No. 24-658

IN THE
Supreme Court of the United States

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

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

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENTS

Petitioners' Statements pursuant to Rule 29.6 were set forth at page iv of the petition for a writ of mandamus, and there are no amendments to those Statements.

RELATED CASES

Since the filing of the petition for a writ of mandamus, the petition for review in *Fines & Fees Justice Center, Inc. v. FCC, et al.*, No. 24-2611 (2d Cir.), has been voluntarily dismissed. Dkt. No. 24.1 (Feb. 4, 2025).

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The First Circuit's refusal to transfer these consolidated cases is a clear error that calls for mandamus.

First, the courts of appeals uniformly recognize that mandamus is available to address clearly erroneous district court action (or inaction) on a transfer motion. As those courts hold, once the lower court decides the merits, it is too late for appellate review to provide relief. The same is true here, where the First Circuit's final refusal to transfer the cases will likely come with its ruling on the merits.

Second, the First Circuit clearly erred. Section 2112(a)(1) required challenges to the *Order* to be heard in the Fifth Circuit, either under the first-filed-petition rule or because the courts of appeals lacked jurisdiction over three of the four lottery petitions. The first-filed rule applies whether Securus' waiver petition is read (correctly) as seeking relief only for Securus or (as the government does) to seek industry-wide relief. An adjudication affecting an industry with fewer than two dozen providers is one with respect to specific parties. And while the government agrees that three of the lottery petitions were incurably premature, it is wrong to dispute appellate jurisdiction over Securus' initial petition. Securus remains aggrieved by the FCC's refusal to grant the requested waiver and clarification because the agency's new rules operate only prospectively and are not yet fully effective.

Third, the First Circuit's refusal to follow the clear text of § 2112(a) rewards forum-shopping by three organizations that applauded the *Order*, while penalizing the many others that followed the Hobbs Act's explicit rules. This is not a one-off fact pattern involving a Federal Register quirk. Bifurcated publication is standard FCC practice. And § 2112(a)(1) regularly

consolidates in a single court of appeals agency actions that are appealable at different times. Such cases create opportunities for those aggrieved only by later-entered agency orders to jump the gun — as happened here — in the hopes of securing review in a court of appeals they perceive as more favorable. This Court's action is needed to deter such future forum-shopping.

ARGUMENT

I. Mandamus Is a Proper Remedy for the First Circuit's Violation of § 2112(a)

The courts of appeals uniformly hold that "mandamus is appropriate when there is a clear abuse of discretion" by a district court on a motion to transfer under 28 U.S.C. § 1404(a). *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 308 (5th Cir. 2008) (en banc); *see id.* at 309 n.3 (citing cases).[1] That is true whether the district court erred in granting transfer, *see In re Clarke*, 94 F.4th 502, 516 (5th Cir. 2024); denying transfer, *see In re McGraw-Hill Glob. Educ. Holdings LLC*, 909 F.3d 48, 55, 56-57 (3d Cir. 2018); or refusing to rule promptly, *see In re TracFone Wireless, Inc.*, 848 F. App'x 899, 900 (Fed. Cir. 2021).

As these courts of appeals recognize, "[i]n the venue transfer context, the three-factor mandamus test collapses into" one question: whether the petitioner has a clear and indisputable right to transfer. *McGraw-Hill*, 909 F.3d at 56. That is because the "usual post-judgment appeal process is not an adequate remedy for an improper failure to transfer." *In re Apple, Inc.*, 602 F.3d 909, 912 (8th Cir. 2010) (per curiam); *accord In re National Presto Indus., Inc.*, 347

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[1] Section 1404(a), like 28 U.S.C. § 2112(a)(5), authorizes transfer "[f]or the convenience of parties and witnesses, in the interest of justice."

F.3d 662, 663 (7th Cir. 2003). If the party that loses the transfer motion also loses on the merits, it "would not be able to show that it would have won" had the case been heard in a different forum. *Volkswagen*, 545 F.3d at 318-19. In addition, "the harm . . . will already have been done . . . , and the prejudice suffered cannot be put back in the bottle." *Id.* at 319.

