NO. 22-_____

# In the Supreme Court of the United States

CPC PATENT TECHNOLOGIES PTY LTD.,

*Petitioner,*

v.

APPLE INC.,

*Respondent.*

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**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

The Question Presented is:

Whether the Federal Circuit, a court with limited jurisdiction that includes cases "arising under" patent law, also has subject matter jurisdiction over a petition for writ of mandamus challenging a denial of a motion to transfer venue under 28 U.S.C. § 1404(a), a statute that does not arise under such law.

## RULE 29.6 STATEMENT

Petitioner CPC Patent Technologies PTY Ltd. is an Australian investment company focused on biometric technology including mobile device security, credit card security, and mobile payments, and having its principal place of business located at Level 1, 18 Tedder Avenue, Main Beach, Queensland 4217, Australia. CPC Patent Technologies PTY Ltd. is a wholly-owned subsidiary of Charter Pacific Corporation Limited. No publicly held company owns 10% or more of its stock.

## LIST OF PROCEEDINGS

### DIRECT PROCEEDINGS

U.S. Court of Appeals for the Federal Circuit

No. 2022-128

In Re: Apple Inc., *Petitioner*

Date of Final Opinion: April 22, 2022

Date of Rehearing Denial: June 6, 2022

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U.S. District Court for the
Western District of Texas, Waco Division

No. 6:21-cv-00165-ADA

CPC Patent Technologies PTY Ltd., *Plaintiff,*
v. Apple Inc., *Defendant.*

Date of Final Opinion: February 8, 2022

### RELATED PROCEEDING

U.S. District Court for the
Northern District of California

No. 5:22-cv-02553

CPC Patent Technologies Pty Ltd. v. Apple Inc.

Active Case, No Final Judgment Entered

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## PETITION FOR A WRIT OF CERTIORARI

CPC PATENT TECHNOLOGIES PTY LTD. (CPC) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit. (App.1a)

## INTRODUCTION

*No less than 17 times* between November 2020 and April 2022, including in the instant proceeding, the United States Court of Appeals for the Federal Circuit has exercised its mandamus power in ordering § 1404(a) transfer in matters pending in the United States District Court for the Western District of Texas.[1]

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[1] *See In re Apple Inc.*, 979 F.3d 1332 (Fed. Cir. Nov. 9, 2020); *In re Intel Corp.*, 841 Fed. Appx. 192 (Fed. Cir. Dec. 23, 2020); *In re Tracfone Wireless, Inc.*, 852 Fed. Appx. 537 (Fed. Cir. April 20, 2021); *In re Samsung Electronics Co., Ltd.*, 2 F.4th 1371 (Fed. Cir. June 30, 2021); *In re Uber Technologies, Inc.*, 852 Fed. Appx. 542 (Fed. Cir. July 8, 2021); *In re Hulu, LLC*, 2021 WL 3278194 (Fed. Cir. Aug. 2, 2021); *In re Juniper Networks*, 14 F.4th 1313 (Fed. Cir. Sept. 24, 2021); *In re Google LLC*, 2021 WL 4427889 (Fed. Cir. Sept. 27, 2021); *In re Juniper Networks, Inc.*, 2021 WL 4519889 (Fed. Cir. Oct. 4, 2021); *In re Google LLC*, 2021 WL 4592280 (Fed. Cir. Oct. 26, 2021); *In re Netscout Systems, Inc.*, 2021 WL 4771756 (Fed. Cir. Oct. 13, 2021); *In re Pandora Media, LLC*, 2021 WL 4772805 (Fed. Cir. Oct. 13, 2021); *In re DISH Network LLC*, 2021 WL 4911981 (Fed. Cir. Oct. 20, 2021); *In re Atlassian, Inc.*, 2021 WL 5292268 (Fed. Cir. Nov. 15, 2021); *In re Google LLC*, 2021 WL 5292667 (Fed. Cir. Nov. 15, 2021); *In re Apple Inc.*, 2021 WL 5291804 (Fed. Cir. Nov. 15, 2021); and *In re Apple Inc.*, 2022 WL 1196768 (Fed. Cir. April 22, 2022).

