No. 24-_____

IN THE
Supreme Court of the United States

IN RE SECURUS TECHNOLOGIES, LLC AND
PAY TEL COMMUNICATIONS, INC.,
Petitioners

On Petition for a Writ of Mandamus to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF MANDAMUS

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QUESTION PRESENTED

Whether the First Circuit violated 28 U.S.C. § 2112(a) by refusing to transfer to the Fifth Circuit consolidated challenges to a Federal Communications Commission order and, instead, rewarding forum-shopping by three public interest organizations that filed incurably premature petitions for review over which the courts of appeals lack jurisdiction, solely to cause a venue lottery that should not have occurred.

PARTIES TO THE PROCEEDINGS

Petitioners Securus Technologies, LLC ("Securus") and Pay Tel Communications, Inc. ("Pay Tel") were parties in the proceedings before the Federal Communications Commission ("FCC"). Securus is a petitioner in proceedings initiated in the Fifth Circuit and transferred to the First Circuit, and Pay Tel is a petitioner in proceedings initiated in the Fourth Circuit and transferred to the First Circuit.

Respondent in this Court, against whom relief is sought, is the United States Court of Appeals for the First Circuit.

Real parties in interest in this Court are the FCC and the United States of America, respondents in related proceedings consolidated in the First Circuit; Criminal Justice Reform Clinic, a party in the proceedings before the FCC and a petitioner in proceedings initiated in the Ninth Circuit and transferred to the First Circuit; Direct Action for Rights and Equality, a party in the proceedings before the FCC and a petitioner in proceedings in the First Circuit; Pennsylvania Prison Society, a party in the proceedings before the FCC and a petitioner in proceedings initiated in the Third Circuit and transferred to the First Circuit; various state governments and sheriffs, and a state sheriffs' association, parties in the proceedings before the FCC and petitioners in proceedings initiated in the Fifth Circuit and transferred to the First Circuit;* and various other state governments, parties in the

* Those entities are the States of Louisiana, Mississippi, and Texas; Sheriffs Sid Gautreaux, Bobby Webre, Mark Wood, and Kevin Cobb; and the Louisiana Sheriffs' Association.

proceedings before the FCC and petitioners in proceedings initiated in the Eighth Circuit and transferred to the First Circuit.**

Fines and Fees Justice Center, Inc., a party in the proceedings before the FCC, filed a petition for review in the Second Circuit; that petition currently remains before the Second Circuit pending the FCC's unopposed motion to transfer to the First Circuit.

The Office of Communication of the United Church of Christ, Inc. has intervened in the appellate proceedings. Global Tel*Link Corporation d/b/a ViaPath Technologies and the National Sheriffs' Association have moved to intervene in the appellate proceedings.

** Those state governments are Alabama, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Missouri, Ohio, South Carolina, South Dakota, Tennessee, Utah, and Virginia.

RULE 29.6 STATEMENTS

Pursuant to this Court's Rule 29.6, petitioners Securus Technologies, LLC and Pay Tel Communications, Inc. state the following:

Securus Technologies, LLC is wholly owned by SCRS Holding Corporation ("SCRS"). SCRS does not have publicly traded stock, and no entity having publicly traded stock owns 10% or more of SCRS. Platinum Equity Capital Partners IV, L.P. ("Platinum") is the principal investor of SCRS. Platinum does not have publicly traded stock, and no entity having publicly traded stock owns 10% or more of Platinum.

Pay Tel Communications, Inc. does not have any parent corporations. Pay Tel does not have publicly traded stock, and no entity having publicly traded stock owns 10% or more of Pay Tel's stock.

RELATED CASES

Fines & Fees Justice Center, Inc. v. FCC, et al., No. 24-2611 (2d Cir., motion to transfer pending)

In re MCP 191, No. 24-8028 (1st Cir., pending motion to intervene of Global Tel*Link Corporation d/b/a ViaPath Technologies)

In re MCP 191, No. 24-8028 (1st Cir., pending motion to intervene of National Sheriffs' Association)

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Petitioners Securus Technologies, LLC ("Securus") and Pay Tel Communications, Inc. ("Pay Tel") petition for a writ of mandamus to the First Circuit directing it to transfer these consolidated appellate proceedings to the Fifth Circuit.

INTRODUCTION

After the Federal Communications Commission ("FCC") adopted an order that purported to implement faithfully new statutory provisions governing audio and video calls from within prisons and jails, Securus — one of the nation's two largest providers of Incarcerated Persons Communications Services ("IPCS") — petitioned for review of a portion of that order in its home circuit, the Fifth Circuit. Desperate to prevent the Fifth Circuit from hearing challenges to that FCC order, three public interest organizations that largely support the FCC's actions quickly filed petitions for review in the First, Third, and Ninth Circuits. But in each petition, the public interest organization conceded that the FCC's rules it would challenge had not yet been published in the Federal Register. And each admitted that the limited portion of the FCC's order then published in the Federal Register did not aggrieve them.

