

STATEMENT OF

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BEFORE THE

**COMMITTEE ON THE JUDICIARY**

Subcommittee on Courts, Intellectual Property and the Internet

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**“Examining the Supreme Court’s *TC Heartland* Decision”**

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**INTRODUCTION**

Chairman Goodlatte, Chairman Issa, Ranking Member Conyers, Ranking Member Nadler, and Members of the Subcommittee:

Thank you for this opportunity to speak with you today about the Supreme Court’s recent decision in *TC Heartland v. Kraft Foods* concerning the venue in which a plaintiff can file a patent infringement lawsuit.<sup>1</sup> As a result of extensive lobbying for legislation by some companies and organizations in the past 5-6 years, patent litigation has had an unusual prominence in the policy debates in D.C. and even among the general public.<sup>2</sup> Thus, it is unsurprising that lawsuits representing some of these same legal and policy issues also have reached the Supreme Court, which is now deciding patent cases at a rate not seen for over 100 hundred years.

*TC Heartland* is one of many decisions in recent years in which the Court has reacted to this broader policy debate by severely restricting or sometimes outright eliminating patent rights. It has done so despite highly questionable statistical data and rhetorical epithets at the core of these policy and legal disputes.<sup>3</sup> *TC Heartland* is just the latest example of this pattern of incremental erosion of patent rights by the Court and by Congress, which imperils our innovation economy

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<sup>1</sup> Professor Mossoff is speaking on his own behalf, and his testimony does not reflect the views of his employer or of any institution or organization with which he is affiliated.

<sup>2</sup> See Venue Equity and Non-Uniformity Elimination (VENUE) Act of 2016, S. 2733, 114th Cong. (2016); Innovation Act, H.R. 9, 114th Cong. (2016).

<sup>3</sup> See Adam Mossoff, *Repeating Junk Science & Epithets Does Not Make Them True*, IPWatchdog (November 19, 2015), <http://www.ipwatchdog.com/2015/11/19/repetition-of-make-them-true/id=63302/>.

and contributes to the decline of what was once a gold-standard patent system in the United States.<sup>4</sup>

*TC Heartland* and court decisions like it should be of concern to Congress precisely because they are undermining the promise of stable and effective property rights that were once secured by the gold-standard U.S. patent system.<sup>5</sup> The patent system has long secured the fruits of productive labors of untold numbers of individual inventors, such as Thomas Edison, Nikola Tesla, Alexander Graham Bell, the Wright Brothers, and others. It drove the biotech and high-tech revolutions of the past half-century—providing legal security in the fruits of R&D to universities, startups, high-tech companies, and biotech and pharmaceutical companies that have brought us the modern miracles of daily life today. Economists and historians have shown that the patent system has been the fountainhead of the U.S. innovation economy for more than 200 years.<sup>6</sup>

This is the context in which we need to consider *TC Heartland* and its impact on *all innovators* and on the innovation economy more generally. Admittedly, there are some bad actors in the patent system, just as there are in all areas of the legal system. But systemic changes that weaken patent rights for millions of patent owners nationwide, most of whom are innocent producers and commercializers of innovation, has pernicious effects on the innovation economy.

There are numerous issues of concern, but for the sake of brevity, I will focus on only three. First, *TC Heartland* arose from the same coordinated campaign of lobbying, strategic litigation, and public relations efforts in the past decade that have produced a large number of one-sided, unbalanced court decisions, legislation, and proposed bills weakening property rights in patented innovation. As a result, *TC Heartland* is equally one-sided and unbalanced in its result, imposing more costs and harms on innovators, especially individual inventors, startups, universities, and even R&D-intensive large companies in the high tech and bio-pharmaceutical industries. Second, *TC Heartland*'s origins in this campaign to weaken patent rights is evidenced by the fact that amici and commentators supporting the Court's decision used the same questionable statistics and rhetoric that has been deployed throughout the patent policy debates to justify eviscerating patent rights. Third, *TC Heartland*'s connection to this campaign to weaken patent rights is further confirmed by the fact that the Court's decision will not change the concentration of patent

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<sup>4</sup> See Kevin R. Madigan and Adam Mossoff, *Turning Gold to Lead: How Patent Eligibility Doctrine is Undermining U.S. Leadership in Innovation*, Geo. Mason L. Rev. Forthcoming, available at <https://ssrn.com/abstract=2943431>.

