ORAL ARGUMENT NOT YET SCHEDULED

No. 17-5093

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SOUNDBOARD ASSOCIATION,

Plaintiff-Appellant,

v.

FEDERAL TRADE COMMISSION,

Defendant-Appellee.

ON APPEAL FROM AN ORDER OF THE
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FINAL BRIEF FOR APPELLANT

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Dated: August 25, 2017

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

Plaintiff in the district court and Appellant in this appeal is Soundboard Association.

Defendant in the district court and Appellee in this appeal is the United States Federal Trade Commission.

There were no amici in the district court and one so far in this appeal: Public Good Law Center.

I. Rulings under Review

The rulings under review are the April 24, 2017 Memorandum Opinion and Order by the district court denying SBA's motion for a preliminary injunction (which the district court construed as a motion for summary judgment), and granting the Federal Trade Commission's cross-motion for summary judgment. *Soundboard Association v. U.S. Fed. Trade Comm'n*, Case No. 1:17-cv-00150-APM (D.D.C. Apr. 24, 2017) (Judge Amit P. Mehta).

II. Related Cases

This matter has not previously come before this Court. Counsel is not aware of any related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of this Court, the Soundboard Association hereby submits the following corporate disclosure statement:

Soundboard Association is a trade association of companies that make and use Soundboard, a technology that facilitates communication over the telephone.

Soundboard Association has no parent corporation and, being a non-stock corporation, no publicly held corporation owns 10% or more of Soundboard Association's stock.

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GLOSSARY

SBA	Appellant Soundboard Association
FTC	Appellee Federal Trade Commission
Order	The district court's underlying decision in this case handed down on April 24, 2017 in Case No. 17-cv-00150.
APA	Administrative Procedure Act
Telemarketing Act	Telemarketing and Consumer Fraud and Abuse Prevention Act
TSR	Telemarketing Sales Rule
EPA	Environmental Protection Agency

JURISDICTIONAL STATEMENT

This Court has jurisdiction over Appellant Soundboard Association's challenge to the district court's April 24, 2017 Order in Case No. 17-cv-00150 (Apr. 24, 2017) ("Order") (JA279-308) because the Order is a final decision under 28 U.S.C. § 1291 and the appeal was timely filed on April 25, 2017. The district court had jurisdiction over the underlying action under 28 U.S.C. § 1331 because the Soundboard Association ("SBA") brought this cause of action under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701–706, the First Amendment to the United States Constitution, and the Declaratory Judgment Act ("DJA"), 28 U.S.C. § 2201.

STATEMENT OF THE ISSUES

1. Whether the November 10, 2016 letter imposes a content-based restriction on certain protected speech and, therefore, violates the First Amendment to the United States Constitution and infringes the free speech rights of SBA member companies.

2. Whether the Federal Trade Commission's November 10, 2016 letter constitutes a legislative rule and, therefore, was issued in violation of 15 U.S.C. § 6102(b) and 5 U.S.C. § 553(b) because the Commission failed to promulgate it through notice and comment as required by the rulemaking provisions of the

Telemarketing and Consumer Fraud and Abuse Prevention Act ("Telemarketing Act") and the APA.

3. Whether, when a plaintiff challenges a final agency action as a substantive enlargement of (and therefore substantively inconsistent with) an existing regulation, such that the action could stand, if at all, only if promulgated through notice-and-comment rulemaking, it is error for the court to dismiss the complaint, in whole or in part, because the plaintiff did not separately label the agency action as "arbitrary or capricious."

STATUTES AND REGULATIONS

Pertinent statutes are contained in the addendum.

STATEMENT OF THE CASE

1. **The Robocall Prohibition.** In 1994, Congress enacted the Telemarketing Act to protect consumers from deceptive and abusive telemarketing practices. *See* Pub. L. No. 103-297 § 2, 108 Stat. 1545 (1994). The Act directs Appellee Federal Trade Commission ("FTC") to prescribe rules regulating the telemarketing industry. 15 U.S.C. § 6102(a)(1). Pursuant to that authority, the FTC promulgated the Telemarketing Sales Rule ("TSR") in 1995. 60 Fed. Reg. 43842 (Aug. 23, 1995), codified at 16 C.F.R. pt. 310. Among other things, the TSR restricts telemarketing calls to certain times of day and allows consumers to request to be placed on a national "do-not-call" list. *See id.* § 310.4(b)(ii), (c).

2. The Telemarketing Act requires the FTC to comply with the rulemaking provisions of the APA, 5 U.S.C. § 553, in any rulemaking activity pursuant to its authority under the Telemarketing Act. 15 U.S.C. § 6102(b).

3. In 2008, the FTC amended the TSR to include new regulations on robocalls. *See* TSR, Final Rule Amendments, 73 Fed. Reg. 51164, 51184 (Aug. 29, 2008). Following notice-and-comment rulemaking, the robocall prohibition took effect in September 2009. *See* 73 Fed. Reg. 51204 (Aug. 29, 2008). The robocall prohibition makes it illegal (as an "abusive" telemarketing act) to "[i]nitiat[e] any outbound telephone call that delivers a prerecorded message." 16 C.F.R. § 310.4(b)(1)(v). The prohibition is set forth in the TSR, 16 C.F.R. § 310.4(b)(1)(v).

4. In prohibiting calls that deliver "a prerecorded message," the FTC targeted a specific evil: one-way, pre-recorded communications that do not involve any human interaction (i.e., robocalls). JA279. (A "robocall" is a "one-way telemarketing message that involves no live sales agent or other human interaction."); 73 Fed. Reg. 51164, 51177 (Aug. 29, 2008) (explaining that a robocall is a telephone call that "converts a two-way instrument of communication into a one-way broadcast of a prerecorded advertisement."). The preamble to the robocall prohibition makes that clear, explaining that the targeted "prerecorded calls 'are by their very nature one-sided conversations'" because there is no human being on the other end of the line. 73 Fed. Reg. at 51167, 51180 (quoting Cmt. No. 529, filed by

National Consumers League). Acknowledging that robocalls are "nothing other than outbound streaming audio files which convert the telephone (traditionally an instrument of two-way communication) into a radio (an instrument for listening)," the FTC observed that "[t]hese [robocall] campaigns are widely regarded as a nuisance and a burden to consumers because consumers are powerless to interact with them." *Id.* at 51173 (quoting Cmt. No. 571, filed by Interactions Corp.).

5. **Soundboard Technology.** By its terms, the robocall prohibition does not apply to calls that utilize Soundboard technology. Unlike robocalls, during which there is "no human being on the other end of the line," 73 Fed. Reg. at 51180, "'Soundboard' technology—the subject of this case"—always engages a live person on both ends of the call. *See* JA279.

6. Soundboard technology "involves a two-way communication" between the caller and the consumer, in which the caller "plays pre-recorded audio clips in response to the consumer's statements." *Id.* Soundboard technology involves combining prerecorded sounds, words, phrases, and sentences to form messages, but their content is determined on an *ad hoc* basis by the Soundboard operator (a live person), based on the operator's decision about what sequence of audio files will best respond to the call recipient, no different than a call agent reading from a menu of pre-written sales scripts. Soundboard technology also allows the caller to break into the call at any time and speak directly to the consumer, if needed. *Id.* At all

times, the call is a continuous, two-way conversation between the call recipient and a live person.

7. Unlike prerecorded messaging platforms or robocall systems, Soundboard technology does not replace "live agent" interaction with a prerecorded message; it merely provides a proxy voice through which live agents may interact with call recipients. An agent using Soundboard technology remains able to converse with call recipients using his or her own voice, but may also converse with them by selecting and substituting appropriate audio clips for his or her own voice in such a way that the consumer experiences a natural conversation. *See* JA147-58. This is particularly helpful for call agents with certain disabilities and for quality assurance and compliance purposes—ensuring that all state and federally mandated disclosure statements are accurately and completely made and that all scripted information pre-drafted by the calling agency and its client are adhered to. JA013.

