IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ALLIANCE OF NURSES FOR HEALTHY ENVIRONMENTS; CAPE FEAR RIVER WATCH; NATURAL RESOURCES DEFENSE COUNCIL, *Petitioners*, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, *Respondent*. SAFER CHEMICALS HEALTHY FAMILIES, et al., *Movants.*	17-1926
ENVIRONMENTAL DEFENSE FUND, *Petitioner*, v. U.S. ENVIRONMENTAL PROTECTION AGENCY; SCOTT PRUITT, Administrator, U.S. Environmental Protection Agency, *Respondents*.	17-2040

PETITIONERS' REPLY IN SUPPORT OF JOINT MOTION TO TRANSFER

All parties agree that the challenges to the two related TSCA rules should be heard by a single Court of Appeals. Section 2112 does not address the scenario presented here, where two different courts are selected through the JPML random lottery for two sets of closely related petitions. Thus, the only way to bring the cases together is for one of the courts to exercise its discretion and transfer its set of petitions to the other court "[f]or the convenience of the parties in the interest of justice." 28 U.S.C. § 2112(a)(5). All parties agree that one of the courts should do so.

After discussions between the five sets of counsel representing the fifteen petitioners, all Petitioners have agreed that the Ninth Circuit is most convenient. Having reached consensus, Petitioners then filed a motion to transfer in this Court—the only court capable of granting the requested relief. This Court should grant the motion to transfer for the convenience of the parties in the interest of justice.

I. The precedent supports transfer to the Circuit selected by Petitioners, not the Circuit selected by the government

Ample precedent establishes that a petitioner's choice of forum should be given "substantial weight," and that is particularly so here, where a majority of Petitioners (eleven of the fifteen) initially chose the Ninth Circuit and more Petitioners are located there than in the Fourth Circuit. *See Trs. of Plumbers & Pipefitters Nat'l Pension Fund v. Plumbing Servs., Inc.*, 791 F.3d 436, 444 (4th

Cir. 2015); *Collins v. Straight, Inc.*, 748 F.2d 916, 921 (4th Cir. 1984); *Tenneco Oil Co. v. EPA*, 592 F.2d 897, 900 (5th Cir. 1979); *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986); *see also In re Nat'l Presto Indus., Inc.*, 347 F.3d 662, 665 (7th Cir. 2003). This factor weighs in favor of transfer to the Ninth Circuit.

EPA disagrees and wishes to have all cases heard in this Circuit, but EPA fails to grapple with the precedent giving weight to a petitioner's choice. Indeed, "[i]mplicit in 28 U.S.C. § 2112 is Congress' design to prevent federal agencies from selecting the forum for review of its decisions." *Newsweek, Inc. v. U.S. Postal Serv.*, 652 F.2d 239, 243 n.2 (2d Cir. 1981). EPA does not dispute the general presumption that the aggrieved party gets his or her choice of forum; instead, EPA asserts that it is irrelevant that Petitioners have all reached consensus because they did so after the JPML conducted the random lottery.[1] But then EPA also asserts that it is irrelevant that the majority of Petitioners chose the Ninth Circuit from the outset because those petitioners reached a consensus earlier and filed a joint petition. EPA's Opp'n to Mot. to Transfer (Resp.) 7, Dkt. 37-1. Thus, under EPA's logic, after a circuit has been designated by the JPML to hear a

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[1] EPA's response expresses frustration with the fact that all fifteen Petitioners did not somehow reach consensus before even filing these suits. While all Petitioners have common interests in this litigation, they are fifteen different entities with distinct locations, histories, and priorities, and they are represented by five separate counsel.

consolidated set of petitions, no weight is given to petitioners' choice of forum in deciding a motion to transfer.

That cannot be. In establishing the JPML designation process, Congress retained, unchanged, the standard governing motions to transfer: "the convenience of the parties in the interest of justice."[2] As that standard gave substantial weight to petitioners' choice of forum prior to enactment of the JPML lottery process, it continues to do so now. *See, e.g.*, *Liquor Salesmen's Union Local 2 v. NLRB*, 664 F.2d 1200, 1204 (D.C. Cir. 1981) (explaining that in applying § 2112's transfer standard, "for the convenience of the parties in the interest of justice," courts place "special emphasis on the choice of forum of the truly aggrieved party"); *ITT World Commc'ns, Inc. v. FCC*, 621 F.2d 1201, 1208 (2d Cir. 1980) (giving weight to the preference of "the parties most clearly aggrieved" by the agency's decision). Regardless of whether this Court looks to Petitioners' conduct before or after designation by the JPML, that choice is the Ninth Circuit.

