IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAFER CHEMICALS HEALTHY FAMILIES, ET AL., Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL., Respondents.	No. 17-72260
ENVIRONMENTAL DEFENSE FUND, Petitioner, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL., Respondents.	No. 17-72501

REPLY IN SUPPORT OF MOTION TO
TRANSFER AND HOLD CASES IN ABEYANCE

Petitioners' opposition to EPA's motion to transfer rests on the mistaken argument that such a transfer would undermine Petitioners' choice of forum and on inapplicable case law. Petitioners here chose three different forums to review challenges to the two EPA rules at issue: the Second Circuit, the Fourth Circuit, and the Ninth Circuit. It was for this reason that the random lottery process

mandated by 28 U.S.C. § 2112(a) was necessary to choose among those three courts in the first place. Now that the Judicial Panel on Multidistrict Litigation ("Panel") has selected two different courts to hear challenges to the two related EPA rules—the Fourth Circuit for the Risk Evaluation Rule and the Ninth Circuit for the Prioritization Rule—the only question before this Court is whether the challenges to the Prioritization Rule should be transferred to the Fourth Circuit "[f]or the convenience of the parties in the interest of justice." 28 U.S.C. § 2112(a)(5).

The parties agree that the interest of justice would be served by having challenges to both rules heard in the same court because these cases present the potential for overlapping issues. This Court only has control over the disposition of challenges to the Prioritization Rule. Convenience and justice would be best served by granting EPA's motion to transfer the Prioritization Rule cases to the Fourth Circuit.

A. Granting EPA's Motion Would Not Upset Petitioners' Choice of Forum, and No "Strong Showing" Is Required

The bulk of Petitioners' opposition is focused on their surprising argument that granting EPA's motion would disrupt Petitioners' choice of forum, which they claim is the most important consideration here. These arguments are both legally unsupported and unpersuasive in light of the procedural history of these cases. Three separate groups of petitioners filed challenges to both EPA rules in three

separate circuits, including three parties (each now opposing EPA's motion) who filed a petition for review in the Fourth Circuit. When this happens, there is no way to ensure that every petitioner is heard in the forum of its choice. Instead, Congress requires that the Panel randomly select among all courts that received challenges to the same agency rule within 10 days of issuance. 28 U.S.C. § 2112(a)(3). Selection of *any* of the multiple courts that received challenges within the specified time period satisfies forum choice insofar as it can be satisfied in such situations. Petitioners' suggestion that EPA is somehow seeking to override Petitioners' choice is unsupported by logic or the case law they cite. *See* Opp. at 2, 8 (pointing to *Newsweek, Inc. v. U.S. Postal Serv.*, 652 F.2d 239 n.2 (2d Cir. 1981) for an analysis of the *prior version* of Section 2112(a), which gave precedence to the first court to receive challenges). Petitioners *themselves* chose to file in the Fourth Circuit, as well as two other courts, within 10 days following issuance of the rule, thereby insuring that Section 2112's neutral-selection procedures would be triggered.

Petitioners argue that the Ninth Circuit is actually the forum of choice because more entities joined the single petition filed in this Court than joined the petition in the Fourth Circuit and because all Petitioners now want to be in this Court. Opp. at 2, 8, 13. Setting aside the absurdity of certain Petitioners now disowning their own choices which led to the complicated Panel lottery in the first

place, nothing in Section 2112(a)(3)—or anything else cited by Petitioners—shows that courts receiving petitions from more parties (or even more petitions) should get extra weight in selecting among the courts. 28 U.S.C. § 2112(a)(3). Even the entities themselves did not treat their petitions for review in this Court as multiple cases; they filed a single joint petition for review of each EPA rule. This Court should likewise not give extra weight to a circuit on that basis when considering a transfer under 28 U.S.C. § 2112(a)(5) for cases that have gone through the lottery process.