8. Agents using Soundboard technology converse with consumers throughout the entire call by listening to their comments, questions, and responses, and responding to them with compliant and well-scripted statements or their own live voice. *See* JA147-58. Most of the time, the person on the receiving end of the line will never even realize he or she is on a soundboard phone call. *Id.* The benefits of soundboard over the call agents reading live from a sales script include clarity, consistency, calm demeanor (the audio clips do not get emotional), and built-in

disclosures that comply with the multitude of federal and state consumer-protection laws. *See id.*

9. Accordingly, the 2008 robocall prohibition does not apply to calls using Soundboard technology. Buttressing the plain language of the ban, which by its terms does not apply to Soundboard, the FTC never once mentioned Soundboard technology in the 2008 rulemaking; the FTC confirmed by written letter in 2009 that the 2008 robocall prohibition does not apply to Soundboard technology; and, until recently, the FTC had never suggested expanding the robocall prohibition to apply to Soundboard technology.

10. In September 2009, shortly after the robocall prohibition was promulgated, a business that used Soundboard technology asked the FTC to confirm that such calls were not prohibited as "robocalls" under the TSR. FTC staff agreed, confirming in an "informal" letter that because calls using Soundboard technology enable the caller and recipient to have a two-way conversation, such calls are not subject to the robocall prohibition. Distinguishing "robocalls," the FTC noted that unlike Soundboard calls, "the delivery of prerecorded messages in such calls does not involve a live agent who controls the content and continuity of what is said to respond to concerns, questions, comments—or demands—of the call recipient." JA017. In other words, the FTC recognized that the robocall prohibition does not

apply to Soundboard technology when it became effective in September 2009. Seven years later, however, the agency changed course.

11. In September 2016, the FTC announced by way of an "informal" draft opinion letter that it was reversing its prior position and ruling that the robocall prohibition would prospectively apply to Soundboard calls, even though they are continuous, two-way communications between a live agent and even where a call agent using Soundboard technology only makes one call at a time. JA004, JA020.

12. Skipping public notice-and-comment rulemaking as required under the APA, and after entertaining instead only informal feedback from several industry representatives (including SBA), the FTC staff issued a final opinion letter on November 10, 2016 (hereinafter the "November 2016 letter" or "November letter") that formally reversed its earlier position and subjects Soundboard technology to the 2008 robocall prohibition. The FTC gave the telemarketing industry until May 12, 2017, "to make any necessary changes to bring themselves into compliance." JA280.

13. The November 2016 letter contains numerous inaccuracies and omissions about Soundboard technology. JA019-21. For example, it inaccurately stated that the FTC had received numerous consumer complaints that calls using Soundboard were not actually being manned by live agents; that the technology was not responding appropriately to consumer questions or concerns; and that using Soundboard to allow call agents to make multiple calls at once was inconsistent with

the FTC's 2009 ruling that Soundboard calls were two-way communications. *See* JA030. The September 2016 letter contains the same or similar inaccuracies and omissions.

14. Notwithstanding the above behavioral problems that the FTC allegedly sought to correct by expanding the 2008 robocall prohibition to apply to Soundboard technology, these same behaviors can be exhibited by a live agent using his or her own live voice (not using Soundboard technology). *See* JA030. For example, a live agent can (a) be slow to respond to a question, (b) give the customer a menu of choices, (c) ignore the real customer question and give a wrong response, (d) misread the script, (e) intentionally derail from the script (despite penalty for doing so), (f) fail to make the mandatory disclosures required by the TSR and various state laws, (g) improperly deny the consumer's "do-not-call" request, (h) improperly terminate a call and even (i) handle multiple calls at the same time. *See* JA013 (citing Ex. 7 (PACE Soundboard Technology White Paper (Feb. 26, 2016)). Soundboard, on the other hand, ensures the scripted message is followed, eliminates call abandonment and prevents calls from being improperly terminated, tracks "do-not-call" requests, and offers more reliable monitoring for quality control and compliance purposes, thereby ensuring that the call recipient's questions are timely and accurately answered. *Id.*

15. SBA countered during discussions with the FTC in 2016 and in the underlying action, that the FTC should use its rulemaking and enforcement authority to target abusive behaviors and not a technology or an entire medium that actually does more to ensure a high level of compliance with the TSR than live agents are capable of reaching. *See* JA147-58. The reality is, a Soundboard call can be a far superior customer experience than a call with a person using his or her own voice without the reliability of soundboard. *See id.*; JA011-15. It comes down to agent behaviors, not whether they are using Soundboard or not. Notwithstanding these discussions, the FTC issued the November 10, 2016 formal opinion.

16. The November 2016 letter is, by its terms, legally binding. JA289. Although the November letter states that the views it expresses "are those of the FTC staff," and "have not been approved or adopted by the Commission, and [] are not binding upon the Commission," it concludes by stating that the views expressed in it "do reflect the views of staff members charged with enforcement of the TSR." *See* JA033. The November letter tells affected "industry" stakeholders in no uncertain terms that they have six months "to make any necessary changes to bring themselves into compliance." *Id.*; JA289-90.

17. The November 2016 letter is an enforcement ultimatum to call centers, other sellers, telemarketing companies, and telefundraisers that use Soundboard technology: Stop making telemarketing sales calls or certain charitable fundraising

calls or face enforcement consequences under the TSR for violations of the robocall prohibition. As it relates to these entities, the robocall prohibition — which has never before been applied to them — now applies in full.

18. **Proceeding Below**. SBA filed suit in the district court on January 23, 2017, seeking injunctive and declaratory relief under the APA, the First Amendment, and the Declaratory Judgment Act. SBA filed a motion for preliminary injunction simultaneously with its Complaint. The parties agreed to consolidate the hearing on the preliminary injunction motion with the "trial" on the merits, pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure, and the court treated the parties' pleadings as cross-motions for summary judgment.

19. On April 24, 2017, the district court handed down its Order in the underlying cause. The district court granted summary judgment for the FTC and denied SBA's request for preliminary injunctive relief from the FTC's implementation and enforcement of its recent ruling that Soundboard technology constitutes a robocall—despite (1) the plain language of the TSR and the FTC's previous ruling to the contrary, (2) its unconstitutional restriction of SBA's First Amendment free speech rights, and (3) its unlawful application of this arbitrary and capricious final rule to SBA and its members without having provided the notice-and-comment period required under the APA.

20. While the district court correctly held that the November 2016 letter was a final rule, it incorrectly concluded that it was an interpretive rule as opposed to a legislative rule, which would have required notice-and-comment rulemaking under the APA. The district court also erroneously held that the final rule's restriction on protected speech was content neutral and, therefore, applied the wrong level of First Amendment scrutiny. Finally, despite having substantively argued that the FTC's expansion of the robocall prohibition to apply to Soundboard technology, which is contrary to the plain language of the 2008 robocall prohibition, is contrary to law, failed to afford the required procedure, and is, therefore, arbitrary and capricious, the district court erroneously ignored SBA's substantive procedural claim.

21. **Effects of the New Rule**. Some SBA member companies conduct fundraising campaigns on behalf of charitable and other not-for-profit organizations. The term charitable organization is not defined in the TSR but generally includes a variety of not-for-profit organizations speaking to important charitable, religious, educational, social, and political causes. The prohibition on Soundboard calls made on behalf of charitable organizations to prospective members or donors interferes with their freedom of speech and restricts advocacy on important social, economic, and political issues, as well as religious proselytization and political speech that involves an eleemosynary purpose.