<sup>5</sup> See generally *id.*

<sup>6</sup> See Stephen Haber, *Patents and the Wealth of Nations*, 23 Geo. Mason L. Rev. 811 (2016) (surveying historical evidence and economic studies confirming that patents are a key variable in successful innovation economies); B. Zorina Khan, *The Democratization of Invention: Patents and Copyrights in American Economic Development, 1790-1920* (2005) (detailing the key role that property rights in patents served in spurring markets and economic growth in the U.S.); United States Patent and Trademark Office, *Intellectual Property and the U.S. Economy: 2016 Update* (2016) (identifying longstanding role of patent licensing in America's innovation economy, facilitating division of labor in the commercialization of patented innovation). A recent economic study proves that patents more than double a startup's chances of obtaining venture capital financing, and thus significantly increases a startup's chances in growing into a small business in the marketplace. See Joan Farre-Mensa et al., *What is a Patent Worth? Evidence from the U.S. Patent "Lottery"* (Nat'l Bureau of Econ. Research) (March 14, 2017). Notably, small businesses create more than 60% of the jobs in the country. See Small Business Administration, Office of Advocacy, *Frequently Asked Questions* (June 2016).

cases in a very small number of judicial districts, but instead will only shift patents cases to more defendant-friendly districts. A recent study by professors Colleen Chien and Michael Risch confirms that *TC Heartland* has an even more dramatic impact than the VENUE Act in shifting lawsuits out of the Eastern District of Texas to two other districts that are favorable to infringers.<sup>7</sup>

In light of this, it is time for Congress to recognize that any further legislation weakening patent owners' ability to protect their property rights against misappropriation would only contribute to the dangerous decline occurring in our patent system as a result of recent Supreme Court cases and legislation. This is particularly pressing given an even more dramatic weakening of property rights in patented innovation in the Court's most recent patent decision in *Impression Products v. Lexmark International*. It is notable that the U.S. Chamber of Commerce now ranks our patent system tenth in the world, down from first not too long ago.<sup>8</sup> The sad reality is that American patents are now incredibly easy to infringe with little to no consequence, so much so that "efficient infringement" is now a common term in patent policy circles.<sup>9</sup>

As with all matters in which the innovation economy, economic growth, and jobs are at stake, the guiding principle for patent legislation ought to be, "First, do no harm."

### **The *TC Heartland* Case Was Hijacked by the Campaign to Weaken Patent Rights**

The policy debate about venue has focused entirely on the comparatively higher number of patent lawsuits filed in the Eastern District of Texas as compared to other judicial districts, especially by individuals and companies using a patent licensing business model (often called "non-practicing entities," "patent assertion entities," or by the more popular rhetorical epithet, "patent troll").<sup>10</sup> This led to the addition of a venue provision in the Innovation Act, which was spun out as its own bill in the VENUE Act. (Since the two pieces of venue legislation are essentially identical, I will refer only to the VENUE Act.)

On its face, *TC Heartland* seems like an extremely odd case if only because the plaintiff is a manufacturer and the lawsuit was filed in Delaware. *TC Heartland* arose when Kraft Foods filed a patent infringement lawsuit against TC Heartland in the District of Delaware. The case involved neither a patent licensing company as plaintiff nor the Eastern District of Texas.

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<sup>7</sup> See Colleen Chien & Michael Risch, *Recalibrating Patent Venue*, 77 Maryland Law Review, 2018 Forthcoming at 37, available at <https://ssrn.com/abstract=2834130>.

