No. 18-722

In the Supreme Court of the United States

SOUNDBOARD ASSOCIATION,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF PROFESSIONAL ASSOCIATION FOR CUSTOMER ENGAGEMENT AS *AMICUS CURIAE* SUPPORTING PETITIONER SOUNDBOARD ASSOCIATION

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 1983, the Professional Association for Customer Engagement ("PACE") is a non-profit trade association dedicated to the advancement of companies that engage customers through a variety of channels, including telephonically. For 35 years, PACE has tracked technology, market trends, and legal developments relevant to the customer engagement industry. It has members operating across the country and internationally. PACE's members include not only for-profit enterprises but also charities and professional fundraisers. Many members are small business, with fewer than 100 employees.

Nearly every sizable company in the United States has a contact center function. Aggregate contact center operating budgets across the country are estimated to be $54 billion. It is estimated that there are over 5 million people employed in contact center-related work, which is over 3% of the U.S. workforce.[2] Average agent wages steadily increased since the Great Recession

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[1] The undersigned counsel for PACE have timely notified all counsel of record of its intention to file an *amicus curiae* brief who have consented to the same. Pursuant to Rule 37.6, *amicus* affirm that no counsel for a party authored this brief in whole or in part. *Amicus* further states that Petitioner is a member of PACE and has made monetary contribution to PACE's Impact Fund which supports industry advocacy.

[2] Benchmark Portal, The Contact Center in America: Considerations and Data Regarding its Central Role for the Nation (Mar. 31, 2017); and https://www.jobs4america.net/facts (last visited December 20, 2018).

and, in 2016, the average agent's hourly wages were $18.31, more than twice the federal minimum wage.[3]

PACE and its members prioritize legal compliance. It provides legal and educational information about the contact center industry to its members, elected officials, and regulators. Since 2003, PACE has published an online Regulatory Guide with up-to-date information about federal and state telemarketing laws and legislation. PACE manages a Self-Regulatory Organization[4] ("SRO") program with standards that reflect state and federal laws and promote best practices for contact center compliance.[5] Before a company can become PACE SRO accredited, it must adopt and implement the SRO standards and pass an independent audit. Additionally, PACE offers Customer Engagement Compliance Professional certification, which involves extensive training, testing, and continuing education related to contact center regulatory compliance.[6]

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[3] *Id.*

[4] The SRO concept has existed for years in many industries and it encouraged by the FTC. Deborah Platt Majors, "Self Regulatory Organizations and the FTC," (Apr. 11, 2005), available at, https://www.ftc.gov/sites/default/files/documents/public_statements/self-regulatory-organizations-and-ftc/050411selfregorgs.pdf ("[M]any self-regulatory schemes have been effective precisely because the self-regulated have recognized that complying has been in their interest.") (last visited December 20, 2018).

[5] https://www.pacesroconnect.org/sub_aboutPACESRO.asp

[6] https://www.paceassociation.org/cecp-certification

PACE represents the interests of its members and their industry partners in matters before legislatures, executive agencies, and the courts.[7] These industries regularly confront issues concerning the scope of the FTC Act, the Telemarketing and Consumer Fraud and Abuse Protection Act, and the FTC's Telemarketing Sales Rule, 16 C.F.R. § 310.1 *et seq*. ("TSR"). Thus, when the FTC completely reversed course in 2016 and declared Soundboard technology to be a prerecorded voice prohibited by the TSR, PACE took notice. The FTC's unappealable proclamation-by-letter creates an impossible choice for businesses: (1) stop using Soundboard and lay off employees; or (2) risk penalties of $40,000 per call. For these reasons, PACE supports the Soundboard Association's ("the Association") Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

An agency action is final, for purposes of judicial review, if it (1) marks the consummation of the agency's decision-making process, and (2) determines rights or obligations from which legal consequences will flow. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). The FTC's 2016 Letter has determined the rights and objections from which legal consequences will flow as required by *Bennett*'s second prong. PACE agrees with the Association that the FTC's 2016 Letter is a ban of Soundboard technology. If allowed to stand, the 2016

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[7] PACE was one of the lead plaintiffs in the case of *ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018) which *inter alia* overruled FCC rulemaking about the type of calling equipment that falls within the Telephone Consumer Protection Act's restrictions on automatic telephone dialing systems. *See,* 47 U.S.C. § 227(b)(1)(A).

Letter will decimate an industry that grew as a result of the FTC's 2009 opinion that Soundboard technology is not a prerecorded message governed by the TSR. Businesses relying on the FTC's 2009 opinion have invested millions to develop and implement Soundboard technology. The FTC minimizes the impact of its 2016 Letter but, its real-world impact forces businesses to choose between two untenable options:

(1) abandon their investment in Soundboard, which will cause a devastating loss of income and considerable layoffs; or,

(2) continue using Soundboard while risking a FTC enforcement action.

