

No. 18-

IN THE
Supreme Court of the United States

HTC CORPORATION,

Petitioner,

v.

3G LICENSING, S.A. ET AL.,

Respondents.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Federal Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This patent infringement case squarely presents a question acknowledged by the Court but left unanswered in *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514 (2017) (“*Heartland*”): whether an atextual “foreign defendant” exception exists to 28 U.S.C. § 1400(b), even though the statute, by its terms, provides for venue in “[a]ny civil action for patent infringement,” and thus, on its face, provides “the sole and exclusive provision controlling venue in patent infringement actions” *Heartland*, 137 S. Ct. at 1519 and 1520 n.2.

The Court of Appeals for the Federal Circuit supposed that such an atextual “foreign defendant” venue exception existed, refused to apply the plain language of § 1400(b), and instead applied 28 U.S.C. § 1391, which, as this Court has held, “governs ‘venue generally,’ [but does not apply] in cases where a more specific venue provision” exists, citing, specifically, § 1400 (which “identif[ies] proper venue for copyright and patent suits.”) *Atl. Marine Constr. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 571 U.S. 49, 56 n.2 (2013). The court reached that conclusion without “analyzing the statutory language [or] enforce[ing] the plain and unambiguous statutory language according to its terms.” *Hardt v. Reliance Standard Life Ins.*, 560 U.S. 242, 251 (2010) (citation omitted). As explained below, that was plain error.

PARTIES TO THE PROCEEDING

Petitioner (defendant in the district court, as well as appellant and mandamus petitioner in the Court of Appeals for the Federal Circuit) is HTC Corporation (“HTC”).¹ Respondents in this Court (and plaintiffs below) are 3G Licensing, S.A. (“3G Licensing”), Orange S.A. (“Orange”), and Koninklijke KPN N.V. (“KPN”) (collectively “Respondents”). Chief Judge Leonard P. Stark of the United States District Court for the District of Delaware was a party to the mandamus proceedings below, and, if the Court exercises jurisdiction under 28 U.S.C. § 1651, would be a Respondent in this proceeding as well. *See* fn. 2 *infra*.

¹ HTC has a U.S.-based subsidiary, HTC America, Inc., which is incorporated in, and has a regular and established place of business in, the Western District of Washington. That subsidiary was previously a defendant in the district court action, but was dismissed for improper venue following this Court’s decision in *Heartland*.

CORPORATE DISCLOSURE STATEMENT

Under Supreme Court Rule 29.6 Applicant HTC Corporation states as follows:

HTC Corporation is a Taiwan corporation and is a publicly traded company in Taiwan, R.O.C. It has no parent corporation and no publicly held company owns 10% or more of its stock.

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The opinion of the court of appeals is reported at *In re HTC Corp.*, 889 F.3d 1349 (Fed. Cir. 2018). A copy is attached at Appendix A. The order denying HTC's petition for rehearing en banc is not reported, but can be found at *In re HTC Corp.*, 2018-130, 2018 WL 4442163 (Fed. Cir. Sept. 6, 2018). A copy is attached at Appendix B. The order of the district court is not reported in the Federal Supplement but is available at *3G Licensing, S.A. v. HTC Corp.*, CV 17-83-LPS-CJB, 2017 WL 6442101 (D. Del. Dec. 18, 2017). A copy is attached at Appendix C.

JURISDICTION

The district court's decision was issued on December 18, 2017. The Court of Appeals for the Federal Circuit denied HTC's petition for a writ of mandamus on May 9, 2018, and rehearing en banc was thereafter denied on September 6, 2018. The district court had subject matter jurisdiction over the case pursuant to 28 U.S.C. § 1338, the court of appeals had jurisdiction over HTC's mandamus petition pursuant to the All Writs Act, 28 U.S.C. § 1651(a), and this Court has jurisdiction over this petition under 28 U.S.C. § 1254(1) or, in the alternative, under 28 U.S.C. § 1651.²

² As explained *infra*, this case meets the considerations supporting a grant of *certiorari* as set out in Sup. Ct. R. 10(a) and (c). Review is necessary to resolve a fundamental question of venue law applicable to patent cases — an important, recurring question expressly acknowledged by, but left open in, *Heartland*, which was itself resolved by the Court on a writ of *certiorari*. See also *Atl. Marine Constr. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 571 U.S. 49 (2013) (reviewing on *certiorari*;

STATUTORY PROVISIONS INVOLVED

1. The venue statute applicable to patent infringement actions, 28 U.S.C. § 1400 (2018), provides in full:

Patents and copyrights, mask works, and designs

(a) Civil actions, suits, or proceedings arising under any Act of Congress relating to copyrights or exclusive rights in mask works or designs may be instituted in the district in which the defendant or his agent resides or may be found.

(b) 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.

2. Rather than relying on § 1400 to determine venue for this patent infringement matter, the district court relied upon 28 U.S.C. § 1391 (2018), which provides in full:

resolving a venue question after court of appeals had denied petition for a writ of mandamus); *Van Dusen v. Barrack*, 376 U.S. 612 (1964) (same). Given the patent error of law reflected in the decisions below, and the extraordinary importance of the issues raised in this case, however, the Court could alternatively exercise its supervisory authority to answer the “basic, undecided question” posed by the case by issuing a writ of mandamus to the district court. *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964); *see also Will v. United States*, 389 U.S. 90, 107 (1967) (issuing a writ of mandamus to fulfill the Court’s supervisory role, lies “at the core of this Court’s [mandamus] decisions”).

Venue generally

(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; and

(2) the proper venue for a civil action shall be determined without regard to whether the action is local or transitory in nature.

(b) Venue in General — A civil action may be brought in—

(1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located;

(2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or

(3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.

(c) Residency — For all venue purposes—

(1) a natural person, including an alien lawfully admitted for permanent residence in the United States, shall be deemed to reside in the judicial district in which that person is domiciled;

(2) an entity with the capacity to sue and be sued in its common name under

applicable law, whether or not incorporated, shall be deemed to reside, if a defendant, in any judicial district in which such defendant is subject to the court's personal jurisdiction with respect to the civil action in question and, if a plaintiff, only in the judicial district in which it maintains its principal place of business; and

(3) a defendant not resident in the United States may be sued in any judicial district, and the joinder of such a defendant shall be disregarded in determining where the action may be brought with respect to other defendants.

(d) **Residency of Corporations in States With Multiple Districts —**

For purposes of venue under this chapter, in a State which has more than one judicial district and in which a defendant that is a corporation is subject to personal jurisdiction at the time an action is commenced, such corporation shall be deemed to reside in any district in that State within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State, and, if there is no such district, the corporation shall be deemed to reside in the district within which it has the most significant contacts.

(e) **Actions Where Defendant Is Officer or Employee of the United States —**

(1) **In general —**

A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or

under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (A) a defendant in the action resides, (B) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (C) the plaintiff resides if no real property is involved in the action. Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party.

(2) Service —

The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.

(f) Civil Actions Against a Foreign State —
A civil action against a foreign state as defined in section 1603(a) of this title may be brought —

(1) in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated;

- (2) in any judicial district in which the vessel or cargo of a foreign state is situated, if the claim is asserted under section 1605(b) of this title;
- (3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title; or
- (4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

(g) **Multiparty, Multiforum Litigation —**

A civil action in which jurisdiction of the district court is based upon section 1369 of this title may be brought in any district in which any defendant resides or in which a substantial part of the accident giving rise to the action took place.

STATEMENT OF THE CASE

1. Last term, in *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514 (2017), this Court unanimously decided that the “general venue” statute, 28 U.S.C. § 1391, is irrelevant to determining venue in patent infringement cases. That ruling implemented the plain language of § 1400 and confirmed the Court’s earlier decision to the same effect in *Fourco Glass Co. v. Transmirra Prod. Corp.*, 353 U.S. 222, 229 (1957) (“We hold that 28 U.S.C. § 1400(b) . . . is the sole and exclusive provision

governing venue in patent infringement actions and . . . is not to be supplemented by the provisions of 28 U.S.C. § 1391(c)"); *see also Stonite Products Co. v. Melvin Lloyd Co.*, 315 U.S. 561 (1942) (§ 1400's predecessor is "the exclusive provision controlling venue in patent infringement proceedings."). *Heartland*, however, involved only domestic parties, and the Court acknowledged there that its decision could have significant unresolved "implications . . . for foreign corporations [that the Court need] not [t]here address." *Heartland*, 137 S. Ct. at 1520 n.2. The Court further recognized that applying *Heartland* to foreign defendants would necessarily draw into question the Court's holding in *Brunette Mach. Works, Ltd. v. Kockum Indus., Inc.*, 406 U.S. 706 (1972), which dealt with a predecessor version of § 1391.³ This case presents the Court with an opportunity to provide answers to those fundamental questions left open by *Heartland*.

2. The Court of Appeals for the Federal Circuit held that as a foreign defendant, HTC is subject to suit for patent infringement in any district court a plaintiff might choose, notwithstanding the unambiguous language of the patent venue statute, § 1400(b), which would make it subject to suit only "where the [it] resides, or where [it] has committed acts of infringement and has a regular and established place of business." That result is incompatible with the straightforward language of not one but *two* federal statutes — the one the court below purported to apply (§ 1391) as well as the one the court largely ignored (§ 1400) — and conflicts

³ *Id.* (refusing to "express any opinion on [the continued application of] this Court's holding in *Brunette*").

with several decisions of this Court post-dating *Brunette*.

