No. 24-658

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

BRIEF IN OPPOSITION FOR RESPONDENTS DIRECT ACTION FOR RIGHTS AND EQUALITY, THE CRIMINAL JUSTICE REFORM CLINIC, AND THE PENNSYLVANIA PRISON SOCIETY

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QUESTION PRESENTED

Pursuant to the judicial lottery procedures set forth in 28 U.S.C. § 2112(a), all petitions for review of a single Federal Communications Commission order published in two parts in the Federal Register were consolidated in the U.S. Court of Appeals for the First Circuit. Dissatisfied with this lottery result, Petitioners twice moved to transfer the consolidated proceedings to the U.S. Court of Appeals for the Fifth Circuit. The First Circuit denied those transfer motions without prejudice and ordered the parties to brief the venue issues for resolution by the merits panel.

The question presented is:

Whether Petitioners are entitled to the extraordinary remedy of mandamus to compel transfer to the Fifth Circuit despite the availability of relief from the First Circuit and the novel and disputed questions regarding § 2112(a)'s application to the idiosyncratic facts of this case.

RULE 29.6 STATEMENTS

Direct Action for Equality and Rights (DARE) has no parent company and no publicly traded stock. No entity having publicly traded stock owns 10% or more of DARE stock.

The Criminal Justice Reform Clinic (CJRC) has no parent company and no publicly traded stock. No entity having publicly traded stock owns 10% or more of CJRC stock.

The Pennsylvania Prison Society has no parent company and no publicly traded stock. No entity having publicly traded stock owns 10% or more of Pennsylvania Prison Society stock.

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INTRODUCTION

Petitioners Securus Technologies, LLC ("Securus") and Pay Tel Communications, Inc. ("Pay Tel"), ask this Court to grant the extraordinary relief of mandamus to undo the results of the judicial lottery governing review of consolidated challenges to an order of the Federal Communications Commission ("Commission"). But Petitioners do not satisfy any element of the mandamus standard. First, Petitioners have alternative means of obtaining relief given that this issue is still being litigated in the First Circuit, which has invited the parties to submit further briefing on the subject. Second, Petitioners' right to relief with respect to the novel and contested venue questions they have raised on the unique facts of this case is far from clear and indisputable. Third, as Securus previously conceded below, transfer is, in any event, a question of discretion, not a mandatory right. Because Petitioners meet none of this Court's criteria for mandamus, the petition should be denied.

The underlying dispute in this case concerns a Commission order setting rate caps for incarcerated people's communications services ("IPCS"). *See In re Incarcerated People's Communications Services; Implementation of the Martha Wright-Reed Act*, Order on Reconsideration, Clarification and Waiver, and Further Notice of Proposed Rulemaking, WC Docket Nos. 23-62 & 12-375, FCC No. 24-75 (rel. July 22, 2024) ("Order"). That Order responded to the dictates of new, bipartisan legislation and reflected the culmination of over a decade of efforts by the Commission to address the inflated rates and charges that IPCS providers have

imposed on incarcerated people. The Order, inter alia, reduced the rate caps applicable to audio communication services, established interim video communication rate caps, and eliminated practices that had historically driven up IPCS prices.

The Commission issued its Order on July 22, 2024. The Commission's rules provide that for purposes of initiating judicial review of Commission action under the Hobbs Act, publication of agency action in the Federal Register starts the clock to file a petition for review. The venue question here arises from a quirk relating to the Federal Register's publication of the Order, in which a small portion (six pages) addressing, *inter alia*, Securus' petitions for clarification and waiver was published on August 26, 2024, and the vast majority (running to hundreds of pages) was published on September 20, 2024.

Petitioner Securus, an IPCS provider dissatisfied with the Order, filed a petition for review in the Fifth Circuit within ten days of the August 26, 2024, publication, stating that Securus was seeking review of the entire Order and attaching the entire Order to its petition. Securus' decision to seek review of the entire Order following the Federal Register's publication of only *part* of the Order created an uncertainty under the judicial lottery statute, which provides for a lottery where an agency "receives two or more or petitions for review of an order" within ten days. 28 U.S.C. § 2112(a)(3).

Respondents Direct Action for Rights and Equality, Inc., the Pennsylvania Prison Society, and the Criminal Justice Reform Clinic (collectively, the "Public Interest

Organizations") are also aggrieved by the Order because the Commission arbitrarily permitted the recovery of certain safety and security costs and declined to adopt certain consumer protection measures. They therefore filed their own petitions for review of the Order within ten days of the initial, partial publication, explaining that Securus' representation that it was challenging the entire Order had prompted their filings, and "in the event that the Order is deemed [already] reviewable," they sought to challenge its "key substantive provisions." Pet. for Review at 2, *DARE v. FCC*, No. 24-1814 (1st Cir. filed Sept. 5, 2024) ("1st Cir. Pet. for Review"); *see also Crim. Just. Reform Clinic v. FCC*, No. 24-5438 (9th Cir. filed Sept. 5, 2024); *Pa. Prison Soc'y v. FCC*, No. 24-2647 (3d Cir. filed Sept. 4, 2024).

The Commission determined that a judicial lottery should occur pursuant to 28 U.S.C. § 2112(a) based on the four petitions filed within the ten-day period following August 26—a determination that Securus has previously conceded was correct. *See* Securus Techs., LLC's Reply in Support of Mot. to Transfer at 3 n.2, *In re MCP 191*, No. 24-8028 (1st Cir. Oct. 11, 2024) ("Securus Reply in Support of Mot. to Transfer") (acknowledging agreement with "the FCC's use of the lottery process because that process is triggered when 'proceedings are instituted in two or more courts of appeals with respect to the same order'" (quoting 28 U.S.C. § 2112(a)). After the First Circuit was randomly selected by the Judicial Panel on Multidistrict Litigation ("JPML"), Petitioners sought to transfer all consolidated cases to the Fifth Circuit, which the First Circuit twice

denied without prejudice while directing the parties to address the venue question in their merits briefs.

