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Predictably Expensive: A Critical Look at Patent Litigation in the Eastern District of Texas

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PREDICTABLY EXPENSIVE: A CRITICAL LOOK AT PATENT LITIGATION IN THE EASTERN DISTRICT OF TEXAS

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Abstract: In this Essay, we compare U.S. patent litigation across districts and consider possible explanations for the Eastern District of Texas's popularity with patent plaintiffs. Rather than any one explanation, we conclude that what makes the Eastern District so attractive to patent plaintiffs is the accumulated effect of several marginal advantages—particularly with respect to the relative timing of discovery deadlines, transfer decisions, and claim construction—that make it predictably expensive for accused infringers to defend patent suits filed in East Texas. These findings tend to support ongoing efforts to pass patent reform legislation that would presumptively stay discovery in patent suits pending claim construction and motions to transfer or dismiss. However, we also observe that judges in the Eastern District of Texas tend to exercise their discretion in ways that dampen the effect of prior legislative and judicial reforms that were aimed (at least in part) at deterring abusive patent suits. Given the broad discretion courts have to control how cases proceed, this additional finding suggests that legislation restricting venue in patent cases may well be the single most effective reform available to Congress.

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INTRODUCTION

After two terms of serious congressional interest in patent reform, including the introduction of roughly twenty competing bills,[1] only only one piece of prospective reform legislation still stands a reasonable chance of passage: the VENUE Act.[2] Introduced in March by Senators Flake, Gardner, and Lee, the bill would (with few exceptions) limit where patent suits can be filed to only those districts in which the accused infringer is incorporated or in which either party has a "regular and established physical facility" for research or production.[3] Many predict that, despite the eventual failures of the many bills that came before, this rather brief piece of legislation has a legitimate shot at passing through Congress by the end of 2016.

Though you won't find it anywhere in the bill's text, the VENUE Act's target is crystal clear: the U.S. District Court for the Eastern District of Texas, a court made infamous as the location of choice for America's "patent trolls," companies formed solely for the purpose of monetizing patent rights through litigation, often using methods that seem to leverage the costs and burdens of litigation more so than the value of the patented technology.[4] Since the mid-2000s the Eastern District has established a reputation as a "renegade jurisdiction"[5] that actively cultivates, or at least tolerates,[6] an image as the go-

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[1] For a summary of the various bills introduced in the House and Senate since 2013, see Patent Progress's Guide to Federal Patent Reform Legislation, http://www.patentprogress.org/patent-progress-legislation-guides/patent-progresss-guide-patent-reform-legislation/ (last accessed Aug. 28, 2016).

[2] Venue Equity and Non-Uniformity Elimination Act of 2016, S. 2733, 114th Cong. (2016), *available at* https://www.congress.gov/bill/114th-congress/senate-bill/2733/. The VENUE Act has been referred to, for example, as a "last stand" or "last ditch effort" for patent reform supporters. *See* Holly Fechner et al., *Senators Introduce VENUE Act as Last Stand on Patent Legislation This Congress*, Global Policy Watch blog (Mar. 22, 2016), https://www.globalpolicywatch.com/2016/03/senators-introduce-venue-act-as-last-stand-on-patent-legislation-this-congress/; Andrew Williams, *The Venue Act – A Last-Ditch Attempt at Patent Reform*, Patent Docs blog (Mar. 28, 2016), http://www.patentdocs.org/2016/03/the-venue-act-a-last-ditch-attempt-at-patent-reform.html.

[3] S. 2733, *supra*, at § 2(a). This is not the first time Congress has considered venue reform for patent cases. Most recently, a patent-specific venue provision was included in the ultimately unsuccessful Patent Reform Act of 2006, S. 3818, 109th Cong. §8(a) (2006).

[4] For a general overview of how non-practicing patent holders can impose asymmetric costs in patent litigation and thereby induce nuisance value settlements, see Informational Hearing on Patent Assertion Entities before the California Assembly Select Committee on High Technology (Oct 30, 2013) (statement of Brian J. Love, Assistant Professor of Law, Santa Clara University), *available at* http://papers.ssrn.com/sol3/papers.cfm.?abstract_id=2347138.

[5] As Justice Scalia once famously referred to the district. Transcript of Oral Argument at 10-11, eBay v. MercExchange, 547 U.S. 388 (2006) (No. 05-130) ("[T]hat's a problem with Marshall, Texas, not with the patent law . . . . I don't think we should . . . write our patent law because we have some renegade jurisdictions."), *available at* https://www.supremecourt.gov/oral_arguments/argument_transcripts/05-130.pdf. Others have been more direct in expressing their displeasure with the court. *Texas Monthly* once dubbed the Eastern District of Texas "[maybe] the worst thing that ever happened to intellectual

to jurisdiction for patent litigation. In recent years word of the Eastern District of Texas spread far enough that the rural court and its judges have garnered attention from the likes of the New York Times,[7] VICE,[8] NPR,[9] and HBO's John Oliver.[10]

In this Essay, we take a close, up-to-date empirical look at how U.S. patent litigation plays out in districts across the nation and consider the extent to which the Eastern District of Texas's reputation is justified.[11] While the appeal of the Eastern District to patent plaintiffs is undeniable (almost 44 percent of all patent cases in 2015 were filed in the district), a simple explanation for the district's popularity is surprisingly hard to articulate. Though we find evidence that the Eastern District of Texas is relatively plaintiff-friendly in certain respects, we also observe that allegedly "defendant-friendly" jurisdictions[12] such as the Northern District of California have characteristics that in many respects are quite similar.[13]

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property law." Annette Waller & Loren Steffy, *Patently Unfair*, Texas Monthly, Oct. 2014, *available at* http://www.texasmonthly.com/politics/patently-unfair/. The court is also ranked ninth on the American Tort Reform Foundation's list of "Judicial Hellholes." Judicial Hellholes: U.S. District Court for the Eastern District of Texas, http://www.judicialhellholes.org/2015-2016/u-s-district-court-for-the-eastern-district-of-texas/ (last accessed Aug. 29, 2016).

[6] There is at least some evidence that the people of East Texas, if not also the judiciary, recognize and welcome the economics benefits that come from the local patent litigation boom. For example, Tyler4Tech, "a consortium of Tyler, Texas' local civic, education and private enterprise leaders, companies and organizations," touts on its website the region's "plaintiff-friendly local rules, speedy dispositions, and principled jurors who understand the value of Intellectual Property." Tyler4Tech, http://tyler4tech.com/index.html (last accessed Aug. 29, 2016). For a thorough examination of the phenomenon of "forum selling" in the Eastern District of Texas, including the indirect financial benefits of patent litigation for the local economy, *see* Daniel M. Klerman & Greg Reilly, *Forum Selling*, 89 S. Cal. L. Rev. 241 (2016).

[7] Julie Creswell, *So Small a Town, So Many Patent Suits*, N.Y. Times, Sept. 24, 2006; Edgar Walters, *Tech Companies Fight Back Against Patent Lawsuits*, N.Y. Times, Jan. 23, 2014.

[8] Kaleigh Rogers, *The Small Town Judge Who Sees a Quarter of the Nation's Patent Cases*, Motherboard, May, 5 2016, https://motherboard.vice.com/read/the-small-town-judge-who-sees-a-quarter-of-the-nations-patent-cases.

[9] *When Patents Attack!*, This American Life (NPR radio broadcast Jul. 22, 2011), *available at* http://www.thisamericanlife.org/radio-archives/episode/441/when-patents-attack.

[10] Last Week Tonight with John Oliver (HBO television broadcast Apr. 19, 2015), *available at* https://www.youtube.com/watch?v=3bxcc3SM_KA&noredirect=1.

[11] For a summary of inter-district variation in patent litigation during prior years, see, e.g., John Allison et al., *Understanding the Realities of Modern Patent Litigation*, 92 Tex. L. Rev. 1769 (2014); Jeanne C. Fromer, *Patentography*, 85 N.Y.U. L. Rev. 1444 (2010); Kimberly A. Moore, *Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation?*, 79 N.C. L. Rev. 889 (2001).

[12] Letter to Congress from 28 Law Professors & Economists Urging Caution on the VENUE Act, Aug. 1, 2016, http://cpip.gmu.edu/2016/08/01/law-professors-economists-urge-caution-

Rather than any one of the traditional narratives explaining the appeal of East Texas, we conclude that what makes the Eastern District so attractive to patent plaintiffs is the accumulated effect of several marginal advantages, particularly with respect to the timing and success rate of important pretrial events. To borrow a shopworn phrase, the devil is in the details—specifically the nitty gritty details of seemingly mundane procedural choices, like the relative timing of discovery deadlines, transfer decisions, and claim construction. This observation suggests to us that, among reforms like those included in the Innovation Act and other recent omnibus patent reform bills,[14] mandatory delays in discovery may be the most effective at protecting companies from abusive patent enforcement in East Texas and elsewhere.

However, we also find evidence that judges in the Eastern District of Texas have generally exercised their discretion in the past in ways that dampen the effect of prior patent reform measures and Supreme Court opinions that would otherwise have shifted leverage in patent suits away from "trolls" and toward accused infringers. This observation leads us to the conclusion that there may well be no simple fix, apart from venue reform, that will end the Eastern District of Texas's popularity with patent plaintiffs. Because judges have broad, and largely unappealable,[15] discretion to control when and how motions are heard and the way cases proceed in their courtrooms, almost any other reform may ultimately prove toothless if judges choose not to embrace them. As retired Magistrate Judge Judith Guthrie of Tyler, Texas once cautioned: "[a]nybody who applies to be a judge in the Eastern District knows what the deal is . . . . It's like an unspoken job

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on-venue-act-in-letter-to-congress/ (stating that the District of Delaware and the Northern District of California "are recognized as more friendly to defendants").

[13] In fact, the Eastern District of Texas adopted its local patent rules from those already in place in the Northern District of California. For a comparison of the districts' respective local rules, see Jenner & Block LLP, Chart Comparing the Local Patent Rules, https://jenner.com/system/assets/assets/6962/original/Local_20Patent_20Rules_20Chart.pdf (last accessed Aug. 28, 2016).

[14] In 2013, the Innovation Act, H.R.3309, 113th Cong. (2013), passed the House but ultimately stalled in the Senate. It was introduced again the next term, H.R. 9, 114th Cong. (2015), but again failed to gain traction. The Innovation Act included, among other reforms: a presumption that attorney's fees be awarded to prevailing parties in patent cases, mandatory discovery stays pending motions to transfer or dismiss, and codification of an expanded customer suit exception. *Id.*

[15] "District courts . . . are afforded broad discretion to control and manage their dockets, including the authority to decide the order in which they hear and decide issues pending before them." Amado v. Microsoft Corp., 517 F.3d 1353, 1358 (Fed. Cir. 2008). Intermediate, discretionary rulings like these are not immediately appealable, 28 U.S.C. § 1291 (limiting appellate jurisdiction to "final decisions of the district courts"), and, when appealed, are reviewed under a permissive "abuse of discretion" standard, Highmark, Inc. v. Allcare Health Mgmt. System, Inc., ("[D]ecisions on 'matters of discretion' are 'reviewable for abuse of discretion.'" (quoting Pierce v. Underwood, 487 U.S. 552, 558 (1988))).

description. It will continue until the bar decides to file elsewhere or until Congress changes the law."[16] Accordingly, restricting patentees' ability to file suit in East Texas in the first place may be the single most effective reform available to Congress.