<sup>8</sup> *The Roots of Innovation*, U.S. Chamber International IP Index, Fifth Edition (Feb. 2017), [http://www.theglobalipcenter.com/wp-content/uploads/2017/02/GIPC\\_IP\\_Index\\_2017\\_Report.pdf](http://www.theglobalipcenter.com/wp-content/uploads/2017/02/GIPC_IP_Index_2017_Report.pdf).

<sup>9</sup> See Adam Mossoff & Bhamati Viswanathan, *Explaining Efficient Infringement*, CPIP Blog (May 11, 2017), <https://cpip.gmu.edu/2017/05/11/explaining-efficient-infringement/>.

<sup>10</sup> These are ill-defined and amorphous terms that have swept up in condemnations of the patent system individual inventors, startups, universities, and even companies that create their own R&D-supported innovation. See, e.g., Christopher Cotropia et al., *Unpacking Patent Assertion Entities (PAEs)*, 99 Minn. L. Rev. 649, 655-60 (2014). Thus, I use the term that neutrally refers to their business model, "patent licensing." See Adam Mossoff, *Thomas Edison Was a "Patent Troll"*, Slate (May 19, 2014), [http://www.slate.com/articles/technology/history\\_of\\_innovation/2014/05/thomas\\_edison\\_charles\\_goodyear\\_and\\_eli\\_as\\_howe\\_jr\\_were\\_patent\\_trolls.html](http://www.slate.com/articles/technology/history_of_innovation/2014/05/thomas_edison_charles_goodyear_and_eli_as_howe_jr_were_patent_trolls.html).

But this merely confirms why this case was pursued up to the Supreme Court. Despite the ostensive appearance in the Court’s opinion that this was merely a case about interpreting a statute, TC Heartland discussed the Eastern District of Texas in its cert petition and in its primary merit-stage briefs. In its reply brief at the merits stage, Kraft Foods discussed it. *All* of the amici supporting TC Heartland’s cert petition and at the merits stage discussed the Eastern District of Texas, the alleged problem of NPEs or “patent trolls,” or both. Nine out of eleven total amicus briefs filed in support of Kraft Foods discussed the Eastern District of Texas and patent licensing companies. Justice Stephen Breyer even remarked during oral argument that he was surprised at all of the policy arguments unconnected to the case before the Court. In sum, Kraft Foods had its lawsuit hijacked by a broader policy debate about patent litigation brought by so-called NPEs or PAEs in the Eastern District of Texas.

The fact that there has been an extensive lobbying effort to revise the venue rules in Congress while this case was progressing through the courts and gathering extensive amici support for TC Heartland is not a coincidence. *TC Heartland* is merely one tactical engagement in wide-ranging lobbying and strategic litigation campaign to weaken U.S. patent rights. The slew of one-sided, unbalanced proposed legislation to restrict patent rights reflects this,<sup>11</sup> as do the numerous recent decisions by the Supreme Court eroding inventors’ ability to obtain or enforce patent rights.<sup>12</sup>

### ***TC Heartland* Imposes Higher Costs on All Innovators**

Systemic changes to the patent system, such as changing the legal rule on venue, involve trade-offs between costs and benefits. The critics of the Eastern District of Texas have highlighted bad actors to justify shifting costs from defendants to plaintiffs in patent infringement lawsuits, but *all* patent owners now bear the higher costs of *TC Heartland*’s more restrictive venue rule. The advocates for this more restrictive venue rule do not discuss or acknowledge these costs to inventors, startups, small businesses, and R&D-intensive high tech and bio-pharmaceutical companies. Like the economic law of supply and demand, refusing to acknowledge real-world costs neither negates them nor makes them go away as a policy concern.

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<sup>11</sup> See Adam Mossoff, *Weighing the Patent System: It is Time to Confront the Bias Against Patent Owners in Patent “Reform” Legislation*, Washington Times, Mar. 24, 2016, at <http://www.washingtontimes.com/news/2016/mar/24/adam-mossoff-weighing-the-patent-system/>.

