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IN THE SUPREME COURT OF THE UNITED STATES

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TC HEARTLAND LLC, :

Petitioner : No. 16-341

v. :

KRAFT FOODS GROUP BRANDS LLC, :

Respondent. :

- - - - - x

Washington, D.C.  
Monday, March 27, 2017

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:09 a.m.

APPEARANCES:

JAMES W. DABNEY, ESQ., New York, N.Y.; on behalf of the Petitioner.

WILLIAM M. JAY, ESQ., Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(11:09 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 16-341, TC Heartland v. Kraft Foods.

Mr. Dabney.

ORAL ARGUMENT OF JAMES W. DABNEY

ON BEHALF OF THE PETITIONER

MR. DABNEY: Mr. Chief Justice, and may it please the Court:

The Court in this case is presented with an historic choice. That choice is between upholding or destroying venue protections that Congress provided in 28 U.S.C. 1400(b), and that this Court interpreting that statute declared to exist in its Fourco Glass decision. And the correct choice, we submit, is to adhere to this Court's existing, long-established interpretation of Section 1400(b) and to reject the new call for a new revisionist interpretation that would render Section 1400(b) nugatory in this case and in all but the most unusual cases.

I'd like to open first with some undeniable points. In Fourco Glass, this Court made two holdings about 1400(b) that control this case. The first is this Court interpreted Section 1400(b) as a standalone. It's

1 the sole and exclusive provision governing venue in  
2 patent cases and is not to be supplemented with Section  
3 1391.

4 JUSTICE SOTOMAYOR: How can that be when in  
5 Brunette we said that 1391 governed aliens, the  
6 definition of aliens? So that broad statement we  
7 couldn't have meant.

8 MR. DABNEY: What the Court held in Brunette  
9 was that venue legislation had, since the beginning of  
10 the Republic, been extended only to United States  
11 domestic persons and that the then-existing 1391(d) of  
12 Title 28 was not a venue rule at all, but rather was a  
13 codification of a principle that dated back to 1789 that  
14 aliens were simply outside the scope of all venued laws.

15 JUSTICE SOTOMAYOR: So what do we do with  
16 unincorporated associations?

17 MR. DABNEY: What we do  
18 with unincorporated --

19 JUSTICE SOTOMAYOR: Those are -- those are  
20 not defined by 1400.

21 MR. DABNEY: Well, 1400(b) in Fourco was  
22 held to apply to all defendants. That was one ground on  
23 which this Court held in Fourco that 1400(b) was  
24 standalone, precisely because its predecessor had  
25 applied to any person, corporation, or partnership. And

1 there was never any practical issue interpreting 1400(b)  
2 as in litigation involving limited partnerships and even  
3 unincorporated nonperson associations, because the  
4 linchpin of 1400(b) and its predecessor was domicile.

5 When you have a venue rule that keys to  
6 domicile and specifically distinguishes between a  
7 domiciliary and a non-domiciliary, then the problems  
8 that the Denver and Rio Grande case addressed and that  
9 Respondent brings up as hypothetical problems simply  
10 didn't exist.

11 It's noteworthy that in -- in the  
12 Respondent's brief, they don't cite a single real world  
13 example where there was any problem interpreting and  
14 applying Section 1400(b) ever since the Sperry v.  
15 American --

16 JUSTICE GINSBURG: Is there --

17 MR. DABNEY: -- Railroad case.

18 JUSTICE GINSBURG: Is there any other  
19 provision, venue provision in which a venue for a  
20 corporation is only the place of incorporation?

21 MR. DABNEY: Where venue for a corporation  
22 is only the place of incorporation. I cannot stand  
23 here, Your Honor, and identify -- it could very well be  
24 that there is one, and that's a very good reason why  
25 when Congress amended 1391 in 2011, they put that broad

1 exception language in.

2 JUSTICE GINSBURG: Well, don't you  
3 suppose -- even for diversity purposes, a corporation  
4 is -- is diverse based on not simply its place of  
5 incorporation, but its principal place of business.  
6 Principal place of business counts. It doesn't count  
7 under 1400.

8 MR. DABNEY: Well, since 1948, that has been  
9 the general rule that 1391(c) has provided. 1391(c) has  
10 said for 60-odd years that a corporation, regardless of  
11 its domicile, will be deemed to be resident in this  
12 district, that district, that district. And that has  
13 been a feature of general venue law since 1948. The  
14 whole point here is that -- that rule was urged upon  
15 this Court. In the Fourco Glass case, the Court  
16 considered statutory language that was not materially  
17 different in this respect from current 1391 and held  
18 that 1400(b) when it says the judicial district where  
19 the defendant resides, that means domicile. That means  
20 where --

21 JUSTICE GINSBURG: Again, whatever it said  
22 in Fourco, it was not based on any statute. It was  
23 based on the common law: Where is the corporation  
24 domiciled?

25 MR. DABNEY: Well, I would respectfully

1 disagree with that. The word "resides" in the statute  
2 was a statutory term, and it had a very well-established  
3 meaning at the time of the statute's enactment. And  
4 this Court held one of the specific issues in this case  
5 is, did the word "resides" in -- in 1400(b) signal a  
6 change from the word "whereof he is an inhabitant" in  
7 Section 48 of the 1911 judicial code. And this Court  
8 held those words were synonymous. It meant domicile,  
9 and there can only be one of those. There's only --

10 JUSTICE KAGAN: What do --

11 MR. DABNEY: -- one domicile.

12 JUSTICE KAGAN: What do you think Congress  
13 would have to do to reverse our decision in Fourco?

14 MR. DABNEY: Well, there are many ways that  
15 it could be done. And -- and in 2001, the American Law  
16 Institute proposed that Section 1400(b) be repealed.

17 JUSTICE KAGAN: Is there any way Congress  
18 could do it without repealing 1400?

19 Is there any change that Congress could make  
20 to 1391 that would have that effect.

21 MR. DABNEY: I could imagine that if instead  
22 of saying "except as otherwise provided by law," the  
23 statute said "notwithstanding any other provision of  
24 law, this would govern." That would be a way to do  
25 that. But --

1 JUSTICE KAGAN: That -- that would do it?  
2 In other words, your argument in the end rests on that  
3 "except" provision?

4 MR. DABNEY: It rests importantly on the  
5 "except" provision. The "except" provision makes this  
6 case an easier case than Fourco Glass was because at the  
7 time of Fourco Glass, all you had was the general venue  
8 statute and the very specific tailored, historic venue  
9 statute that had been dating back to 1897. And so in  
10 that case, the Court used the standard tools of  
11 statutory construction and said, you know, the specific  
12 statute is not going to be swallowed up and rendered  
13 nugatory by the more general, and it applied the kind of  
14 reasoning that the Radzanower case did. Radzanower v.  
15 Touche Ross is a very, very analogous case to this.

16 But now that Congress has specifically  
17 provided not that 1391 overrides 1400(b), but that 1391  
18 yields, is subordinate to other statutes and common law  
19 that -- that provide otherwise for venue, that makes  
20 this case just easy to apply.

21 JUSTICE GINSBURG: But -- but Congress also  
22 said in 1391(c) that it was defining residency for all  
23 venue places -- all venue purposes.

24 MR. DABNEY: And the prior statute said for  
25 venue purposes. So, yes, the word "all" was added.



1 Respondent has not identified any venue purpose that was  
2 not covered by the original version of 1391(c) that now  
3 is covered by 1391(c).

4                   What we never had before 2011 was a statute  
5 that subordinated 1391(c) to other venue provisions.  
6 And we encourage the Court to read pages 31 and 32 of  
7 Respondent's brief, because you don't get up until -- it  
8 isn't until you get to page 31 that Respondent can even  
9 bring itself to address the exception clause, which is  
10 so clearly fatal to their position. They talk about all  
11 means all means all means all for the first 30 pages.  
12 And then finally we get to page 30 and 31, and what do  
13 they say? Well, they say, well, the "except" language.  
14 The "except" language has nothing to do -- this is on  
15 page 32 -- the "except" language in Section 1391(a) has  
16 nothing to do with the definition in 1391(c); quote,  
17 "Those definitions do not govern venue," unquote.