II. The convenience to the parties favors the Ninth Circuit

EPA's argument that the Fourth Circuit is more convenient for counsel is misplaced. When considering whether transfer is appropriate for the convenience of the parties, the location of attorneys "is not a permissible consideration." *See In*

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[2] *Compare* Pub. L. No. 85-791, § 2, 72 Stat. 941, 941 (1958) (allowing transfers "[f]or the convenience of the parties in the interest of justice"), *with* 28 U.S.C. § 2112(a)(5) (same language).

re Ralston Purina Co., 726 F.2d 1002, 1004–05 (4th Cir. 1984) (discussing district court transfer for the "convenience of parties and witnesses"). Generally courts give more weight to "the convenience of the *parties*," the standard articulated in the statute, 28 U.S.C. § 2112(a)(5) (emphasis added), and as Petitioners explained in their motion, more parties are located in the Ninth Circuit than the Fourth Circuit. EPA states that the location of the parties is irrelevant in an administrative record review case (Resp. 7–8), but Congress expressly referred to "parties" in § 2112(a)(5), governing precisely such cases. "[T]he plain wording of § 2112(a) belies any notion [that the residence of the parties is] irrelevan[t]." *Liquor Salesmen's Union Local 2*, 664 F.2d at 1209 ("Residence of the parties, although not a major factor, nevertheless has been considered by this court.").

To the extent this Court finds it appropriate to consider convenience of counsel, any difference between the relative convenience of this Court and the Ninth Circuit is negligible. None of the counsel of record have offices in Richmond, whereas three of the five sets of counsel for Petitioners have offices in San Francisco, the location of the headquarters of the Ninth Circuit. To the extent the parties have to provide physical filings to the Court or interact with the Clerk's Office, the Ninth Circuit is more convenient. As for travel costs, the case will likely have a single oral argument; counsel of record will need to travel to participate in a hearing in either forum, and the difference in travel costs between

the destinations is not large. In short, convenience to counsel and relative travel costs are not decisive here and do not favor one court over the other.

EPA also asserts that this Court may resolve these cases more quickly than the Ninth Circuit, pointing to an eight-month difference in the median time for resolving cases. But EPA cannot rely on speed to justify its motion given its positions and overall conduct in these cases. EPA could seek expedition in the Ninth Circuit to resolve concerns about speed. *See* 9th Cir. R. 27-12. EPA has objected to that suggestion as "prejudicial" without explanation. *See* Reply in Supp. of Mot. to Transfer 7, *Safer Chems. Healthy Families v. EPA*, No. 17-72260 (9th Cir., Oct. 2, 2017), Dkt. 19. In addition, EPA took a month to publish these rules in the Federal Register after announcing them on June 20, 2017, effectively postponing any judicial review by a month. EPA cannot demand the forum of its choice on the basis of speed without moving expeditiously itself.

III. Principles of comity and the first-to-file rule favor the court where a case is first filed, not where a party first files a motion

EPA misapplies the doctrine of federal comity when it asserts (Resp. 9–10) that because it filed its motion to transfer two business days before Petitioners, EPA's motion should get preference. Instead, the comity precedent supports Petitioners' argument that the first *case* filed should have priority if no other factor is controlling. *See, e.g.*, *Merial Ltd. v. Cipla Ltd.*, 681 F.3d 1283, 1299 (Fed. Cir. 2012) ("The 'first-to-file' rule is a doctrine of federal comity, intended to avoid

conflicting decisions and promote judicial efficiency, that generally favors pursuing only the first-filed action when multiple lawsuits involving the same claims are filed in different jurisdictions."). The Ninth Circuit cases were filed before any of the other cases, so these factors weigh in favor of granting this motion. Pet'rs' Joint Mot. to Transfer 3–4, Dkt. 26.

EPA suggests that the parties' competing transfer motions will lead to absurd results, but Petitioners trust the courts to avoid an absurd outcome here by taking into account the rulings of the other court. For example, if this Court transfers the Risk Evaluation Rule petitions to the Ninth Circuit, then the Ninth Circuit could decline to transfer the Prioritization Rule petitions to this Court. And EPA could easily withdraw its motion to avoid transfer. Alternatively, if the Ninth Circuit rules first and transfers its petitions to this Court, then this Court could deny this motion and retain jurisdiction. Similarly, if one Court denies a motion, that denial would weigh strongly in favor of the other Court granting its transfer motion. Indeed, the single precedent cited by EPA for its "comity" argument supports precisely this approach. This Court correctly ensured that its decision aligned with the decision already made by a "co-equal circuit court"; it did not point to a pending, unresolved motion as dispositive. *In re Naranjo*, 768 F.3d 332, 349 (4th Cir. 2014) ("[W]e often consider whether our decisions fall in line with those of our sister circuits.").

CONCLUSION

For the foregoing reasons, this Court should transfer the consolidated petitions challenging the Risk Evaluation Rule to the Ninth Circuit.

Dated: October 6, 2017

Respectfully submitted,

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No. 17-1926 **Caption:** All. of Nurses for Healthy Env'ts v. EPA

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Party Name Environmental Defense Fund

Dated: October 6, 2017

CERTIFICATE OF SERVICE

I certify that on October 6, 2017, the foregoing document was served on the following counsel of record through the CM/ECF system: Eve Carol Gartner, Peter D. Keisler, Nancy Sharman Marks, Jessica O'Donnell, Samara Michelle Spence, David Burton Weinberg, and Peter L. de la Cruz. That filing served counsel for all but three parties.

Three parties—Polyurethane Manufacturers Association, Society of Chemical Manufacturers and Affiliates, and Utility Solid Waste Activities Group—have no counsel of record accepting service via CM/ECF. I served their counsel via U.S. mail sent to the following addresses:

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