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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AS AMICI CURIAE IN SUPPORT OF PETITIONER

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The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents more than three million businesses and professional organizations of every size, in every sector, and from every geographic region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community.

The National Federation of Independent Business Small Business Legal Center ("NFIB Legal Center") is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. NFIB is the nation's leading small business association, representing members in Washington, D.C., and all fifty state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses.

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[1] Counsel of record for all parties received timely advance notice of intent to file and consented to the filing of this brief. S. Ct. R. 37(2)(a). No counsel for any party authored this brief in whole or in part, and no person or entity other than amici curiae or their counsel made a monetary contribution intended to fund the brief's preparation or submission.

NFIB represents small businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs ten people and reports gross sales of about $500,000 a year. NFIB membership reflects American small business. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses.

The membership of NFIB and the Chamber includes businesses engaged in commerce throughout the nation, subject to the reach of every federal agency. Their members, in varying degrees, must comply with a wide range of regulatory schemes that federal agencies are tasked with interpreting and enforcing. Accordingly, amici have a keen interest in ensuring that when agencies change that regulatory environment—particularly in ways that shutter entire industries—its members have a mechanism to ensure the substantive and procedural validity of those changes through administrative accountability and appropriate, timely judicial review.

INTRODUCTION AND SUMMARY OF ARGUMENT

The presumption of judicial review forms the bedrock of the Administrative Procedure Act, ensuring that federal agencies cannot impose their will on regulated entities unless those affected have an opportunity to test the lawfulness of agency action without risking financial ruin.

The D.C. Circuit's decision imperils that interest by providing a roadmap for agencies to evade judicial review. Under that ruling, even when staff "advice" consists of unambiguous, industry-wide legal pronouncements, sets a strict compliance date for businesses to shut down, and threatens substantial consequences for failure to comply, an agency can still escape judicial review. How? All an agency need do is authorize staff to issue the rule, disclaim finality with boilerplate language, and provide a hortatory promise that it might later change its mind—even though no further agency review is contemplated, and the administrative process, short of enforcement, is over.

In an overly formalistic application of this Court's already confused finality jurisprudence, the D.C. Circuit withheld judicial review of a definitive, industry-shuttering pronouncement, where all that was left for the agency to do was enforce its diktat. This further muddying of already murky finality waters turned on the paradoxical conclusion that the real-world effects of agency actions can be ignored in a purportedly pragmatic finality inquiry. And by artificially bifurcating its analysis, the court allowed the existence of prosecutorial discretion to defeat finality, even though the risk of enforcement has long been understood to support finality.

Because the D.C. Circuit is the predominant court with respect to administrative law cases, and thus the principal arbiter of agency action,[2] and

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[2] The D.C. Circuit hears "a disproportionate share of administrative petitions" as Congress "has expressly given the

because en banc review has been denied, only this Court can correct course. The D.C. Circuit's garbling of finality doctrine and resulting abdication of its judicial review responsibilities will have ripple effects across other agencies, and likely be replicated across other courts, unless and until this Court acts to clarify the law.

ARGUMENT

I. Certiorari Is Warranted To Resolve Confusion About When The Consequences Of An Agency's Action Must Be Considered, Regardless Of The Agency's "Non-Final" Label.

An agency's action, regardless of formality, constitutes "final agency action" subject to judicial review under the Administrative Procedure Act, 5 U.S.C. § 704, when it "mark[s] the consummation of the agency's decisionmaking process," and is an act "by which rights or obligations have been determined, or

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D.C. Circuit jurisdiction over many types of administrative issues." Eric M. Fraser et al., *The Jurisdiction of the D.C. Circuit*, 23 Cornell J.L. & Pub. Pol'y 131, 152 & app. (2013) (detailed analysis of U.S. Code provisions conferring jurisdiction on D.C. Circuit). "Whatever combination of letters you can put together, it is likely that jurisdiction to review that agency's decision is vested in the D.C. Circuit. Even when the jurisdiction is concurrent, as it often is . . . lawyers frequently prefer to litigate in the D.C. Circuit because there is a far more extensive body of administrative law developed there than in other circuits." John G. Roberts, Jr., *What Makes the D.C. Circuit Different?: A Historical View*, 92 Va. L. Rev. 375, 389 (2006).

from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997).