<sup>12</sup> See, e.g., *Impression Prods, Inc. v. Lexmark Int’l, Inc.*, No. 15-1189 (U.S. May 30, 2017) (holding that any and all sales of a patented product by the patent-owner regardless of the conditions imposed on the sale automatically terminates all patent rights); *Samsung Elec. Co. v. Apple Inc.*, No. 15-777 (U.S. Dec. 6, 2016) (holding that damages must be limited to the particular value of a component, and not the market value of a device comprising this component); *Alice Corp. v. CLS Bank Int’l*, 134 S. Ct. 2347 (2014) (holding that a computer program for facilitating complex international financial transactions is an abstract idea and cannot be patented); *Ass’n. for Molecular Pathology v. Myriad Genetics, Inc.*, 133 S. Ct. 2107 (2013) (holding that isolated DNA for laboratory and medical uses is an unpatentable natural phenomenon); *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 132 S. Ct. 1289 (2012) (holding that a diagnostic medical treatment for an autoimmune disorder is an unpatentable discovery of a law of nature); *Bilski v. Kappos*, 561 U.S. 593 (2010) (holding that a business method for hedging investment risk is an abstract idea and not a patentable invention); *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007) (holding that a licensee can challenge the validity of the licensed patent in court without having to be liable for infringement by first violating the license agreement); *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006) (holding that an injunction is not presumptively available to patent-owners on a finding of infringement).

These increased costs come either from higher costs in filing and litigating patent cases or from the new incentives for strategic behavior by defendants.

First, litigation costs for patent owners will increase because after *TC Heartland*, a large number of patent lawsuits will remain concentrated in a very small number of judicial districts. *TC Heartland* does not stop concentration of cases, it only shifts cases from the Eastern District of Texas to two other districts: the Northern District of California and the District of Delaware. The elephant in the room is why *TC Heartland* and so many amici (not to mention all the companies that lobbied for the VENUE Act) would spend so much money and resources merely to shift patent cases from one district to two other districts? The answer is simple: the Northern District of California and the District of Delaware are widely recognized as two districts in which it is more difficult and costly to sue someone for patent infringement.<sup>13</sup>

The primary supporters of the *TC Heartland* decision are essentially the same companies who lobbied for the VENUE Act: large high-tech companies and retailers with an online presence who have been sued in the Eastern District of Texas. Like all defendants who are hauled into court, they would rather litigate in a small number of more defendant-friendly jurisdictions. Many of the high-tech companies are based in Silicon Valley, giving them home court advantage if they must be sued in the Northern District of California.<sup>14</sup>

The District of Delaware is deemed to be more friendly for defendants simply because it suffers from long delays in litigation due to its small number of judges that handle a broad range of cases. This means that it takes longer to bring lawsuits to a final judgment, increasing costs to patent owners via delay as well as the costs of ongoing infringement during the litigation. Even before *TC Heartland*, in 2013 then-Chief Judge Sue Robinson testified to Congress that her district's patent docket was expanding quickly and that her court could not "keep this level of work up indefinitely."<sup>15</sup>

This is significant for patent owners who are undercapitalized and thus are sensitive to litigation costs and delay: individual inventors, startups, small businesses, and universities. Even larger companies, such as biotech and pharmaceutical firms, will suffer increased costs in the enforcement of their patent rights, such as having to file separate lawsuits throughout the country against multiple defendants given the unique nature of the Hatch-Waxman regime.

Second, one-sided, unbalanced changes in legal rules often have unintended consequences, as they create opportunities for strategic behavior by the beneficiaries of the new rule. In this case, these beneficiaries are defendants, many of whom do business over the Internet and thus may choose to incorporate electronically in far-flung jurisdictions, such as Wyoming, Maine, or the

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<sup>13</sup> See PricewaterhouseCoopers LLP, 2015 Patent Litigation Study (May 2015) ("PWC Study"), <http://www.pwc.com/us/en/forensic-services/publications/assets/2015-pwc-patent-litigation-study.pdf>. See also Brief of 22 Law, Economics and Business Professors as Amici Curiae in Support of Respondent at 8-12, *TC Heartland LLC v. Kraft Foods Group Brands LLC*, \_\_\_ S.Ct. \_\_\_, No. 16-341 (2017) (discussing this point at length).

