

In the
Supreme Court of the United States

IN RE SECURUS TECHNOLOGIES, LLC, ET AL.,
Petitioners.

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

BRIEF OF RESPONDENT
NATIONAL SHERIFFS' ASSOCIATION
IN SUPPORT OF PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

The NATIONAL SHERIFFS' ASSOCIATION (the "NSA") is a non-profit association formed under 26 U.S.C. § 501(c)(4). No public corporation owns 10% or more of the NSA.

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INTRODUCTION

The NATIONAL SHERIFFS' ASSOCIATION (the "NSA") is a non-profit association formed under 26 U.S.C. § 501(c)(4). Formed in 1940, the NSA seeks to promote the fair and efficient administration of criminal justice throughout the United States and, in particular, to advance and protect the Office of Sheriff throughout the United States.

The NSA has over 20,000 members and is the advocate for 3,083 sheriffs throughout the United States who operate more than 3,000 local correctional facilities throughout the country. The NSA has participated extensively in the proceedings before the Federal Communications Commission ("FCC") that lead to the adoption of the *Order*¹ that is the subject of the proceeding in the First Circuit, and is an intervenor therein.

¹ Report and Order, Order on Reconsideration, Clarification and Waiver, and Further Notice of Proposed Rulemaking, *In the Matter of 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) (the "Order").



REASONS FOR GRANTING THE PETITION

As demonstrated in the Petition filed by Securus Technologies, L.L.C. (“Securus”) and Pay Tel Communications, Inc. (“Pay Tel”) (together, the “Petitioners”), the criteria for issuance of a writ of mandamus are met. As further shown below, a writ of mandamus would also prevent forum shopping and avoid undermining the purpose for which the multidistrict litigation lottery process was implemented.

I. TRANSFER IS MANDATORY UNDER A CORRECT APPLICATION OF § 2112(a)

The Petitioners are correct in their assertions that transfer is mandatory because Securus was first to file its Petition for Review in the Fifth Circuit, and because the other courts of appeal lacked jurisdiction over the other petitions for review. Petition for Writ of Mandamus at 12, *In re: Securus Technologies, LLC and Pay Tel Communications, LLC*, No 24-658, (December 13, 2024) (the “Petition”). Accordingly, as the Petitioners demonstrate, proper application of the law demands transfer to the Fifth Circuit. The NSA adopts and supports their arguments here.

II. FAILURE TO TRANSFER WOULD PROMOTE FORUM SHOPPING

In addition to the arguments made by the Petitioners, the NSA submits that transfer is also necessary to prevent forum shopping. As the Petitioners point out, Direct Action for Rights and Equality (“DARE”), Pennsylvania Prison Society (“PPS”), and Criminal Justice Reform Clinic (“CJRC”) (collectively, “Public

Interest Organizations”) each admitted they are not aggrieved by the document for which they sought review in the lottery system. Petition at p. 5. As discussed following, their participation in the proceedings before the FCC was limited, and the FCC’s action was considered a victory for them. What the Public Interest Organizations describe as a “protective” petition is, in reality, an improper attempt at forum shopping.

The Court of Appeals for the D.C. Circuit described one particularly “epidemic” form of forum shopping as follows:

[a] party who has substantially if not completely prevailed before the agency files a petition for review – ofttimes [sic] within seconds of the agency order – solely to guarantee that review will occur in the forum of its choice . . . Although the court of first filing is authorized to transfer the petitions to any court of appeals “for the convenience of the parties in the interest of justice,” the transfer authority is not always exercised, even when appropriate.

Liquor Salesmen’s Union v. NLRB, 664 F.2d 1200, 1203 (1981). This is essentially what the Public Interest Organizations have done in this case.

A review of the Public Interest Organizations’ filings makes clear that they have “substantially prevailed” in their arguments before the FCC.² Although

² One of the Public Interest Organizations even issued a press statement calling the *Order* a “victory.” *Prison Society Victory - FCC Backs Family Connection*, dated July 31, 2024, <https://www.prisonsociety.org/in-the-news/prison-society-victory-fcc-backs-family-connection> (last visited January 14, 2025).

their participation in the docket below was minimal,³ the Public Interest Organizations “applauded” the FCC in comments on the draft final order, and simply “respectfully suggest[ed] that the Commission take further steps” regarding the matters on which they now seek review.⁴ All three filings seeking review of the FCC *Order* address only one aspect of the *Order*: the FCC’s decision to allow IPCS providers to include costs associated with two out of seven categories of safety and security measures.⁵ Specifically, The PPS stated:

PPS supports almost all the findings, rulings and regulations adopted in the *Report and Order* portion of the *Order*. However, PPS

³ None of the Public Interest Organizations filed comments or reply comments in response to the FCC’s notice-and-rulemaking proceeding. Instead, they filed a joint letter on a draft of the final order, and participated in various oppositions to petitions for stay. *See, fn 4, infra.*

⁴ Letter to Marlene H. Dortch, Secretary, Federal Communications Commission from Melonie Perez, DARE; Aliza Kaplan, CJRC; Leigh Owens, PPS; and Jennifer Scaife, Correctional Association of New York, WC Docket No. 23-62 and 12-375, filed July 10, 2024.

