov. 11, 2021)	1	2	2	2	0	2	0	0	9	xfer
	Express Mobile, Inc. v. Google LLC, No. 6:20-CV-804-ADA (W.D. Tex. Aug. 2, 2021)	0	2	2	0	-2	2	0	0	4	deny
34	*In re Meraki Integrated Cir. (Shenzhen) Tech. Ltd.*, No. 2021-180 (Fed. Cir. Nov. 15, 2021)	0	0	0	0	0	0	0	0	0	dismissed
	Monolithic Power Sys., Inc. v. Meraki Integrated Cir. (Shenzhen) Tech., Ltd., No. 6:20-CV-876-ADA (W.D. Tex. Aug. 12, 2021)	0	-2	0	0	-3	2	0	0	-3	deny
35	*In re Apple Inc.*, No. 2021-181, 2021 WL 5291804 (Fed. Cir. Nov. 15, 2021)	2	2	3	0	0	2	0	0	9	xfer
	Neonode Smartphone LLC v. Apple Inc., No. 6:20-CV-505-ADA (W.D. Tex. July 19, 2021)	0	0	0	-3	-3	1	0	0	-5	deny
36	*In re DISH Network L.L.C.*, No. 2021-182, 2021 WL 4911981 (Fed. Cir. Oct. 21, 2021)	2	2	3	0	0	3	0	0	10	xfer
	Broadband iTV, Inc. v. DISH Network L.L.C., No. 6:19-CV-716-ADA, 2021 WL 4955906 (W.D. Tex. Sept. 3, 2021)	0	0	0	-3	-3	0	0	0	-6	deny
37	*In re Quest Diagnostics Inc.*, No. 2021-193, 2021 WL 5230757 (Fed. Cir. Nov. 10, 2021)	1	0	2	0	0	0	0	0	3	xfer

#	Controversy	1	2	3	4	5	6	7	8	Σ	Xfer?
	Ravgen, Inc. v. Quest Diagnostics Inc., No. 6:20-CV-972-ADA, 2021 WL 6050313 (W.D. Tex. Aug. 20, 2021)	0	0	0	-3	-3	1	0	0	-5	deny
38	*In re Medtronic, Inc.*, No. 2022-107, 2021 WL 6112980 (Fed. Cir. Dec. 27, 2021)	0	0	0	0	0	0	0	0	0	deny
	TMT Sys., Inc. v. Medtronic, Inc., 6:20-CV-973-ADA, 2021 WL 5316406 (W.D. Tex. Oct. 19, 2021)	0	0	0	0	0	0	0	0	0	deny
39	*In re Alfresco Software, Ltd.*, No. 2022-112, 2021 WL 5754819 (Fed. Cir. Dec. 3, 2021)	0	0	0	0	0	0	0	0	0	moot
	Open Text Corp. v. Alfresco Software, Ltd., No. 6:20-CV-00928-ADA (W.D. Tex. Nov. 22, 2021)	0	2	0	2	2	-2	0	0	4	xfer
	Open Text Corp. v. Alfresco Software, Ltd., No. 6:20-CV-928-ADA, 2021 WL 5316410 (W.D. Tex. Oct. 21, 2021)	0	0	0	1	1	-2	0	0	0	deny
40	*In re Apple Inc.*, No. 2022-128, 2022 WL 1196768 (Fed. Cir. Apr. 22, 2022)	2	0	3	0	0	2	0	0	7	xfer
	CPC Patent Techs. PTY Ltd. v. Apple Inc., No. 6:21-CV-165-ADA, 2022 U.S. Dist. LEXIS 165507 (W.D. Tex. Feb. 8, 2022)	0	-3	1	-2	-2	0	0	0	-6	deny
41	*In re Canon Inc.*, No. 2022-131, 2022 WL 1197336 (Fed. Cir. Apr. 22, 2022)	0	0	0	0	0	0	0	0	0	deny
	WSOU Invs. LLC v. Canon Inc., No. 6:20-CV-980-ADA (W.D. Tex. Feb. 11, 2022)	0	0	2	-2	-2	-2	0	0	-4	deny
42	*In re Trend Micro Inc.*, No. 2022-133, 2022 WL 1485183 (Fed. Cir. May 11, 2022)	0	0	0	0	0	0	0	0	0	deny
	Kajeet, Inc. v. Trend Micro, Inc., No. 6:21-CV-389-ADA, 2022 WL 126490 (W.D. Tex. Jan. 12, 2022)	1	0	0	-2	-2	0	0	0	-3	deny
43	*In re Broadcom Corp.*, No. 2022-135, 2022 WL 1467914 (Fed. Cir. May 10, 2022)	0	0	0	0	0	0	0	0	0	moot

#	Controversy	1	2	3	4	5	6	7	8	Σ	Xfer?
	Monterey Rsch., LLC v. Broadcom Corp., No. W-21-CV-542-ADA, 2022 WL 526242 (W.D. Tex. Feb. 21, 2022)	1	2	0	-2	-2	1	0	0	0	deny
44	*In re Broadcom Corp.*, No. 2022-135, 2022 WL 1467914 (Fed. Cir. May 10, 2022)	0	0	0	0	0	0	0	0	0	moot
	Monterey Rsch., LLC v. Broadcom Corp., No. W-21-CV-541-ADA (W.D. Tex. Feb. 21, 2022)	1	2	0	-2	-2	1	0	0	0	deny
45	*In re Apple Inc.*, No. 2022-137, 2022 WL 1676400 (Fed. Cir. May 26, 2022)	2	2	2	0	0	2	0	0	8	xfer
	BillJCo, LLC v. Apple Inc., No. 6:21-CV-528-ADA (W.D. Tex. Feb. 17, 2022)	2	-2	2	0	-2	-1	0	0	-1	deny

In addition, the "Xfer?" column provides the outcomes of the transfer: transfer denied ("deny"), or transfer granted ("xfer"), the case mooted ("moot"), the case vacated ("vacate"), the case stayed ("stayed"), and finally dismissed ("dismiss"). The boxes that are not shaded in (sixteen in total) indicate instances of case sets where the Federal Circuit and Judge Albright reached the same outcome, usually resulting in a denial of the petition for writ of mandamus. The shaded in number boxes (twenty-nine in total) indicate instances of case sets where there was disagreement between the Federal Circuit and Judge Albright, usually resulting in a grant of the mandamus petition or just different results (e.g., vacate, stayed, moot vs. anything different). Hence, there was a disparity between the Federal Circuit and Judge Albright roughly 64% of the time and an agreement only 35% of the time.

The sigma or Σ symbol represents the summation of all the numerically evaluated weighted *Gilbert* factors, which calculate an overall transfer weight determined by the respective court. This is done on a scale of -24 (maximum weight against transfer) to 24 (maximum weight for transfer). As provided by the table above, the lowest Σ values (-8) were in *EcoFactor, Inc. v. Google LLC*[115] and *Koss Corp. v. Apple Inc.*,[116] both representing Judge Albright's strongest tendencies to keep a case in his court. Further, the Federal Circuit mandamus orders for those corresponding cases sum to zero. The highest Σ value (11) was in *Correct Transmission LLC v. ADTRAN, Inc.*,[117] and interestingly, it was reversed by the Federal Circuit in a denial

[115] No. 6:20-CV-75-ADA, 2021 WL 1535413 (W.D. Tex. Apr. 16, 2021).
[116] No. 6:20-CV-665-ADA, 2021 WL 5316453 (W.D. Tex. Apr. 22, 2021).
[117] No. 6:20-CV-669-ADA, 2021 WL 1967985 (W.D. Tex. May 17, 2021).

of transfer out of Judge Albright's court, also with a net Σ value of zero.

Various other patterns can be observed from the data above as well, including the difference between each court's resulting sum, which is further analyzed in the full table provided in the Appendix. Discussing the various unique outcomes such as dismissals, vacaturs, moots and stays, several cases stand out that should not be used for analysis except for their specific controversies.

In the case of *In re Intel Corp*.,[118] VLSI's transfer motion in a member case (the -00254 case) was originally granted, but the case was later sent back to Waco, unconsolidated from the -00977 case.[119] This was due to the COVID-19 pandemic. In fact, the table by the district court includes a § 1404(a) analysis both pre- and mid-pandemic.[120] The Federal Circuit did not disturb the district court's ruling, as this ruling had followed the Federal Circuit's order on "unanticipated post-transfer events [frustrating] the original purpose for transfer of the case from Waco to Austin originally."[121]

In the case of *In re Nitro Fluids L.L.C.*,[122] the Federal Circuit vacated and directed the district court to conduct further proceedings. Specifically, they looked at the differences between the cases in the WDTX and the SDTX, and how the time frame from the petition filing to the resolution of the first-to-file issue had narrowed. The Federal Circuit also conducted a more in-depth exploration of court process and procedures beyond "two sentences," and incorporated the availability of "multi-district procedures" into its reasoning.[123]

The *In re Broadcom Corp.*[124] case, originally filed by Monterey Research LLC, yielded a § 1404(a) district court analysis that failed to surpass the "clearly more convenient standard."[125] The petition for writ of mandamus was withdrawn, and each party bore their own expenses.[126]

In the *In re Alfresco Software, Ltd.*[127] case and its attendant underlying case, *Open Text Corp. v. Alfresco Software, Ltd*.,[128] the transfer issue was mooted because the WDTX, after further consideration in *Open Text Corp. v. Alfresco Software, Ltd*,

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[118] 843 F. App'x 272 (Fed. Cir. 2021) (unpublished).
[119] VLSI Tech. LLC v. Intel Corp., No. 1:19-CV-977-ADA, 2020 WL 8254867, at *6 (W.D. Tex. Dec. 31, 2020).
[120] *Id.*
[121] *Intel*, 843 F. App'x at 275.
[122] 978 F.3d 1308 (Fed. Cir. 2020).
[123] *Id*. at 1312–13.
[124] No. 2022-135, 2022 WL 1467914 (Fed. Cir. May 10, 2022); *see also* Monterey Rsch., LLC v. Broadcom Corp., No. W-21-CV-542-ADA, 2022 WL 526242 (W.D. Tex. Feb. 21, 2022).
[125] *Monterey Rsch*., 2022 WL 526242, at *18 (quoting Quest NetTech Corp. v. Apple, Inc., No. 2:19-CV-00118-JRG, 2019 WL 6344267, at *7 (E.D. Tex. Nov. 27, 2019)) (internal quotations omitted).
[126] *Broadcom Corp.*, 2022 WL 1467914, at *1.
[127] No. 2022-112, 2021 WL 5754819 (Fed. Cir. Dec. 3, 2021).
[128] No. 6:20-CV-928-ADA (W.D. Tex. Nov. 22, 2021).

granted transfer. Only one month prior, the transfer was denied.[129]

Moreover, the case of *In re Meraki Integrated Cir. (Shenzhen) Tech. Ltd*[130] was dismissed upon Meraki "believ[ing] that mandamus relief is no longer necessary."[131] However, in the concurrence filed, Judge Hughes pointed out "incongruous findings on jurisdiction."[132] Under a stream of commerce analysis, Meraki was found to have personal jurisdiction in Texas and was equally subject in California. The district court found, however, that the threshold question of transferee forum compatibility failed, and so this ultimate incongruity of result came to Judge Hughes's attention.[133]

Lastly, the case of *In re SK hynix Inc*. had a petitioner asking for a transfer as well as an order to stay the WDTX and rule on the district court's pending motion to transfer.[134] Because the district court "scheduled a hearing on the motion and [was] presumably proceeding toward a resolution of the transfer issue," the Federal Circuit was cut off from intervening.[135] Since SK hynix had avenues to obtain relief on their underlying motion to transfer, it was best for the district court to proceed. However, a stay on all substantive proceedings in the case was granted until the transfer motion was addressed in light of the lengthy delay and further proceedings looming in the case at the district court level. The Federal Circuit went so far as to say "[p]recedent compels entitlement to such relief and the district court's continued refusal to give priority to deciding the transfer issues demonstrates that SK hynix has no alternative means by which to obtain it."[136]

The bolded cases also denote the four precedential Federal Circuit opinions, which will be explained in further detail below. To provide an overview of how the weighing analysis occurs for individual cases, a narrative summary of how the four precedential cases were analyzed will be discussed, with special attention devoted to the factors looked at by the Federal Circuit that eventually led to a grant of the petition for mandamus and thus reversal of Judge Albright's venue transfer order, because all four precedential cases were instances where Judge Albright was reversed in terms of his ultimate venue transfer decision.