Petitioners now seek mandamus to compel an immediate transfer to the Fifth Circuit, but they are not entitled to such extraordinary relief. As this Court has repeatedly stressed, mandamus is "reserved for really extraordinary causes," *Ex parte Fahey*, 332 U.S. 258, 259–60 (1947), and "only exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion will justify the invocation of this extraordinary remedy," *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380 (2004) (citations omitted); *see also Will v. United States*, 389 U.S. 90, 106-07 (1967); *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 383 (1953); *Roberts v. U.S. Dist. Ct. N.D. of Cal.*, 339 U.S. 844, 845 (1950); *Parr v. United States*, 351 U.S. 513, 520 (1956). A writ of mandamus will issue only where: (1) petitioner has no other adequate means of obtaining relief; (2) petitioner's right to relief is clear and indisputable; and (3) the writ is appropriate under the circumstances. *See Cheney*, 542 U.S. at 380–81. Petitioners acknowledge this demanding standard in passing but otherwise make little attempt to show why it is satisfied. In fact, none of the three conditions for mandamus is met.

First, Petitioners have other adequate means to attain the relief they seek. Relief is still available from the First Circuit, which has ordered further briefing on the venue question and determined that the appropriate course is to defer a decision on venue to the merits panel. Thus, Petitioners may still receive a decision from the First Circuit that this matter must be transferred to the

Fifth Circuit. To the extent Petitioners' assertion is that they are entitled to immediate transfer to the Fifth Circuit, this Court's precedents are clear that any (in this case, minimal) harms stemming from the First Circuit's discretionary determination to leave venue determinations to the merits panel cannot justify mandamus relief.

Second, Petitioners have not satisfied their burden to show that their right to the writ is "clear and indisputable." Resolving the venue dispute stemming from the Federal Register's idiosyncratic publication decision requires untangling the relationship among, at minimum, the governing statutory provisions in the Hobbs Act, the Communications Act, the judicial lottery statute, and the Commission's timing rules. That dispute is further complicated by the fact that Securus' *own* petition—purporting to trigger review of the entire Order based on the publication of a small piece—was itself premature, and because all four parties have now filed supplemental petitions for review. As explained below, the two theories Petitioners offer in this Court as to why transfer to the Fifth Circuit is mandatory are incorrect. But the Court need not agree with the Public Interest Organizations' arguments on the merits. The mere fact that Petitioners' arguments rest on novel and contested premises precludes Petitioners from receiving mandamus relief.

Third, mandamus is not appropriate under these circumstances. This Court's recent cases make clear that mandamus is confined to extremely limited circumstances—for instance, those involving major separation-of-powers disputes or foreign affairs. *See*,

e.g., *Cheney*, 542 U.S. at 390–91. It is not an appropriate mechanism for Petitioners to undo a statutorily required lottery—triggered by their *own* decision to file early—and thereby second-guess the First Circuit, which has already adopted a briefing schedule to resolve the transfer question.

Nor is mandamus relief appropriate here to dissuade supposed forum shopping, as Petitioners contend. Indeed, if there has been any forum shopping in this case, it has been by Petitioners. It was Securus that petitioned the Fifth Circuit early for review of the entire Order, thereby requiring other parties to file in their home circuits in order to protect the rights that Congress provided to all parties under the judicial lottery statute. Those parties were completely transparent about why they believed they needed to file given Securus' representation that it was challenging the Commission's entire Order. Yet, unsatisfied with the random draw of the First Circuit by the JPML, Petitioners have since done everything in their power to force this case to the Fifth Circuit, including by adopting conflicting positions regarding the lottery's propriety and whether transfer is discretionary or mandatory. The petition should be denied.

STATEMENT

I. The Hobbs Act and the Judicial Lottery Statute.

Judicial review of Commission orders is governed by the Communications Act, 47 U.S.C. § 405, and the Hobbs Act, 28 U.S.C. § 2344. The Communications Act provides that the 60-day period for seeking judicial

review runs "from the date upon which the Commission gives public notice of the order, decision, report, or action complained of." 47 U.S.C. § 405. The Hobbs Act likewise provides that the 60-day period begins "[o]n the entry of a final order," for which the agency "shall promptly give notice thereof by service or publication." 28 U.S.C. § 2344; *see Bhd. of Locomotive Eng'rs & Trainmen v. Fed. R.R. Admin.*, 972 F.3d 83, 101–02 (D.C. Cir. 2020). By rule, the Commission has further provided that the 60-day period for review of agency action begins to run "the day after the day on which public notice of that action is given," and defined what constitutes "public notice" in various situations. 47 C.F.R. § 1.4. As relevant here, public notice occurs for "documents in … rulemaking proceedings" upon their "publication in the Federal Register." *Id.* § 1.4(b)(1).