When the Court "distilled" these "two conditions that generally must be satisfied for agency action to be 'final' under the APA," it reaffirmed the "'pragmatic' approach … long taken to finality." *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1813, 1815 (2016). If a regulated business faces the Hobson's choice of changing its business practices to comply with an agency pronouncement or risking ruinous sanctions, the agency action is "final" and judicial review is available. *See id.* at 1815; *Frozen Food Express v. United States*, 351 U.S. 40, 44 (1956). Agency action is thus final when regulated businesses either "must comply with the [agency] requirement and incur the [associated] costs . . . or . . . follow their present course and risk prosecution." *Abbott Labs. v. Gardner*, 387 U.S. 136, 152 (1967).

The D.C. Circuit's stovepiped approach to the finality inquiry muddies this law and invites agencies to game the finality inquiry.

First, by focusing exclusively on "the agency's perspective," as the panel majority believed *Bennett*'s two-step inquiry required, Pet. 22a, the decision elevated the letter's boilerplate over its function, according decisive weight to the letter's "own terms" regarding the consummation of the FTC's decisionmaking process, Pet. 2a–3a. And the court deferred to the agency's finality disclaimer even though the letter included "unambiguous pronouncements of a legal position, announced compliance dates, and substantial legal consequences for failure to fall in line." Pet. 51a.

Second, by deeming the possibility of enforcement-stage Commission reconsideration to be further administrative "review" sufficient to render the letter non-final under *Bennett*'s first prong, the D.C. Circuit introduced irreconcilable tension into the law. Under the approach below, the possibility of (non)-enforcement and the exercise of prosecutorial discretion counts against finality under *Bennett's* first prong, while that very risk of the enforcement hammer dropping favors finality under *Bennett's* second prong. Both cannot be true.

A. The Decision Below Reflects Confusion Regarding the Role of Consequences in the Pragmatic Finality Inquiry.

1. This Court has emphasized that finality is a pragmatic inquiry, focused on the real-world consequences of an agency's pronouncement. *Hawkes*, 136 S. Ct. at 1815; *Abbott Labs.*, 387 U.S. at 149. Under this approach, the finality inquiry considers whether judicial review will "interfer[e] in the early stages of an administrative determination as to specific facts." *Abbott Labs.*, 387 U.S. at 148. When judicial review will not encroach on administrative fact-finding or interfere with ongoing proceedings—when a challenged agency action is "definitive," and not "informal" or "tentative"—then the Government's own views on its binding effect are not dispositive. *Hawkes*, 136 S. Ct. at 1817–18 (Ginsburg, J., concurring) (citing *Abbott Labs.*, 387 U.S. at 151). Instead, the question is whether the agency action has an "immediate and practical effect" that requires

regulated entities to change their behavior. *See id.* (citing *Frozen Food Express,* 351 U.S. at 44).

When a non-tentative agency pronouncement—issued by agency actors with the delegated authority to do so—is promulgated at the conclusion of agency fact-finding and insists on compliance, that action is final. *See Hawkes*, 136 S. Ct. at 1815. Even a pronouncement that "would have effect only *if and when* a particular action was brought" is immediately reviewable when it mandates a change in behavior by industry to avoid the risk of enforcement. *Abbott*, 387 U.S. at 150 (emphasis added). The "APA provides for judicial review of all final agency actions, not just those that impose a self-executing sanction." *Sackett v. EPA*, 566 U.S. 120, 129 (2012).

For such an action-mandating pronouncement, it is of no moment that the agency might later reconsider or change its mind. Revision is "a common characteristic of agency action, and does not make an otherwise definitive decision nonfinal." *Hawkes,* 136 S. Ct. at 1814. Where there is "no entitlement to further agency review," and nothing left to do but "wait for the agency to drop the hammer," *Sackett*, 566 U.S. at 127, an agency's action is final.

The consequences of an agency action are typically discussed under the rubric of *Bennett*'s second prong—whether the act is one "from which legal consequences will flow." *Bennett*, 520 U.S. at 178. But this Court has yet to fully grapple with the interrelationship of *Bennett's* two prongs. And the question of whether *Bennett's* two steps are truly distinct and independently necessary aspects of finality was explicitly left open in *Hawkes*. *See* 136 S.