3. Specifically, the court below refused to apply the patent venue statute, § 1400(b), even though it expressly applies to “any” case of alleged patent infringement. “Any” when used by Congress in this way means “every,” as this Court has just recently reiterated. *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1353 (2018). That is, “the word ‘any’ naturally carries ‘an expansive meaning’ … [and] ‘refers to [any] member of a particular group or class without distinction or limitation’ and in this way ‘impl[ies] every member of the class or group.’” *Id.* at 1354 (emphasis supplied in original) (citations omitted). The consequences of this language are inescapable: (a) this is a patent infringement action; (b) § 1400(b) applies to “any,” meaning every, patent infringement action; therefore (c) § 1400 applies. The statute says so unmistakably.

4. Just as clearly, § 1391 — the “general venue” statute on which the court below expressly relied⁴ — does not apply here. Language added to § 1391(a) in 2011 specifies that the statute’s venue rules apply “[e]xcept as otherwise provided by law.” As the Court unanimously held in *Heartland* at 1521, this “clause applies to the entire ‘section’”; it walls off § 1391 *in its entirety* from any case for which Congress has provided a specialized venue statute such as § 1400. As the Court has elsewhere held, “Section 1391 governs ‘venue generally,’ *but does not apply* “where a more specific venue provision” applies. *Atl. Marine*

⁴ Specifically, both courts below relied upon § 1391(c)(3), which provides that “a defendant not resident in the United States may be sued in any judicial district.”

Constr. Co. v. U.S. Dist. Court for W. Dist. of Texas, 571 U.S. 49, 56 n.2 (2013). As an example of a “more specific venue provision,” the *Atlantic Marine* Court singled out § 1400, which, the Court said, is the exclusive source for “proper venue for copyright and patent suits.” *Id.* Without conducting any real analysis of the relevant statutory text — without even *mentioning* the savings clause on which the *Heartland* Court relied — the court of appeals concluded that “any” does not *really* mean “any,” and that although this Court has said, multiple times, that § 1400(b) provides the “sole and exclusive” rule governing venue in patent infringement cases, it is not, in fact, the “sole and exclusive” source for venue in patent infringement cases. Instead, the court of appeals concluded that a special, *entirely extra-statutory* foreign-defendant venue rule emanates from *Brunette*, making § 1391 applicable.⁵ That conclusion was a patent error of both process and result; as explained *infra*, *Brunette* construed statutory language that no longer exists, and the *Brunette* Court adopted a rule it felt was necessary in order to fix a problem that did not survive the 2011 amendments.

5. Respondents 3G Licensing, S.A. (“3G Licensing”), Orange S.A. (“Orange”), and Koninklijke KPN N.V. (“KPN”) (collectively “Respondents”) sued

⁵ *3G Licensing, S.A. v. HTC Corp.*, CV 17-83-LPS-CJB, 2017 WL 6442101, at 2 (D. Del. Dec. 18, 2017) (Appendix C at 28a) (“the general venue provision, 28 U.S.C. § 1391” and the Supreme Court’s decision in *Brunette*, govern this case; HTC “may be sued in any judicial district” pursuant to § 1391(c)(3)); *see also In re HTC Corp.*, 889 F.3d 1349, 1354 (Fed. Cir. 2018) (“We see no error in the district court’s . . . applying § 1391(c)(3) in a patent case [or] relying on *Brunette*”) (Appendix A at 7a).

HTC Corp. (a Taiwanese corporation with its principal place of business in Taiwan) and HTC America (its wholly owned U.S. based subsidiary) in the District of Delaware for infringing five patents. HTC America is a Washington corporation with its principal place of business in Seattle, Washington. Neither HTC Corp. nor HTC America is incorporated in Delaware, and neither has a regular and established place of business there. After *Heartland*, Plaintiffs amended their venue allegations to contend that venue was proper at least as to HTC Corp. under both 28 U.S.C. § 1391 and 28 U.S.C. § 1400. HTC Corp. and HTC America moved to dismiss the action for improper venue under 28 U.S.C. § 1400(b) or, in the alternative, to transfer the case to the Western District of Washington pursuant to either 28 U.S.C. § 1404 or 28 U.S.C. § 1406 where venue was indisputably proper as to HTC Corp. (a fact the plaintiffs never disputed). The district court first held that venue in Delaware was not proper as to HTC America (a domestic corporation) under § 1400(b) and dismissed that entity. As to HTC Corp., however, the court relied on 28 U.S.C. § 1391(c)(3), which provides for venue against any “defendant not resident in the United States . . . in any judicial district,” and on that basis held that venue was proper as to the foreign defendant, HTC Corp., in Delaware.

6. The court of appeals affirmed this result and largely adopted the district court’s rationale in an opinion issued on May 9, 2018. Rehearing and rehearing en banc were denied without an opinion on September 6, 2018. *See In re HTC Corp.*, 2018 WL 4442163 (Appendix B).

REASONS FOR GRANTING THE WRIT

The grounds for review on *certiorari* could hardly be more compelling. First, the court below decided a recurring, threshold question affecting as much as a third of the patent enforcement lawsuits filed each year. This Court acknowledged in *Heartland* that this important question has not been, but should be, settled by the Court. *See* Sup. Ct. R. 10(a). This case presents that unanswered question squarely.

Second, in resolving this case, the court of appeals departed dramatically from the approach to statutory construction mandated by this Court's precedents, and that aberrant approach led directly to an unsustainable result. Correcting that departure from this Court's precedents calls for the exercise of this Court's supervisory power. *See* Sup. Ct. R. 10(c).

Indeed, few standards guiding, and confining, the exercise of judicial power are more settled than the principle that courts must "begin [any case requiring statutory analysis] with the language of the statute. The first step 'is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.' [The court's] inquiry ceases 'if the statutory language is unambiguous' and 'the statutory scheme is coherent and consistent.'" *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) (citations omitted).

The court of appeals below shunned this settled approach. Instead of focusing first on the language Congress chose for § 1400, it analyzed various historical, policy, and logistical considerations it believed supported an atextual — indeed, *anti*-textual — venue rule applicable to patent cases involving foreign defendants. Because the Federal

Circuit has exclusive appellate jurisdiction over patent infringement cases, 28 U.S.C. § 1295, no division of appellate authority will ever develop on this question; the court of appeals' idiosyncratic approach will effectively resolve the question for good unless this Court exercises its supervisory authority to correct it.

I. THIS CASE PRESENTS AN IMPORTANT UNANSWERED QUESTION OF LAW THAT ONLY THIS COURT CAN DECIDE

This case directly presents the open question acknowledged by the Court in *Heartland*, and that question can only be answered by this Court. Although the Court often prefers to let open questions “percolate” in the courts of appeals before resolving them, this issue cannot percolate; no division of authority will develop because the Court of Appeals for the Federal Circuit has exclusive jurisdiction over patent cases. 28 U.S.C. § 1295. And only a decision by this Court can resolve the fate of *Brunette*, as only “this Court [has] the prerogative of overruling its own decisions.” *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989). The Court should grant the petition to overrule *Brunette* or declare that it has lost its precedential value.

The question presented here is not merely an unanswered one; it is a critical one. It does not concern some rarely-encountered patent law technicality, where uncertainty, or even plain error, might be tolerable. The question posed here arises routinely, and the result reached below draws into question the impartiality of our system of justice.

Until *Heartland*, the Federal Circuit's construction of § 1391 allowed, even incentivized, plaintiffs to shop for the most appealing of the nation's 97 district courts in which to bring their litigation. And plaintiffs made use of that situation, routinely "selecting the district that provide[d] the best strategic advantages to their case." Jeanne C. Fromer, *Patentography*, 85 N.Y.U. L. Rev. 1444, 1445 (2010).

The Court previously decried the pernicious effect of such forum shopping when it discussed Congress' decision to give the Federal Circuit exclusive appellate jurisdiction in patent cases:

Patent litigation long has been identified as a problem area, characterized by undue forum-shopping and unsettling inconsistency in adjudications. [Some] courts are regarded as 'pro-patent' and other 'anti-patent,' and much time and money is expended in 'shopping' for a favorable venue. In a Commission survey of practitioners, the patent bar reported that . . . patent law [is] an area in which widespread forum-shopping was particularly acute.

Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 651 n.3 (1999) (citing H.R. Rep. No. 97-312, pp. 20-21 (1981) (footnotes omitted); S. Rep. No. 97-275, p. 5 (1981)).

Taking full advantage of the Federal Circuit's venue case law, the patent plaintiffs' bar developed an unmistakable attraction for certain districts, or divisions within districts, that might favorably view their cases. The most notorious court — one Justice

Scalia condemned as a “renegade” jurisdiction⁶ — has for decades been the Marshall Division of the Eastern District of Texas (which currently houses only one district judge and one magistrate judge). That court became ground zero for patent cases, “in large part due to the perception that it [was] friendly to patent holders.” *Id.*⁷ Indeed, in 2015, more than 43% of all patent infringement cases *nationwide* were brought in the Eastern District of Texas. Brian Howard, *Lex Machina 2015 End-of-Year Trends*, Fig. 3 (Jan. 7, 2016), available at <http://www.lexmachina.com/lex-machina-2015-end-of-year-trends>).⁸

And once filed there, these cases almost never moved. Despite the theoretical possibility of transfer under 28 U.S.C. § 1404(a), cases filed in the Eastern District of Texas were transferred only 6.8% of the time, *Forum Selling* at 263, even though data showed that almost two-thirds of the patent cases filed against foreign defendants had no defendant domiciled in Texas. See Marketa Trimble, *When Foreigners Infringe Patents: An Empirical Look at the*

⁶ Transcript of Oral Argument at 11, *eBay Inc. v. MercExchange L.L.C.*, 547 U.S. 388 (2006).