I. THE EASTERN DISTRICT OF TEXAS'S POPULARITY

Looking first at patent caseloads nationwide, we re-confirm what has long been known: that the Eastern District of Texas is wildly popular with patent plaintiffs, particularly those whose core business is enforcing "high tech" patents.[17] As shown below in Table 1, more than a third of patent suits filed since 2014 were brought in the Eastern District.[18] In fact, one judge—Judge Rodney Gilstrap of Marshall, Texas—saw almost one quarter of all patent case filings nationwide during the same timeframe, more than all the federal judges in California, New York, and Florida combined.[19]

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[16] Waller & Steffy, *supra* note _.

[17] For more on the Eastern District of Texas's rise to prominence in patent litigation, see Yan Leychkis, *Of Fire Ants and Claim Construction: An Empirical Study of the Meteoric Rise of the Eastern District of Texas As a Preeminent Forum for Patent Litigation*, 9 Yale J. L. & Tech. 193 (2007); Xuan-Thao Nguyen, *Justice Scalia's "Renegade Jurisdiction": Lessons for Patent Law Review*, 83 Tulane L. Rev. 111 (2008) (presenting statistics on patent litigation in the Eastern District of Texas for the period 1996 to 2006); Andrei Iancu & Jay Chung, *Real Reasons the Eastern District of Texas Draws Patent Cases: Beyond Lore and Anecdote*, 14 SMU Sci. & Tech. L. Rev. 299 (2011) (presenting statistics on patent litigation in the Eastern District of Texas for the period 1991 to 2010).

[18] 28 U.S.C. § 1400(b) 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." 28 U.S.C. § 1391(d) states that, for venue purposes, a corporate defendant "shall be deemed to reside in any district . . . within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State." As interpreted by the Federal Circuit, these statutory rules make jurisdiction for patent suits proper in any federal district in which the accused product is sold. *In re* T.C. Heartland, LLC, No. 2016-105, at *10 (Fed. Cir. Apr. 29, 2016) (stating that jurisdiction exists "where a nonresident defendant purposefully shipped accused products into the forum through an established distribution channel and the cause of action for patent infringement was alleged to arise out of those activities"). As a result, a patentee contemplating suit against a national retailer, or the producer of any of its products, can essentially file suit in the district of its choice.

[19] According to Lex Machina, between 2014 and mid-2016 Judge Gilstrap saw 3,166 new patent suits, more than the combined total of all district courts in California, Florida, and New York: 2,656. Judge Gilstrap's popularity is attributable, at least in part, to the fact that he is currently assigned 95 percent of all civil cases filed in the Marshall Division. U.S. District Court for the Eastern District of Texas General Order No. 16-7, http://www.txed.uscourts.gov/cgi-bin2/view_document.cgi?document=25551. In most other districts, new cases are assigned randomly across all judges in the district (or across all judges in the district who are participating in the Patent Pilot Program). Because the Eastern District of Texas does not follow this convention, patentees that file suit in East Texas have the unique

What makes this level of concentration even more remarkable is where it takes place. East Texas saw more patent suits since 2014 than the districts that contain California's Silicon Valley, Massachusetts' Route 128, Detroit's Automation Alley, Illinois' Golden Corridor, and North Carolina's Research Triangle.[20] In contrast to the Northern District of California, which is home to a population of over 6.2 million residents, the Eastern District of Texas's population is (despite spanning three times as many counties) under 3.9 million.[21] Marshall, Texas, where almost a third of all patent suits are filed today,[22] has a population just shy of 25,000.[23] In short, rather than being a jurisdiction of convenience for America's tech industry, the Eastern District has attracted the majority of all patent suits in the U.S. despite lacking its own technology hub.[24]

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ability to select which judge will hear their case (with a high degree of probability) by filing suit in a division that assigns a large percentage of its civil docket to a particular judge. Prior standing orders on civil case assignment in the Eastern District likely also contributed to the outsized popularity of several former East Texas judges who attracted large patent dockets during their time on the bench. *See* Klerman & Reilly, *supra* note _, at 252-56 (noting, for example, that "at the outset of the Eastern District's popularity in 2006, patentees filing in the Marshall division were told they had a 70% chance of being assigned to Judge Ward, those filing in Tyler a 60% chance of Judge Davis, . . . and those filing in Texarkana a 90% chance of Judge Folsom").

[20] According to Lex Machina, between 2014 and mid-2016, 4,736 patent suits were filed in the Eastern District of Texas, while the Northern District of California saw 595 patent suits, the District of Massachusetts saw 154, the Eastern District of Michigan saw 159, the Northern District of Illinois saw 448, and the Middle and Eastern Districts of North Carolina collectively saw 79.

[21] A list of counties included in each judicial district can be found, for example, via the U.S. Marshals Service, https://www.usmarshals.gov/district/ (last accessed Aug. 29, 2016). Population estimates for Texas and California counties can be found, for example, here Population Estimates of Texas Counties, 2010-2015, https://www.tsl.texas.gov/ref/abouttx/popcnty2010-11.html (last accessed Aug. 29, 2016); California Counties by Population, http://www.california-demographics.com/counties_by_population (last accessed Aug. 29, 2016).

[22] According to Lex Machina, Judges Gilstrap and Schroeder of the Marshall Division collectively preside over 93 percent of all patent cases filed in the Eastern District of Texas.

[23] Population: Marshall, Texas, https://www.google.com/publicdata/explore?ds=kf7tgg1uo9ude_&met_y=population&idim=place:4846776&hl=en&dl=en (last accessed Aug. 29, 2016) (displaying data collected from the U.S. Census Bureau).

[24] Klerman & Reilly, *supra* note _, at 243 ("[The Eastern District of Texas] is home to no major cities or technology firms."). In fact, though the Eastern District's Sherman Division includes a portion of the Dallas-Fort Worth Metroplex—perhaps most notably several suburbs of Dallas located in Collin and Denton Counties—very few patent cases are filed in the Sherman Division. According to Lex Machina, Judges Crone, Mazzant, and Schell of the Sherman Division presided over just 44 of the 4,736 patent cases filed in the Eastern District during the period of our study.

Table 1: Patent Case Filings by District (Jan. 2014 - June 2016)[25]

	Num. Dist. Judgeships[26]	2014	2015	2016 (to 7/1)	Total	Total per Judgeship
E.D. Tex.	8	1427	2541	768	4,736	592
D. Del.	4	946	545	201	1,692	423
C.D. Cal.	28	335	300	153	788	28.1
N.D. Cal.	14	259	229	107	595	42.5
D.N.J.	17	286	272	110	668	39.3
N.D. Ill.	22	157	163	128	448	20.4
S.D.N.Y.	28	120	155	59	334	11.9
S.D. Fl.	18	111	131	85	327	18.2
S.D. Cal.	13	75	80	62	217	16.7
All Other Districts	535	1,371	1,409	568	3,348	6.3
J. Gilstrap	1	988	1686	492	3,166	3,166
All Except E.D. Tex.	679	3,660	3,284	1,473	8,417	12.4
Total	687	5,087	5,825	2,241	13,153	19.1

In addition to its sheer size, the population of cases in East Texas is also noteworthy for its composition. Table 2 shows that, far from a random assortment of cases, the Eastern District of Texas's caseload skews heavily toward computing and telecommunications technology, and is almost entirely made up of cases filed by patent assertion entities (PAEs)—companies that exist to monetize patents, rather than commercialize the technology they cover. While cases involving pharmaceutical and medical patents are primarily located in close proximity to where those industries are most concentrated—in California and New Jersey[27]—the same is not true for patents that cover computing technology. None of the U.S. computer

[25] LexMachina, All Court Case Filings by Year: All Patent Case Filed by Year, https://law.lexmachina.com/court/table#Patent-tab (last accessed August 21, 2016).

[26] These are counts of the total number of congressionally authorized judgeships in each district. U.S. Courts, Chronological History of Authorized Judgeships - District Courts, http://www.uscourts.gov/judges-judgeships/authorized-judgeships/chronological-history-authorized-judgeships-district-courts (last accessed August 21, 2016). The total count includes district judgeships on territorial courts. Note that not all judgeships were filled during the entire period of this study.

[27] Of the top ten pharmaceutical companies ranked by revenue earned in the U.S. in 2014, five are based in California and two in New Jersey. *Top 15 Pharma Companies in the US*, http://www.pmlive.com/top_pharma_list/us_revenues (last accessed Aug. 30, 2016). The other three are based in Europe. *Id.*

industry's most prolific patent applicants has so much as a single office in East Texas.[28]

The gulf between the locus of original innovation and of later patent assertion is likely explained in part by the fact that so few cases filed in East Texas are filed by companies that actually produce and sell technology. Instead, cases in the Eastern District of Texas are overwhelmingly filed by entities created expressly for the purpose of litigating patent suits. No other district comes even close. Because these parties generally lack a principal place of business—or, for that matter, assets other than the patents in suit—they have the flexibility to form an LLC and file suit wherever they deem most advantageous for litigation purposes.[29]

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[28] For a list of companies with the top ten largest U.S. patent portfolios (all of which are computing and electronics companies), see Joff Wild, *The biggest US patent portfolio is not owned by IBM, but by Samsung Electronics*, Intell. Asset Mgmt. blog, Apr. 11, 2016, http://www.iam-media.com/blog/detail.aspx?g=b174a267-c73b-4f99-aa9b-dd4b21f3e217. According to Lex Machina, since January 2014 only one of these ten companies filed a patent infringement case in the Eastern District of Texas, and that company filed just one suit. Hitachi Maxwell, Ltd. v. Top Victory Electronics (Taiwan) Co., No. 2:14-cv-01121 (E.D. Tex. 2014).

[29] Many have noted the proliferation of empty offices in East Texas leased by patent-holding LLCs for purposes of manufacturing an apparent connection to the Eastern District. *See, e.g.*, Allan Pusey, *Marshall Law: Patent Lawyers Flock to East Texas Court for its Expertise and 'Rocket Docket'*, Dallas Morning News, Mar. 26, 2006, at 1D ("Office suites housing nothing but banker's boxes and patent paperwork are not uncommon in Marshall."); *When Patents Attack!*, *supra* note _ (noting that a patentee filing suit in the Eastern District "has no researchers, no employees of any kind that we can find, and it's only place of business seems to be an empty office in a corridor of empty offices in a small town in Texas"); Timothy B. Lee, *These Empty Offices Are Costing the US Economy Billions*, Vox, June 8, 2016, http://www.vox.com/2016/6/8/11886080/patent-trolls-eastern-texas (describing and linking to a video of software developer Austin Meyer's attempt to visit the East Texas offices of several PAEs).