18                   Well, that directly contradicts what they  
19 say on page 8 of their brief, which states, quote, "The  
20 new -- Section 1391(c) now governs for all venue  
21 purposes."

22                   So the plain meaning of "govern" applies to  
23 1391(c) by their own characterization. They're the ones  
24 who are saying that 1391(c) governs venue in this case,  
25 which is what they say on page 8, and then they try to

1 do this acrobatic maneuver to escape the exceptions  
2 clause by saying it doesn't govern. Well, as we say in  
3 our reply brief, the plain meaning of "govern" means  
4 that 1391(c) is part of the sections that in the  
5 structure of 1391 is subordinated to the exception  
6 language.

7           So the -- the Court doesn't need to do  
8 anything here except say that Fourco's interpretation of  
9 1400(b), which under *Kimble v. Marvel* and statutory  
10 precedence of this Court, it is as much a part of that  
11 statute as the words originally were, that that is part  
12 of the law that everyone agrees provides for a venue  
13 otherwise than what the Respondent is arguing for.

14           The Respondent is arguing that 1400(b)  
15 should now be given an artificial meaning imported from  
16 1391(c). That is the exact argument that the Respondent  
17 made in the *Fourco* case. The -- the Petitioner in  
18 *Fourco* was a -- a West Virginia corporation who was  
19 alleged to reside in the Southern District of New York  
20 when it didn't actually reside, because the argument  
21 was, it's deemed fictitiously to reside in New York  
22 under 1391. And the Court said, in the context of  
23 1400(b), which distinguishes between resident and  
24 nonresident defendants, you can't import that synthetic,  
25 fictitious definition of "resides" without destroying

1 both the text of the statute and completely defeating  
2 its purpose.

3           1400(b) was enacted to restrict where patent  
4 cases could be filed, and what we've seen in the Federal  
5 search that's experiment since 1990 is a very good  
6 demonstration of why patent cases need a venue statute  
7 like 1400. If you don't have a venue statute like  
8 Section 1400, you get the kind of litigation experiences  
9 that are set out in the amici briefs.

10           The -- the law professor's brief noted that  
11 there's a single judge in the United States that has  
12 one-quarter of all patent cases in the United States on  
13 his docket. This is a situation that cries out for  
14 nothing more than upholding the venue protection that  
15 Congress provided and that this Court announced in  
16 *Fourco*, and that Congress took a very careful look at in  
17 2011, and decided to --

18           JUSTICE KAGAN: But, Mr. Dabney, I mean, one  
19 oddity of this case is -- is usually, when we say  
20 something, when we issue a decision, we can be pretty  
21 confident that Congress is acting against the backdrop  
22 of that -- that decision. But I think that that would  
23 be an odd thing to say in this case, given that for 30  
24 years the Federal Circuit has been ignoring our decision  
25 and the law has effectively been otherwise. And then

1 the question is, well, what is the backdrop against  
2 which Congress is legislating.

3 It seems actually that if -- if I were a  
4 congressman, I'd think that the practical backdrop  
5 against which I'm legislating is not Fourco; it is  
6 instead the Federal Circuit's decision in VE Holding,  
7 which is the decision that the practice has conformed  
8 to.

9 MR. DABNEY: Well, I -- I can tell the Court  
10 from someone who does practice that not everyone ever  
11 acceded to VE Holding. And I think, if you look at what  
12 actually happened in the 2011 act, it seems to me that,  
13 in 2011, Congress took steps that indicated that they  
14 didn't get the memo, that this Court's decision in  
15 Fourco Glass was a nullity and that -- and that its  
16 disregard by lower courts had somehow become the law of  
17 the land.

18 First, VE Holding, the 1990 decision of the  
19 Federal Circuit, had seized upon a prepositional phrase  
20 in a 1988 version under this chapter. So if Congress  
21 was thinking, oh, what I want to do is lock in a  
22 situation in which an enormous, extreme controversial  
23 imbalance in Federal patent litigation that goes to a  
24 very small number of victics, it was an odd thing for  
25 Congress to have repealed the very grab-hold that --

1 that the Federal Circuit had seized on to justify its  
2 results.

3 So I would argue that the legislation that  
4 Congress passed, far from ratifying that holding, very  
5 intentionally abrogated it. Not only that, in  
6 September, three months before the 2011 act was passed,  
7 Congress amended the America Invents Act to provide for  
8 a new restriction on what could be deemed a regular and  
9 established place of business under 1400(b). Section  
10 18(c) of the AIA says that an automated teller machine,  
11 an ATM, shall not be deemed a regular and established  
12 place of business. Now, I suppose the Respondent would  
13 say that that -- that provision was not inserted at the  
14 behest of New York money center banks; that -- that  
15 provision was put in at the behest of individuals who  
16 didn't even form an LLC or a corporation so that they  
17 would enjoy the protection alone.

18 JUSTICE KENNEDY: Well, wasn't that statute  
19 before the 1400 was enacted?

20 MR. DABNEY: It was --

21 JUSTICE KENNEDY: I mean that -- that case.

22 MR. DABNEY: That -- that amendment was done  
23 in September of 2011 by the same Congress, three months  
24 before Congress declined to accept the American law --

25 JUSTICE BREYER: I don't quite see -- two

1 things; one, you can comment on it or not, but these  
2 amici briefs, and -- they're filled with this thing  
3 about a Texas district which they think has too many  
4 cases. What's this got to do with this? As far as I  
5 can see, if we're supposed to decide what's good or bad,  
6 maybe you'd lose. But I -- I don't know whether that's  
7 good, bad, or indifferent. Okay? But is there some  
8 relevance to it?

9                   And the second thing that I'd like to know  
10 is you are not a corporation. So since you are not a  
11 corporation, why do we have this case here deciding?  
12 And what are we supposed to do about that? We don't  
13 normally decide cases because Mr. Smith would like us to  
14 decide a case involving a corporation. He's not a  
15 corporation, nor are you. So what do we do?

16                   MR. DABNEY: Well, let me respond in -- in  
17 two ways. First of all, from -- from the Petitioner's  
18 point of view, the relevance of litigation behaviors in  
19 the United States is important evidence of why  
20 Section 1400(b) was a wise statute that Congress passed  
21 and that it should be upheld. Not -- not --

22                   JUSTICE GINSBURG: Well, why, when you --  
23 you're complaining about a -- a forum that's friendly to  
24 infringers. If you've -- many corporations are  
25 incorporated in Delaware. That's also said to be a

1 friendly forum.

2 MR. DABNEY: There -- there has never been,  
3 in any other field of law, such a disparity between  
4 patent infringement case filings and other case filings  
5 in other areas of law. And -- and that --

6 JUSTICE BREYER: You can go into that if you  
7 want. As far as that -- might be other people are  
8 interested in that. But I really feel I need an answer  
9 to my second question.

10 MR. DABNEY: Can you remind me what that --

11 JUSTICE BREYER: That is, you're asking us  
12 to decide where venue is proper for a corporation, and  
13 you are not a corporation. Therefore, on what basis are  
14 we supposed to decide that?

15 MR. DABNEY: That -- that's not a correct  
16 statement of our position. 1400(b) is not restricted to  
17 corporate or individual or other defendants --

18 JUSTICE BREYER: Is there a holding that it  
19 includes you?

20 MR. DABNEY: There's a holding in *Fourco*  
21 that it applies to all defendants, all -- italicized  
22 all. Justice Whitaker said all in italics.

23 JUSTICE BREYER: Including a person.

24 MR. DABNEY: Including a person. Including  
25 a partnership, including an unincorporated said

1 partnership. The -- the predecessor statute to -- to  
2 1400(b) specifically said partnership.

3           So this was never a problem for patent  
4 cases. It was always that all defendants, all types of  
5 defendants were covered by the statute. So that has not  
6 been a question that's ever been raised throughout this  
7 case, and -- and the beauty of this is Judge Learned  
8 Hand's opinion in the -- in the Sperry case, in 132  
9 F.2d., it dealt with the hardest case of all.

