No. 18-722

In the Supreme Court of the United States

SOUNDBOARD ASSOCIATION, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a nonbinding informal advisory opinion letter issued by a staff member of the Federal Trade Commission is a judicially reviewable "final agency action" under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-53a) is reported at 888 F.3d 1261. The opinion of the district court (Pet. App. 54a-91a) is reported at 251 F. Supp. 3d 55.

JURISDICTION

The judgment of the court of appeals was entered on April 27, 2018. A petition for rehearing was denied on August 3, 2018 (Pet. App. 103a-104a). On October 12, 2018, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 1, 2018. The petition was filed on November 30, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Telemarketing Sales Rule (TSR), 16 C.F.R. Part 310, prohibits deceptive and abusive telemarketing practices, including the use of most "prerecorded message[s]" in telemarketing calls placed to consumers. 16 C.F.R. 310.4(b)(1)(v). In November 2016, staff of the Federal Trade Commission (FTC or Commission), the agency that enforces the rule, issued an informal letter stating that the TSR's prohibition of prerecorded messages applies to calls made using "soundboard" technology, which allows a call agent to play short prerecorded messages. Pet. App. 97a-98a. Petitioner, a trade association representing soundboard manufacturers and users, challenged the letter under the Administrative Procedure Act (APA), 5 U.S.C. 553, 706. Petitioner argued that the letter was a legislative rule that had been adopted without notice and comment, and that it infringed the First Amendment rights of petitioner's members.

The district court held that the staff letter was a reviewable agency action but rejected petitioner's challenges on the merits. Pet. App. 54a-91a. The court of appeals held that petitioner's complaint should be dismissed on the ground that the letter was not a reviewable "final agency action" under the APA because it did not mark the conclusion of the agency's decisionmaking process. *Id.* at 1a-53a.

1. a. The APA authorizes judicial review of "final agency action." 5 U.S.C. 704. An agency action is "final" if it satisfies two conditions: (1) it is not "of a merely tentative or interlocutory nature" but instead "mark[s] the 'consummation' of the agency's decisionmaking process"; and (2) it is "one by which 'rights

or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett* v. *Spear*, 520 U.S. 154, 177-178 (1997) (citations omitted). An agency action generally does not satisfy the first condition "if it is only 'the ruling of a subordinate official.'" *Franklin* v. *Massachusetts*, 505 U.S. 788, 797 (1992) (quoting *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 151 (1967)). "The core question is whether the agency has completed its decisionmaking process." *Ibid.*

b. The FTC enforces a variety of consumer-protection statutes and rules, including the TSR. The agency may adopt rules by a majority vote of the Commissioners. 16 C.F.R. 1.22(a), 1.26(d), 4.14(c). The Commission has delegated to certain senior staff members "limited authority" to open and close investigations into potential wrongdoing. 16 C.F.R. 2.1, 2.14(d). After conducting an investigation, the staff may recommend an enforcement action, but only the Commission itself, by majority vote, may authorize enforcement proceedings. 16 C.F.R. 2.14(a), 3.11(a), 4.14(c).

Businesses seeking guidance on whether their activities may be subject to FTC enforcement actions can seek an advisory opinion either from the Commission itself or from its staff. 16 C.F.R. 1.1. A Commission opinion (which must be approved by a majority of the Commissioners) provides a safe harbor: "The Commission will not proceed against the requesting party with respect to any action taken in good faith reliance upon the Commission's advice" so long as "all the relevant facts were fully, completely, and accurately presented to the Commission." 16 C.F.R. 1.3(b). Staff opinions, by contrast, are not approved by the Commission, do not require a vote, and do not provide a safe harbor: "Advice rendered by the staff is without prejudice to the

right of the Commission later to rescind the advice and, where appropriate, to commence an enforcement proceeding." 16 C.F.R. 1.3(c).

2. a. In 1994, Congress directed the FTC to "prescribe rules prohibiting deceptive * * * and other abusive telemarketing acts or practices." Telemarketing and Consumer Fraud and Abuse Prevention Act, Pub. L. No. 103-297, § 3(a)(1), 108 Stat. 1545, codified at 15 U.S.C. 6102(a)(1). The following year, the Commission promulgated the TSR, which restricts telemarketing calls to certain times of day, creates the "do not call" list, and imposes various other requirements to prevent fraud, abuse, and intrusions on consumer privacy. 60 Fed. Reg. 43,842, 43,854-43,855 (Aug. 23, 1995); 16 C.F.R. Pt. 310.

