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*Venue Statutes — Patent Suits — Definition of Corporate Residence — TC Heartland LLC v. Kraft Foods Group Brands LLC*

Congress governs the location of civil suits through a general venue statute<sup>1</sup> and various specialized venue statutes.<sup>2</sup> One of these specialized statutes governs venue for patent infringement actions.<sup>3</sup> Before last Term, the Supreme Court had twice held that the patent venue statute was the “exclusive provision controlling venue in patent infringement actions.”<sup>4</sup> In both cases, the Court arrived at its holding after examining the *purposes* of Congress’s venue legislation. The second time around, the patent venue statute’s exclusivity meant that a defendant corporation “resides” only in its state of incorporation for venue purposes in patent suits.<sup>5</sup> Last Term, in *TC Heartland LLC v. Kraft Foods Group Brands LLC*,<sup>6</sup> the Supreme Court again held that a defendant corporation “resides” only in its state of incorporation for venue purposes in patent suits.<sup>7</sup> Specifically, nothing in the text of the most recent amendments to the general venue statute<sup>8</sup> clearly signaled Congress’s intent to overturn the Court’s settled construction of the patent venue statute as exclusive.<sup>9</sup> An instructive irony underlies *TC Heartland*: a text-focused clear statement rule led the Court to uphold a purposivist construction of a statutory scheme. This irony ought to motivate textualist judges to enforce the best textual readings of amended statutory schemes instead of requiring a clear statement of Congress’s intent to overrule preamendment judicial constructions of these schemes.

In 2014, Kraft Foods filed a patent infringement lawsuit against TC Heartland in the District of Delaware.<sup>10</sup> TC Heartland is a limited liability company allegedly incorporated in Indiana and with headquarters there.<sup>11</sup> TC Heartland filed a motion to dismiss for lack of personal

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<sup>1</sup> 28 U.S.C. § 1391 (2012).

<sup>2</sup> See, e.g., 28 U.S.C. § 1396 (tax collection actions); *id.* § 1401 (stockholder derivative actions).

<sup>3</sup> 28 U.S.C. § 1400. Congress first enacted a specialized patent venue statute 120 years ago. See Act of Mar. 3, 1897, ch. 395, 29 Stat. 695.

<sup>4</sup> *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 229 (1957); see *Stonite Prods. Co. v. Melvin Lloyd Co.*, 315 U.S. 561, 563 (1942).

<sup>5</sup> *Fourco*, 353 U.S. at 226.

<sup>6</sup> 137 S. Ct. 1514 (2017).

<sup>7</sup> *Id.* at 1521.

<sup>8</sup> Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, sec. 202, § 1391, 125 Stat. 758, 763–64 (codified as amended at 28 U.S.C. § 1391).

<sup>9</sup> *TC Heartland*, 137 S. Ct. at 1520.

<sup>10</sup> *Kraft Foods Grp. Brands LLC v. TC Heartland, LLC*, No. 14-28, 2015 WL 4778828, at \*2 (D. Del. Aug. 13, 2015). Kraft Foods was targeting TC Heartland’s manufacture of “liquid water enhancer products.” *Id.* at \*1.

<sup>11</sup> *Id.* at \*1. The parties eventually noted that TC Heartland was perhaps an unincorporated entity. *TC Heartland*, 137 S. Ct. at 1517 n.1. But because the lower courts had decided the case on the assumption that TC Heartland was in fact a corporation, the Supreme Court retained that assumption. *Id.*

jurisdiction and to transfer venue to the Southern District of Indiana.<sup>12</sup> The transfer of venue claim depended on where TC Heartland “resides”<sup>13</sup>: If the patent venue statute applied exclusively, venue would lie in Indiana where the company was allegedly incorporated.<sup>14</sup> But if the general venue statute supplemented the patent venue statute, venue could also be proper in the District of Delaware so long as TC Heartland was within that court’s personal jurisdiction.<sup>15</sup>

