No. _____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Do Petitioners have a right to judicial review under the Administrative Procedure Act of a Federal Trade Commission staff advisory opinion that effectively creates a new rule, chills protected speech, shutters an industry, and which was issued arbitrarily and without the required administrative procedure?

PARTIES TO THE PROCEEDING

Petitioner is the Soundboard Association. Soundboard Association is a trade association of companies that make and use Soundboard, a technology that facilitates interactive, voice-assisted communication over the telephone. Petitioner is dedicated to promoting and protecting the responsible use of Soundboard in conformity with all applicable laws and regulations.

Respondent is the Federal Trade Commission, an independent federal agency of the United States Government.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court, Petitioner Soundboard Association hereby states that it has no parent company, and, being a non-stock corporation, no publicly held company owns 10% or more of Soundboard Association's stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Soundboard Association ("Association") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The panel opinions of the United States Court of Appeals for the District of Columbia Circuit (App. 1a-53a) are reported at 888 F.3d 1261. The opinion of the United States District Court for the District of Columbia (App. 54a-92a) is reported at 251 F. Supp. 3d 55.

JURISDICTION

The court of appeals entered its judgment on April 27, 2018. A petition for rehearing *en banc* was denied on August 3, 2018. App. 103a-104a. On October 12, 2018, Chief Justice Roberts granted an extension of time within which to file a petition for a writ of certiorari to and including December 1, 2018. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

Relevant constitutional, statutory and regulatory provisions are reproduced in the Appendix to this petition. App. 105a-119a.

INTRODUCTION

Do business owners have a right to immediate judicial review of an agency's self-described "staff advisory opinion" that sets forth a new rule and a compliance mandate that chills speech and destroys businesses? The Federal Trade Commission's ("FTC's") Division of Marketing Practices issued a definitive, binding letter to representatives of the Soundboard industry on November 10, 2016 ("Division Letter") rescinding a previous advisory opinion and banning Soundboard calls, a form of protected speech, effective May 12, 2017. The United States Court of Appeals for the District of Columbia Circuit reversed the district court's finding of final agency action, vacated its decision, and dismissed the action. The Court did not address the merits of Petitioners' First Amendment, U.S. CONST. amend. I, or Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, claims.

Like the Sacketts and Hawkes, the D.C. Circuit's decision to dismiss imposes an insufferable choice on Soundboard industry members. According to the decision, Soundboard manufacturers and users who believe that the Division Letter is procedurally and

substantively invalid and the new rule unconstitutional must either (1) cease using and manufacturing Soundboard technology and close their doors in the face of the ban and threat of ruinous civil penalties, or (2) invite agency to bring an enforcement action for up to tens of millions of dollars in civil penalties for alleged violations of the new ban.

The D.C. Circuit suggested, at FTC's urging, that industry could ask for a second opinion from the Commission or wait and hope that agency might later rescind its final word. The Commission regulations provide no process for administrative appeal, no second opinion, and no entitlement to further review. FTC failed to even raise the prospect of a second opinion until it reached the court of appeals. Even if knocking on Commissioners' doors was an option, expecting a different answer here is as beside the point as it was in *Sackett*, and the APA does not require it. Either option would still force businesses to silence and close up shop in compliance or invite enforcement action as they wait with forlorn hope that agency might later rescind the rule.

Forgoing a decision on the merits, the D.C. Circuit reformulated the first prong of the *Bennett* test into a subjective inquiry defined by agency's self-serving attempt to avoid judicial review. This Court has consistently rejected that "agency-say-so" approach to finality. *See United States Army Corps of Eng'rs v. Hawkes Co*., 136 S. Ct. 1807 (2016); *Sackett v. EPA*, 566 U.S. 120 (2012); *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967); *Frozen Food Express v. United States*, 351 U.S.

40 (1956). And it should have been rejected again here. The decision below conflicts with established Supreme Court precedent. *Id.* It also contradicts the plain language of the APA and the approach to finality taken previously by the D.C. Circuit and by other federal circuits. Only this Court can resolve the conflict. Therefore, certiorari is warranted.

STATEMENT OF THE CASE

A. Statutory and Regulatory Framework

In 1994, Congress enacted the Telemarketing and Consumer Fraud and Abuse Prevention Act ("Telemarketing Act") to protect consumers from deceptive and abusive telemarketing practices. The Act directs FTC to prescribe rules regulating telemarketing. 15 U.S.C. § 6102(a)(1). Pursuant to that authority, FTC promulgated the Telemarketing Sales Rule ("TSR") in 1995. Among other things, the TSR restricts telemarketing calls to certain times of day, prohibits call abandonment, and allows consumers to request to be placed on a national "do-not-call" list. 16 C.F.R. § 310.4(b)(1)(ii), (iv), (c).

The Telemarketing Act requires FTC to comply with the rulemaking provisions of the APA, 5 U.S.C. § 553, in any rulemaking activity pursuant to its authority under the Telemarketing Act. 15 U.S.C. § 6102(b). In 2008, FTC amended the TSR to include new regulations prohibiting robocalls. *See* TSR, Final Rule Amendments, 73 Fed. Reg. 51164, 51184 (Aug. 29,

2008). Following notice-and-comment rulemaking, the robocall prohibition took effect in September 2009. *See* 73 Fed. Reg. 51204 (Aug. 29, 2008). The robocall prohibition makes it illegal (as an "abusive" telemarketing act) to "[i]nitiat[e] any outbound telephone call that delivers a prerecorded message." 16 C.F.R. § 310.4(b)(1)(v). The prohibition is set forth in the TSR, 16 C.F.R. § 310.4(b)(1)(v). The term "prerecorded message" is not defined by statute or regulation.