In 2008, the FTC amended the TSR by adding an anti-robocall provision that restricts calls that use prerecorded messages instead of a live operator or agent. 73 Fed. Reg. 51,164 (Aug. 29, 2008). Robocalls are one of the most common sources of consumer complaints to the FTC. The TSR now prohibits most telemarketing calls that "deliver[] a prerecorded message" absent express written consent from the call recipient. 16 C.F.R. 310.4(b)(1)(v) and (A). The Commission explained that "the reasonable consumer would consider interactive prerecorded telemarketing messages to be coercive or abusive of such consumer's right to privacy." 73 Fed. Reg. at 51,180. "The mere ringing of the telephone to initiate such a call may be disruptive; the intrusion of such a call on a consumer's right to privacy may be exacerbated immeasurably when there is no human being on the other end of the line." *Ibid.*

b. In 2009, a telemarketing company sought an advisory opinion from FTC staff about whether its use of so-

called "soundboard" technology would violate the TSR's anti-robocall provision. C.A. J.A. 230-235. The company stated that soundboard technology "substitutes sound files for the [telemarketer] agent's voice," so that the agent "interact[s] with callers by selecting the appropriate audio file responses with the consumers." *Id.* at 231, 234. The company informed Commission staff that a conversation using this technology would be indistinguishable from a live two-way conversation, with an agent handling one call at a time and able to interject with live responses as needed. *Ibid.* On the basis of that representation, FTC staff issued an opinion letter advising that, "to the extent that actual company practices conform to the material submitted for review," the TSR's anti-robocall provision would not prohibit such calls. Pet. App. 124a; see *id.* at 120a-124a. The staff cautioned that its opinion reflected only the "views * * * of the FTC staff," which "ha[d] not been reviewed, approved, or adopted by the Commission," and which were "not binding upon the Commission." *Id.* at 124a.

In the ensuing years, the FTC received many consumer complaints about telemarketing calls using soundboard technology. The staff saw growing evidence that soundboard calls did not resemble live two-way conversations, as had been represented in the letter requesting the advisory opinion, but were functionally equivalent to ordinary robocalls. Pet. App. 94a-97a. In particular, and contrary to the representations in the 2009 request, FTC staff learned that telemarketers were using soundboard technology to enable individual agents to oversee multiple calls simultaneously, were not providing live operators upon request, and were not providing appropriate responses to consumers' questions. *Ibid.*

c. In 2016, FTC staff issued a new advisory opinion—the letter now at issue—revoking the 2009 letter and concluding that soundboard telemarketing calls are subject to the TSR's anti-robocall provision. Pet. App. 93a-102a. The letter explained that, "since we issued the letter in 2009, staff has seen evidence of the widespread use of soundboard technology in a manner that does not represent a normal, continuous, two-way conversation between the call recipient and a live person." *Id.* at 95a. Telemarketers were using soundboard technology in ways "inconsistent with the principles * * * laid out" in the 2009 letter and the staff's understanding of the technology at the time. *Ibid.* The staff also observed that "calls made using soundboard technology deliver prerecorded messages," and that the "plain language" of the anti-robocall provision covers "'any outbound telephone call that delivers a prerecorded message.'" *Id.* at 97a (quoting 16 C.F.R. 310.4(b)(1)(v)).

The 2016 letter advised that, "[i]n order to give industry sufficient time to make any necessary changes," the revised opinion would become effective in six months, *i.e.*, on May 12, 2017. Pet. App. 100a. The letter explained that, after that date, the 2009 opinion would "no longer represent the opinions of FTC staff" and could not be "used, relied upon, or cited for any purpose." *Ibid.* Like the 2009 letter, the 2016 letter cautioned that it had not been approved or adopted by the Commission and was not binding upon it. *Id.* at 101a.