Ct. at 1813 n.2 (leaving open question of whether "an agency action that satisfies only the first [prong] may also constitute final agency action"). Insistence on a "pragmatic" approach, yet specification of a two-step (and seemingly ordered) test, has left room for misunderstanding the interrelationship of *Bennett's* two prongs, and the role that consequences play in each step.

2. Filling that void, the D.C. Circuit here adopted a confusing and rigid finality rubric that ignores the actual consequences of an agency action when deciding whether it is sufficiently definitive to be final. The result: a paradoxical situation where *Bennett's* second prong is met—a non-tentative agency legal pronouncement has immediate consequences for regulated parties—but an overly formalistic acquiescence to agency labeling nonetheless defeats review at *Bennett* step one. The Court should grant review to clarify that this rigid approach is not compelled by *Bennett*. And it cannot be right under the pragmatic approach to finality that *Bennett*'s two factors are designed to implement.

It cannot seriously be disputed that the 2016 staff letter has immediate consequences: As of its fixed compliance date (but not before), industry may no longer present arguments that they meet the conditions specified in the 2009 staff opinion letter, and thereby forestall enforcement. Rather, any soundboard operator that uses the technology for commercial purposes is on notice that staff charged with enforcement and acting with delegated authority have concluded that the technology violates the regulation. Pet. 97a–98a. That the Commission is not

bound by the letter to impose penalties hardly reduces the risk faced by a business that presses on as if the letter was never issued. What's more, if staff advice had no legal consequence, why even revoke the 2009 letter, much less announce an industry-wide date certain by which to comply with the new directive?

As the dissent recognized, and FTC Counsel acknowledged at oral argument, the Division Letter "spawn[ed] legal exposure," that could accumulate into "crushing financial penalties." Pet. 46a–47a & n.9. And more than administrative penalties are at stake. Courts, which have authority to impose equitable penalties, give deference to FTC staff letters. *E.g.*, *Carter v. AMC, LLC*, 645 F.3d 840, 843–44 (7th Cir. 2011) (providing "respectful consideration" to interpretations in FTC staff letters).[3] State courts, too, defer to FTC staff advice. *See, e.g.*, *Fedor v. Nissan of N. Am.*, 74 A.3d 977, 987–88 (N.J. Super. Ct. App. Div. 2013) (giving "substantial deference" to an FTC

[3] Although this Court declined to characterize a specific FTC staff letter as "authoritative guidance" for purposes of assessing whether a violation of the Fair Credit Reporting Act was willful, the letter proffered there did not "canvass the issue" in question as the 2016 staff letter here purports to do, and the FTC did not hold substantive rulemaking authority regarding the statutory provisions at issue. *Safeco Ins. Co. of Am. v. Burr,* 551 U.S. 47, 70 & n. 19 (2007).

staff advisory letter); *N.J. Guild of Hearing Aid Dispensers v. Long*, 384 A. 2d 795 (N.J. 1978).[4]

The upshot of the FTC letter is that the only certain option to obtain judicial review is to violate the definitive directive and await enforcement. This is no option at all. *E.g.*, *Hawkes*, 136 S. Ct. at 1815; *Abbott*, 387 U.S. at 153. The D.C. Circuit itself recognizes as much when it considers finality under the second *Bennett* factor: "The possibility that the agency might not bring an action for penalties, or, if it did, might not succeed in establishing the underlying violation, did not rob the administrative order in *Sackett* of legal consequences, nor does it so here." *Rhea Lana, Inc. v. Dep't of Labor*, 824 F.3d 1023, 1032 (D.C. Cir. 2016) (citing *Sackett*, 132 S. Ct. at 1372).

The D.C. Circuit's belief that *Bennett* compels a drastically different analysis if the case is presented under the first factor, rather than the second, is a testament to the confusion wrought by the various

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[4] *See also Don't Waste Or. Comm. v. Energy Facility Siting Council,* 881 P.2d 119 (Or. 1994) (noting how Oregon courts defer to agencies' interpretations of their own rules); *Vaught v. Green Bankshares, Inc.*, No. E2015–01259–COA–R3–CV, 2016 WL 1594963 (Tenn. Ct. App. Apr. 18, 2016) (affording *Auer*-type deference to FDIC staff opinion letter). So even if this Court overrules *Auer v. Robbins*, 519 U.S. 452 (1997) and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945) and clarifies that federal courts should not defer to agency interpretations of their own regulations (as it should), *see* Brief of Amicus Curiae the Chamber of Commerce in support of Petitioner, *Kisor v. Wilkie*, No. 18-15, 2018 WL 6439837 (U.S. Dec. 10, 2018) (granting certiorari), FTC staff letters, even if clothed as "nonbinding" FTC Staff "advice" will still have legal consequences.