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[129] No. 6:20-CV-928-ADA, 2021 WL 5316410 (W.D. Tex. Oct. 21, 2021).
[130] No. 2021-180, 2021 WL 5292271 (Fed. Cir. Nov. 15, 2021).
[131] *Id.* at *1.
[132] *Id.* (Hughes, J., concurring).
[133] *Id.* at *2 (Hughes, J., concurring).
[134] No. 2021-113, 835 F. App'x 600, 600 (Fed. Cir. 2021) (unpublished).
[135] *Id.* at 601.
[136] *Id.*

2. The Precedential Cases and Comparisons

a. In re Apple Inc.

This first precedential case, *In re Apple Inc.*,[137] saw the Federal Circuit grant Apple's petition for transfer, with an overall shift of nine points—the difference between each court's respective Σ value. Generally speaking, there was an upgrade in transfer strength regarding the relative ease of access to evidence, factor (1). More specifically, it highlighted a categorical discount of proof by Apple—the counting of witnesses as part of the factor—and generally diminished the importance of the evidence in the NDCA.[138] Factor (3), the cost convenience, saw a minor shift to a slight transfer rating, pointing out that the district court "gave too much significance to the fact that the inventors and patent prosecutor live closer to [the] WDTX than [the] NDCA."[139] The lion's share of issues for this case came down to factor (4), practical problems, and factor (5), court congestion. Regarding the practical problems factor, the Federal Circuit pointed out particularly that "after Apple moved for transfer in November 2019 . . . [and] after Apple moved to stay the case in January 2020 . . . most of the 'significant' steps the district court relied on were taken after the [motion transfer hearing]."[140] The Federal Circuit further pointed out that the "NDCA has historically had a shorter time to trial for patent cases."[141] Similarly, the court congestion arises from the district court "relying too heavily on the scheduled trial date . . . [but] a court's general ability to set a fast-paced schedule is not particularly relevant."[142] They further wrote with particularity that "[the WDTX] itself has not historically resolved cases so quickly."[143] The local interest factor rested upon the Federal Circuit looking to where the alleged infringement, or "the events that gave rise to a suit," arose.[144]

b. In re Nitro Fluids L.L.C.

This precedential case, *In re Nitro Fluids L.L.C.*,[145] focused on the procedural consideration of the first-to-file rule as it intersected with a § 1404(a) analysis relating to an infringement case out of the SDTX. The petitioner here was a defendant in two underlying cases: one filed in the SDTX in 2018, and the other filed in the WDTX in 2020.[146] Originally, the WDTX found it more appropriate "to utilize a balance of the traditional transfer factors" to avoid the first-to-file rule.[147] The lower court then used

[137] 979 F.3d 1332 (Fed. Cir. 2020).
[138] *Id.* at 1339–40.
[139] *Id.* at 1342.
[140] *Id*. at 1343 (emphasis omitted).
[141] *Id.* at 1343–44 (emphasis omitted).
[142] *Id.* at 1344.
[143] *Id.*
[144] *Id.* at 1345 (emphasis omitted).
[145] *In re* Nitro Fluids L.L.C., 978 F.3d 1308 (Fed. Cir. 2020).
[146] *Id.* at 1309–10.
[147] *Id.* at 1310.

the § 1404(a) factors to decide against transfer, relying on relative ease of access, factor (1), and local interests, factor (2).[148] The district court acknowledged that transference to a district with a related pending action would be judicially economical but that the two-year pause in Houston weighed against this transfer, and the WDTX could avoid conflicting claim construction by adjudicating faster than Houston.[149] The Federal Circuit here, however, pointed to the fact that "[in] a usual transfer analysis, requiring the movant to demonstrate that the balance of factors favors transfer serves to give deference to the plaintiff's choice of forum."[150] "The same deference, however, is not owed when a party is insisting on having two substantially overlapping proceedings continue [simultaneously in different courts]."[151] While similar to the judicial economy factor, the Federal Circuit reminded us that the intent of the first-to-file rule is "to avoid potential interference in the affairs of another court."[152] "Requiring that the balance of the transfer factors favor the second-filed court helps to ensure that more compelling concerns exist."[153] In short, at the district court level, the transfer factors did "not expressly resolve the critical issue of whether a balance of the factors favors the second-filed court," and even without implicit understanding, the retaining factors were not "important enough to warrant, on balance, favoring the Western District of Texas."[154]

c. In re Samsung Elecs. Co., Ltd.

In re Samsung Elecs. Co., Ltd.[155] is part of several cases that were filed by Ikorongo Texas and other affiliated entities.[156] On a general view, the factor analysis shows the Federal Circuit having a strong transfer bias across the board—either strengthening the transfer factors or raising a retention to a neutral grade. However, that was not the most pressing matter for this particular controversy. Specifically, the Federal Circuit pointed out that, although Ikorongo Texas "claims to be unrelated to Ikorongo Technology LLC, . . . the operative complaints indicate that [both entities] are run out of the same Chapel Hill, North Carolina office . . . [and] the same five individuals 'own[ed] all of the issued and outstanding membership interests' in both Ikorongo entities."[157] Further, the Federal Circuit examined the history of the complaints and proper venue and pre-litigation acts. The district court's conclusion "was erroneous because the district court disregarded the pre-litigation acts by Ikorongo Tech and Ikorongo Texas aimed at manipulating venue."[158] The court

[148] *Id.*
[149] Cameron Int'l Corp. v. Nitro Fluids L.L.C., No. 6:20-CV-125-ADA, 2020 WL 3259809, at *8 (W.D. Tex. June 16, 2020).
[150] *In re Nitro Fluids*, 978 F.3d at 1311.
[151] *Id.* at 1311–12.
[152] *Id.* at 1312.
[153] *Id.*
[154] *Id.*
[155] 2 F.4th 1371 (Fed. Cir. 2021).
[156] Ikorongo Tex. LLC v. Samsung Elecs. Co., Ltd., No. 6:20-CV-257-ADA (W.D. Tex. Mar. 1, 2021).
[157] *Samsung*, 2 F.4th at 1371, 1373.
[158] *Id.* at 1377.

further elaborated on how "the Supreme Court and this court have repeatedly assessed the propriety of venue by disregarding manipulative activities of the parties."[159] The Federal Circuit then quoted a case from the U.S. Supreme Court to emphasize that "[the] power to defeat a transfer to the convenient federal forum should derive from rights and privileges conferred by federal law and not from the deliberate conduct of a party favoring trial in an inconvenient forum."[160] This controversy is squarely within the Federal Circuit's sights for manipulation, as they plainly discussed the facts surrounding the parties and analogous case law.[161] Once the Federal Circuit resolved that "the presence of Ikorongo Texas is plainly recent, ephemeral, and artificial—just the sort of maneuver in anticipation of litigation that has been routinely rejected." To add further, the Federal Circuit held that even in the absence of manipulation, venue could have been brought in the NDCA.

After the above analysis, the Federal Circuit then stepped through all the transfer factors. With no relevant events and circumstances in the WDTX, many witnesses in Northern California, other parties having witnesses in the NDCA, and "not a single witness [having] been identified as residing in or near the Western District of Texas," the Federal Circuit weighed factor (1), the relative ease of access to sources of proof, moderately in favor of transfer, factor (2), the availability of compulsory process to secure the attendance of witnesses, as neutral, and factor (3), cost of attendance for willing witnesses, as heavily in favor of transfer.[162] The judicial economy factor, factor (4), was diminished to neutral given "entirely different underlying application" of only two patents of the nebulous cases.[163] The local interest factor, factor (6), was also illuminating in this case. "The district court, however, declares that 'it is generally a fiction that patent cases give rise to local controversy or interest, particularly without record evidence suggesting otherwise.'"[164] The very next line states that "[l]ocal interests are not a fiction, and the record evidence here shows a substantial local interest."[165] Cold water is additionally thrown on the court congestion factor, factor (5), finding that "neither respondents nor the district court pointed to any reason that a more rapid disposition of the case . . . might be available in [the WDTX]."[166] This precedential writ of mandamus order really struck with the tone and strength of the petitioners, the local interest factor, and the relative dismissal of the court congestion factor.

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[159] *Id.*
[160] *Id.* at 1377–78 (quoting Van Dusen v. Barrack, 376 U.S. 612, 624 (1964)).
[161] *Id.* at 1378–79; *see also In re* Microsoft Corp., 630 F.3d 1361 (Fed. Cir. 2011).
[162] *Id.* at 1379.
[163] *Id.*
[164] *Id.* at 1380.
[165] *Id.*
[166] *Id.* at 1380–81.

d. In re Juniper Networks, Inc.

This recent precedential case, *In re Juniper Networks, Inc.*,[167] is another writ of mandamus for transfer from the WDTX to the NDCA. WSOU Investments, doing business as Brazos Licensing and Development, alleged that seven patents were being infringed by Juniper. Juniper, headquartered out of California, sought a transfer, arguing that Brazos is a "patent assertion entity" and "does not seem to conduct any business from its recently opened office in Waco other than filing patent lawsuits."[168] Beginning the factor analysis, first is the relative convenience and ease of witnesses, factor (3). Here, there was a "striking imbalance in the parties' respective presentations on this factor," with the district court "clearly err[ing]."[169] The Federal Circuit also noted that the district court "'assumes that no more than a few party witnesses will testify live at trial' and that in any event 'it is unlikely that all of them will testify.'"[170] The Federal Circuit additionally highlighted how the district court cited itself for the assertion that prior-art witnesses "are accorded little weight in the analysis as they are generally considered unlikely to testify."[171] This affront to the Federal Circuit is on display poignantly, as the court states that "[w]e have previously rejected the district court's reliance on the proposition," and cites a fair number of very recent cases, even further claiming "we stated [in *In re Hulu*] that the 'categorical rejection of Hulu's witnesses [was] entirely untethered to the facts of [that] case and therefore was an abuse of discretion.'"[172] To impress upon the district court, "[t]he force of Juniper's showing . . . is particularly strong in light of the very weak showing on that issue made by Brazos."[173]

In this case, there was also similarly strong language on the local interest factor, factor (6). First, for this issue, the district court acknowledged that the events "occurred mainly in the Northern District of California" and that "none occurred in the Western District of Texas."[174] Second, Juniper had a small presence in the WDTX that was unrelated and not connected with the patent infringement. As previously discussed in *In re Samsung Elecs. Co. Ltd.*, "little or no weight should be accorded to a party's 'recent and ephemeral' presence in the transferor forum."[175] The relative ease of access to evidence, or factor (1), turned on how the district court was dismissive of Juniper's declaration of where the majority of evidence was located and on the fact that electronic records do not make this first factor irrelevant.[176] The Federal Circuit was also puzzled by the district court's analysis of the compulsory

[167] 14 F.4th 1313 (Fed. Cir. 2021).
[168] *Id.* at 1315–16.
[169] *Id.* at 1318–19.
[170] *Id.* at 1319.
[171] *Id.*
[172] *Id.* (quoting *In re* Hulu, No. 2021-142, 2021 WL 3278194, at *3 (Fed. Cir. Aug. 2, 2021)).
[173] *Id.*
[174] *Id.*
[175] *Id.* at 1320.
[176] *Id.* at 1321.

service factor, or factor (2).[177] This was "because Juniper identified several non-party potential witnesses in the Northern District of California, and Brazos identified none in the Western District of Texas."[178] The Federal Circuit additionally found that the district court "erred in finding [on this factor] . . . [because] the district court's finding on that factor was [based on] the parties' failure to identify any unwilling witnesses who would need to be subpoenaed."[179]

Furthermore, the district court, in considering the court congestion factor, focused on Brazos's time-to-trial assertion, and the court lacked any explanation for prospective differences between the NDCA and the WDTX.[180] This opened up an avenue for the Federal Circuit to elaborate on how it "is improper to assess the court congestion factor based on the fact that the Western District of Texas has employed an aggressive scheduling order for setting a trial date."[181] The tone set by the Federal Circuit in this controversy is palpable.

e. Summary

The cases of *In re Juniper* and *In re Samsung Elecs. Co. Ltd*. really struck at the heart of gamesmanship from "patent assertion entities" and how that behavior can invite severe scorn from the Federal Circuit. Several key themes, not just in these precedential cases but through all of the recent cases, are that the Federal Circuit is more than willing to be deferential and that the Federal Circuit has pointed out where they disagreed on factors, but yielded deference. There are certain situations that do repeat frequently in their venue transfer analysis of the eight *Gilbert* factors, such as the categorical rejection of certain witnesses for consideration, the diminution of "connection to the forum" that patent infringement cases have, and the biggest situation being the so-called "rocket docket" interplay. A rigid adherence to full, good-faith analyses of each type of witness—one that properly delineates where the common nucleus of the operative facts and controversy arises, describes where the majority of evidence is physically located, and uses docket control as a more attenuating factor—would likely yield a predictive outcome not dissimilar to those at the Federal Circuit.