Apart from making passing references in those cases to its own jurisdictional statute (28 U.S.C. § 1295(a)(1)) and/or the statute governing writs (28 U.S.C. § 1651(a)), the Federal Circuit has never sufficiently explained why it has subject matter jurisdiction to hear a mandamus petition regarding § 1404(a) transfer, despite that statute not "arising under" any Act of Congress "relating to" patent law. In fact, the plain text of all three statutes makes clear that it is the regional circuit to which such mandamus petitions should be directed, and, as a matter of law, the Federal Circuit lacks subject matter jurisdiction to issue mandamus relief in a § 1404(a) context.[2] The Court should therefore grant the petition.

## OPINIONS BELOW

*In re Apple Inc.*, ___ F.4th ___, 2022 WL 1196768 (Fed. Cir. April 22, 2022) (App.1a-12a); *CPC Patent Technologies Pty Ltd. v. Apple Inc.,* 6:21-cv-00165, Order Denying Transfer (W.D. Tex. Feb. 8, 2022) (App.13a-34a). These opinions were not designated for publication.

[2] Jurisdiction cannot be waived, and that the issue was not raised below is of no moment, *See, e.g.*, *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934) (jurisdiction "cannot be waived," and "[a]n appellate federal court must satisfy itself not only of its own jurisdiction, but also of that of the lower courts in a cause under review").

## JURISDICTION

The Federal Circuit granted a petition for writ of mandamus on April 22, 2022, vacating the February 8, 2022 decision of the District Court for the Western District of Texas and ordering the court to transfer the case to the Northern District of California. (App.1a-12a, App.13a-34a). A petition for rehearing was denied on June 6, 2022 (App.35a-36a). This Court has jurisdiction over this petition for writ of certiorari under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

**28 U.S.C. § 1404(a)**
**Change of Venue**

> (a) For the convenience of parties and witnesses, in the interests of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.

**28 U.S.C. § 1295**
**Jurisdiction of the United States Court of Appeals for the Federal Circuit**

> (a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—
>
> (1) of an appeal from a final decision of a district court of the United States, the District Court

> of Guam, the District Court of the Virgin Islands, or the District Court of the Northern Mariana Islands, in any civil action arising under or in any civil action in which a party has asserted a compulsory counterclaim arising under, any Act of Congress relating to patents or plant variety protection.

**28 U.S.C. § 1651(a)**
**Writs**

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

## STATEMENT OF THE CASE

CPC brought a claim for patent infringement against Apple in the Western District of Texas on February 23, 2021 [ECF Docket No. 1]. Apple moved pursuant to 28 U.S.C. § 1404(a) to transfer the matter to the Northern District of California [ECF Docket No. 22]. The district court denied that motion on February 8, 2022 (App.13a-34a). On March 9, 2022, Apple petitioned for mandamus relief from the order denying transfer. The Federal Circuit granted that petition on April 22, 2022, ordering transfer of the pending litigation to the Northern District of California.

## REASONS FOR GRANTING THE WRIT

The Federal Circuit lacked subject matter jurisdiction to entertain a mandamus petition seeking to undo an order denying transfer pursuant to 28 U.S.C. § 1404(a), as that statute does not arise under any Act of Congress relating to patent law.

### I. THE FEDERAL CIRCUIT LACKS JURISDICTION TO CONSIDER A PETITION FOR WRIT OF MANDAMUS INVOLVING VENUE TRANSFER UNDER 28 U.S.C. § 1404.

#### A. The Limited Jurisdiction of the Federal Circuit.

The jurisdictional statute of the Federal Circuit reads, in relevant part, that the court "shall have exclusive jurisdiction of an appeal from a final decision of a district court of the United States . . . in any civil action *arising under* . . . any Act of Congress *relating to patents*." 28 U.S.C. § 1295(a)(1) (emphasis added). The sole issue presented in this Petition is whether 28 U.S.C. § 1404(a), which applies generally to the issue of venue in district court, falls within that jurisdictional limit. It does not.

