No. 18-722

In The
Supreme Court of the United States

SOUNDBOARD ASSOCIATION,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The Federal Trade Commission's ("FTC's") Brief in Opposition paints a picture of an entirely different case than that which is presently before this Court on Petition for Writ of Certiorari. That is both amazing and frightening. But, as Judge Millett rhetorically asked in framing her powerful dissent below, "Why let reality get in the way of a good bureaucratic construct?" App. 29a.

Petitioner argues that Certiorari should be granted because (1) the new test for finality adopted by the D.C. Circuit impacts all regulated industries and federal agencies on a national level; (2) it is in conflict with binding Supreme Court precedent; and (3) it contradicts the plain language of the Administrative Procedure Act ("APA"), and the FTC has failed to overcome the APA's presumption of reviewability. FTC does not refute or even address Petitioner's first and third arguments, thereby admitting those dispositive realities. FTC's attempt to distinguish away this Court's precedent to refute Petitioner's second argument is unavailing.

FTC bases its case exclusively on the Commission's characterization of its own action as non-final and its interpretation of its own regulations as non-delegatory. However, FTC cannot evade judicial review simply by styling its action as non-final. Pet. 15. Substance matters.

Appealing to a fundamental principle of administrative law, Judge Millett noted in her dissent that

"finality is about agency accountability for the decisions it makes and the consequences it unleashes." Case Comment, *D.C. Circuit Holds that Informal Staff Letters Are Not Eligible for Judicial Review under the Administrative Procedure Act:* Soundboard Ass'n v. FTC, 132 Harv. L. Rev. 1345, 1352 (Feb. 8, 2019), *available at* https://harvardlawreview.org/2019/02/soundboard-assn-v-ftc/. That principle applies to all of agency. Backdooring a new rule through staff that bans speech and shutters an industry cannot be dismissed as if it were some "detached endeavor" immune from judicial review and agency accountability, even if disguised in boilerplate. App. 30a, 32a.

This "Court's review is needed" to clarify that *Bennett v. Spear*, 520 U.S. 154 (1997) does not require "courts to short-circuit a pragmatic finality inquiry by considering only agency form and not the substance of agency action." Chamber Br. 12. Petitioner respectfully requests this Court look at what this letter really is and what it says, and not just what agency says it is. "For the countless individuals and organizations impacted by federal agency decisions, [this case] threatens their very day in Court." 132 Harv. L. Rev. at 1352.

ARGUMENT

Soundboard calls are not robocalls. Pet. 6. FTC admits that in "2008, [it] amended the TSR by adding an anti-robocall provision that restricts calls that use prerecorded messages *instead of a live operator or agent*."

Br. 4 (emphasis added). In so doing, FTC acknowledges the difference between robocalls and Soundboard calls.

Unlike robocalls, which involve automated, one-way, radio-like broadcasts of a pre-recorded message with no human being on the other end of the line, Soundboard calls involve a live agent operating a soundboard through which he or she speaks to consumers in a real-time, consumer-driven conversation. Pet. 6-7. A soundboard is a "thing" – a device that facilitates communication. It is used in many contexts, particularly by those with disabilities, and it is used here to ensure compliance with state and federal laws regulating telemarketing. *Id.* Soundboard technology requires a human operator or agent to operate the soundboard at all times, selecting pre-recorded audio snippets to speak with and reply to consumers' responses in a consumer-driven call. *Id.*

FTC admits it was robocalls, and not Soundboard calls, that were banned by the Telemarketing Sales Rule ("TSR"), 16 C.F.R. § 310.4, in 2008. *See* Br. 4 (explaining that "a consumer's right to privacy may be exacerbated immeasurably *when there is no human being on the other end of the line*"). FTC's 2009 advisory opinion confirms that. App. 122a-23a.

FTC acknowledges it has since amended the TSR to "*now prohibit[ ]* most telemarketing calls that 'deliver[ ] a pre-recorded message.' " Br. 4. This contradicts FTC's claim in its 2016 Division Letter ("Division Letter") that the "plain language" of the TSR has always banned Soundboard calls. Pet. 9; App. 42a. Either way,

FTC admits in its Brief that its 2016 pronouncement banning Soundboard is *now* the agency's settled position.