3. Petitioner filed suit under the APA to challenge the 2016 letter. The complaint alleged that the letter is a legislative rule for which 5 U.S.C. 553(b) required notice-and-comment rulemaking, and that the regulatory scheme the letter contemplates is "contrary to constitutional right," 5 U.S.C. 706(2)(B), because it draws

content-based distinctions in violation of the First Amendment. C.A. J.A. 23-25. Petitioner did not allege that the staff's interpretation of the TSR was arbitrary, capricious, or otherwise substantively invalid. Pet. App. 78a n.2, 83a & n.3; C.A. J.A. 143 n.7, 265, 338.

The district court granted summary judgment to the FTC. Pet. App. 54a-92a. The court held that the 2016 opinion letter was a reviewable final agency action under the APA, 5 U.S.C. 704, but that notice-and-comment rulemaking was not required because the letter was an interpretive rule rather than a legislative rule. Pet. App. 65a-84a. The court viewed the letter as a "'quintessential'" interpretive rule because it "communicate[d] to the telemarketing industry the agency's view that an existing regulation now applies to a particular form of telemarketing technology as currently used by the industry." *Id.* at 80a (citation omitted).

The district court also rejected petitioner's First Amendment claim. Pet. App. 84a-90a. Since its promulgation in 2008, the TSR's anti-robocall rule has contained an exception to the advance-written-consent requirement for prerecorded-message calls that solicit charitable donations from "a member of, or previous donor to," the charity. 16 C.F.R. 310.4(b)(1)(v)(B); see 73 Fed. Reg. at 51,185. Petitioner alleged that, through this exception, the 2016 letter drew an impermissible content-based distinction in the regulation of speech. C.A. J.A. 25 (¶ 74). The court rejected this claim, concluding that the distinction is based not on the content of the call but on the nature of the relationship between the recipient of the call and the charity on whose behalf the call is placed. Pet. App. 86a-89a. Applying intermediate scrutiny, the court found that the challenged pro-

vision serves a significant governmental interest in protecting consumers from unwanted calls while leaving open other channels of communication. *Id.* at 89a-90a.

4. The court of appeals vacated the district court's judgment and ordered that the complaint be dismissed on the ground that the 2016 letter was not a "final agency action." Pet. App. 28a-29a.

a. The court of appeals applied the two-part test for finality set forth in *Bennett*, *supra*, under which an agency action is final only if it (1) "mark[s] the consummation of the agency's decisionmaking process" and is not "of a merely tentative or interlocutory nature"; and (2) is an action "by which rights or obligations have been determined, or from which legal consequences will flow." 520 U.S. at 177-178 (citations and internal quotation marks omitted). The court held that the 2016 letter did not satisfy the first *Bennett* requirement because it represented only the staff's opinion and not the official view of the Commission. Pet. App. 14a-26a.

The court of appeals observed that FTC regulations "expressly delineate between advice from the Commission and advice from its staff," Pet. App. 18a, and that the staff has not been delegated the authority to speak on behalf of the FTC, *id.* at 15a-20a. Petitioner acknowledged that it could have sought, and still could seek, an advisory opinion from the Commission itself under 16 C.F.R. 1.1(a) and 1.3(b). Pet. App. 16a. The court further explained that the 2016 letter did not leave petitioner "trapped without recourse," *ibid.*, because even if FTC staff recommended an enforcement action against petitioner for violating the TSR, the Commission would be in a position "to decide—itself, for the first time—whether the [staff's] interpretation of the

TSR is correct," *id.* at 18a. The court of appeals therefore concluded that, unlike the plaintiffs in *Sackett* v. *EPA*, 566 U.S. 120 (2012), who were ordered by the EPA Administrator to undertake expensive restoration efforts and who were denied an agency hearing, petitioner was "neither out of regulatory review options nor subject to an order or enforcement action issued from the head of the agency itself." Pet. App. 18a.

The court of appeals distinguished the informal and nonbinding advice of FTC staff from the definitive rulings of other agencies that this Court has deemed final for purposes of judicial review. See Pet. App. 14a-15a. The court of appeals explained that *Frozen Foods Express* v. *United States*, 351 U.S. 40 (1956), "involved a formal, published report and order of the Interstate Commerce Commission, not its staff." Pet. App. 14a. And *United States Army Corps of Engineers* v. *Hawkes Co.*, 136 S. Ct. 1807 (2016), involved a determination that "was issued by the agency" itself, was "expressly deemed 'final agency action' by regulation," and was "'binding on the Corps for five years.'" Pet. App. 14a-15a (brackets and citation omitted). By contrast, the court observed, informal opinion letters from the FTC staff are "subject to rescission at any time without notice" and are "not binding on the Commission." *Id.* at 15a; see *id.* at 19a-20a.

