

No. 17-803

IN THE
Supreme Court of the United States

SANDUSKY WELLNESS CENTER, LLC,
Petitioner,
v.

ASD SPECIALTY HEALTHCARE, LLC,
Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit**

**BRIEF OF RESPONDENT IN OPPOSITION TO
THE PETITION FOR WRIT OF CERTIORARI**

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QUESTIONS PRESENTED

1. The district court found that individual issues of consent predominate over common issues and preclude class certification in this case, notwithstanding the FCC's Solicited Fax Rule (requiring solicited faxes to include opt-out notices),¹ because the FCC specifically waived the Rule for Besse.² On appeal, the Sixth Circuit concluded that it was bound by the D.C. Circuit's intervening decision in *Bais Yaakov of Spring Valley v. FCC*, 852 F.3d 1078 (D.C. Cir. 2017), which invalidated the Solicited Fax Rule, but the Sixth Circuit also agreed with the D.C. Circuit that the FCC exceeded its authority in promulgating the Solicited Fax Rule. Should the Court grant review of the Sixth Circuit's decision to follow *Bais Yaakov* when the court expressly agreed with the D.C. Circuit's reasoning and, moreover, the district court can be affirmed on an alternative basis – *i.e.*, that the Solicited Fax Rule, even if valid, is inapplicable here due to the waiver the FCC granted to Besse?

2. There are no fax logs that identify which of the intended faxes were successfully sent. The district court concluded that the individualized inquiries necessary to determine which transmissions were successful presented predominance problems and numerous practical concerns that warranted denial of class certification. The Sixth Circuit affirmed, concluding that even if it applied the superiority standard endorsed by Petitioner, class certification would remain inappropriate. Should this Court grant review when the Sixth Circuit already applied the standard advocated by Petitioner?

¹ As discussed further below, the terms “Solicited Fax Rule” and “Rule” refer to 47 C.F.R. § 64.1200(a)(4)(iv).

² For ease of reference and consistency, Respondent ASD Specialty Healthcare, LLC d/b/a Besse Medical is referred to herein as “Besse.”

**PARTIES TO THE PROCEEDING
AND RULE 29.6 DISCLOSURE**

Petitioner, which was Plaintiff below, is Sandusky Wellness Center, LLC (“Petitioner”).

Respondent, which was one of the Defendants below, is ASD Specialty Healthcare, LLC d/b/a Besse Medical. (ASD Specialty Healthcare, LLC was previously incorporated as a corporation with the name ASD Specialty Healthcare, Inc., but converted to a limited liability company on March 31, 2017.) ASD Specialty Healthcare, LLC is wholly-owned by AmerisourceBergen Specialty Group, LLC, which is wholly-owned by AmerisourceBergen Drug Corporation, which is wholly-owned by AmerisourceBergen Services Corporation, which is wholly-owned by AmerisourceBergen Corporation, which is a publicly-traded company. Walgreens Boots Alliance, Inc., a publicly-held company traded on the NASDAQ stock market under the symbol WBA, owns more than 10% of AmerisourceBergen Corporation’s stock. No other publicly-held company owns more than 10% of AmerisourceBergen Corporation’s stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE	ii
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	1
BACKGROUND.....	5
A. TCPA Regulations at Issue	5
B. Rule 23 Requirements	7
C. District Court Proceedings	8
D. Appellate Court Proceedings.....	9
REASONS FOR DENYING THE WRIT	10
I. REVIEW IS NOT WARRANTED BECAUSE INDIVIDUALIZED ISSUES OF CONSENT PRECLUDE CERTI- FICATION.....	11
A. The fates of <i>Bais Yaakov</i> and the Solicited Fax Rule do not impact the outcome here.....	11
B. The Sixth Circuit’s decision to follow <i>Bais Yaakov</i> was correct and there is no circuit split on this issue	13

TABLE OF CONTENTS—Continued

	Page
II. REVIEW IS NOT WARRANTED BECAUSE PETITIONER CANNOT MEET THE RULE 23 REQUIREMENTS FOR CERTIFICATION IN THE ABSENCE OF CLASS-WIDE MEANS OF DETERMINING WHICH FAXES WERE SUCCESSFULLY SENT.....	16
A. The superiority analysis advocated by Petitioner does not change the outcome.....	16
B. The role of ascertainability in the Rule 23 analysis need not be decided here	18
C. The Rule 23 class action procedural device cannot change the elements of Petitioner’s TCPA claim	19
CONCLUSION	20