⁵ *See, Petition for Review, Direct Action for Rights and Equality v. Federal Communications Commission, et al.*, Case No. 24-8026 (1st Cir.), filed September 18, 2024 (DARE Petition); Petition for Review, *Pennsylvania Prison Society v. Federal Communications Commission*, Case No. 24-8028 (3rd Cir.), filed September 23, 2024 (PPS Petition); Petition for Review of FCC Decision, *Criminal Justice Reform Clinic v. Federal Communications Commission*, Case No. 24-8028 (9th Cir.), filed September 19, 2024 (CJRC Petition). CJRC also references “adopt[ion of] certain consumer protection measures,” in addition to the safety and security cost recovery issues.

does seek review of one portion of the *Report and Order* on the grounds that it was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. Specifically, PPS challenges the determination allows [sic] IPCS providers to recover certain safety and security costs in their rates.

PPS Petition at p. 3-4. The CJRC states, “CJRC seeks review on the grounds that the *Order* arbitrarily and capriciously determined that communications security services are used and useful in the provision of incarcerated people’s communications services.” CJRC Petition at p. 3. DARE states, “[i]n particular, the FCC declined to adopt certain consumer protection measures and permitted the recovery of safety and security costs that are not used and useful in the provision of IPCS through its regulated rate caps.” DARE Petition at p. 2.

In the *Order*, the FCC held that the majority of costs associated with safety and security measures were unrecoverable. *Order* at ¶339-407 (finding five out of seven categories of safety and security costs are not recoverable); *Order* at FN 629 (finding 74% of safety and security costs identified in a Pay Tel report are not recoverable); *Order* at Appendix F, Table 18 (finding 66% of safety and security costs identified in an FCC data collection are not recoverable). As such, those remaining costs for which the Public Interest Organizations seek to be excluded on review are comparatively minor. While the NSA does not dispute that the Public Interest Organizations have a valid right to petition for review of the *Order*, the petitions for review filed on that portion of the *Order* addressing Securus’ petition for reconsideration are designed to enable forum shopping.

For this reason, the case should be transferred to the Fifth Circuit.

III. FAILURE TO TRANSFER UNDERMINES THE PURPOSE OF THE LOTTERY SYSTEM

The “protective” filings made by the Public Interest Organizations also undermine one of the primary purposes of the multidistrict litigation lottery process, which is to promote judicial economy. Joanna R. Lampe, Cong. Rsch. Serv, IF11976, *Multidistrict and Multicircuit Litigation: Coordinating Related Federal Cases* (2017). As described by the Petitioners, prior to the implementation of the lottery process, the court in which the first petition had been filed would resolve all challenges to the agency’s decision. Petitioner at p. 12-14. Courts have recognized the original first-to-file process led to a myriad of logistical issues, such as “unseemly races to the courthouse” and “[t]eams of runners . . . positioned in clerks’ offices poised to file as soon as the agency released its order.” *Sacramento Mun. Util. Dist. v. FERC*, 683 F.3d 769, 770 (7th Cir. 2012), citing Richard J. Pierce, Jr., ADMINISTRATIVE LAW TREATISE Vol. 3 § 18.3 (5th ed. 2010). Allowing the Public Interest Organizations’ machinations to succeed would only condone gamesmanship and invite parties to file premature or otherwise invalid petitions to improperly influence the lottery process.

The facts of the instant case validate this concern, as what should have been a straightforward process has become a complex dance involving multiple motions to transfer, unresolved orders to show cause, and a full briefing schedule adopted in a court that may not have jurisdiction over the case. Petition at p. 9. The Public Interest Organizations’ novel tactic has injected uncertainty into the lottery process and has prejudiced the

rights of every other party to the proceeding that waited until the appropriate time to file a petition for review.⁶



CONCLUSION

For the foregoing 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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⁶ As the Petitioners note, twenty-two other parties properly waited to file their petitions for review. Petition at p. 9-10.