attempts to distill a pragmatic multi-factor inquiry into certain guideposts. Some circuits have stuck to the old ways. *See, e.g.*, *Qureshi v. Holder*, 663 F.3d 778, 781 & n.7 (5th Cir. 2011) (citing *FTC v. Standard Oil Co. of Ca.*, 449 U.S. 232, 242–43) (applying five-factor test for finality).[5] But no matter how finality factors are sliced and diced, they do not permit a court to swallow whole an agency's self-serving label of non-finality where the action to be reviewed:

- Is a widely-disseminated and purely legal pronouncement on the industry-wide reach of an enforcement regulation, revoking a former safe harbor;
- is issued by staff with delegated authority to do so, at the conclusion of extensive fact-finding and meetings with industry representatives; and
- announces an effective compliance date by which industry must change its day-to-day operations or risk enforcement and significant penalties.

In short, a "pragmatic" approach to finality cannot be reconciled with the panel majority's refusal to consider the consequences of agency action in deciding whether agency decisionmaking is complete, and its subordination of all other indicia of finality to agency

[5] The factors are "(1) the legal and practical effect of the agency action; (2) the definitiveness of the ruling; (3) the availability of an administrative solution; (4) the likelihood of unnecessary review; and (5) the need for effective enforcement of the Act." *Qureshi*, 663 F.3d at 781 n.7.

say-so. Because the D.C. Circuit believes its approach is compelled by *Bennett*'s structure, and has denied en banc rehearing, only this Court can correct course.[6]

B. The Court Should Clarify that Consequences of Agency Directives Cannot Be Overcome by Agency Labels.

By closing its eyes to the 2016 letter's consequences for regulated industry, Pet. 22a, the D.C. Circuit created even more confusion than already existed for the finality inquiry, departed from the tests applied by other courts of appeals, and invited agency manipulation. The Court's review is needed to dispel the belief that *Bennett* requires courts to short-circuit a pragmatic finality inquiry by considering only agency form and not the substance of agency action.

1. Because the D.C. Circuit held that the definitiveness of an agency's decision must be viewed solely "from the agency's perspective," Pet. 22a, it unsurprisingly accorded decisive weight to what the letter said about finality "by its own terms," Pet. 3a, rather than the letter's effects. And it did so despite recognizing that the letter presents a "conclusive view"

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[6] Enshrined due process principles, dating back to *Ex parte Young*, 209 U.S. 123 (1908), establish that judicial review is constitutionally inadequate if it can be obtained only by running the risk of significant civil or criminal liability, and if judicial review cannot otherwise be had while complying. These same principles likewise counsel against deeming non-final and declining to review an agency action that concludes all decision-making other than the enforcement call, while announcing a compliance date.

that the Telemarketing Sales Rule bans soundboard technology, Pet. 15a—announced after a "notice and comment light" endeavor, where staff held a series of meetings and fact-finding sessions with industry representatives. Pet. 96a. The court did not seriously dispute the immediate and practical effect, from the industry's perspective, of the FTC's announcement of a date certain by which industry actors must cease commercial use of soundboard technology or else expose themselves to an enforcement action. Pet. 22a. It simply held that those consequences could not be considered when deciding whether an agency's statement was definitive. *Id.*

This overly formalistic analysis departs from the reasoning applied by other courts of appeals. Other circuits have recognized that "[a]n agency cannot render its action final [or nonfinal] merely by styling it as such." *Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1183, 1189 (10th Cir. 2014). Instead, "[i]t is the effect of the action and not its label that must be considered" when determining finality. *Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 985 (9th Cir. 2006) (citation omitted).[7]

Such a test for definitiveness, that precludes consideration of practical effects, is easily manipulated. All an agency need do, as here, is disclaim finality and technically "preserve [the] right

[7] Before adoption of its effects-agnostic approach to the first *Bennett* factor, the D.C. Circuit likewise recognized that an agency's description of its position as "'informal'" or non-final is not definitive. *Better Gov't Ass'n v. Dep't of State*, 780 F.2d 86, 93 (D.C. Cir. 1986).

to disagree (or not) . . . at some 'later' date." Pet. 29a. Even if—as here—the possibility of agency disagreement later does not obviate the need now for industry to change its business practices (or, in fact, close its doors). Nothing in *Bennett* mandates such blindness to real-world effects. This Court's review is urgently needed to shut the Pandora's box the D.C. Circuit has opened, before other agencies take up the invitation to shield their industry-wide mandates from review. *See* Part II, *infra*.