TABLE OF AUTHORITIES

CASES	Page(s)
<i>Bais Yaakov of Spring Valley v. FCC</i> , 852 F.3d 1078 (D.C. Cir. 2017).....	<i>passim</i>
<i>Briseno v. ConAgra Foods, Inc.</i> , 844 F.3d 1121 (9th Cir. 2017).....	19
<i>Brizendine v. Cotter & Co.</i> , 4 F.3d 457 (7th Cir. 1993), <i>rev'd</i> , 511 U.S. 1103 (1994).....	14-15
<i>Brotherhood of Locomotive Eng'rs v.</i> <i>Boston & Maine Corp.</i> , 788 F.2d 794 (1st Cir. 1986)	15
<i>Carrera v. Bayer Corp.</i> , 727 F.3d 300 (3d Cir. 2013)	19
<i>GTE South Inc. v. Morrison</i> , 199 F.3d 733 (4th Cir. 1999).....	14
<i>MCI Telecommunications Corp. v.</i> <i>U.S. West Communications</i> , 204 F.3d 1262 (9th Cir. 2000).....	14
<i>Menowitz v. Brown</i> , 991 F.2d 36 (2d Cir. 1993)	13
<i>Mullins v. Direct Digital, LLC</i> , 795 F.3d 654 (7th Cir. 2016).....	18-19
<i>Peck v. Cingular Wireless, LLC</i> , 535 F.3d 1053 (9th Cir. 2008).....	13-14
<i>Rikos v. Procter & Gamble Co.</i> , 799 F.3d 497 (6th Cir. 2015).....	19

TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Wal-Mart Stores, Inc. v. Dukes</i> , 564 U.S. 338 (2011).....	20
<i>Westinghouse Electric Corp. v.</i> <i>U.S. Nuclear Regulatory Comm’n</i> , 598 F.2d 759 (3d Cir. 1979)	14
FEDERAL STATUTES	
28 U.S.C. § 2112	14, 15
28 U.S.C. § 2112(a)(3).....	13
28 U.S.C. § 2342(1).....	13, 14
47 U.S.C. § 227	<i>passim</i>
47 U.S.C. § 227(a)(5).....	5
47 U.S.C. § 227(b)(1)(C).....	5-6
47 U.S.C. § 227(b)(1)(C)(i)	6
47 U.S.C. § 227(b)(1)(C)(iii)	6
47 U.S.C. § 227(b)(2)(D)	6
47 U.S.C. § 402(a).....	14
FEDERAL RULES	
Fed. R. Civ. P. 23	<i>passim</i>
Fed. R. Civ. P. 23(a).....	7, 8
Fed. R. Civ. P. 23(b)(3)	<i>passim</i>

TABLE OF AUTHORITIES—Continued

FEDERAL REGULATIONS	Page(s)
47 C.F.R. § 64.1200(a)(4)(i)-(iii)	6
47 C.F.R. § 64.1200(a)(4)(iv)	<i>passim</i>
OTHER AUTHORITIES	
<i>In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991</i> , 21 F.C.C.R. 3787, 3812 (F.C.C. Apr. 6, 2006)	6
<i>In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991</i> , 29 F.C.C.R. 13998, 14009 (F.C.C. Oct. 30, 2014)	7
<i>In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991</i> , 30 F.C.C.R. 8598 (F.C.C. Aug. 28, 2015)	7
Statement of FCC Chairman Ajit Pai on the Latest D.C. Circuit Rebuke of FCC Overreach (Mar. 31, 2017), <i>available at</i> http://bit.ly/2q8aAYh	15
Statement of Commissioner Michael O’Rielly on Court Rejection of FCC Anda Order (Mar. 31, 2017), <i>available at</i> http://bit.ly/ 2qty6Ba	15

BRIEF OF RESPONDENT IN OPPOSITION

Petitioner seeks the Court's review of the decisions of the U.S. District Court for the Northern District of Ohio and the U.S. Court of Appeals for the Sixth Circuit, both of which found that certification of Petitioner's claims in this consumer class action would be inappropriate on the particular facts of this case. The Petition should be denied for two reasons. First, Petitioner's asserted grounds for review are not outcome-determinative, as the findings below would hold even if the Court were to resolve the questions presented in Petitioner's favor. Second, Petitioner has identified no legal error or circuit split implicated by these proceedings that would justify review of the district court's and the Sixth Circuit's fact-dependent opinions.

STATEMENT OF THE CASE

This case is about faxes. Specifically, a single-page fax relating to the pharmaceutical Prolia,¹ which a third party fax broadcaster sent on behalf of Besse in June 2010 (the "Prolia Fax"). Pet. App. 31a-32a. Three years after purportedly receiving the Prolia Fax, Petitioner brought a class action lawsuit against Besse, seeking tens of millions of dollars in damages under the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 (the "TCPA").² See Pet. App. 31a, 35a;

¹ Prolia is a prescription-only injectable drug used to treat post-menopausal osteoporosis. Pet. App. 31a.

² Petitioner's damages model is explained at page 27 of the Petition. Petitioner seeks between \$500 and \$1,500 for each of the 40,343 faxes that were successfully sent, for a total recovery of between \$20,171,500 and \$60,514,500 for a single fax campaign. Pet. at 27; *see also* Pet. App. 5a.