Under the Hobbs Act, venue lies "in the judicial circuit in which the petitioner resides or has its principal office," or in the D.C. Circuit. 28 U.S.C. § 2343. When Hobbs Act "proceedings are instituted in two or more courts of appeals with respect to the same order," Congress has provided for a judicial lottery to randomly select a single venue in which all such proceedings will be consolidated. 28 U.S.C. § 2112(a); *see also* 47 C.F.R. § 1.13(a)(1) (requiring that a party that "wishes to avail itself of" the judicial lottery "in the case of multiple petitions for review of the same Commission action[] pursuant to 28 U.S.C. [§] 2112(a)" must serve its petition on the FCC "within ten days after the issuance of that order"). The purpose of this provision is to avoid a race to the courthouse and ensure that any party aggrieved by an order has access to a "procedure for preserving its

choice of forum." *Remington Lodging & Hosp., LLC v. NLRB*, 747 F.3d 903, 905 (D.C. Cir. 2014). Courts have recognized that § 2112(a) "is not jurisdictional in nature, but rather, is a somewhat unusual venue statute." *Westinghouse Elec. Corp. v. U.S. Nuclear Regul. Comm'n*, 598 F.2d 759, 766 (3d Cir. 1979).

II. The Order's Publication and the Petitions for Review.

In 2022, Congress enacted the Martha Wright-Reed Act to provide the Commission with additional authority to address the excessive rates and charges IPCS providers had long charged incarcerated people for communications services. Martha Wright-Reed Just and Reasonable Communications Act of 2022, Pub. L. No. 117-338, 136 Stat. 6156 (2023) (codified at 47 U.S.C. § 276); *cf. Global Tel*Link v. FCC ("GTL")*, 866 F.3d 397 (D.C. Cir. 2017) (limiting the Commission's ability to curb excessive rates under its prior statutory authority).

On July 22, 2024, the Commission released its 464-page Order implementing the Act. *See* Order. The Commission's main focus in the Order was on adopting and applying a methodology for setting rate caps for various kinds of communications services offered in carceral settings. The Order set those rates, *id.* ¶¶ 117–474, and adopted certain consumer protection measures concerning providers' practices to safeguard those rates, *id.* ¶¶ 499–556. The same Order also dismissed as moot petitions that Securus had previously filed for clarification and for waiver of the Commission's prior rules. *See id.* ¶¶ 604–607.

On August 26, 2024, the Federal Register published part of the Order, totaling just six pages. *See* Incarcerated People's Communications Services; Implementation of the Martha Wright-Reed Act; Rates for Interstate Inmate Calling Services, 89 Fed. Reg. 68,369 (Aug. 26, 2024). The overwhelming majority of the Order—containing the Commission's new substantive rules and the bulk of its reasoning, and spanning hundreds of pages in the Federal Register—was published on September 20, 2024. *See* Incarcerated People's Communications Services; Implementation of the Martha Wright-Reed Act; Rates for Interstate Inmate Calling Services, 89 Fed. Reg. 77,244 (Sept. 20, 2024).

On August 30, 2024—four days after the first Federal Register publication—Petitioner Securus filed a petition for review in its home circuit, the Fifth Circuit, purporting to challenge the entire Order. Pet. for Review at 1–2 & n.1, *Securus Techs., LLC v. FCC*, No. 24-60454 (5th Cir. Sept. 4, 2024). Given Securus' representation that it was challenging the entire Order and desiring to protect their rights under the judicial lottery statute, the Public Interest Organizations then filed petitions for review in their home circuits (the First, Third, and Ninth Circuits), also within the ten-day period after August 26, explaining that they did not believe the entire Order was reviewable yet, but "in the event that the Order is deemed [already] reviewable," they sought to challenge its "key substantive provisions." 1st Cir. Pet. for Review at 1–2; *see also Crim. Just. Reform Clinic v. FCC*, No. 24-5438 (9th Cir.

filed Sept. 5, 2024); *Pa. Prison Soc'y v. FCC*, No. 24-2647 (3d Cir. filed Sept. 4, 2024).

The Commission sent all four petitions to the JPML to conduct the lottery. On September 18, 2024, the JPML randomly selected the First Circuit to hear consolidated challenges to the Order. Consolidation Order, *In re FCC, Incarcerated People's Commc'ns Servs., Implementation of the Martha Wright-Reed Act, FCC 24-75, Released July 22, 2024, 89 Fed. Reg. 68,369, Published on Aug. 26, 2024*, MCP No. 191 (J.P.M.L. Sept. 18, 2024). As a result, all four petitions were transferred to the First Circuit, including Securus' petition in the Fifth Circuit.

Following the Federal Register publication of the remainder of the Order on September 20, 2024, all four of the original petitioners promptly filed supplemental petitions for review, and other petitions were filed in three different circuits as well. *DARE v. FCC*, No. 24-1884 (1st Cir. filed Sept. 25, 2024); *Pa. Prison Soc'y v. FCC*, No. 24-2798 (3d Cir. filed Sept. 25, 2024); *Securus Techs., LLC v. FCC*, No. 24-60492 (5th Cir. filed Sept. 25, 2024); *Crim. Just. Reform Clinic v. FCC*, No. 24-5895 (9th Cir. filed Sept. 26, 2024). The other petitions included a petition from Pay Tel in the Fourth Circuit. *Pay Tel Commc'ns, Inc. v. FCC*, No. 24-1984 (4th Cir. filed Oct. 7, 2024). All of these petitions have now been transferred to the First Circuit, with one exception where transfer remains pending.[1]

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[1] Fines and Fees Justice Center, Inc. filed a petition for review in the Second Circuit on September 27, 2024. *Fines & Fees Just. Ctr.*,

III. Pre-Merits Motions in the First Circuit.

Only *after* Securus filed its initial petition and *after* it acquiesced to the JPML's random selection of the First Circuit did Securus begin to contend that something had gone awry in the venue-selection process. On September 27, 2024, Securus moved in the First Circuit to transfer all the consolidated cases to the Fifth Circuit. Notably, Securus did not argue in its initial transfer motion that transfer was mandatory, instead arguing that the First Circuit should "exercise its discretion to transfer" the cases "in the interest of justice." Mot. of Securus Techs., LLC to Transfer to the Fifth Circuit at 8, *In re MCP 191*, No. 24-8028 (1st Cir. Sept. 27, 2024) ("Securus Mot. to Transfer") (citation omitted). After "carefully reviewing" Securus' arguments, the First Circuit denied that motion "without prejudice to later revisitation of all issues bearing on venue and potential transfer." Pet. App. 7a.