Having determined that the 2016 letter did not satisfy *Bennett*'s first condition for finality, the court of appeals declined to address *Bennett*'s second condition. Pet. App. 21a-22a. The court also declined to address the substance of petitioner's First Amendment claim, which had been pleaded "as [an] APA [violation] under 5 U.S.C. § 706(2)(B)" and thus could not "proceed without final agency action." *Id.* at 3a; see *id.* at 28a.

b. Judge Millett dissented. Pet. App. 29a-53a. She would have held that *Bennett*'s first condition was satisfied for four reasons. First, she understood FTC regulations to provide that, "when staff issues advisory opinions to industry, it does so at the Commission's direction and as its delegate." *Id.* at 33a. In her view, the staff's opinion therefore was in effect the opinion of the FTC. Second, Judge Millett concluded that, because the regulations "do not provide a process for appealing" staff opinions, a staff opinion is the agency's final decision. *Id.* at 35a. Third, Judge Millett viewed the Commission's power to rescind staff opinions as irrelevant because an agency can always "reverse course." *Id.* at 37a. Fourth, she viewed staff letters as functionally equivalent to safe harbors because enforcement actions cannot result in civil penalties unless the defendant has "actual knowledge" that its acts were prohibited. *Id.* at 40a (quoting 15 U.S.C. 45(m)(1)(A)).

c. The court of appeals denied petitioner's request for rehearing en banc, with no judge requesting a vote. Pet. App. 103a-104a.

ARGUMENT

Petitioner contends (Pet. 13-15, 19-32) that the court of appeals misapplied the first prerequisite for "final agency action" set forth in *Bennett* v. *Spear*, 520 U.S. 154 (1997). The court's decision is correct and does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. a. The court of appeals correctly held that FTC staff's 2016 advisory opinion letter was not "final agency action" under the APA because it did not "mark the 'consummation' of the agency's decisionmaking process." *Bennett*, 520 U.S. at 178 (citation omitted). To

determine whether particular conduct of agency personnel reflects "the 'consummation' of the agency's decisionmaking process," *ibid.* (citation omitted), a court must often consider "[t]he manner in which an agency's governing statutes and regulations structure its decisionmaking processes," Pet. App. 18a. Here, an integral feature of the FTC's structured decisionmaking process is that "[a]ny person, partnership, or corporation may request advice from the Commission." 16 C.F.R. 1.1(a). An advisory opinion from the Commission is binding on the agency, and it operates as a legal safe harbor to preclude the agency from bringing an enforcement action against a person who acts in reliance on it. 16 C.F.R. 1.3(b). The FTC therefore does not dispute that an advisory opinion from the Commission could satisfy *Bennett*'s first condition for finality, because it could represent the consummation of *the agency*'s decisionmaking process—*i.e.*, it would be a decision by the Commission itself.

The 2016 letter at issue here, by contrast, is an advisory opinion not from the Commission, but from FTC staff. Such staff opinions are not binding on the Commission and therefore do not represent *the agency*'s decision on a topic. Cf. *Heintz* v. *Jenkins*, 514 U.S. 291, 298 (1995) (refusing to give weight to FTC staff commentary in part because it "is not binding on the Commission") (citation omitted). And staff advice does not mark the "consummation" of the agency's decisionmaking process, since the Commission can "rescind the [staff] advice" at any time and for any reason, and can immediately "commence an enforcement proceeding." 16 C.F.R. 1.3(c). The 2016 letter states that "the views expressed in this letter are those of the FTC staff" and

"have not been approved or adopted by the Commission." Pet. App. 101a. Although petitioner characterizes that language as "boilerplate" (Pet. 11, 18, 22), the staff's disclaimer reflects the "specific FTC regulations that structure the agency's decisionmaking process." Pet. App. 19a. It follows that staff advice does not represent the agency's "last word on the matter." *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 478 (2001) (quoting *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 586 (1980)).