Class Action Complaint, RE 1. Discovery revealed two factual points dispositive of Petitioner's claims.

First, while the broadcaster attempted to send the Prolia Fax to 53,502 fax numbers, only 40,343 of the faxes were successfully transmitted. Pet. App. 31a-32a. The parties agree that the 13,159 individuals to whom the fax was not transmitted do not have valid claims. Pet. App. 34a. But because Petitioner filed its lawsuit more than three years after transmission of the Prolia Fax—well beyond the expiration of Besse's document retention policy—any fax logs identifying the successful transmissions were no longer in existence (if they ever were).³ Pet. App. 34a-35a. In its motion for class certification, Petitioner was unable to advance an alternate class-wide method of determining which faxes were successfully transmitted, and the district court concluded that, in the absence of fax logs, individualized inquiries into each of the 50,000+ intended fax transmissions would be necessary, thereby precluding certification. Pet. App. 36a-38a.

Second, the target list of fax recipients included numerous current and former Besse customers, many

³ Petitioner misrepresents the record when it states on page 4 of its Petition that "WestFax also emailed Defendant a detailed fax-transmission log showing each individual transmission by target fax number and whether the transmission was successful. (Pet. App. 8a). But Defendant and WestFax say they destroyed the log before this suit was filed. (*Id.*)" Petitioner's sole authority for this assertion is page 8a of the Appendix, where the Sixth Circuit states that "the fax logs no longer exist." There is no evidence in the record that a fax log ever existed, let alone any admission that it was destroyed. See Besse Decl., ¶ 8, APX 0002 (filed under seal); Besse 30(b)(6) Dep., APX 0142 (filed under seal). As the district court observed, "[a]ny fax logs Besse received from Westfax at the time of the 2010 fax were gone by the time Sandusky initiated this lawsuit in 2013." Pet. App. 35a.

of whom consented to receive faxes from Besse. Pet. App. 39a-40a. But determining which recipients of the Prolia Fax consented to receive the fax would entail manually cross-checking 450,000 potential consent forms against each of the 40,343 recipients (if they could be identified) – an analysis the Sixth Circuit concluded “would result in the exact ‘myriad mini-trials’ that Rule 23(b)(3) seeks to prevent.” Pet. App. 20a. Petitioner posited that no such individual inquiries would be necessary because the Prolia Fax allegedly failed to include the opt-out notice required by the FCC’s Solicited Fax Rule, and as a result, Besse’s liability should extend to all recipients regardless of whether they consented to receive the fax. Pet. App. 38a-39a. The district court disagreed and denied certification, appropriately recognizing that the FCC granted Besse a waiver of the Solicited Fax Rule, meaning that Besse was not required to include an opt-out notice on faxes sent to recipients who consented to receive faxes. Accordingly, the district court concluded that individual inquiries into each class member’s consent would, in fact, be necessary. Pet. App. 38a-40a.

Petitioner appealed the district court’s denial of certification to the Sixth Circuit, and while that appeal was pending, the D.C. Circuit issued its order in *Bais Yaakov* striking down the Solicited Fax Rule. See Pet. App. 6a-7a. The Sixth Circuit subsequently issued its opinion affirming the district court in this case. *Id.* The Sixth Circuit agreed with the district court that individual inquiries into each putative class member’s consent precluded certification – commenting specifically that the D.C. Circuit’s intervening *Bais Yaakov* decision provided “alternative” grounds for reaching this conclusion. Pet. App. 10a. The Sixth Circuit also affirmed the district court’s denial of certification

based on Petitioner’s inability to determine—by class-wide means—which faxes were successfully transmitted, and to whom. Pet. App. 10a. The court declined Petitioner’s invitation to categorize this issue as a matter of ascertainability, predominance, or superiority, concluding that denial of certification was appropriate under any analysis. *See* Pet. App. 22a-29a. Petitioner’s request for a writ of certiorari followed.

Petitioner presents the Court with two questions for consideration. First, Petitioner contends that the Sixth Circuit should have ignored the D.C. Circuit’s *Bais Yaakov* opinion and instead applied the invalidated Solicited Fax Rule requiring opt-out notices on faxes sent with consent. Pet. at 13-21. Second, Petitioner claims that the absence of fax logs (and Petitioner’s concomitant inability to identify, by class-wide means, the class member recipients of the successfully sent faxes) should be analyzed as one aspect of the “superiority” analysis of the class mechanism under Rule 23. Pet. at 24-29. But resolution of either—or both—questions in Petitioner’s favor would not change the outcome here.

