No. 24-658

In the Supreme Court of the United States

IN RE SECURUS TECHNOLOGIES, ET AL., PETITIONERS

ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

P. MICHELE ELLISON
General Counsel
JACOB M. LEWIS
Deputy General Counsel
SARAH E. CITRIN
Deputy Associate General Counsel
MATTHEW J. DUNNE
Counsel
Federal Communications Commission
Washington, D.C. 20554

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

Implementing a statutory directive to address excessive rates and fees for communications services in prisons and jails, the Federal Communications Commission (FCC) revised its prior regulations to establish new rate caps. In the same order, the FCC dismissed as moot pending petitions from Securus Technologies, LLC, to clarify or waive certain of the agency's former rules. By happenstance, the portion of the FCC's order that dismissed those petitions was published in the Federal Register weeks before the remainder of the order, which contained the revised rules. Within ten days after the first Federal Register notice, Securus and three other parties petitioned for review of the order in four different courts of appeals.

After a lottery was conducted pursuant to 28 U.S.C. 2112(a), the cases were consolidated in the First Circuit. When the remainder of the FCC's order was published in the Federal Register, the same parties and others filed additional petitions for review in various courts of appeals. All but one of the petitions challenging the order have now been transferred to the First Circuit pursuant to 28 U.S.C. 2112(a)(5). The First Circuit denied without prejudice three motions to transfer the consolidated cases to the Fifth Circuit, stating that it would revisit the issue of venue after receiving the parties' merits briefs. The questions presented are:

1. Whether, given the First Circuit's statement that it will revisit arguments for transfer at the merits stage, petitioners have an adequate alternative remedy to a writ of mandamus from this Court.

2. Whether petitioners have shown a clear and indisputable right to transfer.

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OPINIONS BELOW

The order of the First Circuit denying without prejudice petitioners' most recent motions to transfer the appellate proceedings to the Fifth Circuit (Pet. App. 1a-2a) is not reported. Additional orders of the First Circuit, directing the parties to show cause why certain petitions should not be dismissed for lack of jurisdiction and denying without prejudice petitioner Securus's initial motion to transfer the appellate proceedings to the Fifth Circuit (Pet. App. 3a-13a), are not reported.

JURISDICTION

The most recent order of the First Circuit denying petitioners' motions to transfer the consolidated cases to the Fifth Circuit was entered on December 9, 2024. The petition for a writ of mandamus was filed on December 13, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1651(a).

STATUTORY PROVISION INVOLVED

Section 2112 of Title 28 of the United States Code is reproduced in the appendix to this petition. App., *infra*, 35a-39a.

STATEMENT

In January 2023, Congress enacted the Martha Wright-Reed Just and Reasonable Communications Act of 2022 (Martha Wright-Reed Act), Pub. L. No. 117-338, 136 Stat. 6156 (47 U.S.C. 152-153, 276). The Martha Wright-Reed Act expanded and clarified the scope of the authority that the Federal Communications Commission (FCC or Commission) possesses to regulate the provision of audio and video communications services in prisons and jails—services known as "incarcerated people's communications services" (IPCS). In 2024 the FCC adopted rules implementing the Martha Wright-Reed Act. *In re Incarcerated People's Commc'ns Servs.; Implementation of the Martha Wright-Reed Act; Rates for Interstate Inmate Calling Servs.*, FCC WC Docket Nos. 12-375, 23-62 (July 22, 2024) (Order), https://docs.fcc.gov/public/attachments/FCC-24-75A1.pdf. In the same Order, the Commission dismissed as moot petitions for clarification and waiver that Securus, one of the petitioners here, had filed concerning some of the agency's former rules.

Numerous petitions for review of the Order were filed in various courts of appeals. Pursuant to the judicial lottery statute, 28 U.S.C. 2112, those petitions for review were consolidated in the United States Court of Appeals for the First Circuit. The First Circuit has twice denied motions to transfer the consolidated cases to the Fifth Circuit (Securus's preferred forum). But it has done so "without prejudice," inviting the parties to address "gating matters," "including * * * venue

issues," in briefs to the merits panel. Pet. App. 2a. Merits briefing is now underway: Under a schedule jointly proposed by all parties and approved by the First Circuit, petitioners' briefs are due January 27, 2025, and final briefing by all parties will be complete by June 9, 2025.

1. a. For decades, rates for IPCS have been "egregiously high." Order 3. The problem reflects a widely recognized "market failure." Order 14 (citation omitted). Because correctional facilities typically contract with a single IPCS provider to serve an entire facility, each IPCS provider has a monopoly within a given facility. Order 13. IPCS providers do not compete for end users who pay for calls, and market forces fail to constrain rates. See *ibid.* Indeed, historically, many correctional facilities have granted monopolies to providers based partly on what monetary or in-kind payments providers agree to make to the facilities—payments known as "site commissions." See Order 15. When bidding for new contracts, providers therefore have often competed to offer the highest commission payments, resulting in correspondingly higher charges for incarcerated people and their friends and families. See *ibid.*

b. In 2015, seeking to curb inflated rates, the FCC adopted revised rules governing audio IPCS, including rate caps for interstate and intrastate calls. *In re Rates for Interstate Inmate Calling Servs.*, 30 FCC Rcd 12,763 (2015). On review, the D.C. Circuit vacated those rate caps as beyond the agency's statutory authority, particularly for intrastate calls. See *Global Tel*Link* v. *FCC*, 866 F.3d 397, 408-412 (2017). In response, the Commission took further steps to combat excessive rates within the strictures of *Global Tel*Link*, setting interstate rate caps and capping certain site commission

payments. See *In re Rates for Interstate Inmate Calling Servs.*, 36 FCC Rcd 9519 (2021) (2021 Order).

Shortly thereafter, Securus submitted to the FCC two petitions concerning application of the IPCS rules. First, Securus petitioned the FCC for a waiver of the revised audio rate caps and of a corresponding prohibition on flat-rate calling. See App., *infra*, 1a-12a (waiver petition). Second, Securus petitioned for clarification "regarding the limitations on the ability of providers * * * to recover site commission costs from * * * rates as established in the [2021 Order]." *Id.* at 13a; see *id.* at 13a-22a. In particular, Securus asked the Commission to clarify "whether providers" could use resources independent of end-user revenue to "pay additional site commissions," over and above a $0.02 per minute cap on site-commission costs that the FCC's rules then allowed providers to recover directly through charges to end-users. *Id.* at 16a.

c. While the Securus petitions were pending with the agency, Congress enacted the Martha Wright-Reed Act, which expanded and clarified the scope of the Commission's authority over IPCS. Among other things, that statute authorizes the regulation of interstate and intrastate rates, "regardless of technology," and it directs the Commission to ensure that rates for IPCS are "just and reasonable." Martha Wright-Reed Act § 2(a)(1)(B) and (b)(3), 136 Stat. 6156.

2. a. The FCC Order implementing the Martha Wright-Reed Act set new, lower rate caps on intrastate and interstate service. Order 115. It also prohibited IPCS providers from paying site commissions. Order 131-132.

In a portion of the Order, the FCC resolved outstanding petitions, filed by individual parties, that had

been made part of the rulemaking docket. See Order 309-312. The Commission "dismiss[ed] as moot Securus's Petition for Clarification" of the agency's existing rule governing payments to correctional facilities. Order 311. Clarification of the prior rule was no longer necessary, the Commission explained, now that site commissions would be prohibited. *Ibid.* The FCC also dismissed Securus's petition for waiver of a prior rule that required per-minute rates and prohibited flat-rate pricing. See *ibid.* That request for waiver was moot, the Commission determined, because the new rules adopted in the Order "specifically allow[] alternate pricing plans, including flat-rate pricing." Order 311-312.

b. The FCC adopted the Order on July 18, 2024; released it on the FCC's website on July 22; and amended it on August 26 and October 1.

FCC staff prepared separate Federal Register submissions for (a) the portion of the Order that adopted revised rules governing IPCS and (b) the portion of the Order in which the agency addressed petitions from individual parties, including Securus's petitions for clarification and waiver. The much shorter portion addressing those petitions was the first to receive approval for Federal Register publication. That portion of the Order was published in the Federal Register on August 26, 2024. 89 Fed. Reg. 68,369. The remainder of the Order, including the principal rulemaking and a further notice of proposed rulemaking, was published in the Federal Register on September 20, 2024. 89 Fed. Reg. 77,244; 89 Fed. Reg. 77,065.

3. a. Within ten days after publication of the first portion of the Order, four parties filed petitions for review. Securus petitioned for review in the Fifth Circuit, arguing that the "denials of its clarification and waiver

petitions" were unlawful. Pet. for Review, Doc. 1-2, at 2, *Securus Techs., LLC* v. *FCC*, No. 24-60454 (Aug. 30, 2024). Three other parties—Direct Action for Rights and Equality, Inc.; Pennsylvania Prison Society; and Criminal Justice Reform Clinic (collectively, the Public Interest Advocates)—also filed petitions for review in the First, Third, and Ninth Circuits. Those groups indicated that, "in the event that the Order [was] deemed [already] reviewable," they wished to challenge "its key substantive provisions." Pet. for Review, Doc. 118186753, at 1-2, *Direct Action for Rights & Equal.* v. *FCC*, No. 24-1814 (1st Cir. Sept. 5, 2024); see Pet. for Review, Doc. 1.1 at 2, *Criminal Just. Reform Clinic* v. *FCC*, No. 24-5438 (9th Cir. Sept. 5, 2024); Pet. for Review, Doc. 1-2, at 2, *Pennsylvania Prison Soc'y* v. *FCC*, No. 24-2647 (3d Cir. Sept. 4, 2024). Pursuant to 28 U.S.C. 2112(a)(3), the FCC forwarded all four petitions to the Judicial Panel on Multidistrict Litigation. See Notice of Multicircuit Petitions for Review, Doc. 1, MCP No. 191 (J.P.M.L. Sept. 16, 2024).