Indeed, the agency has not even spoken its *first* word on the matter, since the Commission has never opined on the applicability of the TSR's anti-robocall provision to soundboard technology. In the 11 years since the anti-robocall rule took effect, it does not appear that any person has requested the Commission's advice on the topic. Petitioner could have requested an opinion from the Commission, but it "chose not to pursue" that option. Pet. App. 18a. It would turn *Bennett*'s first condition on its head if a plaintiff could unilaterally render an agency's decisionmaking process "consummated" simply by refusing to invoke that process.

This case is thus unlike *Sackett* v. *EPA*, 566 U.S. 120 (2012), in which the agency issued a compliance order and subsequently denied the plaintiffs' request for further administrative review of that order. *Id.* at 127. Here, the agency has not ordered petitioner to engage in or refrain from any particular action; the 2016 letter represents only "the ruling of a subordinate official," not the agency itself, *Franklin* v. *Massachusetts*, 505 U.S. 788, 797 (1992) (quoting *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 151 (1967)); and neither petitioner nor anyone else has requested a ruling from the Commission concerning the TSR's application to soundboard

technology, despite an available regulatory process for doing so.

The possibility that the Commission might someday bring an enforcement action against petitioner for violating the anti-robocall rule does not render the 2016 letter a final agency action. The FTC could have commenced such an action even if the 2009 letter still represented the staff's views. See 16 C.F.R. 1.3(c) (Commission may "rescind [staff] advice" and "commence an enforcement proceeding"). And if FTC staff recommended the filing of an enforcement action against petitioner for using soundboard technology, the Commission would need to decide "whether the 2016 Letter's interpretation of the TSR is correct" before "vot[ing] on whether to issue a complaint." Pet. App. 18a (citing 16 C.F.R. 3.11). Issuance of the 2016 letter thus did not deprive petitioner of any "regulatory review options" it would otherwise possess. *Ibid.*

b. Petitioner's view that the 2016 letter is a "final agency action" largely rests on two premises: that FTC regulations "provide no process" for a "second opinion," thereby rendering staff advice the consummation of the agency's decisionmaking process, Pet. 3, 31; and that the Commission has actually delegated to the staff the power to issue final and binding guidance, Pet. 11, 19 n.2. The briefs filed by petitioner's amici reflect the same understandings. See, *e.g.*, Chamber of Commerce Amici Br. 7, 10, 15; Professional Ass'n for Customer Engagement Amicus Br. 8-9. Those premises are incorrect.

First, as described above, 16 C.F.R. 1.1(a) establishes a process to seek advice from the Commission itself, rather than from staff. Petitioner acknowledged below that it could have invoked that process. Pet. App.

17a-18a. The Commission thus has not "rendered its last word on the matter," *American Trucking*, 531 U.S. at 478 (citation omitted), and petitioner has not asked it to.

Second, petitioner asserts that FTC "regulations expressly provide for delegation" to the staff of the Commission's power to issue binding guidance. Pet. 19 n.2; see *id.* at 11. That argument, which echoes the view expressed by the dissenting judge below (Pet. App. 33a), is incorrect. As the court of appeals explained (*id.* at 20a-21a & n.3), there is a significant difference between *authorizing* staff to issue nonbinding advice and *delegating* the Commission's own authority to issue binding advice. The applicable FTC regulations do the former, not the latter. Although Rule 1.1 "authorize[s]" staff "to render advice," 16 C.F.R. 1.1(b), Rule 1.3 makes clear that such staff advice does not have the same binding effect and legal consequences as the Commission's own advice, 16 C.F.R. 1.3(b) and (c). And as the court of appeals further recognized, other FTC regulatory provisions make clear that, "[w]hen the Commission delegates its authority to staff, it does so expressly." Pet. App. 20a (citing 16 C.F.R. 2.1 and 2.14(d)).

Petitioner argues (Pet. 32-33) that the 2016 letter necessarily reflects the Commission's views because "if *only* the Commission can rescind or revoke advisory opinions * * * then staff was necessarily acting on the Commission's behalf as its delegate and at its direction in revoking the 2009 advisory opinion." The argument rests on a false premise, since it is not "*only* the Commission" who can rescind staff advice. Rather, as the 2016 letter itself demonstrates, the staff is free to withdraw its own advice sua sponte without the Commission's involvement.