As to Petitioner’s first question, the district court presumed the validity of the Solicited Fax Rule, and concluded nonetheless that individualized issues of consent defeat certification because Besse obtained a waiver of the Rule for the relevant time period. The Sixth Circuit did not disturb this finding, and Petitioner seeks no review of it here. Accordingly, even if the Court were to reverse *Bais Yaakov*’s invalidation of the Solicited Fax Rule, and/or conclude that the Sixth Circuit should not have followed *Bais Yaakov*, the outcome of this case would not change because the district court’s denial of certification was not premised on the invalidity of the Solicited Fax

Rule – it was based on the FCC’s waiver of the Rule, and Petitioner is not seeking the Court’s review of that aspect of the lower court proceedings.

As to Petitioner’s second question, the Sixth Circuit already indulged Petitioner’s request to analyze class member identification as a matter of superiority and concluded that “[e]ven if [Petitioner] is correct that class member identity is properly analyzed under Rule 23(b)(3) superiority . . . it would not have been an abuse of discretion for the district court to conclude that class action treatment was not the superior method for resolving [Petitioner’s] claim.” Pet. App. 22a. Application of the standard endorsed by Petitioner would thus have no impact on the lower courts’ conclusions that certification is inappropriate on these facts.

That Petitioner’s presented questions are not outcome-determinative is by itself reason to deny the writ. But denial of review is also appropriate because the lower courts committed no legal errors, and there are no intercircuit disagreements implicated by this case. Petitioner’s claims, on the facts of this case, are not amenable to class treatment.

The Petition for Certiorari should be denied.

BACKGROUND

A. TCPA Regulations at Issue

The TCPA prohibits the transmission of *unsolicited* advertisements⁴ by facsimile unless certain conditions apply. See 47 U.S.C. § 227(b)(1)(C) (“It shall be

⁴ An “unsolicited advertisement” is defined to mean advertising “which is transmitted to any person without that person’s prior express invitation or permission, in writing or otherwise.” 47 U.S.C. § 227(a)(5).

unlawful for any person . . . (C) to use any telephone facsimile machine, computer, or other device to send to a telephone facsimile machine, an unsolicited advertisement, unless . . . ”); *see also* 47 C.F.R. § 64.1200(a)(4)(i)-(iii). The statute creates an exception by which senders who have an “established business relationship” (“EBR”) with a potential recipient may send an *unsolicited* fax to that recipient as long as the fax contains an opt-out notice advising the recipient how he or she can opt out of receiving future faxes. 47 U.S.C. § 227(b)(1)(C)(i), (C)(iii), (b)(2)(D); *see also* 47 C.F.R. § 64.1200(a)(4)(i)-(iii). Accordingly, the statute requires that opt-out notices be included only on *unsolicited* faxes.

In 2006, the FCC attempted to change the law. By way of the Solicited Fax Rule (47 C.F.R. § 64.1200(a)(4)(iv)), the FCC mandated that all fax transmissions—even *solicited* faxes sent with consent—contain an opt-out notice (the “Opt-Out Notice Requirement”). *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 21 F.C.C.R. 3787, 3812 (F.C.C. Apr. 6, 2006) (“2006 Order”). Soon, plaintiffs began bringing TCPA class actions based on the Solicited Fax Rule; Petitioner here, for instance, filed approximately 10 TCPA class actions based on this regulation. (*See* RE 79-1, Page ID #699-701). The Rule thus raised a “spectre of crushing liability” for businesses transmitting faxes with recipient consent, and these businesses, as well as courts, began to question whether the FCC exceeded its authority by purporting to regulate solicited faxes, which are not otherwise within the scope of the TCPA. Pet. App. 5a.

Faced with numerous TCPA class actions based on a failure to include the FCC’s specific opt-out wording,

a number of defendants filed petitions with the FCC, challenging the Solicited Fax Rule and seeking relief from application of the Rule. (FCC Order, RE 100-11, Page ID #2065-86). In 2014, the FCC issued an order clarifying and reaffirming the Solicited Fax Rule, but also recognizing the confusion surrounding the scope of the Rule that made limited waivers of the Rule appropriate. *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 29 F.C.C.R. 13998, 14009 (F.C.C. Oct. 30, 2014) (“2014 Order”). The FCC granted certain waivers as part of the 2014 Order, and directed any other affected parties to seek similar waivers by April 2015. *Id.*

Besse heeded the FCC’s advice and applied for a retroactive waiver. Pet. App. 5a-6a. On August 28, 2015, the FCC’s Consumer and Governmental Affairs Bureau granted Besse’s request and issued a waiver. *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 F.C.C.R. 8598, 8612 (F.C.C. Aug. 28, 2015) (“2015 Order”).

B. Rule 23 Requirements

Petitioner’s certification motion was brought pursuant to Federal Rule of Civil Procedure 23(b)(3). Pet. App. 33a. Accordingly, to succeed in certifying the putative class, Petitioner was required to meet all of the Rule 23(a) criteria as well as the 23(b)(3) requirements. *See* Fed. R. Civ. P. 23(b)(3).

Rule 23(a) provides that “One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

- (1) the class is so numerous that joinder of all members is impracticable;

- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the class.”

