

# The Evolution of Nationwide Venue in Patent Infringement Suits

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This article discusses the long running dispute regarding venue in patent infringement cases, now on petition for certiorari before the Supreme Court.

## Policy Considerations Underlying Venue Statutes Improper Allegations of Venue

The typical complaint in a patent infringement case alleges that venue is proper under both 28 U.S.C. §§ 1391 and 1400(b), vaguely contending something like this: "Venue is proper in the [district court] pursuant to 28 U.S.C. §§ 1391(c) and 1400(b) because Defendant is deemed to reside in this district." In addition, and in the alternative, Defendant has committed acts of infringement in this district." In other words, venue is premised in the first instance upon the notion that the corporate defendant "resides" within the district. Often, however, corporate defendants accused of patent infringement have little or no actual physical presence in the district where the case has been filed. Instead, the alleged infringer is often a geographically limited manufacturer whose products are sold nationwide by third-party distributors or retailers. So, why are they considered to be a resident of some far off judicial district?

The patent venue statute, 28 U.S.C. § 1400, states that a patent infringement action "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." Under earlier concepts of residency, simply placing products into the stream of commerce in a given venue would be insufficient to confer residency status upon a patent infringement defendant in that venue because corporations traditionally have been considered to reside where incorporated.<sup>1</sup>

Under the law as it stands today, however, corporate patent infringement defendants are now considered to reside for purposes of venue wherever they are subject to personal jurisdiction. The Federal Circuit's first conflation of personal jurisdiction and venue under the relevant statutes appeared in *VE Holding Corp. v. Johnson Gas Appliance Co.*<sup>2</sup> In *VE Holding*, the effect of 1988 congressional amendments to the general venue statute were considered, with the Federal Circuit finding that "venue in a patent infringement case includes any district where there would be personal jurisdiction over the corporate defendant at the time the action is commenced."<sup>3</sup> A new definition of "reside" presented in the

1988 amendment along with changes regarding the applicability of the general venue statute, 28 U.S.C. § 1391(c), supposedly resulted in the question of venue being subsumed in questions of personal jurisdiction. As the Committee on the Judiciary described it, “[i]n effect, the Federal Circuit collapsed the tests for personal jurisdiction and venue, rendering § 1400 a nullity.”<sup>4</sup>

The holding of *VE Holding* was recently reconsidered by the Federal Circuit and upheld in *In re TC Heartland LLC*,<sup>5</sup> despite arguments that the 2011 congressional amendments to the general venue statute required traditional definitions of residency to apply. As a result, because of the relatively lower burden required to demonstrate personal jurisdiction in patent infringement cases, corporate defendants may still find themselves to be “residents” of districts far from their place of incorporation.

### *Policies behind Venue Designations*

Title 28 of the United States Code defines the term “venue” as “the geographic specification of the proper court or courts for the litigation of a civil action that is within the subject-matter jurisdiction of the district courts in general.”<sup>6</sup> Although this less than helpful definition fails to give any insight into the underlying purpose and policy considerations behind venue designations, concepts of convenience traditionally have factored into the original designation of venue specifications.<sup>7</sup>

Clearly, nationwide venue designations are not convenient for all defendants. Abuse of early venue statutes, allowing suit wherever a defendant could be found, prompted the Act of March 3, 1887, amending the Judiciary Act, which “permitted civil suits to be *instituted only in the district of which the defendant was an inhabitant*, except that in diversity jurisdiction cases suit could be started in the district of the plaintiff’s or the defendant’s residence.”<sup>8</sup> The scope of this act, however, was muddled by the 1893 Supreme Court decision in *In re Hohorst*, which held:

[T]he provision of the existing statute, which prohibits suit to be brought against any person “in any other district than that whereof he is an inhabitant,” is inapplicable to an alien or a foreign corporation sued here, and *especially in a suit for the infringement of a patent right*; and that, consequently, such a person or corporation may be sued by a citizen of a state of the Union *in any district in which valid service can be made upon the defendant*.<sup>9</sup>

The *Hohorst* decision created uncertainty, resulting in some courts finding that patent infringement defendants could be sued almost anywhere. It was this confusion that resulted in what would later become 28 U.S.C. § 1400, the patent venue statute. As noted in the House report:

