No. 13-486

In the Supreme Court of the United States

DOUGLAS P. WALBURG,
Petitioner,
v.
MICHAEL R. NACK,
Respondent.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Eighth Circuit

SUPPLEMENTAL BRIEF OF PETITIONER IN SUPPORT OF CERTIORARI

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November 18, 2013

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INTRODUCTION

Petitioner Douglas P. Walburg respectfully submits this supplemental brief in support of certiorari to address the Sixth Circuit's amended decision in *Leyse v. Clear Channel Broadcasting, Inc.*, No. 10-3739, 2013 WL 5926700 (6th Cir. Nov. 5, 2013), which was issued after the petition for certiorari was filed.

The petition for certiorari argued that the Eighth Circuit's decision in this action created a split of authority with the Sixth Circuit's original decision in *Leyse*. *See Leyse v. Clear Channel Broad., Inc.*, 697 F.3d 360 (6th Cir. Sept. 6, 2012). In direct contrast to the Eighth Circuit's decision here, the original *Leyse* decision held broadly that the Hobbs Act does *not* prohibit a party from challenging the validity of an FCC rule in the context of an action under the Telephone Consumer Protection Act of 1991 ("TCPA"). *See* Petition 8-10. However, over a year after the original *Leyse* decision issued, the Sixth Circuit withdrew the original *Leyse* decision and replaced it with an "amended opinion" that substantially altered the court's analysis and held that the challenge to the FCC rule at issue could not be heard.[1] *See Leyse v. Clear Channel Broad., Inc.*, No. 10-3739, 2013 WL 5926700 (6th Cir. Nov. 5, 2013).

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[1] Although the amended opinion does not mention the initial opinion, a letter from the Clerk of Court advised the parties: "Upon consideration of the petitions for rehearing en banc filed by the appellant and intervenor, the hearing panel issued an amended opinion." Letter from Deborah S. Hunt, Clerk, United States Court of Appeals for the Sixth Circuit, to Stephen R. Felson et al., No. 10-3739 (Nov. 5, 2013).

Nonetheless, even after the *Leyse* amended opinion was issued, there remains a split of authority between the Sixth Circuit, on the one hand, and the Seventh and Eighth Circuits, on the other, regarding the Hobbs Act's applicability in cases applying FCC rules. This case squarely presents that question, and certiorari is warranted to resolve the split of authority that persists following the *Leyse* amended opinion.

SUPPLEMENTAL REASONS FOR GRANTING THE PETITION

Although the *Leyse* amended opinion holds that the particular challenge to an FCC regulation in that TCPA case was barred by the Hobbs Act, *Leyse* nevertheless makes clear that the Sixth Circuit does not agree with the expansive reading of the Hobbs Act adopted by the Eighth Circuit here. To the contrary, as the *Leyse* amended opinion recognized, Sixth Circuit precedent establishes that where, as here, a defendant is sued in an as-applied action based on an FCC rule, the Hobbs Act does *not* bar a challenge to the rule as unconstitutional or *ultra vires*. *See Leyse*, 2013 WL 5926700, at *10-11 (citing *United States v. Any and All Radio Station Transmission Equipment*, 204 F.3d 658 (6th Cir. 2000) ("*Maquina Musical*")). Indeed, *Leyse* expressly recognized "limits to the extent the Hobbs Act ... appl[ies] to some constitutional defenses" and other non-procedural challenges, and the court doubted that the Hobbs Act's strictures would apply to "*as-applied* arguments." *Id.* at *13. Thus, the Hobbs Act barred the challenge to the FCC rule at issue in *Leyse* only because it presented "a facial attack on the TCPA [rule]," arguing "that the rule is invalid or should be set

aside because of procedural deficiencies in its promulgation." *Id.* Thus it "raise[d] none of the constitutional questions at issue in [*Maquina Musical*], and [wa]s not an as-applied challenge." *Id.*

By recognizing that Sixth Circuit precedent would *not* bar "as-applied" *ultra vires* challenges or challenges raising "constitutional questions," the Sixth Circuit diverged significantly with the Eighth Circuit's decision in this case. Petitioner's challenge to the FCC's "opt-out" regulation is unquestionably "as-applied." Petitioner is not seeking to invalidate that regulation in all situations, for all parties; Petitioner is merely raising the invalidity of the regulation as a defense to liability *in this case*. Nor is Petitioner asking that the regulation be set aside because of "procedural deficiencies in its promulgation." *Leyse*, 2013 WL 5926700, at *13. Rather, Petitioner is claiming that the regulation is invalid as *ultra vires*. Petitioner is thus in the same position as the party in *Maquina Musical*, who was permitted to challenge the validity of an FCC regulation on substantive grounds as it applied in an enforcement suit. Accordingly, if this suit had been brought against Petitioner in the Sixth Circuit, *Maquina Musical* – which *Leyse* expressly preserved – would have permitted Petitioner to raise the invalidity of the FCC "opt-out" regulation as a defense to the application of the regulation in this case.

Unfortunately for Petitioner, however, this suit was brought in the Eighth Circuit, which has followed the Seventh Circuit in reading the Hobbs Act to prohibit a party from challenging an FCC regulation even as a defense to liability in a suit applying that regulation.

See Petition 10-11. The Eighth Circuit's holding here, therefore, conflicts squarely with the Sixth Circuit's precedent, first articulated in *Maquina Musical* and then reiterated in *Leyse*, recognizing that the Hobbs Act does *not* bar as-applied challenges such as the one Petitioner raises.

Critically, moreover, in clarifying that the Sixth Circuit does *not* interpret the Hobbs Act to prohibit as-applied challenges such as Petitioner's, *Leyse* relied on principles articulated by other circuits. For example, *Leyse* cited *NLRB Union v. FLRA*, 834 F.2d 191, 195-96 (D.C. Cir. 1987), for the proposition that "a regulation or rule may be challenged after the expiration of a statutory limitations period where the rule is blatantly unconstitutional or *ultra vires*." *Leyse*, 2013 WL 5926700, at *13. That case, in turn, relied on the D.C. Circuit's "long line of cases stretching back to *Functional Music, Inc. v. FCC*, 274 F.2d 543 (D.C. Cir. 1958)," permitting a defendant in an enforcement proceeding to defeat liability "on the ground that the issuing agency acted in excess of its statutory authority in promulgating [the regulations at issue]." *NLRB Union*, 834 F.2d at 195-96. Thus, the *Leyse* amended opinion only underscores how the rule adopted by the Eighth Circuit in this action is in conflict with the reasoning of other courts of appeals.

Finally, the Sixth Circuit's issuance of an amended opinion in *Leyse* over a year after the initial opinion was issued demonstrates that the application of the Hobbs Act in TCPA cases is a matter of profound confusion for the courts of appeals. The need for this Court's guidance is manifest.

In sum, this case presents a conflict of authority in the courts of appeals even after the Sixth Circuit issued its amended opinion in *Leyse*. Certiorari is warranted by this Court to resolve that conflict.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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