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[177] *Id.* at 1322.
[178] *Id.*
[179] *Id.* at 1321.
[180] *Id.* at 1322.
[181] *Id.* (citing *In re* Samsung, 2 F.4th 1371, 1380–81 (Fed. Cir. 2021); *In re* Apple Inc., 979 F.3d 1332, 1344 (Fed. Cir. 2020); *In re* Hulu, LLC, 2021 WL 3278194, at *5 (Fed. Cir. 2021)).

3. Observations of All Eight Gilbert Factors in the 45 Case Sets

a. Overview

Generally speaking, to appreciate a §1404(a) analysis for a petitioner, two tracks of thought must be contemplated for the factorial analysis. The first path illuminates the appellate level, the second path illuminates the district level. First for the appellate path is the recognition that the writ of mandamus is a "drastic remedy . . . reserved for really extraordinary causes."[182] Second for the appellate path is the realization that the petitioner bears a burden of showing "they lack adequate alternative" to the writ.[183] Third for the appellate path is the requirement that the petitioner must show a "clear and indisputable" right to the writ.[184] This is a rigorous standard to achieve,[185] primarily because the appellate path reviews for clear abuse of discretion by the district court.[186] The district level looks to "the private and public interest factors first enunciated in *Gulf Oil Corp. v. Gilbert*, . . . for the determination of whether a § 1404(a) venue transfer is for the convenience of parties and witnesses and in the interest of justice."[187] For the court to reach that analysis, "[t]he preliminary question under § 1404(a) is whether a civil action 'might have been brought' in the [transfer] destination venue."[188] When that initial bar is hurdled, a stronger hurdle arises; "the movant [must] demonstrate[] that the transferee venue is clearly more convenient."[189] This begins the path to application of the Gilbert factors, "none of which can be said to be of dispositive weight."[190]

Again, by way of review, there are eight assessed factors that are weighed. The private interest factors are: "(1) the relative ease of access to sources of proof; (2) the availability of compulsory process to secure the attendance of witnesses; (3) the cost of attendance for willing witnesses; and (4) all other practical problems that make a trial easy, expeditious and inexpensive."[191] The public interest factors include "(1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized interests decided at home; (3) the familiarity of the forum with the law that will govern the case; and (4) the avoidance of unnecessary problems of conflicts of laws or in the application of foreign law."[192]

In the prioritization of factors, the shifts between the WDTX and the Federal Circuit show interesting patterns with respect to analysis differentials for each factor.

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[182] *Ex parte* Fahey, 332 U.S. 258, 259–60 (1947).
[183] Mallard v. U.S. Dist. Ct. for S. Dist. of Iowa, 490 U.S. 296, 309 (1989).
[184] Will v. Calvert Fire Ins. Co., 437 U.S. 655, 662 (1978).
[185] Cheney v. U.S. Dist. Ct. for D.C., 542 U.S. 367, 381 (2004).
[186] *In re* TS Tech USA Corp., 551 F.3d 1315, 1319 (Fed. Cir. 2008).
[187] *In re* Volkswagen of Am., Inc. (*Volkswagen II*), 545 F.3d 304, 315 (5th Cir. 2008).
[188] *Id.* at 312.
[189] *In re* Radmax, 720 F.3d 285, 288 (5th Cir. 2013).
[190] Action Indus., Inc. v. U.S. Fid. & Guar. Co., 358 F.3d 337, 340 (5th Cir. 2004).
[191] *TS Tech.*, 551 F.3d at 1319 (citing Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241 n.6 (1981)).
[192] *Id.* (quoting *Volkswagen II*, 545 F.3d at 315).

Public factor (1), the administrative difficulties flowing from court congestion, resulted in 16 splits, 7 of which are a weighted shift going from "neutral" to "heavily transfer/against." Private factor (4), all other practical problems that make a trial easy, expeditious and inexpensive, or the "judicial economy" factor, resulted in 12 splits, but had 8 of a weighted shift going from "neutral" to "heavily transfer/against." Private factor (3), the cost and attendance for willing witnesses, resulted in 16 splits, 7 of which are a weighted shift going from "neutral" to "heavily transfer/against." Private factor (2), the availability of compulsory process for witnesses, had 9 splits, of which only 4 were a weighted shift going from "neutral" to "heavily transfer/against." Public factor (6), the local interest factor, had 8 splits, of which only 3 were a weighted shift going from "neutral" to "heavily transfer/against." Private factor (1), the relative ease of access to evidence, had 8 splits, but merely 2 were a weighted shift going from "neutral" to "heavily transfer/against." By the derivations themselves, the last two public factors, jurisdictional conflict and familiarity of governing law in the forum, can be cast aside as having zero consequences.[193]

b. Court Congestion and Judicial Economy

The first grouping strongly looks to the practical realm of the litigation—that is, public factor (1) and private factor (4). Public factor (1), the congestion control factor, has some interesting caveats. A court being too self-reliant on a "rocket docket" is not well received.[194] This is further emphasized when a court could be a fast-light, slow-burn type rocket, and "[t]his is particularly true where . . . the forum itself has not historically resolved cases so quickly."[195] The Federal Circuit has held that the congestion factor should not outweigh the other factors when they are neutral or favor transfer.[196] This factor is also held as the "most speculative" factor.[197] The private factor (4), or judicial economy, consideration is a catch-all to capture significant overlap and familiarity of controversies so as to limit any duplication of effort, such as multiple lawsuits.[198] It generally speaks to what practical considerations bear upon the court to make the trial easy. What is interesting with respect to the aforementioned *Volkswagen* factors is that accelerated *Markman* hearings or other proceedings could create an issue intertwined with the "rocket docket" concept. This situation was seen in various cases.[199] When a plaintiff has filed multiple suits covering the same patent,

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[193] *See, e.g.*, PacSec3, LLC v. NetScout Sys., Inc., No. 6:20-CV-914-ADA, 2021 WL 3478221, at *5 (W.D. Tex. July 27, 2021) (finding these factors neutral due to party agreement); Monolithic Power Sys., Inc. v. Meraki Integrated Cir. (Shenzhen) Tech., Ltd., No. 6:20-CV-876-ADA, at 11 (W.D. Tex. Aug. 12, 2021) (finding these factors neutral even when there was no stipulation or agreement of neutrality).

[194] *See In re* Apple Inc., 979 F.3d 1332, 1344 (Fed. Cir. 2020) (citing *In re* Adobe Inc., 823 F. App'x 929, 932 (Fed. Cir. 2020)).

[195] *Id.*

[196] *See In re* Google LLC, No. 2021-178, WL 5292267, at *3 (Fed. Cir. Nov. 15, 2021).

[197] *In re* Apple Inc., No. 2021-181, 2021 WL 5291804, at *9 (Fed. Cir. Nov. 15, 2021); *see also Apple*, 979 F.3d at 1344 n.5.

[198] *In re* Volkswagen of Am., 566 F.3d 1349, 1351 (Fed. Cir. 2009).

[199] *See In re* Apple Inc., 844 F. App'x 364, 365 (Fed. Cir. 2021); *In re* TracFone Wireless, Inc., No. 2021-

there can be nuance to what the actual infringement litigation entails as well as the appropriate procedures therewithin.[200]

These factor differentials are visible in the appendix table. As a synopsis of the factors, court docket control cannot govern the outcome to retain a case. The ability for one district to shift the timing of hearings in comparison to another gives the incumbent district a self-selection bias that can be untethered to time-to-trial determinations. A clear example of this is discussed in *In re Apple Inc*., where the Federal Circuit pointed out issues of *Markman* and other "significant steps" after the transfer motion, and it further touched upon the NDCA having faster patent case resolution despite a more crowded docket.[201]

c. Witness Attendance and Compulsory Process

There's no doubt as to the importance of private factor (3), the cost of attendance for the willing witnesses. "We start with an important factor, the convenience for and cost of attendance of witnesses."[202] The assessment of witnesses is case-specific and individualized.[203] The district court must "consider[] all potential material and relevant witnesses."[204] The prevailing analysis umbrella is that a venue with a substantial number of witnesses is weighted to transfer against a venue with no witnesses.[205] With the actual convenience of the individual witness, a fair bit of controversy arises with the 100 mile rule of Federal Rule of Civil Procedure 45(b)(2)(C) and "the Fifth Circuit['s] established . . . '100-mile' rule" which states that the "inconvenience to witnesses increases in direct relationship to the additional distance to be traveled."[206] The Federal Circuit adapts the common understanding of inconvenience and looks at the timing consideration of travel and its inconvenience, which perhaps better reflects the transnational and intranational reach of infringement

118, 848 F. App'x 899, 900–01 (Fed. Cir. Mar. 8, 2021); *In re* SK hynix Inc., 835 F. App'x 600, 600–01 (Fed. Cir. 2021); *In re* Intel Corp., 843 F. App'x 272, 274–75 (Fed. Cir. 2021) (finding that retransfer to the Waco Division was not an abuse of discretion because they could schedule hearings and events during COVID-19); *In re* Nitro Fluids L.L.C., 978 F.3d 1308, 1312–13 (Fed. Cir. 2020) (noting the issue of self-bias regarding a district's ability to schedule an accelerated *Markman* hearing).

[200] *See In re* Samsung Elecs. Co., Ltd,, 2 F.4th 1371, 1375–80 (Fed. Cir. 2021); *In re* Zimmer Holdings, Inc., 609 F.3d 1378, 1382 (Fed. Cir. 2010); *In re* EMC Corp., 501 F. App'x 973, 976 (Fed. Cir. 2013).

[201] 979 F.3d 1332, 1343–44 (Fed. Cir. 2020).

[202] *In re* Genentech, Inc., 556 F.3d 1338, 1343 (Fed. Cir. 2009) (citing Neil Bros. Ltd. v. World Wide Lines, Inc., 425 F.Supp.2d 325, 329 (E.D.N.Y. 2006) ("The convenience of the witnesses is probably the single most important factor in transfer analysis.")).

[203] *In re* Hulu, LLC, No. 2021-142, 2021 WL 3278194, at *3 (Fed. Cir. Aug. 2, 2021).

[204] Solas OLED Ltd. v. Apple Inc., 6-19-CV-00537-ADA, 2020 WL 3440956, at *6 (W.D. Tex. June 23, 2020) (citing Fintiv, Inc. v. Apple Inc., No. 6:18-CV-372-ADA, 2019 WL 4743678, at *6 (W.D. Tex. Sept. 13, 2019)).

[205] *In re* Hulu, LLC, No. 2021-142, 2021 WL 3278194, at *4 (Fed. Cir. Aug. 2, 2021) (citing *Genentech*, 566 F.3d at 1345).

[206] *Genentech*, 566 F.3d at 1343 (quoting *In re* Volkswagen of Am., Inc. (*Volkswagen II*), 545 F.3d 304, 317 (5th Cir. 2008)) (internal quotations omitted).

cases. Far trips, like traveling from one part of the country to the other side, is more sensitive in time traveled than raw distance traveled, and thus, rigid application of the 100 mile rule is rejected.[207] All potential witnesses and their convenience are to be analyzed.[208] When inventors or non-party witnesses have to be away from home for long stretches of time, their relative inconvenience of forum choice diminishes.[209] A comprehensive review of the reasonable potential witnesses would better determine this factor's outcome, not merely a rigid distance-as-the-crow-flies inconvenience assessment.