Whether the general venue statute supplements the patent venue statute had been litigated twice before at the Supreme Court. Both times, the Court answered this question in the negative. In *Stonite Products Co. v. Melvin Lloyd Co.*,<sup>16</sup> if the patent venue statute was independent of the general venue statute, then venue was proper only where the defendant was an “inhabitant” (that is, the defendant’s state of incorporation<sup>17</sup>), or where the defendant allegedly infringed and had a “regular and established place of business.”<sup>18</sup> If it was not independent, venue could lie in other districts as well.<sup>19</sup> The Court opined that the “scope” of the patent venue statute could “best be determined from an examination of the *reasons* for its enactment.”<sup>20</sup> Relying heavily on a House report and a Congressman’s remarks,<sup>21</sup> the Court determined that “Congress did not intend [the patent venue statute] to dovetail with the general provisions relating to the venue of civil suits.”<sup>22</sup> Thus, the patent venue statute “[wa]s the exclusive provision controlling venue in patent infringement proceedings.”<sup>23</sup>

The Court reaffirmed *Stonite* fifteen years later in *Fourco Glass Co. v. Transmirra Products Corp.*<sup>24</sup> In the intervening time, Congress had revised and recodified the Judicial Code. The patent venue statute, § 1400(b), now looked to where the defendant “resides”<sup>25</sup> instead of

<sup>12</sup> *Kraft Foods*, 2015 WL 4778828, at \*1–2.

<sup>13</sup> See 28 U.S.C. § 1400(b) (“Any civil action for patent infringement may be brought in the judicial district where the defendant resides . . .”).

<sup>14</sup> See *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 226 (1957) (finding that “reside[nce]” in § 1400(b) refers to “the state of incorporation only”).

<sup>15</sup> See 28 U.S.C. § 1391(c) (“For all venue purposes . . . [a corporation] shall be deemed to reside, if a defendant, in any judicial district in which such defendant is subject to the court’s personal jurisdiction . . .”).

<sup>16</sup> 315 U.S. 561 (1942).

<sup>17</sup> When Congress originally enacted the venue statutes, a corporation was understood to “inhabit” its state of incorporation. *Shaw v. Quincy Mining Co.*, 145 U.S. 444, 449–50 (1892).

<sup>18</sup> *Stonite*, 315 U.S. at 562 & n.1.

<sup>19</sup> *Id.* at 562 & n.1, 563.

<sup>20</sup> *Id.* at 563 (emphasis added).

<sup>21</sup> *Id.* at 565 & n.5.

<sup>22</sup> *Id.* at 566.

<sup>23</sup> *Id.* at 563.

<sup>24</sup> 353 U.S. 222 (1957).

<sup>25</sup> 28 U.S.C. § 1400(b) (1952) (“Any civil action for patent infringement may be brought in the

where the defendant “inhabits.” The general venue statute now defined “residence . . . for venue purposes” as the state of incorporation *or* wherever a company was “licensed to do business or [wa]s doing business.”<sup>26</sup> Drawing largely on the Revisers’ Notes, *Fourco* found that Congress had not intended any “substantive change” in the venue statutes,<sup>27</sup> so § 1400(b)’s use of “resides” retained the prerevision meaning of “inhabitant” — the state of incorporation only.<sup>28</sup> The patent venue statute remained the “exclusive provision controlling venue in patent infringement actions,”<sup>29</sup> independent of the general venue statute, § 1391.<sup>30</sup> *Fourco* stood unchallenged for thirty years.

In 1988, Congress amended § 1391 to provide: “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 . . . .”<sup>31</sup> In *VE Holding Corp. v. Johnson Gas Appliance Co.*,<sup>32</sup> the Federal Circuit parsed the effect of the newly inserted language, “[f]or purposes of venue under this chapter.”<sup>33</sup> Since the patent venue provision was in the same chapter, it would now incorporate § 1391(c)’s definition of corporate residence.<sup>34</sup> According to the Federal Circuit, then, § 1400(b) was no longer independent of § 1391(c). *VE Holding* had gutted *Fourco*.