10           TC Heartland is a chartered entity. It has  
11 a charter, and you can tell where its principal place of  
12 business is by just looking it up in a public record.  
13 Learned Hand dealt with the hardest of all situations of  
14 what do we do with an unincorporated association that  
15 isn't an entity. The Association of American Railroads  
16 that had no entity status at all, and Judge Learned Hand  
17 in that case held -- which had been a rule applied  
18 across the board in patent cases without problem -- that  
19 for a nonperson, an association that was a nonperson, we  
20 look to the -- the -- we -- we treat the inhabitants as  
21 being where the principal place of business is located.

22           But to -- to reiterate, the statute has  
23 always applied to unincorporated entities, the patent  
24 venue statute has, and the Respondent has not pointed to  
25 a single real world --



1 JUSTICE KENNEDY: Well, where does this  
2 unincorporated entity reside?

3 MR. DABNEY: In Indianapolis, Indiana.

4 JUSTICE KENNEDY: No other place?

5 MR. DABNEY: No other place.

6 JUSTICE KENNEDY: What -- what do we look  
7 to, to confirm that? What -- what --

8 MR. DABNEY: The corporate charter of the  
9 company, it so happens to --

10 JUSTICE KENNEDY: No, no. What -- what law  
11 do we look at to see where an LLC resides?

12 MR. DABNEY: Under this Court's precedence,  
13 the Court has looked to State law to determine where the  
14 residence of a juristic person created by a State is  
15 located, and so --

16 JUSTICE GINSBURG: Suppose the State would  
17 say we count the principal place of business as well.

18 MR. DABNEY: It -- well, some states might  
19 do that, but the States always require that the domicile  
20 to be in the State.

21 So in this case -- in this case it's a very  
22 straightforward case because the -- the -- the public  
23 office, that is, its legal domicile under Indiana law,  
24 is in Indianapolis. But -- but it is an Indiana -- it  
25 is an Indiana domicile question under any -- under --

1 under anybody's interpretation.

2 So unless there is some fictitious meaning  
3 given to 1400(b) imported from another place, this is an  
4 easy case. There's -- there's -- the -- the Petitioner  
5 has no offices in Delaware, it has no regular  
6 established place of business in Delaware, and there's  
7 really not much more to say about that.

8 There's -- there's one other point that I'd  
9 like to bring up, and that is that 1400(b) was enacted  
10 together with a Federal service of process statute found  
11 today in 28 U.S. 6 -- U.S.C. 1694. And it authorizes  
12 services of process in patent cases that are commenced  
13 in a district where the defendant is not a resident, but  
14 has a regular and established place of business. And  
15 there is another demonstration that, in this context,  
16 "resident" means domicile, and Federal law specifically  
17 provides for nationwide service of process on  
18 nonresident defendants.

19 So the key point I'd just like to leave you  
20 with is, for more than 100 years, a patent venue has  
21 been a function of the domicile of a defendant, and it  
22 provides for an easy-to-administer, clear rule that  
23 prescribes where venue is -- is permissive in a patent  
24 case.

25 JUSTICE KAGAN: Well, but for more than 30

1 years the practice has been the other way. I mean,  
2 I'm -- I'm -- I was thinking as I was reading the  
3 briefs, sometimes we have accidental theme days at the  
4 Supreme Court. So today's accidental theme is: When 30  
5 years of practice goes against you, what happens?

6 (Laughter.)

7 MR. DABNEY: I -- I -- I heard Justice  
8 Souter say something like that in the KSR case, you  
9 know, the teaching-suggestion-motivation test has been  
10 around so long that, at some point, the mistake becomes  
11 the law. And -- and this Court has again and again and  
12 again stood up for its authority to declare what the law  
13 is.

14 On -- on issues of patent law, there's  
15 actually a precedent, *Andrews v. Hovey* that says no  
16 issue of patent law is settled until we have settled it.  
17 In *Dickenson v. Zurko*, there's a tremendous  
18 administrative law -- body of law that this Court said  
19 the Federal Circuit was wrong in the way it --

20 JUSTICE GINSBURG: Well, maybe the Federal  
21 Circuit was wrong in not following *Fourco*, but the  
22 question is now before us, and you are asking us to say  
23 that venue in a patent infringement case is only where  
24 the entity is incorporated or comparable to that, and  
25 you have acknowledged that there is no other venue

1 provision for any other kind of claim that is so limited  
2 to just the place of incorporation.

3 MR. DABNEY: Well, I -- I would -- I would  
4 respectfully disagree because what 1400(b) does is it  
5 provides a different way to define venue for nonresident  
6 defendants. 1400(b) isn't restricted just to the  
7 district where the defendant is domiciled. 1400(b)  
8 provides not the expansive regime that 1391(c) does, you  
9 know, anyplace where, you know, someone could  
10 constitutionally summon you into court. 1400(b) says  
11 you have to have a regular and established place of  
12 business and commit an act of infringement.

13 Now, that's the choice that Congress made.  
14 That is a different venue prescription than what 1391(c)  
15 provides. And there is very good reasons. I could sit  
16 here, and -- and as -- as someone who tries patent  
17 cases, I could tell you, there's a reason why patent  
18 litigation is -- has characteristics that make it much  
19 more susceptible to the kind of forum shopping that some  
20 of the amici have done because the injuries at issue in  
21 patent litigations don't grow out of some tangible --  
22 you know, a train wreck or some tangible loss where --  
23 where it tends to bring the litigation to the place of  
24 the injury.

25 The injury claimed in patent litigation

1 usually is -- is a synthetic nonreceipt of a reasonable  
2 royalty that allegedly is due, and -- and that can be  
3 marketed and sold and transmitted into a forum. There's  
4 all kinds of reasons why 1400(b) is an important law to  
5 enforce and uphold.

6 If there are no further questions, I'd like  
7 to reserve the rest of my time.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.

9 JUSTICE BREYER: Well, I do, actually.

10 MR. DABNEY: Okay.

11 CHIEF JUSTICE ROBERTS: Not so fast.

12 (Laughter.)

13 JUSTICE BREYER: Now, as long as you have a  
14 minute, maybe you could indulge me and trace me through  
15 this. With a corporation, I think 1400 says resides,  
16 where the defendant resides.

17 MR. DABNEY: Correct.

18 JUSTICE BREYER: But then that incorporated  
19 Section 48. And Section 48 said where the defendant is  
20 an inhabitant.

21 MR. DABNEY: Correct.

22 JUSTICE BREYER: And now "inhabitant," how  
23 do we know that means where the incorporation is  
24 incorporated or something? What does that mean in the  
25 case of -- how do we know that that -- that that word

1 "inhabitant" means what you think it means?

2 What do you think it means?

3 MR. DABNEY: Because Fourco said that.

4 Fourco said --

5 JUSTICE BREYER: And Fourco is going really  
6 into whether 1391(c) or -- whether they made an  
7 exception, whether they included that, and it says no.  
8 It's a very short opinion.

9 MR. DABNEY: 1400(b) is the relevant part of  
10 Fourco --

11 JUSTICE BREYER: Yeah.

12 MR. DABNEY: -- is on page 226 --

13 JUSTICE BREYER: Yeah.

14 MR. DABNEY: -- where the Court says, by an  
15 eight-to-one vote, characterizing the change from  
16 Section 48, in the middle of the page, quoting the  
17 revisor's notes, words in subsection (b), "where the  
18 defendant resides" were substituted for "of which the  
19 defendant is an inhabitant" because the words  
20 "inhabitant" and "resident" as respects venue, are  
21 synonymous.