⁷ The court’s reputation as a plaintiff-friendly forum for patent infringement cases is richly deserved. The court crafted a number of pro-plaintiff procedural rules, generally beyond the scope of appellate review, and grants summary judgment at “less than one-quarter the rate of judges in other districts.” Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. Cal. L. Rev. 241, 251-65 (2016). A New York Times article quoted Judge Ward from the Eastern District declaring that his district “is historically anyway, a plaintiffs-oriented district.” Julie Creswell, *So Small a Town, So Many Patent Suits*, N.Y. Times, Sept. 24, 2006,

<http://www.nytimes.com/2006/09/24/business/24ward.html>.

⁸ Necessarily, most of the available data reflects the state of affairs prior to last year’s *Heartland* decision.

Involvement of Foreign Defendants in Patent Litigation in the U.S., 27 Santa Clara Computer & High Tech. L.J. 499, 535 (2011).

For domestic defendants, the *Heartland* decision changed everything. Forum shopping became the exception, not the rule. But the decision did nothing to fix the problem for foreign defendants. An estimated 30% or more of patent cases filed in district courts every year involve foreign defendants, *When Foreigners Infringe* at 523 fig. 2, and for that sizable portion of the patent litigation docket nationwide, the law in the Federal Circuit has not changed; they can be sued in Marshall or Casper or Hagåtña, or anywhere else the plaintiffs perceive a friendly forum, whether the alleged infringer or the alleged infringement have appreciable connections to the jurisdiction or not (subject, of course to the minimum requirements of due process). Indeed, as commentators have suggested, current law gives patent plaintiffs every incentive to “adapt their behavior [by] focusing on foreign defendants.” Colleen V. Chien & Michael Risch, *Recalibrating Patent Venue*, 77 Md. L. Rev. 47, 102 (2017).

In the past, the Court has been “unwilling to attribute to Congress the intent” to “encourage and reward forum shopping,” *Southland Corp. v. Keating*, 465 U.S. 1, 15 (1984), and wherever possible, has adopted rules designed to “discourage[] forum-shopping and avoid[] inequitable administration of the laws.” *Hanna v. Plumer*, 380 U.S. 460, 468 (1965); *see also Atl. Marine Constr. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 571 U.S. 49, 65 (2013) (application of § 1404(a) “should not create or multiply opportunities for forum shopping”) (citation omitted). The Court has an opportunity in this case

to consider whether the decision below, which indisputably encourages forum shopping, is compelled, or even permitted, by the text of the relevant statutes.

II. *CERTIORARI IS WARRANTED TO CORRECT THE ABERRANT APPROACH TO STATUTORY CONSTRUCTION EMPLOYED BELOW*

This is a case, first and last, of statutory construction. The question presented is whether, as its text plainly states, § 1400 governs venue in patent cases brought against foreign defendants, or whether those cases are governed by the general venue statute, § 1391, which, just as plainly, does not apply where venue is “otherwise provided by [a special purpose] law.”

A court seeking to divine the meaning of these statutes must “begin by analyzing the statutory language, ‘assum[ing] that the ordinary meaning of that language accurately expresses the legislative purpose’ [and then] must enforce plain and unambiguous statutory language according to its terms.” *Hardt v. Reliance Standard Life Ins.*, 560 U.S. 242, 251 (2010) (citation omitted). As this Court has held “time and again . . . courts *must* presume that a legislature says in a statute what it means and means in a statute what it says there. . . . When the words of a statute are unambiguous, then, this first canon is also the last: ‘judicial inquiry is complete.’” *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253–54, (1992) (emphasis added) (citations omitted).

The case for applying § 1400(b) to this case could hardly be more straightforward. By its terms, that

statute applies to “[a]ny civil action for patent infringement,” regardless of whom the plaintiff sues. When Congress used the word “any” in § 1400, it “did not add any language limiting the breadth of that word,” and thus must have intended it to apply “indiscriminately [to patent infringement cases] of whatever kind.” *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (construing sentencing statute); *accord SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1354 (2018) (construing patent statute); *Collector of Internal Revenue v. Hubbard*, 79 U.S. 1, 15 (1870) (“it is quite clear” that a statute prohibiting the filing of suit “in any court” “includes the State courts as well as the Federal courts,” because “there is not a word in the [statute] tending to show that the words ‘in any court’ are not used in their ordinary sense”).

Because this is a “civil action for patent infringement,” according to the statute’s unambiguous terms, and using universally understood principles of statutory construction, § 1400(b) applies here, full stop.

The court of appeals, however, paid almost no attention to the language of § 1400(b), or, for that matter, to the language of § 1391(a), which it purported to apply instead. Rather, it relied on what it called the “color[]” provided “by a long statutory and judicial history” relating to venue and foreign defendants. *In re HTC Corp.*, 889 F.3d 1349, 1354 (Fed. Cir. 2018) (Appendix A at A8). This extra-statutory “color” convinced the court that Congress likely did not mean what it said, either in the text of § 1400 or in the text of amended § 1391(a) — amendments that added the “saving clause” relied upon by this Court in *Heartland*. Remarkably, based on “history” and “color,” the court concluded that

Congress intended *precisely the opposite* of what it said in those two statutes.

Had the court started the process of judging at the beginning, with the text Congress provided, it could not have reached that result. To accept the court's decision, one would have to accept: (a) that when Congress used the phrase "any civil action for patent infringement" in § 1400(b), it did not mean "any" at all, but rather meant "sometimes" or "usually but not always; it depends on whom the plaintiff sues"; (b) that when Congress added the phrase "*except as otherwise provided by law*" to § 1391(a) in 2011, it *actually* meant "except as provided by law *everywhere in the United States Code except in § 1400(b)*"; and (c) that when the *Heartland* Court reaffirmed, unanimously, that 28 U.S.C. § 1400(b) "is the sole and exclusive provision controlling venue in patent infringement actions, and . . . is not to be supplemented by . . . § 1391(c),"⁹ it *actually* meant that § 1400(b) is *not* the exclusive provision controlling venue in patent infringement cases, and that it *may* be supplemented by § 1391(c).

The Federal Circuit's text-free approach to statutory analysis requires correction. As already suggested, reliance on the general venue statute, § 1391, instead of the patent-case-specific language of

⁹ *Heartland*, 137 S. Ct. at 1519 (internal quotations omitted); *see also* *Fourco Glass Co. v. Transmirra Prod. Corp.*, 353 U.S. 222, 229 (1957) ("We hold that 28 U.S.C. § 1400(b) . . . is the sole and exclusive provision governing venue in patent infringement actions and . . . is not to be supplemented by the provisions of 28 U.S.C. § 1391(c)"); *see also* *Stonite Products Co. v. Melvin Lloyd Co.*, 315 U.S. 561 (1942) (§ 1400's predecessor is "the exclusive provision controlling venue in patent infringement proceedings.").

§ 1400(b), does not survive first contact with § 1391's text: the statute's first six words prevent it. As the Court explained just last year in *Heartland*, this "saving clause expressly stat[es] that [§ 1391] *does not apply* when [venue is] 'otherwise provided [for] by law.'" *Heartland*, 137 S. Ct. at 1521 (emphasis added). Because venue is unmistakably "otherwise provided by" § 1400 in "[a]ny civil action for patent infringement," the savings clause of § 1391 *explicitly* makes the rest of that statute — everything after the introductory "except as" phrase — completely irrelevant. That, indeed, was the central holding of *Heartland*. But one will search the panel's opinion in vain for any mention at all of that savings clause language. It is not explained, construed, applied, or distinguished. Rather, it is ignored.

The court of appeals apparently thought that *Brunette* justified its decision to ignore the explicit, unambiguous language of both § 1391 and § 1400. That decision did, indeed, hold that in patent cases, foreign defendants could be sued in any judicial district, but *Brunette* is a derelict, moored to statutory language that no longer exists.

Writing for the Court, Justice Marshall began his *Brunette* opinion by tracing the history of venue in the U.S. courts back to the Judiciary Code of 1789, which by its express "terms [applied] only to suits against 'an inhabitant of the United States,' [and therefore] left [venue for aliens] unrestricted" *Brunette Mach. Works, Ltd. v. Kockum Indus., Inc.*, 406 U.S. 706, 708 (1972). Although Congress later "dropped the phrase 'suit . . . against an inhabitant of the United States' and substituted 'suit . . . against any person' [the] Court [in *In re Hohorst*, 150 U.S. 653 (1893)] held . . . the change was stylistic and not

substantive, and [concluded] that Congress did not thereby bring suits against aliens within the scope of the venue laws.” *Id.* at 709. From this history lesson, Justice Marshall concluded that, notwithstanding the “[a]ny civil action for patent infringement” language in § 1400, “Congress [had] never given the slightest indication that it is dissatisfied with the longstanding judicial view that the 1789 language continues to color the venue statutes, with the result that suits against aliens are outside the scope of all the venue laws.” *Id.* at 710-11.

Brunette’s approach to the case cannot be reconciled with modern principles of statutory construction, since it subordinated the plain “any civil action” language of § 1400(b) to the Court’s assumptions, based largely on congressional silence, about how Congress may have regarded the vestigial impact of the 18th century history it described. Because *Brunette* gave primacy to inferences drawn from an historical analysis, rather than an examination of the statutory text, there would be a substantial question whether it should be overruled. As the Court held decades later, a first-order focus on the statute’s text is non-discretionary; “courts *must* presume that a legislature says in a statute what it means and means in a statute what it says there. . . . When the words of a statute are unambiguous, then, this first canon is also the last: ‘judicial inquiry is complete.’” *Germain*, 503 U.S. at 253–54 (emphasis added).