In 2011, Congress again amended § 1391, setting the groundwork for *TC Heartland*. First, Congress changed “[f]or purposes of venue under this chapter” to “[f]or *all* venue purposes.”<sup>35</sup> Second, Congress added a saving clause, which states that § 1391 governs venue for all civil actions “[e]xcept as otherwise provided by law.”<sup>36</sup> *TC Heartland* argued that the addition of the saving clause insulated § 1400(b) from § 1391(c)’s definition of corporate residence.<sup>37</sup> So insulated, “resides” in § 1400(b) would refer only to the state of incorporation, as *Fourco* had held.<sup>38</sup> Venue would therefore be proper only in two categories of locations:

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judicial district where the defendant *resides*, or where the defendant has committed acts of infringement and has a regular and established place of business.” (emphasis added); *accord* 28 U.S.C. § 1400(b) (2012) (retaining identical language).

<sup>26</sup> 28 U.S.C. § 1391(c) (1952).

<sup>27</sup> *Fourco*, 353 U.S. at 227.

<sup>28</sup> *Id.* at 226.

<sup>29</sup> *Id.* at 229.

<sup>30</sup> *Id.* at 226.

<sup>31</sup> 28 U.S.C. § 1391(c) (1988).

<sup>32</sup> 917 F.2d 1574 (Fed. Cir. 1990).

<sup>33</sup> *See id.* at 1578–80.

<sup>34</sup> *Id.* at 1578.

<sup>35</sup> 28 U.S.C. § 1391(c) (2012) (emphasis added).

<sup>36</sup> *Id.* § 1391(a).

<sup>37</sup> *Kraft Foods Grp. Brands LLC v. TC Heartland, LLC*, No. 14-28, 2015 WL 4778828, at \*9–10 (D. Del. Aug. 13, 2015).

<sup>38</sup> *Id.* at \*8.

(1) TC Heartland's state of incorporation, and (2) jurisdictions where TC Heartland allegedly infringed and had a regular and established place of business.<sup>39</sup> Under this premise, since TC Heartland was allegedly incorporated in Indiana and did not have a place of business in Delaware, venue was improper in Delaware.

Magistrate Judge Burke rejected TC Heartland's reading of the 2011 amendments, finding that the changes to § 1391 had done nothing to alter *VE Holding's* interpretation of this provision.<sup>40</sup> He also concluded that the Delaware district court had personal jurisdiction over TC Heartland with respect to all claims.<sup>41</sup> He accordingly recommended that the court deny TC Heartland's motion to dismiss for lack of personal jurisdiction and to transfer venue.<sup>42</sup> The district court adopted Magistrate Judge Burke's recommendation in full.<sup>43</sup>

TC Heartland petitioned the Federal Circuit seeking a writ of mandamus for dismissal or transfer, but the court denied the petition.<sup>44</sup> Judge Moore, writing for a unanimous panel,<sup>45</sup> held that Federal Circuit precedent foreclosed TC Heartland's venue and personal jurisdiction arguments.<sup>46</sup> The panel found that nothing in the 2011 amendments provided any basis for reconsidering *VE Holding's* interpretation of the venue statutes.<sup>47</sup> That is, nothing in the 2011 amendments insulated § 1400(b) from § 1391(c)'s definition of corporate residence.<sup>48</sup> Judge Moore observed that "the patent venue statute itself does not define corporate residence and thus there is no statutory 'law'" that supplies an alternate definition of corporate residence in lieu of § 1391(c)'s default definition.<sup>49</sup>

The Supreme Court reversed. Writing for a unanimous Court,<sup>50</sup> Justice Thomas held that "reside[nce]" in § 1400(b) means the state of

<sup>39</sup> *Id.* at \*7; see also 28 U.S.C. § 1400(b).

<sup>40</sup> *Kraft Foods*, 2015 WL 4778828, at \*9.