22. More specifically, the November 2016 letter abridges speech protected by the First Amendment to the United States Constitution by effectively banning certain kinds of charitable or advocacy calls made using Soundboard technology based on their content — *i.e.*, targeting subject matter (consumer and charitable calls) and the substantive content of the message (banning charitable calls requesting first-time contributions from prospective donors or members but allowing calls requesting continued or renewed support from members or prior donors and calls containing pure political messages).

23. The constitutional and economic implications are far reaching. Soundboard is employed by call centers around the country and throughout the world. SBA members' Soundboard software packages help call centers to achieve better compliance and security, and improve the call experience. For the manufacturer members, the Soundboard products are usually the dominant source of their revenue.

24. SBA member companies employ approximately 3,000 employees throughout the United States. Most of these jobs are long-term, full-time jobs, frequently providing employment to unskilled workers in depressed job markets. Employees are provided with computer training, a comfortable work environment, and better-than-average income within the unskilled labor class of jobs. Many are involved in fundraising for well-known charities.

25. Nonetheless, on what was effectively a whim of the FTC and without notice-and-comment rulemaking as required under the APA, the FTC promulgated a new, final rule that turns an entire industry on its head, restricts certain kinds of speech made using the technology based on the content of the message, and forces many users to downsize or close their doors altogether. The economic harm is measured in millions of dollars and countless hours of development and training.

26. The use of Soundboard technology in telemarketing sales operations increased after the TSR's robocall prohibition became effective in 2009 precisely because calls made using Soundboard technology are not robocalls — at all times they involve a live operator and provide two-way communication. The Soundboard technology industry grew up relying on the plain understanding of the robocall prohibition, as confirmed by the September 2009 ruling from the FTC. The FTC has never (until now) given any indication that the use of Soundboard technology might come within the scope of the TSR's robocall prohibition (because it does not).

27. The effects of the November 2016 letter will be devastating for SBA's member companies, depriving them of their First Amendment right to free speech and resulting in the need to lay off many of their employees or, in many cases, cease operating altogether.

SUMMARY OF ARGUMENT

First, the FTC's November 2016 letter restricts the free speech rights of the Association and its members calling on behalf of charitable and other advocacy organization clients. The TSR's robocall prohibition, as recently amended by the FTC's November 2016 letter, restricts Soundboard calls based on the content of their message; therefore, it is subject to strict scrutiny. The letter cannot survive strict scrutiny because it is not narrowly tailored to promote a compelling government interest. The APA requires courts to set aside decisions of a federal administrative agency that are contrary to a constitutional right. 5 U.S.C. § 706(2)(A)–(C).

Second, the FTC's letter of November 2016 constitutes a final, legislative amendment to the TSR. The substantive amendment requires call centers and other telemarketers and telefundraisers that were lawfully using Soundboard technology for sales-related calls and certain fundraising calls to "make any necessary changes to bring themselves into compliance" with the amended robocall prohibition by May 12, 2017. This final agency rule is decidedly legislative and not interpretative because Soundboard calls plainly do not fit within the plain language of the TSR's 2008 robocall prohibition. Therefore, any substantive expansion of the TSR by agency rule to bring Soundboard technology within the ambit of the robocall prohibition cannot be classified as a matter of interpretation; rather, it must be regarded for what it is—the legislative expansion of a regulation. Accordingly, the Telemarketing Act requires the FTC to

follow the notice-and-comment rulemaking procedures of the APA, *see* 15 U.S.C. § 6102(b), which it failed to do. The FTC is not free to make new substantive law by sub-regulatory decree.

Finally, the district court oddly faulted plaintiff for what at most was a stylistic point about how SBA framed its APA claim. The APA requires this court to set aside an agency decision that is: (A) "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"; (B) "contrary to constitutional right, power, privilege, or immunity"; (C) "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right"; or (D) "without observance of procedure required by law." 5 U.S.C. § 706(2). The district court took issue with SBA not styling its APA claim as an "arbitrary and capricious" challenge to the November 2016 letter. That elevated form over substance. While SBA has not separately labeled the November 2016 letter as arbitrary and capricious, it substantively argues the claim, which the district court and the FTC both acknowledged. *See, e.g.*, JA120-30; JA300-01; JA442; JA204-05; Appellee's Opp. to Appellant's Emergency Mot. Inj. Pending Appeal p. 2.

In any event, the November 2016 letter is contrary to constitutional right (the First Amendment), law (the 2008 Robocall prohibition), authority (in excess of the FTC's rulemaking authority), and procedure (for failure to issue through notice and comment), and, therefore, should be set aside under 5 U.S.C. § 706.

ARGUMENT

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment *de novo*. *Grunewald v. Jarvis*, 776 F.3d 893, 898 (D.C. Cir. Jan. 20, 2015. In cases involving review of final agency action under the APA, 5 U.S.C. § 706, "[t]he entire case on review is a question of law." *Am. Biosci. Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001) (internal quotation marks omitted) (collecting cases). This Court will reverse summary judgment for the FTC if "it violated the Administrative Procedure Act by taking action that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Dist. Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46, 54 (D.C. Cir. 2015). If agency action is contrary to a constitutional right, law, or required procedure, it is not in accordance with the law. In cases raising First Amendment issues, appellate courts must "make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *Lebron v. Washington Metro. Area Transit Auth.*, 749 F.2d 893, 897 (D.C. Cir. 1984) (quoting *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984)). Accordingly, this Court must decide "whether as a matter of law the agency action is supported by the administrative record and is otherwise consistent with the APA standard of review" under 5 U.S.C. § 706 *supra*, *see Vilsack*, 684 F. Supp. 2d at 142, and, because First Amendment claims are raised,

make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression. 749 F.2d at 897.

I. The November 2016 letter runs afoul of the First Amendment because it is a content-based regulation of speech that fails to pass strict scrutiny.

The APA requires courts to set aside decisions of a federal administrative agency that are contrary to a constitutional right. 5 U.S.C. § 706(2)(A)–(C). Under the First Amendment, "the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of the City of Chi. v. Mosley*, 408 U.S. 92, 95 (1972); JA302. Content-based regulations are presumptively unconstitutional. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *Foti v. City of Menlo Park*, 146 F.3d 629, 637 (9th Cir. 1998); JA302.

A. The charitable solicitations effectively banned by the November 2016 legislative rule are fully protected by the First Amendment.

The First Amendment fully protects charitable solicitations. *See Riley v. Nat'l Feder'n of the Blind, Inc.*, 487 U.S. 781, 788-89 (1988); *Sec'y of State of Maryland v. Joseph H. Munson Company*, 467 U.S. 947, 959 (1984); *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980). This is so because "charitable appeals for funds . . . involve a variety of speech interests—communication of

information, the dissemination and propagation of views and ideas, and the advocacy of causes. . . .” *Schaumburg*, 444 U.S. at 632.

In distinguishing commercial speech from fully-protected charitable speech, the Supreme Court recognized that charitable speech is not mere commercial speech because it “does more than inform private economic decisions and is not primarily concerned with providing information about the characteristics of goods and services.” *Id.* Any restriction imposed on charitable solicitations, therefore, must “be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues.” *Id*.

SBA members call on behalf of many groups including religious organizations, such as churches and ministries, political organizations focusing on legislative issues, large and well known charities fighting hunger and disease, civil rights advocacy organizations, women’s rights organizations, environmental organizations, trade associations, and veterans’ services groups. All of these nonprofit organizations fall under the umbrella of “charitable organization” for purposes of application of the TSR, *see* 68 Fed. Reg. at 4589–90, and heightened First Amendment protections, *Riley*, 487 U.S. at 789. They are recognized as exempt from federal income tax under various sections of the Internal Revenue Code including but not limited to sections 501(c)(3), 501(c)(4), 501(c)(6), 501(c)(19) and

527, and their charitable solicitations are afforded the strictest First Amendment protection. *Riley*, 487 U.S. at 789.