Table 2: Tech., Plaintiff, and Claim Types by District (Jan. 2014 - June 2016)[30]

	Technology at Issue in Case			PAE Cases	Declar. Judg. Actions
	Computing & Telecomm	Pharmaceutical & Medical	Other		
E.D. Tex.	91.8%	2.9%	5.3%	93.9%	0.3%
D. Del.	57.4	33.7	9.0	59.0	3.2
C.D. Cal.	39.5	8.2	52.3	44.9	8.1
N.D. Cal.	81.4	5.1	13.4	62.4	10.7
D.N.J.	20.5	68.7	10.8	18.3	4.0
N.D. Ill.	57.6	9.6	32.8	51.9	7.2
S.D.N.Y.	48.9	14.7	36.4	41.7	6.6
S.D. Fl.	65.9	9.1	25.0	66.5	6.1
S.D. Cal.	53.7	7.9	38.3	43.3	5.5
All Other Districts	38.6	12.7	48.7	38.0	7.8
All Except E.D. Tex.	47.1	20.1	32.8	45.3	6.6
Total	63.5	13.8	22.7	62.9	4.3

Finally, it is worth noting that the Eastern District of Texas's popularity is almost entirely driven by the preferences of patent enforcers, not those of accused infringers. Though it has been suggested by some that the Eastern District may be popular due to a general preference for efficiency and judicial expertise among all patent litigants,[31] case filing statistics do not bear this out. As shown above in Table 2, the Eastern District of Texas sees declaratory judgment filings at a rate well below the national average. In other

[30] We are grateful to Unified Patents for making this data available to us. We adopted the three technology classes used by Unified Patents, see Unified Patents, 2015 Patent Dispute Report, Dec. 31, 2015, https://www.unifiedpatents.com/news/2016/5/30/2015-patent-dispute-report ("High-tech = Technologies relating to Software, Hardware, and Networking. Medical = Technologies relating to Pharmaceuticals, Medical Devices, Health Related Technologies. Other = Technologies relating to Mechanical, Packaged Goods, Sporting Equipment and any other area outside of high-tech and medical patents.").

[31] *See* Samuel F. Baxter, *Eastern District of Texas: Fair and Just Patent Outcomes for Plaintiffs and Defendants*, Metro. Corp. Counsel, Sept. 1, 2007, http://www.metrocorpcounsel.com/articles/8817/eastern-district-texas-fair-and-just-patent-outcomes-plaintiffs-and-defendants; Christopher P. Gerardi, *Inside the Busiest Patent Court in America: A Discussion with Chief Judge Leonard Davis*, FTI J., Feb. 2014, http://ftijournal.com/article/inside-the-busiest-patent-court-in-america.

words, when accused infringers are given the opportunity to select the venue for litigation, they disproportionately choose a different court.

Viewed together, these findings give us pause. While the Eastern District's popularity alone may not be cause for serious concern,[32] we find that the court's appeal is not shared by all kinds of litigants. Since 2014, more than 90 percent of patent suits filed in East Texas were filed by PAEs enforcing high tech patents. Accused infringers, by contrast, chose to file suit in East Texas at a rate less than one tenth that seen in other districts. Moreover, there appears to be nothing special about the East Texas economy that explains this dichotomy. Rather, cases litigated in the Eastern District of Texas overwhelmingly involve patents covering inventions made elsewhere, asserted against parties located elsewhere, and by plaintiffs with little or no connection to the region prior to filing a complaint.[33]

II. WHY IS THE EASTERN DISTRICT OF TEXAS SO POPULAR?

While the Eastern District's popularity with patent enforcers has been well documented for years, there is less certainty on the reasons why this district has become the venue of choice for patent monetization. Reviewing the evidence, we find a number of plausible answers. However, we ultimately conclude that the answer is likely more complex than traditional narratives suggest.

A. Is the Eastern District of Texas a "Rocket Docket"?

One common explanation for the Eastern District of Texas's popularity is its reputation as a fast docket—i.e., a jurisdiction where cases proceed to trial quickly, which in turn allows plaintiffs to recover faster while placing greater pressure on defendants to settle.[34] Many current and former East Texas

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[32] In theory, at least. In practice, we question whether it is ever possible for a single judge or small group of judges to effectively oversee many thousands of lawsuits at once, regardless of the causes of action alleged.

[33] Klerman & Reilly, *supra* note _, at 255-56 ("[P]atent cases generally have a tenuous connection to the Eastern District based on the sale of a few allegedly infringing products somewhere in the district.").

[34] *See, e.g.*, Creswell, *supra* note _ ("What's behind the rush to file patent lawsuit here [in the Eastern District of Texas]? A combination of quick trials and plaintiff-friendly juries, many lawyers say."); Rogers, *supra* note _ (attributing the Eastern District of Texas's early popularity with patent plaintiffs to the district's lack of a criminal docket and, thus, relative speed in civil matters); Jeff Bounds, *New Patent Infringement Lawsuits in East Texas Shatter Records*, Dallas Morning News, Aug. 18, 2015 ("The Eastern District of Texas became popular with patent lawyers a decade ago when the federal judges there created a so-called

judges have reinforced this reputation by publicly expressing a preference for getting cases to trial, and quickly.[35] We find support for this hypothesis, but less than many might expect.

First, we do find that patent litigation generally moves quickly in the Eastern District of Texas. Eastern Texas patent cases tend to settle early (and at high rates), and when cases do not settle, they generally make it to trial faster than patent suits litigated in other courts. As shown below in Table 3, patent cases in the Eastern District that go to trial tend to make it to a jury in less than two years, about 5 months faster than the nationwide median. Among districts that saw at least 15 trials in the last two and a half years, the Eastern District has a median time-to-trial that is over two months faster than the next fastest court.

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rocket docket, allowing patent holders to move through the pretrial process more quickly and get to trial sooner.").

[35] *See* Symposium, *The History and Development of the EDTX as a Court with Patent Expertise: From TI Filing, to the First Markman Hearing, to the Present*, 14 SMU Sci. & Tech. L. Rev. 253, 263 (2011) ("We believe in trial by jury, the no-nonsense expectations of lawyers to act in a professional way, getting cases to trial quickly, firm trial settings, and not deviating from them." (quoting Judge Leonard Davis, retired)); John R. Bone & David A. Haas, *Interview with Former Chief Judge David Folsom of the U.S. District Court for the Eastern District of Texas*, Spring 2013, http://www.srr.com/article/interview-former-chief-judge-david-folsom-us-district-court-eastern-district-texas ("Judge Ward and I always tried to maintain a scheduling order that would have the case ready for trial within 18 months, maybe 24 months of the filing date . . . . I think we should always give thought to how to move the docket; do it quickly." (quoting Judge David Folsom, retired)).

Table 3: Patent Case Terminations, Settlements, and Trials by District (Jan. 2014 - June 2016)[36]

	Terminations		Settlements			Trials	
	Num.	Median Days to Term.	Num. (as % of all terms.)	Median Days to Settle.	% of Cases Settled w/in 1 Year	Num.	Median Days to Trial
E.D. Tex.	4,963	188	4,341 (87.5%)	174	81.50%	43	717
D. Del.	2,493	400	1,961 (78.7)	355	50.6	68	819
C.D. Cal.	982	251	640 (65.2)	240	64.1	15	795
N.D. Cal.	687	262	491 (71.5)	227	65.4	25	867
D.N.J.	591	266	307 (51.9)	182	67.8	23	801
N.D. Ill.	536	239	386 (72.0)	191	67.6	8	1482
S.D.N.Y.	378	227	269 (71.2)	157	74	17	868
S.D. Fl.[37]	337	120	228 (67.6)	99	93	3	454
S.D. Cal.	303	263	238 (78.5)	243	65.5	3	581
All Other Districts	3,779	259	2,726 (72.1)	237	66.5	101	1125
All Except E.D. Tex.	10,086	274	7,246 (71.8)	246	63.1	263	899
Total	15,049	237	11,587 (77.0)	210	70.0	306	861

We also observe that cases filed in the Eastern District of Texas tend to reach a faster conclusion regardless of the manner in which they are terminated. Among all cases terminated during the period we study, those in the Eastern District conclude about six months faster than those in the District of Delaware and close to two months faster than the national median.

Looking just at those cases that settle, we again see a similar pattern. Among all cases settled between 2014 and mid-2016, those in the Eastern District settled about four months faster than in the next most popular venue, the District of Delaware, and over two months faster than the national median. Looking closer still to cases that settled relatively quickly—within one year of

[36] We collected these statistics using Lex Machina. The medians reported are the median days to termination, settlement, or trial for all cases in the listed populations that were terminated, settled, or tried between January 1, 2014 and June 30, 2016.

[37] Statistics for the Southern District of Florida are skewed heavily by the actions of one patentee, Shipping and Transit, LLC (FKA ArrivalStar), which filed 110 suits in the district during the period of our study. These suits also terminated exceptionally quickly, settling after a median of just 65 days. For background on Shipping and Transit LLC's litigation tactics, see, e.g., Jacqueline Bell, *Notorious IP Plaintiff ArrivalStar Back On The Hunt*, Law360, Mar. 5, 2015, http://www.law360.com/articles/628275/notorious-ip-plaintiff-arrivalstar-back-on-the-hunt.

filing—we also see a disproportionate number in the Eastern District of Texas. While about seventy percent of patent cases nationwide settled in their first year, the Eastern District saw more than eighty percent of its cases end within a year after filing. In the District of Delaware, by comparison, only half of cases settled within one year. In fact, with the exception of the Southern District of Florida, which saw less than one-tenth as many terminations and trials during the same period of time, the Eastern District of Texas is the fastest venue among the top ten most popular to settlement, to trial, and to overall termination.

That said, the Eastern District is only marginally faster than many other districts, and it is not the overall fastest. Among the most popular districts for patent suits, that distinction goes to the Southern District of Florida, and nationwide to the Eastern District of Virginia, the original "rocket docket," where patent cases make it to trial more than twice as fast as those in the Eastern District of Texas.[38] Moreover, the Eastern District of Texas's popularity with patentees has continued to grow over time despite the district's rising case load and consequent drop in speed.[39] If speed were patentees' primary criteria for venue selection, we would expect to see cases filed across a larger number of districts in a manner that achieves a more natural equilibrium.

B. Are East Texas Judges and Juries Patentee-Friendly?

Yet another common explanation for East Texas's dominant position in patent litigation is a belief that the district is home to judges and jurors who

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[38] *See, e.g.*, Robert M. Tata, *Virginia's 'Rocket Docket' Continues To Roar*, Law360, Apr. 17, 2015, http://www.law360.com/articles/644064/virginia-s-rocket-docket-continues-to-roar ("[T]he Eastern District of Virginia—known nationally as the "Rocket Docket"—had the fastest trial docket in the country in 2014 . . . . for the seventh year in a row.").

[39] Leychkis, *supra* note _, at 210 ("[The Eastern District of Texas] patent docket has been slowing in recent years as the judges are inundated with more and more new cases."). Indeed, many have predicted (incorrectly so far) over the years that the Eastern District's popularity would eventually shift to other districts with faster dockets. *See, e.g.*, Tresa Baldas, *Texas IP Rocket Docket Headed for Burnout?*, Nat'l L.J., Dec. 28, 2004, http://www.nationallawjournal.com/id=900005541644/Texas-IP-Rocket-Docket-Headed-for-Burnout?slreturn=20160731164911; Fromer, *supra* note _, at 1483 ("[T]he Eastern District of Texas might be on the decline as an artificial cluster [of patent litigation], while the Western District of Wisconsin is an up-and-comer."); Pusey, *supra* note _, at 1D ("There is . . . trouble on the horizon [for the Eastern District of Texas]. Patent cases that used to take eight to 12 months to resolve are now taking 20 to 24 months. And districts in Pennsylvania and Wisconsin are promoting their own rocket dockets to bring intellectual property cases their way.").

are unusually sympathetic to plaintiffs.[40] Indeed, the district was a popular venue for mass tort cases before the rise of patent suits and many lawyers and judges in the area cut their teeth litigating these cases.[41] We also find statistical support for this hypothesis, but again less than conventional wisdom might suggest.