[T]he necessity for this law grows out of the acts of 1887 and 1888 which amended the judiciary act. Conflicting decisions have even arisen in the different districts in the same States as to the construction of these acts of 1887 and 1888, and there is great uncertainty throughout the country as to whether or not the act of 1887 as amended by the act of 1888 applied to patent cases at all.<sup>10</sup>

In response, Congress created in 1897 “a special new venue statute for the occasion: patent infringement claims were to be heard only in the district where the defendant was an inhabitant, or the district where he committed acts of infringement and also maintained a regular and established place of business.”<sup>11</sup>

This became the patent venue statute as it exists today. Its creation began with debates regarding the extent to which a broader venue statute might apply to patent cases, much like recent arguments.<sup>12</sup> Today’s consideration of whether the provisions of the patent venue statute are to be supplemented by the terms of the general venue statute should account for the sole underlying purpose for the existence of the patent venue statute. “That purpose indicates that Congress did not intend the Act of 1897 to dovetail with the general provisions relating to the venue of civil suits, but rather that it alone should control venue in patent infringement proceedings.”<sup>13</sup>

### ***Effect of VE Holding***

What was the effect of “rendering § 1400 a nullity” through the decision in *VE Holding*? In 1988, the year that the general venue statute was amended, a single patent infringement suit was filed in the Eastern District of Texas. In fact, between 1978 and 1987, a grand total of two patent infringement actions had been filed there. The year after *VE Holding*, however, seven patent infringement cases were filed in the Eastern District of Texas. A slow increase in filings followed thereafter each year, with 23 patent infringement cases being filed in 2000.

With the ability to bring in defendants from anywhere in the country, the stage was set for a major shift when medical malpractice tort reform hit Texas at the end of 2003. In 2004, 106 patent infringement cases were filed in the Eastern District of Texas, with that number hitting 654 by 2010. This was a far cry from the three cases filed during the 10-year period before *VE Holding*. By 2015, almost half of all patent infringement cases filed nationwide were filed in the Eastern District of Texas:

- Total number of patent cases (nature of suit (NOS) code 830) filed nationwide in 2015: 5,806.
- Total number of these cases filed in the Eastern District of Texas: 2,558.
- Total number of these cases filed in Division 2 (Marshall) and 6 (Tyler) of the Eastern District of Texas: 2,448.

In comparison, during the same time period only 220 patent cases were filed in the Northern District of California, a region encompassing Silicon Valley, the home to numerous high-tech corporations. For whatever reason, 42% of all patent cases were filed in two divisions that together encompass less than 0.3% of the area of the United States and which are home to only 0.27% of its population.

If venue rules are for “protecting a defendant from the inconvenience of having to defend an action in a trial court that is either remote from the defendant’s residence or from the place where the acts underlying the controversy occurred,”<sup>14</sup> it would seem that the current application of the general venue statute to § 1400 is at odds with the policy considerations and history behind the existence of the patent venue statute.

## History of the Relevant Statutes

### *Specialized Patent Venue Statute Prior to VE Holding*

Prior to 1988, 28 U.S.C. § 1400(b)—the special venue statute applicable to patent cases—was considered to be the only provision controlling venue in patent infringement actions. The statute provides: “Any 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.*”<sup>15</sup> Thus, § 1400(b) only permits patent cases to be brought in two venues: (1) where a defendant “resides,” or (2) where a defendant has committed an infringing act *and* has a “regular and established” place of business.

On the other hand, § 1391 is the general venue statute, and before 1988 subsection (c) provided: “A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.”<sup>16</sup> In *Fourco Glass Co. v. Transmirra Products Corp.*, the Supreme Court reaffirmed that § 1400 alone, and not this general venue statute, controlled the proper designation of venue in patent cases.<sup>17</sup>