The preamble to the robocall prohibition makes clear that the targeted "prerecorded message" is by its "very nature [a] one-sided conversation[]" because there is no human being on the other end of the line. 73 Fed. Reg. at 51167, 51180 (Aug. 29, 2008). Acknowledging that robocalls are "nothing other than outbound streaming audio files which convert the telephone (traditionally an instrument of two-way communication) into a radio (an instrument for listening)," FTC observed that "[t]hese [robocall] campaigns are widely regarded as a nuisance and a burden to consumers because consumers are powerless to interact with them." *Id.* at 51173.

The Telemarketing Act delegates authority to the States to require companies to comply with these federal regulations in the telemarketing space. 15 U.S.C. § 6103. Whenever a state attorney general has reason to believe that "any person has engaged or is engaging in a pattern or practice of telemarketing which violates any rule of the Commission . . . the State, as parens patriae, may bring a civil action on behalf of its residents in an appropriate district court of the United

States to enjoin such telemarketing, to enforce compliance with such rule of the Commission," and "to obtain damages, restitution, or other compensation on behalf of residents of such State. . . ." *Id.* at (a). States too have their own telemarketing regulations and standards. *Id.* at (f). The Act also reserves a private right of action to consumers to bring lawsuits for violations of the FTC's TSR, including the robocall prohibition. *See* 15 U.S.C. § 6104.

B. The Speech Activity at Issue

Soundboard technology provides voice-assisted, interactive communication via telephone with American consumers, including telephone calls made for the sale of goods or services and the solicitation of charitable contributions. Soundboard calls are not robocalls. Unlike "robocalls," which are automated, one-way, prerecorded advertisements that turn the telephone into a radio broadcast, a Soundboard call is a live, two-way dialogue with a human being on both ends of the line. Soundboard provides the voice of the call; the speaker determines the content of the message by selecting audio files to respond to the consumer on the other end of the line in a consumer-driven conversation, no different than if the speaker were reading from a script without the technology. In a Soundboard call, the speaker listens to and truly interacts with the consumer in a live two-way dialogue.

As voice-assisted technology, Soundboard benefits speakers with certain physical disabilities. It also

minimizes, if not eliminates, human error in ensuring that scripts are followed and state and federal mandated disclosure statements are accurately made during the call. The technology was designed as a tool to enable speakers to communicate their message accurately and in compliance with the multitude of applicable federal and state regulations. The technology allows users and government enforcers to measure compliance in ways and depths not possible with live calls made without the technology.

FTC asserts that some users of Soundboard have abused the technology. App. 10a, 97a. However, rather than controlling the abuse under one or more of the existing regulatory provisions available to the FTC under the TSR, including but not limited to the call abandonment prohibition, curfews, caller ID restrictions, auto-dialer limitations, cell phone restrictions, and numerous other restrictions under the TSR, FTC simply banned the speech. App. 97a-98a.

If a telephone call violates the TSR, each call constitutes a separate violation and triggers a civil penalty of up to approximately $40,000 per call. App. 46a. For example, if there is a delay in the caller's response, which is measurable in fractions of a second, and that delay violates the call abandonment rule, each such call triggers a penalty of up to $40,000. Any violation of the TSR made during a Soundboard call is trackable, measurable and reportable.

Rather than use Soundboard technology as an effective and accurate measure of compliance and,

thereby, an investigative tool, FTC chose the easier route and simply banned Soundboard calls under its self-proclaimed "reinterpretation" of the TSR's robocall prohibition. In so doing, FTC brought fully protected speech within its proscription and chilled Soundboard companies' First Amendment rights. The First Amendment has long preferred subsequent punishment of unlawful speech to prior suppression of protected speech. *Near v. Minnesota*, 283 U.S. 697, 714 (1931).

C. FTC's November 2016 Letter

On November 10, 2016, FTC's Division of Marketing Practices issued its letter banning Soundboard calls and imposing a mandatory compliance deadline under threat of ruinous civil penalties. App. 93a-102a. The letter bans protected speech and outlaws a particular business model. App. 43a, 52a. Importantly, the 2016 Division Letter rescinded a prior staff advisory opinion dated September 11, 2009. *Id.* at 97a. The 2009 advisory opinion had affirmed that the TSR's recently enacted robocall prohibition of 2008 does not apply to Soundboard calls.[1] App. 122a-123a. Industry relied on

[1] FTC and the panel majority complained that the original requestor of the 2009 staff advisory opinion specifically requested an opinion from "staff." App. 22a. To the extent it even matters (and it does not), it was on the recommendation of agency that the original requestor of the 2009 opinion asked for a "formal" opinion. In any event, the regulatory provisions provide the process for determining who issues the opinion. *See* n.2, *infra* at 14. And who issues the opinion makes no difference for finality purposes when that opinion (the Division Letter) issues a conclusive, binding rule that determines rights or obligations of affected businesses. *Sackett*, 566 U.S. at 126 (citing *Bennett*, 520 U.S. at 178).

that agency pronouncement and the plain language of the TSR and built the Soundboard industry up around it over the next decade.

FTC styled its 2016 Division Letter reversing course and banning Soundboard calls also as a "staff advisory opinion." App. 93a. FTC styled it so even though it sets forth a new, conclusive, binding rule. Addressed to all of industry and posted on agency's website, FTC's newly minted position is that the "plain language" of the TSR's 2008 robocall rule has always banned Soundboard calls notwithstanding the substantive invalidity of this position and FTC's 2009 advisory opinion to the contrary. App. 42a, 97a.

The Division Letter subjects the Association's industry members to serious civil penalties for failure to comply with the new rule without affording them an opportunity to appeal or contest the "reinterpretation." App. 52a. For ongoing violations, each day the banned speech activity continues "shall be treated as a separate violation." App. 46a (quoting 15 U.S.C. § 45(m)(1)(C)). "Penalties could thus quickly snowball into more than $1 million a month or roughly $14.5 million a year for each single contract held by a soundboard company." App. 46a. The risk of noncompliance with the new rule that industry members believe is invalid and unconstitutional could be as costly as, if not more ruinous than, compliance with the speech-chilling, business-ending mandate.