First, as shown below in Table 4, we find that judges in the Eastern District are less likely than their counterparts in other parts of the nation to grant motions to transfer. In fact, the U.S. Court of Appeals for the Federal Circuit has taken the extraordinary stop of issuing a writ of mandamus ordering the Eastern District to transfer a patent case four times since 2014, something it has otherwise done just once during the same period across all cases litigated in the other 93 districts.[42] In addition, we observe that when East Texas judges do transfer cases, they do so much later in the pre-trial process. Cases transferred out of the Eastern District of Texas are over twice as old as those transferred out of the Northern and Central Districts of California. Compared to the national average, the Eastern District of Texas takes more than 100 days longer to grant motions to transfer venue.

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[40] *See* Lee Cheng, *Patent Troll Venue Abuse Must Stop in the Eastern District of Texas*, TribTalk, Oct. 28, 2015 ("What makes trolls like [the Eastern District of Texas]? . . . . [T]he perception, and reality, that the district is favorable to plaintiffs. Historically, Eastern District patent cases have been propelled quickly toward high win rates and large damage awards favoring plaintiffs."); Bounds, *supra* note _ ("'While the Eastern District of Texas may not be the rocket docket it once was, and even though the size of jury verdicts has generally declined in recent years, the Eastern District of Texas still boasts an environment that is very friendly towards plaintiffs . . . .'" (quoting Tyler T. VanHoutan, Partner, Winston & Strawn)); *When Patents Attack!*, *supra* note _ ("Many people say that it has to do with juries in Marshall, they're famously plaintiff-friendly, friendly to patent owners trying to get a large verdict.").

[41] *See* Klerman & Reilly, *supra* note _, at 272 ("Long before East Texas was a hotbed for patent litigation, it was a focal point for personal injury, products liability, and medical malpractice litigation, including major class actions against the asbestos, pharmaceutical, and tobacco industries."). In fact, many attribute the rise of patent litigation in East Texas at least in part to the impact that tort reform had on the local tort docket. *See* Ronen Avraham & John M. Golden, *From PI to IP: Yet Another Unexpected Effect of Tort Reform*, U of Texas Law, Law and Econ Research Paper No. 211 (2012); Creswell, *supra* note _ ("In Marshall, an oft-told joke is that the passage of tort reform was when many local lawyers . . . moved out of personal injury and into intellectual property.").

[42] We calculated this statistic by searching DocketNavigator for Federal Circuit rulings that address requests for writs of mandamus. *See also* Paul R. Gugliuzza, *The New Federal Circuit Mandamus*, 45 Ind. L. Rev. 343, 346 (2012) ("Before December 2008 . . . the Federal Circuit had never granted a mandamus petition to overturn a transfer decision, denying each one of the twenty-two petitions it had decided on that issue. It is therefore surprising that the Federal Circuit has, on ten occasions since December 2008, granted mandamus to order the U.S. District Court for the Eastern District of Texas to transfer a patent case").

Table 4: Patent Case Motions to Transfers by District (Jan. 2014 - June 2016)

	Num.[43]	Grant	Deny	Other	Median Days to Transfer[44]
E.D. Tex.	346	164 (47.4%)	154 (44.5%)	28 (8.1%)	340
D. Del.	92	48 (52.2)	33 (35.9)	11 (11.9)	286
C.D. Cal.	46	20 (43.5)	24 (52.2)	2 (4.3)	165
N.D. Cal.	26	13 (50)	11 (42.3)	2 (7.7)	137
D.N.J.	25	17 (68)	5 (20)	3 (12)	290
N.D. Ill.	34	22 (64.7)	8 (23.6)	4 (11.8)	136
S.D.N.Y.	8	5 (62.5)	3 (37.5)	0 (0)	308
S.D. Fl.	31	23 (74.2)	8 (25.8)	0 (0)	161
S.D. Cal.	9	5 (55.5)	3 (33.3)	1 (11.1)	188
All Other Districts	289	145 (50.2)	135 (46.7)	9 (3.1)	279
All Except E.D. Tex.	560	298 (53.2)	230 (41.1)	32 (5.7)	189
Total	906	462 (51.0)	384 (42.4)	60 (6.6)	232

We also see that East Texas judges are disproportionately unlikely to grant motions for summary judgment of non-infringement or invalidity. As shown below in Table 5, judges in the Eastern District of Texas grant summary judgment in defendants' favor at a rate of about half the national average. A motion for summary judgment filed by an accused infringer litigating in a court outside the Eastern District is over 20 percentage points more likely to be granted at least in part than one filed in the Eastern District of Texas. As with motions to transfer, we also see that the Eastern District of Texas takes an unusually long time to grant summary judgment. Compared

[43] We calculated these statistics by searching DocketNavigator for motions to transfer filed between January 1, 2014 and June 30, 2016. Here and throughout, we adopt DocketNavigator's conventions for determining whether a motion was granted and/or denied: "Granted Includes orders (i) granting a motion, and (ii) recommending that a motion be granted. Denied Includes orders (i) denying a motion, (ii) denying a motion as moot, (iii) denying a motion without prejudice, (iv) striking a motion, (v) striking a motion without prejudice, (vi) vacating a motion, (vii) recommending that a motion be denied, and (viii) recommending that a motion be denied as moot. Partial Includes orders (i) denying or granting a motion in part, or (ii) recommending that a motion be denied and granted in part. Other Includes orders which were not included in Granted, Denied or Partial." DocketNavigator, Case Management, https://www.docketnavigator.com/stats (last accessed Sept. 2, 2016).

[44] We collected this statistic from Lex Machina. The medians reported are the median days to termination for cases in the listed populations that were terminated due to inter-district transfers between January 1, 2014 and June 30, 2016.

the Northern and Central Districts of California, the gap exceeds a year in duration. Even relative to the national median, the Eastern District is more than 100 days slower.

Table 5: Defendants' Motions for Summary Judgment in Patent Cases by District (Jan. 2014 - June 2016)

	Num.[45]	Grant	Deny	Partial	Other	Median Days to SJ[46]
E.D. Tex.	227	40 (17.6%)	135 (59.5%)	19 (8.4%)	33 (14.5%)	1053
D. Del.	243	78 (32.1)	94 (38.7)	44 (18.1)	27 (11.1)	969
C.D. Cal.	149	53 (35.6)	56 (37.6)	20 (13.4)	20 (13.4)	552
N.D. Cal.	163	55 (33.7)	72 (44.2)	25 (15.3)	11 (6.7)	694
D.N.J.	45	15 (33.3)	26 (57.8)	3 (6.7)	1 (2.2)	1273
N.D. Ill.	73	26 (35.6)	32 (43.8)	10 (13.7)	5 (6.8)	1180
S.D.N.Y.	58	25 (43.1)	25 (43.1)	6 (10.3)	2 (3.4)	1153
S.D. Fl.	26	12 (46.1)	13 (50)	1 (3.8)	0 (0)	662
S.D. Cal.	46	10 (21.7)	33 (71.7)	3 (6.5)	0 (0)	925
All Other Districts	607	204 (33.6)	305 (50.2)	62 (10.2)	36 (5.9)	944
All Except E.D. Tex.	1,410	478 (33.9)	656 (46.5)	174 (12.3)	102 (7.2)	909
Total	1,637	518 (31.6)	791 (48.3)	193 (11.8)	135 (8.2)	911

Next, because East Texas patent cases are both unlikely to be transferred out of the district and unlikely to be completely resolved by summary judgement, they are (unless settled first) disproportionately likely to go to trial. As shown below in Table 6, cases tried in the Eastern District are relatively likely to be tried to a jury, and East Texas juries are in turn disproportionately likely to side with patentees. That said, Eastern District jury verdicts are far from the most plaintiff-friendly in the country, and East Texas juries find for the patentee only slightly more often than the national average. Moreover, while damages awarded by East Texas juries exceed the national average by a large margin, median jury awards in East Texas are actually quite modest—a

[45] We calculated these statistics by searching DocketNavigator for motions for summary judgement filed by accused infringers in cases in the listed populations between January 1, 2014 and June 30, 2016.

[46] We collected this statistic from Lex Machina. The medians reported are the median days to termination in cases resolved by summary judgment (in favor of either party) between January 1, 2014 and June 30, 2016.

fact suggesting that, while large awards are certainly possible in East Texas patent trials, they are relatively rare.[47]

Table 6: Trials and Damages Awards in Patent Cases by District (Jan. 2014 - June 2016)

	Trials			Damages Awards			
	Num.[48]	% Jury Trials[49]	% Won by Patentee	Num.[50]	Median	Mean	Num. in Top 10 (2014-16)
E.D. Tex.	43	81.8%	60.0%	19	$6,970,381	$76,741,070	2
D. Del.	68	54.9	74.1	12	$15,500,000	$83,233,792	2
C.D. Cal.	15	45.5	20.0	3	$13,488,765	$48,372,672	1
N.D. Cal.	25	82.9	46.2	14	$8,320,000	$45,475,067	3
D.N.J.	23	0.0	54.5	0	--	--	0
N.D. Ill.	8	50.0	50.0	1	$15,884,106	$15,884,106	0
S.D.N.Y.	17	26.7	50.0	4	$3,494,518	$9,634,759	0
S.D. Fl.	3	75.0	50.0	2	$10,673,289	$10,673,289	0
S.D. Cal.	3	100.0	100.0	3	$2,166,654	$95,160,551	1
All Other Districts	101	61.5	55.3	33	$7,800,000	$18,419,845	1
All Except E.D. Tex.	263	56.2	57.9	72	$8,376,351	$38,190,010	8
Total	306	60.0	58.3	91	$8,099,943.00	$46,239,132.36	10

Finally, the district's high reversal rate on appeal tends to support the belief that the district is too friendly to patent plaintiffs.[51] As shown below in

[47] Patentees' ability to win large damages awards in the Eastern District of Texas is also supported by the fact that East Texas juries are responsible for six of the thirteen largest jury verdicts awarded in patent cases since 1995. *See* Chris Barry et al., 2014 Patent Litigation Study, PriceWaterhouseCoopers, at 7, *available at* https://www.pwc.com/us/en/forensic-services/publications/assets/2014-patent-litigation-study.pdf; Masimo Corp. v. Philips Elec. N. Am. Corp., No. 09-cv-00080 (D. Del. 2014) (awarding $466,774,783 in damages); Smartflash LLC v. Apple Inc., No. 13-cv-00447 (E.D. Tex. 2015) (awarding $532,900,000 in damages); VirnetX v. Apple, No. 14-cv-00371 (E.D. Tex. 2016) (awarding $625,633,841 in damages).

[48] We collected the number of trials and win rate from Lex Machina, looking at all trials conducted between 2014 and mid-2016.

[49] We collected the percentage of jury trials by searching DocketNavigator for verdicts and findings of fact issued in cases in the listed populations between 2014 and mid-2016. Thus, this statistic does not include any trials that settled or otherwise ended prematurely before a verdict was issued.

[50] We collected data on damages awards by searching DocketNavigator for awards issued in cases in the listed populations between 2014 and mid-2016. These statistics exclude any amounts awarded in default judgments.