<sup>41</sup> *Id.* at \*2-7. In *Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558 (Fed. Cir. 1994), the Federal Circuit held that specific jurisdiction was met in forums where a defendant intentionally distributed infringing products "through an established distribution channel." *Id.* at 1565. Since TC Heartland had purposefully distributed some infringing products to Delaware customers, specific jurisdiction was met for claims as to those products. *Kraft Foods*, 2015 WL 4778828, at \*4-5. Per *Beverly Hills*, this was also sufficient to establish specific jurisdiction for claims arising from infringing products sold outside Delaware. *Id.* at \*5-7.

<sup>42</sup> *Kraft Foods*, 2015 WL 4778828, at \*15.

<sup>43</sup> *Kraft Foods Grp. Brands LLC v. TC Heartland, LLC*, No. 14-28, 2015 WL 5613160, at \*1 (D. Del. Sept. 24, 2015).

<sup>44</sup> *In re TC Heartland LLC*, 821 F.3d 1338, 1340 (Fed. Cir. 2016).

<sup>45</sup> Judge Moore was joined by Senior Judge Linn and Judge Wallach.

<sup>46</sup> *TC Heartland LLC*, 821 F.3d at 1341.

<sup>47</sup> *Id.*

<sup>48</sup> See *id.* at 1341-43.

<sup>49</sup> *Id.* at 1342. Judge Moore also echoed Magistrate Judge Burke in concluding that Federal Circuit precedent negated TC Heartland's personal jurisdiction arguments. *Id.* at 1343-44.

<sup>50</sup> Justice Gorsuch took no part in the consideration or decision of the case.

incorporation, a meaning unaltered by the 2011 amendments to § 1391.<sup>51</sup> Justice Thomas observed that *Fourco* had reaffirmed *Stonite*'s findings of congressional purpose: "Congress designed § 1400(b) to be 'complete, independent and alone controlling in its sphere.'"<sup>52</sup> Just as "nothing in the 1948 recodification evidenced an intent to alter" the patent venue statute's independent status,<sup>53</sup> Justice Thomas continued, nothing in the 2011 amendments showed an intent to alter *Fourco*'s interpretation of § 1391 and § 1400(b).<sup>54</sup> The Court relied on a clear statement rule: if Congress wishes to change the settled judicial construction of a statute, it must give an obvious signal to that effect.<sup>55</sup>

To show that there was no such clear statement in the 2011 amendments, the Court adduced three arguments. First, the insertion of the word "all" in "[f]or all venue purposes"<sup>56</sup> did not materially change the applicability of § 1391(c).<sup>57</sup> Second, § 1391's new saving clause — "[e]xcept as otherwise provided by law"<sup>58</sup> — permits specialized venue statutes to contain independent definitions of "resides."<sup>59</sup> Third, the 2011 amendments eliminated the words "under this chapter," which had been the basis for the Federal Circuit's application of § 1391's corporate residence definition to the patent venue statute.<sup>60</sup> In short, the text of the 2011 amendments failed to clearly signal Congress's intent to overrule *Fourco* in favor of *VE Holding*.<sup>61</sup> For the Court, *Fourco* was still the law, which meant that "resides" in § 1400(b) still only referred to the defendant's state of incorporation.<sup>62</sup>

*TC Heartland*'s text-focused application of the clear statement rule ironically left *Stonite*'s and *Fourco*'s purposivist interpretations of the venue statutes intact. This irony ought to motivate textualist judges to enforce the best textual readings of amended statutory schemes instead of requiring a clear statement of Congress's intent to overrule preamendment judicial constructions of these schemes. To be sure, had the *TC Heartland* Court just stuck with the best textual reading of the amended statutory scheme instead of applying a clear statement rule,<sup>63</sup> it still

<sup>51</sup> *TC Heartland*, 137 S. Ct. at 1520–21.

<sup>52</sup> *Id.* at 1519 (quoting *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228 (1957)).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 1520.

<sup>55</sup> *Id.*

<sup>56</sup> 28 U.S.C. § 1391(a) (2012) (emphasis added).

<sup>57</sup> *TC Heartland*, 137 S. Ct. at 1520–21.

<sup>58</sup> 28 U.S.C. § 1391(a).