But there are two independently compelling reasons arising from the amendment of § 1391 to conclude that *Brunette* is no longer relevant, even if it was correctly decided at the time. First, in that

decision, Justice Marshall described the Court’s task succinctly:

Section 1391(d) of the United States Judicial Code provides that ‘(a)n alien may be sued in any district.’ Section 1400(b) provides that ‘(a)ny civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.’ We are *asked to decide which provision of Title 28 governs* the venue of an action for patent infringement against an alien defendant.

Brunette, 406 U.S. at 706-07 (emphasis added). But § 1391(d)’s language providing that an “alien may be sued in any district” language, on which the *Brunette* Court opined, no longer exists; it was deleted from the statute by Congress entirely in 2011.¹⁰ Thus,

¹⁰ See Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, § 202, 125 Stat. 763 (2011). The court of appeals thought that the House Reports accompanying the 2011 amendments suggested that § 1391(c)(3) and former § 1391(d) were intended to serve the same purpose. In re *HTC Corp.*, 889 F.3d at 1360. Perhaps so; perhaps not. But the Court need not consider whether those changes were substantive because Congress made clear that, *whatever* the new § 1391(c) means, it has no application here, where Congress has “otherwise provided [for venue] by law.” 28 U.S.C. § 1391. Moreover, the Court has held, repeatedly, that “[l]egislative history, for those who take it into account, is meant to clear up ambiguity, not create it.” *Milner v. Dep’t of Navy*, 562 U.S. 562, 574 (2011); *see also Suprema, Inc. v. Int’l Trade Comm’n*, 796 F.3d 1338, 1362 (Fed. Cir. 2015) (“Statements in the legislative history should not be used to create ambiguity in an already clear statute”). As the Court held in *TC Heartland*, the savings clause is not ambiguous; it was intended to wall off § 1391

Brunette resolved an apparent, facial conflict between two provisions, one of which is now gone, and therefore the conflict has disappeared with it. *Burnette* is now a relic.

More importantly, in 2011, Congress amended § 1391 in two ways that quite directly “expressed its dissatisfaction” with the 1789 rule that the venue statutes do not apply to aliens. First, it added what became § 1391(c), which “grant[ed] a [previously non-existent] venue defense to permanent resident aliens who are domiciled in the United States.” *In re HTC Corp.*, 889 F.3d 1349, 1359 (Fed. Cir. 2018) (Appendix A at 17a).

Second, it added the savings clause the Court found so significant in *Heartland*, explicitly directing courts elsewhere — including to § 1400(b) in patent cases — to determine venue. The self-evident operation of that savings clause is to *eliminate* the apparent conflict between § 1391 and § 1400 with which the *Brunette* Court grappled.

Thus, the tug of war described by Justice Marshall, between two conflicting statutory provisions that both seemed to apply, has become an entirely one-sided affair. Had the *Brunette* Court been confronted with § 1391 *as it currently reads*, with the savings clause’s explicit command that the rest of § 1391 be given no effect in “[a]ny civil action for patent infringement,” the Court would have had no occasion to choose between the two statutes, as *Brunette* avowedly did. 28 U.S.C. § 1400(b). Textual harmony now exists without judicial intervention and

entirely whenever Congress has crafted a special-purpose venue statute like § 1400.

construction.¹¹ Perhaps that is why the Court cautioned in *Heartland* that *Brunette* merely “determin[ed] proper venue for foreign corporation under [the] then existing statutory regime.” *Heartland*, 137 S. Ct. 1514, 1520 n.2 (emphasis added). *Brunette* is of no value in resolving this case, yet it was the ground on which the decision below rests.

III. COURTS ARE EQUIPPED TO FILL ANY VENUE “GAP” WITHOUT DISREGARDING CONGRESS’ EXPLICIT COMMANDS

Finally, the court below offered a policy rationale for rejecting the plain language of § 1400(b) in favor of § 1391, but even if the court were constitutionally authorized to identify and address policy issues Congress “failed” to address in the language it selected, the “fix” the court adopted was entirely unnecessary. The court believed that if it were to apply § 1400(b) according to its terms to cases involving a foreign defendant, “there would . . . be cases . . . where a venue gap [would] exist[]” because no district would satisfy the venue requirements of § 1400(b). *In re HTC Corp.*, 889 F.3d 1349, 1360 (Fed. Cir. 2018) (Appendix A at 21a). In such cases, an alleged infringer could escape justice (at least evade suit in this country).

¹¹ Although the unambiguous language of § 1400 and the savings clause of § 1391 mean that no tie-breaking rule of construction is necessary, it is settled law that “specific statutory language [like that in § 1400] should control more general language [like that in § 1391] when there is a conflict between the two.” *Nat'l Cable & Telecomm. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 335 (2002).

But it was unnecessary for the court to shun longstanding principles of statutory construction or ignore unambiguous statutory language to fill this supposed gap in coverage; the statutes themselves offer a solution. As noted above, § 1391(a) provides venue “except [where venue is] otherwise provided by law” in a special-purpose statute such as § 1400. In hypothetical circumstances, unlike this case, where § 1400(b) would result in the venue gap that so concerned the court — where no district would satisfy the requirements of that section — § 1400(b) would fail to “otherwise provide[]” a venue for the plaintiff’s case. The precondition Congress specified for applying § 1391 (the absence of venue provided elsewhere “by law”) thus having been satisfied, the court could use § 1391(c)(3) to fill what otherwise would have been a gap in venue, and do so while maintaining fidelity to both § 1400 *and* the savings clause of § 1391.

Here, no one disputes that venue exists for a suit against HTC in Washington under § 1400, and in any event, HTC has waived any argument to the contrary. 28 U.S.C. § 1406. No venue gap exists. There was no policy reason to ignore the patent venue statute *as Congress wrote it*. When cases arise in which a venue “gap” actually exists, the courts have ample means to respond.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for a writ of *certiorari* and reverse the decision of the Court of Appeals for the Federal Circuit. In the alternative, the Court should treat this petition as a petition for a writ of mandamus to

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the district court, grant that petition and correct the court's misapplication of the relevant statutes.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE
FEDERAL CIRCUIT

IN RE: HTC CORPORATION,
Petitioner

2018-130

On Petition for Writ of Mandamus to the United
States District Court for the District of Delaware in
No. 1:17-cv-00083-LPS, Chief Judge
Leonard P. Stark.

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N.V., Orange S.A. Also represented by
Alexandra Giselle White, Houston, TX.

ON PETITION

Before PROST, Chief Judge, WALLACH and
TARANTO, Circuit Judges.

PROST, Chief Judge.

O R D E R

HTC Corporation petitions for a writ of mandamus directing the United States District Court for the District of Delaware to (a) vacate its December 18, 2017 order denying-in-part HTC Corporation’s motion to dismiss for improper venue under Federal Rule of Civil Procedure 12(b)(3); and (b) dismiss the complaint against HTC Corporation. 3G Licensing, S.A., Orange S.A., and Koninklijke KPN N.V. (collectively, “Respondents”) oppose.

In January 2017, Respondents filed their patent infringement suit against HTC Corporation, a Taiwanese corporation with its principal place of business in Taiwan, and its wholly owned U.S. based subsidiary, HTC America, Inc., a Washington corporation with its principal place of business in Seattle, Washington. In June 2017, after Respondents filed their second amended complaint, HTC Corporation and HTC America filed a motion to dismiss for improper venue pursuant to Rule 12(b)(3) or, in the alternative, to transfer the case to the United States District Court for the Western District of Washington pursuant to 28 U.S.C. §§ 1404(a) or 1406(a).

In its December 18, 2017 order, the district court found that venue was not proper as to HTC America but was proper as to HTC Corporation. App. 1–7. Following the order, Respondents voluntarily dismissed their suit against HTC America without prejudice. HTC Corporation now files this mandamus petition seeking dismissal for improper venue.¹

¹ On March 28, 2018, the petition was dismissed for failure to pay the docketing fee. The petition was reinstated on March 29,

DISCUSSION

A writ of mandamus is a drastic remedy available only in extraordinary circumstances. Such a writ may issue only where the following conditions are met: (1) the petitioner must have no other adequate means to attain the relief desired; (2) the petitioner must demonstrate a “clear and indisputable” right to the issuance of the writ; and (3) “even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.” *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380–81 (2004).

I.

A party seeking mandamus must demonstrate that it has “no other adequate means to attain the relief [it] desires.” *Cheney*, 542 U.S. at 380 (quoting *Kerr v. U.S. Dist. Court for N. Dist. of Cal.*, 426 U.S. 394, 403 (1976)). This requirement is “designed to ensure that the writ will not be used as a substitute for the regular appeals process.” *Id.* at 380–81.

The mandamus petition in this case is based on the denial of a motion to dismiss under Rule 12(b)(3) or, alternatively, to transfer under § 1406(a), for improper venue.² While this court has granted mandamus petitions based on the denial of motions to transfer under 28 U.S.C. § 1404(a) with some

2018, after Petitioner paid the docketing fee and moved to vacate the dismissal order.

² Objections to improper venue are made through a Rule 12(b)(3) motion, and § 1406(a) provides for either dismissal or transfer if venue is found to be improper. See § 1406(a); Fed. R. Civ. P. 12(b)(3).

frequency,³ we have done so less frequently with respect to petitions based on the denial of motions under § 1406(a) asserting *improper* venue. *See In re Cray Inc.*, 871 F.3d 1355, 1367 (Fed. Cir. 2017); *In re Micron Tech., Inc.*, 875 F.3d 1091, 1102 (Fed. Cir. 2017). This divergence, in part, relates to the first requirement for granting mandamus—that the mandamus petitioner have no other adequate means to attain the relief desired.⁴

Unlike a defendant challenging the denial of a § 1404(a) transfer motion,⁵ a defendant aggrieved by

³ *See, e.g., In re Nintendo Co.*, 589 F.3d 1194, 1197 (Fed. Cir. 2009); *In re TS Tech USA Corp.*, 551 F.3d 1315, 1318 (Fed. Cir. 2008). Section 1404(a) governs changes of venue “[f]or the convenience of parties and witnesses, in the interest of justice.” “Unlike § 1406(a), § 1404(a) does not condition transfer on the initial forum’s being ‘wrong.’” *Atl. Marine Constr. Co. v. U.S. Dist. Court for W. Dist. of Tex.*, 571 U.S. 49, 59 (2013).