The petitioner in the matter, Fourco Glass Company, was a West Virginia corporation that had been sued for patent infringement in the Southern District of New York. It moved to dismiss the suit for lack of venue, and argued in part that it had not committed any of the alleged acts of patent infringement in the Southern District of New York. The district court agreed and held that there had been no showing of any act of infringement in the venue where suit was brought, and because venue in patent infringement actions is “solely and exclusively governed by 1400(b),” then dismissal was proper. The Second Circuit Court of Appeals, however, reversed and held that proper construction “requires . . . the insertion in § 1400(b) of the definition of corporate residence from § 1391(c), and that the two sections, when thus read together, meant that this defendant may be sued in New York, where it is doing business.”<sup>18</sup>

In overturning the Second Circuit, the *Fourco* Court first looked to its earlier decision in *Stonite Products Co. v. Melvin Lloyd Co.* The question in *Stonite*, “not legally distinguishable from the question” in *Fourco*, was whether the venue provision applying to patent litigation at that time was the sole provision governing venue in patent cases, or whether it should be supplemented by what became 28 U.S.C. § 1392(a). Section 1392(a) authorized an action against two or more defendants, residing in different judicial districts within the same state, to be brought in either district. “That supplementation, if permissible, would have fixed venue over Stonite Products Company (an inhabitant of the Eastern District of Pennsylvania) in the District Court for the Western District of Pennsylvania, where the suit was brought, because its codefendant was an inhabitant of that district.”<sup>19</sup> The *Stonite* Court reviewed the history of the venue statute applying specifically to patent suits at that time, and held that “[it] is the exclusive provision controlling venue in patent infringement proceedings” and “that Congress did not intend [it] to dovetail with the general provisions relating to the venue of civil suits, but rather that it alone should control venue in patent infringement proceedings.”<sup>20</sup>

Given this holding in *Stonite*, the *Fourco* Court concluded that unless there had been a “substantive change” in the patent venue statute since *Stonite* was decided, then the result in the case before it was preordained. The *Fourco* Court then reviewed the relevant provisions of the 1948 revision and recodification of the Judicial Code and the revisers’ notes to the same. It held that these notes did not express any substantive change, and that the venue statute recodified as 28 U.S.C. § 1400(b) was therefore the same exclusive statute for venue provisions that it had been in *Stonite*.

The *Fourco* Court reached this holding despite the fact that the respondents had argued that § 1391(c) had “clear and unambiguous” language applying to all actions—including patent actions—against corporations, and that as a result § 1391(c) should be read to supplement § 1400(b) in suits for patent infringement. The Court disagreed and noted that the relevant question was not whether § 1391(c) was “clear and general” but whether § 1400(b) was “complete, independent and alone controlling in its sphere as was held in *Stonite*, or is, in some measure, dependent for its force upon the former.”<sup>21</sup> The Court concluded that § 1391(c) was a general corporate venue statute, while § 1400(b) was a special one applying to patent actions, and that “[i]n these circumstances the law is settled that [h]owever inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment. . . . *Specific terms prevail over the general in the same or another statute which otherwise might be controlling.*”<sup>22</sup>

#### *1988 Amendments to General Venue Statute*

All this changed in 1988, when Congress passed the Judicial Improvements and Access to Justice Act of 1988 and amended § 1391(c) to read: “**For purposes of venue under this chapter, a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced.**”<sup>23</sup> The “chapter” referred to was chapter 87, which included § 1400.

In *VE Holding*, the Federal Circuit had its first opportunity to interpret this amended language. In that case, VE Holding Corporation had sued defendant Johnson Gas Appliance Company in two separate matters for patent infringement in the Northern District of California. Johnson moved to dismiss for improper venue, arguing that it was an Iowa corporation with no regular and established place of business in the Northern District of California. The district court agreed with Johnson, and dismissed VE Holding’s argument that the 1988 amendment to § 1391(c) redefined the word “reside” as it was used in § 1400(b).

On appeal, the Federal Circuit noted that the Supreme Court in *Fourco* and *Stonite* had taken a restrictive view of venue in patent cases, and had refused to modify the meaning of the terms used in § 1400(b) with other provisions of the venue statutes. The court found, however, that Congress’s 1988 amendments to § 1391(c) were significant. In particular, the new “under this chapter” language added to § 1391 meant that section applied to everything in chapter 87, including § 1400(b). Thus, the term “resides” in § 1400(b) had been redefined.