These cases refute the government's and public interest organizations' assertions that mandamus is not warranted because the First Circuit still might transfer the case. *See* U.S. Br. 9-10; Pub. Int. Br. 13-15. And the sole example the government identifies of any court of appeals ever before deferring a § 2112(a) transfer motion to a merits panel demonstrates why petitioners here have no other adequate means to obtain relief. There, the D.C. Circuit finally acted on — and granted — the transfer request, just nine days before oral argument. *See* Order, *Howard Stirk Holdings, LLC v. FCC*, No. 14-1090 (D.C. Cir. Nov. 24, 2015), https://bit.ly/40yeNGu. But had the court instead waited and denied transfer while resolving the merits, "an appeal w[ould] provide no remedy for a patently erroneous failure to transfer." *Volkswagen*, 545 F.3d at 319.[2]

Absent mandamus, petitioners face that same risk of receiving the First Circuit's final transfer denial once it is too late for any adequate remedy. At a minimum, therefore, the Court should grant mandamus and order the First Circuit to resolve the transfer

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[2] The public interest organizations claim (at 17-18) that *U.S. Telecom Association v. FCC* is another such example, but that court ordered "that the motion *to dismiss* be referred to the merits panel." Order, No. 15-1063 (D.C. Cir. June 11, 2015) (emphasis added), https://bit.ly/4jrBxjZ. No party filed a transfer motion.

motion promptly and sufficiently before its merits decision to permit the possibility of further review. *Cf. TracFone*, 848 F. App'x at 901 (granting mandamus and ordering district court to "rul[e] on the motion to transfer within 30 days," with a "reasoned basis" permitting "meaningful appellate review"). But as shown below, transfer is mandatory, and the First Circuit's refusal to grant it was clear error that this Court should correct now.

II. Petitioners' Right to Relief Is Clear and Indisputable

A. The first-filed petition rule requires transfer to the Fifth Circuit

The FCC's dismissals of Securus' petitions were "adjudicatory decisions with respect to specific parties," so the time to petition for review began on the *Order*'s "release date." 47 C.F.R. § 1.4(b)(1) note, 1.4(b)(2).

The government agrees (at 19) that the decisions are adjudicatory and the *Order* containing it is clearly a rulemaking document.[3] The government, however, insists (at 20) that the decision was an "agency action[] of general applicability, not [a] party-specific adjudication[] determining individual rights."

As to the waiver petition, the government bases that claim solely on a passing reference to "other providers." U.S. Br. 14, 19-20 & n.5. Yet the relief Securus sought was clearly limited to itself: as the petition's conclusion stated, Securus sought a "waiver to allow

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[3] The government does not join the public interest organizations' assertion (at 21) that the denials were a rulemaking. As we showed (at 13-14), decisions on waiver and clarification petitions are adjudications. But if there were any doubt, the Federal Register publication of the dismissals states that it "does not adopt any rule." Final Rule, *Incarcerated People's Communications Services*, 89 Fed. Reg. 68,369, 68,370 (Aug. 26, 2024).

continuation of *the company's* pilot subscription programs." U.S. Br. App. 11a (emphasis added). That the FCC mischaracterized the scope of the requested relief in dismissing the petition, *see* U.S. Br. 20 n.5 (citing *Order* ¶ 606), does not change that Securus sought a waiver only for itself.

Securus' waiver petition was thus no different from the waiver petitions in *ACR Electronics*, which the FCC found triggered the note in § 1.4(b)(1). *See* Pet. 13-14. Like those waiver petitions, Securus' petition was "based on [an] individualized factual showing[]." U.S. Br. 21-22. Securus' evidence in support of its petition was specific to its pilot program. *See* U.S. Br. App. 3a-5a, 9a-10a. The FCC's dismissal of that petition was thus an "individualized adjudication[] . . . issued within the context of an FCC rulemaking . . . that determine[d] the rights of specific parties." U.S. Br. 21.

In all events, the industry is sufficiently small that a waiver or clarification denial affecting the entire industry is "reasonably . . . described as a decision 'with respect to specific parties.'" *PSSI Glob. Servs., L.L.C. v. FCC*, 983 F.3d 1, 7 (D.C. Cir. 2020) (quoting 47 C.F.R. § 1.4(b)(1) note). There are fewer than two dozen IPCS providers, *see Order* App. D ¶ 8, and eight of them account for 96% of IPCS usage, *see Order* ¶ 216. The FCC has argued that the "note in § 1.4(b)(1)" encompassed an adjudicatory decision contained in a rulemaking document that "modified thousands of . . . licenses at once." *PSSI Glob. Servs.*, 983 F.3d at 7. While the D.C. Circuit rejected that overreach, *see id.*, a waiver or clarification petition that would affect at most a score of easily identified companies falls comfortably within the FCC's own reading of the note in § 1.4(b)(1).