<sup>14</sup> See, e.g., Neel U. Sukhatme, *A Theoretical and Empirical Study of Forum Shopping in Diversity Cases* (August 18, 2014), <https://ssrn.com/abstract=1989250>.

<sup>15</sup> *Federal Judgeship Act of 2013: Hearing Before the Subcomm. On Bankruptcy and the Courts of the S. Comm. on the Judiciary*, 113th Cong. 3 (2013).

U.S. Virgin Islands, to make it harder and more costly for them to be sued for patent infringement by inventors or other undercapitalized patent owners. For example, Josh Malone, an inventor who lives in Dallas, Texas, has already spent millions of dollars pursuing infringers in court and defending his patents before the Patent Trial & Appeal Board (PTAB).<sup>16</sup> After *TC Heartland*, he is forced to sue retailers in far-away states where the defendants are incorporated or where they have a regularly established business. This substantially increases his costs, and, as he has reported, will effectively put him and other inventors out of business because he will be unable to stop infringement of his patents.<sup>17</sup>

This concern about unintended consequences harming inventors, startups, small businesses, and other creators and owners of patented innovation threatens serious consequences for the U.S. innovation economy, and for jobs and economic growth. For example, there will be extensive satellite litigation now as to what counts as having a “regular and established place of business,” as there is no settled, single definition of this term in the case law.<sup>18</sup> This increased litigation increases costs for all patent owners, making it harder for them to recoup the patent system’s promise of the reward for their inventive labors.

These added costs for all patent owners in securing their property rights against recalcitrant infringers are particularly hard to bear for individual inventors and other undercapitalized innovators, such as startups and universities. Here is just one example: When there are multiple infringers, which is often the case when a patented product is used or sold by many different commercial businesses, each defendant must be sued separately in a separate lawsuit. This is because the America Invents Act of 2011 prohibited patent owners from joining multiple defendants sued for infringing a single patent in a single lawsuit.<sup>19</sup> Prior to *TC Heartland*, it was often possible for patent owner to reduce litigation costs by concentrating these multiple lawsuits in a single forum, but *TC Heartland* now requires that each defendant be sued in its state of incorporation or place of regularly doing business. This significantly multiplies the costs to all patent owners in securing their property rights in court.<sup>20</sup> Large, established companies will be able to absorb these added transaction costs, but small innovators with limited income and legal budgets will not be able to do so. Rather than seeing a return on their innovation, they will be financially constrained to watch as their valuable ideas are taken without fear of liability.

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<sup>16</sup> Paul Morinville, *Water Ballons, Weapons of Mass Destruction and the PTAB*, IPWatchdog (Jan. 27, 2017), <http://www.ipwatchdog.com/2017/01/27/water-balloons-weapons-mass-destruction-ptab/id=77637/>.

<sup>17</sup> See Email to Adam Mossoff, June 8, 2017 (“I had to foot a legal bill of \$12M to date and we have not even had a trial yet. I am one out of 1,000 to survive the gauntlet under VE Holdings. *TC Heartland* will be the nail in the coffin for any would be inventors or start-ups that rely on patents to protect their technology. Filing suit in every Defendants place of incorporation will be impossible to afford, and will produce conflicting rulings.”).

<sup>18</sup> The numerous definitions of “regular and established place of business” has long been recognized as one of the primary problems in section 1400(b). See, e.g., Arthur H. Seidel, *Venue in Patent Litigation*, 22 Geo. Wash. L. Rev. 682, 691 (1953) (collecting definitions). See also *In re Cordis Corp.*, 769 F.2d 733 (Fed. Cir. 1985) (failing to determine how “permanen[t]” a defendant’s presence in a district must be to count as a “regular and established place of business”). *In re Cordis* was the Federal Circuit’s final attempt at determining the meaning of section 1400(b) prior to *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574 (Fed. Cir. 1990).