D. The Proceedings Below

The Association challenged the Division Letter as substantively and procedurally invalid under the APA and as unconstitutional under the First Amendment. On cross motions for summary judgment, the United States District Court for the District of Columbia held that the Division Letter constitutes final agency action. App. 56a-57a. However, it erroneously concluded that the Division Letter is an interpretive rule that was not required to issue through notice and comment rulemaking and that the rule's content-based discrimination in its ban on Soundboard calls was a permissible time, place and manner restriction under the First Amendment. *Id.* The district court declined to consider the issue of substantive invalidity, despite that it was fully briefed. App. 78a, n.2.

A divided panel of the D.C. Circuit reversed the district court's finding of final agency action, vacated its decision, and dismissed the action. The panel did not address the merits of the Association's APA or First Amendment arguments. App. 3a. Over a powerful dissent, the D.C. Circuit started and ended its finality analysis by deferring exclusively to agency's interpretation of its own unambiguous regulations and styling of its own action. App. 13a-15a, 19a-21a, 27a. Instead of looking objectively at whether agency decisionmaking had actually concluded as the APA and *Bennett* require, 5 U.S.C. § 704; *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997), the D.C. Circuit simply accepted agency's argument that an action "is not final unless agency expressly says it is." *See* App. 29a-30a. Accordingly, the

panel refused to reach the second prong of *Bennett*. App. 21a-22a.

First, FTC argued and the panel held that the November 2016 Division Letter is not "final agency action" because it was penned by agency staff (not signed by a Commissioner) and disguised in boilerplate. App. 14a-15a. To bolster its argument, FTC argued and the panel accepted that the regulatory scheme does not provide for delegation of authority to staff to issue advisory opinions that reflect the views of agency and, therefore, agency cannot be held accountable for the actions of its staff. App. 19a-21a. To the contrary, the regulations expressly provide for such delegation, and agency's pattern and practices confirm it. App. 32a-36a.

Second, FTC argued and the panel suggested that as an alternative to judicial review, the Association could seek a second opinion, wait and hope that FTC later rescinds the Division Letter, or await an enforcement action. With no mechanism for administrative appeal or entitlement to further review, the dissent disagreed, explaining that none of these alleged alternatives are adequate under established Supreme Court precedent. App. 35a-38a. With respect to the prospect for agency reconsideration, FTC acknowledged that the Commission plans to do nothing further and, therefore, its review is at an end. App. 67a-68a; *see also* App. 36a (even so, the mere prospect of future reconsideration does not render final action nonfinal). This Court has repeatedly held that waiting for agency to enforce the rule is not an adequate alternative to

judicial review under the APA. App. 36a-37a (citing *Hawkes*, 136 S. Ct. at 1815; *Sackett*, 566 U.S. at 127).

Judge Millett dissented from this unprecedented decision: "Why let reality get in the way of a good bureaucratic construct?" App. 29a. "[I]n deciding whether the agency process has ended for purposes of *Bennett's* first prong, courts must look beyond the agency's say-so to objective and practical indicia of finality." App. 30a (citing *Sackett*, 566 U.S. at 127). In her view, the APA "should not countenance an agency telling an individual or industry that its business must end, while fending off court review on the ground that its own internal administrative processes have not ended." App. 30a. In fact, no agency should "be able to transmorgify the mantle of 'staff advice' into both a sharp regulatory sword and a shield from judicial review." App. 52a. This decision offends due process and "the pride of our legal system," which guarantees "evenhandedness and fairness to all who come before it," *id.*, even when agency dislikes the particular speech at issue.

Like the Sacketts and Hawkes, the D.C. Circuit's decision leaves the Association with a Hobson's choice: either "shut up and shut down" in compliance with a new rule that is substantively and procedurally invalid and unconstitutional or continue on despite the ban and await a ruinous enforcement action, which is no choice at all. App. 30a. The D.C. Circuit's subjective review of finality exclusively from agency's perspective skirts the clear import of *Sackett* and departs from this Court's precedent. App. 29a-30a.

The D.C. Circuit's decision insulating from judicial review invalid or unconstitutional rules that are otherwise final is a result of agency strong arming. This decision is deleterious to those injured by such rules with no other remedy in a court of law. 5 U.S.C. § 704. If allowed to become precedent, this decision will have far-reaching ramifications in administrative law, creating a roadmap for FTC and other agencies to impose regulations through staff advisory opinions or agency guidance to evade judicial review, including, and especially, when First Amendment rights are at stake.

The Association now respectfully petitions this Court for certiorari.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE RULE ADOPTED BY THE D.C. CIRCUIT WILL SIGNIFICANTLY IMPACT ALL REGULATED INDUSTRIES AND FEDERAL AGENCIES ON A NATIONAL LEVEL

As the dissent observed, this case presents an issue of considerable importance in administrative law. This case is not about whether FTC can regulate Soundboard calls. It is about "whether the Commission must own up to the regulatory actions it has set in motion, and whether those who are told to close up shop and discharge their employees are entitled first to a day in court." App. 52a.

The APA provides for judicial review of final agency action for which there is no other adequate remedy in a court. 5 U.S.C. § 704. There is a strong presumption in favor of judicial review of administrative action. *Abbott Labs.*, 387 U.S. at 140. The Supreme Court has established a two-part test for measuring finality: at step one, the court asks whether the action "marks the 'consummation' of the agency's decisionmaking process," and, at step two, the court asks whether it is one "by which 'rights or obligations' have been determined, or from which 'legal consequences will flow.' " *Bennett*, 520 U.S. at 177-78; *Hawkes*, 136 S. Ct. at 1813.