On September 18, 2024, the Panel by random lottery selected the First Circuit to hear challenges to the Order. See Consolidation Order, Doc. 3, MCP No. 191 (J.P.M.L.). Accordingly, the three petitions that had been filed in other courts of appeals as of that date were transferred to the First Circuit, and all four cases were consolidated as First Circuit case No. 24-8028.

After the remainder of the Order was published in the Federal Register on September 20, 2024, the original parties and others filed additional petitions for review in seven different courts of appeals. Among those petitions, Securus filed a second petition for review in the Fifth Circuit, challenging the revised rules adopted in the Order. Pay Tel, the other petitioner in this Court,

petitioned for review of the rules in the Fourth Circuit. Each of the three Public Interest Advocates filed a petition for review in its own home circuit within ten days after the September 20 Federal Register publication. All but one of those additional petitions have now been transferred to the First Circuit, and the various petitions have been consolidated.[1]

b. On September 27, 2024, Securus moved in the First Circuit for transfer of all consolidated cases to the Fifth Circuit. App., *infra*, 23a-34a. Arguing that it was the only party aggrieved by the first-published portion of the Order, Securus urged the First Circuit to "exercise its discretion to transfer [the] consolidated petitions" to the Fifth Circuit "'in the interest of justice.'" *Id.* at 30a (citation omitted). After full briefing, the First Circuit denied transfer "without prejudice to later revisitation of all issues bearing on venue and potential transfer." Pet. App. 7a.

On October 3, 2024, the First Circuit issued orders in each of the three cases filed by the Public Interest Advocates based on the first-published portion of the Order, directing the parties to show cause why the petitions in those cases should not be dismissed for lack of jurisdiction. See Pet. App. 8a-13a. In response, the government stated that, because the Public Interest Advocates did not claim to be aggrieved by the first-published portion of the Order, their initial petitions were incurably premature and should be dismissed. C.A. Doc. 118203686, at 6 (Oct. 17, 2024). The government

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[1] One petition for review of the Order remains pending in the Second Circuit. See *Fines and Fees Justice Ctr., Inc.* v. *FCC*, No. 24-2611 (filed Sept. 27, 2024). That court has not yet acted on the FCC's unopposed motion, filed on October 8, 2024, to transfer that petition to the First Circuit.

stated, however, that the court had jurisdiction to review the subsequent petitions of those same entities, which addressed the later-published remainder of the Order and had been filed within ten days of the September 20 Federal Register publication of that portion. *Id.* at 6-7.

On November 13, 2024, "[h]aving considered the responses to this court's order[s] to show cause," the First Circuit "determined that this matter [would] proceed, with the issues flagged in the order[s] to show cause reserved to the ultimate merits panel." Pet. App. 3a-5a.

In parallel with those developments, Securus and Pay Tel each separately moved for a stay pending judicial review of the FCC's Order. On November 18, 2024, after full briefing, the First Circuit denied both motions. C.A. Docs. 118215790, 118215793.

Securus filed a renewed motion to transfer, and Pay Tel filed a motion to transfer. On December 9, 2024—the date on which the First Circuit had previously directed the parties to submit a joint proposed briefing schedule—the court denied the new transfer motions "without prejudice to revisitation of relevant issues by the ultimate merits panel." Pet. App. 2a. The court's new order provided that, "[d]uring 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." *Ibid.*

The parties subsequently submitted a joint briefing proposal in which they asked for leave to submit overlength briefs "to provide space for parties to discuss jurisdiction and transfer issues in their merits briefs." C.A. Doc. 118223816, at 6 (Dec. 9, 2024). The First Circuit accepted the parties' proposal. C.A. Doc. 118227533 (Dec. 18, 2024). Under the briefing schedule

that is currently in effect, petitioners' initial briefs are due January 27, 2025, and briefing will be complete by June 9, 2025.

ARGUMENT

This Court grants writs of mandamus as a matter of "discretion sparingly exercised," and only upon a showing that "the writ will be in aid of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court." Sup. Ct. R. 20.1. Because petitioners have not made the required showings, the petition for a writ of mandamus should be denied.

A. The First Circuit Can Provide Petitioners Adequate Relief

Petitioners contend (Pet. 15) that, without a writ of mandamus, they have "no other adequate means for resolution of th[e] threshold question of venue." But as they elsewhere acknowledge, the First Circuit denied their recent transfer motions "without prejudice to revisitation of relevant issues by the ultimate merits panel." Pet. App. 2a. The court's order further provides that, "[d]uring briefing, * * * the parties should address all relevant gating matters, including the venue issues discussed in [petitioners'] motions to transfer." *Ibid.* At the parties' joint request, moreover, the court has allowed for longer-than-standard merits briefs "to provide space for parties to discuss jurisdiction and transfer issues in their merits briefs." C.A. Doc. 118223816, at 6; see C.A. Doc. 118227533. And after issuing orders to show cause why the Public Interest Advocates' initial petitions should not be dismissed for lack of jurisdiction, Pet. App. 8a-13a, the court determined

that "the issues flagged in the order[s] to show cause [would be] reserved to the ultimate merits panel," *id.* at 3a-5a.

The First Circuit thus has made clear that it will consider petitioners' transfer arguments at the merits stage. The court's decision to defer resolution of the venue issue was not a "clear abuse of discretion" or "judicial 'usurpation of power'" of the kind that might justify the extraordinary remedy of mandamus. *Cheney* v. *United States Dist. Ct.*, 542 U.S. 367, 389-390 (2004) (citations omitted); cf. *Will* v. *Calvert Fire Ins. Co.*, 437 U.S. 655, 661 (1978) (plurality opinion) (reversing writ of mandamus issued by appellate court that "impermissibly interfered with the discretion of a district court to control its own docket"). The court may reasonably have determined that merits briefing could better inform its ultimate decision on whether the petitions should be transferred. Additional briefing, for example, might elucidate the extent to which Securus was in fact aggrieved by the first-published portion of the Order, see pp. 12-16, *infra*, or more thoroughly address the application of 47 C.F.R. 1.4(b)(1) in relation to Pay Tel's argument (which Securus did not initially raise or embrace) that no valid petitions for review were filed within the period allowed for lottery petitions under 28 U.S.C. 2112(a), see pp. 16-22, *infra*.

Petitioners say (Pet. 15) that they are "unaware of any other instance of a court of appeals moving to merits briefing without first resolving" transfer motions under 28 U.S.C. 2112. But such an approach is not unprecedented. In another FCC case involving a judicial lottery, the D.C. Circuit referred a transfer motion to the merits panel, which eventually granted transfer to the Third Circuit after merits briefing was completed but

before oral argument. See *Prometheus Radio Project* v. *FCC*, 824 F.3d 33, 38 (3d Cir. 2016) (describing transfer). More generally, it is not unusual for courts to defer decisions on jurisdictional questions to the merits stage. See, *e.g.*, *Royal Brush Mfg., Inc.* v. *United States*, 75 F.4th 1250, 1255 (Fed. Cir. 2023); *Process & Indus. Devs. Ltd.* v. *Federal Republic of Nigeria*, 962 F.3d 576, 580 (D.C. Cir. 2020). Indeed, when parties have invoked this Court's mandatory appellate jurisdiction, the Court has regularly postponed resolution of any jurisdictional disputes until consideration of the merits. See Stephen M. Shapiro et al., *Supreme Court Practice* § 5.21 (11th ed. 2019) (citing cases); Sup. Ct. R. 18.12.

The First Circuit has thus expressed its intent to reconsider petitioners' transfer request, and petitioners will have an opportunity to seek further review of any unfavorable ruling on that issue if the court declines to transfer the petitions. Petitioners therefore have not shown that "adequate relief cannot be obtained * * * from any other court." Sup. Ct. R. 20.1.

B. Petitioners Have Not Shown "Exceptional Circumstances" Sufficient To Justify Mandamus

Neither of petitioners' mutually exclusive theories for mandamus establishes a "clear and indisputable" right to have the consolidated cases heard in the Fifth Circuit. *Kerr* v. *United States Dist. Court*, 426 U.S. 394, 403 (1976) (quoting *Bankers Life & Cas. Co.* v. *Holland*, 346 U.S. 379, 384 (1953)).

1. In a variation on Securus's original argument before the First Circuit—which was for discretionary transfer to the Fifth Circuit "in the interest of justice,"

App., *infra*, 23a[2]—petitioners contend (Pet. 15) that "[t]ransfer [i]s [m]andatory" because only Securus (and not the Public Interest Advocates) was aggrieved by the portion of the Order that dismissed as moot Securus's petitions for clarification and waiver. Petitioners argue (Pet. 10-11) that Securus's own Fifth Circuit petition was the only *valid* petition for review filed within the first ten days after Federal Register publication of that portion of the Order, and that 28 U.S.C. 2112(a)(1) therefore requires that all petitions for review of the Order must be heard in the Fifth Circuit. We agree that the Public Interest Advocates were not aggrieved by the first-published portion of the Order. But because the FCC's revised rules governing IPCS afforded Securus the relief it sought in those petitions, Securus likewise was not meaningfully aggrieved, if it was aggrieved at all, by the agency's dismissal of its petitions as moot.

a. *Clarification regarding site commissions.* Securus's 2021 petition for clarification concerned the $0.02 per-minute cap that the FCC then imposed on rates used to pay site commissions. Securus sought clarification on whether providers could pay additional site commissions above that cap, so long as those payments did not result in additional fees to end users. See App., *infra*, 13a-22a. In seeking clarification on that point, Securus stated that it had conferred with FCC staff, who explained that the rule then in effect did not permit such additional payments. *Id.* at 17a-18a.