Compulsory process, or private factor (2), is about a litigant's access to trial and less about an unwilling witness.[210] Similar to the willing witnesses convenience factor, a case-by-case individualized assessment of each witness where compulsory process could attach is necessary, and then a comparison between venues would be more holistic.[211] A willing witness cannot be compelled, since by their nature, they are willing and should be discounted from consideration.[212] An example of an application difference on compulsory process would be *In re Google LLC*, where the Federal Circuit highlighted the discounting by the lower court of Google's prior-art witnesses, the categorical rejection of another venue's subpoena power, and the district court's "highly speculative" likelihood of a former Google employee inside their district providing relevant testimony.[213] Compulsory process follows closely with willing witnesses and could fairly be considered as a blind analysis with the litigants putting forward good faith non-party witness lists and witnesses availabilities for assessment. To arrive at a reasonable prediction with both of these factors, an agnostic review of each individual and their purpose, then balancing between the two categories of witness type, would arrive at the likely determined outcome.

d. Local Interest & Relative Ease of Access

The first factor of this group is the local interest factor, or public factor (2). At the top level, the Court has made clear that "there is a local interest in having localized controversies decided at home."[214] Naturally, one controversy aspect arises from the common nucleus of operative facts arising in the district, and patent infringement can give rise to controversy in one district and thus locally.[215] Furthermore, the Federal Circuit in *Samsung* quotes from *In re Acer Am. Corp.*,[216] that "[t]his factor most

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[207] *In re* Google LLC, No. 2021-170, 2021 WL 4427899, at *4 (Fed. Cir. Sept. 27, 2021).
[208] *In re* Google LLC, No. 2021-171, 2021 WL 4592280, at *4 (Fed. Cir. Oct. 6, 2021).
[209] *See, e.g.*, *id* (discussing the relative convenience of witnesses).
[210] *Hulu*, 2021 WL 3278194, at *4 n.2.
[211] *See generally id.* at 4, 4 n.2.
[212] *See In re* Apple Inc., No. 2022-137, 2022 WL 1676400, at *2 (Fed. Cir. May 26, 2022).
[213] *In re* Google LLC, No. 2021-170, 2021 WL 4427899, at *6–7 (Fed. Cir. Sept. 27, 2021).
[214] *In re* Samsung Elecs. Co., Ltd., 2 F.4th 1371, 1380 (Fed. Cir. 2021) (citing Gulf Oil Co. v. Gilbert, 330 U.S. 501, 509 (1947)) (emphasis added).
[215] *Id.* ("Local interests are not a fiction, and the record evidence here shows a substantial local interest . . . in Northern California, and not at all in the Western District of Texas.").
[216] 626 F.3d 1252, 1256 (Fed. Cir. 2010).

notably regards not merely the parties' significant connections to each forum writ large, but rather the 'significant connections between a particular venue and the events that gave rise to a suit.'" The contours relating to infringement is softened by "the sale of an accused product offered nationwide [not giving] rise to a substantial interest in any single venue." A clear example of this would be Jenam, an entity residing in Texas, alleging infringement that occurred at Google's California headquarters, with the Federal Circuit explicitly pointing out that "none of the underlying events occurred in the Western District of Texas."[217] This particular factor probes deeply into the controversy's actual facts and gives little weight, if any, to the horizontal breadth and presence of a company.[218]

Relative ease of access is assessed using several substantial rules. The first general rule for the patent infringement cases is "the bulk of the relevant evidence usually comes from the accused infringer. Consequently, the place where the defendant's documents are kept weighs in favor of transfer to that location."[219] The second general rule is that, "[i]n considering the relative ease of access to proof, a court looks to where documentary evidence, such as documents and physical evidence, is stored."[220] While that could be construed to be favorable towards electronically stored documents, the Federal Circuit has held that "the fact that [a party] stores documents in electronic form at data centers around the country [does not favor transfer or denial] . . . the fact that some evidence is stored in places outside both the transferor and the transferee forums does not weigh against transfer."[221] These rules ultimately are contemplated inside of the framework of "relative ease." "[T]he question is relative ease of access, not absolute ease of access."[222] Attention must be paid, however, to the fact that only non-witness evidence is considered in this factor.[223] Summarily, this private factor (1) and public factor (2) grouping is more easily determined by looking towards the physical repository of non-witness evidence, comparatively analyzing all non-witness evidence, and looking at the physical locus of the underlying action.

V. A Proposed Two-Step Burden-Shifting Venue Transfer Framework

Just as how the new Republic of the French Consulate was formed at the conclusion of the French Revolution in Dickens's *A Tale of Two Cities*, leading to a new "Age of Reason," a new framework for patent venue jurisprudence is proposed in order to replace the outdated and problematic *Gilbert* factors with a more accurate, robust, and consistent approach. Thus, in describing a timeline of the procedure used

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[217] *In re* Google LLC, No. 2021-171, 2021 WL 4592280, at *5 (Fed. Cir. Oct. 6, 2021).
[218] *See In re* DISH Network L.L.C., No. 2021-182, 2021 WL 4911981, at *3 (Fed. Cir. Oct. 21, 2021).
[219] *In re* Genentech, Inc., 566 F.3d 1338, 1345 (Fed. Cir. 2009) (citing Neil Bros. Ltd. v. World Wide Lines, Inc., 425 F. Supp. 2d 325, 330 (E.D.N.Y. 2006)).
[220] Fintiv, Inc. v. Apple, Inc., No. 6:18-CV-00372-ADA, 2019 WL 4743678, at *2 (W.D. Tex. Sept. 13, 2019) (citing *In re* Volkswagen of Am., Inc. (*Volkswagen II*), 545 F.3d 304, 316 (5th Cir. 2008)).
[221] *In re* Google LLC, No. 2021-170, 2021 WL 4427899, at *6 (Fed. Cir. Sept. 27, 2021).
[222] *In re* Radmax, Ltd., 720 F.3d 285, 288 (Fed. Cir. 2013) (emphasis omitted).
[223] *In re* Apple Inc., 979 F.3d 1332, 1339–40 (Fed. Cir. 2020).

to derive the burden-shifting framework presented in this paper, what will first be covered is how the eight *Gilbert* factors can be grouped into three main "combined factors." Then, how the proposed burden shifting framework was built based off of these "combined factors" will then be discussed.

A. The Main Three Combined-Factors

Upon performing the above analysis, it is clear that the eight *Gilbert* factors can be distilled into three main groups to form three newly combined factors. As mentioned in the Introduction, Professor Barton Beebe stated that the usage of multifactor tests, having too many factors, forces judges to employ "fast and frugal" heuristics to "short-circuit" the analysis, where a "few factors [may] prove to be decisive" while "the rest are at best redundant and at worst irrelevant."[224] This invariably leads to more subjective, outcome-oriented results, e.g., the judge tending to "stampede" remaining factors to conform to a specified test outcome or reach an end to the means, instead of weighing the factors deliberately and thoughtfully in a more careful means to an end.[225] The eight *Gilbert* factors are no exception to this analysis, and aside from the "conflict of laws" factor proven to be effectively useless in Part I, the factors can be more effectively organized into three relevant and combined factors.

1. Location and Presence of Party

The combined factor of "Location and Presence of Party" would take into account all four of the private interest factors—(1) relative ease of access to sources of proof, (2) availability of compulsory processes to secure the attendance of witnesses, (3) cost of attendance for willing witnesses, and (4) all other practical problems that make trial of a case easy, expeditious and inexpensive—as well as court resource-based administrative cost issues from the public interest factor (2), the local interest in having localized interests decided at home. As can be seen by the discussion for each of the "Seven Districts" in Part II, much of the analysis implicit in the eight *Gilbert* factors are redundant. Mainly, all four of the private interest factors can be resolved or boiled down to one simple determination: whether the corporate defendant or party is located in the district, and in turn, has facilities, employees, etc., in the district as well. Thus, by answering one question represented by this combined factor, many factors are satisfied, making the analysis more streamlined and effective by removing redundant or repetitive analyses.

2. Accuracy/Consistency of Patent Law Decisions

This second combined factor gauges, in general, how familiar the forum (for the case to be transferred to or from) is with patent law, so it encompasses the public interest factors of (1) the administrative difficulties flowing from court congestion, (3) the familiarity of the forum with the law that will govern the case, and (4)

[224] Beebe, *supra* note 5, at 1581.
[225] *Id.* at 1582.

avoidance of unnecessary problems of conflict of laws or in the application of foreign law (which was deemed irrelevant above, so it is merely and nominally included). These factors should be grouped together in this second combined factor group due to the above-discussed redundancy that is encountered by having to analyze all eight *Gilbert* factors, with many of the public interest factors being able to be decided by answering one question: how many patent law cases is the district handling? By answering this question, three simultaneous questions are answered, e.g., if the court handles many patent cases, then the district might experience congestion, but it is very familiar with patent law. Conversely, by answering this question in the negative, the district experiences less congestion, but it is not familiar with patent law—and it may not be the best tribunal to hear the case. Moreover, determining the familiarity of the district with patent law can be further broken down into questions considering: how many claims have those judges construed, how many *Markman* hearings have they had, how many patent trials have they conducted, how often have their rulings in patent trials been affirmed or reversed by the Federal Circuit (e.g., in deciding motions or in *Markman* orders), and are there other indicia supported by potential statistical data?

3. Identity and Interests of Party (Punishing Gamesmanship)

This final combined factor is not based on any of the pre-existing eight *Gilbert* factors but instead compiles data from the above analyzed cases to focus in on the identity and interests (e.g., filing motivations) of the party seeking or fighting transfer, and it also seeks to punish gamesmanship from non-practicing entities (NPEs) in trying to exploit defendants for quick and dirty settlement payments and meritless patent litigation filings. This combined factor mainly gives more weight to the transfer motion if the party is a legitimate company and gives less weight if the party is an NPE, or a perceived "patent troll" seeking to collect "smash and grab" settlements from a variety of defendants. However, slightly more weight may be given to the party if they prove themselves as a legitimate patent assertion entity (PAE) that routinely and regularly utilizes patent litigation as a way to derive licensing revenue.[226] This combined factor is also a way to balance the prevailing interests of plaintiffs in being able to file patent suits in their forum of choice while at the same time gauging whether or not they are a worthy party that deserves to file a patent case in their chosen district (amplifying the considered factors from the first factor group as well). Another consideration that this factor or factor group analyzes (that the *Gilbert* factors never did) is the inherent authority that a U.S. District Judge possesses in managing its own case docket, fact-finding for venue transfer analysis, trying its cases, and other powers reserved to U.S. District Judges overall.[227]

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[226] *See, e.g.*, FED. TRADE COMM'N, PATENT ASSERTION ENTITY ACTIVITY: AN FTC STUDY (2016) (describing PAEs and assessing potential risks and benefits of PAE-initiated patent infringement suits and licensing behavior); Colleen V. Chien, Presentation at the DOJ/FTC Workshop on Patent Assertion Entities (Dec. 10, 2012) (presentation available at https://ssrn.com/abstract=2187314).

[227] *See* Dietz v. Bouldin, 579 U.S. 40, 47 (2016) (acknowledging the district court's inherent powers).

By grouping the eight *Gilbert* factors into three main combined factors that provide a clear indication of what is important and what must be focused on, the venue transfer analysis is simplified and streamlined to points that matter more in patent litigation, and it maintains an efficient and equitable judicial system that adjudicates patent cases. Nonetheless, it is worth pointing out that, in earlier instances of this research project, stopping at these three combined factors was thought to be sufficient. The fallacy of this conclusion became immediately apparent after realizing that, by adding up the above metrics and combining them into fewer categories, nothing essentially was changed.[228] As a result, the directive for this research project became trying to distill a more robust and streamlined test for patent venue that would displace factors entirely.

B. Proposal of a Two-Step Burden-Shifting Framework

Nonetheless, the work done above in distilling the eight *Gilbert* factors to three main combined factors is still useful for the purposes of deriving a better test for ascertaining proper patent venue. The goal with any replacement of the *Gilbert* factors is to achieve more consistency and agreement between Judge Albright and the Federal Circuit. Thus, after much contemplation and analysis of the above data, a proposed two-step burden-shifting framework was derived that also borrows from the similar three-step burden-shifting test prevalent in Antitrust law, as set-forth by the 2021 U.S. Supreme Court case of *NCAA v. Alston*,[229] where the three steps are (1) "a plaintiff must first show a given restraint had anticompetitive effects in a relevant product market," (2) "then the burden shifts to the defendant to justify the restraint by pointing to its procompetitive effects," and then (3) "the plaintiff will prevail if it shows the procompetitive justification could be 'reasonably achieved through less anticompetitive means.'"[230]

Here, the burden-shifting framework proposed for patent venue jurisprudence—and for a replacement of the eight *Gilbert* factors—contains just two steps instead of three. In addition, although a plaintiff may usually oppose transfer and a defendant may want transfer, the reverse scenario could also happen with the same named parties; hence, the parties for this burden-shifting framework will simply be referred to as a "mover," who wishes to have a transfer motion granted in their favor, and a "stayer," who does not wish for a transfer motion to be granted.

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[228] A remark from my colleague Professor Jeremy Telman during a 2021 Faculty Colloquium Presentation at Oklahoma City University School of Law was also incredibly insightful because he mentioned how, by combining eight factors into three fewer ones, you still have not fundamentally changed how this flawed test may still rely on factors—because it still does, just less of them.

[229] Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021).

[230] *With NCAA Ruling, Supreme Court Opens the Door to Significant Judicial Oversight of Joint Ventures and Standard-Setting Activities*, BAKER BOTTS (June 22, 2021), https://www.bakerbotts.com/thought-leadership/publications/2021/june/with-ncaa-ruling-supreme-court-opens-the-door-to-significant-judicial-oversight-of-joint-ventures (citing NCAA v. Alston, 141 S. Ct. 2141, 2160 (2021)).