On October 3, 2024, the First Circuit *sua sponte* issued orders to show cause why the original petitions filed by the Public Interest Organizations should not be dismissed as premature. Pet. App. 8a, 10a, 12a. After receiving briefing on that question, the First Circuit concluded on November 13, 2024, that the matter could proceed, with the "issues flagged in the order to show cause reserved to the ultimate merits panel." Pet. App. 3a, 4a, 5a. Following that ruling, Securus subsequently renewed its motion for transfer—and Pay Tel filed its

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Inc. v. FCC, No. 24-2611 (2d Cir. filed Sept. 27, 2024). The Commission filed an unopposed motion to transfer that petition to the First Circuit on October 8, 2024. That motion remains pending.

first such motion—on November 20, 2024, which the First Circuit again denied on December 9, 2024. Pet. App. 2a. The First Circuit then ordered the parties to brief these venue issues in their merits briefs. Pet. App. 2a ("[T]he parties should address all relevant gating matters, including the venue issues discussed in the current motions to transfer.").

Meanwhile, the First Circuit has continued to proceed with the case. On November 18, the court ordered the parties to meet and confer regarding a joint briefing schedule.[2] In proposing a schedule, to which Petitioners agreed, the parties "include[d] longer-than-standard-length opening and reply briefs … to provide space for parties to discuss jurisdiction and transfer issues in their merits briefs." Joint Proposed Briefing Format and Schedule at 6, *In re MCP 191*, No. 24-8028 (1st Cir. Dec. 9, 2024). According to that joint briefing schedule, which the First Circuit adopted on January 6, 2025, opening briefs will be due ten days from today, and briefing will conclude on May 5, 2025.

REASONS FOR DENYING THE PETITION

Petitioners are not entitled to a writ of mandamus compelling the First Circuit to transfer the consolidated cases to the Fifth Circuit. This Court may grant mandamus relief under the All Writs Act, which empowers this Court, like the lower courts, to "issue all writs necessary or appropriate in aid of [its] respective jurisdiction[]." 28 U.S.C. § 1651. As stated in this Court's rules, the

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[2] That same day, the First Circuit denied Petitioners' motions to stay the Order pending judicial review. Order of Court, *In re MCP* 191, No. 24-8028 (1st Cir. Nov. 18, 2024).

circumstances in which this Court grants such extraordinary writs are highly circumscribed. Entitlement to the writ is "not a matter of right, but of discretion sparingly exercised." Sup. Ct. R. 20.1.

In order for a petition for mandamus to issue, "three conditions must be satisfied." *Cheney*, 542 U.S. at 380; *see also Kerr v. U.S. Dist. Ct. for N. Dist. of Cal.*, 426 U.S. 394, 403 (1976). First, the "party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires." *Kerr*, 426 U.S. at 403. Second, the "petitioner must satisfy the burden of showing that [his] right to issuance of the writ is clear and indisputable." *Cheney*, 542 U.S. at 380 (citations omitted). Finally, "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." *Id.* at 381. None of these conditions is satisfied here.

I. Petitioners Have Alternative Means of Relief.

A. Relief Remains Available from the First Circuit.

The first mandamus condition is not satisfied because Petitioners may well obtain relief from the First Circuit and can seek certiorari in this Court to review the First Circuit's venue determination in the ordinary course. *See, e.g.*, *In re HTC Corp.*, 889 F.3d 1349, 1353 (Fed. Cir. 2018) (collecting cases holding that appeal after judgment is an adequate remedy for disagreement with venue ruling). "[W]hatever may be done without the writ may not be done with it." *Bankers Life Co.*, 346 U.S. at 383. Therefore, appellate courts have recognized

that mandamus is improper "when the [lower] court might yet decide the motion" in the movant's favor "on its own" because in that situation, a would-be petitioner can argue the motion in the lower court in lieu of seeking mandamus. *In re Flynn*, 973 F.3d 74, 79 (D.C. Cir. 2020).[3]

Here, Petitioners have sought mandamus to compel the "First Circuit to transfer these consolidated cases to the Fifth Circuit." Pet. 20. But the First Circuit is still actively considering this issue. As Petitioners acknowledge, the First Circuit issued "*sua sponte* Show Cause Orders" to undertake a preliminary inquiry into the Public Interest Parties' initial petitions. The First Circuit then undertook a careful review of the briefing on that question and determined to defer resolution of the transfer question to the merits panel. And the First Circuit further asked the parties to brief the venue question in their merits briefs and gave them extra space in their briefs for those arguments. All of these actions make clear that a final decision on transfer remains outstanding from that court, eliminating the need for intervention by this one.

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[3] Indeed, this Court is quite hesitant to review an issue before a court of appeals has weighed in. Certiorari before judgment is granted only upon a "showing that the case is of *such imperative public importance* as to justify deviation from normal appellate practice and to *require immediate determination* in this Court." Sup. Ct. R. 11 (emphases added). Petitioner has not put forth a single reason as to why this highly fact-specific venue dispute arising out of an anomalous quirk in the Federal Register's publication schedule is of great public importance.