Thus far, their gambit has succeeded. The FCC submitted the four petitions for review to the Judicial Panel on Multidistrict Litigation, which selected the First Circuit to hear all challenges to the FCC's order. And the First Circuit has blessed the public interest organizations' forum-shopping by denying transfer motions, refusing to dismiss the jurisdictionally defective petitions, and proceeding to briefing on the merits. The First Circuit's refusal to send these petitions for review to the Fifth Circuit violates 28 U.S.C. § 2112(a).

Mandamus is warranted to "confine" the First Circuit "to a lawful exercise of its prescribed jurisdiction"

and "to compel it to exercise its authority when it is its duty to do so." *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943). All three criteria for mandamus are met. *See Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380-81 (2004). First, Securus and Pay Tel have no other adequate means to obtain relief on this threshold question, as the First Circuit has denied their transfer motions and is proceeding with merits briefing. Second, the right to transfer is clear and indisputable — 28 U.S.C. § 2112(a) identifies the Fifth Circuit, and only the Fifth Circuit, as the proper venue to hear these challenges to the FCC's order. And the writ is appropriate under the circumstances to undo the public interest organizations' blatant forum-shopping here and avoid incentivizing similar forum-shopping in future cases.

ORDERS BELOW

The order of the First Circuit denying petitioners' motions to transfer the appellate proceedings to the Fifth Circuit (App. 1a-2a) is not reported. Additional orders of the First Circuit (App. 3a-13a) — to show cause and to deny a separate motion to transfer — are not reported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1651(a). The order of the First Circuit was entered on December 9, 2024.

STATUTORY PROVISIONS INVOLVED

The All Writs Act, 28 U.S.C. § 1651(a), provides: "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." Relevant provisions of 28 U.S.C. § 2112 are set forth at App. 14a-16a.

STATEMENT

A. The FCC's *Order* and the Initial Petitions for Review

1. In July 2024, the FCC issued an order addressing Incarcerated People's Communications Services ("IPCS") — the audio and video services that enable incarcerated persons to communicate with friends and family.[1] In the *Order*, the FCC took three discrete actions: it adopted new regulations that significantly lowered the caps on IPCS rates, *see Order* ¶ 4, and altered IPCS providers' operations, *see id.* ¶ 3; it issued a Further Notice of Proposed Rulemaking, *see id.* ¶¶ 608-625; and — most relevant here — it denied long-pending petitions for reconsideration, clarification, and waiver, *see id.* ¶¶ 599-607.

Securus had filed two of those petitions. In August 2021, Securus asked the FCC to waive certain rules so Securus could offer IPCS users consumer-friendly alternative pricing plans, rather than only the per-minute pricing the FCC's rules required.[2] And in September 2021, Securus petitioned for clarification regarding the FCC's rules governing the payment of site commissions — fees that jails and prisons charge IPCS providers like Securus and that provide funding to correctional authorities for various programs to aid

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[1] *See* Report and Order, Order on Reconsideration, Clarification and Waiver, and Further Notice of Proposed Rulemaking, *Incarcerated People's Communications Services; Implementation of the Martha Wright-Reed Act; Rates for Interstate Inmate Calling Services*, WC Docket Nos. 23-62 & 12-375, FCC 24-75 (rel. July 22, 2024, amended Aug. 26, 2024) ("*Order*").

[2] *See* Petition for Waiver, WC Docket No. 12-375 (Aug. 30, 2021) ("Waiver Pet."), https://www.fcc.gov/ecfs/document/10830227993038/1.

the incarcerated population and to offset authorities' costs of providing communications services.[3]

In the *Order*, the FCC dismissed both petitions. *See Order* ¶¶ 604-607. As to the waiver petition, the FCC concluded that Securus' requests for waivers of the rules mandating per-minute calling rates were "moot" because the *Order* adopts new rules "allowing alternat[iv]e pricing plans." *Id.* ¶ 606.[4] The FCC also concluded that the *Order*'s new rules "end[ing] the practice of paying site commissions" "effectively moot Securus'[] request for clarification." *Id.* ¶ 605.

2. On August 26, 2024, one of the three portions of the *Order* was published in the Federal Register: the portion dismissing Securus' petitions for waiver and clarification and ruling on others' petitions for reconsideration.[5] The other two portions of the *Order* — those adopting new regulations and issuing a Further Notice of Proposed Rulemaking — were not published in the Federal Register until September 20, 2024.[6]

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[3] *See* Petition for Clarification, WC Docket No. 12-375 (Sept. 17, 2021), https://www.fcc.gov/ecfs/document/109170039603182/1.

