IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAFER CHEMICALS HEALTHY FAMILIES, et al., *Petitioners,* v. U.S. ENVIRONMENTAL PROTECTION AGENCY, et al., *Respondents*.	17-72260
ENVIRONMENTAL DEFENSE FUND, *Petitioner*, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, et al., *Respondents*.	17-72501
ALLIANCE OF NURSES FOR HEALTHY ENVIRONMENTS, et al., *Petitioners (docketing pending)*, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, et al., *Respondents*.	No. _____

PETITIONERS' JOINT OPPOSITION TO RESPONDENTS' MOTION TO TRANSFER AND HOLD CASES IN ABEYANCE

Petitioners[1] oppose EPA's Motion to Transfer and Hold Cases in Abeyance (Motion to Transfer). The three petitions for review pending before this Court challenge a rule issued by the U.S. Environmental Protection Agency (EPA or Agency) establishing procedures by which the Agency will prioritize chemicals for comprehensive risk evaluation under the Toxic Substances Control Act (TSCA). Another set of petitions for review filed by Petitioners and challenging a closely related EPA rule implementing TSCA is pending before the U.S. Court of Appeals for the Fourth Circuit. All parties agree that the challenges to the two related TSCA rules should be heard by a single Court of Appeals. Petitioners seek to have both sets of petitions heard in this Court. Toward that end, Petitioners: (1) oppose the instant Motion to Transfer; and (2) filed a motion in the Fourth Circuit seeking transfer of the petitions pending in that Circuit to this Court. Pet'rs' Joint Mot. to

[1] The petitioners before this Court include Safer Chemicals Healthy Families; Alaska Community Action on Toxics; Environmental Health Strategy Center; Environmental Working Group; Learning Disabilities Association of America; Sierra Club; Union of Concerned Scientists; United Steelworkers; WE ACT for Environmental Justice; Asbestos Disease Awareness Organization; Vermont Public Interest Research Group; Environmental Defense Fund; as well as Alliance of Nurses for Healthy Environments, Cape Fear River Watch, and Natural Resources Defense Council, whose challenge to the same rule at issue in the consolidated petitions before this Court has been transferred to this Court by the U.S. Court of Appeals for the Fourth Circuit, but has not yet been docketed. These entities are referred to in this Opposition collectively as Petitioners.

Transfer, *All. of Nurses for Healthy Env'ts v. EPA*, No. 1926 (4th Cir. Sept. 18, 2017), Dkt. 26.

With its Motion to Transfer, EPA seeks to override the chosen forum of the vast majority of the Petitioners and instead litigate these cases in its preferred forum. But that is not EPA's choice to make. Congress expressly gave Petitioners the right to select a forum. 15 U.S.C. § 2618(a)(1)(A). In light of this congressional scheme, Petitioners' choice is the predominant factor in determining whether transfer would be "[f]or the convenience of the parties in the interest of justice." 28 U.S.C. § 2112(a)(5). Here, that factor weighs strongly against transfer because eleven of the fifteen Petitioners elected to file their petitions in this Court, and all Petitioners now believe that both sets of petitions should be consolidated in this Court. Moreover, EPA's proffered reasons in support of its Motion to Transfer do not show that the Fourth Circuit is a more appropriate forum than this Court. Further, EPA's request that the Court hold these cases in abeyance should be denied as moot, pursuant to 9th Cir. R. 27-11(a)(2).

BACKGROUND

I. EPA issued two related rules under TSCA establishing procedures for the Agency's review of chemical risks

In June 2016, Congress amended TSCA to require that EPA evaluate a minimum number of chemicals to determine whether they pose "unreasonable risk[s]" to health or the environment. 15 U.S.C. § 2605(b)(2), (b)(4); *see* Frank R.

Lautenberg Chemical Safety for the 21st Century Act, Pub. L. No. 114-182, 130 Stat. 448, 462–63 (2016). Congress required EPA to issue two rules to implement these amendments: one rule establishing the process by which EPA will prioritize chemicals for comprehensive risk evaluation by designating them as either high or low priority (the Prioritization Rule), 15 U.S.C. § 2605(b)(1)(A); and a second rule to establish a process for evaluating the health and environmental risks of the prioritized chemicals (the Risk Evaluation Rule), *id.* § 2605(b)(4)(B).