<sup>19</sup> Statistical studies have proven that the provision in the America Invents Act prohibiting joinder of defendants was the primary cause of the increase in patent lawsuits after 2012. See Cotropia et al. *supra* note 10, at 696.

<sup>20</sup> See Matthew Bultman, *TC Heartland Could Make Enforcing Patents More Expensive*, LAW360 (June 2, 2017), <https://www.law360.com/articles/930849/tc-heartland-could-make-enforcing-patents-more-expensive>.

In sum, *TC Heartland* has restricted patent rights for *all* patent owners, and the costs from this systemic change in the patent system are real and must be accounted for in any valid assessment of this decision. It is a one-sided decision, like so many other recent Court decisions (not to mention proposed legislation), that imposes costs on patent owners in favor of defendants. These costs, especially those imposed on individual inventors, universities, startups, small businesses, and even large companies who have patent-based business models or who license patents, threatens the foundations of the innovation economy by reducing the value of millions of patents. This in turn reduces incentives to innovate and to commercialize patented innovation, which threatens the jobs and economic growth that are the hallmarks of the U.S. innovation economy.

### **Instead of Reducing Concentration of Patent Lawsuits, *TC Heartland* Simply Shifts Lawsuits to Two Districts That Work to the Advantage of Infringers**

The connection of *TC Heartland* to the broader policy effort to weaken patent rights is further confirmed by the fact that it does not achieve the goal its proponents claim it does. The basic intuition behind the concern about concentration of cases in a few courthouses is that it is seemingly harmful. As Professors Colleen Chien and Michael Risch stated last year in an op-ed in support of the VENUE Act, “[t]he staggering concentration of patent cases in just a few federal district courts is bad for the patent system.”<sup>21</sup> But is this true and does *TC Heartland* change this high concentration of cases in a few districts?

Although there are 94 judicial districts throughout the United States, under the Supreme Court’s interpretation of the venue statute in *TC Heartland*, the substantial majority of patent lawsuits (60%) will continue to be filed in the same *five* districts around the country.<sup>22</sup> The only major change will be a shift in patent infringement lawsuits being filed in one district to two districts. Specifically, the Eastern District of Texas will drop from about 36% to 15% of all cases, and the Northern District of California and the District of Delaware will collectively rise from about 14% to 37% of all cases.<sup>23</sup>

No one has offered an argument or explanation why shifting cases from *one* district to *two* districts results in a meaningful distribution of patent cases among the 94 federal judicial district courts throughout the country. If the goal of revising the venue rules is to distribute cases widely across numerous districts given vague appeals to “fairness” or “uniformity,” *TC Heartland* fails to achieve this, just as the VENUE Act would have failed to do so. No reasonable argument exists as to why shifting from one to two district courts out of 94 is a magic dividing line given the claim that the concentration of cases as such is bad for patent policy. When the denominator is 94 districts, two districts is not automatically a “magic number” where concentration ceases to be a concern.

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<sup>21</sup> Colleen Chien & Michael Risch, *A Patent Reform We Can All Agree On*, Washington Post (June 3, 2016), <https://www.washingtonpost.com/news/in-theory/wp/2015/11/20/why-do-patent-lawyers-like-to-file-in-texas/>.

<sup>22</sup> They are the Eastern District of Texas, the District of Delaware, the Central District of California, the Northern District of California, and the District of New Jersey. See Chien & Risch, *supra* note 7, at 37.

<sup>23</sup> See Chien & Risch, *supra* note 7, at 37

Instead, it appears that the celebration over the *TC Heartland* decision is really based on the fact that defendants will now be far more likely to litigate in two districts that pose several advantages for infringers (as discussed above), making it more difficult for patent owners to protect their property rights against theft.