[4] The *Order* also denied the waiver request as to 47 C.F.R. § 64.6080 "to the extent [it] would permit" "per-call and per-connection charges," because Securus "d[id] not explain why" such a waiver "is necessary." *Order* ¶ 607. But Securus did not offer such an explanation because its alternative pricing plans did not involve per-call or per-connection charges. *See* Waiver Pet. 3-4 (describing the plans).

[5] *See* Final Rule, Incarcerated People's Communications Services, 89 Fed. Reg. 68,369 (Aug. 26, 2024).

[6] *See* Final Rule, Incarcerated People's Communications Services, 89 Fed. Reg. 77,244 (Sept. 20, 2024) ("Final Rules"); Proposed Rule, Incarcerated People's Communications Services, 89 Fed. Reg. 77,065 (Sept. 20, 2024).

Securus timely petitioned for review of the dismissals of its waiver and clarification petitions in the Fifth Circuit, where it has long maintained its principal office. *See* Pet. for Review, *Securus Techs., LLC v. FCC*, No. 24-60454 (5th Cir. Aug. 30, 2024). In its petition, Securus expressly sought review of only "the portion of the *Order* resolving petitions for reconsideration, clarification, and waiver" that had been "published in the Federal Register" and sought as relief only a ruling that the FCC's "denials of [Securus'] clarification and waiver petitions" were unlawful. *Id.* at 1-2; *see also* Fed. R. App. P. 15(a)(2)(C) (requiring that a petitioner "specify the order *or part thereof* to be reviewed") (emphasis added). Securus attached a copy of the Federal Register publication of that portion of the *Order* to its petition. And, as the local rules required, Securus also "[a]ttach[ed] a copy of the order . . . to be reviewed." 5th Cir. L.R. 15.1(b).

Within days, three others — Direct Action for Rights and Equality ("DARE"), Pennsylvania Prison Society ("PPS"), and Criminal Justice Reform Clinic ("CJRC") (collectively, "Public Interest Organizations") — filed what they called "protective" petitions for review in the First, Third, and Ninth Circuits, respectively. In those petitions, each admitted it was *not* aggrieved by the FCC's actions on the reconsideration, waiver, and clarification petitions — the only part of the *Order* then published in the Federal Register. For example, DARE admitted that it "does not claim to be separately aggrieved by the limited portion of the Order published on August 26, 2024." Pet. for Review at 2, *Direct Action for Rights & Equality v. FCC*, No. 24-1814 (1st Cir. Sept. 5, 2024). PPS similarly stated that "the one portion of the *Order* as to which PPS seeks review" — the FCC's new regulations "allow[ing] IPCS

providers to recover certain safety and security costs in their rates" — "ha[d] not been published in the Federal Register." Pet. for Review at 2, 4, *Pennsylvania Prison Soc'y v. FCC*, No. 24-2647 (3d Cir. Sept. 4, 2024). And CJRC made a nearly identical statement. *See* Pet. for Review at 2-3, *Criminal Just. Reform Clinic v. FCC*, No. 24-5438 (9th Cir. Sept. 5, 2024).

B. The Hobbs Act and the Lottery Statute

The Communications Act of 1934 makes most FCC decisions, including the *Order*, reviewable under the Hobbs Act. *See* 47 U.S.C. § 402(a). The Hobbs Act, in turn, grants "exclusive jurisdiction" to the courts of appeals to review those FCC "final orders" that are "made reviewable by section 402(a) of title 47." 28 U.S.C. § 2342(1). Within 60 days after the FCC "give[s] notice" of "the entry of a final order reviewable" under the Hobbs Act "in accordance with its rules," "[a]ny party aggrieved" by that order may petition for review in the D.C. Circuit or "in the judicial circuit in which the petitioner resides or has its principal office." *Id.* §§ 2343, 2344. "The Hobbs Act's requirements that the agency action be final and that the petition timely filed are jurisdictional." *Brotherhood of Locomotive Eng'rs & Trainmen v. Federal R.R. Admin.*, 972 F.3d 83, 98 (D.C. Cir. 2020).