The first step of the finality test "looks to the conclusion of activity by the agency." *See Ticor Title Ins. Co. v. FTC*, 814 F.2d 731, 745-46 (D.C. Cir. 1987) (finality looks not to the steps "a litigant must take," but to whether agency action has concluded); *Sackett*, 566 U.S. at 125-28; *Bennett*, 520 U.S. at 178. The action must be definitive and not tentative or interlocutory. *Bennett*, 520 U.S. at 178. "Courts must examine finality in a 'flexible' and 'pragmatic way,' considering the impact of delayed review on both the agency action and the regulated entities." App. 31a (quoting *Ciba-Geigy v. EPA*, 801 F.2d 430, 435 (D.C. Cir. 1986)); *Hawkes*, 136 S. Ct. at 1815; *Abbott Labs.*, 387 U.S. 136, 149. The panel ignored the substance of this question as well as the APA's presumption of reviewability.

In a grave departure from precedent, the D.C. Circuit reformulated the first prong of the *Bennett* test into a subjective analysis guided by agency's attempt to dodge judicial review. The panel deferred exclusively

to agency's characterization of its own actions, rather than the effect and implication for the Association and others. App. 29a-30a. In other words, the panel looked not to whether agency action had actually concluded as the APA and *Bennett* require, but erroneously adopted agency's argument that an action "is not final unless agency says so." *See id.* However, FTC "cannot render its action final merely by styling it as such." *Kobach v. United States Election Assistance Comm'n*, 772 F.3d 1183, 1189 (10th Cir. 2014) (citing *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 479 (2001)).

The panel's decision conflicts with a litany of binding Supreme Court precedents which require an objective, pragmatic and flexible approach to finality. *Sackett*, 566 U.S. at 125-32; *Hawkes*, 136 S. Ct. at 1813-15; *Abbott Labs.*, 387 U.S. at 149-54; *Frozen Food*, 351 U.S. at 44-45. In those cases, the Supreme Court eschewed the "say-so" approach often advocated by agency to evade judicial review, as did the Tenth Circuit in *Kobach*, 772 F.3d at 1189, and the D.C. Circuit in *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022 (D.C. Cir. 2000). It should have been rejected again here.

A. *Appalachian Power* illustrates the moral hazard of issuing substantive rules through staff to evade judicial review

The D.C. Circuit itself explained in *Appalachian Power Co. v. EPA* the danger and consequences of the agency-say-so approach that it erroneously adopted in this case:

The phenomenon we see in this case is familiar. Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in the regulations. One guidance document may yield another and then another and so on. Several words in a regulation may spawn hundreds of pages of text as the agency offers more and more detail regarding what its regulations demand of regulated entities. *Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations.* With the advent of the Internet, the agency does not need these official publications to ensure widespread circulation; it can inform those affected simply by posting its new guidance or memoranda or policy statement on its web site. *An agency operating in this way gains a large advantage. "It can issue or amend its real rules, i.e., its interpretative rules and policy statements, quickly and inexpensively without following any statutorily prescribed procedures."* Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 85 (1995). *The agency may also think there is another advantage – immunizing its lawmaking from judicial review*.

208 F.3d at 1020 (emphasis added) (invalidating a legislative rule that agency issued by and through staff guidance without honoring the required rulemaking procedure to avoid APA review).

Similar to this case, *Appalachian Power* involved a procedurally and substantively invalid legislative rule issued through staff to evade judicial review. Trade associations representing the chemical and petroleum industry argued that the rule at issue in that case expanded the scope of a 1992 federal regulation and, therefore, it constituted a binding legislative rule that should have issued through notice and comment rulemaking. 208 F.3d 1015, 1024. The EPA – like FTC here – argued that the guidance document at issue was not subject to judicial review because it was not final, and it was not final because it was not "binding." *Id.* at 1020. The D.C. Circuit disagreed, concluding that it was binding enough to compel compliance and that EPA's "expansive reading" of the term at issue "significantly broadened the 1992 rule," *id.* at 1028; thus, it was a legislative rule that should have issued through notice and comment rulemaking. *Id.* Accordingly, the D.C. Circuit invalidated the guidance document.

Like FTC, EPA claimed "that the Guidance is a policy statement, rather than an interpretative rule," and is not binding because it was penned by staff, wrapped in boilerplate, and subject to change. *Id.* at 1021-22. In the alternative, EPA argued its document was an interpretative rule (as opposed to a legislative rule) and, therefore not binding. *Id.* at 1020-23. The Court noted, however, that EPA acknowledged that

"the Agency's position on the central legal issue here . . . indeed is settled." *Id.* at 1022. In other words, like FTC here, "whatever EPA may think of its Guidance generally, the elements of the Guidance petitioners challenge consist of the agency's settled position, a position it plans to follow in reviewing State-issued permits, a position it will insist State and local authorities comply with in setting the terms and conditions of permits issued to petitioners, a position EPA officials in the field are bound to apply." *Id.*

This case is no different. FTC argues that the letter is a mere advisory opinion or, at most, an interpretive rule (not a legislative rule), and it is not binding on agency because it was issued by staff, wrapped up in boilerplate, and is subject to change. But, as the panel in *Appalachian Power* noted, "all laws are subject to change. Even that most enduring of documents, the Constitution of the United States, may be amended from time to time." *Id.* "The fact that a law may be altered in the future has nothing to do with whether it is subject to judicial review at the moment." *Id.* Further, if, as FTC argues and the Division Letter announces, the "plain" language of the TSR allegedly supports FTC's legal conclusion, why would FTC later change its mind on the issue? App. 43a. Agency admits that it is the settled legal position of staff charged with enforcement, App. 44a, 101a, and pursuant to the

delegation provisions,[2] it reflects the views of agency. App. 39a.