On July 20, 2017, EPA published both rules in the Federal Register. Procedures for Prioritization of Chemicals for Risk Evaluation Under the Toxic Substances Control Act, 82 Fed. Reg. 33,753 (July 20, 2017); Procedures for Chemical Risk Evaluation Under the Amended Toxic Substances Control Act, 82 Fed. Reg. 33,726 (July 20, 2017). The two rules are closely related, and several of their key provisions interpret or implement the same statutory provisions. *See, e.g.*, 82 Fed. Reg. at 33,755 (cross-reference in Prioritization Rule to Risk Evaluation Rule's discussion of the term "conditions of use"). Together, these rules establish the process by which EPA will determine which chemicals in commerce should be "prioritized" to undergo comprehensive risk evaluation, and whether these prioritized chemicals pose an unreasonable risk to health or the environment. These risk evaluations will dictate the Agency's obligations under TSCA to issue protective measures to reduce those risks. *See* 15 U.S.C. § 2605(a).

II. Three sets of petitioners filed challenges to both the Risk Evaluation and Prioritization Rules

Pursuant to 15 U.S.C. § 2618(a), three sets of petitioners filed petitions for review in three different Courts of Appeals challenging both rules. On August 10, 2017, eleven groups (collectively, the Safer Chemicals Petitioners) filed petitions for review of the Prioritization and Risk Evaluation Rules in this Court: Safer Chemicals Healthy Families; Alaska Community Action on Toxics; Environmental Health Strategy Center; Environmental Working Group; Learning Disabilities Association of America; Sierra Club; Union of Concerned Scientists; United Steelworkers; WE ACT for Environmental Justice; Asbestos Disease Awareness Organization; and Vermont Public Interest Research Group. Pet. for Review, *Safer Chems. Healthy Families v. EPA*, No. 17-72259 (9th Cir.), Dkt. 1-5 (Risk Evaluation Rule challenge); Pet. for Review, *Safer Chems. Healthy Families v. EPA*, No. 17-72260 (9th Cir.), Dkt. 1-5 (Prioritization Rule challenge).

On August 11, 2017, Alliance of Nurses for Healthy Environments, Cape Fear River Watch, and Natural Resources Defense Council (collectively, the Alliance of Nurses Petitioners) filed petitions for review of both rules in the Fourth Circuit. Pet. for Review, *All. Of Nurses for Healthy Env't's v. EPA*, No. 17-1926 (4th Cir.), Dkt. 3-1 (Risk Evaluation Rule challenge); Pet. for Review, *All. Of Nurses for Healthy Env't's v. EPA*, No. 17-1927 (4th Cir.), Dkt. 3-1 (Prioritization Rule challenge).

The same day, Environmental Defense Fund (EDF) filed petitions for review of both rules in the Second Circuit. *See* Pet. for Review, *EDF v. EPA*, No. 17-2464 (2d Cir.), Dkt. 1-2 (Risk Evaluation Rule challenge); Pet. for Review, *EDF v. EPA*, No. 17-2403 (2d Cir.), Dkt. 6-2 (Prioritization Rule challenge).

III. Orders of the Judicial Panel on Multidistrict Litigation (JPML)

As required by 28 U.S.C. § 2112(a), on August 31, 2017, EPA notified the JPML that three petitions for review of the Prioritization Rule and three petitions for review of the Risk Evaluation Rule had been filed in more than one federal appellate court. *See* Notice of Multicircuit Pets., No. 17-72259 (9th Cir.), Dkt. 8; Notice of Multicircuit Pets., No. 17-72260 (9th Cir.), Dkt. 8. The notices state that EPA "believes it would be in the interest of justice and judicial efficiency for challenges to both rules to be litigated in the same court." *Id.*

On September 1, the JPML randomly selected the Ninth Circuit to hear the petitions challenging the Prioritization Rule, *see* Consol. Order, No. 148 (JPML), Dkt. 3, and randomly selected the Fourth Circuit to hear the petitions challenging the Risk Evaluation Rule, *see* Consol. Order, No. 149 (JPML), Dkt. 3. Pursuant to the JPML's consolidation order for the Prioritization Rule petitions, the Fourth Circuit and the Second Circuit transferred their Prioritization Rule cases to this

Court.[2] Order, No. 17-1927 (4th Cir.), Dkt. 18; Notice of Appeal Transfer, No. 17-2403 (2d Cir.), Dkt. 32-2. Accordingly, all three Prioritization Rule cases are either before, or have been transferred to, this Court.