This Court has held that a case "arising under" patent law must "set up some right, title or interest under the patent laws, or at least make it appear that some right or privilege will be defeated by one construction, or sustained by the opposite construction of these laws." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 807–08 (1988), *citing Pratt v. Paris Gas Light & Coke Co.*, 168 U.S. 255, 259 (1897). In *Chris-*

*tianson*, despite the invalidity of defendant's patents being an "essential element" of plaintiff's monopolization claim, the Court held that such claim did not "arise under" patent law. *Id.* at 811. In so concluding, the Court turned to the well-pleaded complaint rule, which "focuses on claims, not theories." *Id.* As the Court noted, "just because an element that is essential to a particular theory might be governed by federal patent law does not mean that the entire monopolization claim 'arises under' patent law." *Id.*

A mandamus petition, particularly one directed to a § 1404(a) transfer, is even further removed from patent law than the patent invalidity "element" confronting the Supreme Court in *Christianson*. As the Federal Circuit has noted, § 1404(a) "concerns the convenience of the parties and the interests of justice, which are not patent-specific considerations." *In re ZTE (USA) Inc.*, 890 F.3d 1008, 1013 (Fed. Cir. 2018) (contrasting sections 1400(b) and 1404(a) as concerns applicability of regional circuit law).

As to the well-pleaded complaint rule, a *prima facie* patent infringement claim does not turn on the convenience of the forum selected by the patentee. Rather, as the Federal and Fifth Circuits have repeatedly noted, it is the party seeking transfer that bears the burden to show that the transferee forum is the more convenient forum. *See, e.g.*, *In re Vistaprint Ltd.*, 628 F.3d 1342, 1346 (Fed. Cir. 2010), *citing In re Volkswagen, Inc.*, 545 F.3d 304, 314 n.10 (5th Cir. 2008). And, in the case of a mandamus petition directed to venue transfer of § 1404(a), to the extent this Court considers such a petition to be a "complaint," the "claim" therein is that a transferee forum would be more convenient—a claim that the Federal Circuit has all

but acknowledged has *nothing* to do with, let alone arises under, patent law.

### B. The Statute Providing for Writs of Mandamus Does Not Expand Federal Circuit Jurisdiction.

Turning now to the statute empowering courts to issue writs of mandamus, that statute requires that such writs be "necessary or appropriate in aid of [the issuing courts'] respective jurisdictions." 28 U.S.C. § 1651(a). "The common-law writ of mandamus, as codified in 28 U.S.C. § 1361, is intended to provide a remedy for a plaintiff only if he has exhausted all other avenues of relief and only if the defendant owes him a clear nondiscretionary duty." *Heckler v. Ringer*, 466 U.S. 602, 616 (1984), *citing Kerr v. United States District Court*, 426 U.S. 394, 402–403 (1976) (discussing 28 U.S.C. § 1651); and *United States ex rel. Girard Trust Co. v. Helvering*, 301 U.S. 540, 543–544 (1937).

Despite this purpose, however, that statute "does not expand a court's jurisdiction." *See, e.g.*, *Cox v. West*, 149 F.3d 1360, 1363 (Fed. Cir. 1998). *See also Freeman v. McDonough*, 2021-2152 (Fed. Cir. April 1, 2022); and *Telecomms. Rsch. & Action Ctr. v. F.C.C.*, 750 F.2d 70, 76 (D.C. Cir. 1984), *citing F.T.C. v. Dean Foods Co.*, 384 U.S. 597, 603–04 (1966)). Thus, "[t]he All Writs Act is not an independent basis of jurisdiction, and the petitioner must initially show that the action sought to be corrected by mandamus is within this court's statutorily defined subject matter jurisdiction."