PACE has already been made aware of at least two companies that have gone out of business as a direct result of this 2016 Letter. PACE has also learned that the FTC has issued investigatory subpoenas about the use of Soundboard after the effective date of its 2016 Letter. In light of the severe legal consequences that result from the 2016 Letter's unequivocal proclamation of rights and obligations, PACE supports the Association's Petition for a Writ of Certiorari.

ARGUMENT

I. The FTC's Staff Letter Prohibits Beneficial Technology and Requires Call Centers to Eliminate Valuable Systems and Employees who have Engaged in Lawful Conduct Since 2009 or Risk a Ruinous Enforcement Action.

The Administrative Procedures Act ("APA") allows for judicial review of a "final agency action." 5 U.S.C. § 704. In *Bennett v. Spear*, 520 U.S. 154 (1997), this Court directed that agency action will be final if it (1) marks the consummation of the agency's decision-making process, and (2) determines rights or obligations from which legal consequences will flow. *Id.* at 177-78. As set forth below, prong two of the *Bennett* test is met because (1) the FTC's ban of Soundboard technology will eliminate an entire industry and (2) the FTC itself is treating the 2016 Letter as tantamount to a binding regulation to the detriment of Soundboard developers and users.

In an unfortunate twist of irony, investment and expansion in the Soundboard industry only took off in reliance on a 2009 FTC Letter which declared that Soundboard is not a prerecorded message. Seven years later, the FTC revoked that letter, signaling a death knell for an entire industry. This ban wrongly conflates proper users of beneficial technology with unlawful, rogue outliers who will continue to break the law regardless of a regulatory interpretation. Stated differently, the FTC took a sledgehammer approach when a scalpel was better suited to address the issue.

As noted by the Association's Petition, Soundboard serves many legitimate business interests. It opens the

door to semi-skilled job opportunities for individuals who could not otherwise work in a call center and serves as a valuable compliance tool which greatly benefits consumers. Pet. 6, 7. See also, App. 3a, 55a, 100a.

Organizations began increasing investment in Soundboard technology in reliance on the FTC's 2009 Opinion Letter, App. 120a, which found that Soundboard was not a prerecorded message subject to the TSR. *See,* Dkt. 4-3; 4-4, p. 2-3. Soundboard developers have spent seven years and millions of dollars working to improve the functionality of the technology. As stated in one Declaration submitted to the trial court, "member companies have built and grown their businesses based on the knowledge that [S]oundboard was embraced by…the FTC as an effective technology that was not only compliant with the anti-robocall provision of the TSR, but in fact actually facilitated compliance with many other aspects of the TSR[.]" Dkt. 4-3, p. 10. One Soundboard Developer reported investing over $10 million in Soundboard since 2009. Dkt. 4-3, p. 3.

Soundboard users also spent a considerable amount of time and resources to implement Soundboard technology. Organizations bought Soundboard equipment and software licenses. Dkt. 4-4, p. 3. They researched typical calls, developed scripted responses, and trained employees on how to use Soundboard. *Id.* They recorded audio files, which are carefully tailored to the goods or services being offered or the charitable, political, religious, or informational message conveyed. *Id.* Finally, organizations monitored performance and modified the foregoing processes to best serve their

customers. One user estimates "conservatively" that it spent over $3 million to implement Soundboard. 4-4, p. 3. Again, these expenditures are from only two companies that were willing to provide Declarations; the industry-wide expenditures are certainly many degrees larger.

It comes as no surprise then that Soundboard developers and users predict disastrous effects for their businesses – and their employees – if the 2016 Letter survives. One developer estimates that it will suffer an 80% revenue loss, considerable layoffs, and termination of domestic operations. Dkt. 4-3, p. 10-11. In addition to the impact on telemarketing operations, the 2016 Letter will have a chilling effect on Soundboard's use for non-telemarketing purposes for banking, insurance, and medical industries. *Id.* With Soundboard effectively "illegal," "businesses that manufacture or distribute [S]oundboard technology will have no choice but to close down entirely or, at a minimum, drastically scale back their operations…[which] will lead to the loss of thousands of jobs across those industries alone." *Id.* at 11.