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[2] Mandamus would not be warranted under Securus's original argument because, "[w]here a matter is committed to discretion, it cannot be said that a litigant's right to a particular result is 'clear and indisputable.'" *Allied Chem. Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 36 (1980) (per curiam) (citation omitted).

Securus argued, however, that clarification from the Commission was still needed because, without it, "varying interpretations * * * could result in some providers being competitively disadvantaged in the bidding process." *Id.* at 18a. Securus thus wanted *other* providers to know the rules so that everyone would negotiate new contracts on an even footing, and it asked the FCC to clarify the rules that applied to providers generally.

In the Order, the FCC banned the payment of site commissions altogether. Order 131-132. The Commission accordingly recognized that clarification of the old rules, which would become obsolete once the new rules took effect, was no longer needed. Order 311. Under the new rules—which are now in effect—providers may no longer negotiate contracts that involve the payment of site commissions at all.[3] Thus, any competitive advantage a provider might have gained under the old rules, absent clarification from the Commission, is irrelevant to the negotiation of contracts under the Commission's new rules. Because Securus's stated interest in clarification of the prior rules is obsolete, Securus cannot be aggrieved by the dismissal of its clarification petition.

Petitioners assert in passing (Pet. 13) that the requested clarification petition was "relevant to [Securus's] existing contracts." But even as to existing contracts that are not yet governed by the new rules, no need for further clarification exists. In its clarification petition, Securus acknowledged that it had received guidance on that point from FCC staff and understands

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[3] The rules are now in effect for new contracts, while contracts existing as of June 27, 2024, remain subject to the prior rules through April 1, 2026, at the latest. Order 304-305.

that such payments are not allowed. App., *infra*, 17a-18a.

b. *Waiver of alternate pricing plans*. The other Securus petition that was addressed in the first-published portion of the Order concerned the FCC's former rules banning flat-rate pricing and alternate pricing plans, which limited providers to charging per-minute rates. App., *infra*, 1a-12a. Though styled as a request for "[w]aiver," *id.* at 1a, that petition did not seek for Securus an exemption from restrictions that would remain binding on other providers. Rather, the petition explained that a waiver would "enable Securus and other providers to offer alternative rate options that promote increased calling while reducing costs." *Id.* at 2a; see pp. 19-20 & n.5, *infra*.

The new rules adopted in the Order provided the relief Securus sought. "In recognition of" marketplace changes and "the pro-consumer benefits of allowing more flexible pricing programs," the FCC changed its rules to "permit IPCS providers to offer * * * IPCS via optional 'alternate pricing plans.'" Order 229-230. In light of those changes, the FCC dismissed as moot Securus's petition to waive the rules that had previously required per-minute charges and prohibited flat-rate calling. Order 311-312.

Before the First Circuit, Securus claimed injury from the dismissal of its petition for waiver because, until the Office of Management and Budget completes its Paperwork Reduction Act review of the FCC's new rule allowing alternate pricing plans, that rule will not go into effect and Securus will purportedly not be able to offer subscription plans for interstate calls (or calls that

cannot be identified as purely intrastate).[4] But the fact that the FCC's new rule must go through the required governmental procedures before taking effect does not change the fact that other portions of the Order resolved that issue in Securus's favor, so that Securus was not aggrieved by the dismissal of its waiver petition.

c. For the foregoing reasons, there is at least a substantial question whether Securus was aggrieved by the first-published portion of the Order, or whether its initial petition for review was instead premature. To be sure, the government continues to believe, as it asserted in the First Circuit, that the Public Interest Advocates' initial three petitions for review were themselves incurably premature. See pp. 7-8, *supra.* But there is no dispute that the Public Interest Advocates' subsequent petitions for review, filed after the remainder of the Order was published in the Federal Register, were timely. There can likewise be no doubt that the central claims of all petitioners before the First Circuit concern the new rules adopted in the second-published portion of the Order.

Particularly in those circumstances—as Securus agreed in the First Circuit, *contra* Pet. 12—it would arguably have been "improper for the agency to make pre-lottery determinations of the validity of petitions that challenge its order." C.A. Doc. 118201547, at 3 n.2

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[4] Securus has not sought a waiver of this rule from the Commission with a particularized showing that its business practices will actually be affected during this interim period. It recently did so regarding a different issue, and the Commission granted that waiver. See *In re Incarcerated People's Communications Services; Implementation of the Martha Wright-Reed Act; Rates for Interstate Inmate Calling Servs.*, FCC WC Docket Nos. 12-375, 23-62 (Dec. 19, 2024), https://docs.fcc.gov/public/attachments/DA-24-1277A1.pdf.

(Oct. 11, 2024). The First Circuit was selected to hear these cases through a duly conducted judicial lottery. And although transfer to another court of appeals would be within the First Circuit's discretion, see 28 U.S.C. 2112(a)(5), petitioners have not established that transfer to Securus's preferred forum is mandatory—let alone clearly and indisputably so.

Petitioners accuse (Pet. 1) the Public Interest Advocates of attempting to manipulate venue by filing petitions for review of the first-published portion of the Order. But accepting petitioners' venue theory would produce an anomalous result. Petitioners rely (Pet. 10-11) on the fact that, under 28 U.S.C. 2112(a)(1) and (3), a venue lottery is authorized only if petitions for review of a particular order are filed in two or more courts of appeals within ten days after the order is issued. Here, however, each of the Public Interest Advocates filed two separate petitions for review, one within ten days after the first portion of the Order was published in the Federal Register on August 26, and another within ten days after the second portion was published on September 20. Petitioners' position is that, for purposes of choosing the appropriate venue under 28 U.S.C. 2112(a), none of those petitions should count—that the first group of petitions should be disregarded because the Public Interest Advocates were not aggrieved by the first-published portion of the Order, and that the second group (which by their nature could not have been filed before September 20) cannot trigger a lottery because they were filed more than ten days after the August 26 publication of the Order's first portion. At the very least, petitioners cannot show a clear and indisputable right to transfer on that basis.

2. In the alternative, petitioners argue (Pet. 14) that under the FCC's rules the release of the Order on July 22, rather than the Order's subsequent publication in the Federal Register, triggered the start of the lottery period for challenging the Commission's dismissal of Securus's petitions for clarification and waiver. Petitioners further contend that, because "no party petitioned for review of either the waiver or the clarification petitions within 10 days" after that date, "the FCC was required to file the administrative record 'in the court in which proceedings with respect to the order were first instituted,'" which "was the Fifth Circuit." *Ibid.* (quoting 28 U.S.C. 2112(a)(1)). That argument reflects a misunderstanding of the FCC rules that govern the date of public notice.

Subject to exceptions not relevant here, the exclusive means to challenge FCC orders are set forth in the Hobbs Act, 28 U.S.C. 2341 *et. seq.* See 28 U.S.C. 2342(1); 47 U.S.C. 402(a). Under the Hobbs Act, a party aggrieved by an FCC order may file a petition for review "within 60 days after its entry." 28 U.S.C. 2344. In turn, "entry" of an order occurs upon "notice * * * or publication in accordance with [agency] rules." *Ibid.* See, *e.g.*, *Small Bus. in Telecomms.* v. *FCC*, 251 F.3d 1015, 1024 (D.C. Cir. 2001) (explaining that "'[e]ntry'" of an FCC order "occurs on the date the Commission gives public notice of the order" as provided by agency rules) (citation omitted). Consistent with the Hobbs Act, the Communications Act of 1934, ch. 642, 48 Stat. 1064 (47 U.S.C. 151 *et seq.*), provides that "[t]he time within which a petition for review [of an FCC order] must be filed * * * shall be computed from the date upon which the Commission gives public notice of the order." 47 U.S.C. 405(a).

The date of "public notice" of an FCC order is governed by Section 1.4(b) of the Commission's rules. 47 C.F.R. 1.4(b); see 47 C.F.R. 1.103(b) ("Commission action shall be deemed final, for purposes of seeking * * * judicial review, on the date of public notice as defined in § 1.4(b) of [the Commission's] rules."). "For all documents in notice and comment * * * rulemaking proceedings required by the Administrative Procedure Act * * * to be published in the Federal Register," public notice occurs on "the date of publication in the Federal Register." 47 C.F.R. 1.4(b)(1). By contrast, "[f]or nonrulemaking documents," public notice occurs on a document's "release date." 47 C.F.R. 1.4(b)(2).

Because the Order on review here is a document in a rulemaking proceeding, the date of public notice is governed by Section 1.4(b)(1), and it therefore occurred upon publication of the Order in the Federal Register. 47 C.F.R. 1.4(b)(1). The window for Hobbs Act review and for judicial lottery petitions thus began, at the earliest, on August 26, 2024, when the first portion of the Order was published. See 89 Fed. Reg. at 68,369. Four parties petitioned for review in different courts of appeals within ten days of that publication, requiring a judicial lottery under Section 2112(a). The FCC has consistently taken that position throughout this appeal. See, *e.g.*, Unopposed Mot. to Transfer, *Securus Techs., LLC* v. *FCC*, No. 24-60492 (5th Cir. Sept. 30, 2024). And at an earlier stage of this case, Securus agreed that Section 2112 required the transfer of its case to the First Circuit in the first instance (subject to the possibility of transfer back to the Fifth Circuit later). See *id.* at 3-4.