FTC further acknowledges that it will use this Division Letter as a basis for establishing the "knowledge" required "to trigger an enforcement action and financial penalties," for violations of the new rule under the Telemarketing Act, "and it is something that 'a reasonable business would take into account.'" App. 47a (quoting oral argument transcript). Likewise, the Division Letter will also be used by states enforcing Commission rules in the field to establish the knowledge required for an enforcement action and civil penalties, as well as by private parties and potentially class action plaintiffs. 15 U.S.C. §§ 6103, 6104. On information and belief, FTC has already started investigating members of the Association regarding its use of Soundboard technology under the TSR. In other words, FTC says the Division Letter does not have the force

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[2] The regulations expressly provide for delegation of authority to staff to issue advisory opinions reflecting the views of the Commission, and the whole regulatory scheme supports finality. App. 30a, 32a-35a (citing 16 C.F.R. § 0.7 (the "*Commission* . . . may delegate, by published order or rule, certain of *its* functions to a division of the Commission . . . or an employee. . . ."); § 1.2(a) (all "requests for advisory opinions must first be submitted to the Secretary of the Commission"); §§ 1.1, 1.3 (the *Commission* will then "'inform the requesting party of *its* views,' *id.* § 1.3(a), through either the issuance of an opinion by the Commission itself, *id*. § 1.1(a), or the Commission deputizing agency staff to 'render [the] advice,' *id.* § 1.1(b)") (emphasis added). "[T]he decision whether to issue advisory opinions directly or through agency staff [thus] rests exclusively with the Commission. App. 35a (citing 16 C.F.R. §§ 1.2(a), 1.3(a))." It is a partial delegation. App. 20a; 16 C.F.R. § 1.1(b).

and effect of law, but it treats it as though it does. Thus, like in *Appalachian Power*, the Division Letter constitutes "final agency action, reflecting a settled agency position which has legal consequences both for" federal and "State agencies administering" Commission rules *and* "for companies like those represented by petitioners who must" cease engaging in protected speech or discontinue operating. *Id.* at 1023.

The "Division Letter itself speaks in final, conduct-altering, and compliance-demanding terms, leaving the regulated businesses to either knuckle under or face a penalty-seeking enforcement action." App. 41a. The demands of the letter "admit of no ambiguity" and suggest no "possibility of modification." App. 43a. And the consequences of compliance that flow from the Division Letter are dire, "forc[ing] many users to downsize or close their doors altogether:

> [it forces businesses] "to scrap the soundboard technology systems in which they have invested millions of dollars and countless hours of development and training," and to "lay off many – and, in some cases, all – of the thousands of people whom the companies have trained and, for years, paid good salaries to[.]" Dkt. 2-2 at 11–12*; see also* Dkt. 2-2 at 10 (compliance with the 2016 Division Letter will "eliminate 80% or more of [company] revenue," and dampen sales even in areas not subject to the Telemarketing Sales Rule); Dkt. 2-3 at 3–4 (affirming that one company will be forced to make massive layoffs and will ose over $3 million invested in soundboard

> technology as a result of the Division's 2016 letter).

App. 43a-44a.

It "unqualifiedly" states the Soundboard calls are now subject to the robocall ban. App. 41a. And it provides a "six-month lead time" to afford the industry sufficient time to "make [the] necessary changes to bring themselves into compliance" with the law. *Id.* at 41a-42a, App. 100a. It requires the Soundboard industry "to either reshape 'the manner in which an important segment of the . . . business will be done' or run the 'risk' of civil penalties." App. 48a (quoting *Frozen Food*, 351 U.S. at 44). FTC thus "views its deliberative process as sufficiently final to demand compliance with its announced position." App. 42a (quoting *Ciba-Geigy*, 801 F.2d at 436). "And when agency action is final enough that business-ending compliance is expected by a date certain, it should be final enough for judicial review. What is final for the goose should be final for the gander." *Id.*

B. The decision below is erroneous

Unlike in *Appalachian Power*, the panel below did not proceed to analyze finality objectively and flexibly under both prongs of the *Bennett* test. Rather, the *Soundboard* majority ignored the effects of the Division Letter, dismissing them as mere conjecture, and refused to reach the second prong of *Bennett*. App. 26a. With regard to the first prong, FTC's argument and the panel's holding mirrored EPA's argument in *Appalachian Power*: the Division Letter is not final because it

is not binding on agency, and it is not binding on agency because (1) it was authored by staff, (2) decorated in boilerplate, and (3) per FTC regulations, the Commission cannot be held accountable for the actions of its staff. App. 13a-15a, 19a-21a. For the same reasons it was rejected in *Appalachian Power*, that argument should have been rejected here.

As in *Appalachian Power*, FTC cannot hide behind staff to avoid APA review of final agency action. Despite agency's reliance on "staff" as the vehicle for avoiding judicial review, the Division Letter "comfortably fits the mold of cases in which [courts have] held that the actions of subordinate agency officials qualify as final agency action." App. 50a; *see Safari Club Int'l v. Jewell*, 842 F.3d 1280 (D.C. Cir. 2016) (press release adopting position of Division of Scientific Authority constitutes final agency action); *Rhea Lana, Inc. v. Dep't of Labor*, 824 F.3d 1023, 1025 (D.C. Cir. 2016) (letter from subordinate official informing company of agency's longstanding interpretation of the Fair Labor Standards Act is final agency action); *Her Majesty the Queen in Right of Ontario v. EPA*, 912 F.2d 1525, 1531 (D.C. Cir. 1990) (letter of assistant EPA official – with explicit caveat that it contained only a personal opinion – constitutes final agency action); *NRDC v. Thomas*, 845 F.2d 1088, 1093-94 (D.C. Cir. 1988) (memorandum drafted by subordinate EPA official constitutes final agency action); *Ciba-Geigy*, 801 F.2d at 435 (letters issued by director of pesticide programs constitute final agency action).

This is so whether FTC characterizes the Division Letter as a staff advisory opinion, staff guidance, or a letter, as courts have held that all of those species of action can be final for APA reviewability purposes. *Id.* "The writing is on the wall, and a line of routine boilerplate cannot erase it." App. 46a. The staff advisory guidance issued in *Appalachian Power* contained even more forceful boilerplate language than that contained in the Division Letter, "emphasizing that '[t]he policies set forth in this paper are intended solely as guidance, do not represent final Agency action, and cannot be relied upon to create any rights enforceable by any party.' " App. 44a-45a (quoting 208 F.3d at 1023). "Such 'boilerplate,' which the EPA – like Commission staff here – routinely included at the end of guidance documents, was not enough 'to keep the proceduralizing courts at bay.' " *Id.* (quoting Peter L. Strauss, Comment, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1485 (1992)). In other words, boilerplate qualifications cannot "fend off judicial review of otherwise final agency action." App. 44a.