22 And then there's this parenthetical, "We  
23 pause here to observe that this treatment, and the  
24 express reason for it, seems to negative any intention  
25 to make corporations suable in patent infringement cases

1 where they are merely doing business because" --

2 JUSTICE BREYER: Yeah. It says in respect  
3 of corporations, it means the state of incorporation  
4 only.

5 MR. DABNEY: Correct.

6 JUSTICE BREYER: But you are not an  
7 incorporation, so I'm back to my first question.

8 MR. DABNEY: The -- the treatment of  
9 domiciles of -- of chartered entities has, under this  
10 Court's precedence and under universal practice --

11 JUSTICE BREYER: And so I should look at  
12 what case?

13 MR. DABNEY: We cite the Troutwine case as  
14 a -- as an Indiana case --

15 JUSTICE BREYER: Okay. Okay.

16 MR. DABNEY: -- in our brief as an -- as an  
17 example of that.

18 JUSTICE KENNEDY: But I thought you said it  
19 depended on what -- that the State can define residence  
20 in a different way.

21 MR. DABNEY: Well, States will tell --

22 JUSTICE KENNEDY: With respect to LLCs.

23 MR. DABNEY: When a State creates a legal  
24 person, a juristic, jural entity, the State will  
25 prescribe where its -- its legal domicile is. And --

1 and that is a -- that is a matter of public record. So  
2 it's an easy thing to find out.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
4 Mr. Jay.

5 ORAL ARGUMENT OF WILLIAM M. JAY  
6 ON BEHALF OF THE RESPONDENT

7 MR. JAY: Mr. Chief Justice, and may it  
8 please the Court:

9 If I may, I'd like to offer a different  
10 theme for today, and that would be definitions rather  
11 than the 30-year point that Justice Kagan posited.

12 Congress has written a definition of  
13 "residence" that applies for all venue purposes.

14 CHIEF JUSTICE ROBERTS: Well, but I mean --  
15 yes, there's a difference between for venue purposes,  
16 and for all venue purposes, and for venue under this  
17 chapter, but this is something fairly significant in the  
18 area of patent law. And I would have thought that if  
19 Congress were trying to make a significant change,  
20 there'd be a lot more evidence of it other than just  
21 changing the particular nuances of -- of the words.

22 MR. JAY: Well, of course, Mr. Chief  
23 Justice, it isn't here a change from "for venue  
24 purposes" just to "for all venue purposes." There are,  
25 I think, four changes in between the Fourco text and the



1 text today. And in between, you had the statute  
2 construed in VE Holdings which said "for purposes of  
3 venue under this chapter."

4 CHIEF JUSTICE ROBERTS: But there's no real  
5 evidence of any -- including in the nuances you talk  
6 about -- of such a significant change.

7 I mean, the -- we can't get -- we can't get  
8 rid of this issue. I mean, we tried in -- in Stonite  
9 and then in Fourco. It just sort of keeps coming up.  
10 And -- and I would have thought, when you have -- well,  
11 I mean, is our Fourco decision law?

12 MR. JAY: Fourco -- the principles by which  
13 Fourco interpret the statutes are still good law --

14 CHIEF JUSTICE ROBERTS: Well, then the --

15 MR. JAY: -- but the definition that Fourco  
16 applied is no longer the controlling definition of  
17 "residence."

18 CHIEF JUSTICE ROBERTS: Okay. Well, the  
19 current statute says "except as otherwise provided by  
20 law." And I would have thought that excluded  
21 overturning the Fourco decision.

22 MR. JAY: So, I don't think so, Your Honor.  
23 And I think that the function that "except as otherwise  
24 provided by law," I'd like to illustrate what work that  
25 is doing in the statute, and then I would like to

1 explain why nothing, in fact, "otherwise provides by  
2 law" in 1400(b).

3 So if you look at the appendix to the red  
4 brief, pages 3A to 4A, and then again 5A to 6A, these  
5 are the old statutes. So this is the '88 version and  
6 then it would actually be the '52 version. And, you  
7 know, from the '48 recodification.

8 "Except as otherwise provided by law" has  
9 been in the statute since the '48 recodification. Where  
10 was it? It was in the general venue provision, and it  
11 was in the diversity venue provision, (a) and (b) of  
12 1391. So that's right in the carryover on --

13 JUSTICE KENNEDY: Is that the end, and then  
14 later it's going to be -- it's going to be moved to the  
15 beginning.

16 MR. JAY: That's right. So now that there  
17 is -- there aren't separate statutes anymore for general  
18 venue, diversity venue, and local action venue, which  
19 was 1392, all of that's now in 1391(b). And this  
20 "except as otherwise provided by law" language, which  
21 has always been there, has now been put in 1391(a). And  
22 if you look at why the American Law Institute drafted it  
23 just that way, because it's just the way that the ALI  
24 drafted it that Congress adopted, you will see that --  
25 both from the ALI report and also from page 18 of the

1 House report, that the purposes of this "except as  
2 otherwise provided by law language" is to, quote,  
3 "follow current law." It wasn't intending to overrule  
4 VE Holding at all.

5 Now, my friend on the other side --

6 CHIEF JUSTICE ROBERTS: No -- but it wasn't  
7 intended to overrule VE Holding, but I suspect it wasn't  
8 intended to overrule Fourco at all either. And Fourco  
9 is a decision of this Court.

10 MR. JAY: It certainly is, Your Honor. But  
11 I do think that Fourco is based on two things, and I --  
12 those things are no longer the case in the statute. Let  
13 me walk through that.

14 So Fourco is based on two things. Number  
15 one, the fact that 1400 was recodified in the 1948  
16 revision of the Judicial Code. And if there isn't a  
17 change specified in the revisor's notes, the Court said  
18 it will not read that change in, even though,  
19 ordinarily, when Congress makes a change in language,  
20 this Court's presumption is the opposite. The Court's  
21 presumption is that Congress means to do something by  
22 its change, not in the recodification context. Now we  
23 don't have the recodification context anymore.

24 The other thing is the specific and the  
25 general canon. This Court said that 1391(c), as it then

1 existed, was clearly a general corporation venue  
2 statute, and so it was. It provided where a corporation  
3 could be sued. It doesn't do that anymore. 1391(c) is  
4 now a purely definitional provision, and it was adopted  
5 specifically to clear up a number of the nagging  
6 problems that the members of the Court have been asking  
7 my friend about, including where do you sue an  
8 artificial entity that is not a corporation? Where does  
9 it reside.

10 Justice Breyer, the answer to your question  
11 is in this -- this Court's decision in Denver and Rio  
12 Grande from 1967. Now, my friend says, well, that's a  
13 general venue case. But I think the salient point is  
14 that the Court said in that case, there is -- there was  
15 no settled construction of the law on where an  
16 unincorporated association resides in 1948, and there is  
17 none yet.

18 CHIEF JUSTICE ROBERTS: Did you raise the  
19 significance of the fact that it was an unincorporated  
20 association in your brief in opposition?

21 MR. JAY: No, Your Honor, because we don't  
22 think that it matters because the definition now applies  
23 to all business entities; corporations, and LLCs.  
24 The --

25 CHIEF JUSTICE ROBERTS: It seems odd to me

1 you didn't raise it in your brief in opposition, and yet  
2 it takes up several pages in -- in your brief on the  
3 merits.

4 MR. JAY: Because it's relevant to our  
5 statutory interpretation, that our interpretation, but  
6 not the other side's, would clear up this issue and save  
7 the Court from having to confront in another case where  
8 does an LLC reside.

9 JUSTICE BREYER: Why another case?

10 MR. JAY: -- in another case --

11 JUSTICE BREYER: I mean, look -- look.  
12 You -- if you -- if you're right, you win. That's the  
13 end of the case. If you're wrong, then you have another  
14 point, and that is that Fourco doesn't apply really to  
15 unincorporated associations. So why isn't the right  
16 thing to do for us to decide the issue, if you win,  
17 that's the end of it; and if you lose, you send it back  
18 and we say to the lower court, if you haven't forfeited  
19 the point, maybe you could raise it and argue it.

20 Is that the correct way to handle this?

21 MR. JAY: I think that that's fine, Your  
22 Honor. I do think that --

23 JUSTICE BREYER: That's fine. That's the  
24 correct way to handle it?

25 MR. JAY: Yes, simply because -- because we

1 think, of course, that we win. And one reason that we  
2 win --

3 JUSTICE BREYER: Obviously, you think you  
4 win. And -- and.

5 MR. JAY: Yes.

6 JUSTICE BREYER: -- and --

7 (Laughter.)

