

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

**PETITIONER'S REPLY
TO BRIEF IN OPPOSITION**

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PETITIONER'S REPLY BRIEF

The petition raised two issues: (1) whether there is a rule of “intercircuit stare decisis,” making one circuit court’s decision in a Hobbs Act appeal “binding” in all other circuits; and (2) whether there is a class-member “identification” requirement for Rule 23(b)(3) class actions. The petition shows that there is a circuit split on the first issue between the Seventh Circuit in *Brizendine* and the Ninth Circuit in *Peck*, and confusion among the circuits regarding the second. Nothing in Respondent’s Brief in Opposition detracts from the importance of these issues, and the Court should grant review.

ARGUMENT

A. The Court should review whether the Sixth Circuit was really “bound by” the D.C. Circuit’s decision in *Bais Yaakov*.

The Sixth Circuit held in this action under the Telephone Consumer Protection Act of 1991 (“TCPA”), that it was “bound” by the D.C. Circuit’s decision in *Bais Yaakov of Spring Valley v. FCC*, 852 F.3d 1078 (D.C. Cir. 2017), in which the majority ruled that the FCC lacked statutory authority to issue

47 C.F.R. § 64.1200(a)(4)(iv), the regulation requiring opt-out notice on so-called “solicited faxes.”¹

Respondent acknowledges that the Sixth Circuit based this conclusion solely on “the procedural mechanism[s]” in the Hobbs Act, 28 U.S.C. §§ 2112, 2342–43, which (1) require a petitioner to “bring a direct challenge before the FCC,” and (2) provide for “consolidating petitions into a single circuit court” when petitions from the same agency order are filed in more than one circuit. (Opp. at 13).

Neither of these procedures alters the rule that a decision by one circuit court is not binding on another circuit, *e.g.*, *Mast, Foos, & Co. v. Stover Mfg. Co.*, 177 U.S. 485, 488 (1900), and the arguments raised in support of this remarkable assertion in the Opposition fail.

1. Respondent is correct that § 2342(1) provides that “[t]he court of appeals” has “exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of” a final FCC order. (Opp. at 13, n.6). Respondent is incorrect,

¹ The term “solicited fax” is not in the statute or the rules, which govern “prior express invitation or permission.” 47 U.S.C. § 227(a)(5); 47 C.F.R. § 64.1200(a)(4)(iv); *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 21 FCC Rcd. 3787 (rel. Apr. 6, 2006) (“2006 Order”).

however, that this language creates a rule of “intercircuit stare decisis,” such that a decision in a Hobbs Act appeal is binding law in other circuits. The Sixth Circuit shared this mistaken understanding of the Hobbs Act, and this Court should correct it.

The Hobbs Act was enacted in 1950 in order to “cure” several problems caused by “the cumbersome review by three judge district courts with direct appeal to the Supreme Court,” which previously governed review of FCC orders under the Urgent Deficiency Act of 1913. *See* H.R. Rep. 81-2122, 1950 U.S.C.C.A.N. 4303, 4304 (May 23, 1950). Congress did away with the procedure of review by a three-judge district court with direct appeal to this Court, and replaced it with review by “the appropriate circuit courts of appeals upon the record made before the administrative agency with further review on certiorari by the Supreme Court in its discretion, as in most other cases coming from the courts of appeals.” *Id.* at 4306.

Thus, contrary to an intent to make the decision of one circuit court binding on all others, the legislative history of § 2342(1) makes clear that Congress intended this Court “in its discretion” to review decisions by the various courts of appeals according to its usual standards, including to resolve conflicts

among the circuits. *Id.* If Congress intended the decision of the first circuit court to reach an issue to be binding nationwide, it would have said so, and there would be no potential for intercircuit conflict for this Court to resolve.

Similarly, the “exclusive” jurisdiction of the statute that Respondent emphasizes merely provides that the “appropriate circuit courts of appeals,” and *not* district courts as under the prior system, have jurisdiction over appeals from agency orders. The Hobbs Act does not provide “exclusive jurisdiction” in one particular circuit, but in *any* circuit, while providing that *venue* is proper in either “the judicial circuit in which the petitioner resides or has its principal office,” or the D.C. Circuit. 28 U.S.C. § 2343.