B. The November 2016 agency rule is content-based because it regulates charitable speech based on its subject matter and its substantive message.

In *Reed v. Town of Gilbert*, the Supreme Court recently clarified the controlling standard for content-neutrality. The Supreme Court articulated a two-step analytical framework to determine whether a restriction is (1) content-based on its face or (2) content-neutral on its face but still functionally content-based because "it cannot be justified without reference to the content of the regulated speech" or was "adopted by the government because of disagreement with the message [the speech] conveys." *Cahaly v. Larosa*, 796 F.3d 399, 405 (4th Cir. 2015) (quoting *Reed*, 135 S. Ct. at 2227) (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791, (1989)) (internal quotations omitted).

This Court recently relied on *Reed* as the controlling standard for content-neutrality in *Act Now to Stop War and End Racism Coal. v. Dist. of Columbia*, 2017 U.S. App. LEXIS 1193, *23-24 (D.C. Cir. Jan. 24, 2017) (challenging speech restriction limiting placement of event posters on public lampposts); *see also Brickman v. Facebook, Inc.*, 2017 U.S. Dist. LEXIS 11849, *15-16 (N.D. Cal. Jan. 27, 2017). At least three courts, including the Fourth Circuit Court of Appeals and two federal district courts, have used this framework to strike down content-based

restrictions in other "robocall" statutes. *See Cahaly*, 796 F.3d at 405 (affirming lower court's ruling in relevant part)*; Gresham v. Rutledge*, 198 F. Supp. 3d 965, 969 (E.D. Ark. 2016).

While the district court also correctly relied on the *Reed* framework, it came to the wrong conclusion under both prongs of the *Reed* analysis, which resulted in the district court erroneously applying the wrong level of First Amendment scrutiny. The Court in *Reed* observed that "[s]ome facial distinctions based on a message are obvious, defining regulated speech by particular *subject matter*, and others are more subtle, defining regulated speech by its function or purpose." *Reed*, 135 S. Ct. at 2224. But, either way, "[b]oth are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny." *Id.* This, the lower court failed to recognize; therefore, its decision on the First Amendment claim is plain error.

1. The expanded robocall prohibition is content-based because, on its face, it describes calls based on the content of the message.

In assessing the first prong of the *Reed* analysis, i.e., whether the FTC's robocall prohibition as recently expanded to apply to Soundboard technology is content-based, the district court completely ignored the fact that, on its face, the robocall prohibition describes telephone calls based solely on their content—i.e., *consumer* messages ("to induce the purchase of any good or service") and *charitable* messages ("to induce a charitable contribution"). *See* 16 C.F.R. § 310.4(b)(1)(v)(A)-

(B). This dooms the language of the ban as a content-based regulation under well-established law with no further analysis required. *See Reed*, 135 S. Ct. at 2228; *Foti*, 146 F.3d at 636. The express language of the ban targets speech based on subject matter. It further—more subtly—targets the purpose and function of the message—to induce a sale of goods or services or induce a charitable contribution.

"Speech regulations can be viewpoint-neutral but content-based." *Planet Aid v. City of St. Johns*, 782 F.3d 318, 329 (6th Cir. 2014). For example, when an ordinance regulates speech on the basis of its subject matter (but not its viewpoint), such as here, it is not content neutral. *Id.* at 325 (applying strict scrutiny to content-based restriction on charitable solicitations); *National Federation of the Blind of Texas, Inc. v. Abbott*, 647 F.3d 202, 212 (5th Cir. 2011) (same). By way of analogy, an ordinance that regulates billboard signs addressing the subject of abortion, regardless of viewpoint, would be content-based. *Planet Aid*, 782 F.3d at 330. Likewise, a prohibition that targets telephone calls addressing consumer and charitable speech is content-based. *Cahaly*, 796 F.3d at 399, 405 (applying strict scrutiny to content-based robocall statute targeting *consumer* and *political* speech). In both instances, the government attempts to regulate an entire topic or a subtopic of protected speech as conveyed through a particular medium.

Further, the regulation need not be a complete ban to constitute a facially content-based restriction. If the regulation hampers the "communicative impact of

the speaker's expressive conduct," it is content-based. *Planet Aid*, 782 F.3d at 326, 327 (quoting *Texas v. Johnson*, 491 U.S. 397, 411 (1989)); *Reed*, 135 S. Ct. at 2227. "The distinction between laws burdening and laws banning speech is but a matter of degree." *Id.* at 331 (emphasis added). The FTC's "content-based burdens must satisfy the same rigorous scrutiny as its content-based bans." *Id.*

Notwithstanding the express language of the ban in this case, which regulates speech on the basis of its subject matter, the robocall prohibition goes on to exempt *some charitable messages*—those messages that "induce a charitable contribution from a member of, or previous donor to, a non-profit charitable organization on whose behalf the call is made," *see* 16 C.F.R. § 310.4(b)(1)(v)(B), and purely *political* messages, *see* 68 Fed. Reg. 4580, 4589 (Jan. 29, 2003), while restricting *charitable messages* that include a first-time request for a charitable contribution and all *consumer messages*. *See* 16 C.F.R. § 310.4(b)(1)(v) (what is not exempted is banned). When "exceptions to the restriction on noncommercial speech are based on content, the restriction itself is based on content." *Foti*, 146 F.3d at 636 (quoting *National Advertising Co. v. City of Orange*, 861 F.2d 246, 249 (9th Cir. 1988)). If the language of the ban itself was not enough, the language of the exemptions are clear content-based restrictions under well-established law with no further analysis required. *See Reed*, 135 S. Ct. at 2228; *Foti*, 146 F.3d at 636.

Relying on *Reed*, the United States Court of Appeals for the Fourth Circuit struck down South Carolina's similar robocall statute in August of 2015. It noted that "*Reed* instructs that [g]overnment regulation of speech is content based if a law applies to particular speech because of the *topic* discussed or the *idea* or *message* expressed." *Cahaly*, 796 F.3d at 405 (quoting *Reed*, 135 S. Ct. at 2227) (emphasis added). Finding that the state robocall statute applied to calls with a *consumer* or *political* message but did not reach calls made for any other purpose, it concluded the law was content-based because it restricted certain pre-recorded calls based on the content of the message. *Id.* Applying strict scrutiny, the Fourth Circuit held that the law was unconstitutional.

In much the same way, the language of the TSR's robocall ban applies to calls with a *consumer* or *charitable* message but does not reach calls made for any other purpose. *See* JA215 ("informational" calls, "political" calls, and "healthcare" calls, and "many" charitable calls unaffected). In making such a distinction, the rule "raises the specter of impermissible content discrimination." *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 449 (2002). Like *Cahaly*, the FTC's robocall ban as recently expanded to include Soundboard calls similarly restricts certain allegedly pre-recorded calls based on their content—specifically, the subject matter of the message—thereby raising the specter of impermissible content discrimination.

Similarly, in July of 2016, the United States District Court for the Eastern District of Arkansas struck down Arkansas' robocall statute because it prohibited prerecorded messages "for any purpose in connection with a political campaign." *Gresham v. Rutledge*, 2016 U.S. Dist. LEXIS 97964, *2 (E.D. Ark. July 27, 2016). In that case, the parties simply agreed that the statute contained a content-based restriction under *Reed*, and the case turned on whether such content-based restriction could survive strict scrutiny. Unsurprisingly, the court found it could not. *See Burson v. Freeman*, 504 U.S. 191, 211 (1992) ("[I]t is the rare case in which . . . a law survives strict scrutiny.").