2. The D.C. Circuit's characterization of enforcement as an opportunity for further agency "review" that defeats finality also created irreconcilable conflicts in the law warranting this Court's intervention. In reasoning that the agency's decisionmaking process was ongoing because the Commission might exercise prosecutorial discretion and opt not to approve a complaint predicated on the letter, Pet. 18a, the court turned settled principles of administrative law upside down. Cases from other courts of appeals and this Court—as well as the D.C. Circuit, before its rigid interpretation of *Bennett*—have long recognized that authorized guidance from staff that represents the agency's final position short of enforcement is final.

Courts of appeals cases establish that when a subordinate official acting "pursuant to a subdelegation of authority" issues "effectively the last word of the agency," which "mark[s] the end of the road for the agency's consideration of the issue," and "purport[s] to decide the [parties'] rights" under the law being interpreted, then the first prong of the finality consideration is easily satisfied. *Kobach*, 772

F.3d at 1190, 1192. Agency action is thus final where it "marked the end of its process for deciding," and there is "no opportunity for further administrative review." *Berry v. U.S. Dep't of Labor*, 832 F.3d 627, 633 (6th Cir. 2016); *accord Her Majesty the Queen v. EPA*, 912 F.2d 1525, 1531–32 (D.C. Cir. 1990) (concluding that staff letters "confirm[ing] a definitive position that has a direct and immediate impact on the parties," were final, and that the "agency's failure to issue a more formal interpretation is irrelevant," because the staff position was "effectively final agency action [construing section 115]" (internal quotations and citation marks omitted)).

Because it announced a definitive legal position at the conclusion of agency fact-finding, and required industry action, the FTC staff letter should have easily qualified as final under these tests. But under the D.C. Circuit's now-confused approach, the mere possibility of enforcement instead *defeats* reviewability under the first *Bennett* factor, making a morass out of the law: the possibility of enforcement either thwarts or ensures reviewability, depending on whether the court frames the analysis under *Bennett*'s first or second factor.

Focusing solely on *Bennett*'s first step, the D.C. Circuit thus relied on a Commission enforcement vote that might never occur to dodge immediate judicial review. Before this ruling, review of a definitive agency pronouncement was available if, in the absence of review, a regulated party would face the possibility of draconian penalties from its enforcement. Now—in the D.C. Circuit, at least if the court is deciding the case under *Bennett*'s first prong—a definitive agency

pronouncement is shielded from review for the very reason that it might (or might not) be enforced.

This makes little sense. Even if the Commission declined to vote out a complaint against a specific soundboard operator, voting against the complaint would not diminish the force of the industry-wide guidance declaring soundboard technology unlawful. The Commission could decline enforcement for any number of reasons, which need not cast doubt on the soundboard guidance. *Cf. Heckler v. Chaney*, 470 U.S. 821, 831 (1985) ("[A]n agency decision not to enforce often involves a complicated balancing of a number of factors . . . .").

The D.C. Circuit also emphasized that staff opinions operate "without prejudice to the right of the Commission later to rescind the advice." 16 C.F.R. § 1.3(c) (Pet. 118a–19a). But staff can rescind staff guidance, too—indeed, that is what happened here—yet the possibility of such reconsideration does not render the guidance tentative or interlocutory while it is in effect.[8] Rather, the mere fact that rescission would be necessary to deprive the letter of force underscores that it is, in fact, the agency's

[8] The 2009 letter, Pet. 120a–24a, issued per one business's request to staff, provided a fact-specific safe harbor, a very different type of informal agency guidance. In contrast, the 2016 letter announced that wide-ranging and common industry practice violated the plain meaning of a rule and was subject to enforcement on or after a date certain set for compliance. Reversal of the D.C. Circuit's ruling in this case would not interfere with an agency's ability to offer the former sort of guidance.

definitive, final position. *See also Hawkes*, 136 S. Ct. at 1814.

