IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COUNTY OF SANTA CLARA; SANTA CLARA COUNTY CENTRAL FIRE PROTECTION DISTRICT, *et al.* *Petitioners*, v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *Respondents*.	Case No. 18-70506 (Lead) *Consolidated with Nos. 18-70510, 18-70679, 18-70680, 18-70686, 18-70691, 18-70692, 18-70695, 18-70697, 18-70698, 18-70699, 18-70700, 18-70701, 18-70702, 18-70703*

MOTION TO TRANSFER CASE TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Pursuant to 28 U.S.C. § 2112(a)(5) and Circuit Rule 27-11, Petitioners Mozilla Corporation, Coalition for Internet Openness, Etsy, Benton Foundation, Free Press, Vimeo, Public Knowledge, National Hispanic Media Coalition, Open Technology Institute, Center for Democracy & Technology, Ad Hoc Telecom Users Committee, NTCH Inc., the States of New York, California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Mississippi, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and the District of Columbia ("Petitioners") hereby respectfully move to transfer their consolidated cases, any other cases that may be consolidated with their cases, and any other petitions for review concerning the same agency order as may be filed, to the U.S.

Court of Appeals for the District of Columbia ("D.C. Circuit"). Transfer is warranted by all of the factors considered by this Court, including the convenience of the parties, the choice of forum made by the majority of the petitioners, and the fact that this Court's sister Court for the D.C. Circuit has considered virtually identical issues in inter-related proceedings. Specifically, this case is the fourth, "follow-on" phase in the review of the Federal Communications Commission's "network neutrality" actions; all prior phases have been adjudicated by the D.C. Circuit. That Court has issued four decisions in these prior three proceedings, variously affirming, or disagreeing with, the FCC's actions. Transfer is warranted in the interest of continuity. The only two petitioners who have not joined this motion do not object to the requested transfer. Respondents Federal Communications Commission and the United States of America also do not object to the requested transfer.

BACKGROUND

Petitioners in this appeal challenge the final order of the Federal Communications Commission ("FCC") captioned in Restoring Internet Freedom, *Declaratory Ruling, Report and Order, and Order*, 33 FCC Rcd. 311 (2018) ("Order"). In the Order, the FCC repealed the network neutrality protections that the FCC promulgated in 2015. *See* Protecting and Promoting the Open Internet, *Report and Order On Remand, Declaratory Ruling, and Order*, 30 FCC Rcd. 5601

(2015), *aff'd sub nom. United States Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016).

Multiple parties filed petitions for review of the Order, alleging, *inter alia*, that the Order violates federal law, including, but not limited to, the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.*, as amended, and the Telecommunications Act of 1996; is arbitrary, capricious, and an abuse of discretion within the meaning of the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*; and is otherwise contrary to law. *See* Notice of Multicircuit Petitions for Review, ECF No. 10, Attachment 1 (Mar. 8, 2018). Ten parties filed petitions in the D.C. Circuit, and two parties filed in this Court. *Id*. The FCC on March 7, 2018 notified the Judicial Panel on Multidistrict Litigation that it had received petitions for review in more than one circuit and requested consolidation pursuant to 28 U.S.C. § 2112. *Id*. Another three parties filed timely petitions with the D.C. Circuit after the close of the 10-day lottery period.

The Judicial Panel on Multidistrict Litigation on March 7, 2018 chose this Court through lottery. *See* Consolidation Order Designating the Ninth Circuit Court of Appeals as the Circuit in which the Petitions for Review are Consolidated, ECF No. 11 (Mar. 8, 2018).

ARGUMENT

Under 28 U.S.C. § 2112(a)(5), this Court may transfer cases consolidated by the Judicial Panel on Multidistrict Litigation to another United States Court of Appeals "[f]or the convenience of the parties in the interest of justice." This Court has recognized that it has the inherent power to transfer a case to another circuit. *See Pearce v. Department of Labor*, 603 F.2d 763, 771 (9th Cir. 1979). There are several reasons why the Court should transfer this case to the D.C. Circuit.

First, the convenience of the parties weighs in favor of such transfer. As this Court has held, the predominant factor in weighing the convenience of the parties in the interests of justice is the choice of forum of the petitioners. *See Decker Coal Co. v. Commonwealth Edison Co*., 805 F.2d 834, 843 (9th Cir. 1986). Here, thirteen of fifteen petitioners filed in the D.C. Circuit. Further, the two petitioners that filed in the Ninth Circuit—the California Public Utilities Commission and the County of Santa Clara—have informed us that they do not oppose transfer to the D.C. Circuit. Thus nearly all of the petitioners agree, and none opposes, that the D.C. Circuit is the most convenient forum for this matter. *See Newsweek, Inc. v. U.S. Postal Service*, 652 F.2d 239, 243 (2d Cir. 1981). Finally, neither respondent opposes the requested transfer.