However, it is a position that is both substantively and procedurally invalid and unconstitutional. FTC's contention that Petitioner did not raise substantive invalidity is easily disposed of. Br. 7. Petitioner devoted more than ten pages of briefing to that issue in the district court. Pet. 10. And Petitioner has continued to press forward the substantive invalidity of FTC's 2016 expansion of the robocall ban to apply to Soundboard calls, which are not robocalls. *Id.* at 9. FTC does not dispute that Petitioner challenges the Division Letter as procedurally invalid for failure to issue through notice and comment rulemaking and unconstitutional under the First Amendment.

While FTC ineffectively attempts to dismiss Petitioner's First Amendment claims, FTC's own description of *Blount v. Rizzi*, 400 U.S. 410 (1971) demonstrates that it is directly on point. Br. 19. Further, FTC contends that all courts that have considered the issues have rejected Petitioner's First Amendment claims. That is wrong. *See Cahaly v. Larosa*, 796 F.3d 399 (4th Cir. 2015) (striking down similar content-based provisions); *Gresham v. Rutledge*, 198 F. Supp. 3d 965 (E.D. Ark. July 27, 2016) (same).

Notwithstanding these wrongs, FTC is already wielding its so-called "informal" and "non-binding" Division Letter as a sword against regulated parties. PACE Br. 4, 8 n.8, 9. FTC admits it will use the Division

Letter to establish knowledge that Soundboard calls are now "illegal," a requirement necessary to trigger civil penalties and an end to businesses. Br. 17. Contrary to FTC's characterization, the Division Letter is not some meaningless piece of staff advice that regulated parties can take or leave as they please.

I. THE RULE ADOPTED BY THE D.C. CIRCUIT IMPACTS ALL REGULATED INDUSTRIES AND AGENCIES

The ruling below is wrong and sets dangerous precedent. As Judge Millett's dissent, five amici and the Harvard Law Review recently explained, the misguided decision below has wide-reaching ramifications in administrative law. The decision adopts a formalistic test for the finality inquiry that allows agencies to issue new binding rules through staff to evade procedural requirements and judicial review. This new test enables courts to limit the finality inquiry to *Bennett*'s first prong and ignore the impact of the agency's action on regulated parties. Such an approach "stands in tension with recent precedent" from both this "Court[1] and the D.C. Circuit," and this tension "will only grow." 132 Harv. L. Rev. at 1349, 1352.

The D.C. Circuit "has taken a dramatic turn away from an analysis of the action's legal consequences for regulated parties and towards a view of finality 'from the agency's perspective.'" Cato Br. 5. As the Cato

[1] 132 Harv. L. Rev. at 1350-51 (citing *United States Army Corps of Eng'rs v. Hawkes Co.*, 136 S.Ct. 1807, 1815 (2016)).

Institute explained, "[s]uch an exclusive view of finality unfairly prejudices regulated parties like the petitioners in this case, who face losing thousands of workers to layoffs if they comply with the agency's rules, and millions in financial penalties if they do not." *Id.*

Put to a Hobson's choice, these businesses were denied judicial review to challenge the rule that binds them, which FTC denies is final, yet which it continues to enforce – using the Division Letter as a "sword" against regulated entities and a "shield from judicial review." Pet. 19; App. 52a; PACE Br. 4, 9. FTC does not refute this.

Turning "settled principles of administrative law upside down," Chamber Br. 14, the decision below allows agency to "functionally compel action, yet still deny they have made up their mind to demand anything at all." 132 Harv. L. Rev. at 1352. Such an unfair and paradoxical result "creates a conundrum for regulated parties" that "will hamper the ability of those harmed by agency decisions to seek judicial review." *Id.*

FTC contends that claims penned by staff are "informal" and thus not final. Br. 3. However, that is no longer good law, and has not been since 1997. FTC relies on *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967) in support of its proposition. But "*Bennett*'s acceptance of an informal action as final action" departed from that earlier rule in *Abbott Labs*. Cato Br. 3-4. And a long line of cases have since recognized that informal

actions of staff may constitute final agency action. Pet. 22 (citing long line of cases); Chamber Br. 14.