Next, the panel agreed with FTC that the Commission regulations do not provide for delegation of authority to staff to express the views of agency in advisory opinions. App. 20a-21a. However, even if so (and the regulations do expressly require delegation) that would pose no bar to finality. Even if the rule in the Division Letter was "invalid" and "issued without authority, [] none of that would destroy [this Court's] jurisdiction to hear the case." *Kobach*, 772 F.3d at 1192; *see also George Hyman Constr. Co. v. Occupational*

Safety & Health Review Comm'n, 582 F.2d 834, 837 (4th Cir. 1978) ("[u]nless the order is appealable the employer is placed in a jurisdictional limbo that would prevent him from seeking judicial relief from a possibly erroneous decision"); *Marshall v. Sun Petroleum Prods. Co.*, 622 F.2d 1176, 1179-80 (3d Cir. 1980) (same). Thus, at least three circuit courts of appeal have held that absence of authority has no bearing on an appellate court's ability to hear an erroneous rule that is otherwise final.

In consideration of the first *Bennett* prong, the panel rightly required that agency's action be definitive and not tentative or interlocutory; however, it disallowed any consideration of the "demands" and "consequences" of the Division Letter as part of that analysis. The panel reasoned that consideration of the "demands" and "consequences" (i.e., the substance of the Letter), which is required to determine definiteness, somehow "bootstraps the second element of *Bennett* into the first." App. 24a. In other words, agency says look not to what it is and what it says, but to what agency says it is. To the contrary, that reasoning directly conflicts with *Bennett* and this Court's pragmatic approach taken in *Sackett, Hawkes, Abbott Labs.*, and *Frozen Food* and actually bootstraps the first element into the second, which renders the first element impossible to establish. *Sackett*, 566 U.S. at 125-26; *Hawkes*, 136 S. Ct. at 1814-15; *Abbott Labs.*, 387 U.S. at 149-50; *Frozen Food*, 351 U.S. at 44.

Appalachian Power illustrates the danger in letting agencies escape judicial review by using subordinates

to announce new substantive policies camouflaged in routine boilerplate. Disregarding its own warning, the D.C. Circuit in *Soundboard* acquiesced to agency and reversed the district court's finding of final agency action as agency requested.

C. This new approach sets dangerous precedent

The consequences of the D.C. Circuit's new approach are far-reaching. In the wake of the *Soundboard* decision, other federal agencies have issued statements regarding the finality of staff advisory opinions and agency guidance. The Securities and Exchange Commission and the Bureau of Consumer Financial Protection, for example, have both taken the position that anything penned by staff is not final for purposes of judicial review. *See* SEC, *Statement Regarding SEC Staff Views*, https://www.sec.gov/news/public-statement/statement-clayton-091318 (last visited Nov. 27, 2018); FDIC, *Interagency Statement Clarifying the Role of Supervisory Guidance*, https://www.fdic.gov/news/news/press/2018/pr18059a.pdf (last visited Nov. 27, 2018).

It is the potential for abuse of government power and the regulatory process that is dangerous. If agency's staff attorneys can issue new binding rules without the required procedure and with immunity from judicial review, then nothing is beyond the reach of federal regulators. The fact that this decision issued from the D.C. Circuit, which is in the unique position to hear the vast majority of cases involving federal

administrative claims, weighs heavily on the impact of this decision on all regulated industries nationwide.

Further, this decision raises significant First Amendment implications that will go unchecked absent reversal by this Court. This Court has held that where First Amendment claims are at stake, those constitutional claims must weigh heavily in the court's finality calculus. App. 49a-50a; *see Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 485-86 (1975) (finding a decision "final" in part because further delay "of the First Amendment claim . . . will leave unanswered an important question of freedom of the press . . . an uneasy and unsettled constitutional posture [that] could only further harm the operation of a free press"); *Blount v. Rizzi*, 400 U.S. 410, 416-17 (1971) (noting prior restraints "require 'prompt judicial review' . . . to prevent the administrative decision of the censor from achieving an effect of finality").

The message of this Court's precedent is clear: "When an agency's 'authoritative interpretation' and demand for 'compliance' means business's 'only alternative to costly compliance' is 'to run the risk of serious civil . . . penalties,'" or the loss of First Amendment freedoms, "finality attaches and the time for judicial review has come." App. 48a-49a; *Ciba-Geigy*, 801 F.2d at 437-39; *see Hawkes*, 136 S. Ct. at 1815 (holding that parties "need not await enforcement proceedings before challenging final agency action where such proceedings carry the risk of serious criminal and civil penalties"); *Sackett*, 566 U.S. at 126 (finding that agency action had "all of the hallmarks of APA finality

that our opinions establish" because, *inter alia*, it "exposes the Sacketts to double penalties in a future enforcement proceeding").

The decision below departs from the precedent of this Court, its own Circuit, and its sibling circuits. Such a departure undermines the principle that administrative law should be applied uniformly in all federal courts, including and especially when it involves First Amendment claims. The decision below is incorrect and has the potential to destroy an industry and permanently silence protected speech. As cautioned by *Appalachian Power*, unless reversed, this decision will continue to impact industries regulated by other agencies on a national level, diminishing their right to judicial review of otherwise final agency action under the APA.

II. CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION CONFLICTS WITH BINDING SUPREME COURT PRECEDENT

The D.C. Circuit summarized its approach when it incorrectly stated this Court's instruction for analyzing finality under the APA: "*Bennett* directs courts to look at finality from the agency's perspective" to determine "whether the action represents the culmination of the agency's decisionmaking." App. 22a. Unsurprisingly, the panel neglected to cite to any page in *Bennett* on which that instruction may be found. It is not there.