The primary and initial step is to examine the prevalent location derived from focusing on two sub-issues: factor (A) (A standing for "act" of infringement), the prevalent location where the act of patent infringement actually occurred, and factor (B) (B standing for "best witnesses"), the prevalent location where the relevant necessary or compelling witnesses are located that can legitimately prove or disprove infringement. The dominant, prevalent locations when looking to factors A and B are weighed to determine the venue where the case should be adjudicated. This overall inquiry also builds off of the aforementioned "location and presence of party" combined factor above, but it focuses specifically on the location where the act of infringement occurred and the location where the best and necessary witnesses are based, as will be explained further below. Factor (C) (C standing for "corporate entity status") is looked to as a tiebreaker to determine which venue location, out of multiple, would be the most legitimate one to transfer to. Factor C is also a "public policy" factor that combines the second "accuracy or consistency of patent law decisions" combined factor and the third "identity or interests of party (punishing gamesmanship)" combined factor discussed above. Namely, a mover's request to transfer venue will be given more weight the closer they are to a legitimate company—termed an operating patent entity (OPE) in this paper—or the more acceptable patent assertion entity engaging in licensing, like a university. The mover's request to transfer venue will be given less weight the closer they are to being a non-practicing entity or patent troll. Hence, Factor C involves the classification of the mover.

If a mover can establish this first step, the burden then shifts to the stayer to show, as a second step, that there is a significant extraordinary circumstance, represented by factor (D) (D standing for doomsday or *deus ex machina*), for why the transfer should not be granted, such as it leading to substantial harm, being extreme waste of judicial resources, or being a miscarriage of justice. This second step carries a very high threshold that, under close examination, would necessitate a showing of a substantially material impact to the stayer party or to justice—"an enquiry . . . looking to [all] the circumstances, details, and logic."[231] If the stayer cannot prove this second step, then the mover prevails and the motion to transfer should still be granted. However, if the stayer can prove this second step, then the motion for transfer gets denied.

Together, these two steps analyzing four factors (A)-(D) are configured in a burden-shifting framework to act in concert to provide a more effective and robust way for assessing whether or not transfer is actually proper, specifically with respect to the Federal Circuit's opinions of proper venue according to the above data tables (e.g., a grant or deny of mandamus). The two steps will then be explained in further detail below with accompanying illustrative examples and diagrams.

[231] Cal. Dental Ass'n v. Fed. Trade Comm'n, 526 U.S. 756, 781 (1999).

1. First Step: Acts of Infringement & Best Witnesses Inquiry

The first inquiry is to tally the most prevalent location that occurs with respect to two main determinations, outlined in the below table as factor (A), act of infringement, and factor (B), best witnesses. The location with the highest tally is noted as the prevalent venue location. Factor (C), corporate entity status, is then utilized as a weight consistently considered while determining the prevalent or predominant location from factors (A) and (B), and it can be used as an effective "tie-breaker" in the case that more than one location tie or are very close in number.

a. Factor (A): Act of Infringement

Factor A asks where or in what location did the Act of patent infringement occur. Specifically, the act of infringement can either occur (1) in one location (e.g., an infringing drilling rig located at just one site) or (2) be spread out amongst multiple, diffused locations (e.g., an infringing software program spread out over multiple sites located in different areas). If the act of infringement only occurs in one location as described in scenario (1), then only one location is tallied. However, if the infringement is spread out amongst multiple locations as described in scenario (2), the prevalent location is the location that is most predominant in that set of several locations—possibly defined as the location having the highest number of identifications among those multiple locations.

b. Factor (B): Best Witnesses

Factor (B) then asks about the location where the best and most relevant necessary witnesses are located that can legitimately prove or disprove infringement. This "best witnesses" location determination can also be split up into two similar determinations by asking (1) whether the best and most necessary witnesses are located objectively and substantially in one location and (2) whether the best and most necessary witnesses are located in multiple locations that could be potentially spread out. Similar to factor (A) above, if there is only one location, the inquiry ends with that location being the predominant one; otherwise, in the situation of multiple locations, the predominant location is the one that has the highest occurrence in the aggregate, or the highest average occurrence. In addition, "best" witnesses are witnesses that can directly testify to patent infringement, such as engineers or designers that worked on the actual allegedly infringing product or, more generally, employees who would have intimate and specialized knowledge regarding the detailed functionality of an allegedly infringing product. As a result, a witness that would not be a "best" witness (i.e., a poor witness) would be an employee with little knowledge of the actual operation, design, or engineering of an allegedly infringing product, such as an employee based at a satellite branch office of a company that just so happens to be located in the desired venue location where transfer is sought.

Splitting the factor (A) and factor (B) inquiries into two more "one" vs. "multiple" granular determinations allows judges to make decisions that drive to the very heart of the matter in terms of making proper patent venue decisions, especially

with respect to the Federal Circuit's "correct patent venue" barometer. As a result, courts can weigh the location where the act of infringement occurs, factor (A), and also where the best and most necessary witnesses are located, factor (B), with both being factors that reflect the true nature of patent infringement in the real world. Moreover, the initial inquiry is a determination of a predominant location from factor (A) and a determination of a predominant location from factor (B). If the determined predominant locations from factor (A) and factor (B) are the same, then that matching predominant location becomes the proper venue location where the case should be held. Factor (C) is then examined to determine if the mover should really be allowed to transfer to that proper venue location. On the other hand, if the determined predominant locations from factor (A) and factor (B) are different, then factor (C) is examined more closely in order to ultimately determine the proper venue location.

c. Factor (C): Corporate Entity Status

Factor C looks to the party type of the mover and draws from many of the considerations outlined in the third "identity or interests of party (punishing gamesmanship)" combined factor above. The first type of patent litigation party is what we term in this paper an "operating patent entity," or a company who obtains patents and actually manufactures products or provides services based on those patents, thus actively engaging in the utilization of their patented technology in commercial trade to derive revenue. The second and third types of parties are non-practicing entities and patent assertion entities.[232] Courts also already engage in discussion of NPEs and are well aware of what type of entities they are.[233] However, although some sources lump NPEs and PAEs together,[234] other leading scholars such as Professor Colleen Chien have defined PAEs to be classified as a type of entity that derives revenue from licensing instead of asserting their patents in litigation[235]—a more legitimate practice compared to the nuisance patent infringement lawsuits filed by NPEs to collect "smash and grab" settlements. Indeed, the Federal Trade Commission has authored a report recognizing the legitimacy of such PAEs.[236] Hence, from that report, a PAE is most likely an entity such as a research consortium or a university that develops their own technology and licenses it to developers or manufacturers for commercial trade purposes. In contrast, NPEs derive their profits from litigation or the threat of litigation. The type of entity in factor (C) is quickly ascertainable by looking at the date of incorporation, corporate officers and structure, product portfolio, marketing, and sales. The inquiry to obtain this information has been made somewhat easier due to the disclosure requirements set forth by U.S. District Judge Colm Connolly of the U.S. District Court for the District of Delaware;

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[232] *Who do Non-Practicing Entities (NPEs) Target?*, UNIFIED PATENTS (Nov. 15, 2019), https://www.unifiedpatents.com/insights/2019/11/13/da67lqresu99qshdibvrvv7vu4plk8.

[233] *See In re* Juniper Networks, Inc., No. 2021-156, 2021 WL 4519889, at *3 (Fed. Cir. Oct. 4, 2021) (using term "non-practicing entity" and discussing one such NPE in transfer analysis).

[234] UNIFIED PATENTS, *supra* note 232.

[235] Chien, *supra* note 226.

[236] FED. TRADE COMM'N, *supra* note 226.

however, the Federal Circuit has also been considering the legitimacy of those requirements via petitions for writ of mandamus.[237]

Essentially, how factor (C) is weighed is that, if the mover is able to prove that they should be identified more towards the OPE and legitimate PAE side of the "spectrum" (and are therefore less of an NPE), they will be able to have their transfer motion granted because they are bringing a patent litigation suit for more good faith or meritorious reasons. Furthermore, the more legitimate of an OPE or PAE they are, the higher the chance that their venue transfer motion will be granted. However, if the mover is only able to prove that they are an NPE—or really an NPE wolf in PAE or OPE sheep's clothing (so to speak, after doing the appropriate due diligence investigations)—then the stayer prevails by the venue transfer motion being denied. What this means in terms of the weight given a predominant location is that, if any of the determined locations from factors (A) and (B) are the situses of a legitimate OPE or PAE company, such as the location of an actual research facility, factory, or office where engineers work, then those locations will be given more weight as a truly proper venue location for transfer motion purposes. On the flipside, if the predominant locations from the factor (A) and (B) analysis turns out to be a lawyer's office, an inactive warehouse, an empty building next to a courthouse, or any situs seemingly manufactured just to qualify for "minimum contacts" purposes, those locations will be given less weight. If the predominant locations are tied, and they are all seemingly legitimate (e.g., a factory or research facility where infringement occurs or an office where an engineer works), then the identity of the party in factor (C) is looked at in order to give each of those locations their appropriate weight. In other words, a location operated by an OPE or PAE will be given more weight than a location operated by an NPE, and hence, such a location will be much more likely to be evaluated as the proper venue location at the end of this analysis.

Hence, using factor (C) as a weight or tie breaker in a prevalent or predominant location determined from factor (A) and factor (B), that prevalent or predominant location determined becomes the proper venue location where the case should be adjudicated or transferred to. Factor (C) then looks to see the identity of the moving party requesting transfer to that proper venue location, and the closer that party is to the PAE or OPE end of the spectrum and away from the NPE end, the more deference will be given to grant their transfer motion. However, the burden then shifts to the stayer to rebut transfer if they can show an extraordinary circumstance, as set forth by factor (D), as explained below.

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[237] *Federal Circuit Halts Judge Connolly's Comprehensive Disclosure Order*, RPX (Nov. 18, 2022), https://insight.rpxcorp.com/news/72645-federal-circuit-halts-judge-connolly-s-comprehensive-disclosure-order; Heather M. Schneider & Eugene L. Chang, *Patent Ownership and Litigation Financing: A New Era Begins in Delaware?*, WILLKIE FARR & GALLAGHER LLP (Dec. 22, 2022), https://www.willkie.com/-/media/files/publications/2022/patentownershipandlitigationfinancinganewerabegins.pdf.

2. Second Step

As mentioned above, the mover only prevails if they can establish a prevalent location under factors (A) and (B) and further using factor (C) as a consistent weight or tie breaker throughout that analysis. After a prevalent location or proper venue location is established from this first step, the burden shifts to the stayer in this second step, giving the stayer an opportunity to rebut the transfer by showing that there is an extraordinary circumstance relating to a substantial reason judicial economy (i.e., an extreme waste of judicial resources), a miscarriage of justice, or substantial harm to the stayer party as to why the transfer should not be granted. This also involves a more detailed analysis of a new factor: factor (D).

a. Factor (D): Doomsday or Deus Ex Machina Scenario

First and foremost, factor (D) primarily focuses on an extraordinary circumstance amounting to an "Act of God," *e.g.*, extreme weather problem such as a flood, hurricane or earthquake, or uncontrollable cataclysmic event, such as impacts from the COVID-19 pandemic, that would make transfer to the desired court unfair or highly inequitable. Again, these extraordinary circumstances are extraordinarily rare, and in the forty-five cases that were analyzed, consideration of this factor (D) "doomsday" or "*deus ex machina*" scenario only came up four times, with COVID-19 being the reason to deny transfer only arising twice as an appropriate "extraordinary circumstance," doomsday scenario, or *deus ex machina* scenario. Thus, this is the first and primary goal of factor (D): if there is such an extraordinary circumstance, it should be found and cited as the sole reason as to why the transfer cannot be effectuated.