The district court relied on *Patriotic Veterans v. Zoeller*, 845 F.3d 303, 2017 U.S. App. LEXIS 47, 2017 WL 25482 (7th Cir. Ind. Jan. 3, 2017), but *Zoeller* is distinguishable and should not be followed here. In *Zoeller*, the Seventh Circuit Court of Appeals held that exceptions to a robocall regulation for messages to persons with whom the caller has a current relationship are valid time, place, and manner restrictions, and not content-based discrimination. This result in *Zoeller* is an unconstitutional restriction on protected speech because the restriction impacts, at a minimum, the function and purpose of the message as well as its content. The *Zoeller* court placed outsized weight on what it viewed as a content-neutral consent requirement and insufficient weight on the content-based exceptions to the prohibition, which by design demonstrated the prohibition itself to be content-based.

Regardless, this Court need not pass too long on *Zoeller* because the challenge brought by SBA is materially different. Unlike the Patriotic Veterans, SBA does not challenge only the language of the exceptions to the robocall prohibition as amended by the November 2016 letter. Rather, SBA challenges the whole construct, including the language of the ban itself—the prohibition on Soundboard calls containing a charitable message ("to induce a charitable contribution")—based on the content of the message. Thus, *Cahaly*, *Gresham*, and *Reed* (and not *Zoeller*) control this case.

More specifically, in *Cahaly*, plaintiff's constitutional challenge attacked the statute's general ban on calls with *consumer* or *political* messages and not its exceptions, which the court recognized as being "based on the express or implied consent of the called party." *Cahaly*, 796 F.3d at 402. Like *Cahaly*, SBA challenges the general ban on calls with *consumer* or *charitable* messages. In this case, however, the exception for purely *political* calls, *see* 68 Fed. Reg. at 4589, is not based on any express or implied consent of the called party. Therefore, to the extent that SBA also challenges the government's disparate treatment of protected speech based on its content in the exceptions, it is again *Cahaly* and *Reed* that distinguish this case.

While not a sign ordinance, the exceptions in this case mirror those struck down by the Supreme Court in *Reed*. The sign code at issue in *Reed* purported to impose general limits on the display of outdoor signs, but was in fact saturated with

multiple different exemptions. *Reed*, 135 S. Ct. at 2224. These exemptions regulated certain topics or subtopics of speech differently (or not at all) based on the content of the message. For example, "political" signs were subject to one rule, while "ideological" signs were subject to another, both in terms of size and as to when they were allowed, and "directional" signs were subject to still other requirements. *Id.* at 2224–25. The FTC's recently expanded robocall prohibition operates in exactly the same way—applying one rule to "political" calls, while certain "charitable" calls are subject to another, other charitable calls to yet another, and "consumer" calls were subject to still other requirements.

In *Gresham*, the parties did not even dispute the content-based distinction. *Gresham*, 198 F. Supp. 3d at 969. The statute targeted political speech based on subject matter, which the parties agreed was obvious content-best discrimination. This case imports *Gresham*, *Reed* and *Cahaly*. The FTC's new, final rule targets *consumer* and *charitable* speech delivered through Soundboard technology. The rule also targets *political* calls that include an eleemosynary appeal, but not charitable calls that include requests for continued contributions or purely political calls (not including any eleemosynary appeal). The rule subjects different categories and subcategories of speech to different regulation based on subject matter and substantive content of the message (such as purpose and function). On its face, this is blatant content-based discrimination that cannot be justified.

2. The recently expanded robocall prohibition is content-based because enforcement officials must review the call's content to determine what restrictions apply.

Enforcement officials must review a call's content to determine what restrictions apply and whether there was a violation of same. Under no measure may the newly expanded robocall prohibition be justified without reference to the content of the message. The lower court's finding that the robocall prohibition as recently expanded to apply to Soundboard is content-neutral under *Reed* was erroneous.

As shown *supra*, the FTC's expanded robocall prohibition is riddled with content-based distinctions among Soundboard calls, and therefore is impermissibly content-based under well-established law. While the analysis ends there, SBA considers, for the sake of argument, the second prong of the *Reed* analysis. The district court erroneously determined that the robocall prohibition does not require the FTC to review a call's content to determine whether it applies to a Soundboard charitable call.

The district court explained that the FTC "need only determine whether the call's recipient is either a potential first-time donor or a prior donor or member." JA304. This misses the content-based distinction altogether and fails to consider the fact that the FTC cannot determine whether a call's recipient is either a potential first-time donor or a prior donor or member without looking at the content of the call.

Under *McCullen v. Coakley*, a regulation is content-based when an enforcement officer must read the call's message to determine if the call is exempted from the regulation or falls within its proscription. 134 S. Ct. at 2531 (2014). This necessarily requires a review of (1) the subject matter and, if charitable speech, (2) whether it includes a request for a first-time donation or continued contribution or membership. If the caller asks for a first-time donation, it is prohibited; if the caller asks for a renewed contribution, it is permitted. Where the restriction necessitates the government's examination of "the content of the message that is conveyed to determine whether a violation has occurred," it is found to be content based. *McCullen*, 134 S. Ct. at 2531; *see also Carey v. Brown*, 447 U.S. 455, 462 (1980); *Foti*, 146 F.3d at 636.

The same is true here. Consider, for example, the FTC's investigation of consumer complaints. The FTC investigates for compliance by requesting copies of the scripts and transcripts of calls. Determination of compliance with the robocall prohibition cannot be made without reviewing the content of the message (as the regulation differentiates the requirements based on the subject matter and substantive content of the call). Thus, the message is so inextricably intertwined with the relationship allegedly targeted by the restriction that it is invariably the request for a first-time charitable donation—the charitable speech—that is the basis of the ban and the evidence of any alleged violation thereof. As explained *supra*, this is

fully protected speech under the First Amendment and, therefore, a content-based restriction on same.

The district court misconstrued this restriction as relationship-based and not content-based. Regardless of the FTC's motive,[1] the effect is an indisputable content-based restriction on fully protected speech. The FTC most clearly prefers calls to previous donors as opposed to potential donors; however, it is clear that the nature of this relationship-based preference is inextricably intertwined with the content of the message conveyed and results in compelled silence with respect to an entire subcategory of fully protected speech. This is so because it is logistically impossible to get express written consent (the increased burden attached to charitable messages requesting first-time donations) prior to calling prospective

[1]In *Reed*, Justice Thomas elaborates on the immateriality of innocuous intent and motive:

> A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech. . . . Although a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary. In other words, an innocuous justification cannot transform a facially content-based law into one that is content neutral.
>
> That is why we have repeatedly considered whether a law is content neutral on its face before turning to the law's justification or purpose.

Reed, 135 S. Ct. 2218, 2228 (2015).

members or donors of a charitable organization. This hampers the communicative impact of the charitable speech at issue and chills First Amendment freedoms. The lower court's conclusion on this legal issue is contrary to all of the Supreme Court's First Amendment precedent.

Even if the FTC's recently expanded robocall prohibition were held to be content-neutral on its face (and it is not), it would still be functionally content-based because "it cannot be justified without reference to the content of the regulated speech" or was "adopted by the government because of disagreement with the message [the speech] conveys." *Cahaly*, 796 F.3d at 405.

C. The FTC's recently expanded content-based regulation of pre-recorded calls cannot withstand strict scrutiny.

Content-based speech restrictions "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve a compelling state interest." *Reed*, 135 S. Ct. at 2226; *R. A. V. v. St. Paul*, 505 U. S. 377, 395 (1992); *Riley*, 487 U.S. at 800. Strict scrutiny requires the government to demonstrate that no less restrictive alternatives are available to achieve that compelling end. *R.A.V.*, 505 U.S. at 395 ("The existence of adequate content-neutral alternatives thus 'undercuts significantly' any defense of such a statute") (internal citation omitted). The government must show that no less restrictive alternatives exist, "and not simply that the chosen route is easier." *McCullen*, 134 S. Ct. at 2540.