Implementing the Hobbs Act's text, the FCC's rules specify when public notice of agency actions occurs and thus the time to seek judicial review begins. *See* 47 C.F.R. § 1.4(b). As a general matter, public notice of "all documents in notice and comment . . . rulemaking proceedings" occurs on "the date of publication in the Federal Register." *Id.* § 1.4(b)(1). In contrast, public notice of "non-rulemaking documents" occurs on "the release date." *Id.* § 1.4(b)(2). But when an "adjudicatory decision[] with respect to specific

parties" is "contained in [a] rulemaking document[]," public notice is "governed by the provisions of § 1.4(b)(2)" — that is, public notice of the adjudicatory decision occurs upon release, even though public notice of the rulemaking contained in the same document must await Federal Register publication. *Id.* § 1.4(b)(1) note.[7]

Finally, in 28 U.S.C. § 2112, Congress established rules to identify which court of appeals will hear challenges to administrative orders "[i]f proceedings are instituted in two or more courts of appeals with respect to the same order." 28 U.S.C. § 2112(a). First, if petitions for review are filed "in at least two courts of appeals" during the first 10 days of the judicial review period, the agency is to notify the Judicial Panel on Multidistrict Litigation, which will hold a lottery to select the court of appeals in which the agency must file the administrative record. *Id.* § 2112(a)(1), (3). Second, if petitions for review are filed in only one court of appeals during that 10-day period, that court is the one in which the agency must file the administrative record, "notwithstanding the institution in any other court of appeals of proceedings for review of that [agency] order." *Id.* § 2112(a)(1). Third, if no petitions for review are filed in that 10-day period, "the court [of appeals] in which proceedings with respect to the

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[7] The FCC added this note in 2000, in response to the D.C. Circuit's decision in *Adams Telcom, Inc. v. FCC*, 997 F.2d 955 (D.C. Cir. 1993), which read the FCC's then-effective rules to say that public notice of an adjudication contained in a rulemaking document occurred upon Federal Register publication. *See* Memorandum Opinion and Order, *Amendment of Section 1.4 of the Commission's Rules Relating to Computation of Time*, 15 FCC Rcd 9583, ¶ 4 (2000) ("*Rule 1.4 Amendment Order*").

order were first instituted" is the one in which the agency must file the administrative record. *Id.*

Regardless of which of the three methods selects the court of appeals in which the agency must file the administrative record, all other courts of appeals that receive petitions for review of "the same order . . . shall transfer those proceedings to the court in which the record is so filed." *Id.* § 2112(a)(5). The court in which the record is filed "may thereafter transfer all the proceedings with respect to that order to any other court of appeals," "[f]or the convenience of the parties in the interest of justice." *Id.*

C. The First Circuit's Unexplained Refusal To Transfer the Petitions to the Fifth Circuit

1. On September 16, 2024, the FCC gave notice of the four petitions — Securus' and the Public Interest Organizations' — to the Judicial Panel on Multi-district Litigation. The Panel then selected the First Circuit through the random lottery. *See* Consolidation Order, No. 24-1814 (1st Cir. Sept. 19, 2024). Right after the First Circuit opened a docket consolidating the four petitions, Securus moved to transfer them to the Fifth Circuit, arguing for a discretionary transfer "in the interest of justice." 28 U.S.C. § 2112(a)(5).

Before Securus' transfer motion was fully briefed, the First Circuit *sua sponte* issued Show Cause Orders to the Public Interest Organizations. *See* Orders To Show Cause, *In re MCP 191*, Nos. 24-8028 *et al.* (1st Cir. Oct. 3, 2024) (reproduced at App. 8a-13a). The court's orders noted that the "protective" petitions appeared to be prematurely filed and, therefore, jurisdictionally defective. The court directed each to show cause why its petition should not be dismissed. While the petitioners argued that their later-filed petitions for review of the *Order*'s Final Rules rendered their

initial petitions timely, the FCC explained that those initial "petitions are incurably premature and should be dismissed for lack of jurisdiction." FCC's Resp. to Show Cause Orders at 6, *In re MCP 191*, No. 24-8028 (1st Cir. Oct. 17, 2024).

On October 21, 2024, before ruling on the jurisdictional question it raised, the First Circuit denied Securus' motion to transfer, stating:

> Having carefully reviewed the specific arguments petitioner offers in favor of transfer, we deny the motion, without prejudice to later revisitation of all issues bearing on venue and potential transfer.

Order at 2, *In re MCP 191*, Nos. 24-8028 & 24-1860 (1st Cir. Oct. 21, 2024) (reproduced at App. 6a-7a).

On November 13, 2024, the First Circuit declined to resolve the jurisdictional issue it had identified, instead "reserv[ing] to the ultimate merits panel" the "issues flagged in the order[s] to show cause." *E.g.*, Order, *In re MCP 191*, Nos. 24-8028 & 24-1814 (1st Cir. Nov. 13, 2024) (reproduced at App. 3a); *see also* App. 4a, 5a.