⁴ We need not decide whether to apply regional or Federal Circuit law in evaluating whether post-judgment appeal is adequate for review of a denial of a § 1406(a) motion. We agree with the Third Circuit on that issue.

⁵ Two reasons have been stated for the inadequacy of post-judgment appeals as a remedy for denials of § 1404(a) challenges, i.e., for why such cases “normally deal with an issue, the convenience of parties and witnesses, which in its nature must be reviewed before trial, if at all.” *Gulf Research & Dev. Co. v. Leahy*, 193 F.2d 302, 305 (3d Cir. 1951) (internal quotation marks omitted). First, the purpose of § 1404(a) is to avoid burdening parties and witnesses with unnecessary inconvenience and expense, so by the time a case is tried and appealed, for example, witnesses would have suffered the inconvenience of traveling to a distant forum. In short, the mandamus petitioner would have suffered the very inconvenience the statute seeks to avoid. *See id.; In re Volkswagen of Am., Inc.*, 545 F.3d 304, 319 (5th Cir. 2008) (en banc). Second, mere inconvenience does not support a showing of *harmful* error under 28 U.S.C. § 2111 and Fed. R. Civ. P. 61

the denial of an improper-venue motion has an adequate remedy on appeal from a final judgment. Specifically, if after judgment venue is determined to have been improper, and the improper-venue objection was not waived, the appellants “will be entitled to assert it on appeal and, if the objection is sustained, obtain from [the appeals] court an order vacating the judgment . . . and directing the remand of the action to the [appropriate venue].” *Gulf Research & Dev. Co. v. Leahy*, 193 F.2d 302, 304–05 (3d Cir. 1951); *see id.* (“[A]n appeal in this action will be just as adequate as in any other case where an objection to jurisdiction or venue is overruled by the trial court and after a trial on the merits the objection is sustained on appeal from the final judgment.” (footnote omitted)); *Chi., R.I. & P.R. Co. v. Igoe*, 212 F.2d 378, 381 (7th Cir. 1954) (“[A]ny judgment entered in the cause is a nullity, an error correctible on appeal.”); *cf. Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 41–43 (1998) (indicating that a strict venue limitation, such as § 1391(a), “is sufficient to establish the substantial character of any violation,” making such a violation not harmless error under 28 U.S.C. § 2111). Given the availability of adequate relief on appeal, mandamus review of improper-venue decisions is generally inappropriate. *See Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 379–84 (1953) (holding that

on appeal after judgment. *See, e.g., In re Nat'l Presto Indus., Inc.*, 347 F.3d 662, 663 (7th Cir. 2003) (inconvenienced appellant “would not be able to show that it would have won the case had it been tried in a convenient forum”); *see also In re Volkswagen of Am.*, 545 F.3d at 318-19 (citing the harmless error rule, Fed. R. Civ. P. 61, and holding that appeal would provide no remedy for a “patently erroneous” denial of a § 1404(a) convenience transfer).

mandamus review of an improper venue decision was inappropriate and noting it was not clear that an adequate remedy could not be afforded); *Comfort Equip. Co v. Steckler*, 212 F.2d 371, 374–75 (7th Cir. 1954) (denying mandamus review of an improper-venue motion); *Gulf Research*, 193 F.2d at 304–05 (denying mandamus review of an improper venue motion in a patent case and stating that “an appeal in this action will be just as adequate as in any other case where an objection to jurisdiction or venue is overruled by the trial court and after a trial on the merits the objection is sustained on appeal from the final judgment” (footnote omitted)).

Although Petitioner argues that it should “not be forced to litigate this case in an improper venue through a final judgment before it can contest venue via appeal,” Pet’r’s Br. 6, the Supreme Court rejected this same argument in *Bankers Life*, explaining that “the extraordinary writs cannot be used as substitutes for appeals, even though hardship may result from delay and perhaps unnecessary trial.” *Bankers Life*, 346 U.S. at 383 (citations omitted); *see also* *Comfort Equip.*, 212 F.2d at 375 (“If the correctness of [the judge’s] ruling on the [improper-venue] motions to dismiss must await an appeal from the final disposition of the case on its merits in the district court, there is no unusual inconvenience or hardship.”). Decisions of this court and the Third Circuit reflect that reasoning. *See In re BP Lubricants USA Inc.*, 637 F.3d 1307, 1313 (Fed. Cir. 2011) (“To issue a writ [of mandamus] solely for th[e] reasons [that a defendant will be forced to undergo the cost of discovery and trial] would undermine the rare nature of its form of relief and make a large class of interlocutory orders

routinely reviewable.” (citing *Bankers Life*, 346 U.S. at 383); *Gulf Research*, 193 F.2d at 304–05 (“The mere fact that the petitioners will be put to the inconvenience and expense of what may prove to be a wholly abortive trial is an argument which might be addressed to Congress in support of legislation authorizing interlocutory appeals but does not constitute ground for invoking mandamus power.”).

To be sure, while an appeal will usually provide an adequate remedy for a defendant challenging the denial of an improper venue motion, there may be circumstances in which it is inadequate. We need not articulate such circumstances here, as Petitioner’s only argument is that it should be able to avoid the inconvenience of litigation by having this issue decided at the outset of its case. This is insufficient, and there is no other indication that Petitioner cannot be afforded adequate relief on appeal.

II.

A party seeking issuance of a writ of mandamus must also demonstrate that the right to the writ is clear and indisputable. *Cheney*, 542 U.S. at 381 (quoting *Kerr*, 426 U.S. at 403). Petitioner has failed to meet this burden.

The district court in this case relied on *Brunette Machine Works, Ltd. v. Kockum Industries, Inc.*, 406 U.S. 706, 706 (1972), and § 1391(c)(3) to hold that HTC Corporation, as a foreign corporation, is subject to suit in any judicial district. App. 3. Petitioner argues that the district court erred in three ways: (1) by applying § 1391(c)(3) in a patent case; (2) by relying on *Brunette*, which interpreted a prior version of § 1391; and (3) by not applying the patent venue statute, § 1400(b). We see no error in the district

court’s analysis. As explained below, Petitioner’s arguments are fully addressed by reaffirming the “long-established rule that suits against aliens are wholly outside the operation of all the federal venue laws, general and special.” *Brunette*, 406 U.S. at 714.

A.

The issue of whether the venue laws protect alien defendants is colored by a long statutory and judicial history, including two cases in which the Supreme Court directly addressed this same question. *Id.* at 707; *In re Hohorst*, 150 U.S. 653, 659 (1893).

As explained in *Brunette*, the origins of the venue laws extend back to the Judiciary Act of 1789. *Brunette*, 406 U.S. at 708. The original venue restriction stated:

[N]o civil suit shall be brought before [district or circuit] courts *against an inhabitant of the United States*, by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ

Act of Sept. 24, 1789, ch. XX, § 11, 1 Stat. 79 (1789) (emphasis added). Because this venue limitation applied “only to suits against ‘an inhabitant of the United States,’ suits against aliens were left unrestricted, and could be tried in any district.” *Brunette*, 406 U.S. at 708.

The Court addressed this background principle (referred to for convenience as the alien-venue rule) in *In re Hohorst*, which involved the Hamburg-American Packet Company, a German corporation, as defendant. 150 U.S. at 654. The

Court held that the then-existing venue statute did not govern suits by citizens against alien defendants. *Id.* at 662; *see also Galveston, H. & S.A. Ry. Co. v. Gonzales*, 151 U.S. 496, 507 (1894) (“[I]f the suit be against the alien, he may doubtless, under [Hohorst], be sued in any district wherein he is found.”). At the time, the statute read, in relevant part:

[N]o civil suit shall be brought before [district or circuit] courts against *any person* by any original process or proceeding in any other district than that whereof he is an inhabitant

Act of Mar. 3, 1887, ch. 373, § 1, 24 Stat. 552 (emphasis added); *Hohorst*, 150 U.S. at 660. The Court explained that “person,” as used in the statute, referred to “inhabitants of some district within the United States,” describing the shift in language from the original 1789 statute as immaterial. *Hohorst*, 150 U.S. at 660–61. Accordingly, the Court held that the venue restriction was “inapplicable to an alien or a foreign corporation sued here, . . . 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.” *Id.* at 662.

In *Brunette*, the Supreme Court reaffirmed its reasoning in *Hohorst*, despite the intervening enactment of the Judicial Code of 1948, which included then-§ 1391(d) and § 1400(b) (the patent venue statute). *Brunette*, 406 U.S. at 710 (“The reasoning of *Hohorst* with respect to suits against aliens continues to have force today.”). The issue before the Court in *Brunette* was “which provision of Title 28 governs the venue of an action for patent

infringement against an alien defendant”—§ 1400(b) or then-§ 1391(d). *Id.* at 706–07. Section 1391(d), at the time, stated that “[a]n alien may be sued in any district.” § 1391(d) (1970).