The court noted that this ruling was potentially controversial, particularly because Supreme Court precedent and the “lack of express legislative history indicating that the 1988 amendment of § 1391(c) was intended to change the scope of venue in patent infringement cases” arguably indicated that § 1400(b) was meant to stand on its own as the exclusive venue statute for patent infringement suits.<sup>24</sup> The new “under this chapter” language of § 1391(c) was “exact and classic language of incorporation,” however, and this language was clear and unambiguous.<sup>25</sup> The legislative history of the 1988 amendment was silent as to whether or not it meant to affect § 1400(b), and the court read nothing into this silence.

Thus, the new test for venue in patent infringement actions, as articulated for the first time by the *VE Holding* court, was whether the defendant was subject to personal jurisdiction in the district of suit at the time the action was commenced. Because Johnson had conceded that *VE Holding* obtained personal jurisdiction over it in the Northern District of California, Johnson “resided” in that district as far as § 1400(b) went, and venue in that district was therefore proper.

### ***General Venue Statute Is Amended Again***

In 2011, § 1391 was amended again, this time doing away with the language that the Federal Circuit had relied on in reaching its decision in *VE Holding*. The phrase “[f]or purposes of venue under this chapter” was eliminated, and introductory language was added explicitly stating that the general venue provisions of § 1391 would only be applicable if there were no other venue provision provided by law: “(a) Applicability of section.—*Except as otherwise provided by law*—(1) this section shall govern the venue of all civil actions brought in district courts of the United States.”<sup>26</sup> The legislative history of this amendment states that “[n]ew paragraph 1391(a)(1) would follow current law in providing the general requirements for venue choices, but would not displace the special venue rules that govern under particular Federal statutes.”<sup>27</sup> However, the same legislative report later states that “proposed subsection 1391(c) would apply to all venue statutes, including venue provisions that appear elsewhere in the United States Code.”<sup>28</sup>

In its petition for writ of mandamus to the Federal Circuit, *TC Heartland* argued that there was no conflict between these two statements. It contended that the new § 1391(c) was meant by Congress to apply more broadly than the old subsection (c), which by its terms applied “only for purposes of venue under Chapter 87.” Yet the new subsection (c) was still only a general default rule for venue, and it did not act to displace the scope of venue articulated by special venue statutes like § 1400(b). *TC Heartland* argued that Supreme Court precedent established that a specific venue statute like § 1400(b) was not subject to the general default definition of corporate residence, and thus even the amended § 1391 had no effect on § 1400(b)’s definition of “resides.” The Federal Circuit was unconvinced by these arguments.

### ***In re TC Heartland and Patent Venue Reform***

#### ***Federal Circuit Decision in TC Heartland***

On April 29, 2016, the Federal Circuit issued its decision in *In re TC Heartland LLC*, upholding its earlier decision in *VE Holding*, even in view of the 2011 amendments to the general venue statute. As stated by the Federal Circuit, “[i]n *VE Holding*, this court held that the definition of corporate residence

in the general venue statute, § 1391(c), applied to the patent venue statute, 28 U.S.C. § 1400.”<sup>29</sup> No reason was found to reverse that decision based on what the Federal Circuit characterized as “minor” amendments to the general venue statute.

The Federal Circuit focused on the lack of a definition for the term “reside” as found in the patent venue statute to support its holding. “It is undisputed that the patent venue statute itself does not define corporate residence and thus there is no statutory ‘law’ that would satisfy [the petitioner’s] claim that Congress intended in 2011 to render § 1391(c)’s definition of corporate residence inapplicable to venue for patent cases.”<sup>30</sup> For this reason, the general venue statute’s definition of residency was read into the patent venue statute, despite the presence of the amended introductory language found at the beginning of 28 U.S.C. § 1391, which states that the section is applicable “except as otherwise provided by law.”