And on November 18, 2024, the First Circuit — without explanation — denied motions for a stay pending appeal that Securus and Pay Tel had filed. *See* Order at 2, *In re MCP 191*, Nos. 24-8028 & 24-1927 (1st Cir. Nov. 18, 2024) ("Having carefully reviewed the specific arguments Securus offers in favor of a stay, the motion is hereby denied, without prejudice to later revisitation of relevant points in briefing and during merits review."); Order at 2, *In re MCP 191*, Nos. 24-8028 & 24-1969 (1st Cir. Nov. 18, 2024) (same).

2. On November 19, 2024, the final deadline for petitioning for review of any aspect of the *Order*

expired. By that point, Securus, the Public Interest Organizations, and 24 other parties — including 17 States, a Sheriff's association, four individual Sheriffs, another public interest organization, and Pay Tel — had filed timely petitions for review of the *Order*'s Final Rules. With all petitions for review on file, and all but one transferred to the First Circuit under the "same order" rule in 28 U.S.C. § 2112(a)(5),[8] Securus renewed its transfer motion. Pay Tel also filed a transfer motion. Both motions argued that transfer to the Fifth Circuit was mandatory under 28 U.S.C. § 2112(a).

First, transfer is mandatory under the first-filed petition rule in § 2112(a)(1). The time for seeking judicial review of the FCC's dismissal of Securus' petition for waiver and of its petition for clarification began on July 22, 2024, with the release of the *Order*. *See* 47 U.S.C. § 405(a); 47 C.F.R. § 1.4(b)(1) note. Because no party petitioned for review within 10 days of the *Order*'s release, all petitions for review of the *Order* must be heard "in the court in which proceedings with respect to the order were first instituted." 28 U.S.C. § 2112(a)(1). That is the Fifth Circuit. And all courts of appeals "shall transfer" any "proceedings . . . instituted with respect to the same order" to that court. *Id.* § 2112(a)(5).

Second, even if the time for seeking judicial review of the FCC's dismissals of both Securus petitions began with Federal Register publication, transfer is

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[8] Fines and Fees Justice Center, Inc. filed a petition for review of the Final Rules in the Second Circuit. *See Fines & Fees Just. Ctr., Inc. v. FCC*, No. 24-2611 (2d Cir. Sept. 27, 2024). The FCC filed an unopposed motion to transfer that petition to the First Circuit under 28 U.S.C. § 2112(a)(5). That motion has been pending since October 8, 2024.

still mandatory under § 2112(a)(1). Only Securus filed a petition for review within the 10-day period after Federal Register publication that properly invoked a court of appeals' jurisdiction. As the FCC correctly explained, the three petitions that the Public Interest Organizations filed shortly after Securus petitioned for review were "incurably premature and should be dismissed for lack of jurisdiction." FCC's Resp. to Show Cause Orders at 6, *In re MCP 191*, No. 24-8028 (1st Cir. Oct. 17, 2024). Therefore, "within ten days after" Federal Register publication, a valid petition for review was filed "in only one court of appeals" — the Fifth Circuit — so all appeals of the *Order* must be heard in that circuit "notwithstanding the institution in any other court of appeals of proceedings for review of that order." 28 U.S.C. § 2112(a)(1); *see id.* § 2112(a)(5).

On December 9, 2024, without waiting for reply briefs, the First Circuit denied Securus' and Pay Tel's transfer motions. The court's terse order states, in full:

> The motions seeking transfer are denied, without prejudice to revisitation of relevant issues by the ultimate merits panel. The parties have been directed to confer and jointly propose a consolidated briefing schedule. During briefing, in addition to addressing the merits, the parties should address all relevant gating matters, including the venue issues discussed in the current motions to transfer.

App. 2a.

REASONS FOR GRANTING THE PETITION

The Court may issue a writ of mandamus under 28 U.S.C. § 1651 when three criteria are satisfied. First, the parties seeking the writ must "have no other adequate means to attain the relief." *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380 (2004). Second, the right to the relief must be "clear and indisputable." *Id.* at 381. Third, "the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Id.* These criteria are "demanding," but they "are not insuperable." *Id.*

As shown below, the criteria are met here. The relief Securus and Pay Tel seek also fits squarely within the "traditional use of the writ," as it seeks both "to confine an inferior court to a lawful exercise of its prescribed jurisdiction" by dismissing three petitions for review for lack of jurisdiction and "to compel it to exercise its authority when it is its duty to do so" as § 2112(a) requires transfer in this case. *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943).

I. Transfer Is Mandatory Because of Securus' First-Filed Petition for Review

The FCC violated 28 U.S.C. § 2112(a) when it sent the four petitions to the Judicial Panel on Multidistrict Litigation. The agency instead was required to file the administrative record in the Fifth Circuit, where Securus submitted the first-filed petition for review of the portion of the *Order* that dismissed its petitions for waiver and for clarification. And the First Circuit violated § 2112(a) by refusing to transfer all the petitions for review of the *Order* — all parts of which are the "same order" under § 2112(a) — to the Fifth Circuit.