The Court upheld the alien-venue rule, despite the existence of § 1400(b), emphasizing the need to avoid a venue gap, where the federal courts have jurisdiction, but where no proper venue to exercise that jurisdiction exists. *Brunette*, 406 U.S. at 709–10 (noting the reasoning in *Hohorst* that “the venue provisions are designed, not to keep suits out of the federal courts, but merely to allocate suits to the most appropriate or convenient federal forum”). Looking to the relevant venue statutes, the Court found that applying those statutes to alien defendants would create a venue gap. *Id.* at 710. The Court thus preserved the alien-venue rule, noting that “Congress does not in general intend to create venue gaps,” and that “in construing venue statutes it is reasonable to prefer the construction that avoids leaving such a gap.” *Id.* at 710 n.8.

Moreover, emphasizing its treatment of the alien-venue rule as a background principle in *Hohorst*, the Court noted that “in the 79 years since *Hohorst* was decided, Congress has never given the slightest indication that it is dissatisfied with the longstanding judicial view that the 1789 language continues to color the venue statutes, with the result that suits against aliens are outside the scope of all the venue laws.” *Id.* at 710–11. Therefore, the Court concluded that the “broad and over-riding” principle stated in then-§ 1391(d) “cannot be confined in its application to cases that would otherwise fall under the general venue statutes,” as the statute merely

reflected the “long-established rule that suits against aliens are wholly outside the operation of all the federal venue laws, general and special.” *Id.* at 714. The Court thus upheld the alien-venue rule and held that the Canadian corporation defendant in that case, Brunette Machine Works, Ltd., could not rely on § 1400(b) as a “shield” against suit in a particular district. *Id.*

B.

Despite the Court’s having affirmed this overriding principle on two separate occasions, Petitioner now contends that § 1400(b) should apply to it because Congress abrogated *Brunette*—and the alien-venue rule—through the Federal Courts Jurisdiction and Venue Clarification Act of 2011 (“the 2011 amendments”). Pet’r’s Br. 22.

In the 2011 amendments, Congress revised § 1391(a)–(d), among other subsections. As amended, § 1391(c) reads:

(c) Residency.—For all venue purposes—

(1) a natural person, including an alien lawfully admitted for permanent residence in the United States, shall be deemed to reside in the judicial district in which that person is domiciled;

(2) an entity with the capacity to sue and be sued in its common name under applicable law, whether or not incorporated, shall be deemed to reside, if a defendant, in any judicial district in which such defendant is subject to the court’s personal jurisdiction with respect to the civil action in question and, if a plaintiff, only in the judicial district in

which it maintains its principal place of business; and

(3) a defendant not resident in the United States may be sued in any judicial district, and the joinder of such a defendant shall be disregarded in determining where the action may be brought with respect to other defendants.

28 U.S.C. § 1391(c).

As explained below, we believe Congress did not intend the 2011 amendments to upend the centuries-old understanding that the venue laws (as opposed to requirements of personal jurisdiction) do not restrict the location of suits against alien defendants, unless Congress has specifically provided otherwise. First, as the Court held in *Brunette*, § 1400(b) itself was not intended to apply to alien defendants. Second, nothing in the 2011 amendments to § 1391 changed this understanding of § 1400(b). Third, against the historical background leading up to and including *Brunette*, the 2011 amendments do not sufficiently indicate an intent to make venue protections applicable to alien defendants, with a limited exception not relevant here—applicable to natural persons who are aliens but have been lawfully admitted to the United States for permanent residence. Fourth, Petitioner’s contrary view would make some foreign corporations that infringe a U.S. patent unamenable to domestic suit even though personal jurisdiction exists—a gap we cannot conclude Congress created.

1.

At the outset, the patent venue statute was not intended to supplant the longstanding rule that the venue laws do not protect alien defendants. *Brunette*, 406 U.S. at 711–14. Given that § 1400(b) has not been amended since *Brunette*, the Court’s explanation of § 1400(b) remains instructive—and binding—today.

In *Brunette*, the Court rejected the argument that Congress intended the patent venue statute to regulate venue in patent suits against aliens. *Id.* at 711. In doing so, the Court explained:

Since the general venue statutes did not reach suits against alien defendants, there is no reason to suppose the new substitute in patent cases was intended to do so. Indeed, the only glimmer of evidence of legislative intent points in the other direction. . . . [I]n 1948 [when Congress codified § 1391(d)], Congress was apparently quite content to leave suits against alien defendants exempt from the venue statutes, *in patent cases as in all others*.

Id. at 713–14 (emphasis added).⁶

The Court’s recent decision in *TC Heartland* does not alter this conclusion. *See TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514, 1520 n.2 (2017). *TC Heartland* continued a line of cases that interpreted the relationship between the patent venue statute and the general venue statute.

⁶ As explained in Section II.A of this order, at the time of the *Brunette* decision, § 1391(d) stated: “An alien may be sued in any district.” § 1391(d) (1970).

See Fourco Glass Co. v. Transmirra Prods. Corp., 353 U.S. 222, 225 (1957); *Stonite Prods. Co. v. Melvin Lloyd Co.*, 315 U.S. 561, 563 (1942). *Brunette* addressed *Stonite* and *Fourco*, recognizing the Court’s prior refusal to apply the general venue provisions to patent infringement cases. *Brunette*, 406 U.S. at 711. That, however, did not deter the Court from applying the well-established alien-venue rule, even though that rule had been codified in § 1391(d). The Court explained that unlike the venue provisions at issue in *Stonite* and *Fourco*, § 1391(d) was “not derived from the general venue statutes that § 1400(b) was intended to replace.” *Id.* at 712–13. Instead, the Court concluded:

[I]n § 1391(d) Congress was stating a principle of broad and overriding application, and not merely making an adjustment in the general venue statute, as this Court found Congress had done in *Stonite* and *Fourco*. The principle of § 1391(d) cannot be confined in its application to cases that would otherwise fall under the general venue statutes. For § 1391(d) is properly regarded, not as a venue restriction at all, but rather as a declaration of the long-established rule that suits against aliens are wholly outside the operation of all the federal venue laws, general and special.

Id. at 714. The Court thus held that the alien defendant in that case, a foreign corporation like Petitioner here, could not use § 1400(b) as a shield against suit in a particular district court. *Id.* In short, while § 1400(b) governs venue in patent cases, it governs only to displace otherwise-applicable venue

standards, not where there are no such standards due to the alien-venue rule. *See id.*

2.

Given that § 1400(b) itself does not provide an exception to the alien-venue rule, we next ask whether the 2011 amendments to the general venue statute somehow altered the meaning of § 1400(b) so as to change how the alien-venue rule applies in patent cases. As Petitioner concedes, “absent from the House Judiciary Committee report is any discussion or even mention of patent cases such as *Fourco* or *Brunette* and the interplay between those decisions and the amendments to the general venue statute.” Pet’r’s Br. 20.⁷ There is no indication Congress intended to modify the alien-venue rule specifically for patent cases. Accordingly, *Brunette*’s holding that § 1400(b) does not govern suits against aliens still applies at least where other venue

⁷ While Petitioner argues that the House Report should be read as “clearly separating any application of the general venue provisions from the specialized venue statutes,” *see* Pet’r’s Br. 20, this argument misses the mark. This issue does not turn on whether § 1400(b) can be read in conjunction with a particular section of the general venue statute; instead the question is the same one posed in *Brunette*—namely, whether Congress intended to abrogate the centuries-old rule that all venue laws, both general and special, do not apply to suits against alien defendants, regardless of whether that longstanding rule has been codified in the general venue statute. *See Brunette*, 406 U.S. at 714 (“The principle of § 1391(d) cannot be confined in its application to cases that would otherwise fall under the general venue statutes. For § 1391(d) is properly regarded . . . as a declaration of the long-established rule that suits against aliens are wholly outside the operation of all the federal venue laws, general and special.”).

standards remain inapplicable to aliens—which, as we next conclude, is true here.

3.

Petitioner’s final argument is that the reasoning underlying *Brunette*—that aliens fall outside the venue laws entirely—has been abrogated by the 2011 amendments. Pet’r’s Br. 22. Therefore, the argument goes, because the set of venue laws, general and special, now apply to alien defendants, and because § 1400(b) is the sole and exclusive provision governing patent venue, HTC should be able to use § 1400(b) as a venue defense. In other words, HTC argues that Congress intended to discard the well-established alien-venue rule in favor of generally bringing alien defendants, including foreign corporations like the defendants in *Hohorst* and *Brunette*, within the protection of the venue laws. We find no such intent. The textual changes made to § 1391 in 2011 no more support an inference of the suggested radical displacement of the *Hohorst/Brunette* rule than did the textual changes *TC Heartland* held inadequate to displace the *Fourco* rule.

At the outset, it is important to note the broad implications of Petitioner’s argument. A holding that the 2011 amendments altogether discarded the alien-venue rule would extend far beyond patent law and would impact other types of civil cases. Given that this would be a sea change in federal venue law, we expect Congress would make its intent clear, if indeed this was its intent.

Congress made only one clear change to the alien-venue rule in 2011. That was only a modest adjustment limited to natural persons. Congress did

not clearly make—and did not otherwise express an intent to make—a change to the rule as it affects foreign corporations.

In light of certain inconsistencies in how the term “re-sides” had been interpreted, Congress enacted the current versions of § 1391(c)(1)–(2) to include express definitions of residency for natural persons and for unincorporated entities (in addition to residency for corporations, which had previously been defined). *See* H.R. Rep. No. 112-10, at 20–21 (2011) (“House Report”) (noting that some courts had extended the definition of a natural person’s residence, for venue purposes, beyond the person’s domicile to potentially include the location of a summer home; and noting a split of authority regarding venue for unincorporated associations). Congress also made two other specific changes regarding venue as to natural persons. First, Congress altered how permanent residents (who are, nonetheless, “aliens”) should be treated for venue purposes. *See id.* at 23 (“[T]he proposed statute would grant a venue defense to permanent resident aliens who are domiciled in the United States.”). Second, Congress removed venue protections for U.S. citizens domiciled abroad. *See* § 1391(c)(3); House Report at 22 (“This would mean that aliens and United States citizens domiciled abroad could not claim a venue defense to the location of litigation. Prohibiting United States citizens domiciled abroad from raising a venue defense would be a change in current law.”). *See generally* 14D Charles A. Wright et al., *Federal Practice & Procedure* § 3810 (4th ed. Apr. 2018 update).