This would seemingly appear to conflict not only with the plain language of the general venue statute and the legislative history of the patent venue statute, but also with a discussion found in a footnote from a recent Supreme Court decision stating that “Section 1391 governs ‘venue generally,’ that is, **in cases where a more specific venue provision does not apply.** Cf., e.g., § 1400 (identifying proper venue for copyright and patent suits).”<sup>31</sup> Before the 2011 amendments, the phrase “except as otherwise provided by law” was independently present in subsections (a), (b), and (e) of § 1391, but not the relevant subsection (c). Afterward, it was made a blanket statement applicable to the entire section. Giving meaning to the introductory phrase of § 1391 (which states that the *section* is applicable “except as otherwise provided by law”) might have prevented § 1400 from being completely superfluous, but the Federal Circuit refused to do so. Instead, it was simply conceded “that § 1400 is a specific venue provision pertaining to patent infringement suits,” without any explanation of the reason for its existence if not to limit a broader interpretation.<sup>32</sup> As noted by the Committee on the Judiciary, the result of the *VE Holding* decision was that “the U.S. Court of Appeals for the Federal Circuit ‘reinterpreted’ the statute [28 U.S.C. § 1400] in a way that robbed it of all effect.”<sup>33</sup> For all intents and purposes, § 1400 doesn’t even exist.

Notably, the Federal Circuit’s justification in *VE Holding* for reaching a conclusion that it acknowledged “would seem to fly in the face of thirty years of Supreme Court law” was based on the finding that “Section 1391(c) as it was in *Fourco* is no longer. *We now have exact and classic language of incorporation* [for] purposes of venue under this chapter [which includes § 1400].”<sup>34</sup> But, when the converse argument was presented in *TC Heartland*, it was not considered sufficient to overturn *VE Holding*. The petitioner in *TC Heartland* argued that the amended introductory language “except as otherwise provided by law” was *standard language of exclusion*, precluding the application of the general venue section to the patent statute. This argument was summarily rejected on the basis that *Fourco* was no longer the law after the 1988 amendments, leaving no governing Supreme Court precedent that could be codified by the 2011 amendment language.

On September 12, 2016, *TC Heartland* filed a petition for a writ of certiorari with the Supreme Court, asking the question presented in *Fourco* of whether “28 U.S.C. § 1400(b) is the sole and exclusive provision governing venue in patent infringement action and is not to be supplemented by 28 U.S.C. § 1391(c).” Amicus briefs have already begun pouring in, and Kraft’s response is due November 16, 2016.

### *Legislative Reform*

Legislative reform to the patent venue statute was discussed during the petitioner's oral argument before the Federal Circuit in *TC Heartland*. Judge Kimberly A. Moore noted that at least five bills had been introduced in Congress over the previous decade to "correct" the current state of the venue statute. The reasons for such reform have been well documented:

It is long past time for Congress to restore § 1400 to its role of protecting patent owners and accused infringers from the burden of being forced to litigate in remote locations, and ensuring that patent lawsuits do not unfairly burden particular courts. Congress must correct the Federal Circuit's mistake [in *VE Holding*], and clarify that patent lawsuits may only be brought in districts with some reasonable connection to the dispute.<sup>35</sup>

Whether such reform will be successful remains to be seen. In 1897, the purpose of what became the patent venue statute was stated to be "to give original jurisdiction to the court *where a permanent agency transacting the business is located*, and that business is engaged in the infringement of the patent rights of someone who has such rights anywhere in the United States."<sup>36</sup> The need for reform in view of *VE Holding* and *TC Heartland* to reestablish and confirm the original legislative intent for the introduction of the patent venue statute does not seem to be in question, but little progress has been made. The Venue Equity and Non-Uniformity Elimination Act of 2016 (S. 2733) introduced March 17, 2016, proposes amendments to 28 U.S.C. § 1400 that explicitly delineate where patent infringement actions may be brought, notwithstanding 28 U.S.C. § 1391(b) and (c). These limit actions to "where the defendant has its principal place of business or is incorporated" and "where the defendant has committed an act of infringement of a patent in suit and has a regular and established physical facility that gives rise to the act of infringement."<sup>37</sup> But, these amendments are nearly identical to previously proposed amendments found in earlier proposals, such as the Innovation Act (H.R. 9) introduced February 5, 2015, as well as the Patent Reform Act of 2007, and the delay in enacting such amendments seems more related to friction in the process rather than a question of need.