The dissenting judge below thus was wrong in stating (Pet. App. 33a & n.3) that "the Commission itself has already decided that this matter does not warrant a Commission decision" and that it "directed the staff to issue an opinion." In fact, no one requested a Commission decision on this issue, and the FTC never "directed the staff" to do anything. *Id.* at 33a n.3. The staff revisited its 2009 letter on its own initiative, and the Commission has never addressed the applicability of the anti-robocall rule to soundboard technology.

2. a. Petitioner argues (Pet. 8 n.1, 23-27) that the practical consequences of the 2016 letter render it final and reviewable, even though the letter reflects nonbinding advice from agency staff. Acceptance of that position would render the first *Bennett* condition a nullity. If regulated parties could seek immediate judicial review simply by "assert[ing] a dramatic impact on their industry no matter who issued the advice or under what regulatory authority, the first prong of *Bennett* would have little meaning." Pet. App. 24a. Some of petitioner's amici seem to suggest that the Court should jettison *Bennett*'s first condition and focus only on the "immediate consequences" of a given agency issuance. Chamber of Commerce Amici Br. 8. The Court in *Bennett* made clear, however, that *both* conditions must be satisfied for an order to be final, 520 U.S. at 177, and it has not retreated from that principle, cf. *United States Army Corps of Eng'rs* v. *Hawkes Co.*, 136 S. Ct. 1807, 1813 n.2 (2016).

Petitioner offers no compelling reason for the Court to revisit or abandon *Bennett*. Treating informal, nonbinding guidance issued by staff as if it were a formal rule that is binding on the Commission would "make guidance harder for industry to request and receive."

Pet. App. 23a n.4. The purpose of informal staff guidance is to help regulated businesses shape their behavior without the need for protracted litigation. Yet any agency advice, no matter how informal, is likely to have *some* effect on the conduct of regulated entities, or else those parties would have no reason to seek the advice. If that potential effect were sufficient to make informal and nonbinding staff advice reviewable, "[n]ot only might staff be less willing to give advice, the advice that is released may take longer and be more costly to develop." *Ibid.* That is "why precedent emphasizes the importance of *who* made a decision, and how an agency's regulations delineate responsibility for and the bindingness of such a decision." *Id.* at 25a (citing *Abbott Labs.*, 387 U.S. at 151). The contrary rule that petitioner and its amici advocate "would harm the interest of all regulated parties in access to informal advice and compliance help in general." *Id.* at 24a n.4.

Petitioner asserts (Pet. 25-27) that the court of appeals' decision will induce other agencies to issue staff guidance to avoid judicial review. The materials that it cites, however, do not support that assessment. The SEC statement that petitioner cites (Pet. 25) reflects the SEC's "longstanding position"—not one adopted in the wake of the decision below—that guidance statements issued by subordinate staff "are nonbinding and create no enforceable legal rights or obligations." Jay Clayton, SEC, *Statement Regarding SEC Staff Views* (Sept. 13, 2018), www.sec.gov/news/public-statement/statement-clayton-091318. Similarly, the interagency statement of financial agencies simply reiterates that informal guidance issued by staff "does not have the force and effect of law, and the agencies do not take enforcement actions based on [such] guidance." Board of

Governors of the Fed. Reserve Sys., et al., *Interagency Statement Clarifying the Role of Supervisory Guidance* (Sept. 11, 2018) www.fdic.gov/news/news/press/2018/pr18059a.pdf. Those unremarkable statements do not suggest that the decision below has caused agencies to rely on informal staff guidance in lieu of binding rules or regulations.

b. Although the court of appeals rested its decision solely on *Bennett*'s first prerequisite for "final agency action," the 2016 letter does not satisfy *Bennett*'s second condition either. To be reviewable under that condition, an agency action must "be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett*, 520 U.S. at 178 (citation omitted). The Commission could not commence a civil action against petitioner unless a majority of commissioners determined that the TSR prohibits calls made using soundboard technology. And, as noted above, the Commission could have commenced a civil action against petitioner for violating the anti-robocall rule even if the 2009 letter still represented the views of the staff, since staff letters do not operate as safe harbors, see 16 C.F.R. 1.3(c), and thus do not form a "basis for legally cognizable reliance interests," Pet. App. 26a.