Table 7, appeals from the Eastern District of Texas are disproportionately likely to be successful. Since 2014, the Federal Circuit has reversed the Eastern District of Texas, at least in part, in about 45 percent of appeals. Many other popular districts, by contrast, have affirmance rates that are twenty or more percentage points higher than the Eastern District's.[52]

Table 7: Patent Appellate Outcomes by District (Jan. 2014 - June 2016)[53]

	Num. Fed. Cir. Rulings	Affirmed	Reversed	Mixed	Other
E.D. Tex.	55	29 (52.7%)	17 (30.9%)	8 (14.5%)	1 (1.8%)
D. Del.	89	68 (76.4)	15 (16.9)	5 (5.6)	1 (1.1)
C.D. Cal.	52	41 (78.8)	5 (9.6)	5 (9.6)	1 (1.9)
N.D. Cal.	51	37 (72.5)	6 (11.8)	8 (15.7)	0 (0)
D.N.J.	30	23 (76.7)	3 (10)	4 (13.3)	0 (0)
N.D. Ill.	16	10 (62.5)	4 (25)	2 (12.5)	0 (0)
S.D.N.Y.	45	26 (57.8)	5 (11.1)	13 (28.9)	1 (2.2)
S.D. Fl.	16	9 (56.3)	5 (31.3)	1 (6.3)	1 (6.3)
S.D. Cal.	18	10 (55.5)	3 (16.7)	5 (27.8)	0 (0)
All Other Districts	207	126 (60.9)	41 (19.8)	31 (15.0)	9 (4.3)
All Except E.D. Tex.	524	350 (66.8)	87 (16.6)	74 (14.1)	13 (2.5)
Total	579	379 (65.5)	104 (18.0)	82 (14.2)	14 (2.4)

Overall, we find that while the Eastern District has among the most patentee-friendly outcomes in the U.S. However, we also observe that it is comparable in many respects to other districts that see far fewer filings. And in some respects, cases filed in the Eastern District of Texas actually have

[51] Interestingly, early on, many pointed to the Eastern District of Texas's low rate of reversal as evidence of a lack of bias in favor of patentees. *See* Pusey, *supra* note _, at 1D ("Judge [T. John] Ward . . . says [complaints about plaintiff-friendly bias are] overstated, and appellate statistics support his view. Only once has he been overruled in a patent matter, and even then, only partially.").

[52] *See also* Teresa Lii, *Shopping for Reversals: How Accuracy Differs Across Patent Litigation Forums*, 12 Chi.-Kent J. Intell. Prop. 31, 43-45 (2013) (finding that the Eastern District of Texas's reversal rate on appeal between 2009 and March 2012 was significantly higher than the overall mean); 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 ("The Federal Circuit affirmed decisions coming out of the patent hotbed of the Eastern District of Texas only 39 percent of the time in 2015, while the rate for other patent-heavy districts was around 70 percent . . . .").

[53] We collected the data in this table by searching DocketNavigator for Federal Circuit decisions issued between 2014 and mid-2016.

worse outcomes for patentees. Perhaps most notably, both the District of Delaware and that Northern District of California saw higher median and mean jury awards during our period of study, and both district held almost as many trials as the Eastern District despite seeing far fewer filings. Together, these findings once again make us skeptical that a marginal tendency to favor patent enforcers in substantive decision-making is the driving force behind the Eastern District's popularity. Though relative advantages on the merits likely play a role in the district's dominance of filings, they do not strike us as sufficiently stark on net to account for such a great disparity in filings.

C. Discovery Deadlines and Pretrial Motions Practice

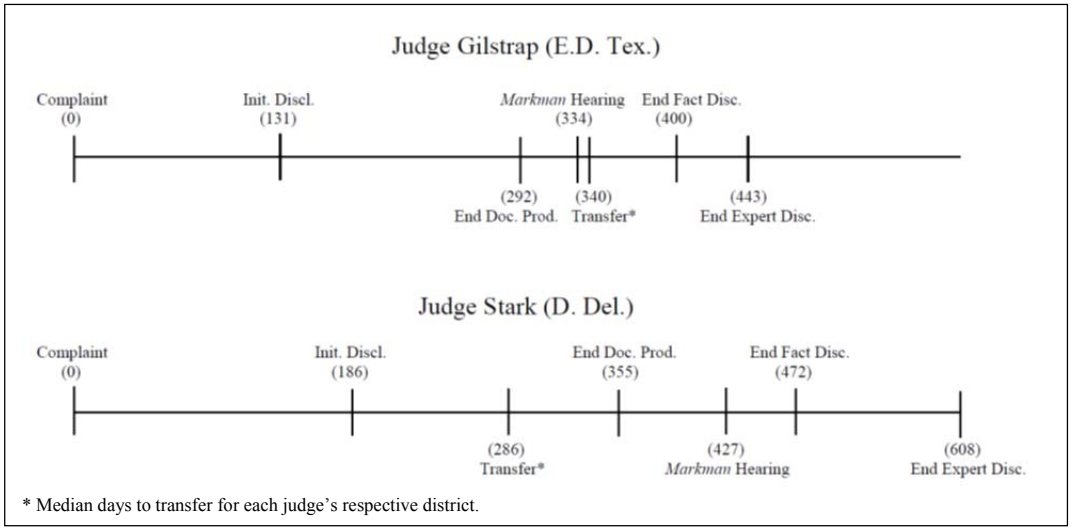
Ultimately we find neither traditional explanation particularly satisfying when viewed in isolation. Rather, we conclude that the true appeal of East Texas is more subtle and stems from the combined effect of a number of marginal procedural advantages, including the relative timing of discovery, rulings on procedural motions, and judicial scrutiny of infringement claims.

Figure 1 below shows a timeline of discovery and other pretrial deadlines taken from a sample of recent scheduling orders issued by Judge Gilstrap in cases litigated in the Eastern District of Texas and by Judge Leonard Stark, who has the largest patent docket in the District of Delaware.[54] The numbers shown in parentheses represent the median number of days from the complaint to each of the deadlines set in our sample of scheduling orders. In addition, we have added to each timeline the median number of days from filing to a ruling on motions to transfer for each judge's respective district.[55]

[54] Using Lex Machina, we identified the last ten scheduling orders issued by each judge prior to June 30, 2016. These orders are largely uniform across cases because both judges encourage litigants to refer to model scheduling orders. Sample Docket Control Order for Patent Cases Assigned to Judge Rodney Gilstrap and Judge Roy Payne, http://www.txed.uscourts.gov/cgi-bin/view_document.cgi?document=22244; Revised Patent Form Scheduling Order, http://www.ded.uscourts.gov/sites/default/files/Chambers/LPS/PatentProcs/LPS-PatentSchedOrder-Non-ANDA.pdf.

[55] *See supra* tbl. _.

Figure 1: Comparison of Median Number of Days from Filing to Various Pretrial Deadlines and Dates



As the figure shows, discovery both begins and ends earlier in cases litigated before Judge Gilstrap. Every discovery deadline occurs earlier on Judge Gilstrap's scheduling order, generally by 50 to 100 days. In fact, these figures probably understate the differential in practice because, in our experience, Judge Gilstrap is less likely than most judges to allow parties to later extend these deadlines.[56] As a result, parties sued for infringement in the Eastern District begin to incur discovery costs—the single largest expense in patent litigation[57]—faster than similarly situated defendants litigating elsewhere in the country.

i. Discovery, Transfer, and Markman *Dates*

At the same time, the districts also differ with respect to the timing of two other important pretrial events: rulings on motions to transfer and the date of claim construction, or *Markman*,[58] hearings. Compared to their colleagues in

[56] This was also true of other former Eastern District judges who were popular with patent case filers during their time on the bench. *See* Gerardi, *supra* note _ ("We have firm trial settings. I seldom grant a motion for continuance, thus one will get a fairly quick trial." (quoting Judge Leonard Davis, retired)).

[57] According to a survey of IP litigators, the median cost to defend a mid-sized patent suit (i.e., a suit with between $10 and $25 million at stake) through the end of discovery is $1.9 million, while the total cost through the end of trial is $3.1 million. Am. Intell. Prop. L. Assoc., 2015 Report of the Economic Survey I-111.

[58] Named after *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996) (holding that claim construction is a question of law to be resolved by the court).

the District of Delware, judges in the Eastern District of Texas take a relatively long time to rule on motions to transfer venue. By the time cases erroneously filed in East Texas are transferred to a new venue, most are a year old. By contrast, judges in the District of Delaware generally transfer cases about two months faster.

Moreover, the size of this gap alone understates the true impact that this dichotomy has on accused infringers. Because Judge Gilstrap also orders that document production be complete within about ten months of filing, the relative delay in transfers means that any defendant sued in the Eastern District (even those with no real connection to the venue) must generally complete document production according to the rules of that district, which (in addition to starting early) are unusually broad in scope. Judge Gilstrap's sample discovery order, for example, requires production or inspection of "all documents . . . that are relevant to the pleaded claims or defenses," a requirement written to be so broad that it "obviate[s] the need for requests for production."[59] Local Rule 26(a) also makes clear that when it comes to discovery in the Eastern District of Texas there are "No Excuses"— responses are required regardless of any "pending motions to dismiss, to remand, or to change venue."[60]

In addition, the relatively early deadlines for the completion of all other forms of discovery also weigh against accused infringers. In a median patent case litigated in the Eastern District of Texas, fact discovery will end 66 days sooner, and expert discovery 157 days sooner, than in the District of Delaware. As a result, otherwise similarly situated defendants litigating in East Texas will be required to incur the high costs of discovery more quickly than their counterparts litigating elsewhere. Once again, the duration of this gap alone understates the impact on accused infringers. As shown in Figure 1, both districts also differ with respect to the relatively timing of discovery cutoffs and the *Markman* hearing. As a result, even though Judge Gilstrap generally schedules *Markman* hearings two to three months earlier than Judge Stark, litigants in Delaware nonetheless have three months longer to conduct discovery post-*Markman*. In our experience, accused infringers (but not plaintiffs looking for a quick settlement) strongly prefer to conduct the bulk of their own discovery only after the court has ruled on the scope of the asserted

[59] Sample Discovery Order for Patent Cases Assigned to Judge Rodney Gilstrap and Judge Roy Payne, http://www.txed.uscourts.gov/cgi-bin/view_document.cgi?document=22243 (last accessed Sept. 1, 2016). The phrase "relevant to any party's claim or defense" is also broadly defined in the District's Local Rules. U.S. District Court for the Eastern District of Texas Local Rules and Appendices §26(d) (Dec. 1, 2015), www.txed.uscourts.gov/cgi-bin/view_document.cgi?document=1164

[60] U.S. District Court for the Eastern District of Texas Local Rules and Appendices §26(a) (Dec. 1, 2015), www.txed.uscourts.gov/cgi-bin/view_document.cgi?document=1164.

claims. Due to the inherent indeterminacy of patent claim scope, it is often unclear how a case will be litigated on the merits until after claim construction takes place.[61] As a result, Judge Gilstrap's scheduling practices often force defendants to decide whether to cram the most crucial aspects of their own discovery into the short window following claim construction or, instead, to shoot in the dark before important terms have been defined.

ii. Predictably Expensive

It is the combined effect of the series of procedural shifts described above that, we believe, actually explains the bulk of the Eastern District's popularity and its case composition. In combination, East Texas's tendency to impose relatively fast and firm discovery deadlines and to issue substantive rulings relatively late in cases facilitates precisely the kind of high volume, low value patent litigation that the Eastern District of Texas has become infamous for.[62] This is because the relative timing of discovery, transfer, and *Markman* ensures that, by virtue of being sued in the Eastern District, an accused infringer will be forced to incur large discovery costs, regardless of the case's connection to East Texas or the merits of its infringement contentions.