Pursuant to the JPML's consolidation order for the Risk Evaluation Rule petitions, the Second Circuit transferred EDF's petition challenging the Risk Evaluation Rule to the Fourth Circuit, where it was consolidated with the Alliance of Nurses Petitioners' petition. *See* Notice of Appeal Transfer, No. 17-2464 (2d Cir.), Dkt. 32-1; Order, No. 17-1926 (4th Cir.), Dkt. 21. As of the time of this filing, this Court has yet to transfer its Risk Evaluation Rule case to the Fourth Circuit. Thus, two of the Risk Evaluation Rule cases are consolidated before the Fourth Circuit and one remains in this Court.

On September 14, EPA filed the Motion to Transfer. Although Petitioners also support review of all of the petitions in a single circuit, the interest of justice would be best served by review in this Court. Accordingly, on September 18, Petitioners filed a motion in the Fourth Circuit to transfer the Risk Evaluation Rule cases to this Court. Pet'rs' Joint Mot. To Transfer, No. 17-2464 (4th Cir.), Dkt. 26.

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[2] This Court has docketed EDF's Prioritization Rule case, *see EDF v. EPA*, No. 17-72501 (9th Cir.), but has not consolidated that case with the Safer Chemicals Petitioners' Prioritization Rule case, *see Safer Chems. Healthy Families v. EPA*, No. 17-72259 (9th Cir.). The Fourth Circuit transferred the Alliance of Nurses Petitioners' Prioritization Rule case to this Court but it has not yet been docketed.

LEGAL STANDARD

Under 28 U.S.C. § 2112(a)(5), this Court has discretion to transfer the consolidated petitions challenging the Risk Evaluation Rule to "any other court of appeals" "[f]or the convenience of the parties in the interest of justice."[3] In weighing the convenience of the parties in the interest of justice, courts consider: the aggrieved parties' choice of forum, judicial economy, the avoidance of inconsistent judgments, the physical location of the parties, whether the court has previously considered identical issues, and fairness. *See, e.g., Am. Pub. Gas Ass'n v. Fed. Power Comm'n*, 555 F.2d 852, 857-58 & n.5 (D.C. Cir. 1976); *ITT World Commc'ns, Inc. v. F.C.C.*, 621 F.2d 1201, 1208 (2d Cir. 1980). "It is a well recognized principle that the interests of justice favor placing the adjudication in the forum chosen by the party that is significantly aggrieved by the agency's decision." *ITT*, 621 F.2d at 1208; *see also Newsweek, Inc. v. U.S. Postal Serv.*, 652 F.2d 239, 243 (2d Cir. 1981) ("The interest of justice favors retention of jurisdiction in the forum chosen by an aggrieved party where … Congress has given him a choice.").

As a general rule, "[t]he defendant must make a strong showing of

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[3] This standard has remained virtually unchanged since first enacted in 1958. *Compare* Pub. L. No. 85-791 § 2 (allowing transfers "[f]or the convenience of the parties in the interest of justice"), *with* 28 U.S.C. § 2112(a)(5) (same language). As a result, cases that predate the creation of the JPML still carry precedential weight.

inconvenience to warrant upsetting the plaintiff's choice of forum." *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986) (discussing similar provision governing transfers in 28 U.S.C. § 1404(a)).

ARGUMENT

I. Petitioners' choice of forum weighs strongly in favor of denying EPA's Motion to Transfer

As the aggrieved parties, Petitioners' choice of forum is the predominant factor in weighing the convenience of the parties in the interests of justice. *Decker Coal Co.*, 805 F.2d at 843 (burden is on the defendant to upset plaintiff's choice of forum); *see ITT*, 621 F.2d at 1208; *Am. Pub. Gas Ass'n*, 555 F.2d at 858 n.5; *J.L. Simmons Co. v. N.L.R.B.*, 425 F.2d 52, 55 (7th Cir. 1970). Eleven Petitioners joined the Safer Chemicals petitions for review and chose this Court to hear these challenges, far more than the three Petitioners that chose the Fourth Circuit. Therefore, the convenience of the parties in the interests of justice favors transfer to the preferred venue of the majority of Petitioners.

Petitioners' choice of forum is entitled to particular respect in light of the statutes governing forum selection. Congress designed 28 U.S.C. § 2112 "to prevent federal agencies from selecting the forum for review of its [sic] decisions," *Newsweek*, 652 F.2d at 243 n.2, so transfer to the Fourth Circuit over Petitioners' objections (or over the initial choice of the eleven Safer Chemicals Petitioners) would defeat the statutory purpose. TSCA's judicial review provision also

expressly gives an aggrieved party a choice between review in his or her home forum and the D.C. Circuit. 15 U.S.C. § 2618(a)(1)(A). "[W]here, as here, Congress has given [a petitioner] a choice [of forum]" "[t]he interest of justice favors retention of jurisdiction in the forum chosen." *Newsweek*, 652 F.2d at 243.