And, in contrast to situations where courts have determined other opinion letters non-final,[9] here there is no assured process for the soundboard industry to submit its alternative view of the Act before the Commission votes to enforce a complaint. Pet. 35a. The FTC's litigating position that "potential defendants would have an opportunity to meet with the Commissioners before the vote," Opposition of the FTC to Petition for Rehearing *En Banc* at 14, *Soundboard Ass'n v. FTC*, No. 17-5093 (D.C. Cir. July 16, 2018), is unsupported by citation to regulation or statute, and belied by practice.[10]

It's also beside the point. Mere promise of informal agency discussions pre-enforcement that might result in an agency's reconsideration of its views is not enough to forestall finality, regardless, even when such informal discussions are "invited." *Sackett*, 566 U.S. at 127. No such invitation has been

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[9] *E.g.*, *Kansas ex rel. Schmidt v. Zinke*, 861 F.3d 1024, 1034 & n.6 (10th Cir. 2017), *cert. denied sub nom. Kansas v. Nat'l Indian Gaming Comm'n*, 138 S. Ct. 571 (2017) (numerous regulatory openings existed for Commission to revisit staff's gaming-eligibility determination).

[10] The panel hypothesized that Soundboard could have requested a Commission opinion, but there is no guaranteed process in the Commission's regulations for appealing or obtaining any form of internal review of staff opinions. Pet. 35a. The "ability to keep knocking on a door that will not open is as beside the point here as it was in *Sackett*." Pet. 36a (citing *Sackett*, 566 U.S. at 127).

issued here; to the contrary, the staff letter announces a compliance date. And because much of the FTC's consumer enforcement actions are judicial, rather than administrative, the simple vote to issue a complaint can have immediate and serious consequences—all before the regulated party has had the opportunity to present its views.[11] The hollow promise that there might be an opportunity to meet with Commission members before an *administrative* proceeding is begun is thus of little solace to industry waiting for the enforcement hammer to drop. Judicial enforcement proceedings can include Telemarketing Sales Rule violation counts and have immediate and draconian consequences, like being haled into court for a temporary restraining order, without any prior notice or opportunity to meet with the Commission before a raid or asset freeze is authorized. *See, e.g.*, *FTC v. E.M.A. Nationwide, Inc.*, 767 F.3d 611, 633 (6th Cir. 2014); *FTC v. Affiliate Strategies*, *Inc.*, 849 F. Supp. 2d 1085, 1091–92 (D. Kan. 2011).[12]

Until now, these consequences would have at least weighed in favor of finality, if not compelled it.

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[11] As the FTC's own website attests. *See A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority*, Fed. Trade Comm'n, https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority (last visited December 31, 2018).

[12] "Identical principles of deception from Section 5 of the FTC Act apply to the TSR, and a violation of the TSR amounts to both a deceptive act or practice and a violation of the FTC Act." *FTC v. Wash. Data Res.,* 856 F. Supp. 2d 1247, 1273 (M.D. Fla. 2012); *see also FTC v. Stefanchik,* 559 F.3d 924, 929–30 (9th Cir. 2009).

The D.C. Circuit's ruling that possible enforcement consequences must either be ignored (under *Bennett* step one) or else count in favor of review (if step 2 is ever reached) creates substantial confusion regarding the interrelationship between *Bennett*'s two prongs, and the circumstances under which agency labels can displace all other factors in a supposedly pragmatic finality inquiry.

II. If Left Standing, The Decision Provides A Roadmap For Agencies To Issue Industry-Transforming Rules That Are Insulated From Judicial Review.

The consequences of the D.C. Circuit's ruling are far-reaching and extend beyond the FTC (which itself has wide-ranging jurisdiction over multiple statutes and great swathes of the economy). The decision below shows other agencies how to issue definitive rules that demand immediate compliance from industry on risk of ruinous penalties, yet evade judicial review. Intervention is needed to stem the tide of copycat informal staff "advice."

The APA's "basic presumption of judicial review" of agency action, *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018), would be obliterated if courts accepted at face value an agency's *ipse dixit* that its staff advice was non-final. Yet that is exactly what the decision below invites, and many agencies are poised to take up the invitation. The FTC is hardly unique in delegating to staff the authority to issue informal guidance. But a handful of other examples include: CFTC interpretative letters, 17 C.F.R. § 140.99; CFPB interpretations, 12 C.F.R. pt.

