On February 5, 2019, the Federal Circuit denied a petition for rehearing en banc regarding a requested writ of mandamus by petitioner Google, Inc. Google sought the petition to overturn an earlier decision from the Eastern District of Texas finding that physical servers, belonging to Google, that were installed by third parties in the facilities of third-party internet service providers physically located in the Eastern District of Texas constituted a "regular and established place of business" under the patent venue rules 35 U.S.C. § 1400(b) and the Federal Circuit's previous decision regarding patent venue, *In re Cray Inc.*, 871 F.3d 1355 (Fed. Cir. 2017). The District Court arrived at this decision despite it being uncontroverted that the servers at issue have no contact with Google employees or customers.

The Federal Circuit panel that originally denied the petition for the writ of mandamus found that mandamus was in appropriate and stated that "it is not known if the district court's ruling involves the kind of broad and fundamental legal questions relevant to § 1400(b)," and "it would be appropriate to allow the issue to percolate in the district courts so as to more clearly define the importance, scope, and nature of the issue for us to review." *In re Google LLC*, 2018 WL 5536478, at *3 (Fed. Cir. Oct. 29, 2018).

A forceful dissent of three Federal Circuit judges took this statement to task, arguing that the Federal Circuit has important supervisory and instructional duties to perform to prevent overly expansive construction of the patent venue statute, such as was performed by the Federal Circuit in *In re Cray*. The dissent also articulated that post-*TC Heartland*, it is important to uniformly apply venue rules and prevent expansion of venue holdings to again encompass nationwide venue determinations.

Regarding the issue of servers, the Federal Circuit noted several instances where other district courts have denied the argument that physical servers, without more, constitute a "regular and established place of business." The finding that said servers does constitute a "regular and established place of business" has far reaching consequences for any other technology company that conducts business over the internet with the use of equipment or other infrastructure such as routers, cell phone towers, or merely a company that stores its equipment in a district. The dissent argues that this interpretation constitutes a larger expansion of § 1400(b) than contemplated in previous decisions that were curtailed by the Federal Circuit, such as in *In re Cray*. Indeed, the danger of this decision is that it can practically reestablish nationwide venue for some corporations, in tension with the Supreme

Court's holding in *TC Heartland*. As for the Federal Circuit panel's "wait and see" approach, the dissent notes that as of the date that rehearing *en banc* was denied, 34 additional patent cases had been filed against Google in the Eastern District of Texas relying solely on the same physical server as a "regular and established place of business" argument that had been deemed valid. Even if the Federal Circuit ultimately curtails this understanding of venue, significant resources will have been expended by the time such a decision arrives.