The result is an opportunity for patentees to file large numbers of cases and offer to settle them for amounts few defendants will find it rational to decline. And, indeed, that is what we see in the data discussed above: the Eastern District is uniquely attractive to plaintiffs that (i) do not sell products of their own, and thus have few documents of their own to produce, (ii) enforce high tech patents that can be asserted broadly against many accused infringers, and (iii) generally settle quickly. As shown below in Table 8, five of the ten patentees that filed the most suits during the period of our study filed exclusively in the Eastern District of Texas and another two filed the majority

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[61] On the difficulty inherent in determining claim scope, see, e.g., Dan L. Burk & Mark A. Lemley, *Quantum Patent Mechanics*, 9 Lewis & Clark L. Rev. 29 (2005); Mark A. Lemley, *The Changing Meaning of Patent Claim Terms*, 104 Mich. L. Rev. 101 (2005).

[62] As then-Chief Judge Leonard Davis once aptly put it: "If I could sum it up [i.e. why the Eastern District is so popular] in one word, I would say predictability." Gerardi, *supra* note _. As mentioned supra in note _, this predictability includes patentees' ability to select (with a very high degree of probability) which Eastern District judge will be assigned to their cases, something that isn't possible elsewhere in the country. *See* Symposium, *supra* note _, at 257-58 (explaining that one reason the Eastern District of Texas is more popular than other district with similar local patent rules is "that there is something happening in the Eastern District that you do not have in the big commercial areas—lawyers generally know who their judge is going to be in the Eastern District of Texas" (statement of Mike McKool, Partner, McKool Smith)). Accordingly, patentees who wish to take advantage of Judge Gilstrap's standard docket control and discovery orders can do so today with 95 percent certainty by filing suit in Marshall.

or plurality of their suits in East Texas.[63] Law firms have also specialized to meet the needs of high-volume litigants like these. The Tadlock Law Firm, for example, has represented patentees in over one thousand cases filed in the Eastern District of Texas since 2012. Those cases have a median time-to-termination of just 172 days, and only three have gone to trial.[64]

Though we lack data on settlement amounts, it is our personal experience that many cases in the Eastern District of Texas settle for between $30,000 and $100,000, amounts that reflect more than anything a fraction of the defendants' anticipated cost of defense.[65] We think it likely that the tendency toward large numbers of small settlements also explains, at least in part, the relatively low level of damage awards that we see in most East Texas trials. Because cases are litigated in this fashion, by the time many patents are tried to a jury (if ever) in the Eastern District of Texas, those patents have been licensed numerous times for small amounts. If entered into evidence, these prior licenses make it hard for the patentee to credibly ask the jury to award a large sum of damages.

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[63] *See also* John R. Allison et al., *Patent Quality and Settlement Among Repeat Patent Litigants*, 99 Geo. L.J. 677 (2011) (finding that patent plaintiffs that sued eight or more times were more likely than other patent enforcers to settle and also much more likely to lose on the merits of their cases if pushed to a trial or judgment).

[64] We collected this information from Lex Machina by searching for firms that have served as counsel in the largest number of patent suits.

[65] For additional anecdotal support consider, for example, the litigation practices of Lodsys and Innovatio. *See* David Ruddock, *Patent Trolls: What Is Lodsys Actually Asking App Developers to Pay? You Might Be Surprised*, Android Police (Nov. 2, 2011), http://www.androidpolice.com/2011/11/02/patent-trolls-what-is-lodsys-actually-asking-app-developers-to-pay-you-might-be-surprised; Gregory Thomas, *Innovatio's Infringement Suit Rampage Expands to Corporate Hotels*, Pat. Examiner, Sept. 30, 2011, http://patentexaminer.org/2011/09/innovatios-infringement-suit-rampage-expands-to-corporate-hotels.

Table 8: Most Frequent Patent Suit Filers (Jan. 2014 - June 2016)[66]

Party	Cases	% Filed in E.D. Tex.	% Terminated	Median Days to Term.	Trials
eDekka, LLC	231	100%	100%	162	0
Uniloc USA, Inc.	111	100	26	320	0
Shipping and Transit, LLC	160	0	84	65	0
Hawk Tech. Systems, LLC	149	8	88	107	0
Olivistar, LLC	103	99	98	182	0
Data Carriers, LLC	99	86	97	189	0
Eclipse IP, LLC	90	48	98	91	0
Blackbird Tech, LLC	72	0	53	336	0
Cryptopeak Solutions, LLC	66	100	73	131	0
Logitraq, LLC	59	100	100	130	0
Total	1,126	63	85	130	0

III. WHY HAVEN'T RECENT REFORMS AND APPELLATE OPINIONS REDUCED THE EASTERN DISTRICT'S POPULARITY?

This conclusion, however, raises the question of why reforms enacted in recent years—reforms targeted at PAEs and overbroad high tech patents—have not already put an end to East Texas's dominance. In this Part, we review evidence that judges in the Eastern District of Texas have generally ruled in ways that have minimized the effect of patent reform measures passed by Congress and changes in the law articulated by higher courts. We find that East Texas judges are disproportionately unlikely to stay cases pending post-grant challenges, to require that patentees litigate individual cases against individual defendants, to grant early motions to dismiss on patentable subject matter grounds, and to award attorney's fees to prevailing parties.

A. The America Invents Act

In 2011, Congress passed the America Invents Act (AIA), the largest set of reforms to U.S. patent law since 1952.[67] Among the reforms enacted in the AIA were two specifically designed to curb the practice of filing patent suits in order to extract settlements that largely reflect defendants' desire to avoid the high cost of defense, rather than the strength and value of the asserted claims.

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[66] The data in this table relies on a combination of information obtained from Unified Patents and Lex Machina. We obtain the names of the top 10 filers from Unified and collected case level information by searching Lex Machina for each party's name.

[67] Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011) (codified in scattered sections of 35 U.S.C.) [hereinafter "AIA"].

One such reform was the expansion of procedures for administratively challenging the validity of issued patents. Such procedures are designed to allow the public to eliminate patents they believe are invalid using patent office procedures that are faster, less expensive, and more broadly available than litigation in federal district court.[68] So far, the new procedures created by the AIA—particularly inter partes review and covered business method review—have proven very potent and, today, it is common for defendants to seek to invalidate patents asserted against them in court.[69] Concurrent with such challenges, defendants regularly file motions to stay patent suits for the roughly 18-month duration of the challenge.[70] In conjunction with litigation stays, post grant challenges allow an accused infringer to invalidate weak patent rights without first incurring the high cost of discovery.

However, as shown below in Table 9, judges in the Eastern District of Texas are less likely than their counterparts in other parts of the country to stay lawsuits pending patent office challenges of the patent-in-suit. Judges in the District of Delaware and Northern District of California grant motions to stay, at least in part, over 70 percent of the time. By contrast, the grant rate in the Eastern District of Texas is less than 58 percent. As a result, defendants sued in East Texas are more likely to continue to rack up litigation costs early in cases, regardless of the asserted patent's validity.

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[68] *See* H.R. 1907, 106th Cong, 1st Sess, in 145 Cong Rec 19278 (Aug. 3, 1999) (statement of Representative Dana Rohrabacher) ("This title was an attempt . . . to further encourage potential litigants to use the PTO as a [sic] avenue to resolve patentability issues without expanding the process into one resembling courtroom proceedings."); Protecting Small Businesses and Promoting Innovation by Limiting Patent Troll Abuse, Hearing on S .23 before the U.S. Senate Judiciary Committee, 113th Cong, 1st Sess *3–6, 8 (2013) ("2013 Patent Troll Abuse Hearing") (testimony of Q. Todd Dickinson, Executive Director of the American Intellectual Property Law Association), online at http://ipwatchdog.com/blog/dickinson-senate-testimony-12-17-2013.pdf (visited Oct 25, 2014) (recounting the debate leading up to the AIA and referring to "the assertion of allegedly invalid or overbroad patents" as "the very abuse for which AIA post-grant procedures were created").

[69] Roughly ten percent of patents litigated between 2012 and 2014 were also challenged in a post-grant proceeding. Brian J. Love, *New Developments, New IPR Strategies Before PTAB*, Presentation to the State Bar of California I.P. Law Section, at 12 (Mar. 23, 2016), *available at* http://digitalcommons.law.scu.edu/facpubs/925/ (reporting statistics compiled by Unified Patents). Of patents challenged in post-grant proceedings between 2012 and 2014, about 80 percent were also asserted in court. *Id.*

[70] Between 2014 and mid-2016, litigants filed almost 1,000 motions to stay litigation pending an inter partes or covered business method review. *See* tbl. _ *infra*.

Table 9: Motions to Stay Pending PTAB Proceedings by District (Jan. 2014 - June 2016)[71]

	Motions to Stay Pending Inter Partes Review					Motions to Stay Pending Covered Bus. Method Review				
	Num.	Grant	Deny	Partial	Other	Num.	Grant	Deny	Partial	Other
E.D. Tex.	88	46 (52.3%)	36 (40.9%)	4 (4.5%)	2 (2.3%)	43	21 (48.8%)	18 (41.9%)	1 (2.3%)	3 (7.0%)
D. Del.	95	59 (62.1)	28 (29.5)	5 (5.3)	3 (3.1)	6	2 (33.3)	2 (33.3)	2 (33.3)	0 (0)
C.D. Cal.	53	29 (54.7)	15 (28.3)	4 (7.5)	5 (9.4)	8	4 (50)	4 (50)	0 (0)	0 (0)
N.D. Cal.	112	68 (60.7)	23 (20.5)	15 (13.4)	6 (5.3)	10	7 (70)	2 (20)	1 (10)	0 (0)
D.N.J.	10	6 (60)	4 (40)	0 (0)	0 (0)	0	0 (0)	0 (0)	0 (0)	0 (0)
N.D. Ill.	36	27 (75)	6 (16.7)	2 (5.5)	1 (2.8)	11	6 (54.5)	3 (27.3)	2 (18.2)	0 (0)
S.D.N.Y.	24	16 (66.7)	4 (16.7)	0 (0)	4 (16.7)	7	5 (71.4)	1 (14.3)	0 (0)	1 (14.3)
S.D. Fl.	11	8 (72.7)	2 (18.2)	0 (0)	1 (9.1)	3	3 (100)	0 (0)	0 (0)	0 (0)
S.D. Cal.	21	9 (42.9)	6 (28.6)	4 (19.0)	2 (9.5)	7	6 (85.7)	1 (14.3)	0 (0)	0 (0)
All Other Districts	362	215 (59.4)	97 (26.8)	26 (7.2)	24 (6.6)	48	31 (64.6)	10 (20.8)	3 (6.3)	4 (8.3)
All Except E.D. Tex.	724	437 (60.3)	185 (25.5)	56 (7.7)	46 (6.3)	100	64 (64)	23 (23)	8 (8)	5 (5)
Total	812	483 (59.5)	221 (27.2)	60 (7.4)	48 (5.9)	143	85 (59.4)	41 (28.7)	9 (6.3)	8 (5.6)

The AIA also sought to limit the ability of patentees to accuse a large number of parties of infringement in a single suit. Pre-AIA it was common for litigious patentees to sue many—sometimes dozens of—unrelated parties in a single suit.[72] This practice, while efficient for the patentee, often disadvantaged defendants sued en masse.[73] Suing large numbers of parties in a single case, for example, allowed patentees to leverage one defendant's local ties to help keep litigation against many others in East Texas. In addition, patentees also benefited from rules restricting all co-defendants to a single brief or allotment of time for argument or trial. In the AIA, Congress sought to limit plaintiffs' ability to file these suits by changing the rules for joinder in patent cases.[74] As the law reads today, joinder of multiple accused infringers

[71] All figures in this table were collected by searching DocketNavigator for motions to stay that were decided between 2014 and mid-2016.