Whatever meaning *Abbott Labs* may retain, its pragmatism requirement is very much still alive and well. *Hawkes Co.*, 136 S. Ct. at 1815 (citing *Abbott Labs* and applying the "'pragmatic' approach we have long taken to finality"); Cato Br. 4-5; 132 Harv. L. Rev. at 1349. Courts must consider the impact of agency action, including whether it is "sufficiently direct and immediate" and whether it has a "direct effect on . . . day-to-day business" as part of the pragmatic finality inquiry. 132 Harv. L. Rev. at 1349-50.

FTC rejects half a century of Supreme Court precedent, arguing that consideration of the legal consequences of agency's action would render the first prong of *Bennett* a "nullity." Br. 15. FTC concludes that the D.C. Circuit was correct in refusing to consider the impact of the action on regulated parties and in ignoring the second prong of *Bennett*. Br. 10, 15. This has created a conflict between this Court's precedents and the D.C. Circuit's newly articulated test for the finality inquiry. Amici demonstrate that this conflict extends to other circuit courts of appeal as well. Chamber Br. 13, 23 (citing, *e.g.*, *Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 985 (9th Cir. 2006) ("'[i]t is the effect of the action and not its label that must be considered' when determining finality")).

As the Harvard Law Review posits, had the D.C. Circuit embraced "functionality, the panel might have asked: Did the FTC's action amount to a decision in the

eyes of a reasonable regulated party? That framework would avoid incentivizing exactly what [this Court] has tried to circumscribe in the past: agency acrobatics calculated to duck judicial scrutiny." 132 Harv. L. Rev. at 1352.

The D.C. Circuit explained these acrobatics in *Appalachian Power*: agencies increasingly issue informal guidance documents "to amend" their "real rules," actively enforce failures to comply with those new rules, and yet deny that any final agency action has occurred to immunize their procedurally invalid "lawmaking" from judicial review. Pet. 16 (citing *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000)). As the Eighth Circuit noted in *Hawkes*, this doubles as an obvious litigation strategy: "by leaving appellants with no immediate judicial review and no adequate alternative remedy," FTC "will achieve the result [it] desire[s]" – an end to a misunderstood technology and a ban on disfavored speech. Pet. 37.

FTC does not deny this. FTC does not even address the substance of Petitioner's first argument in its Brief, including the moral hazard of the decision below as illustrated by *Appalachian Power*. FTC ignores the parallels between this case and *Appalachian Power*, in which the D.C. Circuit struck down a similar legislative rule issued without the required procedure through staff to avoid judicial review. Pet. 16-21. FTC also ignores that the D.C. Circuit "glided past two hallmarks of [finality]" in its singular analysis of *Bennett*'s first prong: "definitive language" and "agency factfinding," both of which are present here but both of which

agency pretends are not. *See* 132 Harv. L. Rev. at 1352; Chamber Br. 13. And it does not deny that the states and private citizens also have authority to enforce violations of this allegedly "non-binding" rule in the field.

The definitive language and impact of the Division Letter are clear: "it commands, it requires, it orders, it dictates," 132 Harv. L. Rev. at 1351, and failure to "toe the Division's line" will result in risk of enforcement and business-ending civil penalties. Pet. 34; App. 52a. As the Cato Institute explained, "where a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, access to the courts under the Administrative Procedure Act . . . must be permitted." Cato Br. 4 (citing *Abbott Labs*, 387 U.S. at 153).

II. THE DECISION CONFLICTS WITH BINDING SUPREME COURT PRECEDENT

FTC's Brief relies heavily on the alleged availability of a second opinion as an alternative review mechanism. FTC alleges that Petitioner simply "chose not to pursue" that second opinion and that it remains available to it today, thereby precluding judicial review under the APA. Br. 12. That is wrong.

Petitioner never said it "chose not to pursue" a Commission opinion. Petitioner did not even know that a Commission opinion might be a possible alternative until it reached the court of appeals, which is when

FTC raised this alleged alternative for the first time. FTC failed to disclose it as an option for further review in the Division Letter and throughout the trial court proceedings. That turns due process upside down.[2]

What Petitioner said was, what would be the point of requesting a Commission opinion? The law does not punish the failure to exhaust a futile remedy. In other words, the law compels no one to do futile or useless things. Pet. 31 (citing *Sackett v. EPA*, 566 U.S. 120, 127 (2012) ("The mere possibility that an agency might reconsider . . . does not suffice to make an otherwise final action nonfinal."); *Hawkes*, 136 S. Ct. at 1814-16 ("such a 'count your blessings' argument is not an adequate rejoinder to the assertion of a right to judicial review under the APA")); PACE Br. 9.