In *Bennett*, this Court found the first prong uncontested and moved on to the second prong. 520 U.S. at 178. In other words, *Bennett* never instructed that courts unilaterally analyze the first prong from agency's view (and, thereby, to the benefit of agency and to the detriment of the regulated party). Rather, this Court has consistently rejected that subjective approach to finality.

A. The panel should have followed *Hawkes, Sackett, Abbott Labs.*, and *Frozen Food*

This case bears all the hallmarks of final agency action present in *Sackett*, *Hawkes*, *Abbott Labs.*, and *Frozen Food*. The Division Letter is similar to the order issued in *Frozen Food*, 351 U.S. at 43-44, which the district court and the dissent emphasized. App. 48a, 70a-71a. In *Frozen Food*, this Court considered an order issued by the Interstate Commerce Commission ("ICC") specifying which commodities are not "agricultural" and therefore not exempt by statute from regulation. 351 U.S. at 41. The Plaintiff was not a recipient of the order but a transporter of agricultural commodities that it believed were exempted by statute contrary to the ICC's recent order. *Id.* at 42.

Though the order "had no authority except to give notice of how the Commission interpreted" the statute, and "would have effect only if and when a particular action was brought against a particular carrier," *Hawkes*, 136 S. Ct. at 1815; *Abbott Labs.*, 387 U.S. at 150 (discussing *Frozen Food*), this Court "held

that the order was nonetheless immediately reviewable," *Hawkes*, 136 S. Ct. at 1815, because it had "an immediate and practical impact on carriers who are transporting the commodities, and on shippers as well." *Frozen Food*, 351 U.S. at 43-44. It "warns every carrier, who does not have authority from the Commission to transport those commodities, that it does so at the risk of incurring criminal penalties." *Id.* at 44.

The Division Letter is no different. It was issued to all industry representatives, published on FTC's website, and it "warns" every user and manufacturer of Soundboard technology that if it continues to use Soundboard for outbound sales and charitable calls, it does so at the risk of incurring coercive civil penalties.[3] App. 48a, 44a. "As counsel for the Commission agreed at oral argument, the specificity and directness of the 2016 Division Letter's conclusion" that the TSR "outlaws the use of soundboard technology 'certainly[] . . . would be a factor' in establishing the knowledge required to trigger an enforcement action

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[3] As Judge Millet noted in dissent, *Sackett* teaches that:

> What matters to finality analysis is the "Government's current litigating position," grounded in statutory text, that failure to comply with the 2016 Division Letter could provide a legal basis for substantial civil penalties, *id*. at 126. That risk is a specific and concrete legal consequence that flows from the challenged agency action. *See id.* And because the Division Letter spawns such legal exposure, the mere possibility that prosecutorial discretion later down the road could reduce the amount of penalties says nothing about the finality of agency action *now*.

App. 47a n.9.

and financial penalties." App. 47a. As the Tenth Circuit held in *Kobach*, "Agency's own behavior [may] belie[] the claim that its [action] is not final." 772 F.3d at 1189 (citing *Whitman*, 531 U.S. at 479).

Like in *Abbott Labs.*, the Division Letter requires industry members "to make significant changes in their everyday business practices" by a date certain. 387 U.S. at 154. It bans the largest and most valuable uses of a technology in which these businesses have invested millions of dollars, forcing industry to discard tens of thousands of audio files, layoff employees, retrain labor, and change their day-to-day operations and business plan or shut their doors altogether. *See id.* at 153; App. 30a. And it is immediate and definite – if businesses fail to observe FTC's new rule within six months' time, "they are quite clearly exposed to the imposition of strong sanctions." *Id.*

As in *Bennett*, the Division Letter carries "direct consequences" and serves as "a final and binding determination." 520 U.S. at 178. It is binding on federal and state agencies who FTC acknowledges will use the Division Letter to trigger enforcement actions and civil penalties; it is binding on industry.

B. The suggested alternatives are inadequate

FTC argued and the majority held that the Association could have chosen one of three alternatives: (1) request a second opinion, (2) await enforcement, or (3) hope for rescission. As in *Hawkes*, all of

these alternatives are inadequate. 136 S. Ct. at 1815-16.

Like the permit process in *Sackett*, FTC's unsupported suggestion that the Association could simply ask for a second opinion would force industry to continue "knocking on a door that will not open" before it can challenge the invalidity and unconstitutionality of the rule that muzzles it. App. 36a; 566 U.S. at 127 ("The mere possibility that an agency might reconsider . . . does not suffice to make an otherwise final action nonfinal."); *see also 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"). The regulations provide for no appeal mechanism or entitlement to further review, and the APA does not require such a costly endeavor. To remove any doubt, this Court found EPA's offer to the Sacketts to "engage in informal discussion of the terms and requirements" of the order in that case irrelevant because it "confers no entitlement to further agency review." 566 U.S. at 127.

Further, this Court has repeatedly held that parties need not wait for agency to file an enforcement action to have their day in court. *Hawkes*, 136 S. Ct. at 1815; *Sackett*, 566 U.S. at 127 ("the Sacketts cannot initiate [an enforcement] process, and each day they wait for the Agency to drop the hammer, they accrue, by the Government's telling, an additional $75,000 in potential liability"); *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 490 (2010) ("We normally do not require plaintiffs to 'bet the farm

. . . by taking the violative action' before 'testing the validity of the law.' "). Thus, the mere prospect that the FTC might not drop the hammer in any given case does not preclude judicial review of the final agency action now. App. 47a n.9; *see Sackett*, 566 U.S. at 127.

The panel also suggested, at agency's urging, that rescission is an adequate alternative for judicial review. "[T]he Commission does have the power to rescind the Letter," App. 68a; *see* 16 C.F.R. § 1.3(c). But "the mere prospect that it might do so does not insulate the Letter from judicial review." App. 68a; 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"); *Sackett*, 566 U.S. at 127.