Petitioners thus invoke an incorrect standard of review. Nothing in EPA's motion would upset Petitioners' choice of forum beyond that caused by the Panel lottery process, and no "strong showing of inconvenience" is required. *See* Opp. at 7-8 (citing *Decker Coal Co. v Commonwealth Edison Co*. 805 F.2d 834, 843 (9th Cir. 1986) (discussing transfer outside of the Section 2112 context and where parties opposing transfer had not themselves originally filed in the destination court)). The only question here is whether transfer would serve "the convenience of the parties in the interest of justice." 28 U.S.C. § 2112(a)(5). There is little caselaw interpreting this language since the Panel lottery process was created, but even under the old law, courts have considered a wider variety of relevant facts than Petitioners suggest, such as the location of the defendant, the location of counsel, areas in which parties and/or their representatives are frequently in

attendance, and whether the destination court is considering very similar issues. *Am. Pub. Gas Ass'n v. Fed. Power Comm'n*, 555 F.2d 852, 857-58 (D.C. Cir. 1976); *see also ITT World Commc'ns, Inc. v. FCC*, 621 F.2d 1201, 1208 (2d Cir. 1980). As discussed next, the convenience and interest of justice factors weigh in favor of transfer.

B. Convenience of the Parties and the Interest of Justice Strongly Favor the Fourth Circuit

The Fourth Circuit would be more convenient for the parties because all counsel of record in these related cases are located in Washington, DC, or New York, within an easy and more economical travel distance of the Fourth Circuit. Petitioners respond that the court should consider the location of the parties rather than the location of counsel, Opp. at 11, but this makes little sense in light of these cases. As Petitioners admit, two petitioners are located in the Fourth Circuit. Opp. at 11 n.6. Moreover, the location of counsel is most certainly relevant. S*ee, e.g.*, *Eschelon Telecom, Inc. v. FCC*, 345 F.3d 682, 683 n.1 (8th Cir. 2003) (finding that the fact that "most of the parties have D.C. counsel of record" supported transfer to the D.C. Circuit); *Am. Pub. Gas Ass'n*, 555 F.2d at 857 (discussing as relevant the fact that counsel for the parties regularly travel to the jurisdiction in question). While Petitioners are correct that the Second Circuit has in the past considered the location of the parties over that of counsel, *see Newsweek*, 652 F.2d at 243, that is

by no means the norm and does not make sense in the context of these petitions for review.

Here, these cases will be resolved on the basis of the administrative record, not on evidence collected during litigation. *See, e.g.*, *IMS, P.C. v. Alvarez*, 129 F.3d 618, 623 (D.C. Cir. 1997). The record is available digitally, briefing will be filed digitally, and counsel will then have to travel for oral argument. Where a federal agency is involved and taxpayer dollars are at stake, it is reasonable to take travel costs into account. It is also reasonable to take Petitioners' travel costs into account because, in the event that Petitioners succeed in their challenge, Petitioners might seek reimbursement of their costs and attorneys' travel time from the United States. *See* 15 U.S.C. § 2618(d) (TSCA provision authorizing certain attorney's fees and costs). These considerations are not, as Petitioners contend, negligible.

Granting EPA's motion would also serve the interests of convenience and justice because it will likely result in a quicker resolution of these cases and minimize disruption to EPA's processes for reviewing potentially toxic chemicals. The Fourth Circuit, which has a smaller docket than this Court, will likely be able to resolve these matters more quickly. In the 12-month period ending in June 2017, for example, this Court received 11,924 new cases, compared to the Fourth Circuit's 4,741 over the same period. *See*, Judicial Caseload Report: U.S. Court of Appeals Summary -- 12-Month Period Ending June 30, 2017, *available at*

http://www.uscourts.gov/statistics/table/na/federal-court-management-statistics/2017/06/30-2. Rather than acknowledge the heavy caseload this Court bears, Petitioners suggest that the parties should further burden this Court by requesting expedited disposition. That suggestion would be prejudicial to EPA and is unhelpful in the context of this motion.

Petitioners make two additional arguments against transferring the cases to the Fourth Circuit, but neither argument weighs in favor of keeping the cases in this Court.

First, Petitioners argue that a tie should go to Petitioners. Opp. at 13. That point is null because the factors here favor transfer to the Fourth Circuit.