Fed. R. Civ. P. 23(a).

Rule 23(b)(3) provides, in pertinent part, that “[a] class action may be maintained if Rule 23(a) is satisfied and if . . . the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3).

C. District Court Proceedings

When the parties briefed class certification in the district court, there was no dispute that the available records demonstrated the total number of fax transmissions attempted and the total number of faxes successfully transmitted, but did not identify *which* of the attempted faxes were sent successfully and which failed. *See* Pet. App. 31a-32a, 34a-35a. The evidence also showed that some thousands of intended recipients were Besse customers, many of whom consented to receive the fax, and that this consent was expressed in a non-standardized format such that determining whether an intended recipient provided consent would require a fax number-by-fax number, document-by-document analysis of Besse’s records. *See* Pet. App. 39a-40a.

The district court held that class treatment was not appropriate on these particular facts in light of Petitioner’s inability to reliably identify which faxes

were successfully sent and the individualized inquiries that would be required to determine which of those recipients consented to receive the fax. Pet. App. 36a-41a. While the district court did not opine on the validity of the Solicited Fax Rule, it credited the FCC's waiver exempting Besse from the Rule for the time period during which the Prolia Fax was sent. Pet. App. 38a-39a.

D. Appellate Court Proceedings

The Sixth Circuit affirmed the district court, finding that denial of certification was not an abuse of discretion on these facts. Pet. App. 2a. The Sixth Circuit cited two independent bases for its decision: (1) “individualized questions of consent prevent common questions from predominating under Rule 23(b)(3)”, and (2) “the difficulty in identifying class members . . . [is] equally sufficient to preclude class certification . . .” Pet. App. 10a.

In affirming the district court's conclusion that individualized issues of consent predominate over common issues, the Sixth Circuit observed that the D.C. Circuit's invalidation of the Solicited Fax Rule in *Bais Yaakov* provided “alternative grounds” that “altogether confirm[ed] the district court's conclusion” that the need for case-by-case assessment of consent rendered certification inappropriate. Pet. App. 10a, 12a, 26a-29a. The court expressed its view that it was bound by the *Bais Yaakov* decision, but in its denial of rehearing clarified that it agreed with the D.C. Circuit's conclusion that the Solicited Fax Rule was invalid. Pet. App. 12a-14a, 43a.

The Sixth Circuit also found that the absence of fax logs—and Petitioner's resulting inability to identify which of the Prolia Faxes were “successfully sent”—

provided an independent basis for denial of certification. Pet. App. 10a. The court discussed at length the various Rule 23 requirements potentially implicated by this issue, and concluded that even if Petitioner was correct that “difficulties in identifying class members should be considered as part of the Rule 23(b)(3) superiority” analysis, the district court’s denial of certification was not an abuse of discretion. Pet. App. 26a-29a.

REASONS FOR DENYING THE WRIT

Besse’s liability to the putative class for potential TCPA violations associated with the Prolia Fax cannot be determined without conducting more than 53,000 individualized inquiries into (1) which faxes were successfully transmitted, and (2) which putative class members consented to receive the fax. Class certification is inappropriate under these particular circumstances, regardless of whether the relevant facts are considered matters of predominance, superiority, ascertainability, or any other Rule 23 requirement, and regardless of whether the D.C. Circuit’s *Bais Yaakov* decision is binding upon its sister circuits. Accordingly, because the outcome here would remain the same even if the Court were to resolve the questions presented in Petitioner’s favor, any disagreements between the circuits concerning “intercircuit stare decisis,” the existence and/or scope of an ascertainability requirement under Rule 23, or the role of class member identification in the certification analysis are not implicated in this matter. In any event, Petitioner’s legal positions lack merit, as explained below.

**I. REVIEW IS NOT WARRANTED BECAUSE
INDIVIDUALIZED ISSUES OF CONSENT
PRECLUDE CERTIFICATION.**

As noted above, the district court found that the Prolia Fax was sent to a multitude of consenting Besse customers, and those customers cannot be identified without a burdensome, manual comparison of over 450,000 pages of consent documents against the recipients' fax numbers. Pet. App. 40a. This fact precludes class certification notwithstanding *Bais Yaakov*, because Besse obtained a waiver of the Solicited Fax Rule from the FCC. Accordingly, Petitioner's contentions regarding the binding nature of *Bais Yaakov* and/or the Sixth's Circuit's jurisdiction to evaluate the Solicited Fax Rule are immaterial to the outcome here. In any event, the Sixth Circuit committed no error warranting review.