[72] *See, e.g.*, John S. Pratt & Bonnie M. Grant, *Beware the Trolls: Explorers or Buccaneers*, Pat. World, Nov. 2008, at 18 (reporting that patentee Clear with Computers, LLC once sued forty-seven defendants in a single suit).

[73] *See* Klerman & Reilly, *supra* note _, at 257-60 (summarizing the Eastern District of Texas's liberal stance on joinder and the negative effects it can have on accused infringers sued in multi-defendant cases).

[74] *See* Tracie L. Bryant, Note, *The America Invents Act: Slaying Trolls, Limiting Joinder*, 25 Harv. J.L. & Tech. 687 (2012) (noting that on the day before the AIA's new joiner rules went

is no longer permissible "based solely on allegations that they each have infringed the patent or patents in suit."[75]

However, as shown below in Table 10, it has become common in the Eastern District of Texas for individual patent cases filed by the same plaintiff to be consolidated post-filing back into what is effectively a single suit for pre-trial purposes. Though grant rates are relatively high for these motions nationwide, judges in the Eastern District of Texas grant them virtually every time. In addition, while these motions are relatively rare in most other districts, they are common in East Texas. On a per case basis, the Eastern District of Texas sees three times more motions to consolidate than the District of Delaware and Northern District of California. In absolute terms, the Eastern District of Texas sees more motions to consolidate than all other districts combined. In fact, these statistics likely understate the gap between districts because, in our experience, it is common for judges in the Eastern District to consolidate cases sua sponte, without a motion ever being filed.[76]

Table 10: Consolidation of Patent Cases by District (Jan. 2014 - June 2016)[77]

	Num.	Grant	Deny	Partial	Other
E.D. Tex.	552	542 (98.2%)	7 (1.3%)	3 (0.5%)	0 (0%)
D. Del.	68	62 (91.2)	5 (7.3)	1 (1.5)	0 (0)
C.D. Cal.	38	25 (65.8)	4 (10.5)	6 (15.8)	3 (7.9)
N.D. Cal.	24	21 (87.5)	3 (12.5)	0 (0)	0 (0)
D.N.J.	116	108 (93.1)	7 (6.0)	0 (0)	1 (0.9)
N.D. Ill.	13	11 (84.6)	1 (7.7)	1 (7.7)	0 (0)
S.D.N.Y.	13	8 (61.5)	4 (30.8)	0 (0)	1 (7.7)
S.D. Fl.	20	10 (50)	6 (30)	0 (0)	4 (20)
S.D. Cal.	16	14 (87.5)	2 (12.5)	0 (0)	0 (0)
All Other Districts	156	119 (76.3)	27 (17.3)	8 (5.1)	2 (1.3)
All Except E.D. Tex.	464	378 (81.5)	59 (12.7)	16 (3.4)	11 (2.4)
Total	1016	920 (90.5)	66 (6.5)	19 (1.9)	11 (1.1)

into effect, NPEs filed "over fifty patent infringement cases . . . against more than 800 defendants").

[75] AIA, *supra* note _, sec. 19(d), § 299, 125 Stat. 284, 332-33 (codified at 35 U.S.C. § 299).

[76] During the first six months of 2016, judges in the Eastern District of Texas issued 121 sua sponte consolidation orders. During the same period of time, all other districts issued just 24. DocketNavigator, Search: Documents, https://www.docketnavigator.com/browse/ (searching for litigation events labeled "sua sponte motion to consolidate").

[77] All figures in this table were collected by searching DocketNavigator for motions to consolidate decided between 2014 and mid-2016.

In short, though one might have expected ex ante that the AIA would shrink the Eastern District of Texas's case load, it appears to have done precisely the opposite. Since 2012, the Eastern District of Texas's share of patent litigation has only grown.[78] While other districts generally embraced the new reforms, judges in East Texas were more reluctant to break with tradition and, as a result, the Eastern District retained and attracted cases filed by patentees who also preferred the old way.

B. Recent Supreme Court Opinions

In addition to congressional action, the Supreme Court has also recently modified several patent law doctrines in ways that tend to favor accused infringers. In these areas as well, we observe that the Eastern District of Texas has been reluctant embrace change.

First, in *Alice v. CLS Bank* the Supreme Court tackled the patentability of software, a topic that had deeply divided the Federal Circuit for years.[79] As interpreted by lower courts, *Alice* all but precludes the patentability of business methods, including those implemented in software.[80] Another result of the case was that, soon thereafter, many courts began disposing cases asserting business method patents on the pleadings, without need for discovery or other pretrial proceedings. In our experience, this type of quick adjudication generally allows for business method cases to be defended for five figures in costs, far more efficiently even than filing an inter partes or covered business method review.[81] However, as shown below in Table 11,

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[78] Patent suits in the Eastern District of Texas have increased since 2012, both in absolute terms and as a share of all patent litigation nationwide. According to Lex Machina, 1,251 new patents cases were filed in the Eastern District of Texas in 2012 compared to a national total of 5,461 patent cases. In 2015, the Eastern District saw 2,541 new patent cases, compared to 5,821 nationally. Patent Cases Filed by Year, https://law.lexmachina.com/court/table#Patent-tab (last accessed Sept. 2, 2016).

[79] Alice Corp. Pty. Ltd. v. CLS Bank Int'l, 573 U.S. _, 134 S. Ct. 2347 (2014).

[80] *See, e.g.*, Robert R. Sachs, *Two Years After Alice: A Survey of the Impact of a "Minor Case" (Part 1)*, Bilski Blog, June 16, 2016, http://www.bilskiblog.com/blog/2016/06/two-years-after-alice-a-survey-of-the-impact-of-a-minor-case.html (showing the impact of *Alice* on patent litigation, particularly with respect to asserted "software" and "business method" patents); Robert R. Sachs, *Two Years After Alice: A Survey of the Impact of a "Minor Case" (Part 2)*, Bilski Blog, June 20, 2016, http://www.bilskiblog.com/blog/2016/06/two-years-after-alice-a-survey-of-the-impact-of-a-minor-case-part-2.html (showing the impact of *Alice* on patent prosecution, particularly with respect to the rate of patentable subject matter rejections in Tech Center 3600, "Business Methods, Construction, Transportation").

[81] Inter partes review, for example, generally costs well over a quarter million dollars. Am. Intell. Prop. L. Assoc., 2015 Report of the Economic Survey I-141 (reporting a median cost of $275,000 to pursue an inter partes review through a hearing before the Patent Trial and Appeal Board).

judges in the Eastern District of Texas have been reluctant to embrace this new practice. On a per case basis, defendants in the Eastern District of Texas filed three to four times fewer motions to dismiss than those sued in other popular districts. We do not believe this lack of motions to reflect a lack of merit in potential arguments, but rather an understanding that such motions would not be viewed favorably by the court. For example, for a period of time, Judge Gilstrap took the exceptional step of requiring parties to request permission in writing to file an early motion to dismiss based on *Alice*.[82]

In addition to seeing a relatively small number of early *Alice* motions, judges in the Eastern District also grant these motions at a relatively low rate—ten percentage points below the national average. Moreover, if we are right about litigants' reluctance to file these motions in the first place, those motions filed in East Texas likely represent among the strongest motions that might otherwise have been filed and, thus, the figures report here likely understates to true gap among districts' grant rates.

Table 11: *Alice* Motions to Dismiss in Patent Cases by District (Jan. 2014 - June 2016)[83]

	Num.	Grant	Deny	Partial	Other
E.D. Tex.	20	8 (40%)	10 (50%)	1 (5%)	1 (5%)
D. Del.	27	11 (40.7)	8 (29.6)	8 (29.6)	0 (0)
C.D. Cal.	9	5 (55.5)	3 (33.3)	1 (11.1)	0 (0)
N.D. Cal.	7	4 (57.1)	2 (28.6)	1 (14.3)	0 (0)
D.N.J.	5	1 (20)	4 (80)	0 (0)	0 (0)
N.D. Ill.	9	6 (66.7)	3 (33.3)	0 (0)	0 (0)
S.D.N.Y.	2	0 (0)	1 (50)	1 (50)	0 (0)
S.D. Fl.	0	0 (0)	0 (0)	0 (0)	0 (0)
S.D. Cal.	2	1 (50)	1 (50)	0 (0)	0 (0)
All Other Districts	42	26 (61.9)	10 (23.8)	5 (11.9)	1 (2.4)
All Except E.D. Tex.	103	54 (52.4)	32 (31.1)	16 (15.5)	1 (1.0)
Total	123	62 (50.4)	42 (34.1)	17 (13.8)	2 (1.6)

[82] *See, e.g.*, Kevin Penton, *Judge Gilstrap Rewrites Rules For Alice Motions In Texas*, Law360, Nov. 12, 2015, http://www.law360.com/articles/726270/judge-gilstrap-rewrites-rules-for-alice-motions-in-texas.

[83] All figures in this table were collected by searching DocketNavigator for motions to dismiss decided between 2014 and mid-2016 that cite to *Alice v. CLS Bank* (i.e., included the text "Alice" within six words of the text "CLS").

The Supreme Court again made waves in the patent world in *Octane Fitness v. ICON Health & Fitness* when it lowered the bar for awarding attorney's fees to prevailing parties in patent suits.[84] The decision came at a time when Congress was considering the Innovation Act, which would have made fee awards all but mandatory in patent suits, and the Court may well have been influenced by congressional interest in deterring abusive patent assertion.[85] Since that time, fee awards in patent suits have become both more common and more substantial in size.[86]

However, as shown below in Table 12, this shift has not been uniform across districts. Compared to the national average, the Eastern District of Texas has seen fewer motions (per case), granted motions at a lower rate, and awarded smaller amounts for those that were granted. Perhaps most remarkable is the dichotomy with respect to the size of awards given. Among the most popular districts for patent litigation, the Eastern District is the only to have median and mean awards that fail to break into the six figures.

[84] Octane Fitness, LLC v. ICON Health & Fitness, Inc., 134 S.Ct. 1749 (2014) (rejecting the Federal Circuit's rigid, two-part test for determining whether a patent suit was "exceptional" for purposes of awarding attorney's fees under 35 U.S.C. § 285).

[85] At the time of the opinion, the Innovation Act, H.R.3309, 113th Cong. (2013), was pending in Congress.