One Soundboard user stated that approximately 90% of its outbound charitable fundraising calls were made using Soundboard. Dkt. 4-4, p. 3-4. The estimated revenue loss will force that user to "undertake massive employee layoffs" of approximately 200 workers. *Id.* Many of those employees being laid off have issues with diction, accents, pronunciation, interpersonal skills, and speech impediments that would make them unable to work as a conventional unassisted sales representative. *Id.* Based on these Declarations, Circuit Judge Millett observed in her Dissenting Opinion that "[n]either the

Commission nor the Division denies" the "dire" consequences that will befall developers and users of Soundboard. App. 43a – 44a.

With Soundboard outlawed, its developers and users are left with two untenable choices. They can either abandon their investment, layoff employees, and suffer terminal revenue losses. Or, they may continue using Soundboard and risk a lawsuit by the FTC, which carries civil penalties of approximately $40,000 per call. App. 46a. PACE agrees with the Association that a more sensible approach would be to (1) punish unscrupulous marketers instead of the technology used and (2) promulgate, through standard notice-and-comment procedures, regulations directing businesses how to use Soundboard. Pet. 7.

The Circuit Court, however, found that industry impact was immaterial to prong two of the *Bennett* test because "it is unclear that much, if any, of the claimed consequences for the industry" are attributable to the 2016 Letter. App. 26a. PACE has learned that at least two members of the Association have already gone out of business from the loss of demand since the 2016 Letter. Further, the FTC regards the 2016 Letter as binding on the industry. Upon information and belief, the FTC has issued subpoenas investigating the use of Soundboard.[8] The FTC's investigative powers are

[8] Pursuant to Supreme Court Rule 32.3, PACE has served a letter on the Clerk asking to lodge a Declaration of Michael Cox, former Attorney General of the State of Michigan. Attorney Cox states in his Declaration that several of his clients have received subpoenas from the FTC seeking documents and information about the use of Soundboard after the effective date of the 2016 Letter.

limited to matters where the "inquiry is within the authority of the agency…and the information sought is reasonably relevant." *United States v. Morton Salt Co.*, 338 U.S. 632, 652, 94 L. Ed. 401, 70 S. Ct. 357 (1950). Before issuing a subpoena or Civil Investigative Demand, the FTC itself must issue a resolution authorizing the use of compulsory process in an investigation. 16 C.F.R. § 2.7. The fact that the FTC has issued subpoenas or Civil Investigative Demands regarding the use of Soundboard technology, leads to two conclusions: (1) the FTC itself believes that the mere use of Soundboard is within its jurisdiction to prosecute under the TSR; and (2) the FTC has adopted the 2016 Letter and intends to enforce it.

It has also been suggested that the Association's members should just request another opinion. First, the FTC *sua sponte* reversed its earlier position. It has made its opinion on the matter clear and it would be a vain act to request another informal letter or Commission opinion. *See, Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531, 34 S. Ct. 359, 58 L. Ed. 713 (1914) ("[T]he law does not require a vain thing[.]")

Further, as noted by Circuit Judge Millett in her dissent, "advisory opinions by different divisions of the Commission are not some independent or detached endeavor." App. 32a. The procedures engrafted onto the FTC advisory opinion process shows that staff opinion letters carry the imprimatur of the Commission itself. Before the FTC issues a staff opinion, a request is submitted to the Secretary of the Commission. 16 C.F.R. § 1.2(a). Then, the Commission reviews the request and decides whether to issue an opinion from the Commission itself or whether staff will be

deputized to "render advice." *Id.* §1.1(a) and (b); App. 32a. That decision rests exclusively with the FTC. App. 35a (citing *id.* § 1.2(a) and 1.3(a)). Because staff opinions give advice only when the Commission empowers it, its attempts to minimize their importance are unavailing. After its staff issue an opinion letter, the FTC considers the request closed. There is no regulatory avenue to appeal or request review of an opinion. App. 35a. Although the FTC *could* review a staff opinion, there is no record of it ever doing so. App. 36a. As Circuit Judge Millett observed, "[w]hy let reality get in the way of a good bureaucratic construct?" App. 29a.

Technology breeds innovation. Our country has a longstanding history of encouraging advancement by punishing bad actors, not the technology they use. *See,* Lawrence Lessig, Free Culture (2003), 3-7, 75-77, 59-61. By banning Soundboard, the FTC will chill contact center innovation, bankrupt an industry, and cause massive layoffs. The FTC already had at its disposal the investigatory and enforcement authority needed to stop misuse of Soundboard. It opted, however, to use a sledgehammer on an industry that only needed a scalpel. As succinctly pointed out by members of the industry, the Petitioner, and Circuit Judge Millett in her dissent, the effect of the FTC's action will decimate an industry and Soundboard technology.

CONCLUSION

For the reasons stated above, the Association's petition should be granted.

Respectfully submitted,

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