8 JUSTICE BREYER: Look. I -- I'm -- I'm not  
9 worried about it if you win. What I'm worried about  
10 what to do is if you lose.

11 MR. JAY: Right. And so I agree with what  
12 Your Honor just said. But I -- but the -- the question  
13 about what to do with LLCs and what to do with  
14 defendants who don't reside in the United States -- this  
15 goes to Justice Sotomayor's question -- is a big part of  
16 why -- why the ALI working with the Judicial Conferences  
17 Committee on Federal-State Jurisdiction proposed a  
18 statute that would resolve these ambiguities in the  
19 naked word "resides" or "resident" --

20 JUSTICE KAGAN: But I thought the ALI -- and  
21 you -- you rely upon it in your briefs a lot and you  
22 rely on it here. I mean, the ALI wanted to get rid of  
23 1400, and Congress didn't do that.

24 MR. JAY: That's right. But its -- its  
25 proposal to clear up the ambiguities in the word

1 "resident" or "resides" for all venue purposes, the ALI  
2 explained in its report at page 188 and 189, and then  
3 Congress then, in the House Report at page 20, echoed it  
4 almost exactly. The reason to -- the work that is --  
5 the work that the words "for all venue purposes" do is  
6 to provide that these definitions shall apply not just  
7 to the general venue statute, but to all venue statutes,  
8 general or special. And the House Report says the same  
9 thing on page 20, even though, of course, as you said,  
10 the House didn't repeal 1400. And we're not saying that  
11 14 --

12 JUSTICE BREYER: In -- special or there are  
13 lots of different ones. But did it say, if you pass  
14 this, don't worry about getting rid of 1400, because  
15 this gets rid of it? I mean, did they say anything like  
16 that at all?

17 MR. JAY: No. Because 1400 still serves a  
18 function.

19 JUSTICE BREYER: Well, I mean, getting rid  
20 of Fourco.

21 MR. JAY: Oh. Well, that's a different --  
22 that's a different --

23 JUSTICE BREYER: Did it say anything --

24 MR. JAY: Well, but -- but -- but

25 JUSTICE BREYER: I mean -- when I used to --

1 maybe this was years ago. This said, don't worry about  
2 repealing 1400. If you pass this, you will be rid of  
3 the Supreme Court's interpretation in Fourco. Or  
4 anything like that.

5 MR. JAY: What it said, Your Honor, is that  
6 the Federal Circuit's decision in VE Holding was it  
7 called it a partial palliative. It said that the work  
8 needed to be finished, because VE Holding addressed  
9 corporations based on the statute as it -- corporate  
10 defendants, based on the statute as it then was, but  
11 that the work needed to be carried forward in the  
12 definition for, number one, corporate plaintiffs, where  
13 do they reside; and, number two, unincorporated  
14 defendants, where do they reside? And that's what this  
15 cross-cutting, all-purpose definition was intended to  
16 do.

17 But for the -- I think it's important to  
18 note that under our view, 1400(b) does do work. It is  
19 the venue statute. So you have to show either that the  
20 defendant reside -- all defendants reside there, or all  
21 defendants are subject to suit there under the other --  
22 under the second half. That's different from what the  
23 general venue statute provides, which, for example, can  
24 base venue on the residence of only one defendant.  
25 There is significance; there is work left to be done for



1 1400(b). But it doesn't define --

2 JUSTICE GINSBURG: And -- and -- because I  
3 thought that the only thing that left was to govern a  
4 suit against an individual.

5 MR. JAY: Well, a suit against an individual  
6 would still -- would be more likely to trigger the  
7 second half of the statute. But in deciding what is the  
8 proper venue, the first thing you do is you look at  
9 which is the right venue statute? In this case, it's  
10 not the general venue statute 1391(b); it is the special  
11 venue statute for patent cases, 1400(b). Now, that  
12 doesn't define "resides." "Resides" is defined to "all  
13 venue purposes" somewhere else. It's in 1391(c). And  
14 so for "all venue purposes," that's the definition you  
15 apply. Now, when the defendant is --

16 JUSTICE SOTOMAYOR: I'm sorry, Mr. Jay.

17 (B) gets really subsumed by (a) -- 1400(b),  
18 the second part of it, gets subsumed by 1391. There's  
19 no -- you keep saying there's work for this, but I --  
20 where?

21 MR. JAY: So the second half, I agree, does  
22 not have much work left to do, except in cases where the  
23 defendant's an individual. So I think that that -- that  
24 by itself means that the second half is not surplusage.

25 JUSTICE SOTOMAYOR: No, but --

1 MR. JAY: But let me answer that --

2 JUSTICE SOTOMAYOR: But you would have  
3 specific jurisdiction if the person committed an act of  
4 infringement and has regular established place of  
5 business. Presumably, they're doing business in that  
6 State by doing the act of infringement.

7 MR. JAY: But the -- for an individual  
8 defendant, Justice Sotomayor, the definition isn't based  
9 on personal jurisdiction. It's based on their domicile.

10 JUSTICE SOTOMAYOR: Tell me what patent case  
11 we've ever had an individual sued that wasn't an agent  
12 of a company.

13 MR. JAY: I can't cite one right now. I --

14 JUSTICE SOTOMAYOR: I couldn't find one.

15 MR. JAY: Well, but I can tell you, for  
16 example, that, you know, my friend Mr. Dabney says that  
17 this -- the problems we've raised are hypothetical  
18 problems. This Court has six patent cases this term.  
19 Four of them have LLC defendants in them. And we think  
20 that understanding where an LLC resides is actually a  
21 very important point. LLCs were basically a business  
22 entity that came into existence in about 1979 and really  
23 have only taken off in the last 20 years. Applying the  
24 1897 definition of "inhabitant" carried forward into  
25 1400(b) without this definition doesn't give you that

1 answer. And we know that because --

2 CHIEF JUSTICE ROBERTS: I thought -- I  
3 thought you responded to Justice Breyer by saying that  
4 is an issue that could be dealt with on remand --

5 MR. JAY: No, Your Honor. What --

6 CHIEF JUSTICE ROBERTS: -- the difficulty of  
7 determining where an LLC is located.

8 MR. JAY: No, Your Honor. What I said both  
9 to Your Honor and to Justice Breyer is that it informs  
10 our statutory answer. In other words, this difficulty  
11 is the reason why you should adopt our reading of the  
12 statute and not the other side's. As for if you adopt  
13 the other side's --

14 CHIEF JUSTICE ROBERTS: It's a difficulty --  
15 again, it's a difficulty you didn't point out to us at  
16 the jurisdictional stage.

17 MR. JAY: I think there are -- the reasons  
18 to adopt our statutory interpretation are many: The  
19 text, the legislative history, and the structural  
20 considerations. And I think that they are all fair game  
21 here on the merits. We're not -- we're not urging you  
22 to dismiss the case as improvidently granted, but I  
23 think that the practical difficulties with the other  
24 side's statutory interpretation, we're not required to  
25 raise all of those in a brief in opposition in order for

1 you to consider why you should adopt our reading on the  
2 merits.

3 JUSTICE KAGAN: But, Mr. Jay, can I just ask  
4 you -- and this is a clarification question, and maybe I  
5 should know this. But you have the original 1391, which  
6 was the subject of Fourco.

7 MR. JAY: Uh-huh.

8 JUSTICE KAGAN: Then you have the 1988  
9 amendment. Then you have the 2011 amendment?

10 MR. JAY: Correct.

11 JUSTICE KAGAN: Is it the 2011 amendment  
12 that you think changed things, or is it also the 1988  
13 amendment? And if it's the 2011 amendment, exactly  
14 which words do you think changed the thing?

15 MR. JAY: So it's both, Your Honor. I don't  
16 think you need to agree with me about the '88 amendment,  
17 but we do think that for corporate defendants, it  
18 changed in 1988. It did not change for noncorporate  
19 defendants in 1988, because those weren't the words that  
20 Congress used.