Congress thus slightly modified the well-established alien-venue rule in one respect. It granted venue protection to alien natural persons having permanent resident status. § 1391(c)(1).⁸ In doing so, it aligned the venue laws with the already-existing treatment of permanent resident aliens for certain jurisdictional purposes. *See House Report* at 23 (noting that the version of § 1332(a) in existence at the time already recognized that “permanent resident aliens may be viewed as citizens of their state of domicile for certain jurisdictional purposes”); *see also* 28 U.S.C. § 1332(a) (1988); Wright, *Federal Practice & Procedure* § 3810 (“Since 1988, Section 1332(a)(2) has defined permanent resident aliens as citizens of the states in which they are domiciled for purposes of diversity of citizenship jurisdiction. It made little sense not to do the same regarding their residence for venue purposes.”). This minor change with respect to one discrete class of individuals is insufficient to upend the centuries-old rule that the venue laws do not protect alien defendants.

There is no comparable change with respect to foreign corporations. Petitioner relies on § 1391(c)(2) and the fact that it does not expressly limit itself to domestic entities, and on that basis argues that a foreign corporation now is deemed a resident in the United States wherever it is subject to personal jurisdiction. We are not persuaded. The mere

⁸ Section 1391(c)(3) eliminated venue protections for certain *non*-aliens (specifically, U.S. citizens domiciled abroad). Adding to the group of persons denied venue protection does not curtail the denial of venue protection to aliens. Only adding to the group of persons *provided* venue protection, *e.g.*, § 1391(c)(1), does that.

absence of an express foreign-corporation exclusion from § 1391(c)(2) is not enough to infer the sweeping repudiation of the *Hohorst/Brunette* rule that Petitioner's position produces. In fact, the conspicuous absence of any reference to aliens in § 1391(c)(2) is telling, since the immediately preceding paragraph, § 1391(c)(1), does expressly refer to aliens, extending venue protections to permanent resident aliens. At the same time, the immediately succeeding paragraph, § 1391(c)(3), uses broad language to *deny* venue protection to any "defendant not resident in the United States," with no exclusion of foreign corporations. And the accompanying House Report makes no mention of alien defendants being included in § 1391(c)(2). Quite the contrary—the House Report emphasizes that aliens will remain *without* a venue defense. House Report at 22 (discussing the shift from alienage to residency and stating "[t]his would mean that aliens and United States citizens domiciled abroad could not claim a venue defense to the location of litigation"); *id.* ("[F]or a party resident abroad, whether a natural person *or a corporation*, any venue privilege against suit in a particular Federal district court would be eliminated" (emphasis added)).⁹

⁹ For all of the reasons we have recited, including the *TC Heartland* decision, we do not think that the statute is properly read to adopt the view on this point expressed by the American Law Institute Federal Judicial Code Revision Project 146-47, 200-01 (2004), from which the 2011 legislation derived through a process that changed the ALI's proposal (which included repeal of § 1400) and produced a quite different congressional committee explanation. We also do not adopt the brief statement on the issue in Wright, *Federal Practice & Procedure* § 3810 ("Because nothing in the statute limits the application of Section 1391(c)(2) to entities formed in the United States, the

Finally, Petitioner contends that former § 1391(d) was not merely recodified in § 1391(c)(3). In light of the changes Congress implemented through the 2011 amendments, however, it is evident why former § 1391(d) had to be reformulated. *See House Report at 23 (“[T]he deletion of the current language of 28 U.S.C. § 1391(d), combined with the proposed amendment to paragraph 1391(c)(1), would also permit permanent resident aliens domiciled in the United States to raise a venue defense.”).* To maintain “the consistent focus of determining venue by reference to the domicile of natural persons,” *id.*, the language of § 1391(c)(3) had to be changed from “an alien may be sued in any district,” *see* § 1391(d) (1970), to “a defendant not resident in the United States may be sued in any judicial district,” § 1391(c)(3).¹⁰ This shift in language is insufficient to indicate a move away from the longstanding alien-venue rule.

4.

Petitioner concedes that its interpretation of the venue laws could create a venue gap, where at least some alien defendants would be entirely exempt from patent infringement actions. Pet’r’s Br. 9–10. It attempts to gloss over this problem, however, by arguing that no gap would exist in this case, as HTC Corporation’s subsidiary, HTC America, is a resident

provision governs venue in cases involving entities formed in foreign countries.” (citing *Poliseno v. Credit Suisse Secs. (USA), LLC*, 2013 WL 499509 (D. Mont. Feb. 8, 2013), *report & recommendation adopted*, 2013 WL 1767951 (D. Mont. Apr. 24, 2013))).

¹⁰ Further, that former § 1391(d) now falls under § 1391(c) under the heading “Residency” is also not dispositive. This merely reflects the general shift in focus from alienage to residency.

of Washington, and venue for HTC Corporation could reasonably be based on where venue is proper for its subsidiary. Pet'r's Br. 10. But, even assuming we could completely disregard the corporate form in this case, there would still be cases, as Petitioner concedes, where a venue gap exists (because, under Petitioner's theory, § 1400(b) displaces § 1391(b), (c)). While Petitioner contends that abiding by *Brunette* creates a “loophole” for a plaintiff to forum shop, *see* Pet'r's Br. 11, that has always been the case. Meanwhile, Petitioner's argument creates a far more unsatisfactory loophole—a complete inability for a patent owner to bring its infringement claims against alien defendants that fall outside the non-residence-based clause of § 1400(b). *See* *Brunette*, 406 U.S. at 710 n.8 (“Congress does not in general intend to create venue gaps Thus, in construing venue statutes it is reasonable to prefer the construction that avoids leaving such a gap.”).

With the Supreme Court having spoken on this issue twice, this court—without clear guidance from Congress—will not broadly upend the well-established rule that suits against alien defendants are outside the operation of the federal venue laws. Indeed, this longstanding rule has “continue[d] to color the venue statutes” since 1789. *Brunette*, 406 U.S. at 710–11. Because this case does not involve the sole clear modification Congress made to the rule in 2011, the rule, “which has prevailed throughout the history of the federal courts, controls this case.” *Id.* at 714.

III.

The final requirement for mandamus to issue is that the issuing court, in its discretion, must be

satisfied that the writ is appropriate under the circumstances. *Cheney*, 542 U.S. at 381. Petitioner contends mandamus is warranted in this case to address an unsettled and important question of law. Pet'r's Br. 26–28. Although Petitioner attempts to characterize this legal issue as “unsettled” and resulting in “inconsistent” holdings, Petitioner does not cite a single case that has adopted its interpretation. Accordingly, even if Petitioner had satisfied the first two mandamus requirements discussed above, the court is not convinced that a writ would be warranted in this case.

CONCLUSION

Petitioner has not satisfied the high standard necessary for a writ of mandamus to issue.

IT IS ORDERED THAT:

The petition for writ of mandamus is denied.

FOR THE COURT

May 9, 2018

Date

/s/ Peter R. Marksteiner

Peter R. Marksteiner

Clerk of Court

APPENDIX B

NOTE: This order is nonprecedential.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

IN RE: HTC CORPORATION,

Petitioner

2018-130

On Petition for Writ of Mandamus to the United
States District Court for the District of Delaware in
No. 1:17-cv-00083-LPS, Chief Judge
Leonard P. Stark.

ON PETITION FOR REHEARING EN BANC

Before PROST, Chief Judge, NEWMAN, LOURIE,
DYK, MOORE, O'MALLEY, REYNA, WALLACH,
TARANTO, CHEN, HUGHES, and STOLL, Circuit
Judges.

PER CURIAM.

O R D E R

Petitioner HTC Corporation filed a petition for rehearing en banc. A response to the petition was invited by the court and filed by respondents 3G Licensing, S.A., Koninklijke KPN N.V., and Orange S.A. The petition was first referred as a petition for rehearing to the panel that heard the appeal, and

thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

FOR THE COURT

September 6, 2018

Date

/s/Peter R. Marksteiner

Peter R. Marksteiner

Clerk of Court

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF DELAWARE

3G LICENSING, S.A., KONINKLIJKE
KPN N.V. and ORANGE S.A.,

Plaintiffs,

v.

HTC CORPORATION and HTC
AMERICA INC.,

Defendants.

Civil Action
No. 17-83-LPS-CJB

MEMORANDUM ORDER

Pending before the Court is Defendants HTC Corporation (“HTC Corp.”) and HTC America Inc.’s (“HTC America” and collectively with HTC Corp., “HTC” or “Defendants”) motion to dismiss (1) both Defendants for improper venue, or, in the alternative, to transfer venue to the Western District of Washington; and (2) HTC Corp. for lack of personal jurisdiction (D.I. 21). Having considered the parties’ motion briefing (D.I. 22, 28, 30) and letter briefing in response to the Court’s September 11, 2017 Oral Order (D.I. 43, 50, 51, 54, 55), and for the reasons stated below, IT IS HEREBY ORDERED that Defendants’ motion to dismiss (D.I. 21) is GRANTED-IN-PART and DENIED-IN-PART.