**A. The fates of *Bais Yaakov* and the
Solicited Fax Rule do not impact the
outcome here.**

The district court denied certification before *Bais Yaakov* was decided. See Pet. App. 12a. While the district court did not address the validity of the Solicited Fax Rule, it held that the Rule had no application here because Besse obtained a waiver of the Rule from the FCC for the time period during which the Prolia Fax was sent. Pet. App. 39a. As a result, the court concluded that the burdensome, individualized analysis that would be required to evaluate consent if the claims proceeded on a class basis rendered certification inappropriate. Pet. App. 38a-39a. After *Bais Yaakov* was decided, the Sixth Circuit issued its ruling affirming the district court and observing that the *Bais Yaakov* court's invalidation of the Solicited Fax Rule provided an alternative

basis upon which to affirm the district court’s conclusion that individualized issues of consent predominate over any common issues.⁵ Pet. App. 10a.

Petitioner takes the position that the Sixth Circuit should have ignored the D.C. Circuit’s *Bais Yaakov* opinion and presumed the validity of the Solicited Fax Rule. But even if it had, the result here would remain unchanged. The district court based its denial of certification not on invalidation of the Solicited Fax Rule (in fact, the district court presumed the Rule to be valid), but on the FCC’s retroactive waiver of the Rule. The Sixth Circuit did not disturb this finding, and Petitioner is not asking the Court to review it. Accordingly, even if the Court were to rule (either in this appeal or in *Bais Yaakov*) that the D.C. Circuit erred in overturning the Solicited Fax Rule, the district court’s denial of certification—based on the FCC’s waiver of the Rule, not on the Rule’s invalidity—would hold.

⁵ Petitioner characterizes the Sixth Circuit’s ruling as holding that, in light of *Bais Yaakov*, it was “‘no longer necessary’ to decide” whether the FCC waiver was valid. Pet. at 11 n.7 (emphasis added). That is not correct. What the Sixth Circuit actually said is that “reliance on [the] waiver is no longer necessary”: “[w]hile the district court assumed the FCC’s retroactive waiver exempted Besse from liability for sending solicited Prolia faxes, the intervening D.C. Circuit decision striking down the Solicited Fax Rule means reliance on this waiver is no longer necessary. Instead, the invalidation of the Rule altogether confirms the district court’s conclusion that Besse cannot be liable to any individuals who solicited the Prolia fax.” Pet. App. 12a.

B. The Sixth Circuit’s decision to follow *Bais Yaakov* was correct and there is no circuit split on this issue.

Petitioner contends that review is warranted here because the Sixth Circuit erred in finding that it was bound by the D.C. Circuit’s *Bais Yaakov* decision. This contention is incorrect for several reasons.

To begin with, the Sixth Circuit’s observations concerning the binding nature of *Bais Yaakov* did not drive the court’s holding. While the Sixth Circuit opined that it was required to follow *Bais Yaakov*, it expressly agreed with the D.C. Circuit’s assessment of the Solicited Fax Rule, and also noted that the invalidation of the Rule provided an alternative basis for affirming the district court. Pet. App. 10a, 12a-14a, 43a. The Sixth Circuit’s decision was thus not contingent on invalidation of the Solicited Fax Rule or the jurisdictional impact of the D.C. Circuit’s ruling. Instead, the court “arrive[d] at [its] own determination of the merits of federal questions presented to [it],” just as Petitioner advocates (Pet. at 15, citing *Menowitz v. Brown*, 991 F.2d 36, 40 (2d Cir. 1993)), and its affirmation holds regardless of whether the Solicited Fax Rule is considered valid for purposes of this appeal.

Moreover, the Sixth Circuit’s conclusion that it was bound by *Bais Yaakov* was correct. 28 U.S.C. § 2112(a)(3) mandates consolidation of appeals from an agency order in a single venue, and courts addressing the issue have consistently held that this statutory provision renders the court hearing the consolidated appeal the sole forum for adjudicating the validity of the order.⁶ See *Peck v. Cingular Wireless, LLC*, 535

⁶ Also supporting this conclusion is 28 U.S.C § 2342(1), which provides that “[t]he court of appeals . . . has exclusive jurisdiction

F.3d 1053, 1057 (9th Cir. 2008); *MCI Telecommunications Corp. v. U.S. West Communications*, 204 F.3d 1262, 1267 (9th Cir. 2000); *GTE South Inc. v. Morrison*, 199 F.3d 733, 742-3 (4th Cir. 1999). This conclusion makes sense, as it achieves the goal accomplished by mandatory consolidation: prevention of territorial variations in federal administrative law. *See GTE South, Inc.*, 199 F.3d at 743 (the “consolidation procedure for review of agency orders [under section 2112] is in place to avoid confusion and duplication by the courts and to prevent unseemly conflicts that could result should sister circuits take the initiative and issue conflicting decisions.”) (citation omitted); *see also Westinghouse Electric Corp. v. U.S. Nuclear Regulatory Comm’n*, 598 F.2d 759, 766-769 (3d Cir. 1979). Petitioner’s position—that the Sixth Circuit was required to disregard *Bais Yaakov* and apply the Solicited Fax Rule despite the D.C. Circuit’s ruling—would lead to the bizarre result of FCC regulations being valid in some jurisdictions but not others, leaving regulated parties without clear direction and subject to liability based solely on the fortuity of a plaintiff’s choice of venue.