### **There Was No Compelling Evidence that the Eastern District of Texas Was a Problem**

Proponents of the decision in *TC Heartland* and advocates for the VENUE Act claimed that the Eastern District of Texas is biased in favor of patent owners and thus became a haven for so-called “patent trolls” or NPEs. As with the questionable statistics and rhetorical epithets that dominate the policy debates more generally, these arguments are deeply problematic.

For example, the critics of the Eastern District of Texas often claim that there is a higher reversal rate of its decisions on appeal in comparison to other districts—39% affirmance rate for the Eastern District of Texas versus affirmance rates ranging from 56% to 84% in the four other districts surveyed in an informal study.<sup>24</sup> But this assertion about high reversal rate falls prey to the same concerns about lack of rigor and the failure to follow basic scientific norms in statistical analysis that have arisen in regards to other statistical claims about patent litigation.<sup>25</sup>

First, the sample size in this informal study on reversal rates is too small to draw any statistically significant conclusion: 18 appellate court opinions reviewing one district court. Second, the study does not distinguish between types of proceedings at the district court that are being appealed, such as motions to dismiss, summary judgment motions, trial verdicts, etc., All lawyers know that the procedural posture of an appeal significantly affects the nature of appellate review. Third, and most important, the claim about reversal rates is likely wrong. A more comprehensive, multi-year study by Price Waterhouse Coopers found that the Eastern District of Texas affirmance rate is only slightly below the national average for all districts.<sup>26</sup>

Another oft-repeated claim is that a majority of the lawsuits filed in the Eastern District of Texas are by NPEs/patent trolls. For example, Chien and Risch’s study claims that NPEs filed a majority of the cases in the Eastern District of Texas,<sup>27</sup> relying on a definition of NPE used by Unified Patents, an “anti-troll” company with a financial stake in the policy and legal fight because it sells defense services to accused infringers.<sup>28</sup> While the details of Chien and Risch’s study appear valid, it is based on a faulty foundation: Unified Patents broadly defines an NPE as any person or entity who licenses, which includes individual inventors, startups who are not

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<sup>24</sup> See Ryan Davis, EDTX Judges’ Love of Patent Trials Fuels High Reversal Rate, LAW360 (Mar. 8, 2016), <http://www.law360.com/articles/767955/edtx-judges-love-of-patent-trials-fuels-high-reversal-rate>.

<sup>25</sup> For example, a widely cited study claiming that “NPEs” are responsible for \$29 billion per year in direct costs to the economy has been thoroughly discredited. David L. Schwartz & Jay P. Kesan, Essay, *Analyzing the Role of Non-Practicing Entities in the Patent System*, 99 Cornell L. Rev. 425 (2014); U.S. Gov’t Accountability Office, GAO-13-465, Intellectual Property: Assessing Factors that Affect Patent Infringement Litigations Could Help Improve Patent Quality at 26 (2013) (identifying this study as “nonrandom and nongeneralizable”).

<sup>26</sup> See PWC Study, *supra* note 13 (finding an average affirmance rate of 48% for all districts, compared to an affirmance rate of 42% for the Eastern District of Texas).

<sup>27</sup> See Chien & Risch, *supra* note 7, at 3-4 footnote 6 & 27.

<sup>28</sup> Unified Patents, <https://www.unifiedpatents.com/>. Its website banner states: “The Anti-Troll: Challenge Bad Patents. Never Pay. Improve Patent Quality” (last visited June 10, 2017).

manufacturing, and companies that have a licensing business model. Including so many legitimate patent owners within the NPE/patent troll category is what ultimately leads Chien and Risch to conclude that the majority of cases filed in the Eastern District of Texas are by NPEs (to their credit, they do not use the “troll” epithet). These expansive definitions of NPEs/patent trolls that sweep within the condemnation of bad actors actual inventors, startups, large patent-intensive companies, and, in other studies, universities is not new in the policy debates over patent litigation. For instance, the notorious and now thoroughly-debunked junk science statistical study claiming that NPEs cost companies \$29 billion in 2011 relied on a similarly expansive definition.<sup>29</sup>