At most, if the FTC commenced an action to enforce the TSR against a soundboard user, it could cite the 2016 letter as one "factor" suggesting that the defendant had actual knowledge that it was violating the TSR. Pet. 29 (citation omitted); see 15 U.S.C. 45(m)(1)(A) (authorizing civil penalties where defendants had "actual knowledge or knowledge fairly implied" that their conduct was "prohibited by such rule"). But that possibility does not make the staff letter an independently enforceable binding rule, Pet. 25-26, since even if the letter

might be invoked as "evidence of willfulness," it does not "independently trigger" any penalties, Pet. App. 27a (emphasis omitted). Agency staff might provide industry guidance in numerous ways, including through informal telephone conversations and speeches at industry conferences. Such communications might inform regulated entities of staff members' understanding of the statutes and rules the agency administers, but they are not final agency actions subject to pre-enforcement challenge.

3. a. Petitioner contends (Pet. 12, 26-27, 31-32) that the decision below conflicts with *Sackett* and other decisions of this Court. As noted above, however, *Sackett* involved a compliance order issued by the agency itself, which then denied a request for further administrative review. 566 U.S. at 127. Here, the agency has not ordered petitioner to take or refrain from any action. Rather, FTC staff has issued an informal guidance letter that does not purport to represent the FTC's views, and petitioner remains free to seek guidance directly from the Commission. See Pet. App. 17a-18a.

The court of appeals' decision likewise is consistent with *Hawkes*, *Abbott Laboratories*, and *Frozen Food Express* v. *United States*, 351 U.S. 40 (1956). In *Hawkes*, the agency's own regulations defined the challenged jurisdictional determination as "final agency action." 136 S. Ct. at 1814 (citing 33 C.F.R. 320.1(a)(6)). Here, by contrast, FTC regulations and the 2016 letter itself make clear that staff letters do not represent the final views of the Commission. *Abbott Laboratories* and *Frozen Food* involved challenges to binding regulations that agencies had issued after notice-and-comment rulemaking and a formal rulemaking hearing, respectively. *Abbott Labs.*, 387 U.S. at 151 & n.17; *Frozen*

Foods, 351 U.S. at 41-42; see 5 U.S.C. 553. Neither decision suggests that the nonbinding advisory opinion of subordinate staff is a final agency action reviewable under the APA.

Petitioner suggests that a less stringent "finality calculus" applies "where First Amendment claims are at stake." Pet. 26. But the mere "presence of constitutional claims" does not suspend the "two-part *Bennett* test for final agency action." Pet. App. 28a n.6. The two cases petitioner cites (Pet. 26) for its contrary approach are inapposite. In *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975), this Court discussed the circumstances under which it will review a state court's interlocutory decision resolving a federal question. *Id.* at 477-485. In *Blount* v. *Rizzi*, 400 U.S. 410 (1971), the Court reviewed a statutory scheme that authorized a prior restraint on speech via administrative order without allowing for "prompt judicial review" of the order. *Id.* at 417 (citation omitted). Neither decision bears on the question presented here.

In any event, this case does not pose a substantial First Amendment question. Petitioner's constitutional challenge rests on the anti-robocall rule's exception for calls to "a member of, or previous donor to," a charity. 16 C.F.R. 310.4(b)(1)(v)(B). But as the district court correctly observed, "every court that has considered one of these types of robocall restrictions has held that a distinction based on the caller-recipient relationship does not violate the First Amendment." Pet. App. 86a-87a (citing cases). The pertinent exception to the robocall ban, moreover, appears not in the 2016 letter, but in the TSR itself, which was promulgated in 2008 and is no longer subject to a pre-enforcement APA challenge.

b. The decision below does not conflict with any decision of another court of appeals. Petitioner principally relies (see Pet. 15, 23-24) on *Kobach* v. *United States Election Assistance Commission*, 772 F.3d 1183 (10th Cir. 2014), cert. denied, 135 S. Ct. 2891 (2015). But that decision supports the distinction, made by the court of appeals here, between an agency's *authorizing* a subordinate to act, on the one hand, and *delegating* the agency's own powers to that subordinate, on the other. *Id.* at 1190. *Kobach* held that a ruling by the executive director of an independent commission was final because the commission had issued a "subdelegation of authority" empowering the executive director to rule "on behalf of the agency." *Ibid.* The commission had even denominated the executive director's decision a "final agency action." *Id.* at 1189. Here, by contrast, although the FTC authorized staff members to issue nonbinding opinion letters, it did not delegate its authority to issue guidance that would bind the agency.