Petitioners now offer a new theory, which they raised for the first time after the First Circuit denied their motions for stay. Petitioners argue (Pet. 12-13) in

the alternative that the Commission's determinations concerning Securus's petitions for waiver and clarification were adjudications that fall within a narrow exception to the FCC rule that generally governs public notice for "documents in notice and comment * * * rulemaking proceedings." 47 C.F.R. 1.4(b)(1). A note to Section 1.4(b)(1) provides: "Licensing and other adjudicatory decisions with respect to specific parties that may be associated with or contained in rulemaking documents are governed by the provisions of § 1.4(b)(2)." 47 C.F.R. 1.4(b)(1) (Note). Because Section 1.4(b)(2) provides that public notice of "non-rulemaking documents" occurs upon their release, 47 C.F.R. 1.4(b)(2), petitioners contend (Pet. 13) in the alternative that the window for seeking review of the FCC's dismissal of Securus's clarification and waiver petitions opened on release of the Order, which occurred on July 22, 2024.

That argument ignores the fact that the exception petitioners invoke applies only to "adjudicatory decisions *with respect to specific parties*." 47 C.F.R. 1.4(b)(1) (Note) (emphasis added). Securus's petitions for clarification and waiver were not limited to its party-specific rights. Those petitions instead sought rulings that would define the rights of all providers and end-users of IPCS, and the FCC's decision to dismiss the petitions was integrally linked with its rulemaking determinations in the Order.

Specifically, Securus filed its petition for clarification about the payment of site commissions "to ensure uniform implementation across the industry," App., *infra*, 13a, and the FCC found the petition moot because the new rules eliminated site commissions for all providers, Order 311. Likewise, Securus sought a waiver to allow "Securus and other providers" to offer alternative rate

plans, App., *infra*, 2a; see *id.* at 11a (arguing that granting the requested waiver would "provide regulatory flexibility for I[P]CS providers"), and the FCC found that request moot because the Commission's newly "adopt[ed] rules" permitted such plans, Order 311.[5] While both petitions were filed by Securus, each sought agency action that would apply to all providers, and the FCC dismissed those petitions as moot based on its new rules. The dismissals of those petitions were thus agency actions of general applicability, not party-specific adjudications determining individual rights.

To the extent petitioners contend (Pet. 13) that the exception set forth in the note to Section 1.4(b)(1) applies to all adjudicatory matters in rulemaking documents, not just adjudications specific to individual parties, that interpretation is inconsistent not only with the text of the rule but with the context in which it was adopted. The exception was created in response to a 1993 D.C. Circuit decision holding that the FCC's rule for "public notice" as then codified was not sufficiently clear regarding a ruling on a "pioneer preference," a

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[5] In asserting (Pet. 13) that Securus's waiver petition sought a waiver only for Securus itself, petitioners describe that petition as "not[ing] that, if [Securus] received a waiver, other IPCS providers would also be able to receive a similar waiver if they made a showing like Securus'." Pet. 13 n.9 (citing App., *infra*, 1a-2a). But the cited page of the waiver petition did not mention the possibility that other providers might seek similar waivers; it simply stated that "[g]ranting this petition will enable Securus and other providers to offer alternative rate options that promote increased calling while reducing costs." App., *infra*, 1a-2a. And in dismissing the waiver petition as moot, the FCC expressed the understanding that the waiver was sought for "Securus and other providers." Order 311 (citation omitted). The administrative action therefore is not a decision with respect to specific parties.

process that affords preferential treatment in licensing for parties who develop new communications services. See *Adams Telcom, Inc.* v. *FCC*, 997 F.2d 955, 956-957 (per curiam). The order on review in *Adams Telecom* included individualized decisions on whether each particular party had made the required showing to merit the preference, but the Commission reached those decisions in the context of an extended proceeding to amend the agency's spectrum-allocation rules. See *ibid.* The D.C. Circuit found that the FCC rules in effect at that time did not make clear when public notice would occur in those circumstances, and it held that the date of public notice for the party-specific adjudicatory decisions in *Adams Telcom* was the date of the order's publication in the Federal Register. *Id.* at 957.

The FCC amended its rules in response, adding the note to Section 1.4(b). *In re Amendment of Section 1.4 of the Commission's Rules Relating to Computation of Time*, 15 FCC Rcd 9583, 9586 (2000). "In so doing, [the agency] expressly depart[ed] from the interpretation of [its] computation of time rule that was announced in *Adams*." *Id.* at 9584. Thus, consistent with the text of the note to Section 1.4(b)(1), the circumstances of the note's adoption indicate that the FCC intended to carve out an exception to the general public-notice rule for rulemaking documents. The exception covers individualized adjudications (like the individualized pioneer-preference decisions in *Adams*) that are issued within the context of an FCC rulemaking but that determine the rights of specific parties. Cf. *In re ACR Electronics, Inc.*, 18 FCC Rcd 11,000, 11,001 (2003) (where a rulemaking document contained adjudicatory decisions that dismissed as moot waiver applications specific to the products of two electronics manufacturers, based on

individualized factual showings, those decisions were adjudications as to specific parties within the meaning of the note to Section 1.4(b)). The Commission's dismissal of Securus's waiver and clarification petitions, by contrast, had no greater legal effect on Securus itself than on any other provider.

Petitioners thus have failed to show—under either of their alternative, mutually exclusive theories—that challenges to the FCC's Order must clearly and indisputably be heard in Securus's preferred forum, the Fifth Circuit.

CONCLUSION

The petition for a writ of mandamus should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

P. MICHELE ELLISON
General Counsel
JACOB M. LEWIS
Deputy General Counsel
SARAH E. CITRIN
Deputy Associate General Counsel
MATTHEW J. DUNNE
Counsel
Federal Communications Commission

JANUARY 2025

APPENDIX

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APPENDIX A

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

WC Docket No. 12-375

IN THE MATTER OF RATES FOR INTERSTATE INMATE CALLING SERVICES

[Filed: Aug. 30, 2021]

SECURUS TECHNOLOGIES, LLC PETITION FOR WAIVER OF THE PER MINUTE RATE REQUIREMENT TO ENABLE PROVISION OF SUBSCRIPTION BASED CALLING SERVICES

Pursuant to 47 C.F.R. § 1.3, Securus Technologies, LLC ("Securus") submits this petition to waive the requirement of Federal Communications Commission ("Commission") rules 64.6030, 64.6080, and 64.6090 that interstate incarcerated calling services ("ICS") must be charged on a per minute basis.[1] Granting this petition

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[1] 47 C.F.R. §§ 64.6030, 64.6080, 64.6090. *See also Rates for Interstate Inmate Calling Services*, Third Report and Order, Order on Reconsideration, and Fifth Further Notice of Proposed Rulemaking, WC Docket No. 12-375, FCC 21-60, at ¶ 305 (rel. May 24, 2021) ("Our rules preclude providers from imposing on consumers of interstate inmate calling services any charges other than per-minute usage charges."). Although § 64.6090, which bars a single fee for a single call regardless of duration, does not appear appli-

will enable Securus and other providers to offer alternative rate options that promote increased calling while reducing costs. As described below, there is an urgency to this request in light of the recent Commission rulings regarding the jurisdiction of calls that places Securus' existing pilot flat-rate calling packages for multiple calls in jeopardy.

I. Introduction

Securus began piloting extremely popular subscription plans for intrastate calls in six select facilities in December 2020. Securus recently extended the program to two additional facilities and hopes to finalize a contract to provide the subscription calling option to another facility very soon. These programs allow incarcerated persons and their families to purchase a set number of calls per month much like consumers pay for commercial telephone services. To remain compliant with the Commission's per-minute rate rules for interstate calls, Securus limits participation in its subscription plans to calls to in-state numbers and has instituted the plans in states that do not mandate per-minute rates for in-state calls. Securus currently offers the plans at facilities in Texas, Utah, North Dakota, Washington, and Colorado.

The Commission's recent orders requiring providers to determine the jurisdiction of a call by its physical end points coupled with its requirement to treat indeterminate calls as interstate jeopardizes these programs.[2]

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cable to Securus' subscription plans, Securus includes it in this waiver request out of an abundance of caution.

[2] *Rates for Interstate Inmate Calling Services*, Report and Order on Remand and Fourth Further Notice of Proposed Rulemaking, 35 FCC Rcd 8485 (2020) ("*Remand Order*"); *Rates for Inter-*

In short, the problem is that, despite informing participants that the plan is limited to in-state calls and is only available for calls to in-state numbers, Securus cannot definitively determine if a call is intrastate when a subscription plan call is made. Many of the calls using the subscription service are made to wireless phones whose exact physical location is difficult to determine. Securus thus is unable to definitively confirm that a call is intrastate. Per the Commission's requirements, Securus must treat potentially in-state but indeterminate calls as interstate calls whose rates are limited to per-minute charges, jeopardizing the development and availability of flat-rate subscription plans for multiple calls. Absent this waiver, Securus will have to suspend these programs and further development of alternative payment options for ICS calling.

Apart from complications arising from the Commission's jurisdictional framework, waiving the per-minute rate rules to enable alternative rate plans furthers the public interest in providing incarcerated persons and their loved ones more affordable and accessible calling options at a more predictable price, whether they are making intrastate, interstate, or jurisdictionally indeterminate calls. As set forth below, there is good cause to grant this petition.