21 In 2011, we think that there are four  
22 things -- and I think these are the four differences  
23 that I wanted to talk about with respect to Fourco. We  
24 think that "for all venue purposes" does the work  
25 because that's what the ALI and the House Report told

1 you in addition to their plain and unambiguous meaning.

2 We think that the definition --

3 JUSTICE KAGAN: So why is "for all purposes"  
4 different from "for venue purposes" or "for purposes of  
5 venue" under this chapter? Why isn't it all the same?

6 MR. JAY: Well, "for all venue purposes" is  
7 broader consciously than "for purposes of venue" under  
8 this chapter because there are more than 200 venue  
9 statutes that are outside Chapter 87. And Congress and  
10 the ALI wanted to --

11 JUSTICE KAGAN: Yes, but 1400 was within the  
12 chapter --

13 MR. JAY: That's right.

14 JUSTICE KAGAN: -- so the effect was exactly  
15 the same, wasn't it?

16 MR. JAY: It wasn't because now it's no  
17 longer just corporate defendants. The 2011 amendment  
18 adds to the definition. It provides for a domicile for  
19 individual defendants. It expands the (c)(2) definition  
20 to cover other business entities besides corporations,  
21 which wasn't done in the '88 amendment, and it provides  
22 a rule that slightly tweaks what this Court said in  
23 Brunette. It provides what the rule should be for  
24 defendants who do not reside in the United States.

25 Now, my friends on the other side say,

1 essentially, aliens can be sued in any district. And  
2 that's what the prior statute said. But that's not what  
3 Congress wanted the law to be anymore. Congress wanted  
4 the law to be that a defendant that does not reside in  
5 the United States may be sued in any district.

6           How do you decide if a defendant resides in  
7 the United States? You apply (c)(1) and (c)(2). All  
8 those definitions tie together. And I think that if --  
9 if Congress had wanted to dispense with -- dispense with  
10 Brunette for patent cases and creates, you know, an  
11 entirely different rule just for patent cases, I think  
12 there, it would have said so. But instead, it wanted to  
13 adopt a cross-cutting definition.

14           Third point: The definition of venue in  
15 1390. We -- if there's any doubt about what a venue  
16 purpose is, you can look at the definition of the word  
17 "venue." And some statutes that might be considered  
18 venue statutes are excluded from that definition.  
19 They're the ones that regulate the subject matter  
20 jurisdiction of a court and say that, this court and  
21 only this court -- you know, let's say the district  
22 court for D.C. -- shall have jurisdiction to decide .  
23 That's carved out of venue, but the patent venue statute  
24 certainly is not carved out of venue.

25           JUSTICE BREYER: You asked me this

1 question -- answer this. I -- I'm not an expert in this  
2 area, comparatively speaking, so you need -- I need  
3 enlightenment here.

4 Think of A-1. This section shall govern the  
5 venue of all civil actions brought in district courts.

6 Okay. So what's an example of one that it doesn't  
7 govern, where the law provides otherwise?

8 MR. JAY: A special venue statute that  
9 provides that, instead of the -- so if you -- if you  
10 turn the page to 2A, the -- here is the general venue  
11 statute, venue in general. So a special venue statute  
12 that provides that the basis for venue should be, for  
13 example, the plaintiff's residence instead of the  
14 defendant's residence, that is an example of a special  
15 venue statute --

16 JUSTICE BREYER: So in other words --

17 MR. JAY: -- by law.

18 JUSTICE BREYER: B doesn't apply because of  
19 the words in A, except as otherwise provided by law.

20 MR. JAY: That is exactly --

21 JUSTICE BREYER: Okay.

22 MR. JAY: Why Congress put those words  
23 into --

24 JUSTICE BREYER: A.

25 MR. JAY: -- general venue statutes in 1948

1 --

2 JUSTICE BREYER: Yeah.

3 MR. JAY: -- and why they are still there  
4 today.

5 JUSTICE BREYER: Okay. So why, if it  
6 governs B, does it not govern C? The words except as  
7 otherwise provided by law you've just said, and I think  
8 you are absolutely right as far as I understand it.  
9 That those words govern B. They govern A and they govern  
10 B, then why don't they govern C?

11 MR. JAY: So their function is to prevent B  
12 from swamping a special venue --

13 JUSTICE BREYER: That might be--

14 MR. JAY: But so --

15 JUSTICE BREYER: So -- so -- I know, but B  
16 is in a separate section.

17 MR. JAY: Yes.

18 JUSTICE BREYER: And now C is the next  
19 section, so why doesn't it govern that?

20 MR. JAY: So, two reasons. Number 1 -- I  
21 think the reason that uses the word section is that  
22 previously there were two general venue sections. Some  
23 were in 1391 and there were more for local actions in  
24 1392.

25 One of the things that Congress did in 2011



1 was get rid of 1392, so that's why I think it wrote in  
2 this section shall govern the venue. Now, what does it  
3 mean to govern venue? What it means to govern venue is  
4 to provide, on which, bases venue shall lie.

5 Plaintiff's residence, defendant's residence,  
6 personal -- principal place of business? There are  
7 venue statutes that do each of those things.

8           1400(b) it is a special venue statute, and  
9 it says defendant's residence or the conjunctive  
10 definition in the second half. So, this is what  
11 provides -- this is what says look to 1400(b) and not to  
12 the general venue statute in a patent infringement case.

13           Of course, in a -- in another patent case,  
14 where it's the alleged infringer bringing a declaratory  
15 judgment action, saying that I want a declaration I  
16 don't infringe, that does go under the general venue  
17 provision and there are lots of declaratory judgment  
18 actions brought right now by the prospective defendants  
19 that get to use the general venue provision. They get  
20 to sue patent owners anywhere the patent owner is  
21 subject to personal jurisdiction.

22           And one virtue of our rule is that it  
23 creates greater harmony between the sort of declaratory  
24 judgment actions which are kind of -- where the  
25 defendant races into the courthouse to sue first, and an

1 infringement action brought by the patent owner under  
2 1400(b).

3                   So I -- I hope that I've -- that I've  
4 answered your question about why this doesn't govern --  
5 why this doesn't do the work. But another part of that  
6 answer, which I had promised to get back to the Chief  
7 Justice on, is -- is about why nothing provides  
8 otherwise by law in this case, even if you don't agree  
9 with anything that I've said to this point, and that is  
10 because Fourco interpreted the word residence in 1400(b)  
11 and that's absolutely true. 14 -- it gave it the same  
12 meaning that it had in all the venue statutes in 1897.  
13 Diversity venue, general venue, patent venue. It just  
14 meant inhabitant, and inhabitant had -- it did have a  
15 meaning to corporations. It did have a meaning for  
16 individuals. It didn't have a settled meaning to  
17 unincorporated associations, but we can -- we can come  
18 back to that.

19                   The point is that Congress has now  
20 adopted -- and one thing that my friend said that I --  
21 that I entirely agree with. It is an artificial  
22 definition. It is an artificial definition of residence,  
23 but it did so because it wanted to eliminate nice  
24 distinctions about where in -- particular kinds of  
25 business entities reside using the term as it was used

1 in 1897, and it wanted to simplify the inquiry.

2           You are going to have to answer the personal  
3 jurisdiction question in all of these cases anyway. So  
4 for corporate defendants, giving an additional venue  
5 inquiry about whether they -- where they are doing  
6 business or where they have a regular and established  
7 place of business are additional complications layered  
8 on top of that personal jurisdiction inquiry that you  
9 are going to have to do anyway.

10           That's why Congress, in 1988, for general  
11 venue, decided to make personal jurisdiction the  
12 touchstone for venue as well for corporate defendants,  
13 and why the ALI, working with the judicial conferences  
14 committee, and then Congress, decided to expand that to  
15 unincorporated associations for all venue purposes in  
16 2011. It's simpler, it's crosscutting, it's not sort of  
17 a patent specific rule, but it is the best rule and it's  
18 the rule that Congress adopted. And --

19           JUSTICE SOTOMAYOR: So a lot of amici  
20 discussions as to their reasons for why so many suits  
21 are centered in this court in Texas, what is your  
22 reason, why do you think that is true?