The petition argues there is a circuit split on this issue relying on *Brizendine v. Cotter & Co.*, 4 F.3d 457, 462 n.4 (7th Cir.), *rev’d on other grounds*, 511 U.S. 1103 (1994), where the Seventh Circuit held it was not bound by the D.C. Circuit’s Hobbs Act decision in *Overland Express, Inc. v. ICC*, 996 F.2d 356, 358, n.1 (D.C. Cir. 1993) (stating D.C. Circuit was exercising its “jurisdiction over challenges to Commission proceedings under the Hobbs Act”). The Seventh Circuit held that “[b]ecause *there is no rule of inter-circuit stare decisis*,” the D.C. Circuit’s

decision was not binding. 4 F.3d at 462 n.4 (emphasis added). The petition contrasted *Brizendine* with the Sixth Circuit’s decision in this case and *Peck v. Cingular Wireless, LLC*, 535 F.3d 1053, 1057 (9th Cir. 2008), where the Ninth Circuit it was bound by an Eleventh Circuit decision in a Hobbs Act appeal. (Pet. at 13–14).

Respondent argues *Brizendine* is distinguishable from this case and *Peck*, because “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.” (Opp. at 15). Thus, Respondent acknowledges that the mere fact that an appeal is a Hobbs Act appeal (like the D.C. Circuit’s decision in *Overland Express*) does not make it binding on other circuits.

2. Having abandoned § 2342(1) as a basis for making *Bais Yaakov* binding nationwide, Respondent argues that “the Sixth Circuit’s conclusion that it was bound by *Bais Yaakov* was correct” because “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.” (Opp. at 13).

Under Respondent’s formulation, if no petition for review of the FCC’s 2014 Order² had been filed in the Eighth Circuit during the ten-day period in § 2112(a), and instead all three petitions had been filed in the D.C. Circuit, then the D.C. Circuit’s decision would *not* have been binding in the Sixth Circuit.³ There is no reasonable way to read § 2112(a), which is merely a venue provision, to compel this absurd result.

Section 2112(a) was enacted in 1957 to provide that “if review proceedings have been instituted in two or more courts with respect to the same order, the Federal administrative agency involved shall file the record in that court in which a proceeding was first instituted.” H.R. Rep. No. 85-842, at 7 (1957). As discussed in the petition, this rule led to a risk of “conflicting decisions’ *as to where venue lies*,” *Westinghouse Elec. Corp. v. NRC*, 598 F.2d 759, 767 (3d Cir. 1979) (emphasis added), so Congress amended the statute to direct the MDL Panel to randomly select the circuit in which the record is filed

² *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 29 FCC Rcd. 13998 (rel. Oct. 30, 2014) (“2014 Order”).

³ In *Bais Yaakov*, one petition was filed in the Eighth Circuit, and two were filed in the D.C. Circuit, and the MDL Panel randomly selected the D.C. Circuit as “the circuit in which the record” was to be filed. (Pet. App. 44a–45a).

from among the circuits in which petitions are filed in the ten days following the agency ruling, which remains the case today. *See* S. Rep. 100-263, 100th Cong. (1987), *reprinted in* 1987 U.S.C.C.A.N. 3198, 3198, 3202, 1987 WL 61562, at **1, 5. None of this history reveals an intent to make the decision of the circuit selected by the MDL Panel binding law in every other circuit, and Congress does not “hide elephants in mouseholes.” *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1612 (2014); *see also Montship Lines, Ltd. v. Fed. Maritime Bd.*, 295 F.2d 147, 164–65 (D.C. Cir. 1961) (“The mere fact that petitions for review of the same order were filed in the Second Circuit and that that court has already upheld the order does not oust this court of jurisdiction.”).

Respondent argues that, if § 2112(a) does not make *Bais Yaakov* binding nationwide, it leads to “the bizarre result” of § 64.1200(a)(4)(iv) being “valid in some jurisdictions” but not others. (Opp. at 14). There is nothing “bizarre” about circuits disagreeing on the validity of agency rules (or statutes), including contexts in which review is controlled by § 2112(a), such as orders of the National Labor Relations Board. *See, e.g., Heartland Plymouth Court MI, LLC v. Nat’l Labor Relations Bd.*, 838 F.3d 16, 26, n.8 (D.C. Cir. 2016). Circuit splits often arise in that context, leading this Court to resolve the conflict. *See, e.g.,*