As a result, this is not a typical mandamus case where a remedy is needed to compel a lower court to do something it has *refused* to do. Here, the First Circuit has not handed down a final rejection of any of the issues raised in this Petition. *Cf. United States v. Texas*, 144 S. Ct. 797, 798 (2024) (Barrett, J., concurring in denial of applications to vacate stay) (where court of appeals "issued a temporary administrative stay and deferred the stay motion to a merits panel," it "ha[d] not yet rendered a decision" on the pending stay motion). The First Circuit simply denied Petitioners' motions to transfer "without prejudice to revisitation of relevant issues by the ultimate merits panel." Pet. App. 2a; *see also In re United States*, 586 U.S. 983 (2018) (mem.) (alternative relief available even though the court of appeals had twice denied petitions for mandamus because it had done so without prejudice). That is a far cry from the requisite showing that the Circuit "persistently and without reason refuse[d] to adjudicate a case properly before it." *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 662 (1978) (plurality opinion). Petitioners have therefore not met their burden to show that "adequate relief cannot be obtained in any other form or from any other court." Sup. Ct. R. 20.1.

B. The First Circuit's Deferral of the Venue Question Does Not Itself Justify Mandamus.

To the extent Petitioners' argument is that they are entitled to an *immediate* decision on transfer, they have provided no reason why. *Cf.* Pet. 2, 15. The All Writs Act does not confer on this Court the authority to override lower courts' discretionary decisions about how to manage their dockets. Case management is the

purview of the lower court, which has "considerable authority 'to manage [its] own affairs so as to achieve the orderly and expeditious disposition of cases.'" *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 172–73 (1989) (quoting *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630–31 (1962)). And mandamus is rarely granted to compel a court to act more quickly than it otherwise would. *See, e.g.*, *In re Blodgett*, 502 U.S. 236 (1992) (per curiam).

In addition, this Court has rejected arguments that mandamus is necessary to avoid potential hardship stemming from being forced to litigate in a disfavored venue. Even when an "order of transfer defeats the objective of trying related issues in a single action," "give[s] rise to myriad of legal and practical problems," and imposes "inconvenience [on] both courts" implicated by the transfer decision, those concerns are not enough to warrant mandamus. *Bankers Life Co.*, 346 U.S. at 383. Indeed, the Court has recognized that even a full trial can be "imposed on parties who are compelled to await the correction of an alleged error at an interlocutory stage by an appeal from a final judgment." *United States Alkali Export Ass'n v. United States*, 325 U.S. 196, 202 (1945); *see also Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 25-32 (1943); *Will*, 389 U.S. at 96-98; *Parr*, 351 U.S. at 520. Yet mandamus still is not available. And here, the harm Petitioners face is even less compelling: they will not have to stand trial unnecessarily or proceed in two related cases in different venues—at most, they would be required to reproduce their merits briefing in another circuit in subsequent proceedings. That burden is hardly

justification to intrude on the First Circuit's discretionary scheduling decision.

Petitioners' arguments to the contrary lack merit. Petitioners first note that "courts of appeals routinely resolve disputes about the application of § 2112(a) through pre-merits briefing motions." Pet. 15. But their examples of this "routine" phenomenon are from 1976, 1980, and 1989. Petitioners then cite more recent examples of courts providing *reasons* why they are denying or granting transfer motions, *see, e.g.*, *In re MCP No. 185*, No. 24-7000, 2024 WL 3517673 (6th Cir. June 28, 2024) (denying transfer motion); *Buckeye Partners, L.P. v. FERC*, No. 22-60100, 2022 WL 1528311 (5th Cir. May 13, 2022) (per curiam) (granting transfer motion), which they accuse the First Circuit of failing to do. But mandamus is surely not required to compel the First Circuit to provide more explanation in its case management order. Finally, Petitioners state that they 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." Pet. 15. But Petitioners should be aware of such an instance given that Securus' own counsel filed a protective petition for review and then advocated for exactly this approach toward that protective petition in a prior case before the D.C. Circuit. *See* Protective Pet. for Review at 2, *U.S. Telecom Ass'n v. FCC*, No. 15-1063 (D.C. Cir. Mar. 23, 2015) ("USTelecom is filing this protective petition for review out of an abundance of caution."); Supplemental Pet. for Review at 1, *U.S. Telecom Ass'n v. FCC*, No. 15-1086 (D.C. Cir. Apr. 13, 2015) ("This petition supplements the protective petition

for review of the Order that USTelecom filed on March 23, 2015."); Opp. to Mot. to Dismiss at 1, *U.S. Telecom Ass'n v. FCC*, No. 15-1063 (D.C. Cir. May 21, 2015); (Order of Court, *U.S. Telecom Ass'n v. FCC*, No. 15-1063 (D.C. Cir. June 11, 2015) (per curiam) ("D.C. Cir. 2015 Order") ("referr[ing] to the merits panel" venue issues presented in pre-merits dismissal briefing). Because Petitioners have an alternative means of relief from the First Circuit, they have not satisfied the first condition for mandamus.