<sup>59</sup> *TC Heartland*, 137 S. Ct. at 1521.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Judge Kavanaugh explicitly distinguishes the "best reading" of a statute from application of a clear statement rule. Judges arrive at "the best reading of [a] statute by interpreting the words of the statute, taking account of the context of the whole statute, and applying any appropriate

would have had sufficient reason to reach the same interpretation of corporate residence as it did in *Fourco*. But this is happenstance. Suppose that *Fourco* had come out the other way — that the purpose of the general venue statute was to supplement the patent venue statute. In this counterfactual, the best reading of the 2011 amendments would be inconsistent with *Fourco*, but such inconsistency still likely wouldn't be enough to clearly signal a congressional intent to overrule *Fourco*. Thus, when the clear statement rule is applied, even where the best textual reading of an amended statute suggests a certain interpretation, the text may not be clear enough to overcome a prior purposivist construction. Despite this ironic possibility, textualist judges likely feel committed to clear statement rules because they force Congress to clearly communicate its intended meaning in statutory text. Nonetheless, when confronted with prior (perhaps purposivist) judicial constructions of statutes, textualist judges could achieve this goal through a method that is more consistent with textualism in the long run: strictly enforcing the best textual readings of amended statutes.

Unlike *TC Heartland*, both *Fourco* and *Stonite* relied on nontextual sources. Upon reviewing the legislative history, *Stonite* determined that “Congress did not intend [the patent venue statute] 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>64</sup> In drawing this conclusion, *Stonite* only quoted the text of the venue statutes in its first footnote<sup>65</sup> and did not engage in any sort of textual exegesis of these statutes.<sup>66</sup> Thus, *Stonite* not only drew on nontextual sources to divine congressional intent, but also relied on purpose *in place of* text to decide the “scope” of the patent venue statute.<sup>67</sup>

*Fourco*'s analysis likewise rested on nontextual sources; in particular, the Court relied heavily on “Revisers’ Notes.”<sup>68</sup> Statements by these Revisers<sup>69</sup> made “uniformly clear that no changes of law or policy [we]re to be presumed from changes of language in the revision unless an intent to make such changes [wa]s clearly expressed.”<sup>70</sup> Finding that the Revisers’

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semantic canons.” Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2163 (2016) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (2014)). Only after arriving at this “best reading” would judges “apply any applicable plain [i.e., clear] statement rules.” *Id.*

<sup>64</sup> *Stonite Prods. Co. v. Melvin Lloyd Co.*, 315 U.S. 561, 566 (1942); *see id.* at 565 & n.5, 566.

<sup>65</sup> *Id.* at 562 n.1.

<sup>66</sup> *See id.* at 561–67.

<sup>67</sup> *See id.* at 563.

<sup>68</sup> *See Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 226–28 (1957).

<sup>69</sup> The Revisers responsible for the 1948 recodification of the Judicial Code included members of congressional committees, law professors, and judges. *See id.* at 227 n.8.

<sup>70</sup> *Id.* at 227.

Notes did not clearly express any such intent, the Court reaffirmed *Stonite*'s interpretation of corporate residence for patent suits.<sup>71</sup>

Instead of looking to legislative history or Revisers' Notes, the *TC Heartland* Court fruitlessly scoured the *text* of the 2011 amendments for a clear indication that Congress had intended to overturn *Fourco*'s purposivist interpretation of the venue statutes. A clear statement rule mandates that Congress can "achieve a particular result only by *explicit* statement."<sup>72</sup> Though clear statement rules "appear to fit comfortably within a textualist approach,"<sup>73</sup> the rule's application in *TC Heartland* had the ironic effect of blessing two judicial opinions — *Stonite* and *Fourco* — that relied on nontextual methods and sources.