NLRB v. Curtin Matheson Sci., Inc., 494 U.S. 775, 785 (1990); *see also Atchison, Topeka & Santa Fe Rwy. Co. v. Peña*, 44 F.3d 437, 443 (7th Cir. 1994) (en banc), *aff'd* 516 U.S. 152 (1996) (disagreeing with Ninth Circuit decision that agency rule was invalid). Even if an agency *acquiesces* in one circuit’s determination that a rule is invalid, it does not bind another circuit, and it is for *this Court* to “decide[] to let a conflict simmer, or to grant plenary review,” as opposed to requiring the “[n]ationwide implementation of the decision of the first circuit to encounter a question.” *Atchison*, 44 F.3d at 447 (Easterbrook, J., concurring) (citing *United States v. Mendoza*, 464 U.S. 154 (1984)).

Moreover, any intercircuit conflict is ameliorated, if not eliminated, by the limitations period for Hobbs Act petitions. In this case, § 64.1200(a)(4)(iv) was issued in the 2006 Order, 21 FCC Rcd. 3787. No “aggrieved party” took a Hobbs Act appeal from that order within 60 days as required by 28 U.S.C. § 2344, a deadline that “is jurisdictional and cannot be judicially altered or expanded.” *City of Arlington, Tex. v. FCC*, 668 F.3d 229, 237 (5th Cir. 2012), *aff'd on other grounds*, 133 S. Ct. 1863, 1867 (2013). Instead, four years later, Anda, Inc. filed its petition, which lead to the FCC’s 2014 Order, 29 FCC Rcd. 13998, which was the “final order” on appeal in *Bais Yaakov*.

If fax advertisers had timely challenged the rule in 2006, the FCC could have decided whether to stay its implementation while the Hobbs Act appeal was taken, or repeal it without accruing ten years' worth of violations.

In sum, § 2112(a) does not create a rule of intercircuit stare decisis making one circuit's decision binding on another, and the Court should grant review on this important issue.

3. Respondent argues the question of intercircuit stare decisis is "immaterial" because the Sixth Circuit "agreed with the D.C. Circuit that the FCC exceeded its authority," regardless whether it was really "bound" by *Bais Yaakov*. As the petition argues, however, the Sixth Circuit lacked jurisdiction, in the procedural posture of this case, to determine the validity of an FCC regulation under the Hobbs Act. (Pet. at 19 (citing *FCC v. ITT World Commc'ns, Inc.*, 466 U.S. 463, 468 (1984)).

The Opposition ignores this point, simply assuming that the Sixth Circuit could find an FCC regulation "invalid" in a private TCPA action. Every circuit court to address that question, including the Sixth Circuit, has held that a circuit court may determine the validity of the TCPA rules issued by the FCC only in a proper Hobbs Act petition from agency

action. *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, --- F.3d ---, 2018 WL 1021225 (4th Cir. Feb. 23, 2018); *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1119 (11th Cir. 2014); *Nack v. Walburg*, 715 F.3d 680, 686 (8th Cir. 2013); *Leyse v. Clear Channel Broad., Inc.*, 545 F. App'x 444, 459 (6th Cir. 2013); *C.E. Design, Ltd. v. Prism Bus. Media, Inc.*, 606 F.3d 443, 445–50 (7th Cir. 2010).

Respondent's argument also fails because, even if the Sixth Circuit had jurisdiction to “agree” with the D.C. Circuit, the *Bais Yaakov* majority was wrong. Rather, as argued in the petition, Judge Pillard's dissent carefully explained why the FCC had authority to issue § 64.1200(a)(4)(iv) to “implement” the TCPA by empowering consumers to revoke their prior express permission, and the majority's ruling was merely an example of “expressio unius” reasoning. (Pet. at 21–22). Respondent ignores this argument, not citing Judge Pillard's dissent once, and the Sixth Circuit's “agreement” with *Bais Yaakov* does not provide a basis to avoid review of the more important question of whether it was “bound” by it.

4. Respondent argues that this Court need not grant review because the FCC granted it a “waiver” from § 64.1200(a)(4)(iv). (Opp. at 11–12). This argument is specious because, as Respondent

concedes, Petitioner argued in the district court that this “waiver” has no effect in private TCPA litigation, and preserved that argument on appeal, but the Sixth Circuit did not decide it, instead relying solely on *Bais Yaakov* to get around the opt-out-notice regulation.