In both *Cahaly* and *Gresham*, the court "assumed" the government's interest was compelling for purposes of analyzing the second prong of the inquiry and, in both cases, found the robocall statute at issue not narrowly tailored. *Cahaly*, 796 F.3d at 405; *Gresham*, 198 F. Supp. 3d at 970 (noting Eighth Circuit has held that similar residential privacy interests were substantial but not compelling) (citing *Kirkeby v. Furness*, 92 F.3d 655, 659 (8th Cir. 1996) ("Although the interest asserted . . . (protecting residential privacy and tranquility) is a 'substantial' one . . . the Supreme Court has never held that it is a compelling interest, *see Carey v. Brown*, 447 U.S. 455, 465, 100 S. Ct. 2286, 2292-93, 65 L. Ed. 2d 263 (1980) and we do not think that it is.")).

Here, too, even assuming for the sake of argument that the FTC has compelling reasons to ban certain speech by SBA members as described above (and, to be clear, it does not), this Court would still need to find that the robocall prohibition, as amended by the November 2016 letter, fails strict scrutiny because numerous less restrictive alternatives are available to the FTC to regulate abusive telemarketing calls in lieu of an outright ban on all charitable fundraising calls to prospective donors or members on behalf of charitable organizations using Soundboard. Indeed, the courts in both *Cahaly* and *Gresham* ultimately concluded that the robocall statutes at issue failed strict scrutiny because there were sufficiently

less restrictive alternatives available to the government and the challenged statutes reached more protected speech than necessary.

The same is true here. For example (and although it is not SBA's burden to demonstrate), the TSR and state telemarketing laws already contain several less restrictive alternatives to crack down on telemarketing fraud and abusive practices, including national and state "do-not-call" list requirements, call-abandonment limitations, opt-out requirements, caller-ID requirements, and anti-fraud statutes. In addition to what the federal government can do and largely already does, the states and private parties also play a role in "policing" telemarketing practices in this country, such as state charity regulators and attorney general offices, watchdog groups and rating organizations, including the Better Business Bureau.

Indeed, the TSR as well as many state laws already require mandatory oral and written disclosure statements to be made during the course of the call. Soundboard technology furthers this and other less restrictive alternative requirements by ensuring that its software does not terminate any calls and that all required state and federal disclosures are made timely and in full. The TSR in particular requires the caller to identify himself or herself as a paid solicitor, identify the charitable organization on whose behalf the call is placed, and state whether the call is intended to solicit a charitable contribution. It also requires the call agent to honor any request to be placed on a "do-not-call" registry. Soundboard's delivery of

these disclosure statements and its calls to consumers and donors are more reliable, tracked, and monitored than calls placed by a call center staffed without Soundboard, which the FTC does not restrict. *See* Coombs Decl. (JA147-58). All the while, the call recipient remains at liberty to hang up, to ask to speak to a supervisor or to be placed on the "do-not-call" registry.

Based on the foregoing, the November 2016 letter's expansion of the robocall prohibition to apply to Soundboard fails strict scrutiny.

D. The November 2016 agency action also fails the time, place and manner test.

The lower court improperly applied the time, place, and manner test to the FTC's November 2016 agency action because it incorrectly found that the robocall prohibition is content-neutral. JA305. Under this test, intermediate scrutiny is applied and speech regulations are permissible, so long as they are "narrowly tailored to serve a significant governmental interest" and "leave open ample alternative channels" of communication. JA305 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). Permissible, content-neutral regulations of speech include regulations of the time, place, and manner in which speech *is expressed* in order to serve legitimate government interests and not what the speech says. *Id.* (citing *Clark v. Cmty. for Creative Non–Violence*, 468 U.S. 288, 293 (1984)) (emphasis added).

At the outset, it is important to note that the time, place, and manner test is the wrong test to apply to the FTC's recently expanded robocall prohibition because it is content-based. *See supra*. As the Supreme Court has explained, "time, place, and manner regulations must be 'applicable to all speech irrespective of content.'" *Consol. Edison Co. of New York, Inc. v. Pub. Serv. Comm'n of New York*, 447 U.S. 530, 536 (1980) (citation omitted). Because the robocall prohibition is content-based, strict scrutiny, rather than the time, place, and manner test's intermediate scrutiny, is the correct constitutional test.

In other words, the time, place and manner test cannot be applied to regulations that limit "what can be said," such as the TSR's recently expanded robocall prohibition; rather, the time, place and manner test properly applies to regulations that limit "when" or "where" or "at what decibel" something may be said. Because the TSR's robocall prohibition expressly limits "what can be said" and not just the time, place or manner in which something may be said, it is content-based. Further, as explained in *McCullen v. Coakley*, if the restriction necessitates the government's examination of "the content of the message that is conveyed to determine whether a violation has occurred," it is content-based and requires strict scrutiny. 134 S. Ct. 2518, 2531 (2014); *accord Carey*, 447 U.S. at 462.

In addition, the recently expanded robocall prohibition lacks the tailoring required by the time, place, and manner test. Applying intermediate scrutiny, a

speech regulation must be narrowly tailored to serve a significant government interest. *Ward*, 491 U.S. at 791. The government must, therefore, provide some evidence to justify how the proposed restriction is narrowly tailored to solve the problem identified. *See, e.g.*, *Mosley*, 408 U.S. at 100-01 ("We reject the city's argument that . . . it may prohibit all nonlabor picketing because, as a class, nonlabor picketing is more prone to produce violence than labor picketing. Predictions about imminent disruption from picketing involve judgments appropriately made on an individualized basis, not by means of broad classifications . . . ."); *United States v. Griefen*, 200 F.3d 1256, 1261 (9th Cir. 2000) (finding that "an actual threat [of violence]posed by the protestors and the appellants clearly existed" thus justifying the government's interest in closing off a designated area of national forest); *Edwards v. City of Coeur D'Alene*, 262 F.3d 856, 863 (9th Cir. 2001) (municipalities must "provide 'tangible evidence' that speech-restrictive regulations are 'necessary' to advance the proffered interest[s]" justifying the regulation).

The Supreme Court's decision in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), illustrates this principle. There, the city argued that its prohibition on newsracks containing commercial publications, while at the same time permitting the proliferation of newsracks containing noncommercial publications, was narrowly tailored to serve its interests in safety and aesthetics. *Id.*

at 429. The Supreme Court rejected this argument because the commercial and noncommercial newsracks were "equally unattractive" and "equally responsible for [the safety] problems" the city sought to regulate. *Id.*

The same is true here. The district court (and the FTC) fail to explain why some protected speech is treated more favorably than other protected speech and how this disparate treatment justifies the ends to its means. More specifically, the FTC fails to account for why calls to prospective donors of a charitable campaign are more dangerous to its privacy interests than calls to prospective donors of purely political campaigns. They are equally susceptible to "annoy" the call recipient and are equally responsible for any alleged invasion of privacy. However, both charitable and political speech are fully protected under the First Amendment. Further, the FTC has not (nor could it) put forth any "tangible evidence" that supports its far less favorable treatment of certain charitable messages. Accordingly, the expanded robocall prohibition as applied to Soundboard also fails the tailoring prong of intermediate scrutiny test that the district court improperly applied.

Based on the foregoing, the November 2016 letter imposes a content-based restriction on certain protected speech. This content-based restriction fails the narrowly tailored prong of both strict constitutional scrutiny, which is required, and intermediate scrutiny, which the district court improperly applied. Accordingly, the restriction is not narrowly tailored under any measure. This violates the First

Amendment free speech rights of SBA members and their clients and renders the ban invalid and unenforceable. Therefore, the APA requires this Court to set aside this final agency action as contravening a constitutional right under 5 U.S.C. 706.

For all of the above reasons, this Court should reverse the lower court's ruling as to SBA's First Amendment challenge.

II. The November letter is a de facto legislative rule that is invalid because it did not go through notice-and-comment rulemaking.