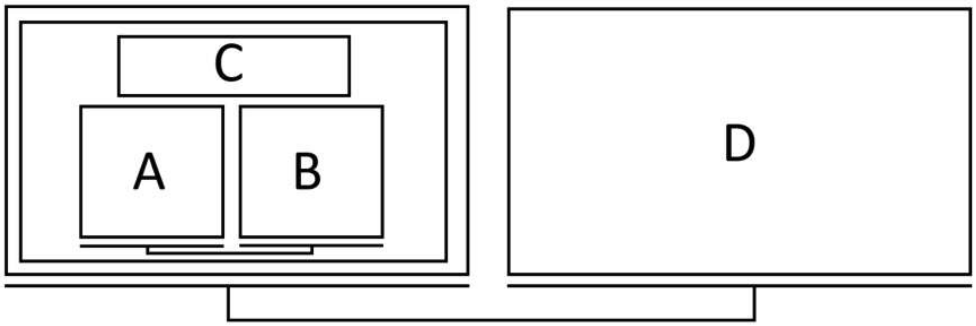
Barring such an extraordinary circumstance, act of god, doomsday scenario, or *deus ex machina* scenario, factor (D) then turns to more of a "totality of the circumstances" approach that focuses, *inter alia*, on judicial economy. The other two occurrences out of the four identified above considering factor (D) are an example of this approach, where judicial economy, fairness, court administration, and party rights considerations are all analyzed. These also may all be considerations examined as part of the second "accuracy or consistency of patent law decisions" combined factor discussed above. However, this judicial economy aspect of factor (D) is not necessarily a catch-all framework but rather a discernment of facts that a court should investigate. Again, this avenue of analysis is very much akin to considering a "totality of the circumstances" as in the "rule of reason" framework for Antitrust Law,[238] for example, examining courtroom proceedings and litigation stages, the present court (and how efficiently they can handle patent cases), the transferee venue, the stage of

[238] Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 22 LOY. CONSUMER L. REV. 15, 18 (2009) ("The rule of reason involves a 'flexible' factual inquiry into a restraint's overall competitive effect, and 'the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed.'" (quoting Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 692 (1978))).

all related proceedings, and the credibility and transparency by parties to the court for judicial efficiency. A premium would also be placed on judicial resources for both the court and the parties to consider in deciding an outcome that would ultimately avoid a true "miscarriage of justice." Judicial economy should also be considered with respect to the situation of multiple locations as discussed above for the first step (e.g., if it makes more sense for efficiency specifically to have the case relocated to a certain venue). Overall, the goal of evaluating this judicial economy aspect of factor (D) is to ultimately find where justice can be more efficiently brought to bear in a totality of the circumstances framework. However, multiple considerations are analyzed (as mentioned in the "accuracy or consistency of patent law decisions" combined factor discussed above) in a totality of the circumstances approach that prioritizes judicial efficiency. Although the counter argument to this approach is that this analysis may still consider the weighing of factors like the eight *Gilbert* ones, a rebuttal is that the most important factors are analyzed in the factor (A), (B), and (C) framework in step one to determine if transfer is even warranted in the first place. These secondary "totality of the circumstances" factors are then analyzed in step two if the more important ones from step one cannot help us and if there is also no extraordinary circumstance, doomsday scenario, or *deus ex machina* scenario that exists, as described above.

Hence, if the stayer is unable to prove this "extraordinary circumstance" or substantial judicial economy reason after looking to the totality of the circumstances required by factor (D) in the second step, the mover prevails and the venue transfer motion is granted. However, if the stayer is able to successfully prove this second step by showing the existence of factor (D), again a very rare showing since it only occurred four times out of the forty-five cases analyzed in total, then the venue transfer motion is denied. The below diagram summarizes the weighting considerations of this two-step burden-shifting framework. Factors (A) and (B) are being weighed with one scale to determine a predominant location, with factor (C) being a consistent weight applied as a tie breaker or equalizer factor. Then, this predominant weight meets the burden that needs to be weighed in the larger scale, unless this massive weight from factors (A), (B), and (C) can be counterbalanced with a very extraordinary circumstance from factor (D).

FIG. 9



C. Data of Applying the Proposed Burden-Shifting Framework

As a result, this proposed two-step burden-shifting framework comparison benefits from a review of facts discerned from the WDTX and Federal Circuit filings. As discussed below, once this new proposed burden-shifting framework was applied by "playing judge" to the forty-five sets of Federal Circuit and WDTX cases above (in applying the above framework like a judge), there were a total of thirty-seven agreements, five non-assignable dispositions, and just three disagreements with the Federal Circuit—a drastic improvement from the seventeen agreements and twenty-nine disagreements with the WDTX applying the eight *Gilbert* factors. Within the five non-assignable dispositions, the two *In re Dropbox* cases had relation to a controversy with Adobe and the Federal Circuit hinted at a transfer being granted, *In re Alfresco* was moot by virtue of Judge Albright revisiting the transfer motion, and the *In re Broadcom* cases were withdrawn upon mutual agreement by the parties with no indication of a Federal Circuit opinion. Further discussion is for the agreement with the Federal Circuit, disagreement with the Federal Circuit, agreement with WDTX, and disagreement with WDTX. Below is data tabulated involving the same forty-five sets of cases analyzed above according to the metrics just mentioned.

CAFC	Controversy	Factor (A)	Factor (B)	Factor (C)	Factor (D)	Hypo Result	Fed. Cir.	WDTX
20-104	*In re Apple Inc.*	WDTX	WDTX	OPE			match	match
20-104	Ruling Result					**Deny**	**Deny**	**Deny**
20-126	*In re Adobe Inc.*	NDCA	NDCA	NPE			match	no-match
20-126	Ruling Result					**Transfer**	**Transfer**	**Deny**
20-127	*In re Apple Inc.*	WDTX	WDTX	PAE			match	match
20-127	Ruling Result					**Deny**	**Deny**	**Deny**
20-130	*In re Dropbox, Inc.*	NDCA	NDCA	NPE			no-match	no-match
20-130	Ruling Result					**Transfer**	**Deny**	**Deny**
20-132	*In re Dropbox, Inc.*	NDCA	NDCA	NPE			no-match	no-match

CAFC	Controversy	Factor (A)	Factor (B)	Factor (C)	Factor (D)	Hypo Result	Fed. Cir.	WDTX
20-132	Ruling Result					**Transfer**	**Deny**	**Deny**
20-135	*In re Apple Inc.*	NDCA	NDCA	OPE			match	no-match
20-135	Ruling Result					**Transfer**	**Transfer**	**Deny**
20-142	*In re Nitro Fluids L.L.C.*	WDTX	WDTX	OPE				match
20-142	Ruling Result					**Deny**	**Remand**	**Deny**
21-111	*In re Intel Corp.*	WDTX	WDTX	OPE	**COVID-19**			match
21-111	Ruling Result					**Transfer**	**Mooted**	**Transfer**
21-113	*In re SK hynix Inc.*	WDTX	WDTX	OPE				match
21-113	Ruling Result					**Deny**	**Stayed**	**Deny**
21-114	*In re SK hynix Inc.*	WDTX	WDTX	OPE			match	match
21-114	Ruling Result					**Deny**	**Deny**	**Deny**
21-115	*In re ADTRAN, Inc.*	NDAL	NDAL	NPE			match	match
21-115	Ruling Result					**Transfer**	**Transfer**	**Transfer**
21-118	*In re TracFone Wireless, Inc.*	SDFL	SDFL	NPE			match	no-match
21-118	Ruling Result					**Transfer**	**Transfer**	**Deny**
21-131	*In re True Chem. Sols., LLC*	WDTX	WDTX	OPE	**COVID-19**		match	match
21-131	Ruling Result					**Transfer**	**Transfer**	**Transfer**
21-135	*In re Apple Inc.*	WDTX	WDTX	OPE			match	match
21-135	Ruling Result					**Deny**	**Deny**	**Deny**
21-136	*In re TracFone Wireless, Inc.*	SDFL	SDFL	NPE			match	no-match
21-136	Ruling Result					**Transfer**	**Transfer**	**Deny**
21-137	*In re W. Digital Techs., Inc.*	NDCA	NDCA	NPE			no-match	no-match
21-137	Ruling Result					**Transfer**	**Deny**	**Deny**
21-139	*In re Samsung Elecs. Co., Ltd.*	NDCA	NDCA	NPE			match	no-match
21-139	Ruling Result					**Transfer**	**Transfer**	**Deny**
21-140	*In re Samsung Elecs. Co., Ltd.*	NDCA	NDCA	NPE			match	no-match
21-140	Ruling Result					**Transfer**	**Transfer**	**Deny**
21-142	*In re Hulu, LLC*	CDCA	CDCA	PAE			match	no-match
21-142	Ruling Result					**Transfer**	**Transfer**	**Deny**
21-144	*In re Google LLC*	WDTX	WDTX	OPE			match	match
21-144	Ruling Result					**Deny**	**Deny**	**Deny**
21-147	*In re Apple Inc.*	WDTX	WDTX	OPE			match	match
21-147	Ruling Result					**Deny**	**Deny**	**Deny**
21-148	*In re DISH Network L.L.C.*	CO	CO	PAE			no-match	no-match
21-148	Ruling Result					**Transfer**	**Deny**	**Deny**
21-150	*In re Uber Techs., Inc.*	NDCA	NDCA	NPE			match	no-match
21-150	Ruling Result					**Transfer**	**Transfer**	**Deny**
21-160	*In re Juniper Networks, Inc.*	NDCA	NDCA	NPE			match	no-match
21-160	Ruling Result					**Transfer**	**Transfer**	**Deny**
21-168	*In re Intel Corp.*	WDTX	WDTX	OPE			match	match
21-168	Ruling Result					**Deny**	**Deny**	**Deny**
21-169	*In re Intel Corp.*	WDTX	WDTX	OPE			match	match
21-169	Ruling Result					**Deny**	**Deny**	**Deny**
21-170	*In re Google LLC*	NDCA	NDCA	OPE			match	no-match
21-170	Ruling Result					**Transfer**	**Transfer**	**Deny**

CAFC	Controversy	Factor (A)	Factor (B)	Factor (C)	Factor (D)	Hypo Result	Fed. Cir.	WDTX
21-171	*In re Google LLC*	NDCA	NDCA	NPE			match	no-match
21-171	Ruling Result					**Transfer**	**Transfer**	**Deny**
21-172	*In re Pandora Media, LLC*	NDCA	NDCA	NPE			match	no-match
21-172	Ruling Result					**Transfer**	**Transfer**	**Deny**
21-173	*In re NetScout Sys., Inc.*	EDMI	EDMI	NPE			match	no-match
21-173	Ruling Result					**Transfer**	**Transfer**	**Deny**
21-176	*In re G&H Diversified Mfg.*	WDTX	WDTX	OPE			match	match
21-176	Ruling Result					**Deny**	**Deny**	**Deny**
21-177	*In re Atlassian Corp. PLC*	NDCA	NDCA	NPE			match	no-match
21-177	Ruling Result					**Transfer**	**Transfer**	**Deny**
21-178	*In re Google LLC*	NDCA	NDCA	NPE			match	no-match
21-178	Ruling Result					**Transfer**	**Transfer**	**Deny**
21-180	*In re Meraki*	NDCA	NDCA	OPE				no-match
21-180	Ruling Result					**Transfer**	**Dismissed**	**Deny**
21-181	*In re Apple Inc.*	NDCA	NDCA	NPE			match	no-match
21-181	Ruling Result					**Transfer**	**Transfer**	**Deny**
21-182	*In re DISH Network L.L.C.*	CO	CO	PAE			match	no-match
21-182	Ruling Result					**Transfer**	**Transfer**	**Deny**
21-193	*In re Quest Diagnostics Inc.*	CDCA	CDCA	PAE			match	no-match
21-193	Ruling Result					**Transfer**	**Transfer**	**Deny**
22-107	*In re Medtronic, Inc.*	WDTX	WDTX	PAE			match	match
22-107	Ruling Result					**Deny**	**Deny**	**Deny**
22-112	*In re Alfresco Software, Ltd.*	foreign	CA*	OPE	**Judicial Economy**		match	match
22-112	Ruling Result					**Transfer**	**Mooted**	**Transfer (2nd)**
22-128	*In re Apple Inc.*	NDCA	NDCA	NPE			match	no-match
22-128	Ruling Result					**Transfer**	**Transfer**	**Deny**
22-130	*In re Canon Inc.*	WDTX	foreign	NPE	**Indemnity**		match	match
22-130	Ruling Result					**Deny**	**Deny**	**Deny**
22-133	*In re Trend Micro Inc.*	foreign	TX	OPE			match	match
22-133	Ruling Result					**Deny**	**Deny**	**Deny**
22-135	*In re Broadcom Corp.*	split	NDCA	PAE				no-match
22-135	Ruling Result					**Transfer**	**Mooted**	**Deny**
22-136	*In re Broadcom Corp.*	split	NDCA	PAE				no-match
22-136	Ruling Result					**Transfer**	**Mooted**	**Deny**
22-137	*In re Apple Inc.*	NDCA	NDCA	NPE			match	no-match
22-137	Ruling Result					**Transfer**	**Transfer**	**Deny**

1. Federal Circuit Comparison Specifically

The proposed two-step burden-shifting framework led to results that were overwhelmingly in accord with the Federal Circuit's determination of case venue transfer—a stark contrast from applying the eight *Gilbert* factors. General review of each case appeared to fall in line with the concepts put forward for consideration. Factor (A) (act of infringement), or where the actual underlying act of alleged

infringing activity occurred, was the most powerful factor. Factor (B) (best witnesses) would add the tilt, such as *In re Apple Inc.,* No. 20-104, where the location of a witness group was substantially in the WDTX, or *In re Apple Inc.*, No. 20-135, where the location of one of the diffuse witness groups from factor (B) aligned more with the location derived from factor (A). This analysis of looking at the primary infringement and witness locations from factors (A) and (B) has thus proven to be a reliable indicator of where venue should properly be upon transfer request—at least, according to the Federal Circuit. However, the second step that focused on an extraordinary circumstance was not that strong of a predictor in terms of outcome, unless the burden upon the stayer demonstrated by that second step was exceptionally high. Two cases*, In re Intel Corp*., No. 21-111, and *In re True Chem. Sols. LLC*., No. 21-131, were COVID-19 related cases, and the burden relief there was to ensure that litigation would proceed and not be delayed by an undeterminable pause in all court activity brought about by the COVID-19 pandemic (an "act of god" or cataclysmic event, if anything). The *In re Dropbox* cases, Nos. 20-130 and 20-132, had a discrepancy with the Federal Circuit in that the petitioner had remedies at hand before filing a writ of mandamus. The underlying facts of that case were that there were more related witnesses and evidence in the NDCA through a connected proceeding. Hence, the NDCA was the proper venue location. In that vein, *In re Apple Inc*., No. 21-147, had substantial judicial economy and case overlap considerations. *In re Nitro Fluids*, No. 20-142, had to consider a first-to-file conflict in the SDTX that, in hindsight, was a determining driver in the second step. Finally, factor (C) was also a somewhat accurate predictor of proper transfer in that, out of twenty NPEs (those that were farther away from the PAE end of the spectrum), nineteen saw transfer, and the sole outlier was an issue of indemnification, as seen in the *In re Canon Inc*. case, No. 22-130.

