No. 24-86

IN THE

Supreme Court of the United States

CAREER COUNSELING, INC.,
DBA SNELLING STAFFING SERVICES,

Petitioner,

v.

AMERIFACTORS FINANCIAL GROUP, LLC,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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This case presents two significant questions that call for clarification from this Court: (1) whether Rule 23(b)(3) carries with it an unwritten requirement that the plaintiff show an administratively feasible way to "identify" class members; and (2) whether the Telephone Consumer Protection Act, 47 U.S.C. § 227(a)(3), is limited to traditional "stand-alone" fax machines, leaving consumers unprotected if they receive their faxes via an "online fax service."

Respondent concedes that there is a split in authority on the first question, at least between the Third Circuit (which imposes the heightened "ascertainability" standard) and the Seventh, Ninth, and Eleventh Circuits (which reject this "extratextual" requirement). BIO 16. Respondent argues there is no split on the second question because the Sixth Circuit did not address "online fax services" when it ruled (contrary to the Fourth Circuit's decision in this case) that users of such services need not be excluded from the certified class in *Lyngaas v. Curaden AG*, 992 F.3d 412, 426–27 (6th Cir. 2021). Respondent's arguments present no barrier to review, and the Court should grant the petition.

A. Respondent submits that the Court's answer to the first question presented "would not affect the outcome of this case" for two reasons. BIO 11. First, respondent claims that the Fourth Circuit did not require Career Counseling to demonstrate an "administratively feasible" method for identifying class members, and merely held Career Counseling "had not provided a reliable method of identifying class members." BIO 13. Regardless of

whether phrased as "feasible" or "reliable," the court required Career Counseling to show a method to *identify* class members, a requirement that is not part of the traditional ascertainability standard, which is solely concerned with whether the class is defined by "objective criteria." *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 662 (7th Cir. 2015).

Respondent argues there is no split because every circuit requires that a class be "ascertainable." BIO 12–13. That is of no help because what it means to be "ascertainable" varies from circuit to circuit. Does "ascertainable" mean that members of a class must be "identifiable," as the Fourth Circuit held in the decision below? App.16a. Or does "ascertainable" merely mean "defined by objective criteria," such that a court could determine whether a person who files suit in the future is a class member and thus subject to res judicata, as the Seventh, Ninth, and Eleventh Circuits have held? *See Mullins*, 795 F.3d at 662; *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1133 (9th Cir. 2017); *Cherry v. Dometic Corp.*, 986 F.3d 1296, 1302 (11th Cir. 2021). In assuming that every circuit treats "ascertainable" as synonymous with "identifiable," Respondent ignores the very real differences between the circuits.

Second, Respondent argues this Court should deny review of the ascertainability issue because, in Respondent's view, class certification should alternatively be denied based on a lack of Rule 23(b)(3) predominance of common issues. BIO 13–15. Career Counseling disagrees. *See Douglas Phillip Brust, D.C., P.C. v. Opensided MRI of St. Louis LLC*, 343 F.R.D. 581, 593–94 (E.D. Mo. 2023) (holding all-fax-recipients class satisfied Rule 23(b)(3))

Scoma Chiropractic, P.A. v. Dental Equities, LLC, No. 2:16-CV-41-JLB-MRM, 2021 WL 6105590, at *11–13 (M.D. Fla. Dec. 23, 2021) (holding alternative stand-alone fax machine class satisfied Rule 23(b)(3)).

However, the Rule 23(b)(3) determination is for the district court to decide in the first instance. This is a Court "review," not of "first view." *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 588 U.S. 1, 8 (2019) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718, n.7 (2005)). The district court in this case held the *written* prerequisites of Rule 23(a) were satisfied, App.48a–49a, and both the district court and the Fourth Circuit expressly declined to consider whether Rule 23(b)(3) was satisfied. App.58a; App.18a, n.6. This Court should reverse and remand with instructions for the district court to finish the Rule 23 analysis.

B. With respect to the second question presented, Respondent argues that the Sixth Circuit's analysis in *Lyngaas*, 992 F.3d at 426, was limited to "efaxes," and that "*Lyngaas* did not say that its discussion of efaxes would apply to online fax services." BIO at 26, n.3. Respondent ignores the discussion regarding whether users of "online fax services" were required to be excluded from the class definition. 992 F.3d at 427.

The Sixth Circuit concluded that users of "online fax services" were properly included in the class definition because they are covered under the "plain language" of the TCPA. The Sixth Circuit squarely rejected the notion that such users should be excluded from the class of all fax recipients. *See Brust*, 343 F.R.D. at 588 (agreeing with *Lyngaas* and holding the TCPA "encompasses faxes

received via online fax services"). There is a clear conflict between the Sixth and Fourth Circuits on this pure issue of law, and the Court should grant review to resolve the split.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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