The other two decisions petitioner cites (Pet. 23-24) likewise are inapposite. In both *Marshall* v. *Sun Petroleum Products Co.*, 622 F.2d 1176, 1179-1180 (3d Cir.), cert. denied, 449 U.S. 1061 (1980), and *George Hyman Construction Co.* v. *Occupational Safety & Health Review Commission*, 582 F.2d 834, 836-837 (4th Cir. 1978), the ruling of an administrative law judge was deemed the agency's final decision because the commissioners were deadlocked. Both decisions turned on that unique circumstance; the courts recognized that parties should not be deprived of judicial review because of an intra-agency stalemate. *Ibid.* That situation bears no resemblance to the circumstances here.

c. Petitioner argues (Pet. 15-27, 34) that the court of appeals departed from its own precedents. Even if that

were true, "[i]t is primarily the task of a Court of Appeals to reconcile its internal difficulties." *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam); see *Joseph* v. *United States*, 135 S. Ct. 705, 707 (2014) (Kagan, J., respecting the denial of certiorari) ("we usually allow the courts of appeals to clean up intra-circuit divisions on their own").

In any event, no intra-circuit conflict exists. Petitioner relies most heavily (Pet. 15-18, 20-25, 34) on *Appalachian Power Co.* v. *EPA*, 208 F.3d 1015 (D.C. Cir. 2000). But that case involved a guidance document that had been issued by a pair of EPA Directors and reflected "the agency's settled position," as to which the EPA "will insist State and local authorities comply" and that "EPA officials in the field are bound to apply." *Id.* at 1022. By contrast, the 2016 staff letter does not represent the FTC's "settled position" on the TSR's applicability to soundboard technology. The court in *Natural Resources Defense Council, Inc.* v. *Thomas*, 845 F.2d 1088 (D.C. Cir. 1988), recognized that decisions by subordinate officials generally are unreviewable, but held that an EPA official's memorandum was final because agency employees and state governments would "be justified in construing" it "to be their marching orders." *Id.* at 1094. No such circumstances are present here, since the 2016 letter represented the views of the staff alone and was neither approved by nor binding on the Commission. Pet. App. 101a.

The other D.C. Circuit decisions that petitioner cites (Pet. 22) are even further afield. In *Rhea Lana, Inc.* v. *Department of Labor*, 824 F.3d 1023 (2016), the agency "conceded" that the letter at issue had "completed the agency's decisionmaking" and thus met "the first finality requisite" under *Bennett*. *Id.* at 1027. In *Safari*

Club International v. *Jewell*, 842 F.3d 1280 (2016), the Fish & Wildlife Service issued a "definitive" decision not to issue certain permits for calendar year 2014. *Id.* at 1289 (citation omitted). Both *Her Majesty the Queen in Right of Ontario* v. *EPA*, 912 F.2d 1525 (1990), and *Ciba-Geigy Corp.* v. *EPA*, 801 F.2d 430 (1986), involved warning letters issued by officials who had "authority to speak for the EPA," and in both cases (as in *Sackett*) the EPA had rejected requests for further review within the agency. *Ontario*, 912 F.2d at 1531-1532; see *Ciba-Geigy*, 801 F.2d at 437. Here, by contrast, the FTC did not authorize its staff to bind the Commission on the question whether soundboard technology violates the TSR, and neither petitioner nor anyone else has asked the Commission to address that issue. The decision below is thus consistent with a long line of D.C. Circuit cases holding that nonbinding advice letters generally do not satisfy *Bennett*'s first condition. See, *e.g.*, *Holistic Candlers & Consumers Association* v. *FDA*, 664 F.3d 940, cert. denied, 568 U.S. 962 (2012), and the cases cited therein, *id.* at 945 n.6.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2019