



January 7, 2019

Clerk of Court
United States Supreme Court
1 First Street, NE
Washington, DC 20543

**Re: *Soundboard Association v. Federal Trade Commission*
 U.S. Supreme Court Case No. 18-722
 Request to Lodge Non-Record Material With the Clerk**

Dear Clerk of Court:

I am counsel for the Professional Association for Customer Engagement (PACE) which is filing a Brief as *amicus curiae* in support of Petitioner Soundboard Association's Petition for Writ of Certiorari. I am writing, pursuant to Supreme Court Rule 32.3, to request permission to lodge non-record material in this action.

Specifically, PACE has obtained a Declaration from Michael Cox, former Attorney General for the State of Michigan, who has advised that he has several clients who have received investigatory subpoenas from the Federal Trade Commission seeking documents and information about the use of Soundboard technology.


This information should be considered by the Court because it is highly relevant to this action. The Circuit Court for the District of Columbia held that a Staff Opinion Letter issued by the FTC's Division of Marketing Practices was not a final agency action subject to judicial review under the Administrative Procedures Act, 5 U.S.C. § 704. *Soundboard Assn. v. Fed'l Trade Comm'n*, D.C. Cir. No. 17-5093 (Apr. 27, 2018). The Circuit Court Opinion advised that finality is determined by "what legal and practical consequences will flow from the agency's action" and that the record was underdeveloped on that issue. *Id.* at p. 22-23 (emphasis in original). The FTC issues investigatory subpoenas upon resolution and direction of the Commission. This Declaration therefore shows that the FTC is enforcing the Division's Staff Opinion Letter as an agency regulation.

The events described in the Declaration post-date the trial court proceedings in this action and could not have been made part of the record. Soundboard Association filed its Complaint in January of 2017. The trial court entered judgment for the FTC in April of 2017. The events described by Attorney Cox's Declaration began in late 2017 and into 2018.

I am therefore requesting that you lodge this Declaration as non-record material. Pursuant to Rule 32.3, I will submit the Declaration with your permission and at your request.

Please feel free to contact me if there is anything you wish to discuss. Thank you for your time and attention.

Sincerely,



Michele A. Shuster

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