The district court correctly held that the November 2016 letter constitutes final agency action; however, it improperly held that it was an interpretative rule, not a legislative rule. The FTC's November letter is both "final" and a "rule" because it consummated a months-long consideration by the FTC office responsible for enforcing the TSR, and it binds SBA member companies to conform to its mandate on pain of civil penalty. And the letter is a legislative rule rather than an interpretive one because it substantively expands the scope of the robocall prohibition — from unattended, prerecorded calls that permit no variation, to (for the first time) telemarketing calls in which a live agent determines the course and content of the communication and speaks and responds to the call recipient using Soundboard technology. The FTC cannot "interpret" its way to that result — if it wants to ban outbound telemarketing calls that use Soundboard, it must go through notice-and-comment rulemaking, as the Telemarketing Act requires. The district court erred in concluding otherwise.

A. The November letter is reviewable as final agency action.

This Court may only review agency actions that are "final." The district court held that the November 2016 letter is such final agency action. *See* JA287-96. On this point, the district court's analysis was thorough and correct.

First, the November letter is a "definitive" statement of the FTC's legal position. *See Bennett v. Spear*, 520 U.S. 154, 178 (1997). The letter was issued by the Division of Marketing Practices, the FTC component that "issues, revises, and enforces . . . [t]he Telemarketing Sales Rule,"[2] following months of consideration that included Soundboard industry representatives meeting with the Division's staff, Division head Lois Greisman, and the then-Director of the FTC's Bureau of Consumer Protection. The November 2016 letter, signed by Ms. Greisman (who also signed the 2009 letter), was the culmination of that process, documenting the FTC's "conclusion" that "calls made using Soundboard technology *are* subject to the [robocall prohibition]," and "*can only* be made legally" in a narrow set of circumstances. *See* JA033 (emphasis added). The November letter is so resolute about the enforceability of its newly announced requirements that it sets a firm deadline by which industry members must "bring themselves into compliance" with

[2] *See Division of Marketing Practices*, FTC.GOV, https://www.ftc.gov/about-ftc/bureaus-offices/bureau-consumer-protection/our-divisions/division-marketing-practices (last visited June 19, 2017).

the FTC's prohibition on Soundboard use. *Id.* The history and substance of the November letter demonstrate the definiteness of the FTC's legal position.

That the FTC might hypothetically not enforce the new Soundboard prohibition in a particular case is not the point because FTC *enforcement* is not at issue. The agency action at issue is the FTC's decision to treat Soundboard calls as prohibited robocalls, an action that by itself has legal consequences for SBA members. There is nothing "tentative" about the letter and no ambiguity as to what the FTC is seeking to accomplish by issuing it. A pronouncement that warns the regulated community that certain acts are *subject to* severe enforcement consequences, and that regulated parties that act out of step with the pronouncement do so at their own risk, is final agency action, notwithstanding the fact that enforcement might never come. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 140, 150 (1967); *Frozen Food Express v. United States*, 351 U.S. 40, 44–45 (1956).

Nor is it of any moment that the November letter claims to represent only the views of "staff" and not necessarily those of the Commission. In the first place, that disclaimer is mere boilerplate, of the sort that this Court has said should not distract from the rest of a document; *see Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. Apr. 14, 2000); *see also* JA039 (using similar disclaimer to that in the November letter). Agencies cannot escape judicial review of their actions merely by using subordinates to announce new substantive policies. The pronouncement at

issue in the *Appalachian Power* case — which this Court held to be a de facto legislative rule — demonstrates the point. It came out of two sub-offices of the Environmental Protection Agency ("EPA"), two levels below the Office of the EPA Administrator — exactly the same as the FTC's Division of Marketing Practices' level of remove from the FTC Commissioners. *See Appalachian Power*, 208 F.3d at 1019; *see also Her Majesty the Queen in Right of Ontario v. EPA*, 912 F.2d 1525, 1531–32 (D.C. Cir. 1990) (rejecting agency argument that, because views expressed in statement were merely those "of a subordinate agency official," they "[could not] be considered final action by the EPA administrator"); *Nat. Res. Def. Council v. Thomas*, 845 F.2d 1088, 1094 (D.C. Cir. 1988) (subordinate agency officials' pronouncements qualified as final agency action).

Second, the district court correctly held that this case presents a "purely legal" question that would not "benefit from a more concrete setting." *Ciba-Geigy v. EPA*, 801 F.2d 430, 435 (D.C. Cir. 1986); *see also Cement Kiln Recycling Coal. v. EPA*, 493 F.3d 207, 215 (D.C. Cir. 2007). This case considers whether the November 2016 letter's substantive expansion of the TSR's robocall prohibition to apply to Soundboard technology, which is plainly not within the language of regulation, is a legislative rule that should have issued through notice and comment and, in any event, whether it is contrary to law and procedure. Accordingly, because there are

no disputed facts bearing on these questions, this case raises "purely legal" questions of statutory interpretation and amendment.

Third, the November 2016 letter imposes immediate and significant practical burdens on SBA and its members. The letter bans outbound telemarketing calls using Soundboard that, prior to the letter, were not within the scope of the TSR robocall prohibition, and threatens that SBA's members will be subject to enforcement actions if they persist in using Soundboard as they have done for years. The November letter's command to SBA member companies (and others similarly situated) to come "into compliance" means, of course, that if SBA members do not do what the staff is directing them to do in the November 2016 letter, they will be presumed to be out of compliance, *i.e.*, acting illegally, and subject to FTC enforcement specifically for using Soundboard. That is the entire point of the November letter. At a minimum, this "cast[s] a cloud of uncertainty" over the viability of SBA's members' ongoing business operations. JA296; *see CSI Aviation Servs., Inc. v. Dep't of Transp.*, 637 F.3d 408, 412 (D.C. Cir. 2011). It also puts SBA's members to a painful choice between business-shuttering compliance and the risk of ruinous enforcement actions in the future — a conundrum that is "the very dilemma [the Supreme Court has found] sufficient to warrant judicial review." *Ciba-Geigy*, 801 F.2d at 439.

"Having thus flexed its regulatory muscle, [the FTC] cannot now evade judicial review." *CSI Aviation*, 637 F.3d at 413. The November 2016 letter is a final, reviewable agency action. JA296.

B. The November letter is a legislative rule, not an interpretive one.

Because the November 2016 letter is final, it is a rule, not a mere policy statement. *See Nat. Res. Def. Council v. EPA*, 643 F.3d 311, 321 (D.C. Cir. 2011) (whether agency action is a rule is essentially same as inquiry into whether action is final); *Cement Kiln Recycling Coal.*, 493 F.3d at 226 & n.14 (same point). Furthermore, it is a legislative rule, not an interpretive one. Because the FTC did not announce its new legislative rule by way of notice-and-comment rulemaking, this Court should follow its long line of cases invalidating purported policy statements, guidance documents, and interpretive rules that are practically binding and, therefore, really legislative rules. This Court should find the November letter invalid for not having gone through notice and comment. It was on this issue that the district court's APA analysis went off the tracks.

Although the distinction between legislative and interpretive rules can be murky, this Court has said that it "likely turns on how tightly the agency's interpretation is drawn linguistically from the actual language" of the statute or regulation from which the so-called interpretation purports to derive. *Id.* So, for example, when an agency pronouncement exceeds what existing regulations can

reasonably be understood to authorize, the pronouncement is a legislative rule, not an interpretive one. *See Nat'l Family Planning & Reprod. Health Ass'n v. Sullivan*, 979 F.2d 227, 235 (D.C. Cir. 1992) (noting that an attempt to "supplement" the law rather than "construe" it amounts to a substantive amendment of a regulation); *see also Nat. Res. Def. Council*, 643 F.3d at 321 (same point); *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993) (same point).