Second, most of the petitioners reside or have counsel of record in the D.C. Circuit. *See ITT World Communications, Inc. v. FCC*, 621 F.2d 1201, 1208 (2d

Cir. 1980) ("Considerations of convenience center around the physical location of the parties."). Here, petitioners Free Press, New America-Open Technology Institute, Public Knowledge, Ad Hoc Telecom Users Committee, and Center for Democracy & Technology all reside in the D.C. Circuit. Of the remaining petitioners, Vimeo, Mozilla Corporation, Etsy, Coalition for Internet Openness, Benton Foundation and National Hispanic Media Coalition have counsel of record located in the D.C. Circuit. *See Eschelon Telecom, Inc. v. FCC*, 345 F.3d 682, 683 n.1 (8th Cir. 2003) (transferring a case to the D.C. Circuit in part because "most of the parties have D.C. counsel of record"). And the remaining petitioners that could have filed where they reside rather chose to file in the D.C. Circuit. And, of course, respondent FCC is located in the D.C. Circuit.

Third, transfer is warranted where, as here, the D.C. Circuit has considered identical and interconnected issues that are the subject of this litigation. *See ITT World Communications, Inc.*, 621 F.2d at 1208 ("A second factor favoring this Court's jurisdiction is its previous consideration of virtually the identical issue."). Here, the Order is the latest, "follow-on" chapter in over half a decade of engagement between and among the FCC, many of the current petitioners, and the D.C. Circuit, as the Order itself recognizes in multiple instances. *See, e.g.*, Order, 33 FCC Rcd. at 321 ¶ 29 n.78. The D.C. Circuit has heard three challenges to the FCC's network neutrality rules over the years that are directly connected to the

Order being challenged as the subject of this appeal and has issued four decisions. In these decisions, the D.C. Circuit has variously affirmed, or disagreed with, the FCC. The FCC in turn has had to account for these decisions in the next phase of its network neutrality deliberations. In 2010, the D.C. Circuit held that the FCC had failed to justify its authority to adopt an order prohibiting Comcast from throttling certain Internet traffic. *See Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010). In response, the FCC subsequently promulgated network neutrality rules based on guidance from *Comcast*. *See* Preserving the Open Internet, *Report and Order*, 25 FCC Rcd. 17905 (2010). These rules again were challenged in and eventually overturned by the D.C. Circuit, which supported the FCC's rationale for the rules, but ultimately vacated them because the rules imposed common carrier obligations on broadband ISPs without taking the necessary step of classifying the ISPs as common carriers. *See Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

Closely following the D.C. Circuit's teaching from the two previous decisions—each of which had been authored by Judge Tatel—the FCC subsequently reclassified ISPs as common carriers and implemented rules to ensure network neutrality. *See* Protecting and Promoting the Open Internet, *Report and Order On Remand, Declaratory Ruling, and Order*, 30 FCC Rcd. 5601 (2015). When the D.C. Circuit once again heard the challenge to the FCC's rules, the rules were upheld in an opinion co-authored by Judge Tatel (for the third time) and by

Judge Srinivasan. *See United States Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016). Finally, on May 1, 2017, the D.C. Circuit denied petitions for rehearing en banc. *United States Telecom Ass'n v. FCC*, 855 F.3d 381 (D.C. Cir. 2017). Several parties have filed petitions for certiorari with the Supreme Court. *See, e.g.*, Petition for Writ of Certiorari, *United States Telecom Ass'n v. FCC*, 825 F.3d 674 (No. 17-504).

The current Order largely repeals the 2015 rules—in doing so, the Order grapples with, and attempts to account for, the D.C. Circuit's decisions in *Comcast*, *Verizon*, and *USTA*, citing those opinions no less than forty-seven times. In other words, this is a case where essentially the same parties are seeking review of the same essential issues that have arisen in multiple inter-related proceedings. *See ITT World Communications*, 621 F.2d at 1208 ("The relationship between the present case and the previous case decided by this Court is sufficiently close for the interest in consistent results to come into play. While the two cases do not constitute the same proceeding, they do involve the same parties, the same statutory provision, and the same essential issue.").

In sum, this is clearly a case where an "inter-related proceeding" was previously under review in a court of appeals, and is now brought for review "in a follow-on phase." *See Public Service Commission for New York v. Federal Power Commission*, 472 F.2d 1270, 1272 (D.C. Cir. 1972). The D.C. Circuit is

thoroughly familiar with the "background of the controversy," making transfer appropriate. *See Eastern Air Lines, Inc. v. Civil Aeronautics Board*, 354 F.2d 507, 510 (D.C. Cir. 1965) ("[O]ne factor that has considerable weight in the guidance of judicial discretion is the desirability of transfer to a circuit whose judges are familiar with the background of the controversy through review of the same or related proceedings."). By transferring to the D.C. Circuit, the Court will ensure that "anomalous results" from having a different circuit review a closely-related matter will be avoided. *Cf. Midwest Television Inc. v. FCC*, 364 F.2d 674, 676 (D.C. Cir. 1966).

CONCLUSION

For the foregoing reasons, we respectfully request that the Court grant our motion to transfer this case to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Georgios Leris, hereby certify that on March 16, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ *Georgios Leris*
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