The FCC's dismissals of Securus' petitions for waiver and for clarification were "adjudicatory

decisions with respect to specific parties . . . contained in [a] rulemaking document[]." 47 C.F.R. § 1.4(b)(1) note. Decisions to grant or deny waivers of a rule are adjudicatory decisions. *See*, *e.g.*, *Blanca Tel. Co. v. FCC*, 743 F.3d 860, 866-67 (D.C. Cir. 2014). So too are decisions to grant or deny a request for clarification of a rule. *See*, *e.g.*, *Qwest Servs. Corp. v. FCC*, 509 F.3d 531, 540 (D.C. Cir. 2007). And Securus sought a waiver of a rule as applied to it,[9] as well as clarification relevant to its existing contracts. Therefore, public notice as to each of these FCC actions is "governed by the provisions of § 1.4(b)(2)" — even though the *Order* is, itself, a rulemaking document — and occurred upon the release of the *Order*. 47 C.F.R. § 1.4(b)(1) note; *see id.* § 1.4(b)(2).

In adding the note to § 1.4(b)(1), the FCC explained that "adjudicatory matters," such as "waivers as to specific parties, do not" require Federal Register publication to start the time for judicial review, "even if the decisions happen to be . . . issued in[] an on-going rule making docket." *Rule 1.4 Amendment Order* ¶ 4. And the FCC has applied that note in circumstances just like this one. In 2002, the FCC issued a single order in which it both amended its rules governing the licensing of personal locator beacons and dismissed

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[9] While Securus noted that, if it received a waiver, other IPCS providers would also be able to receive a similar waiver if they made a showing like Securus', *see* Waiver Pet. 1, the relief Securus sought — and the evidence it submitted — was specific to its offerings, *see id.* at 3-4, 7-9. A grant of that waiver would provide guidance to other industry participants for seeking similar relief. *See Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1167 (D.C. Cir. 1990) (explaining the need for agency "even-handedness" in applying "identifiable standards" for obtaining a waiver). But that does not change the scope of the relief Securus sought through its waiver petition.

as moot two petitions for waiver of the preexisting rules.[10] The applicants for the waivers then sought reconsideration of the dismissals. The FCC uses the same public notice rules in § 1.4(b) that govern the start of the period for judicial review to determine the start of the 30-day period for seeking reconsideration. *See* 47 C.F.R. §§ 1.106(f), 1.429(d). Because the waiver "dismissals were adjudicatory decisions made in a rulemaking document," the FCC held that the 30-day reconsideration period started on release of the order, not Federal Register publication, and so the reconsideration "petitions were untimely."[11]

Here, no party petitioned for review of the dismissals of either the waiver or the clarification petitions within 10 days after the FCC released the *Order*. Therefore, the FCC was required to file the administrative record "in the court in which proceedings with respect to the order were first instituted." 28 U.S.C. § 2112(a)(1). That was the Fifth Circuit, where Securus filed the first petition for review, on August 30, 2024. And all other courts of appeals would then have been required to transfer other petitions for review of the *Order* to the Fifth Circuit under § 2112(a)(5). All the later petitions were filed "with respect to the same order" that contained the adjudicatory decisions Securus challenged; the courts of appeals "shall transfer" those petitions to "the court in which the record is filed pursuant to this subsection." *Id.* § 2112(a)(5).

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[10] *See* Report and Order, *Amendment of Part 95 of the Commission's Rules To Authorize the Use of 406.025 MHZ for Personal Locator Beacons (PLB)*, 17 FCC Rcd 19871, ¶¶ 1, 24 (2002).

[11] Order on Reconsideration, *ACR Electronics, Inc.*, 18 FCC Rcd 11000, ¶ 4 (2003).

In refusing the transfer these cases to the Fifth Circuit, the court below addressed none of these points. Nor may they be deferred to the merits panel. "Sections 2112(a) and 2344 of Title 28 U.S.C. . . . determine the proper court for appellate review of administrative decisions." *Newsweek, Inc. v. U.S. Postal Serv.*, 652 F.2d 239, 241 (2d Cir. 1981) (per curiam). And that determination occurs at the outset of a case, when proceedings are "instituted." 28 U.S.C. § 2112(a)(1). That is why courts of appeals routinely resolve disputes about the application of § 2112(a) through pre-merits briefing motions.[12] And when the courts of appeals rule on those motions, they provide reasons. *See*, *e.g.*, *In re MCP No. 185*, 2024 WL 3517673 (6th Cir. June 28, 2024) (denying transfer motion); *Buckeye Partners, L.P. v. FERC*, 2022 WL 1528311 (5th Cir. May 13, 2022) (per curiam) (granting transfer motion). Petitioners are unaware of any other instance of a court of appeals moving to merits briefing without first resolving its own authority under § 2112(a) to hear the consolidated cases on the merits. Absent mandamus relief, Securus and Pay Tel have no other adequate means for resolution of this threshold question of venue.