In sum, the congruence between the venue decision from the proposed two-step burden-shifting framework and the venue decision from the Federal Circuit applying the eight *Gilbert* factors strongly justifies the adoption of the above burden-shifting framework. The few discrepancies between the proposed burden-shifting framework outcomes and the Federal Circuit outcomes are on very pointed issues such as foreign parties and imported infringement. For example, the *In re Meraki* case, No. 21-180, had infringement occurring abroad because some of the parties were international, and there was simply importation in the WDTX (however, the lion's share of witnesses were based on the West Coast). Coincidentally, the results between the Federal Circuit and burden-shifting framework differed. Similarly, the *In re Western Digital* case, No. 21-137, had a Swiss citizen allege infringement while filing in the WDTX, and because the § 1404(a) part of Western Digital's motion was rejected, dismissal without prejudice was granted, again leading to a difference in outcomes from the burden-shifting framework and the Federal Circuit's analysis. Finally, in the case of *In re Dish Network* LLC, No. 21-148, the Federal Circuit there was "confident [that] the district court [would] reconsider its determination in light of the appropriate

legal standard and precedent on its own."[239] Outside of the two disagreements discussed above on substantive matters, the application of factors (A) and (B) from the first step of the proposed burden-shifting framework, also considering factor (C), prove to be very reliable indicators of how the Federal Circuit will rule on § 1404(a) venue transfer motions.

2. WDTX Comparison Specifically

There was also a clear and substantial difference in outcome between the outcomes from the burden-shifting framework and the WDTX determinations. Where there was alignment, it was generally clear and unambiguous. For example, out of the seventeen alignments, three would rest upon judicial-efficiency-type reasons. The discrepancy came from several reliable factors. Where NPEs were involved, the proposed model disagreed with eighteen out of twenty NPE cases, and for PAEs, six of the nine cases disagreed. This seemingly indicates that PAEs may be able to survive a bit more scrutiny on alleged infringement inquiries, even though they may possess more than a specious filing. Where practicing entities were involved, there were only 4 disagreements, along with a fifth case, *In re Alfresco Software*, No. 22-112, where the WDTX revisited and granted transfer. The facts of the disagreements generally followed those in applying the burden-shifting framework, where the mismatch of the factor (A) predominant location being in one locale but the factor (B) predominant location being in a different locale occurred. The exception is the matter of *In re Meraki*, No. 21-180, where foreign imports were shipped into the WDTX, but the witnesses were predominantly in California or foreign-based.

Considering the differences in how NPEs, PAEs, and practicing entities reached agreements in the proposed burden-shifting framework when compared to the *Gilbert* factors, as applied to WDTX outcomes, indicates not necessarily a perceived "friendliness" towards NPE and PAE entities but, perhaps, a bias towards a good faith consideration of local nexus in the WDTX. In the agreements or alignments between the proposed burden-shifting framework outcomes and the *Gilbert* factors, WDTX-specific outcomes also followed a predictable path: one party would allege infringement occurring wholly or partially inside the district, the purported relevant witnesses would usually be in or closer to the WDTX, or there would be a case diffused across the justice system that the WDTX could potentially resolve faster and more efficiently. However, those bases for a venue transfer consideration are exceptionally more reasonable to expect from an active District Court docket, such as Judge Albright's in the WDTX.

3. Interesting Case Considerations

To give flavor for the proposed burden-shifting framework, there are notable considerations that stand out and should be briefly examined. The first case set is the *In re Dropbox* cases, Nos. 20-130 and 20-132. Early in that litigation, there were

[239] *In re* DISH Network LLC, 856 F. App'x 310, 311 (Fed. Cir. 2021).

multiple related cases filed in the WDTX, and if that status stayed true through the proceeding, it would shift the second step determination to possibly an extraordinary circumstance leading to judicial inefficiencies. Interestingly, Judge Albright, in the district-level transfer orders, acts *en vogue* on modern technology and practical considerations in reflecting upon SynKloud's argument that "relevant documents are in electric form, making them as accessible in this District as in any other."[240] The *In re Intel Corp*. case, No. 21-111, highlights the intra-district transfer controversy as well as Judge Albright's utilization of witness testimony over video. The case of *In re Western Digital*, No. 21-137, was also interesting in that the proposed burden-shifting framework indicates transfer, where "the Court notes that the same allegedly infringing products are sold and marketed around the country" [241] and that the "totality of party witnesses" would find the NDCA more convenient.[242] The conflict in that case's evidence location highlights the difference between traditional evidence locations and electronic documents.[243] Foreign parties again bring interesting considerations through *In re Meraki*, No. 21-180, which, as previously discussed, involved the foreign importation of infringing goods. There, MPS, headquartered in Washington, argued that relevant documents and witnesses were in San Jose, California, and a relevant third-party witness was in the WDTX. Meraki then argued that their relevant documents and witnesses were in China.[244] Those facts weighed in favor of the proposed burden-shifting framework indicating transfer. The interesting aspects of these cases with respect to the proposed burden-shifting framework highlight the length to which things must disturb the order of judicial proceedings—or where international considerations throw a wrench—to override the factors (A) and (B) infringement and witness considerations in the first step.

VI. Other Solutions to the *Mandamus* Abuse Problem

Although the holding of the recent Fifth Circuit *Planned Parenthood* case "may cement Judge Albright's (and any other patent friendly judges in districts under [that Circuit, including EDTX judges]) ability to retain the plethora of patent cases filed in their courts," [245] such a change may not happen soon or require a very long runway. For example, the Federal Circuit side-stepped the application of *Planned Parenthood*

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[240] SynKloud Techs., LLC v. Dropbox, Inc., No. 6:19-CV-525-ADA, 2020 WL 2494574, at *2–3 (W.D. Tex. May 14, 2020) ("'In modern patent litigation, documents are [often] located on a server, which may [be] . . . equally accessible from both the transferee and transferor districts.'" (quoting Fintiv, Inc. v. Apple, Inc., No. 6:18-CV-372-ADA, 2019 WL 4743678, at *4 (W.D. Tex. Sept. 13, 2019))); SynKloud Techs., LLC v. Dropbox, Inc., No. 6:19-CV-526-ADA, 2020 WL 2528545, at *3–4 (W.D. Tex. May 14, 2020).

[241] Kuster v. W. Digital Techs., Inc., No. 6-20-CV-563-ADA, 2021 WL 466147, at *8 (W.D. Tex. Feb. 9, 2021).

[242] *Id.* at *7.

[243] *Id.* at *3–4.

[244] Monolithic Power Sys., Inc. v. Meraki Integrated Circuit (Shenzhen) Tech., Ltd., No. 6:20-CV-876-ADA, ECF No. 51, at 5–8 (W.D. Tex. Aug. 12, 2021).

[245] MAIER & MAIER, *supra* note 46.

in the February 2023 precedential opinion in *In re Google*.[246] As a result, alternative solutions to solving this mandamus abuse problem must be considered, and a few of them are discussed in the following sections.

A. The Inherent Powers of an Article III U.S. District Judge in Trying Their Cases

Article III of the U.S. Constitution provides that the "judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts that Congress may from time to time ordain and establish" and the "Judges [of the] inferior courts, shall hold their offices during good Behaviour."[247] Inherent in these Article III powers is the ability for a U.S. District Judge to try a case and for juries in jury trials to decide the outcome of a case.[248] Indeed, inherent in these capabilities is the policy goal of making judges "independent" from the influence of outside forces, including the other branches of federal government.[249] Some commentators have also suggested that deference be given to Article III U.S. District Judges in being able to try cases however they may like and that the power of appellate judges using procedures such as writ of mandamus should be curtailed for trial court rulings that are not "final decisions."[250] This line of thought is immediately applicable to the current situation before Judge Albright. That is, inherent in his bestowed ability as an Article III U.S. District Judge, he has the capacity to try a case in whichever fashion he wants to. Moreover, federal appellate courts should defer to his decisions in doing so, because considerations on how to try a case is outside of the purview of an appellate judge's power under appellate review. Most notably, in (now Chief) Federal Circuit Judge Moore's dissent in the *In re Apple* case discussed above, the importance of granting a writ of mandamus *only* when a trial court has abused its discretion (or their decision was patently erroneous) was emphasized because the Federal Circuit's "reluctance to interfere is not merely a formality, but rather a longstanding recognition that a trial judge has a superior opportunity to familiarize himself or herself with the nature of the case and the probable testimony at trial, and ultimately is better able to dispose of these motions."[251] Judge Moore further states that the Federal Circuit should not be second-guessing "the district court's individual fact

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[246] RPX, *supra* note 46.

[247] U.S. CONST. art. III, § 1.

[248] *Court Role and Structure*, U.S. COURTS, https://www.uscourts.gov/about-federal-courts/court-role-and-structure (last visited Apr. 18, 2023).

[249] Richard W. Garnett & David A. Strauss, *Interpretation: Article III, Section One*, NAT'L CONST. CTR., https://constitutioncenter.org/interactive-constitution/interpretation/article-iii/clauses/45 (last visited Apr. 18, 2023).

[250] *See, e.g.*, Paul D. Carrington, *The Power of District Judges and The Responsibility of Courts of Appeals*, 3 GA. L. REV. 507, 507–08 (1969) (stating that "our appellate judges have too often failed to recognize the limits of their own capacities and wisdom" and expressing the desire not to "subordinate[] the power of individual officials, such as trial judges" by appellate judge practices such as using writs of mandamus to reverse non-"final decisions").

[251] *In re* Apple Inc., 979 F.3d 1332, 1347 (Fed. Cir. 2020) (Moore, J., dissenting) (citing *In re* Vistaprint Ltd., 628 F.3d 1342, 1346 (Fed. Cir. 2010)).

findings," which is a power Congress has committed "to the sound discretion of the trial court."[252] Nor should the Federal Circuit be criticizing the way that district courts "generally manage their dockets."[253]

What are some of the ways that this attempt to second-guess the rulings of a U.S. District Judge can be challenged? For one, a constitutional challenge calling into question an appellate court's ability to only review final decisions from a district court can be raised in order to point out that a district court judge has complete authority to rule on pre-trial matters such as venue transfer motions. Another possible approach is for the U.S. District Judge or equivalent entity to launch some type of suit or test case challenging the authority of appellate courts in questioning a district court's determination of a fact-heavy inquiry such as a venue transfer. Although there is no immediate precedent of this type of challenge that comes to mind (at least for patent law),[254] it could be a worthwhile case to take up in order to make the writ of mandamus standard more workable, as will be further discussed below. The main point, however, is that federal trial court judges should be deferred to in exercising their given powers under Article III of the Constitution in the first place: managing their frequently congested dockets, trying cases, and reaching fact determinations. Any attempt to curtail these duties should be unconstitutional, or there should be legal challenges arguing as such in order to clarify that venue transfer rulings should be left to the discretion and abilities of a U.S. District Judge, not a Federal Circuit Judge.

In addition, a recent article by Steve Vladeck has pointed out the "judge shopping" activities of parties attempting to get their cases filed before U.S. District Judge Reed O'Connor of the U.S. District Court for the Northern District of Texas, a "favorite of Republican leaders in Texas, reliably tossing out Democratic policies they have challenged."[255] The article details how parties have attempted to get "high-profile" cases in front of Judge O'Connor using a "quirk" of federal procedure by filing a case in a division where there are a few (or only one) judge(s), as can be seen in the case of Judge Albright, who is the only U.S. District Judge in the Waco division of the U.S. District Court for the Western District of Texas.[256] Then, these (often conservative) parties will expect a favorable ruling from Judge O'Connor who has political leanings that are consistent with theirs.[257]

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[252] *Id.*

[253] *Id*.