Considering the glacially slow progress in this effort, it may be some time before such reform is enacted. Until that time, the legacy of *VE Holding* remains that defendants in patent infringement suits are subject to nationwide venue, oftentimes far from their actual place of business. Given the Federal Circuit's recent refusal in *TC Heartland* to modify *VE Holding*, this is a legacy that may live on for some time to come.

### **Endnotes**

1. *Brunette Mach. Works, Ltd. v. Kockum Indus., Inc.*, 406 U.S. 706, 707 n.2 (1972) ("[T]he residence of a corporation for purposes of § 1400(b) is its place of incorporation."); *Shaw v. Quincy Mining Co.*, 145 U.S. 444, 450 (1892) ("[T]he home, the domicil, the habitat, the residence, the citizenship of the corporation can only be in the State by which it was created, although it may do business in other States whose laws permit it.").
2. 917 F.2d 1574 (Fed. Cir. 1990).
3. *Id.* at 1583.
4. H.R. REP. NO. 114-235, at 34 (2015).



5. 821 F.3d 1338 (Fed. Cir. 2016).
6. 28 U.S.C. § 1390(a).
7. **Brunette Mach. Works, Ltd. v. Kockum Indus., Inc., 406 U.S. 706, 710 (1972)** (“[T]he venue provisions are designed . . . to allocate suits to the most appropriate or convenient federal forum.”); *VE Holding*, 917 F.2d at 1576 (“Venue . . . serves the purpose of protecting a defendant from the inconvenience of having to defend an action in a trial court that is either remote from the defendant’s residence or from the place where the acts underlying the controversy occurred.”).
8. *Stonite Prods. Co. v. Melvin Lloyd Co.*, 315 U.S. 561, 563–64 (1942) (emphasis added).
9. 150 U.S. 653, 662 (1893) (emphasis added).
10. H.R. REP. NO. 54-2905, 29 CONG. REC. 1900 (1897).
11. *Brunette Mach. Works*, 406 U.S. at 712 (citing 29 Stat. 695 (1897) (codified as 28 U.S.C. § 1400(b))).
12. *Stonite*, 315 U.S. at 565 (“The Act of 1897 was adopted to define the exact jurisdiction of the federal courts in actions to enforce patent rights and thus eliminate the uncertainty produced by the conflicting decisions on the applicability of the Act of 1887, as amended, to such litigation.”).
13. *Id.* at 565–66.
14. *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1576 (Fed. Cir. 1990).
15. 28 U.S.C. § 1400(b) (emphasis added).
16. 28 U.S.C. § 1391(c) (1976).
17. 353 U.S. 222, 229 (1957) (“We hold that 28 U.S.C. § 1400(b) is the sole and exclusive provision controlling venue in patent infringement actions, and that it is not to be supplemented by the provisions of 28 U.S.C. § 1391(c).”).
18. *Id.* at 223–24 (internal quotation marks omitted).
19. *Id.* at 224–25.
20. *Id.* at 225 (quoting *Stonite Prods. Co. v. Melvin Lloyd Co.*, 315 U.S. 561, 563, 566 (1942)).
21. *Id.* at 228.
22. *Id.* at 222, 228–29 (emphasis added) (internal quotation marks omitted).
23. 28 U.S.C. § 1391(c) (2007) (emphasis added).
24. *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1578 (Fed. Cir. 1990).
25. *Id.* at 1579.
26. 28 U.S.C. § 1391(a) (emphasis added).
27. H.R. REP. NO. 112-10, at 18 (2011).
28. *Id.* at 20.
29. *In re TC Heartland LLC*, 821 F.3d 1338, 1341 (Fed. Cir. 2016).
30. *Id.* at 1342.
31. *Atl. Marine Constr. Co. v. U.S. Dist. Court for the W. Dist. of Tex.*, 134 S. Ct. 568, 577 n.2 (2013).
32. *TC Heartland*, 821 F.3d at 1342.
33. H.R. REP. NO. 114-235, at 34 (2015).
34. *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1578–79 (Fed. Cir. 1990) (emphasis added).
35. H.R. REP. NO. 114-235, at 34 (2015).

36. 29 CONG. REC. 1900 (1897).

37. S. 2733, 114th Cong. § 2 (2016).