### C. The Federal Circuit's Prior Analysis Regarding Its Jurisdiction in a § 1404(a) Context Has Been Deficient.

The Federal Circuit addressed its mandamus jurisdiction over § 1404(a) transfer motions in *In re Regents of University of California*—a decision well before its recent slew of mandamus orders. Therein, the Federal Circuit began by noting that it had previously "considered questions of venue when properly raised." *In re Regents of University of California*, 964 F.2d 1128, 1130 (Fed. Cir. 1992), *overruled on other grounds*, *TC Heartland LLC v. Kraft Foods Group Brands LLC*, 581 U.S. ___, 137 S. Ct. 1514 (2017). However, only one of the three decisions the court cited actually involved venue appeals, and that decision concerned the patent venue statute-§ 1400(b). *See VE Holding Corp. v. Johnson Gas Appliance Co.,* 917 F.2d 1574 (Fed. Cir. 1990), *cert. denied*, 499 U.S. 922 (1991).

The other two cases cited by the Federal Circuit in *Regents* were not venue appeals at all. *See Exxon Chemical Patents, Inc. v. The Lubrizol Corp.*, 935 F.2d 1263 (Fed. Cir. 1991) (addressing district court subject matter jurisdiction under 28 U.S.C. § 1338); and *Kahn v. General Motors Corp.*, 889 F.2d 1078, 12 USPQ2d 1997 (Fed. Cir. 1989) (addressing district court authority to issue stay of proceedings). Facially, these cases are unhelpful in determining whether the Federal Circuit has jurisdiction to issue a mandamus order in a § 1404(a) context.

The Federal Circuit in *Regents* went on to say that venue, when "properly before the Federal Circuit on appeal, are no less within our jurisdiction when raised by extraordinary writ." *Regents of University of California*, 964 F.2d at 1130. Again, the case cited by

the Federal Circuit, *In re Cordis Corp.*, 769 F.2d 733 (Fed. Cir. 1985), concerned § 1400(b), *not* § 1404(a).

There is no question that the patent venue statute is an "Act of Congress relating to patents," and the Federal Circuit has jurisdiction over any civil action "arising under" that statute. This, however, in no way infers that the Federal Circuit also has jurisdiction over venue disputes separately "arising under" § 1404(a), whether in the context of its mandamus power under § 1651(a) or otherwise.

By way of analogy, in *Ex parte Collett*, this Court considered the relationship between the venue provision of the Federal Employers' Liability Act and § 1404(a). *Ex parte Collett*, 337 U.S. 55, 56 (1949). The former "defines the proper forum," while the latter "deals with the right to transfer an action properly brought." *Id.* at 60. Thus, the Court noted, "[t]he two sections deal with two separate and distinct problems." *Id.* In the same fashion, § 1400(b), which defines the proper forum for a patent infringement suit, and § 1404(a) deal with distinct problems as well, and the Federal Circuit's having properly considered venue under the former does not confer upon it jurisdiction under the latter.

### D. Section 1404(a) Mandamus Is Neither "Necessary" nor "Appropriate" to the Federal Circuit's Jurisdiction.

Finally, as noted above, § 1651(a) specifies that a mandamus writ be "necessary or appropriate" in aid of jurisdiction. Such a writ directed to § 1404(a) transfer is neither necessary nor appropriate as concerns the Federal Circuit's jurisdiction. As to necessity, a party would be left with an adequate remedy in the event it seeks transfer to a more convenient forum—

by filing a mandamus petition with the appropriate regional circuit. Relatedly, as the Federal Circuit applies the law of the regional circuit in resolving § 1404(a) dispute, it would be more "appropriate" to confer jurisdiction over such disputes upon the regional circuit that propounded such law in the first place, rather than leaving it to the Federal Circuit to determine what that law might be.

## CONCLUSION

Simply, the Federal Circuit has no jurisdiction over § 1404(a) transfer, as that statute does not involve "patent-specific considerations." *See ZTE*, 890 F.3d at 1013. This Court should therefore grant certiorari, and vacate the Federal Circuit mandamus order directed to the Western District of Texas.

Respectfully submitted,

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