[254] *But see generally* Cheney v. U.S. Dist. Court, 542 U.S. 367 (2004) (involving a similar challenge, not to patent law, but instead to a federal Court of Appeals' power to compel the Vice President to disclose records pertaining to operations of a presidential committee).

[255] Steve Vladeck, *Texas Judge's Covid Mandate Ruling Exposes Federal 'Judge-Shopping' Problem*, MSNBC (Jan. 11, 2022), https://www.msnbc.com/opinion/texas-judge-s-covid-mandate-ruling-exposes-federal-judge-shopping-n1287324.

[256] *Id.*

[257] *Id.* ("If you've heard of any currently sitting federal district judges, you may have heard of Judge Reed O'Connor. Appointed to the Northern District of Texas by President George W. Bush in 2007, O'Connor's resume includes a 2018 ruling throwing out the entire Affordable Care Act on grounds that were derided as 'insanity in print,' and criticized even by conservative opponents of Obamacare.

However, a single judge hearing patent cases does not carry the same concerns of political biases or even detrimental effects. To the contrary, a judge who has substantial experience in patent litigation like Judge Albright is the ideal judge to rule on such patent cases, partly due to his expertise but also due to the commonly held belief that the average federal judge abhors patent cases due to their complexity.

Accordingly, federal judges that lack experience in patent litigation take inordinate amounts of time to try patent cases, denying patent plaintiffs justice. In fact, the most ideal judge to be trying patent cases is a judge exactly like Judge Albright, who, due to his knowledge and expertise, is able to try patent cases not only efficiently but also accurately (with the metric for measuring this perhaps being the number of times his orders have been affirmed or reversed by the Federal Circuit). Thus, in order to ensure consistency in patent law jurisprudence, there should be "more Judge Albrights" installed in the Waco Division in order to avoid this problem. The recent appointment of U.S. Magistrate Judge Derek Gilliland,[258] an experienced patent litigator with a technical background (a Mechanical Engineering degree from Texas A&M University),[259] is one crucial step to realizing this solution.

B. Raising the Bar for the Federal Circuit's Application of Writs of Mandamus

Moreover, the relevant standards (e.g., abuse of discretion) that are applied to writs of mandamus should also be clarified and followed. As Judge Moore mentioned in her *In re Apple* dissent, "there is no more deferential standard of review than clear abuse of discretion," where the Federal Circuit's role is "to defer to the broad discretion of the district court except as necessary to correct a usurpation of judicial power or a patently erroneous result."[260] Thus, the Federal Circuit should only rarely find fault in a district court's factual determination of a venue transfer issue by granting a writ of mandamus especially because, once again, a writ of mandamus is a "drastic and extraordinary" remedy "reserved for really extraordinary causes."[261] Moreover, granting writs of mandamus goes against the requirement that appellate courts review only "final decisions" of district trial courts.[262] In other words, mandamus writs should not be abused to the point of to be granted for determinations

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He also issued a 2016 ruling blocking an Obama administration rule requiring public schools to allow transgender students to use bathrooms corresponding with their gender identity and, most recently, issued a ruling on Jan. 3 requiring the Navy to exempt 26 Navy SEALs from its vaccine mandate based upon religious objections — a ruling that failed to cite, let alone distinguish, the most significant Supreme Court decision to the contrary.").

[258] *Sorey & Gilliland Partner Derek Gilliland Named U.S. Magistrate Judge for Western District of Texas*, SOREY & GILLILAND, LLP (Dec. 22, 2021), https://www.prnewswire.com/news-releases/sorey--gilliland-partner-derek-gilliland-named-us-magistrate-judge-for-western-district-of-texas-301450002.html.

[259] Derek Gilliland, LINKEDIN, https://www.linkedin.com/in/derek-gilliland-46341bb/ (last visited Apr. 19, 2023).

[260] *In re* Apple, 939 F.3d 1332, 1348 (Fed. Cir. 2020) (Moore, J., dissenting).

[261] Gugliuzza, *supra* note 3, at 345 (quoting Cheney v. U.S. Dist. Court, 542 U.S. 367, 380 (2004)).

[262] Carrington, *supra* note 250, at 508 (citing Charles A. Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751, 771–78 (1957)).

made relatively early on in a case, and most certainly not for those made right before trial, such as ruling on a venue transfer motion.

As Professor Gugliuzza has already proposed in his paper on writs of mandamus at the Federal Circuit, a new framework is needed that simplifies jurisdictional issues, eliminates forum shopping by preventing bifurcated appeals, and provides valuable doctrinal guidance and avoidance of "tunnel vision" specialization by making the Federal Circuit grant writs of mandamus on all issues raised in patent cases, not just those involving venue transfer (thus, making it more difficult to grant writs of mandamus overall).[263] Professor Gugliuzza also lists policy considerations, such as issuing jurisdictional mandamus consistent with 28 U.S.C. § 1338, granting advisory mandamus on issues intertwined with patent law, and applying insightful and didactic supervisory mandamus on non-patent questions in order to develop a mandamus standard that accounts for the Federal Circuit's unique role in the federal judicial system.[264] This proposed framework would especially decrease the overly-frequent reversals of venue transfer rulings, decisions that should be left entirely to the district judge's discretion, as discussed above.

Gene Quinn notes in a recent article that "the Federal Circuit has jumped the shark with respect to venue." "The court is not appropriately applying mandamus standards and the Circuit's law on transfer is an archaic mishmash."[265] Therefore, there is a need to not only heighten but also clarify the Federal Circuit's standard for mandamus orders for venue transfer.

Raising the standard for applying mandamus also ensures that U.S. District Judges such as Judge Albright are not getting frequently overturned on issues which they have the most expertise in addressing, such as venue transfers under 35 U.S.C. § 1440(a). Applying the suggested approach from Professor Gugliuzza, we will likely have less mandamus reversals overall due to all the issues in a patent case being considered, not just venue transfer.

C. A Proposal for a Unified Federal Patent District Court

A final suggested approach, which is the subject of the author's next paper, is creating a unified federal patent district court that will eliminate altogether the notion of venue. Currently, there is a proposed study to review the benefits or disadvantages of a "small patent claims court."[266] Organizations, such as US Inventor, propose that

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[263] Gugliuzza, *supra* note 3, at 398–403.

[264] *Id.* at 403–10 (defining "supervisory mandamus" as "mandamus issued to correct an egregious district court error that is likely to recur" and "advisory mandamus" as a procedure able "to answer questions of law that cannot await or regularly evade appellate review"); *see also* Note, *Supervisory and Advisory Mandamus Under the All Writs Act*, 86 HARV. L. REV. 595, 610 (1973).

[265] Gene Quinn, *Mandamus and the Battle Over Venue in Modern America*, IP WATCHDOG (Feb. 7, 2022), https://www.ipwatchdog.com/2022/02/07/mandamus-and-the-battle-over-venue-in-modern-america/id=145345/.

[266] Danis Krass, *Small Patent Claims Court Idea Is Popular But Maybe 'Futile'*, LAW360 (Aug. 30, 2022), https://www.law360.com/ip/articles/1525396.

this small patent claims court should be an Article III court as well.[267] This proposed unified federal patent district court will also be an Article III court, but it will have the functionality of specialized non-Article III courts such as bankruptcy courts[268] and Article I courts such as tax courts.[269]

The revolutionary idea behind this proposed unified federal district patent court is that current Article III judges do not need to leave their current posts. Instead they can sit on this court "by designation" and rule on a pool of patent cases in addition to their normal non-patent case duties. Not only does this allow new judges to be hired that have substantial patent litigation expertise or technical and science backgrounds, it will help recruit talent like Judge Albright and other experienced patent judges such as Judge Gilstrap, Judge Payne, and Judge Colm Connolly by letting them keep their "day jobs" as federal judges.

Moreover, all patent cases across the country will be filed with this U.S. District Court, which will serve as the trial-level version of the Federal Circuit. Thus, a proposed name for it might be the "U.S. District Court for the Federal District." The location of this court should also be in a neutral area that has a relatively low population of both high-tech companies and NPEs. Oklahoma, for example, is perfect not only because the state possesses this quality but also because it is the most centrally located state in the country (although this argument would have to be defended against the claim that Oklahoma is so close to Texas). While not centrally-located, Washington D.C. is also a good fit because there are not that many NPEs or high tech companies based there, and parties have to go to D.C. anyway to engage with the USPTO, argue appeals before the Federal Circuit or U.S. Supreme Court, litigate Section 337 cases at the ITC.

To also take a page from the Patent Trial and Appeal Board (PTAB) of the USPTO, all proceedings in this U.S. District Court for the Federal District could be

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[267] *Initial Comments of US Inventor Inc. In Response to the Request for Comment Regarding the Administrative Conference of the United States ("ACUS") Small Claims Patent Court Study*, US INVENTOR, https://usinventor.org/wp-content/uploads/USI-ACUS-COMMENT.pdf (last visited Apr. 19, 2023).

[268] Samuel R. Henninger, *Bankruptcy Courts and the Constitution*, AM. BAR ASS'N (Dec. 9, 2020), https://www.americanbar.org/groups/business_law/publications/blt/2020/12/bankruptcy-courts/ ("Bankruptcy courts are non-Article III courts. The Supreme Court has addressed the application of the public rights doctrine in the bankruptcy context, but it has yet to hold that the public rights doctrine provides bankruptcy courts with constitutional authority to hear and determine proceedings. *See Stern v. Marshall*, 564 U.S. 462, 493 (2011) ('Vickie's counterclaim—like the fraudulent conveyance claim at issue in *Granfinanciera*—does not fall within any of the varied formulations of the public rights exception in this Court's cases.'); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co*., 458 U.S. 50, 71 (1982) (plurality opinion) ('Finally, the substantive legal rights at issue in the present action cannot be deemed 'public rights.'').").

[269] *United States Tax Court*, BALLOTPEDIA, https://ballotpedia.org/United_States_Tax_Court (last visited Apr. 19, 2023) ("The United States Tax Court is an Article I federal trial court established by Congress under Article I of the U.S. Constitution, Section 8 of which provides (in part) that the Congress has the power to 'constitute Tribunals inferior to the supreme Court.' Tax Court judges are appointed for a term of fifteen years.").

held virtually, either via teleconference software such as Zoom or WebEx (which many *Markman* hearings, patent appeals, and even patent trials were held over during the COVID-19 pandemic) or in a Web 3.0 "Metaverse" environment where all participants would don headsets. This enhanced virtual reality or augmented reality environment might also lend itself to the presentation of evidence, especially evidence of a technically or scientifically complex nature, which patent cases regularly deal with.

By establishing a unified federal patent district court that has a single location or even a virtual, non-physical location, the notion of venue is completely eviscerated; suddenly, no reason exists look to venue statutes. As a result, this may be the "cleanest" solution that avoids the laborious tasks of drafting new legislation or developing new common law precedent. The ability to file all patent cases in one central court would parallel the ability to file bankruptcy and tax cases in nearly every district. A unified federal patent trial court would also be highly consistent with the function of the Federal Circuit to hear patent appeals. This would lead to significantly more uniformity in all patent venue jurisprudence by eliminating the need to rely on constantly-shifting patent venue standards altogether.

Conclusion

"Not another change of venue, Counsellor!"

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This article provides an overview of how current patent venue transfer laws should be modified in order to best accommodate the filing interests of patent plaintiffs while balancing resource and efficiency considerations from judges and courts.

By replacing the eight *Gilbert* factors with a two-step burden-shifting framework, more consistency and robustness of venue transfer analyses can be achieved so as to prevent frequent reversals by means of mandamus orders, which should only be used in extraordinary circumstances. Alternatively, other approaches to lessen this excessive overturning of venue transfer orders from district courts can and should be applied, including recognizing the powers inherent in U.S. District Judges, limiting the power of appellate judges in wielding the writ of mandamus, and creating a new federal district patent court that completely eviscerates the concept of venue for patent cases.

As a result, by applying the proposed two-step burden-shifting framework suggested in this paper instead of the eight outmoded and outdated *Gilbert* factors, patent venue jurisprudence under § 1404(a) for transfers will be more consistent,

[270] Ed Fisher, *Not Another Change of Venue,* NEW YORKER (Mar. 27, 1971).

increasingly robust, and better able to truly weather the "best of times" and the "worst of times," not only with respect to current patent cases but also for many more patent cases in the years to come.