The Venue Defense Is Not Untimely

As an initial matter, Defendants’ venue challenge is not untimely. As the Court of Appeals for the Federal Circuit recently held, “[t]he Supreme Court changed the controlling law when it decided *TC Heartland*^[1] in May 2017.” *In re Micron Tech., Inc.*, 875 F.3d 1091, 1099 (Fed. Cir. 2017). Therefore, “[t]he venue objection was not available until the Supreme Court decided *TC Heartland* because, before then, it would have been improper, given controlling precedent, for the district court to dismiss or to transfer for lack of venue.” *Id.* at 1096.

¹ *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514 (2017).

HTC America is Not a Delaware Resident for
Purposes of Patent Venue

Venue in a patent case for domestic corporations is governed exclusively by 28 U.S.C. § 1400(b), *TC Heartland*, 137 S. Ct. at 1516, which provides: “[a]ny civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.” For purposes of § 1400(b), a defendant which is a domestic corporation “resides” only in its state of incorporation. *See TC Heartland*, 137 S. Ct. at 1517. It is undisputed that HTC America – which is incorporated in Washington (D.I. 20 at ¶ 10) – does not “reside” in Delaware.

Venue is Not Proper in Delaware for HTC America
Under the Second Prong of §1400(b)

Venue is proper in this District unless HTC America can show that the second prong of § 1400(b) is not satisfied. *See Boston Scientific Corp. v. Cook Group Inc.*, ___ F. Supp.3d __, 2017 WL 3996110, at *4 (D. Del. Sept. 11, 2017) (holding that burden is on party opposing venue). With respect to the second prong’s requirement that a defendant have committed “acts of infringement” in the District, it is undisputed that HTC America has sold and offered for sale its allegedly infringing products in Delaware. (See D.I. 22 at 3-5; D.I. 28 at 11) Therefore, Delaware is a proper venue for this lawsuit unless HTC America can meet its burden to show it does not have a regular and established place of business in Delaware. If HTC America can show that that is true, then venue here is improper as to it, and the

Court will have to dismiss or transfer this case (at least as to HTC America).

HTC America has met its burden – and, indeed, Plaintiffs no longer seriously dispute that Delaware is an improper venue as to HTC America. (See D.I. 50 at 2-3; D.I. 54 at 1) In HTC America’s sworn declaration, it indicates that it has no physical location or facility in Delaware, and it has no employees located in Delaware. (D.I. 22 Ex. A at ¶¶ 5-6) HTC America has shown that it does not have a regular and established place of business in this District. Thus, venue does not lie in Delaware for HTC America under the second prong of Section 1400(b).

HTC Corp. is a Foreign Defendant and May be Sued in Any Judicial District

HTC Corp. is a foreign defendant; specifically, it is a Taiwanese corporation with its principal place of business in Taoyuan, Taiwan. (D.I. 20 at ¶ 9) In *Brunette Mach. Works., Ltd. v. Kockum Indus., Inc.*, 406 U.S. 706, 706-07 (1972), the Supreme Court held that when a foreign defendant is sued in a patent infringement action, the general venue provision, 28 U.S.C. § 1391, governs. Pursuant to § 1391, a foreign defendant may be sued in any judicial district. See 28 U.S.C. § 1391(c)(3).

Nevertheless, Defendants argue that “[f]or policy reasons” in light of the *TC Heartland* decision, the Court should find that venue is improper in this District as to HTC Corp. (D.I. 22 at 5-7; D.I. 55 at 1)²

² Defendants’ argument is essentially that *Brunette*’s holding “was unique to a situation where under the then existing statutory regime, no venue would have been proper.” (D.I. 51

But the *TC Heartland* Court made clear that its holding did *not* address the applicability of Section 1400(b) to foreign defendants, and it explicitly stated that it did not “express any opinion on” its holding in *Brunette*. 137 S. Ct. at 1520 n.2. Hence, *Brunette* remains good law, *see, e.g., Red.com, Inc. v. Jinni Tech. Ltd.*, 2017 WL 4877414, at *7 (C.D. Cal. Oct. 11, 2017), and, accordingly, venue is proper in this District as to HTC Corp.

This Court May Exercise Personal Jurisdiction Over
HTC Corp.

In addition to arguing that venue is improper as to both HTC America and HTC Corp., Defendants’ motion also seeks dismissal of HTC Corp. pursuant to Federal Rule of Civil Procedure 12(b)(2), based on lack of personal jurisdiction. (D.I. 22 at 7-9) The Court concludes that this portion of Defendants’ motion lacks merit.

This Court may exercise personal jurisdiction over a foreign defendant pursuant to the “dual jurisdiction” or “stream of commerce” theory, where there is a showing: (1) of an intent to serve the Delaware market; (2) this intent results in the introduction of the product into the market; and (3) plaintiff’s cause of action arises from injuries

at 2) (internal quotation marks and emphasis omitted) In Defendants’ view, due to statutory changes – as well as different circumstances, which here include that HTC America has a regular and established place of business in the State of Washington and “venue for HTC Corp. may be reasonably based on where venue is proper for HTC [America],” (D.I. 55 at 1) – *Brunette* cannot be dispositive here. The Court, however, understands *Brunette* to remain binding precedent, which determines the outcome here.

caused by that product. *See Graphics Props. Holdings, Inc. v. ASUS Comput. Int'l*, 70 F. Supp. 3d 654, 662 (D. Del. 2014); *see also Polar Electro Oy v. Suunto Oy*, 829 F.3d 1343, 1350 (Fed. Cir. 2016) (explaining that when defendant shipped numerous accused products to Delaware retailers, fully expecting that such products would thereafter be sold in Delaware, its actions were “purposefully directed to Delaware, indicating an intent and purpose to serve not only the U.S. market generally, but also the Delaware market specifically”).

The record here shows that these preconditions are satisfied. In its 2015 Annual Report, HTC Corp. stated it “maintains a presence in all key markets, including the United States” and its “products are distributed across . . . America[] . . . through major carriers and local retail channels.” (D.I. 29 Ex. 1 at 34, 145) HTC Corp. further noted that it released particular smartphones in partnership with “US carrier Verizon.” (*Id.* at 49) The record also shows that HTC Corp.’s intent to serve the United States market has resulted in the accused products being sold in Delaware, including at numerous Best Buy, Sprint, and Verizon locations. (*Id.* Exs. 3-7) HTC Corp.’s smartphones are also sold online through HTC America’s website. (*Id.* Ex. 9)

Defendants assert that the Supreme Court recently rejected the dual jurisdiction theory of personal jurisdiction, in *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*, 137 S. Ct. 1773 (2017). (D.I. 22 at 8-9; D.I. 30 at 8) The Court disagrees. *Bristol-Myers Squibb* involved a class action filed in a California state court by a large group of plaintiffs, most of whom did not reside

in California, against a Delaware corporation based in New York, asserting injuries from defendant's drug product. *See* 137 S. Ct. at 1777-78. The California Supreme Court utilized a "sliding scale approach" to find that California courts had specific jurisdiction over the nonresidents' claims. *Id.* at 1778-79. In reversing the California Court, the Supreme Court emphasized that what is needed for specific jurisdiction – and what was missing in *Bristol-Myers Squibb* – "is a connection between the forum and the specific claims at issue." *Id.* at 1781-82. No such connection could be discerned where the nonresidents were not prescribed the drug at issue in California, did not buy it in California, did not ingest it there, and were not injured by the drug in California. *Id.*

By contrast, here, the record shows that HTC Corp. intended to serve the Delaware market, and as a result, the accused products are being sold here, thereby allegedly causing damage to Plaintiffs. Thus, Defendants' argument based on *Bristol-Myers Squibb* is unavailing.

Venue Proper as to One Defendant and Improper as to Second Defendant

In light of the Court's conclusions above, venue is proper here as to HTC Corp. but improper as to HTC America. Defendants request that both Defendants be dismissed or transferred together to the Western District of Washington pursuant to 28 U.S.C. § 1406(a). (D.I. 22 at 9-11; D.I. 30 at 9; D.I. 55 at 1-2) Section 1406(a) instructs district courts that when a suit is filed in an improper venue, the court "shall dismiss, or if it be in the interest of justice, transfer such case to any district . . . in which it could have

been brought.” Plaintiffs object to transfer of the entire case and, instead, request that the Court dismiss HTC America without prejudice and allow this case to proceed in Delaware against just HTC Corp. (D.I. 50 at 3; D.I. 54 at 2) Plaintiffs would then “forego pursuing any claims against [HTC America] during the pendency of this action.” (D.I. 50 at 3)

In the Court’s view, an immediate transfer of the case as to both Defendants is not the most reasonable and appropriate outcome – particularly given Plaintiffs’ objection, Plaintiffs’ contingent request that its case against HTC America be dismissed, and the fact that ten other, related actions (involving at least one of the patents-in-suit in this case) are pending before the undersigned Judge. The Court is not (as yet) persuaded that it is in the interest of justice to burden a second District Court with patent infringement and invalidity disputes that overlap (if not entirely mirror) disputes this Court must (undisputedly) resolve in the related actions. Therefore, the Court will provide Plaintiffs an opportunity to dismiss their claims against HTC America (which they have not yet actually done) and will then permit HTC Corp. to renew its motion to transfer venue (and address the totality of relevant circumstances), or seek any other appropriate relief.

Accordingly, IT IS FURTHER ORDERED that:

1. No later than December 27, 2017, Plaintiffs shall, if they wish, dismiss HTC America, and file an amended complaint.
2. No later than January 3, 2018, HTC Corp. and/or HTC America shall advise the Court, by motion or by letter, whether one or both of them seek

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transfer to the Western District of Washington and/or
any other relief.

December 18, 2017
Wilmington, Delaware

HONORABLE
LEONARD P. STARK
UNITED STATES
DISTRICT COURT