II. EPA has not made a "strong showing" that transfer to the Fourth Circuit is warranted

A. That the interest of justice favors review of both TSCA rules in a single court does not show that the Fourth Circuit is a more appropriate forum than the Ninth Circuit

Petitioners and EPA agree that it would serve the interest of justice for a single circuit to hear the challenges to both the Risk Evaluation and Prioritization Rules.[4] However, this factor simply favors hearing the case in one circuit or the other; it does not favor either circuit *over* the other. Consequently, this factor is neutral and it cannot weigh against the Petitioners' choice of forum.

The Prioritization and Risk Evaluation Rules govern interrelated aspects of EPA's processes under TSCA for selecting chemicals for risk evaluation and for conducting risk evaluations. *See* 15 U.S.C. § 2605(b). The petitions for review challenging both rules involve identical parties, and their resolution will involve

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[4] EPA "believes it would be in the interest of justice and judicial efficiency for challenges to both rules to be litigated in the same court." Not. to JPML of Multicircuit Pets. for Review 4, No. 17-1926 (4th Cir.), Dkt. 15-2; *see* Motion to Transfer at 7. Petitioners agree. *See* Pet. for Review 2, No. 17-1926 (4th Cir.), Dkt. 3-1 (stating that consolidation of challenges to both rules will "promote judicial economy"); Pet'rs' Joint Mot. to Transfer, No 17-1926 (4th Cir), Dkt. 26.

judicial interpretation of some of the same statutory terms. *See* Pet. for Review, No. 17-72260 (9th Cir.), Dkt. 1-5 (noting that the petitions for review of both rules are "related"). Review in a single court would thus avoid inconsistent outcomes and conserve judicial resources. *Cf. Va. Elec. & Power Co. v. U.S. EPA*, 655 F.2d 534, 536-37 (4th Cir. 1981) (granting transfer to enable consolidated review of "manifestly interrelated" rules to promote "judicial economy").

However, the fact that the cases should be heard together in one circuit does not disfavor hearing them in *this* Circuit. The reasons EPA gives for hearing both cases in the Fourth Circuit apply with equal force to hearing both cases in this Court, and thus do not weigh in favor of transfer. Indeed, Petitioners have asked the Fourth Circuit to transfer the cases pending there to this Court. That outcome would equally promote judicial economy and avoid inconsistent outcomes.[5]

B. The location of counsel does not weigh in favor of transfer

EPA's argument that the location of counsel favors hearing this case in the

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[5] Any contention by EPA that its transfer motion takes precedence over Petitioners' Fourth Circuit transfer motion, because EPA filed its motion two business days earlier, is misplaced. Federal comity "allow[s] a district court to decline *jurisdiction* over an action where a complaint involving the same parties and issues has already been filed in another district." *Barapind v. Reno*, 225 F.3d 1100, 1109 (9th Cir. 2000) (emphasis added); *see Pacesetter Sys., Inc. v. Medtronic, Inc.*, 678 F.2d 93, 94-95 (9th Cir. 1982). The doctrine has no application here, where two motions raising similar issues are pending in different Courts of Appeals in cases involving two different challenges to agency action.

Fourth Circuit misses the mark. The statute speaks to "the convenience of the *parties*," 28 U.S.C. § 2112(a)(5) (emphasis added), which "center[s] around the physical location of the parties," not their attorneys. *ITT*, 621 F.2d at 1208; *Newsweek*, 652 F.2d at 243. The fact that the parties' *counsel* may be nearer to Richmond than San Francisco is irrelevant.[6]

Even if this Court finds that the location of counsel is relevant, any added convenience to counsel is negligible. This is not a case where "most" or even some of the parties have counsel in the forum proposed by EPA. *Compare 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). Here, none of the parties has counsel of record in Richmond, meaning that travel by counsel is required regardless of which forum is chosen. In any event, this should not be a significant factor in a case that is likely to require no more than a single trip for oral argument.

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[6] To the extent the Court considers the physical location of the parties, that factor slightly favors review in this Court. Three Petitioners–Alaska Community Action Against Toxics, Asbestos Disease Awareness Organization, and Sierra Club–are headquartered in the Ninth Circuit, whereas only two Petitioners–Alliance of Nurses for Healthy Environments and Cape Fear River Watch–are headquartered in the Fourth Circuit. *Cf. ITT*, 621 F.2d at 1208 (the fact that three of the five parties were headquartered in the proposed forum weighed in favor of hearing the case in that forum).