To be sure, the "best reading"<sup>74</sup> of the 2011 amendments is likely consistent with *Stonite*'s and *Fourco*'s purposivist interpretations of the venue statutes. A contrary reading would render part of § 1400(b) superfluous.<sup>75</sup> Section 1391(c) defines corporate residence in terms of personal jurisdiction, and § 1400(b)'s second prong renders venue proper wherever a defendant corporation has a "regular and established place of business."<sup>76</sup> Since specific personal jurisdiction would necessarily attach if a defendant has a regular and established place of business within a district,<sup>77</sup> adopting the § 1391(c) definition of corporate residence for the first prong of § 1400(b) ("resides") would obviate the need for the second prong of § 1400(b).<sup>78</sup> As a textual matter, then, the 2011 version

<sup>71</sup> *Id.* at 229. The *Fourco* Court did engage in some textual analysis. The Court applied a presumption that "general language . . . 'will not be held to apply to a matter specifically dealt with in another part of the same enactment.'" *Id.* at 228 (quoting *Clifford F. MacEvoy Co. v. United States ex rel. Calvin Tomkins Co.*, 322 U.S. 102, 107 (1944)). Since venue for patent suits was "specifically dealt with" in § 1400(b), the general venue statute did not apply to such cases. *Id.* Justice Scalia and Professor Bryan Garner list the general/specific canon as a contextual canon, in the same category as the rule against surplusage. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW* 174, 183 (2012). Still, the *Fourco* Court had already reaffirmed *Stonite*'s holding before engaging in this textual analysis; nontextual considerations (that is, the Revisers' Notes) provided sufficient basis for the Court's holding. See *Fourco*, 353 U.S. at 227–28.

<sup>72</sup> David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 940 (1992).

<sup>73</sup> Note, *Clear Statement Rules, Federalism, and Congressional Regulation of States*, 107 HARV. L. REV. 1959, 1959 (1994).

<sup>74</sup> See *supra* note 63.

<sup>75</sup> Recall that the "best reading" of a statute involves "taking account of the context of the whole statute." Kavanaugh, *supra* note 63, at 2163. The rule against surplusage is a contextual canon. SCALIA & GARNER, *supra* note 71, at 174. Applying the rule against surplusage involves consideration of a "textual consequence[]" that is "relevant to a sound textual decision." *Id.* at 352.

<sup>76</sup> 28 U.S.C. § 1400(b) (2012).

<sup>77</sup> See *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 881 (2011) (plurality opinion) (noting that personal jurisdiction attaches "[w]here a defendant 'purposefully avails itself of the privilege of conducting activities within the forum State'" (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)); *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

<sup>78</sup> Surprisingly, none of the decisions in the *TC Heartland* litigation discussed this antisurplusage reading. Instead, the Court hinted at a complementary textual reading when it noted "that § 1391's

of § 1400(b) reads as the “exclusive provision controlling venue in patent infringement actions,”<sup>79</sup> consistent with *Stonite*’s and *Fourco*’s purposivist interpretations.

But what if the best textual reading of the 2011 amendments had been *inconsistent* with *Fourco*’s purposivist interpretation of the venue statutes? Consider if the Revisers’ Notes had indicated that the addition of “for venue purposes” to the 1948 version of § 1391 was meant to incorporate § 1391(c)’s definition of corporate residence into § 1400(b). In this circumstance, *Fourco* likely would have held that the purpose of § 1391(c) was to supplement § 1400(b).<sup>80</sup> If *TC Heartland* had enforced the best textual reading of the amended venue statutes by applying the rule against surplusage, it would have abrogated this counterfactual *Fourco* holding.

Yet enforcing the clear statement rule would lead to the opposite result: the purposivist interpretation would have stood. The clear statement rule does not call for the “best reading.”<sup>81</sup> Rather, it asks whether the text of the 2011 amendments provided a clear statement that Congress intended to overrule *Fourco*’s construction of the venue statutes. In this counterfactual, a statutory scheme that created surplusage likely would not have functioned as a clear enough statement to overrule *Fourco*’s holding.<sup>82</sup> Thus, even though the best textual reading of the 2011 amendments is that they insulate § 1400(b) from § 1391(c), these amendments would not have clearly signaled Congress’s intent to overrule a sixty-year-old precedent saying the opposite. This *TC Heartland* counterfactual finds a real-life counterpart in *Forest Grove School District v. T.A.*,<sup>83</sup> in which a six-Justice majority held that the 1997 amendments to the Individuals with Disabilities Education Act (IDEA) did not