II. Petitioners' Right to Mandamus Relief Is Not Clear and Indisputable.

In addition, Petitioners have not remotely shown that their right to mandamus relief is clear and indisputable. To meet the "clear and indisputable" requirement, a petitioner must show that the lower court's action is "plainly and palpably wrong as [a] matter of law." *United States ex rel. Chicago Great W. R.R. Co. v. ICC*, 294 U.S. 50, 61 (1935). Courts deny mandamus when "a petitioner's argument, though 'pack[ing] substantial force,' is not clearly mandated by statutory authority or case law." *In re Al Baluchi*, 952 F.3d 363, 369 (D.C. Cir. 2020) (citation omitted); *see also People of Territory of Guam v. Dist. Ct. of Guam*, 641 F.2d 816, 820-21 (9th Cir. 1981) (mandamus was appropriate where lower court had run afoul of a rule "adhered to consistently" by the Supreme Court (citation omitted)). In a case involving statutory interpretation, the standard is not met where a petitioner's "interpretation is not the only permissible construction of the relevant statute." *Illinois v. Ferriero*, 60 F.4th 704, 716 (D.C. Cir. 2023).

Petitioners do not come close to carrying their heavy burden. They offer two theories why transfer is mandatory under 28 U.S.C. § 2112(a). Both are incorrect on their own terms. But, at minimum, they rest on novel and contestable premises that do not provide a "clear and indisputable" basis for mandamus.

A. The Commission's Release of the Order on July 22, 2024, Did Not Dictate the Lottery Timing.

Petitioners first argue that transfer is mandatory under § 2112(a)(1) because the time for seeking judicial review in fact began on July 22, 2024, with the Commission's release of the Order, rather than with the initial publication of the first part of the Order in the Federal Register on August 26, 2024. Pet. 12-15; *see* 47 U.S.C. § 405(a); 47 C.F.R. § 1.4(b)(1) note. In their view, because no party filed within ten days of the release date on July 22, 2024, all petitions for review must be heard "in the court in which proceedings with respect to the order were first instituted," which is the Fifth Circuit due to Securus' petition filed there on August 30, 2024. Pet. 10 (quoting 28 U.S.C. § 2112(a)(1)). On this view, all subsequent petitions must be transferred to the Fifth Circuit as well. *See* 28 U.S.C. § 2112(a)(5).

This argument has several flaws. First, Securus itself has previously disavowed this rationale, including in its renewed transfer motion before the First Circuit. *See* Securus Mot. to Transfer at 6 (arguing instead that the parties were "required to wait for the Federal Register publication of those rules" that aggrieved them "to petition for review"); Securus Renewed Mot. to Transfer at 7, *In re MCP 191*, No. 24-8028 (1st Cir. Nov.

20, 2024) (contending that "Securus' petition was the only valid one filed within 10 days after Federal Register publication of the FCC's actions resolving reconsideration, clarification, and waiver petitions").

Second, § 2112(a) contains no mandatory transfer provision that operates to correct any miscarriage of its lottery procedure. While § 2112(a)(5) governs transfers after the record has been filed in the court chosen by lottery, it provides only that transfer depends on the "convenience of the parties in the interest of justice." 28 U.S.C. § 2112(a)(5). Thus, the statute provides that the "court in which the record is filed *may* thereafter transfer" the proceedings. *Id.* (emphasis added). Such determinations are left to the discretion of the court, and mandamus is generally not available to review decisions that are expressly discretionary. *See Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980) ("Where a matter is committed to discretion, it cannot be said that a litigant's right to a particular result is 'clear and indisputable.'" (citation omitted)); *Platt v. Minn. Min. & Mfg. Co.*, 376 U.S. 240, 245 (1964) (holding, in case involving transfer decision, that the Court of Appeals improperly "exercised the discretionary function which the rule commits to the trial judge"); *Cheney*, 542 U.S. at 380 (requiring a clear abuse of discretion). In other words, even if Petitioners were correct that the lottery process was carried out incorrectly, the statute does not *require* transfer to remedy that error. Indeed, Securus itself previously recognized that any transfer to the Fifth Circuit would be discretionary and should be assessed under § 2112(a)(5)'s "convenience of the parties in the interest of justice" standard. Securus Mot. to

Transfer at 1, 8 (relying on this discretionary standard).

Third, under § 1.4(b)(1) of the Commission's rules, "[f]or all documents in notice and comment ... rulemaking proceedings required ... to be published in the Federal Register," public notice occurs when the document is published in the Federal Register, not when it is released by the Commission. 47 C.F.R. § 1.4(b)(2). Here, the Order is plainly a document in a rulemaking proceeding, so the triggering date for the judicial lottery was no earlier than August 26, 2024—not the July 22, 2024, date that Petitioners now assert.

Petitioners seek to avoid this result by construing the dismissals of Securus' petitions for waiver and for clarification in the publication of the first part of the Order as "adjudicatory decisions with respect to specific parties ... contained in [a] rulemaking document[]" under 47 C.F.R. § 1.4(b)(1) note. Pet. 12–13 (citing *Blanca Tel. Co. v. FCC*, 743 F.3d 860, 866-67 (D.C. Cir. 2014); *Qwest Servs. Corp. v. FCC*, 509 F.3d 531, 540 (D.C. Cir. 2007)). As such, they argue, public notice is "governed by the provisions of § 1.4(b)(2)" and occurred when the Order was released in July. Pet. 13.

But the Commission's explanations of its Order and denial of waivers in the August 26, 2024, publication, which applied equally to all IPCS providers, constitute rulemaking, not adjudication. *See, e.g.*, *New England Tel. & Tel. Co. v. Pub. Utils. Comm'n of Me.*, 742 F.2d 1, 6 (1st Cir. 1984) (collecting cases); *CBS v. United States*, 316 U.S. 407, 418 (1942). The Commission's reasoning dealt with the rights of all providers and users, and it relied on its newly issued, generally applicable rules regarding site commissions and alternate pricing plans.