[86] *See* Hannah Jiam, Note, *Fee-Shifting and Octane Fitness: An Empirical Approach Toward Understanding "Exceptional"*, 30 Berkeley Tech. L.J. 611 (2015); Federal Circuit Bar Association, *A Comparison of Pre Octane and Post Octane District Court Decisions on Motions for Attorneys' Fees Under Section 285*, (attached to a letter from Edgar Huang, President Elect of the FCBA, to the Senate Judiciary Committee dated Apr. 13, 2015), *available at* http://www.thenalfa.org/files/FCBA-Fee-Shifting-Paper.pdf.

Table 12: Attorney Fee Motions and Awards in Patent Cases by District (Jan. 2014 - June 2016)[87]

	Motions for Fees					Fee Awards		
	Num.	Grant	Deny	Partial	Other	Num.	Median	Mean
E.D. Tex.	36	5 (13.9%)	26 (72.2%)	0 (0%)	5 (13.9%)	26	$14,849	$76,053
D. Del.	46	9 (19.6)	30 (65.2)	4 (8.7)	3 (6.5)	8	$1,197,757	$2,275,452
C.D. Cal.	48	15 (31.3)	29 (60.4)	3 (6.3)	1 (2.1)	8	$494,481	$995,934
N.D. Cal.	38	5 (13.1)	22 (57.9)	6 (15.8)	5 (13.1)	8	$1,004,708	$1,940,818
D.N.J.	12	4 (33.3)	7 (58.3)	0 (0)	1 (8.3)	2	$2,995,842	$2,995,842
N.D. Ill.	16	2 (12.5)	7 (43.7)	6 (37.5)	1 (6.3)	23	$7,500	$437,177
S.D.N.Y.	19	5 (26.3)	10 (52.6)	3 (15.8)	1 (5.3)	5	$739,743	$1,023,830
S.D. Fl.	18	4 (22.2)	13 (72.2)	0 (0)	1 (5.5)	5	$337,553	$1,345,895
S.D. Cal.	13	7 (53.8)	5 (38.5)	0 (0)	1 (7.7)	2	$208,357	$208,357
All Other Districts	227	39 (17.2)	136 (59.9)	15 (6.6)	37 (16.3)	36	$315,734	$1,119,034
All Except E.D. Tex.	437	90 (20.6)	259 (59.3)	37 (8.5)	51 (11.7)	97	$288,857	$1,137,061
Total	473	95 (20.1)	285 (60.3)	37 (7.8)	56 (11.8)	123	$88,902	$912,783

In short, while both Congress and the Supreme Court have modified patent law and procedure in ways that tend to benefit accused infringers, the manner in which cases are conducted in the Eastern District of Texas has dulled the effects of these modifications. While some have asserted that the Eastern District of Texas has developed practices designed to protect the local market for patent litigation,[88] our data is insufficient to support such an assertion. Nevertheless, it is a fact that the Eastern District of Texas's popularity has only grown in the years since the AIA's passage.

IV. ANALYSIS

Viewed as a whole, our findings suggest to us that Congress should consider placing new limits on discovery and venue in patent suits. Though patent litigation in the Eastern District of Texas tends to favor patentees in several respects, our observations lead us to conclude that the driving force behind the jurisdiction's popularity is the combination of plaintiffs' ability to

[87] All figures in this table were collected by searching DocketNavigator for motions for attorney's fees filed between 2014 and mid-2016

[88] For a discussion of whether the judges of the Eastern District of Texas engage in intentional "forum selling" in order to attract patent litigation for the benefit of the local economy, themselves, and their families, see Klerman & Reilly, *supra* note _.

impose early, broad discovery obligations on accused infringers and defendants' inability to obtain an early procedural or substantive victory through motion practice. Together, these facts make the jurisdiction attractive to PAEs with a high-volume, low-rate patent monetization strategy. Simply by filing a complaint in the Eastern District, these plaintiffs can predictably and consistently impose large costs on their opponents and leverage those costs to extract settlements that largely reflect a percentage of a defendant's expected litigation costs from virtually any infringer, no matter where they are located in the U.S.

One way to counteract this leverage—and in turn to shift the focus of patent suits from an accounting of discovery costs to an assessment of the merits of the claim—would be to place strict limits on discovery early in patent suits. Reforms like those found in various iterations of the Innovation Act strike us as particularly promising examples. As passed by the House in 2013, section 3(d) of the bill would have strictly limited discovery in patent suits prior to claim construction.[89] As reintroduced in 2015, a modified version of this subsection would have stayed discovery altogether pending resolution of pretrial motions, including motions to transfer and motions to dismiss on the pleadings.[90] Both reforms would have a significant impact on pretrial practice in the Eastern District of Texas. Today in the Eastern District of Texas defendants are generally required to complete document production—a task that alone can cost six- or even seven-figures[91]—well before the court has held a claim construction hearing, let alone made a ruling, and about fifty days before the court might grant a motion to transfer. Recent experience with rule changes in the District of Delaware also tends to suggest that reforms shifting the relative timing of substantive decisions and discovery can be quite effective. In 2014, Judges Stark and Robinson of the District of Delaware both modified their scheduling practices for patent cases to allow early claim construction decisions.[92] In response, case filings in Delaware fell precipitously, with most plaintiffs shifting their new cases to East Texas.[93]

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[89] Innovation Act, H.R.3309, 113th Cong. § 3(d) (2013), (stating that "if the court determines that a ruling relating to the construction of terms used in a patent claim asserted in the complaint is required, discovery shall be limited, until such ruling is issued, to information necessary for the court to determine the meaning of the terms used in the patent claim . . . .").

[90] Innovation Act, H.R. 9, 114th Cong. § 3(d) (2015) (stating that "discovery shall be stayed if . . . the defendant moves to . . . transfer the action . . . or . . . dismiss the action pursuant to Federal Rule of Civil Procedure 12(b) . . . .").

[91] For example, a study of 45 federal civil cases conducted by the RAND Institute for Civil Justice found a median document production cost (i.e., the total cost of collection, processing and privilege review) of $1.8 million. Nicholas M. Pace & Laura Zakaras, Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery 17-18 (2012), http://www.rand.org/content/dam/rand/pubs/monographs/2012/RAND_MG1208.pdf.

[92] *See, e.g.*, Barnes & Thornburg, LLP, *"The Times They Are A-Changin'" – Delaware's Judge Stark Outlines New Patent Case Management Practices*, Nat'l L. Rev., May 16, 2014,

While demonstrating just how effective pretrial modifications can be, patentees' reaction to Delaware's rule change also reveals how permissive venue rules can easily scuttle otherwise effective reforms. If judges have discretion to implement the rules in ways that tend to dull their effectiveness, plaintiffs can and likely will flock to jurisdictions that fail to fully embrace reforms. The end result may well be a "race to the bottom" that exacerbates, rather than eases, the flow of cases to plaintiff-friendly jurisdictions. In the wake of the AIA and scheduling changes in the District of Delaware, this appears to be precisely what we see today in Marshall, Texas.

This fact, in turn, suggests to us that venue reform may be the single most effective reform available to policymakers. Procedural reforms, by their very nature, are hard to implement and even harder to police. Indeed, the discovery reforms found in both versions of the Innovation Act, though nominally mandatory, are each followed by a list of discretionary exceptions.[94] Though reasonable on their face, exceptions like these nonetheless leave the door open for individual districts to exercise their discretion in a manner that reduced the impact of reforms and reinforces plaintiffs' desire to litigate there. One way to prevent a race to the bottom is to cancel the race altogether. Passing legislation like the VENUE Act would be a significant step in the right direction.

CONCLUSION

Using recent data on patent litigation across the U.S., we examined the Eastern District of Texas's status as an outlier. While the district stands out greatly in terms of quantity of case filings, we see less clear evidence for a simple explanation. Though the Eastern District is relatively fast and relatively friendly to patentees on the merits of their claims, other popular districts often have comparable statistics and occasionally even surpass the

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http://www.natlawreview.com/article/times-they-are-changin-delaware-s-judge-stark-outlines-new-patent-case-management-pr.

[93] *See* Jennifer J. Jedra, *New Patent Suits in Eastern District of Texas Shatter Records*, http://www.myerswolin.com/general/new-patent-suits-in-eastern-district-of-texas-shatter-records/ (reporting that "only 101 new patent cases were filed in the District of Delaware in the second quarter [of 2014]" including "[j]ust six . . . from high-volume plaintiffs . . . . because plaintiffs . . . see the court's early Markman hearings as a negative in getting defendants to settle cases there . . . . in contrast to the Eastern District of Texas, which generally holds claim construction hearings after a great deal of pretrial discovery has been done"); Brian J. Love, 2015 Patent Litigation Update, Presentation at the Corporate Intellectual Property Strategy Conference, at 10 (Nov. 17, 2015), *available at* http://digitalcommons.law.scu.edu/facpubs/911/ (showing that the growth of patent cases filed in the Eastern District of Texas between 2014 and 2015 came at the expense of case filings in the District of Delaware).

[94] H.R.3309, 113th Cong. § 3(d); H.R. 9, 114th Cong. § 3(d).

Eastern District, for example with respect to speed, number of trials, and size of jury verdicts.

Rejecting these traditional explanations as overly simplistic, we then took a look at the relative timing of pretrial litigation events. Here, we found that the patent plaintiffs suing in the Eastern District benefit from the district's combination of early, broad discovery deadlines with late action on motions to transfer, motions for summary judgment, and claim construction. Though our analysis is purely descriptive, we believe that the evidence points to this combination as the primary driving force behind the popularity of East Texas. A virtual guarantee that accused infringers will be forced to incur large discovery costs well before they are given a shot to move or win the case, opens the door for patentees to profitably pursue high volume, low value litigation and this is precisely the phenomenon that appears to drive the popularity of East Texas.

Consistent with our theory, case filings in East Texas are dominated by a relatively small number of frequent filers that virtually always settle quickly and, anecdotally, for relatively small sums. It should come as no surprise then that docket speed and merits decisions do not stand out in our study. These patentees care little about the timing of trial because they have little intention of ever making it that far. Likewise, they care little about the rate of success on summary judgment and in jury verdicts because they price their settlements at levels that primarily reflect expected litigation costs, not damages.

On the one hand, our conclusions are discouraging. Today, patentees can and often do seek out districts that offer procedural and substantive advantages, and are able to leverage these advantages to extract larger settlements from accused infringers. As a result, reforms that apply only in individual courts or that leave individual courts broad discretion to decide how general reforms will be implemented, may (despite reformers' best of intentions) ultimately serve to further exacerbate the accumulation of cases in plaintiff-friendly courts, as scheduling changes in Delaware and some portions of the AIA appear to have done for the Eastern District of Texas. In light of these considerations, venue reform stands out as an appealing solution that bypasses both plaintiffs' ability to "shop" for friendly venues and courts' ability to "market" their jurisdiction to a particular type of litigant. Alternatively, our findings suggest that, in order to be effective, reforms should be mandatory and crafted to limit courts' ability to modify or otherwise undermine them. Mandatory discovery delays like those included in the Innovation Act may be particularly effective.

At the same time, our findings are also encouraging. If problematic patent litigation largely stems from a small number of repeat litigants, then it may be possible to craft a simple, targeted solution. Relatively small shifts in the economics of patent litigation, provided they are unavoidable, could have

outsized impact on the prevalence of cost-fueled patent suits. We believe that venue reform and mandatory discovery delays are two that Congress should give very serious consideration.