The Commission acknowledges in its Brief that the Division Letter is the well-settled position of the agency. The Division Letter "concludes" that Soundboard calls are banned by the TSR. Br. 6. Counsel for the Commission conceded at the district court that the Commission's review of the matter was at an end. Pet. 11. The Commission has defended the rule to date. Pet. 33. A request for a second opinion from the Commission is neither required by the APA for judicial reviewability nor anything more than futile.

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[2] While FTC repeatedly references a "process" for requesting a Commission opinion that was allegedly available to Petitioner, Br. 12, 13, no process for specifically requesting a "Commission opinion" is known to exist. Chamber Br. 17 n. 10. FTC fails to cite to any regulatory or statutory provision providing for same.

The APA creates a "basic presumption of judicial review [for] one 'suffering legal wrong because of agency action.'" Pet. 35. That presumption is strong. *Id.* An "agency action remains reviewable 'final' action notwithstanding the availability of appeal to a 'superior agency authority,' unless agency rules render the initial agency decision 'inoperative' pending such appeal." App. 39a; 5 U.S.C. § 704. Even if a second opinion were available to Petitioner (and the Commission's regulations and practice evidence it is not), no statutory or regulatory provision renders the Division Letter inoperative pending such review. Pet. 35. Like in *Sackett* and *Hawkes*, the alternatives to judicial review offered by FTC fail to overcome the strong presumption of reviewability under the APA. Pet. 35.

Just as this Court rejected the futile permitting process as a proposed alternative in *Hawkes* and *Sackett*, it should dismiss as inadequate the proposed second opinion here, for which FTC provided no notice and affords neither a process nor entitlement to review. The APA does not require this vain act, and the APA controls.

Similarly, FTC argues that the Commission's ability to later rescind or (not) enforce the Division Letter are viable alternatives to judicial review. Again, those arguments fail under *Hawkes* and the plain language of the APA. Pet. 32; 5 U.S.C. § 704; *Hawkes*, 136 S. Ct. at 1814 (the mere possibility of revision "is a common characteristic of agency action, and does not make an otherwise definitive decision nonfinal").

For all of its proposed alternatives, FTC reasons that, under its "statutory scheme, [it] could always override the enforcement staff's position in the future. But, this reliance is confounding given the established principle that an agency's ability to change course does not affect finality in the moment." 132 Harv. L. Rev. at 1351-52. The language of the APA is clear. The ability of a superior or the vote of the Commission to later change course does not rebut the strong presumption of reviewability under the APA. 5 U.S.C. § 704.

Finally, the Chamber and NFIB in their amicus brief and Judge Millett in her dissent dismantle the FTC's incorrect interpretation of its own unambiguous statutory framework. Petitioners agree with the Chamber, NFIB and Judge Millett that FTC's interpretation of its own regulations in favor of dodging judicial review is wrong (and legally impossible). Chamber Br. 19-22; App. 32a-42a.

FTC does not contend that any statute or regulatory provision precludes review, and none does. FTC also does not claim that the action is committed to agency discretion. FTC does not argue that its staff has discretion to issue a binding rule broadening the scope of a regulation, nor could it. But that is what FTC staff did, without honoring the APA's required procedure and, pursuant to the decision below, with immunity from judicial review. Based on these facts, the FTC cannot rely on its statutory framework to evade judicial review. FTC fails to overcome the presumption of reviewability under 5 U.S.C. § 701(a)(1)-(2). Pet. 36.

III. THE DECISION CONTRAVENES THE PLAIN LANGUAGE OF THE APA AND FTC FAILS TO OVERCOME THE APA'S PRESUMPTION OF REVIEWABILITY

The FTC does not refute or even address Petitioner's third argument, thereby admitting same. In fact, FTC argues for non-finality under the APA without actually analyzing any of the provisions of the APA or seeking to rebut its strong presumption of reviewability. Accordingly, FTC has failed to overcome that presumption, and the plain language of the APA requires review of the otherwise final agency action in this case.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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