Order ¶¶ 604, 606. And Securus itself acknowledged in filing its petition for clarification that the nature of its clarification went to "ensur[ing] uniform implementation across the industry," and sought "industry-wide clarification" on whether the Commission had decided to "absolutely bar[] providers" as a whole—not just Securus—from paying site commissions from their IPCS profits. *See* Securus Techs., LLC Pet. for Clarification at 1–2, 5, WC Docket No. 12-375 (FCC filed Sept. 17, 2021), https://www.fcc.gov/ecfs/document/109170039603182/1 ("Pet. for Clarification"). Similarly, the waiver request asked that "Securus *and other providers*" be allowed to offer alternative pricing plans. Securus Techs., LLC Pet. for Waiver of the Per Minute Rate Requirement to Enable Provision of Subscription Based Calling Services at 1, WC Docket No. 12-375 (FCC filed Aug. 30, 2021), https://www.fcc.gov/ecfs/document/10830227993038/1 ("Pet. for Waiver") (emphasis added).[4]

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[4] Petitioners also support this argument with a discussion of the Rule 1.4 Amendment Order and by noting that the FCC has applied the § 1.4(b)(1) note in similar circumstances in 2022. Pet. 13-14 (citing *In re ACR Electronics, Inc.*, Order on Reconsideration, 18 FCC Rcd 11000, 11001 ¶ 4 (2003)). But before the First Circuit, the Commission explained that the narrow exception for "licensing and other adjudicatory decisions with respect to specific parties" in rulemaking documents "applies in much more limited circumstances" than the circumstances here, as is evident from the Amendment Order cited by Petitioners. FCC Resp. to Renewed Transfer Mot. 17–19, *In re MCP 191*, No. 24-8028 (1st Cir. Dec. 4, 2024) ("FCC Resp. to Renewed Mot.").

B. Petitioners' Prematurity Arguments Are Also Incorrect.

Petitioners' second theory is that, even if the time for seeking judicial review ran from the first Federal Register publication, transfer would still be mandatory because only the Securus petition was both filed within the ten-day period and "properly invoked a court of appeals' jurisdiction" at the time. Pet. 11. Thus, because a valid petition supposedly was filed "in only one court of appeals," all appeals must be heard there "notwithstanding the institution in any other court of appeals of proceedings for review of that order." 28 U.S.C. § 2112(a)(1), (a)(5).

This theory, too, rests on incorrect (or at the very least, contestable) premises. First, it relies on the unsupported view that Securus itself is a "party aggrieved" with respect to the part of the Order published on August 26, 2024. As the Commission has explained, Securus received all of the relief it sought in its petitions for clarification and waiver. It sought clarification regarding providers' ability to pay site commission fees from their profits, Pet. for Clarification at 4, but by eliminating site commission fees, the Commission did away with this possibility, *see* Order ¶ 242.[5] Securus also sought a waiver of then-extant

[5] The existence of any contracts with site commission fees that will remain in effect for a short period of time while the Order's provisions take effect does not aggrieve Securus. Securus' concern about competitive disadvantage was that some providers would, believing they could pay higher site commission fees, negotiate *new* contracts with fees higher than Securus. That is no longer allowed, and the

rules banning alternate pricing plans, Pet. for Waiver at 1, but the Commission mooted that request by allowing such plans in the Order, *see* Order ¶¶ 427, 605. Thus, Securus cannot claim to be a party "aggrieved" within the meaning of the Hobbs Act by the Commission's dismissal of its mooted petitions.

Second, accepting Petitioners' alternative theory further requires concluding that the Public Interest Organizations' initial petitions were all *incurably* premature. Pet. 16. Petitioners cite a case from the Eleventh Circuit for that proposition, but it is distinguishable. *See* FCC Mot. to Dismiss at 3-4, 8, *Insurance Mktg. Coalition, Ltd. v. FCC*, No. 23-14125 (11th Cir. Jan. 19, 2024). There, no publication had appeared in the Federal Register prior to the petition's filing, no other party had filed an early petition purporting to challenge the entire Order as Securus did here, and no supplemental petitions were later filed. *See id.* at 2–3, 7. By contrast, the Public Interest Organizations here all filed protective petitions in response to *Securus*' representation that it was challenging the entire Order, including the as-yet unpublished provisions. *See* Pet. for Review at 1–2 & n.1, *Securus Techs., LLC v. FCC*, No. 24-60454 (5th Cir. Sept. 4, 2024) ("Securus Technologies, LLC ('Securus') hereby petitions this Court for review of an order of the Federal Communications Commission ('Commission')." (citing and attaching full Order)); *see also N. Am. Telecomms. Ass'n v. FCC ("NATA")*, 751 F.2d 207, 208–

existence of legacy contracts reflecting those arrangements is no burden to Securus.

09 (7th Cir. 1984) (declining to dismiss petition where litigation activity "may have lulled [the petitioner] into thinking that it had not filed … prematurely"). No doubt owing to these differences, and even though it espouses the "incurably premature" doctrine, the Commission here has told the First Circuit that it should retain these cases. *See, e.g.*, FCC Resp. to Renewed Mot. at 1.