C. Prompt resolution of the issues does not weigh in favor of transfer

EPA's contention that the Ninth Circuit is simply too slow to hear a case of this magnitude is misplaced. If the challenges to both the Prioritization and Risk Evaluation Rules were heard in this Court, EPA or Petitioners could seek expedited hearing on both sets of petitions. 9th Cir. R. 27-12. This Court is as likely as any other Circuit to resolve important issues in a timely fashion. *See Am. Pub. Gas Ass'n*, 555 F.2d at 858 n.5 (explaining that "desirability of a prompt decision in no way indicates which circuit should make it," because "any other circuit would be equally alert" to the need for a prompt decision). Indeed, this Court has previously expedited environmental issues of national import and resolved them in an appropriate timeframe. *See, e.g.*, *NRDC v. EPA*, No. 12-70268 (9th Cir.), Dkt. 27 at 2 (granting petitioner's unopposed motion to expedite a case involving registration of a pesticide).

In sum, none of the factors EPA relies on weigh in favor of transfer to the Fourth Circuit. EPA has not made the "strong showing" necessary "to warrant upsetting the [Petitioners'] choice of forum." *See Decker Coal*, 805 F.2d at 843. Accordingly, the convenience of the parties in the interest of justice does not warrant transfer to the Fourth Circuit, and the Court should deny EPA's Motion to Transfer.

III. Tie-breaking factors weigh against transfer to the Fourth Circuit

If this Court determines that the convenience of the parties in the interest of justice does not resolve the question of the most appropriate venue, tie-breaking factors weigh against transfer to the Fourth Circuit. First, as a general rule, to the extent that the "inconvenience of the alternative venues is comparable" or there is otherwise no basis to choose between venues, "the tie is awarded to the plaintiff." *See In re Nat'l Presto Indus., Inc.*, 347 F.3d 662, 665 (7th Cir. 2003) (discussing venue transfers between district courts). Here, the choice of all Petitioners is now the Ninth Circuit.

Second, if the Court concludes that no other factor is dispositive, it may apply the first-to-file rule, which gives preference to the circuit where petitions are first filed, as a useful and objective approach to selecting the most appropriate venue. *See, e.g.*, *Va. Elec. & Power Co. v. U.S. EPA*, 610 F.2d 187, 188 (4th Cir. 1979) (explaining first-to-file rule under prior version of section 2112(a)); *see also J.P. Stevens & Co. v. NLRB*, 592 F.2d 1237, 1239 (4th Cir. 1979) ("The consensus among those courts that have considered the question … is that the court of first filing should determine the validity of the petition filed in that court.").

To be sure, Congress moved away from the first-to-file rule when it amended 28 U.S.C. § 2112(a) to require the JPML to randomly select a circuit from among those in which a petition was filed within ten days of the challenged

rule's promulgation. Nonetheless, the current version of section 2112 preserves the first-to-file rule to resolve situations not explicitly resolved by the ten-day window: "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 … shall file the record in the court in which proceedings with respect to the order were first instituted." 28 U.S.C. § 2112(a)(1). While this provision does not directly govern under these circumstances (involving two sets of petitions challenging two different, but closely related rules), it indicates that Congress continues to view the first-to-file rule as a reasonable basis for choosing a forum when no other factor is controlling.

Applying this principle here favors denying EPA's Motion to Transfer. The Safer Chemicals Petitioners filed their petitions challenging the Risk Evaluation and Prioritization Rules in the Ninth Circuit on August 10, whereas the Second Circuit and Fourth Circuit petitions were filed on August 11. This approach provides a useful, objective basis for selecting one court over the other.

IV. EPA's request to hold this case in abeyance is moot

EPA's request that the Court hold this case in abeyance is moot, because the case was automatically stayed upon the filing of EPA's Motion to Transfer, and the stay remains in effect "pending the Court's disposition of the motion," pursuant to 9th Cir. R. 27-11(a)(2). To the extent EPA seeks an abeyance of these cases after

this Court resolves the Motion, it can seek appropriate relief at that time.

CONCLUSION

For the foregoing reasons, this Court should deny EPA's Motion to Transfer.

Dated: September 25, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on September 25, 2017, the foregoing document was served on all parties' counsel of record through the CM/ECF system.

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