II. Securus' Pilot Subscription Programs

Under Securus' subscription plans, subscribers pay a flat monthly fee for up to 100 calls per month or 25 calls per week. The maximum amount of time for each

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state Inmate Calling Services, Third Report and Order, Order on Reconsideration, Fifth Further Notice of Proposed Rulemaking, WC Docket No. 12-375, FCC 21-60 (2021) ("*Reconsideration Order*").

call is set by the correctional institution and typically varies between 15 and 30 minutes. The subscription plans are optional, and consumers may choose to use Securus' other prepaid calling options that are based on per-minute rates for intrastate or local calls.

A fixed subscription rate allows consumers to plan and budget for calling expenses, and the calls are much less expensive than under current per-minute rates.[3] Consumers are presented with a description of the plan and costs are broken out into a base price and the separately itemized cost for site commissions (if applicable). There is also a $3.00 automated payment fee in connection with enrolling in the program. Subscribers have the option to automatically renew their participation. The pilot programs grew out of discussions Securus held with formerly incarcerated persons and their families that signified strong support for fixed rate plans.

The initial pilot subscription plans made available in December 2020 offered a single subscription option for each facility, and our goal was to gain insight on customer acceptance, as well as market viability. Securus continues to improve the call subscription functionality based on consumer responses at the six early pilot facilities. Securus is now testing multiple pricing options and packages for 100 calls per month, 60 calls per month, or 25 calls per week (although not all of these options are available at all facilities). The 25 calls per

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[3] A characteristic of subscription plans such as those offered by Securus is that they allow lower but sustainable effective rates based on average call volumes compared to the current traditional per-minute, per-call rates. This is possible because the recurring the predictable call volumes and revenue permit better cost management and investment decisions.

week program is targeted for persons incarcerated in jails for a relatively short period of time. As noted, all call subscription pricing is composed of a base rate, site commission cost, and a one-time $3.00 automated payment fee that is assessed upon enrolling in or renewing a subscription plan.

The results from the initial pilot subscription plans and subsequent modifications indicate that the per-minute effective rate (including all three cost components) is well below the Commission's new interim rates caps for intrastate ICS calls. Assuming subscribers use all available minutes under the plan, per-minute effective rates under these preliminary pricing structures (which Securus continues to adjust with more experience with the programs to ensure cost recovery) range from $0.02 to $0.05 for the 100 or 60 calls per month options and from $0.03 to $0.07 for the 25 calls per week plan. If subscribers only use half of their available minutes, the effective per-minute rates range from $0.03 to $0.10 for the monthly call options and $0.07 to $0.13 per minute for the weekly call option. With the exception of the subscription program offered at North Dakota prisons, all of these programs are offered at jails.

An analysis of the pilot subscription plans as of June 2021 conducted by Securus showed increasing participation and usage. Overall, more than 7 million minutes of calls have been made under subscription plans as of that time, with an overall average per call duration of 14.5 minutes. Many users make back-to-back calls where the facility has adopted short time limits, such as 15 minutes, for each call.

III. The Commission's Jurisdictional Framework Jeopardizes the Plans' Viability

In compliance with the Commission's rules requiring per-minute rates for interstate calls, Securus limits the subscription plan to intrastate and local calls. Securus informs consumers that want to participate in the program that it is only available for calls to in-state numbers. Securus selected the initial facilities to participate in the program by identifying states that do not require per-minute charges for in-state calls and where the vast majority of calls likely would be in-state in light of the state's size and facility location. Except where the called party uses a traditional wireline phone, it is impracticable for Securus to make a call-by-call determination that the called party's phone is physically located in the state when the call is made. Many subscription plan calls are to wireless phones whose physical location is difficult, at best, to determine.[4]

The Commission's *Remand Order*, however, requires providers to determine the jurisdiction of calls based on their physical end points. The *Remand Order* further states that providers that "cannot definitively establish the jurisdiction of a call . . . may *and should* treat the call as jurisdictionally mixed and thus subject to our ancillary service rules."[5] The *Reconsideration Order* stated that this jurisdictional analysis applies to calling rates, as well as ancillary services, and that where "providers find it impossible or impracticable to determine the actual endpoints, hence the ju-

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[4] *See Reconsideration Order* at ¶ 247 (noting the difficulty of determining the called party's location when calling a mobile or nomadic VoIP devices).

[5] *Remand Order*, 35 FCC Rcd at 8503, ¶ 53 (emphasis added).

risdictional nature of a call, [providers] must treat the call as jurisdictionally indeterminate and must charge a rate at or below the applicable interstate cap."[6]

Under this mandate and finding it impossible or impracticable to determine the actual end points of all subscription plan calls, Securus must treat those calls as jurisdictionally indeterminate and may not charge rates in excess of interstate caps, which are based on per-minute rates. Although all of Securus' subscription plans have effective rates below the Commission's existing rate caps,[7] the prices are not based on per-minute rates as required for interstate and jurisdictionally indeterminate calls. Rather than suspending these popular programs, Securus requests that the Commission waive its per-minute rate rules for interstate calls and all jurisdictionally indeterminate calls to allow it to further develop and deploy alternative rate options, such as its pilot subscription plans.

Apart from the potentially adverse effects of the Commission's jurisdictional framework on the viability of Securus' subscription plans, a waiver of the per-minute rate rules to allow for alternative payment options would benefit all providers and their end users. There is no reason why consumers making interstate calls should be precluded from using payment options such as Securus' subscription plans. Securus thus requests that the Commission waive the per-minute rule for all alternative payment options that result in effective

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[6] *Reconsideration Order* at ¶ 254.

[7] The Commission's newly adopted interim rate caps become effective October 26, 2021, 90 days after publication of the Third Report and Order in the Federal Register which occurred on July 28, 2021.

rates, based on average usage of the plans, below the Commission's interstate rate caps.

IV. There is Good Cause to Grant the Waiver

The general standards for granting a waiver are well known. Generally, the Commission's rules may be waived for good cause shown.[8] The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.[9] In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.[10] Waiver of the Commission's rules is appropriate only if both (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest.[11]

These standards are readily met here. The overarching public interest is served where communications options for the incarcerated are made more affordable and easier to use. The Commission has repeatedly cited the benefits of reducing calling costs for individual families and their surrounding communities.[12] As the Commission recently concluded, "making communications less costly and easier to use for incarcerated people promotes their ability to plan for housing, employ-

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[8] 47 C.F.R. § 1.3.

[9] *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) ("*Northeast Cellular*").

[10] *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *affirmed by WAIT Radio v. FCC*, 459 F.2d 1203 (D.C. Cir. 1972); *Northeast Cellular*, 897 F.2d at 1166.

[11] *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-28 (D.C. Cir. 2008) ("*NetworkIP*"); *Northeast Cellular*, 897 F.2d at 1166.

[12] *See, e.g., Reconsideration Order* at ¶¶ 34-38.

ment, and successful integration into communities once released from prison." The Commission went on to note that "[i]n financial terms, increased communication helps reduce repeated incarceration, which benefits society by saving millions of dollars in incarceration-related costs annually."[13] Barring alternative rate plans that reduce costs below per-minute capped rates simply because they do not charge by the minute is counterproductive.

Participants in Securus' subscription plans confirm that these plans produce those benefits. As noted, Securus developed the subscription plans based on lessons learned from listening sessions with formerly incarcerated persons and their loved ones. Key takeaways from those sessions included overwhelming support for subscription services with particularly strong emphasis on the benefit of having a known and expected monthly payment.

Results of the pilot programs for voice service have been very positive. The plans increased calling time while decreasing costs. An initial assessment done in February concluded that the subscription plans increased call length by approximately 27% while reducing costs by over 50%. Initial surveys of users were also positive. Some 80% found the program to be important to them, with more than half stating it was "extremely important," and 70% would recommend it to their friends or families.[14] With respect to the sign-up

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[13] *Id.* at ¶ 37.

[14] *See* https://www.aventiv.com/securus-technologies-first-of-its-kind-subscription-pricing-plan-reduces-call-costs-by-more-than-50-percent/

process, more than 80% also stated they found plan enrollment either "easy to follow" or "acceptable."

In a separate set of interviews, plan users rated the plans as a 10 (the best score) in terms of increasing the amount of time talking with their loved ones and increased peace of mind with having a flat monthly billing option. Among the comments were "you know what you are spending," "don't have to worry about being short of cash," "way cheaper—100 calls versus 2 to 4 calls before," and "I feel more connected." All respondents said they would recommend the plan to others, with one stating, "Yes, I have because of the unbelievable price and number of calls."

The sheriff of Fannin County, one of the participating facilities, stated that: "When Securus approached us to trial a subscription program that would make phone calls cheaper and more frequent, we jumped at the chance and it's been rewarding to see the difference it's made for our population." He went on to note that "more than 70% of our friends and family have enrolled in the subscription plan. We are proud to be one of the first facilities to take a chance and make measurable change to provide cost savings for our community while increasing connections."

Single-price rate plans enable incarcerated persons and their friends and families to utilize payment structures that commercial users have long enjoyed. Although inmate calling services differ from commercial services in many ways, there is no reason that payment for these services cannot more closely resemble

commercial offerings, and incarcerated persons have strongly indicated their interest in such programs.[15]

Further, the Commission's overall policy in this docket for almost a decade has been to reduce the cost of ICS calls to the consumer. In furtherance of that objective, the Commission conducted multiple rounds of cost data collection and ratemaking, producing multiple rate cap structures within the framework of per-minute rates. Subscription plans for multiple calls with effective per-minute rates (based on average call volumes) allows for a more effective implementation of the Commission's policy objectives. Granting a waiver for this limited purpose will provide regulatory flexibility for ICS providers to develop these options to provide consumer value and that, in turn, can be used to inform the next stage in ICS rulemaking with practical, real-world data and examples.