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[new “except as otherwise provided by law”] saving clause expressly contemplates that certain venue statutes may retain definitions of ‘resides’ that conflict with its default definition.” *TC Heartland*, 137 S. Ct. at 1521. As Chief Justice Roberts suggested at oral argument, the law “otherwise provided” could be the independent meaning that *Fourco* gave to § 1400(b)’s use of the term “resides” (that is, the state of incorporation). Transcript of Oral Argument at 25, *TC Heartland*, 137 S. Ct. 1514 (No. 16-341).

<sup>79</sup> *Fourco Glass Co. v. Transmira Prods. Corp.*, 353 U.S. 222, 229 (1957).

<sup>80</sup> Admittedly, one must imagine that the *Fourco* Court would have come to this conclusion even though such a holding would have itself created a surplusage issue. At the time, § 1391(c) defined corporate residence in terms of where a corporation was “licensed to do business or . . . doing business.” 28 U.S.C. § 1391(c) (1952). If “resides” in § 1400(b) had incorporated this definition, § 1400(b)’s second prong would have swallowed it. A corporation’s “regular and established place of business” is necessarily somewhere where it is “licensed to do business or . . . doing business.” The unlikelihood of this counterfactual *Fourco* holding reinforces a disadvantage of clear statement rules: they can favor even those prior judicial holdings that contain flawed analysis.

<sup>81</sup> See Kavanaugh, *supra* note 63, at 2144 n.134 (“[P]lain statement . . . rules tell us that the best reading of the statutory text does not control in certain circumstances.”); see also *supra* note 63.

<sup>82</sup> See Kavanaugh, *supra* note 63, at 2155 (“[P]lain statement rules . . . demand language directly stating Congress’s intent to wade into the area encompassed by the plain statement rule.”).

<sup>83</sup> 557 U.S. 230 (2009).

clearly signal Congress’s intent to abrogate a preamendment, purposivist interpretation;<sup>84</sup> the dissent countered that the best textual reading of the amended IDEA indicated a contrary interpretation.<sup>85</sup>

Put more generally, even where the best textual reading of a statute suggests a certain interpretation, the text may not be *clear enough* to overcome a settled, contrary construction.<sup>86</sup> Indeed, commentators have observed that text-focused clear statement rules actually “stand at a remove from a strictly textualist methodology” because such rules “reflect considerations that are necessarily external to the statutory text itself.”<sup>87</sup> For example, “each instance [of the clear statement rule] represents an area in which the resistance to change is especially acute.”<sup>88</sup> When deployed in a context like that in *TC Heartland*, the clear statement rule is as much about the age-old norm of precedent as it is about the modern norm of textualism.

This conclusion begs a difficult question, however: why does a leading textualist like Justice Thomas endorse an approach that could uphold a settled (purposivist) interpretation of a statute, contrary to the best textual reading of the amended version of that statute?<sup>89</sup> The answer likely has to do with textualists’ preferred way of discerning congressional intent. Textualists want Congress to speak through statutory text if it intends to disrupt traditional treatments of principles like sovereign immunity.<sup>90</sup> Clear statement rules therefore “preclude — or at least substantially reduce the likelihood of — finding a result implicit in a statute’s design.”<sup>91</sup> This textualist justification for clear statement rules is defensive — the point is to make it harder for purposivists to glean controversial congressional intent from ambiguous statutory text.

As *TC Heartland* demonstrates, however, this defensiveness comes at a special cost when the status quo is a purposivist interpretation. A textualist judge may have to leave a settled purposivist construction intact where the best textual reading of a statute indicates (but does not

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<sup>84</sup> *Id.* at 243–44, 247.

<sup>85</sup> *Id.* at 252–53 (Souter, J., dissenting).