II. Transfer Is Mandatory Because the Court of Appeals Lacks Jurisdiction Over the Public Interest Organizations' "Protective" Petitions

Even if public notice of the dismissals of Securus' waiver petition and of its clarification petition occurred with Federal Register publication, § 2112(a)

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[12] *See*, *e.g.*, *North Carolina v. EPA*, 881 F.2d 1250 (4th Cir. 1989) (Phillips, J.); *ITT World Commc'ns, Inc. v. FCC*, 621 F.2d 1201 (2d Cir. 1980); *American Pub. Gas Ass'n v. FPC*, 555 F.2d 852 (D.C. Cir. 1976) (per curiam).

still requires transfer to the Fifth Circuit. That is because the courts of appeals lacked jurisdiction over three of the four petitions for review the FCC presented to the Judicial Panel on Multidistrict Litigation. Once those petitions are eliminated from the § 2112(a) calculus, the outcome is compulsory: these cases *must* be heard in the Fifth Circuit.

Only one party (Securus) filed a valid petition for review in a court of appeals (the Fifth Circuit) "within ten days after" the first Federal Register publication of a part of the *Order*. Therefore, the FCC "shall file the record in that court" (not the First Circuit), "notwithstanding the institution in any other court of appeals of proceedings for review of that order." 28 U.S.C. § 2112(a)(1). And "[a]ll courts in which proceedings are instituted with respect to the same order, other than the court in which the record is filed pursuant to this subsection, shall transfer those proceedings to the court in which the record is so filed." *Id.* § 2112(a)(5).

The Public Interest Organizations' "protective" petitions are incurably premature and must be dismissed for lack of appellate jurisdiction. The key fact here — which the First Circuit highlighted in its *sua sponte* Show Cause Orders — is undisputed: the Public Interest Organizations filed their "protective" petitions before the FCC rules they challenge were published in the Federal Register. So the petitions are "incurably premature" and the courts of appeals "lack jurisdiction" over them. *Council Tree Commc'ns, Inc. v. FCC*, 503 F.3d 284, 291, 293 (3d Cir. 2007); *see also Western Union Tel. Co. v. FCC*, 773 F.2d 375, 380 (D.C. Cir. 1985) (Scalia, J.) (same). The FCC agreed: "Because [the Public Interest Organizations] filed these petitions for review before September 20, the petitions are

incurably premature and should be dismissed for lack of jurisdiction." FCC's Resp. to Show Cause Orders at 6, *In re MCP 191*, No. 24-8028 (1st Cir. Oct. 17, 2024).

Indeed, the FCC recently told the Eleventh Circuit that, "[s]o far as [it is] aware, every . . . court to reach this issue" — whether a "petition filed before publication in the Federal Register is 'incurably premature' and must be dismissed for lack of jurisdiction" — "has come to the same conclusion." FCC Mot. To Dismiss at 3-4, *Insurance Mktg. Coalition Ltd. v. FCC*, No. 23-14125 (11th Cir. Jan. 19, 2024).[13] The FCC also told the Eleventh Circuit that premature petitions for review can create "confusion about whether a lottery should be held," which "would be counter to Congress's purpose in enacting the lottery procedure, and might incentivize other parties to file similar premature petitions in the future." *Id.* at 8. Yet, here, the FCC has urged the First Circuit to hold onto these cases, despite identifying the same jurisdictional defect in the three petitions that caused the lottery to occur as in the Eleventh Circuit case. The FCC was right there and is wrong to abet the Public Interest Organizations' forum-shopping here.