23           MR. JAY: So I think that -- if I understand  
24 your question is, why do people sue -- what are people  
25 suing in this court in Texas or why are so many

1 people suing in this court in Texas.

2 JUSTICE SOTOMAYOR: Is it 1391 or is it  
3 something else?

4 MR. JAY: Well, it's only 1391 in the sense  
5 that it -- it's a permissible choice, but I don't think  
6 that -- that is an answer to the question of why they  
7 choose that over all other permissible choices.

8 And I think if there are complaints about  
9 the way things are handled in East Texas, and my client,  
10 Kraft, has been a defendant in East Texas in patent  
11 infringement cases as well. If there are complaints  
12 they tend to be complaints that aren't venue style  
13 complaints. In other words, it's an inconvenient forum  
14 compared to where I am located. They tend to be  
15 complaints about how the cases are managed, how  
16 discovery takes place, how motions practice is handled,  
17 and so on. And those complaints, if they are valid,  
18 would be valid even when venue is indisputably proper  
19 over a Texas defendant. They are problems that should  
20 be dealt with on their own terms rather than by letting  
21 anybody not from Texas out of that district and leaving  
22 everyone else still in the district with -- where the  
23 practice is unchanged.

24 CHIEF JUSTICE ROBERTS: I -- I didn't  
25 understand that answer. You are saying the problems

1 would be there for Texas corporations that actually  
2 reside in that district anyway. So we shouldn't worry  
3 that 25 percent of the nationwide cases are there?

4 MR. JAY: I'm saying two things, Your Honor.  
5 Number one, I think the complaints about East Texas  
6 aren't really about overcrowding -- and I would like to  
7 answer that as my second point. But that -- rather they  
8 are about the way that the cases are handled, you know,  
9 whether there be, you know, one case or a thousand  
10 cases.

11 Or -- and we talk about the overcrowding --

12 JUSTICE KAGAN: But the complaint is that it  
13 allows a kind of forum shopping, right? That it --  
14 you -- let's go down to Texas where we can get the  
15 benefit of a certain set of rules.

16 MR. JAY: I mean, I think that the same  
17 criticism can be made of the rule that Congress adopted  
18 for the general venue statute in 1988, or for that  
19 matter, the fairly liberal rule that Congress adopted  
20 for corporation in 1948, and patent cases, number one,  
21 don't have the varying circuit law. They have a single  
22 Federal court, appeals court; and number two, they don't  
23 have choice of law problems, you know, so that you can  
24 certainly have forum shopping problems under the general  
25 venue provision quite easily as well. I do think --

1 JUSTICE KENNEDY: The general -- generous  
2 jury verdicts enter into this or is that something we  
3 shouldn't think about?

4 MR. JAY: So I -- I think that the empirics  
5 -- you know, there is a battle in the amicus briefs  
6 about that. I mean, I think that at least one scholar  
7 has said that the outcomes are not significantly  
8 different in cases that go to trial. We don't have a  
9 position on that. We haven't crunched -- crunched the  
10 numbers ourselves. But ultimately we think that --

11 JUSTICE KENNEDY: But certainly that might  
12 be a perception by the -- by the -- by the bar who  
13 brings -- by the -- those in the bar who bring these  
14 suits.

15 MR. JAY: It -- it might well be and I --  
16 and it -- certainly that is -- that is the argument that  
17 is being made to Congress, and I think that when  
18 Congress is -- you know, takes up this issue as it has  
19 already been asked to do and it's already been  
20 considering at the committee level. Congress can do  
21 something that this Court doesn't have the ability to do  
22 in this case, and that is to modulate venue in the -- in  
23 a way that is not binary. I mean, in this case you --  
24 you only have two choices.

25 My friends on the other side say, reside for

1 a corporate defendant just means the state of  
2 incorporation, that is it. What Congress can do is  
3 create a definition that doesn't turn on the word  
4 resides at all, I -- or that adds more choices that  
5 could add principal place of business. It can add where  
6 the plaintiff has done research on the invention that is  
7 patented. Those are, in fact, what the proposals look  
8 like. None of the legislative proposals about patent  
9 venue in the last 10 years that I've seen look anything  
10 like what the -- what my friend on the other side are  
11 proposing.

12 Nobody likes the one place of residence  
13 rule. They all at least offer principal place of  
14 business and some plaintiff-centered venue, and that is  
15 why the empirics say that if you adopt the rule that my  
16 friends on the other side are proposing, you will shift  
17 more than half of all cases from the district where they  
18 now are into other districts. Whereas, if Congress  
19 adopted its current -- the current version of its  
20 reform, nonpracticing entity cases would largely move,  
21 but operating company cases largely would not. Whereas,  
22 if you adopted Heartland's rule, operating company cases  
23 would wind up shifting, and this gets back to my point,  
24 Mr. Chief Justice, they would have to shift to places  
25 like Delaware where lots of defendants are incorporated,

1 and if everybody were incorporated in Delaware maybe  
2 that would be okay, but because lots are incorporated in  
3 Delaware and some are not, you have kind of a dual  
4 problem.

5 You're going to have overcrowding in  
6 Delaware and you're -- you're -- the cases that really  
7 out to be in the same place, you won't be able to bring  
8 in the same place.

9 CHIEF JUSTICE ROBERTS: Were any -- were any  
10 of these policy considerations addressed by Congress  
11 when it made the change you suggest it made in 2011?

12 MR. JAY: The policy considerations about  
13 patent -- about where patent venue ought to be?

14 CHIEF JUSTICE ROBERTS: Yeah.

15 MR. JAY: No, because it -- Congress decided  
16 that it was going to -- for purposes of residence it was  
17 going to adopt a single definition across the board.  
18 But -- but --

19 JUSTICE BREYER: I laugh slightly because  
20 if -- if that is so clear what is this case doing here,  
21 and -- and it -- that's why -- that's why I can't cut  
22 one way or the other with that -- that particular  
23 argument. I mean, you would think the patent holders  
24 are a tremendously powerful group of people, businesses  
25 all over the country, and if they had been -- why



1 weren't they in Congress? See, that -- that's a  
2 Congressional problem. Why weren't they there saying we  
3 have a problem here, why don't you clarify it? You -- I  
4 don't think you can answer that question --

5 MR. JAY: I -- I can --

6 JUSTICE BREYER: -- until I get -- you can?

7 (Laughter.)

8 MR. JAY: Well, sure. Because I think --  
9 because I think that the issue is not the definition of  
10 residence. The issue is how do we come up with a  
11 different patent venue statute altogether? And that is  
12 something that Congress has been working on, trying to  
13 come up with something more calibrated, so that, for  
14 example, a research university would be able to bring  
15 suit in its home district, because that's where it did  
16 the invention; it's where the inventor's lab is and so  
17 forth, you know, where they would want to be able to sue  
18 a defendant in its own principal place of business, even  
19 if it doesn't commit the relevant act of infringement  
20 there.

21 And in particular, because, you know, the --  
22 the second half of the patent venue statute was  
23 interpreted in a way that requires everything to be  
24 conjunctive; in other words, all defendants have to have  
25 committed acts of infringement and have regular and

1 established places of business there. You have parent  
2 subsidiary problems. You have problems when you sue on  
3 multiple patents, patents which are infringed at  
4 different times, like the process of making something,  
5 and then the good that is made. Each of those could be  
6 different acts of infringement.

7           And you also have problems in pharmaceutical  
8 cases. I think one aspect of patent litigation that is  
9 working pretty well is these pharmaceutical cases where  
10 a brand company sues all the generic companies that want  
11 to make a product that's a -- you know, a facsimile of  
12 the brand product.

13           Congress, in Section 299 of the Patent Act,  
14 recognized that those are an example of cases that  
15 really all ought to proceed in the same district. They  
16 are an exception from the No Consolidation Rule that  
17 Congress wrote in the America Invents Act.