Conclusion

For the reasons set forth above, Securus respectfully requests that the Commission promptly grant the requested waiver to allow continuation of the company's pilot subscription programs that offer tremendous ben-

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[15] The California Public Utility Commission recently held two days of public participation hearings as part of its rulemaking to set intrastate rate caps. Several persons suggested adoption of single price calling plans like those available for commercial cell phones or streaming services. *See, e.g.* Public Participation Hearing Transcript, Rulemaking 20-10-002, Vol I, April 28, 2021, at p 30 & 132-34 available at https://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M382/K604/382604073.PDF; *Id.* Vol. 2, April 29, 2021 at p. 233, available at https://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M382/K478/382478114.PDF.

efits to incarcerated persons and their friends and families.

Respectfully submitted,

/s/ JOSHUA P. MARTIN

JOSHUA P. MARTIN
Senior Vice President and General Counsel
Securus Technologies, LLC
4000 International Parkway
Carrollton, Texas 75007
(972) 277-0300
joshuamartin@securustechnologies.com

August 30, 2021

APPENDIX B

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

WC Docket No. 12-375

IN THE MATTER OF RATES FOR INTERSTATE INMATE CALLING SERVICES

[Filed: Sept. 17, 2021]

PETITION FOR CLARIFICATION

Securus Technologies, LLC ("Securus") hereby requests clarification regarding the limitations on the ability of providers of incarcerated calling services ("ICS") to recover site commission costs from ICS rates as established in the Third Report and Order in the above captioned proceeding.[1] Securus files this petition to ensure uniform implementation across the industry in light of indications of potentially conflicting interpretations regarding the extent to which providers may use revenues from FCC-regulated services to pay for site commissions.

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[1] *Rates for Interstate Inmate Calling Services*, Third Report and Order, Order on Reconsideration, and Fifth Further Notice of Proposed Rulemaking, WC Docket No. 12-375, FCC 21-60 (rel. May 24, 2021) ("Third Report and Order").

I. Background

In the Third Report and Order, the Federal Communications Commission ("Commission") adopted a new interim regime governing the payment of site commissions by ICS providers. For prisons and larger jails, those with an average daily population of 1000 or more, the Commission distinguished between contractually-prescribed site commissions and legally mandated site commission payments.[2] This petition addresses only contractually-prescribed site commission payments. The Third Report and Order adopted a contractually-prescribed facility rate component that "permits providers to recover no more than $0.02 per minute over and above the otherwise applicable provider-related rate cap" of $0.12 for prisons and $0.14 for larger jails.[3] The $0.02 per minute contractually-prescribed facility rate component reflects the Commission's view that only facility costs reasonably related to the provision of ICS may legitimately be recovered through ICS rates and hence constitute a prudently incurred expense.[4]

II. Need for Clarification

Prior to the Third Report and Order, the Commission concluded that site commissions were not a compensable cost for purposes of setting of ICS rates.[5] The Third Report and Order appears to take a different

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[2] Third Report and Order ¶ 100. The Third Report and Order capped ICS rates for smaller jails at $0.21 and did not establish separate rate components for these smaller facilities. *Id.* ¶ 46.

[3] Third Report and Order ¶ 134.

[4] Third Report and Order ¶ 127.

[5] *See Rates for Interstate Inmate Calling Services,* Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 14107, 14136-37 (2013) ("2013 Order").

approach. The Commission affirmatively regulates site commissions by establishing facility-related rate components. Securus seeks clarification whether, by adopting a contractually-prescribed rate component for site commissions, the Commission intended to preclude providers from paying site commissions from any profits that providers may retain as part of their provider-related cost component. In other words, Securus seeks clarification whether the Third Report and Order absolutely bars providers from using revenues from ICS rates to pay site commission costs above the $0.02 rate cap for contractually-prescribed site commissions.

The Third Report and Order seems clear that end users may not be charged more than $0.02 as the facility-related rate component of the overall interim rate caps. Potentially less clear is whether providers are precluded from paying site commissions in excess of $0.02 per minute from calling revenue, provided that the total charged to consumers does not exceed the applicable rate cap. The potential ambiguity arises due to the language in paragraph 168 of the Third Report and Order. In relevant part, paragraph 168 states:

> Finally, NCIC Inmate Communications (NCIC) ask us to clarify that our $0.02 allowance 'does not prohibit the payment of additional site commissions should the inmate calling services provider and correctional facility so negotiate.' We confirm that the $0.02 figure does not prevent or prohibit the payment of additional site commission amounts to correctional facilities should the calling services provider and the facility enter into a contract resulting in the provider making per-minute payments to the facility higher than $0.02. All we do here is limit the

providers' ability to recover these commissions to $0.02.[6]

This language clarifies that the Commission is not capping the amount that providers may pay correctional authorities in site commissions. It also affirms that the facility-related rate component cannot exceed $0.02 per minute. The language, however, creates ambiguity over whether providers may pay additional site commissions from end user revenues collected under the provider-related rate component of $0.14 for larger jails or $0.12 for prisons.

The ambiguity is further heightened by the context in which NCIC raised the question that the Commission addresses in paragraph 168. NCIC's comments expressed concern that a cap of $0.02 per minute on site commission payments might preclude state and local governments from recovering their full costs for making ICS available, and it would permit ICS providers "to retain revenue that was previously paid as site commissions."[7] NCIC also noted that site commissions are a common feature in the "prison payphone ecosystem" and often required for the provision of ICS services. In light of these circumstances, NCIC asked the Commission to "make clear that ICS providers will continue to be able to pay site commissions in excess of $0.02 per minute, *so long as inmates and their families are not charged more than the adopted caps on ICS rate[s] and ancillary fees.*"[8] In other words, NCIC asked the FCC to clarify that it may use ICS revenues to pay site commissions in excess of $0.02 per minute as long as the

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[6] Third Report and Order ¶ 168 (citations omitted).

[7] NCIC Comments at 4.

[8] NCIC Comments at 5 (emphasis added).

rate remains below the applicable provider-related rate cap.[9]

III. Confirm Guidance Provided by FCC Staff to Ensure Uniform Implementation

Securus met with Commission staff to seek clarification on the extent to which site commission costs can be recovered through ICS rates.[10] As a result of that meeting, it is Securus' understanding that ICS providers cannot use any end user ICS revenues to pay more than $0.02 per minute for site commissions to prisons and large jails. Providers may, however, pay additional site commissions to correctional authorities from revenue sources other than FCC-regulated ICS rates.

In order to ensure uniform interpretation of the limits on site commission cost recovery from ICS rates across the industry, Securus respectfully requests that the Commission grant this petition for clarification and either confirm the interpretation stated above or provide further guidance on the extent to which ICS providers may recover site commission costs from ICS

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[9] NCIC has recently filed a petition for reconsideration asking the Commission to allow providers to recover site commissions of up to $0.08 per minute for jails with populations less than 350, $0.05 for jails between with populations between 350 to 2499, and at $0.02 for prisons and jails larger than 2500, consistent with recommendations from the National Sheriffs Association. NCIC's petition asks that providers be allowed to recover site commission costs up to these amount within the interim rate caps and not as additives. NCIC Petition for Reconsideration, WC Docket No. 12-375 at 6-7 (filed August 27, 2021). Securus takes no position on NCIC's petition in this filing.

[10] *See* Letter from Michael Pryor, Counsel for Securus, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (filed August 23, 2020) ("Securus Ex Parte Notice").

rates. Failure to clarify the limits of site commission cost recovery from ICS rates may lead to varying interpretations that could result in some providers being competitively disadvantaged in the bidding process by which ICS service providers are selected to serve carceral facilities.

Securus is aware of one provider that has already contacted correctional authorities advising them that the Third Report and Order "does not extend to interfering with your Agency's commission payments." The provider informs correctional authorities that "your Agency does not have to entertain a lower contractual commission rate based on the latest FCC rules" because the Commission's rate caps and fees "allow room for Providers to recoup their operational costs *while also returning a monthly revenue share to Agencies per their current contracts,* unless such provider was charging excess rates for local and instate calling."[11] In other words, if a current contract calls for a commission in excess of $0.02 per minute, the provider may recover that excess amount from its ICS rates as long as its operational costs are below the applicable rate cap.

The interpretation quoted above appears to conflict with the guidance provided to Securus by Commission staff that providers may charge no more than $0.02 per minute in ICS rates to pay for site commissions to prisons and large jails, even if there is additional "room" in the rates to make a higher payment. This attached note to correctional authorities highlights the need for industry-wide clarification on the extent to which pro-

[11] A full copy of the email is attached hereto.

viders can use revenue from ICS services to pay for site commissions.

CONCLUSION

For the reasons stated above, Securus respectfully requests the Commission to grant this petition for clarification.

Respectfully submitted,

/s/ JOSHUA M. MARTIN
JOSHUA M. MARTIN
Senior Vice President and General Counsel
Securus Technologies, LLC
4000 International Parkway
Carrollton, Texas 75007
T: (972) 277-0300
E: joshuamartin@securustechnologies.com

Dated: September 17, 2021

ATTACHMENT

Is your Inmate Telephone Provider trying to re-negotiate your Agreement?