It is also worth noting, the panel determined that it would not consider staff advice final because it is subject to the Commission's right of rescission. App. 18a-20a. However, the panel admits it *would* consider Commission advice final agency action, even though it is also subject to the Commission's right of rescission. *Id*. Section 1.3(b) expressly states that "[a]ny advice given by the Commission is [also] without prejudice to the right of the Commission to reconsider the questions involved and, where the public interest requires, to rescind or revoke the action." 16 C.F.R. § 1.3(b); App. 37a. The panel's argument thus defies common sense.

Besides, if *only* the Commission can rescind or revoke advisory opinions, as the rules require, then staff was necessarily acting on the Commission's behalf as

its delegate and at its direction in revoking the 2009 advisory opinion in November 2016. To argue otherwise would mean that staff revoked the 2009 opinion and issued a new rule banning protected speech by a date certain without authority, and yet agency refuses to rescind the erroneous rule and has defended it to date.

C. The cases relied upon by FTC and the panel in support of non-finality have no application to this case

FTC relied on two inappropriate D.C. Circuit cases for the proposition that staff advisory opinions are "informal" and, therefore, "routinely" found to be nonfinal. Neither of those cases are relevant.

Unlike *Holistic Candlers & Consumers Ass'n v. FDA*, 664 F.3d 940, 944 (D.C. Cir. 2012), and *Reliable Automatic Sprinkler Co. v. Consumer Product Safety Commission*, 324 F.3d 726, 731 (D.C. Cir. 2003), this case involves no request for voluntary compliance. *Holistic Candlers* involved an ongoing administrative investigation of certain ear candle products. FDA issued a letter to specific manufacturers of such candles requesting "voluntary" compliance and additional information before a final determination could be made. 664 F.3d at 944.

Likewise, *Reliable Automatic Sprinkler* involved a "statement of the agency's intention to make a preliminary determination that the [company's] sprinkler heads present a substantial product hazard, and a

request for voluntary corrective action." 324 F.3d at 731-32. The court found the challenged letters in both cases neither concluded agency's activity on the matter nor determined rights, obligations or duties. *See Holistic Candlers*, 664 F.3d at 943-44; *Reliable Automatic Sprinkler*, 324 F.3d at 731-32.

That FTC may have investigated the pros and cons of its proposed rule before issuing its final rule on November 10, 2016, does not somehow render this a civil investigation against individual companies within the meaning of *Reliable Automatic Sprinkler* or *Holistic Candlers*. Nor was it a mere recommendation issued to the Commissioners, who have absolute discretion to accept or reject it, as contemplated in *Bennett*. 520 U.S. at 178. Nor was it merely a "statement of intent to make a preliminary determination" as in *Reliable Automatic Sprinkler* or a request for "voluntary" compliance as in *Holistic Candlers* and *Reliable Automatic Sprinkler*.

There is nothing voluntary about this – in no uncertain terms, the Division Letter bans speech and compels compliance with the new rule within six months. "It commands, it requires, it orders, it dictates." *Appalachian Power*, 208 F.3d at 1023. It conclusively determines the illegality of Soundboard calls and threatens serious civil penalties. And it is binding on everyone in the industry that uses Soundboard for outbound telemarketing purposes. It "shutters" an industry. App. 46a, 51a.

While FTC relied on these cases for the point that "informal" advisory letters are not binding on the agency, that only matters (to the extent it ever matters) if the subject letter is in fact a letter offering only "advice" and lacking any "future effect" or "immediate and practical consequences" as in those cases. *See Indep. Petroleum Ass'n of Am. v. Babbitt*, 92 F.3d 1248, 1256 (D.C. Cir. 1996); *Amoco Prod. Co. v. Watson*, 410 F.3d 722, 732 (D.C. Cir. 2005). Again, it matters not what agency says it is, but what it actually is.

III. CERTIORARI SHOULD BE GRANTED BECAUSE THE D.C. CIRCUIT'S DECISION CONTRAVENES THE PLAIN LANGUAGE OF THE APA AND THE FTC HAS FAILED TO OVERCOME THE APA'S PRESUMPTION OF REVIEWABILITY

The APA creates a "basic presumption of judicial review [for] one 'suffering legal wrong because of agency action.'" *Weyerhaeuser Co. v. United States Fish & Wildlife Serv.*, No. 17-71, 2018 U.S. LEXIS 6932, at *20 (Nov. 27, 2018); (citing *Abbott Labs.*, 387 U.S. at 140) (quoting 5 U.S.C. § 702). That presumption is strong. *Id.* ("legal lapses and violations occur, and especially so when they have no consequence. That is why this Court has so long applied a strong presumption favoring judicial review of administrative action.") (quoting *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1652-53 (2015)).

"The presumption may be rebutted only if the relevant statute precludes review, 5 U.S.C. § 701(a)(1), or

if the action is 'committed to agency discretion by law,' § 701(a)(2)." 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. Agency 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.

The APA further states that "agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority." 5 U.S.C. § 704. The APA "is explicit that an agency action remains reviewable 'final' agency 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 the Association (and the Commission's regulations and practice evidence it is not), no statutory or regulatory provision renders the Division Letter inoperative pending such appeal. Like in *Sackett* and *Hawkes*, the alternatives to judicial review offered by FTC fail to overcome the strong presumption of reviewability under the APA. *Hawkes*, 136 S. Ct. at 1815-16; *Sackett*,

566 U.S. at 128; *see also Abbott Labs.*, 387 U.S. at 141 (noting that the APA's "'generous review provisions' must be given a 'hospitable' interpretation" and "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review") (internal citations omitted).

As the Eighth Circuit explained in *Hawkes*, "[t]he prohibitive costs, risk, and delay of these [asserted] alternatives to immediate judicial review evidence a transparently 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. *See Hawkes Co. v. United States Army Corps of Eng'rs*, 782 F.3d 994, 1001 (8th Cir. 2015). The conflict between the panel decision and this Court's precedent on the availability of judicial review warrants certiorari in this case.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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