18           So what's going to happen to those cases?  
19 Number one, there is no act of infringement yet because  
20 the -- or act of infringement that kicks off the lawsuit  
21 is an artificial one. And number two, you won't be able  
22 to sue all those generics in the same district at all.  
23 Right now, a dozen, or even two dozen, cases can all be  
24 brought in the same district. It has to be litigated to  
25 a judgment in 30 months, which is the time -- time

1 period that Congress put in the statute. And yet, if --  
2 if you were going to have to be bringing a dozen suits  
3 in a dozen districts, that's going to be significantly  
4 more difficult.

5           Ultimately, we don't think that these  
6 practical problems are dispositive, because we think the  
7 text and the legislative history, and the reasons why  
8 the ALI wanted to solve the problems that had come up  
9 with the previous versions of the undefined term  
10 "residents" are so clear. Congress wanted a single  
11 definition that would have cut -- cut across all these  
12 statutes.

13           That might have been --

14           JUSTICE GINSBURG: Then why did -- why did  
15 Congress reject the ALI proposal to just get rid of  
16 1400(b)?

17           MR. JAY: Well, I can't cite you a page of  
18 legislative history, for example, but I think it may  
19 well have wanted to continue having a rule that, for  
20 example, requires all defendants to reside in the  
21 district of venue, which is what 1400(b) now -- now  
22 provides. Whereas the general venue provision has  
23 transactional venue, it allows for venue where nobody  
24 resides, and it also allows for venue sometimes where  
25 only one defendant resides.

1           But we think that Congress could have gone  
2 through and snipped out all of the venue provisions, or  
3 portions of venue provisions that were left somewhat  
4 superfluous by its adoption of this broad definition of  
5 "resides." The ALI recognizes that would be a mammoth  
6 task, but nevertheless, Congress decided to do it  
7 anyway, and to do it this relatively easy way. And I  
8 think, you know, the Fila venue --

9           JUSTICE KENNEDY: It seems to me your answer  
10 is quite proper as to 1400(a), but how does your answer  
11 apply to 1400(b)?

12           MR. JAY: How does it apply in terms of work  
13 left to be done by the rest of the statute?

14           JUSTICE KENNEDY: Yeah. You -- you -- your  
15 explanation was that they -- they wanted to get rid of  
16 all of these distinctions, but that doesn't -- and that  
17 makes sense so far as (a) is concerned, but I don't  
18 understand how it applies to (b).

19           MR. JAY: Well, it -- it wanted to get rid  
20 of the idea of different conceptions of residents under  
21 different statutes, and different conceptions of  
22 residents that applied to different types of defendants.  
23 It wanted to have all of that standardized.

24           Now, that might sometimes result in the word  
25 "resides" in a venue statute swallowing the rest to some

1 degree. I think, you know, this Court, next month, is  
2 going to consider the Fila venue provision, 45 U.S.C.  
3 46, I believe. And that venue provision -- it's in the  
4 list, in, I think, footnote 8 of the House report --  
5 that footnote incorporates of venue provisions that  
6 would be encompassed. And it says, "resides or shall be  
7 doing business."

8 Now plainly, that is subsumed by the  
9 redefinition of "resides," but that is a result that  
10 Congress was comfortable with.

11 Thank you, Mr. Chief Justice.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.

13 Five minutes, Mr. Dabney.

14 REBUTTAL ARGUMENT OF JAMES W. DABNEY

15 ON BEHALF OF THE PETITIONER

16 MR. DABNEY: Thank you, Mr. Chief Justice.

17 Getting to the point that Justice Breyer  
18 made, the domicile of unincorporated associations,  
19 limited liability companies has not been a problem in  
20 the law for decades. It has been settled.

21 There's a reason they didn't bring it up in  
22 their brief in opposition. It was never an issue in the  
23 case. And the place in the Joint Appendix I would  
24 direct the Court's attention to is page 20A, which is  
25 the proof of service that they served in this case in

1 which the defendant's counsel, in Delaware, filed proofs  
2 of service stating that the nonresident defendants were  
3 served with a notice required by, and -- and identifying  
4 the principal place of business of the defendant.

5 The idea that you don't know where the  
6 domicile is of a chartered entity is something for which  
7 there is absolutely no evidence in the record. It is --  
8 it is a complete non-problem --

9 JUSTICE SOTOMAYOR: What do we do with your  
10 adversary's last point about the -- all of the cases,  
11 like the pharmaceutical cases that will be upended and  
12 made completely impractical by ignoring 1391?

13 MR. DABNEY: I don't believe that -- I  
14 believe that that provision -- that that argument is  
15 overstated, for various reasons.

16 First of all, to the extent that venue  
17 applies across the board. Of course it will apply to  
18 putative makers of generic drugs as well. The judicial  
19 panel on multidistrict litigation exists to provide for  
20 pre-trial consolidation of proceedings, if that is  
21 appropriate. Many generic companies have waived any  
22 objection to venue by -- potentially by registering to  
23 do business in the places where the brand companies want  
24 to sue. That was the holding in the Corda case in which  
25 this Court denied cert on January 9.

1           So it is completely speculative to suggest  
2 that simply upholding what Congress has seen fit to  
3 provide by way of across-the-board venue protection for  
4 patent litigation is necessarily going to prevent  
5 litigation over putative generic drug manufacturers.

6           Secondly, the -- the Fourco case was one  
7 whose critical holding was not based on the then content  
8 of 1391(c), which, as Justice Kagan correctly pointed  
9 out, whose breadth was no narrower then than it is now.  
10 "For venue purposes," "for all venue purposes," it's  
11 exact; there is no difference there.

12           What Fourco was so important is that it held  
13 that 1400(b) is freestanding. It is not supplemented by  
14 1391(c). So if we're looking at what 1400(b) means, you  
15 have a -- a word that has been construed by this Court.  
16 That construction has never been overruled or changed by  
17 Congress.

18           And in the Pure Oil v. Suarez case in 1966,  
19 Justice Harlan wrote for a unanimous Court that 1391(c)  
20 applied to all venue statutes, except where there was a  
21 restriction, and cited Fourco and the patent venue  
22 statute as a specific exception. Why? Because the  
23 structure of 1400(b) that specifically distinguishes  
24 between resident and nonresident defendants makes no  
25 sense, unless the statute is given its original meaning.

1 You can sue a defendant in the judicial district where  
2 his domicile is, or if you want to sue somewhere else,  
3 you have to sue somewhere where there is both an act of  
4 infringement and a regular established place of  
5 business. That is what Congress provided.

6 And -- and it's very revealing that -- that  
7 my opponent cites as one argument for overruling Fourco  
8 is that adoption of -- of the respondent's rule would  
9 make more even-handed patent infringement cases and  
10 actions for declaratory judgment. Well, that is simply  
11 a funnel of salt on 1400(b) itself, because when it  
12 talks about actions for patent infringement, it's  
13 talking about the civil action remedy provided by 35  
14 U.S.C. section 281.

15 So those are the only kind of actions that  
16 1400(b) applies to. So if there is a -- a problem with  
17 the way Congress wrote the law, that's just too bad.  
18 That's not for a court to come in and -- and overrule  
19 precedent in order to achieve a goal like that.

20 And I also heard conceded here that,  
21 whatever might be the motivations for filing a patent  
22 suit in a particular jurisdiction, it -- it is conceded  
23 here that it is the interpretation of 1391, and -- and  
24 the disregard of this Court's Fourco decision that has  
25 made all this possible.



1                   And in -- in one of the papers that was  
2 cited in respondent's own brief, the paper by --

3                   CHIEF JUSTICE ROBERTS: Go ahead and finish.  
4 Finish your point.

5                   MR. DABNEY: The -- the paper by Professors  
6 Chien and Risch, that paper cited on page 52 indicates  
7 that 68 percent of small- and medium-sized businesses  
8 will get venue relief if TC Heartland wins this case.

9                   Thank you.

10                  CHIEF JUSTICE ROBERTS: Thank you, counsel.  
11 The case is submitted.

12                  (Whereupon, at 12:09 p.m., the case in the  
13 above-entitled matter was submitted.)

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