1005, app. C; pt. 1026, app. C; FERC informal staff advice and opinions, 18 C.F.R. § 388.104(a); and SEC staff interpretations, 17 C.F.R. § 202.2.[13] Now, under the roadmap offered by the ruling below, there is effectively no substantive limit on how definitive and industry-transforming such "informal" guidance can be.

What's more, if their organic statutes are silent on this question (which most are), agencies that don't yet have similar regulations can take up the open invitation and delegate to staff the power to issue industry-wide interpretations of regulations, with real consequences, but free from judicial review. *Cf. Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 543–44 (1978) (agencies have authority to "fashion their own rules of procedure" when a statute does not specify what process to use). Such unfettered ability to enlarge the scope of executive authority harms the business community by encouraging agencies to adopt vague regulations that they can later interpret with binding force in practice, if not in name, while evading judicial review.

The APA was crafted to "guard[] against excesses in rulemaking by requiring notice and comment," mandating that an agency invite public "comment on [a rule's] shortcomings," "respond to their arguments," and "explain its final decision." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1211 (2015) (Scalia, J.,

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[13] *See also* Pet. 25 (referencing FDIC and SEC positions on staff advisory guidance); Nat'l Fed. of Indep. Bus., *The Fourth Branch and Underground Regulations* (Sept. 2015), *available at* goo.gl/rd523f.

concurring) (citing 5 U.S.C. § 553(b)–(c)). If affording deference to an agency's interpretations of those regulations already incentivizes an agency to "write substantive rules more broadly and vaguely, leaving plenty of gaps to be filled in later, using interpretive rules unchecked by notice and comment," *id.* at 1212, imagine the consequences of allowing agencies to evade judicial review altogether simply by labeling their pronouncements "staff guidance" and leaving all "binding" determinations for enforcement votes.

In elevating agency form over finality substance, the D.C. Circuit's analysis allows agencies to kneecap courts with labels. Judicial review is easily thwarted with the stroke of a pen, while regulated entities are coerced into immediate action through final rules that are cloaked as non-binding guidance. Such extreme deference to agency nomenclature is the polar opposite of the "clear and convincing indications" from Congress (not an agency), that this Court has demanded in other contexts to "foreclose review." *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1360 (2018) (internal quotation marks and citation omitted).

The mechanism blessed here for avoiding judicial review should not be allowed to spread to other agencies. The "APA's presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all." *Sackett*, 566 U.S. at 130. But the decision below provides a roadmap that "enable[s] the strong-arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review." *Id.* at 131.

Through its staff, the Commission initiated a review of an entire industry "[i]n response to rising

complaints and concerns," from consumer groups. Pet. 96a. After "multiple productive discussions and meetings" with industry representatives, *id.*, staff exercised its delegated authority to pronounce an industry-wide "plain meaning" interpretation of the Telemarketing Sales Rule's prerecorded call provision, Pet. 97a, with a date certain "to give industry sufficient time to make any necessary changes to bring themselves into compliance," Pet. 100a. There was not a whiff of "voluntariness" in this directive.

To allow efficiency concerns to shield such action from the judicial review promised by the APA would permit an agency to "become a monster which rules with no practical limits on its discretion." *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167 (1962) (internal quotation marks and citation omitted). If left standing, the ruling below gives agencies every incentive to issue definitive pronouncements of the contours of their regulatory power, with real legal consequences, and simply disavow finality to evade judicial review.[14]

It is not hard to imagine that where there is a broadly worded statute, implemented by regulations containing broad language, real law can be made and widely published on the Internet without following any statutorily prescribed procedures. The decision

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[14] Nor is it a response to say that if there were no letter at all, industry would have to wait until after an enforcement action to challenge the agency's interpretation. "[S]uch a 'count your blessings' argument is not an adequate rejoinder to the assertion of a right to judicial review under the APA." *Hawkes*, 136 S. Ct. at 1816.

below opens the prospect that there will be no judicial review, either, unless a company is willing to run the gauntlet of enforcement proceedings and penalties. Putting a regulated industry to that choice to obtain review—shut down or risk penalties—conflicts with this Court's precedents and cases from other circuits. If left unreviewed, the soundboard industry is not likely to be the last to face that dilemma.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted.

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