The Public Interest Organizations' later-filed petitions for review of the Final Rules did not cure the jurisdictional defects in their earlier-filed petitions. No case holds that a later-filed petition does so. That is why the D.C. Circuit has "repeatedly urged" parties who fear they may have filed an incurably premature petition to "supplement[] its premature petition with a later protective petition" over which the court does

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[13] The petitioner in that case then voluntarily dismissed its petition for review. *See* Unopposed Mot. for Voluntary Dismissal, *Insurance Mktg. Coalition Ltd. v. FCC*, No. 23-14125 (11th Cir. Feb. 7, 2024).

have jurisdiction. *Western Union*, 773 F.2d at 380. But such a later petition — like the ones the Public Interest Organizations filed here — does not create "an exception to the literal application of jurisdictional timeliness requirements" or cure the prematurity of the earlier-filed petition. *Id.* at 381; *see also Tele-STAR, Inc. v. FCC*, 888 F.2d 132, 134 (D.C. Cir. 1989) (per curiam) (explaining that a "challenge to agency action" filed before finality "is incurably premature" and "subsequent action" will not "secure appellate jurisdiction" over the prematurely filed petition). Then-Judge Scalia stressed in *Western Union* that the court "kn[e]w of no decision accepting a petition that was not filed within the time limits established by the jurisdictional review statute." 773 F.2d at 381. Nearly 40 years after *Western Union*, no contrary case exists.[14]

Section 2112(a) also required the First Circuit to resolve the question of the courts of appeals' jurisdiction over the so-called "protective" petitions *now*; that question cannot be deferred to the merits panel. If the courts of appeals lacked jurisdiction over them — and, as the FCC agrees, they do — the Public Interest Organizations' petitions are a nullity for purposes of § 2112(a). *See Southland Mower Co. v. U.S. Consumer*

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[14] The Public Interest Organizations have relied on *NATA v. FCC*, 751 F.2d 207 (7th Cir. 1984) (per curiam), where the Seventh Circuit declined to dismiss a premature petition because its own actions had "lulled NATA into thinking that it had not filed . . . prematurely." *Id.* at 209. Not so here, as the First Circuit promptly issued Show Cause Orders identifying the jurisdictional defect. In addition, *Western Union* and later cases have rejected *NATA*, and even the Seventh Circuit has declined to follow it. *See Council Tree Commc'ns*, 503 F.3d at 290 n.4 (rejecting *NATA* and noting the Seventh Circuit's abandonment of it).

Prod. Safety Comm'n, 600 F.2d 12, 13 (5th Cir. 1979) (per curiam) (discounting "premature" petitions in evaluating which petitions are relevant under § 2112(a)).

The Fifth Circuit in *Southland Mower* endorsed Judge Wilkey's persuasive reasoning in *Industrial Union Department, AFL-CIO v. Bingham*, 570 F.2d 965 (D.C. Cir. 1977). There, Judge Wilkey explained that § 2112(a) "is designed to solve forum disputes as between courts *having jurisdiction over* the order." *Id.* at 974 (Wilkey, J., concurring) (emphasis added). Therefore, a "petition for review which challenges an agency order not yet issued" "cannot qualify" under § 2112(a) because it "is invalid for prematurity." *Id.* Put differently, the court in which a "premature proceeding was launched cannot" be the one that § 2112(a) selects. *Id.* at 973. After dismissing the jurisdictionally defective petitions, § 2112(a) requires a court of appeals to "retransfer all remaining proceedings transferred to it" to the court § 2112(a) would have selected but for the dismissed petitions. *Id.* at 974 n.8. The First Circuit's refusal to do the same here conflicts with *Southland Mower*.

Finally, the Public Interest Organizations' incurably premature petitions for review were not truly "protective." While courts of appeals have "admonished petitioners of the wisdom of filing protective petitions for review," that admonishment applies when petitioners have doubts about when the time for review expires, whether to file in a district court or a court of appeals, or which appellate court has venue over the petitioner. *E.g.*, *Eagle-Picher Indus., Inc. v. EPA*, 759 F.2d 905, 912 & n.36 (D.C. Cir. 1985) (citing cases); *see also American Soybean Ass'n v. Regan*, 77 F.4th 873, 877 (D.C. Cir. 2023) (protective petitions filed in case

"jurisdiction over those challenges properly lies in the courts of appeals rather than district court"); *Chevron U.S.A. Inc. v. EPA*, 45 F.4th 380, 384 (D.C. Cir. 2022) (protective petition filed "anticipating [a] venue objection"). The Public Interest Organizations had no such confusion here. They knew where to file and when. But they knowingly filed too early; each said so on the face of its petition for review. There was nothing — other than the ability to forum-shop — for the Public Interest Organizations to protect.

The Public Interest Organizations — unlike every other party aggrieved by the FCC's Final Rules — deliberately filed jurisdictionally invalid petitions for review, in an effort to cause a lottery that would not (and should not) have occurred. The First Circuit's refusal to apply § 2112(a) as a threshold matter, by dismissing those petitions and transferring the cases to the Fifth Circuit, is unprecedented and violates § 2112(a). It denies Securus and Pay Tel an adequate means for resolving this threshold question of venue.

CONCLUSION

For either or both reasons, the Court should issue a writ of mandamus and order the First Circuit to transfer these consolidated cases to the Fifth Circuit.

Respectfully submitted,

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