The cases relied on by Petitioner are not to the contrary. In *Brizendine v. Cotter & Co.*, 4 F.3d 457 (7th Cir. 1993), *rev’d*, 511 U.S. 1103 (1994), the Seventh Circuit noted in *dicta* that “there is no rule of

to enjoin, set aside, suspend (in whole or in part), or to determine the validity of all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47.” *See Peck*, 535 F.3d at 1057 (“ . . . together, 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1) vest the courts of appeals with exclusive jurisdiction to review the validity of FCC rulings.”) (citation omitted).

intercircuit stare decisis” (4 F.3d at 462 n.4), but there is no indication that the sister circuit opinion at issue was a section 2112 consolidated appeal and, in any event, the Seventh Circuit followed its fellow circuit court’s ruling. *Id.* at 465. *Brotherhood of Locomotive Eng’rs v. Boston & Maine Corp.*, 788 F.2d 794, 801-802 (1st Cir. 1986) does not address the jurisdictional effect of a circuit court decision in another circuit at all, and instead merely finds a sister circuit’s ruling inapposite on different facts. Neither case supports Petitioner’s position, neither case establishes a circuit split on the issue of the jurisdictional impact of 28 U.S.C. § 2112, and neither case supports review.

At bottom, Petitioner’s jurisdictional arguments are fundamentally misplaced in these proceedings.⁷ The validity of the Solicited Fax Rule is directly at issue in the *Bais Yaakov* appeal, and does not affect the outcome here. There is no reason for the Court to accept review of this case to resolve jurisdictional issues that, even if extant, are immaterial to its disposition.

⁷ Further undermining Petitioner’s position that the Solicited Fax Rule should be presumed valid is the fact that the FCC opposes the Court’s review of the *Bais Yaakov* decision, and current FCC leadership does not support the Solicited Fax Rule. See Brief for the Federal Respondents in Opposition, filed in Case No. 17-361; Statement of FCC Chairman Ajit Pai on the Latest D.C. Circuit Rebuke of FCC Overreach (Mar. 31, 2017) (Chairman Pai Statement), *available at* <http://bit.ly/2q8aAYh>; Statement of Commissioner Michael O’Rielly on Court Rejection of FCC Anda Order (Mar. 31, 2017) (Commissioner O’Rielly Statement) (referring to FCC’s “TCPA overreach”), *available at* <http://bit.ly/2qty6Ba>. Effectively, Petitioner is advocating that the Sixth Circuit (and every circuit other than the D.C. Circuit) adhere to an FCC rule that the FCC itself no longer endorses.

II. REVIEW IS NOT WARRANTED BECAUSE PETITIONER CANNOT MEET THE RULE 23 REQUIREMENTS FOR CERTIFICATION IN THE ABSENCE OF CLASS-WIDE MEANS OF DETERMINING WHICH FAXES WERE SUCCESSFULLY SENT.

The individualized issues of consent that are presented by this case (regardless of the outcome of the *Bais Yaakov* appeal) are by themselves sufficient to defeat certification. Accordingly, there is no compelling reason to grant review to address Petitioner's assertions of error concerning the lower courts' analyses of the absence of fax logs, since the Court would not need to reach those issues to resolve the appeal. Nevertheless, the Sixth Circuit was correct in concluding that the absence of fax logs and resulting identification problems provided an independent basis for denying certification. Petitioner's arguments to the contrary have no merit, do not impact the outcome of this appeal, and certainly do not warrant review by the Court.

A. The superiority analysis advocated by Petitioner does not change the outcome.

The parties agree that only persons to whom faxes are "successfully sent" can bring claims under the TCPA. Pet. App. 20a-21a, 34a. Here, the fax at issue was intended to be sent to 53,502 recipients, but only 40,343 faxes were successfully transmitted. Pet. App. 7a. To determine who has a viable TCPA claim, then, it is necessary to determine whether each putative class member is within the 40,343 individuals to whom the fax was actually sent (and if so, whether they consented), or whether the putative class member is within the group of 13,159 individuals to whom faxes were not ultimately transmitted (and thus can have no viable claim). But there are no fax logs to show which

class members fall into which group, and in the absence of any alternative class-wide means of making this determination, Petitioner cannot establish that class treatment is appropriate under Rule 23.