Dear Sheriffs and Corrections Professionals,

The current FCC Rulemaking regarding Inmate Calling Services has an implementation deadline of October 26, 2021. The Rulemaking goes a long way towards reducing some of the abuses that have plagued the Inmate Telephone Industry for years but, thankfully, **does not extend to interfering with your Agency's commission payments.**

Unfortunately, the vague wording surrounding commission payments and how providers report commission payments to the FCC has given certain Providers an opportunity to approach their Facility customers with requests to re-structure/re-negotiate their existing Inmate Communications Agreements, based on misrepresentations regarding the current FCC Rulemaking. The simple fact of the matter is that **your Agency does not have to entertain a lower contractual commission rate based on the latest FCC rules.** The current Rulemaking provides clarity regarding what are the allowed calling rates (and ancillary fees) and then goes on to say:

"*Site commission payments prescribed under negotiated contracts impose contractual obligations on the provider and, in our judgment, on the current record,*

reflect not only correctional officials' discretion as to whether to request site commission payments as part of requests for proposals,311 and if so in what form and amount,312 but also providers' voluntary decisions to offer payments to facilities that are mutually beneficial313 in the course of the bidding and subsequent contracting process.314 Providers may recover up to $0.02 per minute to account for these facility costs. Where a law or regulation merely allows a correctional facility to collect site commissions, requires a correctional facility to collect some amount of site commission payment but does not prescribe any specific amount, or is not subject to state administrative procedural requirements, site commissions would also fall into the category of a site commission payment prescribed by contract, because the correctional facilities and providers can negotiate, in their discretion, regarding how much the providers will pay in site commissions." (Page 45, Paragraph 103 of the FCC ruling) https://ecfsapi.fcc.gov/file/052468571851 6/FCC-21-60A1.pdf

The allowed rates and fees are very reasonable and absolutely allow room for Providers to recoup their operational costs while also returning a monthly revenue share to Agencies per their current contracts, unless such provider was charging excessive rates for local and instate calling.

The team at NCIC Inmate Communications encourages your Agency to have an open dialogue with your current Provider about this issue in the leadup to the implementation deadline. If there are any questions about the current FCC Rulemaking and the allowed rates and fees, please feel free to reach out to your local NCIC representative or respond to this email.

Sincerely,

Craig Storer
NCIC Inmate Communications
www.ncic.com
Craig.Storer@ncic.com

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 24-8028

IN RE: MCP 191

[Filed: Sept. 27, 2024]

MOTION OF SECURUS TECHNOLOGIES, LLC TO TRANSFER TO THE FIFTH CIRCUIT

Of the four parties that filed the petitions for review the Judicial Panel on Multidistrict Litigation lottery consolidated in this Circuit, only Securus is aggrieved by the FCC's denial of petitions for reconsideration, clarification, and waiver. Each of the other parties expressly states that it is *not* aggrieved by those denials —each instead claims to be aggrieved by other decisions the FCC reached in the same order that were not yet reviewable when it filed its petition. The Court should therefore exercise its authority under 28 U.S.C. § 2112(a)(5) to transfer this case in the interest of justice to the Fifth Circuit, which is Securus' home circuit.

BACKGROUND

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] The FCC adopted new regulations governing IPCS rates and IPCS providers' operations, issued a Further Notice of Proposed Rulemaking, and—as relevant here —denied petitions for reconsideration, clarification, and waiver. *See Order* ¶¶ 599-607.

Securus had filed two of those petitions. In August 2021, Securus asked the FCC to waive rules so it could offer consumer-friendly alternative pricing plans—rather than only per-minute pricing—to IPCS users.[2] And in September 2021, Securus petitioned for clarification regarding the FCC's rules governing site commissions—fees that jails and prisons charge IPCS providers like Securus and that provide funding to correctional authorities for various programs to aid the incarcerated population and to offset authorities' costs of providing communications services.[3]

In the *Order*, the FCC denied 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 alter-

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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) ("*Order*").

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

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

nat[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.

On August 26, 2024, the portion of the *Order* denying Securus' petitions for clarification and waiver was published in the Federal Register.[5] The remaining 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]

Securus timely petitioned for review of the denials of its waiver and clarification petitions in the Fifth Circuit, its home circuit. *See* Pet. for Review, *Securus Techs., LLC v. FCC*, No. 24-60454 (5th Cir. Aug. 30, 2024). Three other parties then petitioned for review in other circuits. But each admits in its petition that it is *not* aggrieved by the FCC's denial of the reconsideration, waiver, and clarification petitions—the only part of the *Order* then published in the Federal Register. Direct Action for Rights and Equality ("DARE") states that it "does not claim to be separately aggrieved by the lim-

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[4] The *Order* also denies 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' alternative pricing plans did not involve per-call or per-connection charges. *See* Waiver Pet. 3-4 (describing the plans).

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

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

ited 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) ("DARE Pet."). Pennsylvania Prison Society ("PPS") states that the "one portion of the *Order* as to which PPS seeks review"—the FCC's "determination 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, *Pa. Prison Soc'y v. FCC*, No. 24-2647 (3d Cir. Sept. 4, 2024) ("PPS Pet."). The third petitioner, Criminal Justice Reform Clinic ("CJRC"), makes a nearly identical statement. *See* Pet. for Review at 2-3, *Crim. Just. Reform Clinic v. FCC*, No. 24-5438 (9th Cir. Sept. 5, 2024) ("CJRC Pet.").

On September 16, 2024, the FCC gave notice of the petitions to the Judicial Panel on Multidistrict Litigation. The Panel then selected this Circuit through a random lottery. *See* Consolidation Order, No. 24-1814 (1st Cir. Sept. 19, 2024). On September 27, 2024, this Court opened this docket consolidating the four petitions.

ARGUMENT

Of the four petitioners, only Securus is aggrieved by the FCC decisions reviewable when these petitions were filed. *See* 28 U.S.C. § 2344 (limiting judicial review to a "party aggrieved by the final order"); *see*, *e.g.*, *Matson Navigation Co. v. U.S. Dep't of Transp.*, 77 F.4th 1151, 1156-57 (D.C. Cir. 2023) (explaining that "aggrieved" incorporates "the traditional analysis for Article III standing").

The FCC's denials of Securus' petitions for waiver and clarification injure Securus, the injury is traceable to the denial, and the Court can redress the injury. The FCC denied the petitions as "moot" and "effec-

tively moot" based on new rules the FCC adopted in the *Order*. *Order* ¶¶ 605-606. That is wrong. "A case becomes moot . . . only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 161 (2016). "As long as the parties have a concrete interest . . . in the outcome of the litigation, the case is not moot." *Id.*

The new rule permitting alternative prices for IPCS services, rather than per- minute rates, will not take full effect until some (still unknown) future time. *See Order* ¶ 641.[7] The new rule eliminating site commissions takes effect on a "staggered basis," not fully phasing in at all prisons and jails until as late as April 1, 2026. *See id.* ¶ 587. Securus thus remains injured by the FCC's refusal to waive its still-effective per-minute pricing rule and to clarify its still-effective rules governing site commissions, and this Court can redress those injuries. Securus' petitions were not moot when the FCC adopted the *Order* in July 2024, and they are not moot today.[8]

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[7] The ordering paragraph explains that some portions of the relevant new rule, 47 C.F.R. § 64.6140, will take effect 60 days after Federal Register publication (November 19, 2024), while other portions will take effect after the Office of Management and Budget completes its Paperwork Reduction Act review. *See Order* ¶ 641; *see also* Final Rule, 89 Fed. Reg. at 77,244 (stating that portions of new § 64.6140 are "delayed indefinitely").

[8] The rules the *Order* relies on to claim mootness are now subject to judicial challenge and may be stayed pending appeal or vacated after judicial review, as happened to a prior FCC IPCS order. *See* Order, *Glob. Tel*Link v. FCC*, No. 15- 1461 (D.C. Cir. Mar. 7, 2016) (staying prior rules pending judicial review); *Glob. Tel*Link v. FCC*, 866 F.3d 397, 402 (D.C. Cir. 2017) (vacating prior rate

In contrast to Securus, DARE, PPS, and CJRC each admits that the FCC's denials of the petitions for reconsideration, waiver, and clarification do not aggrieve them. *See* DARE Pet. at 2; PPS Pet. at 2-4; CJRC Pet. at 2-3. Although each claims that aspects of the final rules the FCC adopted aggrieve them, they were required to wait for Federal Register publication of those rules to petition for review of them. *See Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 296-97 (D.C. Cir. 2003) (holding that a petition for review of a rulemaking order is "premature under 28 U.S.C. § 2344" unless it is filed "after" publication in the Federal Register); *Council Tree Commc'ns, Inc. v. FCC*, 503 F.3d 284, 288 (3d Cir. 2007) (holding that petition for review filed "before . . . publi[cation] in the Federal Register" is "incurably premature").

Courts of appeals applying § 2112 have recognized that where, as here, only one petitioner challenging an agency order is aggrieved, it is proper to ignore the forum choices of unaggrieved parties and to transfer the case to the forum the aggrieved party chose.

In *J.L Simmons Co. v. NLRB*, 425 F.2d 52 (7th Cir. 1970) (per curiam), the Seventh Circuit considered competing petitions for review of an NLRB decision that an employer filed in that court and the union filed in the D.C. Circuit. Because the employer filed first, the D.C. Circuit transferred the union's petition to the Seventh Circuit. *See id.* at 53-54. The NLRB, however, had ruled for the employer, so the Seventh Circuit found that its "aggrievement, if any, . . . is insignificant when compared" with the union's. *Id.* at 54-55.

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caps). Securus has recently filed a petition for review of the final rules and has sought a stay pending review from the FCC.

Therefore, the court found it "proper[ ]" to transfer the petitions for review to the D.C. Circuit—where "the party who is substantially aggrieved ha[d] petitioned for review." *Id.* at 55.