Therefore, § 2112(a)(1) required the FCC to file the administrative record in the Fifth Circuit, which is "the court in which proceedings with respect to the order were first instituted." 28 U.S.C. § 2112(a)(1). And all other courts of appeals — including the First Circuit — had to transfer all other proceedings with respect to the same order to the Fifth Circuit. *See id.* § 2112(a)(5). Pay Tel timely made this argument in its transfer motion. While Securus did not initially do so, that does not "override th[e] statutory command that the appeal be heard in the circuit where the petition for review was first filed." *Wynnewood Ref. Co. v. OSHA*, 933 F.3d 499, 501 (5th Cir. 2019) (applying first-to-file rule and transferring appeal). The Fifth Circuit might then consider any motions for discretionary transfer under § 2112(a)(5), but that provision applies only after the application of "the congressional directive" in § 2112(a)(1). *Id.*

B. Alternatively, the one-petition-in-the-first-10-days rule requires transfer to the Fifth Circuit

1. The government again agrees (at 7) that three of the four petitions for review the FCC sent to the Judicial Panel on Multidistrict Litigation are "incurably premature," so the courts of appeals lacked jurisdiction over them. *See also* Pet. 16-17 (quoting FCC First Circuit filing). The public interest organizations' attempts to contest that fail.

First, they repeatedly blame Securus for their decision to file petitions for review before Federal Register publication of the rules they challenge. *See* Pub. Int. Br. 2, 3, 5, 6, 9, 24-26. But despite continually asserting that Securus' petition for review "stat[ed] that Securus was seeking review of the entire Order," *e.g.*, *id.* at 2, they never once quote the petition. For good

reason. As we showed (at 5), Securus expressly sought review of only "the portion of the *Order* resolving petitions for reconsideration, clarification, and waiver" that had been "published in the Federal Register" and as relief sought only a ruling that the FCC's "denials of [Securus'] clarification and waiver petitions" were unlawful.[4] Securus' petition thus created no "uncertainty" about the breadth of its challenge to the *Order*. Pub. Int. Br. 26. Instead, the petition created what for the public interest organizations was an intolerable risk that no other party then-entitled to seek review would do so, and § 2112(a) would consolidate all later-filed challenges of the *Order* in the Fifth Circuit.

Second, they cite (at 25) a variety of cases — nearly all of which do not involve the Hobbs Act — to claim that later events cured the prematurity of their initial petitions, creating appellate jurisdiction over them. But as the FCC recently explained, and the government does not contest here, every court of appeals to consider the question has found petitions like the public interest organizations' are *incurably* premature. *See* Pet. 16-17. And the one Hobbs Act case the public interest organizations cite agrees. What they quote as though it were the holding of *Waterway Communications Systems, Inc. v. FCC*, 851 F.2d 401 (D.C. Cir. 1988), appears in a parenthetical that quotes a non-Hobbs Act case. The actual holding of *Waterway* is that "*Western Union*" — the then-Judge Scalia decision that petitions like the three here are incurably premature — "remains the law of this circuit." *Id.* at 406. Indeed, it remains the law in every circuit.[5]

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[4] Pet. for Review 1-2, *Securus Techs., LLC v. FCC*, No. 24-60454 (5th Cir. Aug. 30, 2024), https://bit.ly/4aLZTks.

[5] Contrary to the public interest organizations' claim (at 3), Securus did not concede below that a lottery was properly held.

2. The public interest organizations (at 23-24), joined by the government (at 12-15), also dispute the court of appeals' jurisdiction over Securus' initial petition, arguing that the dismissals of the waiver and clarification petitions do not aggrieve Securus.

They are wrong. Like nearly all agency regulations, the new rules in the *Order* operate prospectively only. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). Until they take effect, the existing rules — the subject of Securus' waiver and clarification requests — remain in place, as does Securus' need for a waiver and clarification.

The government acknowledges (at 14-15) that the new alternative pricing rule is not yet fully effective; therefore, the harm to Securus from the denial of the waiver persists. Securus need not have renewed its waiver motion after the *Order*'s release, as the government implies (at 15 n.4), to preserve its aggrievement from the FCC's refusal to waive rules that were in effect before the *Order* and remained in effect afterward. The recent successful waiver petition the government cites (*id.*) is one Securus filed only after a different new rule the *Order* adopted took full effect.

As to the site commission ban, the government does not dispute that it phases in over a period that ends on April 1, 2026. Therefore, the regime that was the subject of Securus' clarification petition will remain in place — unclarified — for more than another year.

Rather, Securus noted that the FCC should not — itself — decide whether petitions for review properly invoke appellate jurisdiction when applying § 2112(a)(1). *See* Securus Transfer Reply 3 n.2, *In re MCP 191*, Nos. 24-8028 & 24-1860 (1st Cir. Oct. 11, 2024). That would "let[] the agency decide the forum," which "would be at odds with the statute's text." *Wynnewood Ref.*, 933 F.3d at 501.