Petitioner’s primary argument in support of class certification in the absence of fax logs is an invocation of the superiority prong of Rule 23(b)(3). But the Sixth Circuit already accepted Petitioner’s invitation to analyze the absence of fax logs as a matter of superiority, and concluded that certification nevertheless remained inappropriate. Pet. App. 26a-29a. The court observed that “no circuit court has ever mandated certification of a TCPA class where fax logs did not exist,” and “decline[d] to be the first” since “the facts of this case present a situation where the class device is not ‘superior to other available methods’ due to the ‘the likely difficulties in managing a class action.’” Pet. App. 26a, 27a. The court specifically noted that Petitioner proposed no other class-wide method of identifying class members, and found no abuse of discretion in the district court’s conclusion that its own proffered solution—the use of affidavits by putative class members—would be inappropriate in this case, as it would serve as an unreliable method of establishing the claims of over 40,000 individuals based on the receipt of a single, one-page fax many years ago.⁸ Pet. App. 26a-27a. Petitioner cites no legal

⁸ Petitioner’s insistence that class member identification be viewed as a “manageability” issue is puzzling in light of the fact that both the Sixth Circuit and the district court concluded that class treatment would be unmanageable under these circumstances. *See* Pet. App. 27a (“Practical concerns such as these highlight the difficulties the district court would have in managing Sandusky’s proposed class . . . ”); Pet. App. 41a (noting that individualized issues would “overwhelm” common questions and “result in a series of mini-trials . . .”).

principles employed by the Sixth Circuit in its superiority analysis that conflict with decisions of other courts, nor does it cite any authority requiring certification on these facts.⁹ *See* Pet. at 26-29.

Accordingly, review is not warranted because the superiority analysis advocated by Petitioner was applied by the Sixth Circuit and results in the same outcome.

B. The role of ascertainability in the Rule 23 analysis need not be decided here.

To bolster its claim that review is warranted, Petitioner contends that the district court improperly considered the absence of fax logs to be a problem of “ascertainability,” and posits a disagreement among the circuits regarding the extent to which Rule 23 requires a named plaintiff to demonstrate the ascertainability of a proposed class. Specifically, Petitioner claims that certain circuits have opined that a putative class must be “defined clearly and based on objective criteria” to meet the ascertainability requirement (*see*

⁹ Petitioner’s (erroneous) claim of superiority rests on two false premises: (1) that common issues predominate over any individual issues presented by the putative class claims, and (2) that Besse’s liability can be calculated in the aggregate, without regard for the identities of individual class members. Pet. at 24-29. As discussed above, predominance has not been met here due to the individualized inquiries necessary to identify fax recipients and also to determine which of those recipients consented. Moreover, unless and until Petitioner establishes the number of faxes that were successfully transmitted to unconsenting recipients, Besse’s aggregate liability cannot be calculated, and the proposed alternative damage distribution mechanisms Petitioner endorses (*cy pres* and fluid recovery, Pet. at 27-28) cannot be employed, regardless of whether they could be shown to be appropriate in other circumstances.

Mullins v. Direct Digital, LLC, 795 F.3d 654, 659 (7th Cir. 2016); *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1127 (9th Cir. 2017)), while the Third Circuit has articulated the standard to require an “administratively feasible” way to identify class members. *See Carrera v. Bayer Corp.*, 727 F.3d 300, 304 (3d Cir. 2013). To the extent these positions rise to the level of a circuit split, such a split is not implicated here because the Sixth Circuit expressly declined to decide whether Petitioner’s inability to identify class members should be considered a matter of ascertainability, and a decision by the Court on this issue would have no impact on the outcome here.

Notably, the Sixth Circuit has in the past followed the majority view and rejected the Third Circuit’s heightened ascertainability standard (*see Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 524-5 (6th Cir. 2015)), and Petitioner’s complaint that the court deviated from its own precedent here—even if such contention were true (which it is not)—would not be an appropriate basis for granting certiorari. The facts of this case do not present the Court with an appropriate vehicle to resolve any remaining circuit court conflicts concerning the scope of Rule 23’s ascertainability requirement, as the issue plays no role in this matter’s resolution.

C. The Rule 23 class action procedural device cannot change the elements of Petitioner’s TCPA claim.

Ultimately, it is Petitioner’s burden to satisfy all of the Rule 23 requirements, and with no class-wide means of determining which faxes were successfully transmitted, Petitioner cannot meet this burden, regardless of whether the circumstances are analyzed as matters of superiority, ascertainability, or predominance.

Pet. App. 10a. Rule 23 is a procedural mechanism; it cannot change the substantive elements necessary to prove a TCPA claim. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011) (“Because the Rules Enabling Act forbids interpreting Rule 23 to ‘abridge, enlarge or modify any substantive right’ . . . a class cannot be certified on the premise that [defendant] will not be entitled to litigate its statutory defenses to individual claims.”) (citations omitted). In other words, Rule 23 cannot operate to relieve Petitioner’s burden of establishing two essential elements of liability to the class – successful transmission of the Prolia Fax and an absence of consent to that transmission. Petitioner has offered no reliable, class-wide basis for proving its claims, nor can it.

CONCLUSION

For the foregoing reasons, Petitioner’s request for a writ of certiorari should be denied.

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