Finally, and most important, none of the studies cited by *TC Heartland*'s supporters actually measured *abusive litigation behavior* in the Eastern District of Texas as compared to other judicial districts.<sup>30</sup> Even if the Eastern District of Texas had a higher percentage of plaintiffs with a patent licensing business model, it is both wrong and irresponsible to assume that these plaintiffs are automatically engaging in abusive litigation. Just as it is perfectly legitimate for a landlord to rent her property instead of selling it, it is likewise perfectly legitimate for a patent owner to license her patent rights instead of manufacturing and selling products to customers. And just as it is legitimate for a landlord to sue a squatter for trespass, it is equally legitimate for a patent owner who licenses her property rights to sue for infringement.

None of this is to deny that there are individual cases of abusive behavior by litigants in the American court system. One such prominent example was MPHJ, which was properly sanctioned by the Federal Trade Commission for its false and deceptive practices in mass-mailing patent demand letters to small business owners across the country.<sup>31</sup> But the abusive behavior of a relatively small, narrow sub-class of patent owners is no reason to change the legal rules that millions of upstanding patent owners rely upon to protect their property rights. This is especially true when the vast majority of affected patent owners are individual inventors, small businesses, universities, and R&D-intensive high-tech and bio-pharma companies who are producing and commercializing the myriad innovative technologies that we rely upon every day, and who simply wish to protect their property rights against infringers.

## Conclusion

The main takeaway from *TC Heartland* is that it is now more expensive for everyday patent owners to protect their property rights against infringers. The fact that there was an ongoing lobbying effort to revise the venue rules in the patent statute while the *TC Heartland* litigation was progressing through the courts was not a coincidence. *TC Heartland* was simply part of an

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<sup>29</sup> See *supra* note 25 (listing scholarly critiques of both the methodology and findings of this study).

<sup>30</sup> See, e.g. Jonathan H. Astor et al., *Patents at Issue: The Data Behind the Patent Troll Debate*, 21 Geo. Mason L. Rev. 957, 963 (2013) (noting the lack of empirical research specifically directed to litigation behavior by “PAEs”). Others have suggested that abusive behavior seen with patents generally occurs outside of litigation, and is thus not unique to any district and would not be captured in any litigation behavior study. See Michael Risch, *A Generation of Patent Litigation: Outcomes and Patent Quality*, 52 San Diego L. Rev. 67, 78 n.41 (2015) (discussing abusive settlement demands).

<sup>31</sup> See Press Release, Federal Trade Commission, *FTC Settlement Bars Patent Assertion Entity From Using Deceptive Tactics* (Nov. 6, 2014), available at <https://www.ftc.gov/news-events/press-releases/2014/11/ftc-settlement-bars-patent-assertion-entity-using-deceptive>.

ongoing wide-ranging policy fight in which companies lobbying in D.C. and litigating in courts have broadly weakened U.S. patent rights. Now that the *TC Heartland* decision has followed the same pattern as many other recent Supreme Court decisions in which patent rights have been narrowed or outright eliminated,<sup>32</sup> Congress should take special care not to pursue any legislation that would further weaken inventors' ability to protect their property rights.

If Congress continues to consider patent legislation, there are some fundamental principles about the patent system that it should keep in mind. It is unhealthy for the patent system and for the U.S. innovation economy to myopically focus only on abuses by a small subset of patent owners without addressing—let alone even acknowledging—the widespread abuses by users or infringers of patented innovation. Moreover, it threatens the foundations of the innovation economy when the costs of systemic changes that weaken property rights are not taken into account. Cases like *TC Heartland* that make it harder for legitimate patent owners to protect their rights are not “reform”: they are a one-way ratchet eroding property rights for the inventors and companies that form the foundation of our innovation economy.

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<sup>32</sup> See *supra* note 12 (listing numerous decisions).