Respondent is correct that the petition does not seek review on the “waiver” issue, but that is because there is no court of appeals decision to review. Although this Court could certainly decide the issue if it granted certiorari, it will typically “decline to reach” an issue not decided by the court of appeals. *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 194 (2007). Under these circumstances, if this Court were to grant certiorari and reverse, it would simply remand to the Sixth Circuit for it to complete its analysis by deciding the effect of the “waiver.” *See, e.g., Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1545 (2016).

Moreover, the FCC Bureau order granting Respondent’s “waiver” remains pending before the FCC on Petitioner’s application for review, which is a “condition precedent to judicial review” under 47 U.S.C. § 155(c)(7). Once the FCC issues a final order on that petition, any “aggrieved party” has a right to appeal to “the judicial circuit in which the petitioner resides or has its principal office,” or the D.C. Circuit.

The “waiver” issue has not been resolved, and it presents no basis to deny review here.

5. Finally, Respondent argues that this Court need not decide the question of whether one circuit’s decisions are binding on other circuits because “the FCC itself no longer endorses” § 64.1200(a)(4)(iv). (Opp. at 15, n.7). But whether the FCC “endorses” the regulation does not affect the ability of the hundreds of TCPA plaintiffs outside the D.C. Circuit to enforce it. The reason the statute “authorizes private litigation” to enforce the “regulations prescribed under” the TCPA, 47 U.S.C. § 227(b)(3), is so recipients “need not depend on the FCC” for enforcement. *Holtzman v. Turza*, 728 F.3d 682, 688 (7th Cir. 2013).

Moreover, even if the current FCC majority acquiesces in the D.C. Circuit’s decision and repeals § 64.1200(a)(4)(iv) prospectively on the basis that it is invalid, Petitioner (and other “aggrieved” parties) will appeal that ruling as “not in accordance with law” since it would be based on the “flawed legal premise” that the FCC lacked authority to require opt-out notice on *all* fax advertisements. *Regents of Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 279 F. Supp. 3d 1011, 2018 WL 39914, at *18 (N.D. Cal. Jan 9, 2018). Even where an agency “acquiesces” in one circuit’s

decision that a rule is invalid, the other circuit courts retain the power and duty to decide the validity of the rule independently. *See Atchison*, 44 F.3d at 443.⁴

In sum, the Court should grant review to decide whether the Sixth Circuit erred in holding that it was “bound” by the D.C. Circuit’s decision in *Bais Yaakov*.

B. The Court should grant review on the class-member “identification” issue.

The petition raised exceptionally important class-action issues arising from the Sixth Circuit’s ruling that a class cannot be certified due to lack of class-member “identification,” even though it is known that 40,343 of the 53,502 target fax numbers received the Prolia Fax (a 75% success rate).

Respondent argues that the circuit split on “ascertainability” is “not implicated here” because the Sixth Circuit “declined to decide whether Petitioner’s

⁴ It is inaccurate to state that “the FCC” rejects the regulation. The two press releases Respondent points to do not represent agency action, and although Respondent cites the FCC’s opposition to the petition for certiorari in *Bais Yaakov*, which the Court denied February 20, 2018, the FCC took no position on the validity of the regulation, instead arguing that “[w]hatever the merits of the court of appeals’ decision,” it did not warrant review. (*Bais Yaakov of Spring Valley v. FCC*, No. 17-351, Brief for Federal Respondents at 6–7).

inability to identify class members should be considered a matter of ascertainability,” but that ignores that the Sixth Circuit *affirmed* the district court. The Court can still use this case to resolve the “ascertainability” split, and it presents an ideal vehicle to do so.

With respect to Rule 23(b)(3) “superiority,” Respondent argues that “aggregate liability cannot be calculated” for purposes of *cy pres* distribution or fluid recovery because Petitioner must first “identify fax recipients” and “determine which of those recipients consented.” (Opp. at 18, n.9). That is “begging the question,” because it assumes that there is an “identification” requirement (the issue on which Petitioner is seeking review) and assumes that the opt-out-notice requirement for “consented” faxes was eliminated nationwide by *Bais Yaakov* (the other issue on which Petitioner is seeking review). Respondent should not be able to avoid review by assuming as true its preferred answer to the questions presented.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

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