In *Liquor Salesmen's Union Local 2 of State of New York v. NLRB*, 664 F.2d 1200 (D.C. Cir. 1981), the D.C. Circuit faced the opposite situation—unions that had largely prevailed in separate cases before the NLRB filed first in the D.C. Circuit, while the losing employers sought to transfer the cases to the circuits in which each filed. *See id.* at 1202. The D.C. Circuit found that it "cannot be said that either union . . . was genuinely aggrieved by the Board's decision," "disregarded" the unions' first filing, and granted the employers' motions to transfer the cases to the employer's chosen circuits. *See id.* at 1206, 1209. The court noted further that "it appear[ed] from the insubstantiality of the pleadings that the union filed first largely to secure a forum believed favorable to it" and described the union's petition as "a particularly egregious example of filing solely to forum-shop." *Id.* at 1206.[9]

This case is easier than *J.L. Simmons* and *Liquor Salesmen's*. While the prevailing parties before the NLRB in those cases professed to be slightly aggrieved by the agency's action, DARE, PPS, and CJRC each ad-

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[9] While *J.L. Simmons* and *Liquor Salesmen's* were decided before Congress amended § 2112 to replace the first-filed rule with a lottery, the court of appeals selected in the lottery may then transfer the consolidated proceedings "to any other court of appeals" when that is "in the interest of justice." 28 U.S.C. § 2112(a)(5). These pre-lottery cases were applying that same "interest of justice" standard. *See* 16 Edward H. Cooper, *Federal Practice and* Procedure, Wright & Miller § 3944 & n.36 (3d ed.) (citing both *J.L. Simmons* and *Liquor Salesmen's* in describing § 2112(a)(5)).

mits in their petitions for review that the only FCC decisions they could challenge in their petitions do *not* aggrieve them. Securus is the only aggrieved petitioner, and it chose to file in an available venue—the circuit in which it has long-maintained its principal office. *See* 28 U.S.C. § 2343. "The interest of justice favors retention of jurisdiction in the forum chosen by an aggrieved party," especially where "Congress has given him a choice." *Newsweek, Inc. v. U.S. Postal Serv.*, 652 F.2d 239, 243 (2d Cir. 1981) (per curiam) (collecting cases). The Court should therefore exercise its discretion to transfer these consolidated petitions "in the interest of justice" to the Fifth Circuit. 28 U.S.C. § 2112(a)(5).

CONCLUSION

The Court should transfer these consolidated cases to the Fifth Circuit.

Respectfully submitted,

/s/ SCOTT H. ANGSTREICH
SCOTT H. ANGSTREICH
Justin B. Berg
Jordan R.G. González
KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
sangstreich@kellogghansen.com
jberg@kellogghansen.com
jgonzalez@kellogghansen.com

Michael H. Pryor
BROWNSTEIN HYATT FARBER
SCHRECK, LLP
1155 F Street, N.W., Suite 1200
Washington, D.C. 20004
(202) 389-4706
mpryor@bhfs.com

Counsel for Securus Technologies, LLC

September 27, 2024

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, petitioner Securus Technologies, LLC submits the following corporate disclosure statement:

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.

CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Federal Rule of Appellate Procedure 32(g), that this motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because, excluding the portions of the motion exempted by Federal Rules of Appellate Procedure 27(d)(2) and 32(f), the motion contains 1,993 words.

I further certify that this motion complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (a)(6) because it has been prepared using Microsoft Word in a proportionally spaced typeface (Times New Roman, 14 point).

/s/ SCOTT H. ANGSTREICH
SCOTT H. ANGSTREICH
Counsel for Securus Technologies, LLC

September 27, 2024

CERTIFICATE OF SERVICE

I hereby certify that, on September 27, 2024, I caused the foregoing to be filed electronically with the Clerk of the Court through the Court's CM/ECF system and that a copy of the same will be served on all counsel of record through the Court's CM/ECF system.

/s/ SCOTT H. ANGSTREICH
SCOTT H. ANGSTREICH
Counsel for Securus Technologies, LLC

APPENDIX D

28 U.S.C. 2112 provides:

Record on review and enforcement of agency orders

(a) The rules prescribed under the authority of section 2072 of this title may provide for the time and manner of filing and the contents of the record in all proceedings instituted in the courts of appeals to enjoin, set aside, suspend, modify, or otherwise review or enforce orders of administrative agencies, boards, commissions, and officers. Such rules may authorize the agency, board, commission, or officer to file in the court a certified list of the materials comprising the record and retain and hold for the court all such materials and transmit the same or any part thereof to the court, when and as required by it, at any time prior to the final determination of the proceeding, and such filing of such certified list of the materials comprising the record and such subsequent transmittal of any such materials when and as required shall be deemed full compliance with any provision of law requiring the filing of the record in the court. The record in such proceedings shall be certified and filed in or held for and transmitted to the court of appeals by the agency, board, commission, or officer concerned within the time and in the manner prescribed by such rules. If proceedings are instituted in two or more courts of appeals with respect to the same order, the following shall apply:

(1) If within ten days after issuance of the order the agency, board, commission, or officer concerned receives, from the persons instituting the proceedings, the petition for review with respect to proceedings in at least two courts of appeals, the agency,

board, commission, or officer shall proceed in accordance with paragraph (3) of this subsection. If within ten days after the issuance of the order the agency, board, commission, or officer concerned receives, from the persons instituting the proceedings, the petition for review with respect to proceedings in only one court of appeals, the agency, board, commission, or officer shall file the record in that court notwithstanding the institution in any other court of appeals of proceedings for review of that order. In all other cases in which proceedings have been instituted in two or more courts of appeals with respect to the same order, the agency, board, commission, or officer concerned shall file the record in the court in which proceedings with respect to the order were first instituted.

(2) For purposes of paragraph (1) of this subsection, a copy of the petition or other pleading which institutes proceedings in a court of appeals and which is stamped by the court with the date of filing shall constitute the petition for review. Each agency, board, commission, or officer, as the case may be, shall designate by rule the office and the officer who must receive petitions for review under paragraph (1).

(3) If an agency, board, commission, or officer receives two or more petitions for review of an order in accordance with the first sentence of paragraph (1) of this subsection, the agency, board, commission, or officer shall, promptly after the expiration of the ten-day period specified in that sentence, so notify the judicial panel on multidistrict litigation authorized by section 1407 of this title, in such form as that panel shall prescribe. The judicial panel on multi-

district litigation shall, by means of random selection, designate one court of appeals, from among the courts of appeals in which petitions for review have been filed and received within the ten-day period specified in the first sentence of paragraph (1), in which the record is to be filed, and shall issue an order consolidating the petitions for review in that court of appeals. The judicial panel on multidistrict litigation shall, after providing notice to the public and an opportunity for the submission of comments, prescribe rules with respect to the consolidation of proceedings under this paragraph. The agency, board, commission, or officer concerned shall file the record in the court of appeals designated pursuant to this paragraph.

(4) Any court of appeals in which proceedings with respect to an order of an agency, board, commission, or officer have been instituted may, to the extent authorized by law, stay the effective date of the order. Any such stay may thereafter be modified, revoked, or extended by a court of appeals designated pursuant to paragraph (3) with respect to that order or by any other court of appeals to which the proceedings are transferred.

(5) All 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. For the convenience of the parties in the interest of justice, 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.

(b) The record to be filed in the court of appeals in such a proceeding shall consist of the order sought to be reviewed or enforced, the findings or report upon which it is based, and the pleadings, evidence, and proceedings before the agency, board, commission, or officer concerned, or such portions thereof (1) as the rules prescribed under the authority of section 2072 of this title may require to be included therein, or (2) as the agency, board, commission, or officer concerned, the petitioner for review or respondent in enforcement, as the case may be, and any intervenor in the court proceeding by written stipulation filed with the agency, board, commission, or officer concerned or in the court in any such proceeding may consistently with the rules prescribed under the authority of section 2072 of this title designate to be included therein, or (3) as the court upon motion of a party or, after a prehearing conference, upon its own motion may by order in any such proceeding designate to be included therein. Such a stipulation or order may provide in an appropriate case that no record need be filed in the court of appeals. If, however, the correctness of a finding of fact by the agency, board, commission, or officer is in question all of the evidence before the agency, board, commission, or officer shall be included in the record except such as the agency, board, commission, or officer concerned, the petitioner for review or respondent in enforcement, as the case may be, and any intervenor in the court proceeding by written stipulation filed with the agency, board, commission, or officer concerned or in the court agree to omit as wholly immaterial to the questioned finding. If there is omitted from the record any portion of the proceedings before the agency, board, commission, or officer which the court subsequently determines to be

proper for it to consider to enable it to review or enforce the order in question the court may direct that such additional portion of the proceedings be filed as a supplement to the record. The agency, board, commission, or officer concerned may, at its option and without regard to the foregoing provisions of this subsection, and if so requested by the petitioner for review or respondent in enforcement shall, file in the court the entire record of the proceedings before it without abbreviation.

(c) The agency, board, commission, or officer concerned may transmit to the court of appeals the original papers comprising the whole or any part of the record or any supplemental record, otherwise true copies of such papers certified by an authorized officer or deputy of the agency, board, commission, or officer concerned shall be transmitted. Any original papers thus transmitted to the court of appeals shall be returned to the agency, board, commission, or officer concerned upon the final determination of the review or enforcement proceeding. Pending such final determination any such papers may be returned by the court temporarily to the custody of the agency, board, commission, or officer concerned if needed for the transaction of the public business. Certified copies of any papers included in the record or any supplemental record may also be returned to the agency, board, commission, or officer concerned upon the final determination of review or enforcement proceedings.

(d) The provisions of this section are not applicable to proceedings to review decisions of the Tax Court of the United States or to proceedings to review or enforce those orders of administrative agencies, boards, commissions, or officers which are by law reviewable or enforceable by the district courts.