The government, however, suggests (at 13-14) that "guidance" Securus received "from FCC staff" suffices. Yet the FCC warns "parties who rely on staff advice or interpretations [that they] do so at their own risk,"[6] because "staff conversations are not binding on the agency."[7] That guidance is no substitute for the formal clarification Securus sought and the FCC refused to provide.

3. In sum, Securus filed a timely petition challenging decisions that aggrieved it, while the public interest organizations filed incurably premature petitions over which the courts of appeals lack jurisdiction. Once those premature petitions are ignored, § 2112(a) required the First Circuit to "retransfer all remaining proceedings transferred to it" to the Fifth Circuit, as it is the court § 2112(a) would have selected but for the dismissed petitions. *Industrial Union Dep't, AFL-CIO v. Bingham*, 570 F.2d 965, 974 n.8 (D.C. Cir. 1977) (Wilkey, J., concurring); *see also Consumer Fed'n of Am. v. FTC*, 515 F.2d 367, 368, 373 (D.C. Cir. 1975) (dismissing premature first-filed petition and transferring).

III. The Court Should Act To Deter Future Forum-Shopping

This case presents a blatant example of forum-shopping by organizations that sat out the FCC's rulemaking proceeding, *see* NSA Br. 3-4 & n.3, then

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[6] Memorandum Opinion and Order on Reconsideration, *Applications of Hinton Tel. Co., James L. Brubaker, Knollwood, Ltd.*, 10 FCC Rcd 11625, ¶ 42 (1995).

[7] Forfeiture Order, *Air-Tel, LLC*, 36 FCC Rcd 8867, ¶ 16 (2021).

"applaud[ed]" the FCC's *Order*.[8] But it is hardly unique. Recently, organizations that "[w]elcome[d]" the return of net neutrality[9] nonetheless petitioned for review. But once a court of appeals where internet service providers had challenged the net neutrality rules was selected — rather than their preferred forum — those entities abandoned their own petitions.[10]

Cases like this one are also likely to recur. The bifurcated Federal Register publication of the *Order* was not some "anomalous quirk." Pub. Int. Br. 14 n.3. As the government explains, "FCC staff" prepared the "separate Federal Register submissions," U.S. Br. 5, which was "[c]onsistent with [the agency's] past practice," FCC Transfer Opp. 2, *In re MCP 191*, Nos. 24-8028 & 24-1860 (1st Cir. Oct. 7, 2024). If the First Circuit's refusal to apply § 2112(a) stands, it will become standard practice for those aggrieved only by the later-published portions of such orders to flout the Hobbs Act's clear jurisdictional rules governing the time to file petitions for review.

Nor is the problem limited to bifurcated publication. The FCC includes adjudicatory decisions with respect to specific parties within rulemaking documents often

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[8] Public Interest Organizations Ex Parte Letter at 1, WC Docket Nos. 23-62 & 12-375 (July 10, 2024), https://bit.ly/4hoqN42.

[9] *E.g.*, Press Release, Benton Inst. for Broadband & Soc'y, *Benton Institute Welcomes Step Toward Net Neutrality* (Apr. 3, 2024), https://bit.ly/40BZ2zA.

[10] *See* Unopposed Mot. To Hold Briefing in Abeyance and for Abeyance, *In re MCP No. 185*, Nos. 24-7000 *et al.* (6th Cir. Aug. 6, 2024) (filed by Benton Institute and Media Alliance), https://bit.ly/3PEj862; Mot. To Withdraw and Dismiss Pet. for Review, *In re MCP No. 185*, Nos. 24-7000 *et al.* (6th Cir. Aug. 9, 2024) (filed by National Consumer Law Center), https://bit.ly/4au58VV.

enough that it needs a rule to address the timing of judicial review of such multifaceted decisions. *See* U.S. Br. 20-21. And the courts of appeals — following Congress's intent — understand "same order" in § 2112(a) to encompass "closely related or sequential orders issued in the same proceeding as a single order," all of which are "reviewed by the court that is reviewing the initial order."[11] As a result, parties aggrieved only by a later-appealable order regularly have no say over the appellate venue, which is controlled by the application of § 2112(a) to any petitions for review of the earlier order.[12] Yet if the public interest organizations' gambit here succeeds, those parties will have a blueprint for future forum-shopping through premature petitions for review. *See* NSA Br. 6.

CONCLUSION

The Court should issue a writ of mandamus and order the First Circuit to transfer these consolidated cases to the Fifth Circuit.

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[11] 16 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3944 (3d ed.).

[12] *See*, *e.g.*, Order 10, *Sprint Corp. v. FCC*, Nos. 18-9563 *et al.* (10th Cir. Jan. 10, 2019) (transferring dozens of petitions for review of a later-issued order because of petitions to review earlier-issued order), https://bit.ly/3yVbcbL.

Respectfully submitted,

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