Second, Petitioners argue that the Court should apply the "first-to-file" rule and deny EPA's motion because this Court received petitions one day sooner than the Fourth Circuit. Opp. at 13-14. The old "first to file" rule—under which all challenges to a single rule would have been transferred to the court that received the first challenge, *see, e.g.*, *Va. Elec. & Power Co. v. EPA*, 610 F.2d 187, 188 (4th Cir. 1979)—has been completely and deliberately superseded for all courts receiving challenges to the same rule within 10 days of a rules' issuance. Pub. L. No. 100-236, § 1, 101 Stat. 1731 (1988) (codified at 28 U.S.C. § 2112(a)); S. Rep. 100-263, at *1-6 (1987) (extensive discussion of how the new Panel lottery process was intended to end the "first to file" rule and the associated elaborate and wasteful

practice of racing to the courthouse). Petitioners do not deny that all three sets of challenges to both rules were filed within 10 days of the rules' issuance, and they point to no case in which courts have applied the first-to-file principle following the creation of the lottery process. The Court should decline Petitioners' invitation to exercise a rule that Congress expressly overruled. This is particularly true where, as here, Petitioners themselves chose to file in three separate courts within the 10-day period, triggering Section 2112'a neutral-selection procedures.

C. This Court Should Give No Weight to Petitioners' Later-Filed Competing Motion in the Fourth Circuit

Rather than wait to see how this Court would resolve EPA's motion (which Petitioners knew about for roughly a week before EPA's filing), Petitioners have since filed a competing motion in the Fourth Circuit. This Court should give no weight to the Fourth Circuit motion. First, the instant motion addresses whether this Court should transfer challenges of the Prioritization Rule to the Fourth Circuit, not the other way around. Second, the Fourth Circuit could deny Petitioners' competing motion, particularly if this Court grants EPA's previously filed motion. As EPA explained in its filing in that court, comity counsels against reaching a decision that might conflict with this Court's resolution of this motion. Therefore, EPA has asked the Fourth Circuit to deny Petitioners' motion in the

interest of comity or, at least, to wait to resolve Petitioners' motion until this Court makes a decision.[1]

D. To the Extent Any Automatic Abeyance Will End Before EPA's Proposed Dates, EPA's Request for Abeyance Should be Granted

Petitioners are correct that these cases were automatically stayed upon the filing of this motion and that the stay remains in effect pending disposition of this motion. L.R. 27-11(a)(2). To the extent that the automatic abeyance will end immediately once this motion is resolved, EPA continues to request that the abeyance remain in place until the later of (1) one week after this Court rules on the motion to transfer, or (2) October 10, 2017.

CONCLUSION

In sum, this Court should transfer cases no. 17-72260 and 17-72501 to the Fourth Circuit. Once *Alliance of Nurses for Healthy Environments v. EPA*, No. 17-1927 (4th Cir.), which the Fourth Circuit transferred to this Court pursuant to the Panel order consolidating all challenges to the Prioritization Rule in this Court, is docketed, EPA intends to request the same relief with respect to that case.

[1] Petitioners are wrong in their assertion that the doctrine of comity is solely about jurisdiction over complaints. *See* Opp. at 10 n.5. Rather, "[t]he doctrine of comity instructs federal judges to avoid 'stepping on each other's toes while parallel suits are pending in different courts.'" *In re Naranjo*, 768 F.3d 332, 348 (4th Cir. 2014) (citations omitted).

Dated: October 2, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 2, 2017. I certify that all participants in the case registered as CM/ECF users will receive service via the appellate CM/ECF system.

s/ *Samara M. Spence*

CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with Fed. R. App. P. 27(d)(2)(C) because, excluding the parts listed in Fed. R. App. 32(f), it contains 2,006 words as counted by Microsoft Word. This document also complies with typeface and type-style requirements of Fed. R. App. P. 27(d)(1)(E) because it has been prepared in a proportionally spaced typeface in 14-point Times New Roman font.

Dated: October 2, 2017

/s/ Samara M. Spence
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