Moreover, the Public Interest Organizations have cured any prematurity by filing supplemental petitions for review. Courts regularly recognize their jurisdiction over prematurely filed petitions in analogous circumstances after the agency action has become final. *See, e.g.*, *Jimenez-Morales v. U.S. Att'y Gen.*, 821 F.3d 1307, 1309 (11th Cir. 2016); *Khan v. Att'y Gen. of the U.S.*, 691 F.3d 488, 493 (3d Cir. 2012); *see also Hounmenou v. Holder*, 691 F.3d 967, 970 n.1 (8th Cir. 2012) (concluding the court had jurisdiction because "the finality of [the agency action] is no longer in question"); *Herrera-Molina v. Holder*, 597 F.3d 128, 132 (2d Cir. 2010) ("A premature petition for review of a not-yet final order … can become a reviewable final order upon the adjudication of [the remaining issues]."). That recognition is grounded in the longstanding principle that "[a]n appeal taken prematurely effectively ripens and secures appellate jurisdiction when the [underlying] judgment becomes final prior to the disposition of the appeal." *Waterway Commc'ns Sys., Inc. v. FCC*, 851 F.2d 401, 406 (D.C. Cir. 1988) (internal quotation marks omitted); *accord Triangle Cayman Asset Co. v. LG & AC, Corp.*, 52 F.4th 24, 31 (1st Cir. 2022). Absent authority addressing the novel situation in which a Federal Register publication is split in two, these

principles should govern.

Petitioners also cast aspersions on the motives of Public Interest Organizations, arguing that protective petitions are appropriate only when there is uncertainty about which court to file in and when. Pet. 20. But it was Securus that created the very uncertainty at issue here by filing an early petition for review that stated it was challenging the entire Order. Public Interest Organizations were fully transparent in their filings that they did not believe the Order was reviewable yet, but to the extent the Order was reviewable, they were filing as parties also aggrieved by the Order so as to protect their rights to the venue of their choice under the judicial lottery statute.

Finally, citing outdated cases applying a version of § 2112(a) that included no judicial lottery, Petitioners argue that prematurity has to be decided now and cannot be deferred. Pet. 19 (citing *Southland Mower Co. v. U.S. Consumer Prod. Safety Comm'n*, 600 F.2d 12, 13 (5th Cir. 1979); *Industrial Union Department, AFL-CIO v. Bingham*, 570 F.2d 965, 974 & n.8 (D.C. Cir. 1977) (Wilkey, J., concurring)). But, as discussed, at least one prior court has proceeded in just this way. *See* D.C. Cir. 2015 Order ("referr[ing] to the merits panel" whether the case had been properly initiated in the D.C. Circuit by the filing of a protective petition). Moreover, for all of Petitioners' framing of this matter as "jurisdictional," courts have recognized that § 2112(a) "is not jurisdictional in nature, but rather, is a somewhat unusual venue statute." *Westinghouse Elec. Corp.*, 598 F.2d at 766. And as described above, it is a venue statute with no mandatory transfer provision. There is

therefore no reason to think that immediate resolution of prematurity is required.

III. Mandamus Is Not Appropriate Under the Circumstances.

Finally, the Court should decline to exercise its discretion to issue the writ under the circumstances.

First, the Petition presents no legal issue of significance that has implications beyond the immediate case. Rather, it asks this Court to resolve today an idiosyncratic venue dispute stemming from an unorthodox decision by the Federal Register that is unlikely to recur and that the First Circuit has committed to resolving later following further briefing. As this Court has recognized in its modern cases, mandamus is ordinarily reserved for major disputes with broad impacts or those implicating the separation of powers or foreign affairs—not one-off venue disputes that are in the process of being decided by the lower court and are subsequently reviewable by this Court. *See, e.g.*, *Cheney*, 542 U.S. at 390–91 (remanding for consideration of whether "weighty separation-of-powers objections" made issuance of the writ appropriate under the circumstances).

Second, Petitioners themselves have taken several steps that make mandamus relief inappropriate. As the Commission has argued, Securus' own petition for review to the Fifth Circuit was premature. After setting off an impromptu dash to the courthouse, Securus, and later Pay Tel, proceeded to repeatedly and inappropriately attempt to litigate the venue issues caused by Securus' own actions. They have ignored the

First Circuit's instructions to save resolution of the venue issue for the merits panel, instead delaying the proceedings, seeking mandamus, and throughout, confusing the issues by changing positions repeatedly.

For instance, Securus previously stated that it agreed that the Commission should not have made any assessment of the validity of the Public Interest Organizations' petitions before sending the petitions filed within the ten-day period to the JPML. Securus argued that it "would be improper for the [Commission] to make pre-lottery determinations of the validity of petitions that challenge its order." Securus Reply in Support of Mot. to Transfer at 3 n.2. Securus further argued—in direct opposition to its position here—that "[e]ven facially invalid petitions for review 'institut[e]' 'proceedings'" for purposes of 28 U.S.C. § 2112(a). *Id.* This Court should decline to grant extraordinary relief based on a belated and inconsistent litigating position that Securus has adopted on the eve of merits briefing.

Securus and Pay Tel also consented to a joint briefing schedule in the First Circuit, where opening briefs are due in ten days from the date of this filing. And, when Securus initially moved in the First Circuit to transfer the consolidated cases to the Fifth Circuit, it argued for that result *not* because transfer was mandatory but because the First Circuit should do so in the "interest of justice." Securus Mot. to Transfer at 8. Securus' own litigation conduct therefore undermines its case for relief—if Petitioners themselves cannot adhere to a single interpretation of the authorities at play, this Court cannot conclude that there is only one reasonable interpretation of those statutes and rules.

Petitioners respond by suggesting mandamus is appropriate because the Public Interest Organizations have engaged in forum shopping. But all that Public Interest Organizations have done is seek to secure their statutory right to a judicial lottery by filing petitions for review in their home circuits, as Congress expressly provided. In contrast, it is Petitioners who have made multiple attempts to undo the results of the judicial lottery and transfer these cases to their preferred forum. Granting this petition would not discourage forum shopping; it would reward it.

CONCLUSION

Petitioners' request for a writ of mandamus should be denied.

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Respectfully submitted,

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