<sup>86</sup> See Note, *supra* note 73, at 1959 (noting that a clear statement rule may “operate to foreclose a particular interpretation of a statute even though consideration of the legislative text alone . . . might point to a different meaning than the one dictated by the rule”).

<sup>87</sup> *Id.*

<sup>88</sup> Shapiro, *supra* note 72, at 940.

<sup>89</sup> This question is particularly salient (and all the more puzzling) in light of *Forest Grove*, where Justice Thomas joined a dissent that seemed to reject a clear statement rule. See *Forest Grove*, 557 U.S. at 250 (Souter, J., dissenting) (“[T]here is no authority for a heightened standard before Congress can alter a prior judicial interpretation of a statute . . .”).

<sup>90</sup> See, e.g., *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985) (“[I]t is incumbent upon the federal courts to be certain of Congress’ intent before finding that federal law overrides the guarantees of the Eleventh Amendment. The requirement that Congress unequivocally express this intention in the statutory language ensures such certainty.”).

<sup>91</sup> Shapiro, *supra* note 72, at 940.

clearly signal) a contrary interpretation. Textualists should consider adopting a more offensive-minded approach to statutory interpretation: enforcing the best textual readings of amended statutes,<sup>92</sup> free from the controlling force of prior, preamendment judicial constructions.<sup>93</sup> Importantly, under this approach, statutory text is still the only proper indicator of congressional intent. True, if purposivists need only enforce the best readings of statutes rather than find clear statements, they would have more leeway to find text that supports their purposivist interpretations. But the long-term solution to countering purposivism is to entrench the textualist methodology, something that cannot be done if textualists must yield to settled purposivist constructions that conflict with the best textual readings of amended statutes.

Thus, while *TC Heartland* stands as a short-term victory for textualism, it also warns that the clear statement rule can undermine textualism in the long run. On one hand, the Court focused exclusively on the text of the 2011 amendments, and did not inquire into congressional purposes or legislative history. On the other hand, the Court's use of a demanding clear statement rule could have led textualist Justices to uphold a settled interpretation of the venue statutes contrary to the text of the statutes in force after the 2011 amendments. To preclude this possibility, textualists should dispense with the clear statement rule, at least in this context,<sup>94</sup> and instead strictly enforce the best textual readings of statutes. At the very least, cases like *TC Heartland* should move textualists to reconsider why they find themselves committed to clear statement rules, even where such rules weigh heavily in favor of prior purposivist interpretations of statutes.

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<sup>92</sup> In *City of Arlington v. FCC*, 569 U.S. 290 (2013), the Court held that a court must apply *Chevron* deference to an agency's interpretation of its own regulatory authority. *Id.* at 296–97. Responding to concerns that such a holding would leave the fox (that is, the agency) in charge of the henhouse, the Court said the following: “The fox-in-the-henhouse syndrome is to be avoided not by establishing an arbitrary and undefinable category of agency decisionmaking that is accorded no deference, but by taking seriously, and applying rigorously, in all cases, statutory limits on agencies’ authority.” *Id.* at 307. Analogous reasoning applies here. To force Congress to signal its intent through statutory text, courts need not adopt a restrictive clear statement rule. Rather, the solution is to enforce what statutory text does and does not allow.

<sup>93</sup> Preamendment judicial constructions can of course still inform a court's best textual reading of amended statutes, even if they are not controlling.

<sup>94</sup> Application of the clear statement rule in a context like *TC Heartland* or *Forest Grove* undermines textualism on not just one, but two levels. First, since *TC Heartland*'s clear statement rule is designed to protect prior judicial constructions of statutes, it necessarily reflects nontextual considerations. Note, *supra* note 73, at 1959. Second, this clear statement rule offers a special case where the protection of prior *purposivist* interpretations of statutes separately undermines entrenchment of the textualist methodology. For some textualists, the nontextual considerations inherent in clear statement rules may be reason enough to abandon such rules altogether. But most clear statement rules protect constitutional values, not purposivist statutory interpretations. William N. Eskridge Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 597 (1992). For most clear statement rules, then, textualists might be able to stomach imperfect textualism if it means being able to protect other important values.