Read in its proper context, the phrase "a prerecorded message" cannot reasonably be interpreted to apply to Soundboard calls. *See Am. Mining Cong.*, 995 F.2d at 1112 (holding that an agency pronouncement is a legislative rule if it "effectively amends a prior legislative rule"). The FTC argued below — and the district court held — that the November 2016 letter merely interprets the phrase "a prerecorded message" as that phrase is used in the robocall prohibition. But that position ignores both the text and context of the regulation, and turns a blind eye to the moral hazard of allowing an agency to create and impose binding enforcement obligations — indeed, outright prohibitions — that are not within the scope of any existing regulation without subjecting those new obligations to public comment.

The robocall regulation forbids telemarketers from "initiating any outbound call that delivers a prerecorded message" without the recipient's written consent. 16 C.F.R. § 310.4(b)(1)(v)(A). The crux of this case is the meaning of the phrase "a prerecorded message." Properly construed, that phrase does not extend to calls made

using Soundboard technology because a call made using Soundboard does not deliver "a" (*i.e.*, one) unitary "prerecorded message," which was the FTC's focus when it promulgated its 2008 rule. To be sure, Soundboard technology involves combining prerecorded sounds, words, phrases, and sentences to form messages, but their content is determined on an *ad hoc* basis by the Soundboard operator (a live person), based on the operator's decision about what sequence of audio files will best respond to the call recipient, no different than a call agent reading from a menu of pre-written sales scripts.

To the extent there is ambiguity about the breadth of the phrase "a prerecorded message," moreover, the FTC's preamble to the robocall regulation eliminates it. Time and again, this Court has held that statutes and regulations, ambiguous on their faces, may be disambiguated by their preambles. *See, e.g.*, *Wyo. Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 53 (D.C. Cir. 1999) ("[T]he preamble to a regulation is evidence of an agency's contemporaneous understanding of its proposed rules."); *Ass'n of Am. R.R.'s v. Surface Transp. Bd.*, 237 F.3d 676, 680 (D.C. Cir. 2001) (rejecting agency's construction of ambiguous statutory term because construction was inconsistent with statute's preamble); *United Steelworkers of Am. v. Marshall*, 647 F.2d 1189, 1224 (D.C. Cir. 1980) (relying on preamble to "resolve the apparent contradiction" in an otherwise ambiguous regulation).

The preamble to the robocall prohibition disambiguates the phrase "a prerecorded message" by repeatedly emphasizing that the robocall regulation's prohibition on calls delivering a prerecorded message targets a specific and particularized evil: the unique intrusion on privacy caused by telemarketing calls that make two-way communication impossible and turn the telephone into nothing more than a one-way sales device. For instance, the preamble describes "prerecorded calls" as calls that "'are by their very nature one-sided conversations.'" 73 Fed. Reg. 51164, 51167 (Aug. 29, 2008) (quoting Cmt. No. 529, filed by National Consumers League). It cites an industry comment for the proposition that prerecorded messages are "nothing other than outbound streaming audio files which convert the telephone (traditionally an instrument of two-way communication) into a radio (an instrument for listening)," and that "[t]hese [robocall] campaigns are widely regarded as a nuisance and a burden to consumers because consumers are powerless to interact with them." *Id.* at 51167, 51173 (quoting Cmt. No. 571, filed by Interactions Corp.). And it observes that "a consumer's right to privacy may be exacerbated immeasurably when there is *no human being* on the other end of the line." *Id.* at 51180 (emphasis added). Never, by contrast, does the preamble so much as mention Soundboard or hint that any other technology used to facilitate a live, two-way interaction, with humans on both ends of the call, could fit within the robocall prohibition's scope merely because a human was not doing the actual talking. The

import is clear: In promulgating the robocall prohibition, the FTC never meant for it to reach Soundboard calls. Soundboard calls are not robocalls.

That limitation on the scope of the term "prerecorded message" is baked into the robocall prohibition itself, so that any attempt to erase or modify it must equally take the form of a legislative rule. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). When an agency uses a term in a regulation and, in so doing, ascribes to that term a narrow and particularized meaning, the agency may not later pretend as though it did not constrain the term's meaning in a substantive way, as though the term remained susceptible to later re-interpretation. *See Sullivan*, 979 F.2d at 236. To do so is to amend the regulation itself by augmenting its scope. That is the hallmark of a legislative rule. *See id.* at 236 ("[An agency] may not constructively rewrite [a] regulation, which was expressly based upon a specific interpretation of the statute, through internal memoranda or guidance directives that incorporate a totally different interpretation and effect a totally different result.").

Here, the FTC did just that. The preamble, as noted above, made it plain that the FTC had a specific regulatory target in mind: the traditional robocall that makes two-way communication impossible. Soundboard — a distinctively different type of phone call — was never mentioned. Even assuming *arguendo* that the Telemarketing Act permits the FTC to add Soundboard calls to the list of prohibited telephone

practices, that would be a substantive addition and the statute obligates the agency to do so through notice-and-comment rulemaking.

The FTC's 2009 letter makes it even more obvious that the robocall prohibition, as promulgated in 2008, does not encompass Soundboard calls. The letter is clear as can be: "[T]he 2008 TSR amendments. . . do not prohibit telemarketing calls using [Soundboard] technology." JA038. The FTC did not frame its 2009 statement as a discretionary interpretation of an ambiguous term, subject to future change. Its earlier letter simply stated that Soundboard technology was not covered by the robocall prohibition. Courts ordinarily give substantial weight to a contemporaneous agency interpretation of a statute the agency administers. *See United States v. Kanchanalak*, 192 F.3d 1037, 1045 & n.15 (D.C. Cir. 1999); *see also Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (court need not defer to agency's interpretation of disputed regulation when alternative reading is compelled by "indications of the [agency's] intent at the time of the regulation's promulgation"). That is what this Court should do with respect to the FTC's 2009 letter.

Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199 (2015)), does not require otherwise. The Supreme Court's reiteration in *Perez* that a new interpretation of an existing regulation is no less permissible (if reasonable) than a prior interpretation does not apply in this case because, in *Perez*, the plaintiff did not challenge the new

interpretation at issue as a legislative rule. *See id.* at 1210. Indeed, there was no question in *Perez* that the challenged interpretation was permissible under the terms of the regulation; the challenge was premised instead on a line of cases from this Court that required even changes in interpretations to go through notice and comment.[3] The Supreme Court rejected that, and *Perez* had nothing to say about the other line of cases from this and other courts rejecting so-called interpretative rules (or other types of "guidance") that were, in substance, legislative rules that failed to go through notice and comment. Because, in substance and effect, the November 2016 letter expands the TSR's robocall prohibition beyond the outer limits of what the regulatory text permits, it constitutes a legislative rule. *Perez* is inapposite.

If embraced by this Court, the path the FTC took to arrive at its conclusion that Soundboard calls are prohibited robocalls would embolden more agencies to accomplish substantive ends without following the procedures required by law. *See Appalachian Power*, 208 F.3d at 1020 ("Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations."). Procedural rights matter in rulemaking, especially where substantial investment is at stake. As this Court has emphasized:

> Notice requirements are designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop

[3] *See Alaska Prof'l Hunters Ass'n v. FAA*, 177 F.3d 1030 (D.C. Cir. 1999); *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997).

> evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review.

Int'l Union, United Mine Workers of Am. v. MSHA, 407 F.3d 1250, 1259 (D.C. Cir. 2005); *see also Sprint Corp. v. FCC*, 315 F.3d 369, 373 (D.C. Cir. 2003); *Pickus v. U.S. Bd. of Parole*, 543 F.2d 240, 242 n.4 (D.C. Cir. 1976) (noting that "proposed rules are not graven in stone, and comments on [a given] limitation could cause the [agency] to change its mind").[4]

The district court stated that courts are not required to "consider the degree to which an agency would benefit from the notice-and-comment process when deciding whether an agency action is a legislative rule." JA301. The district court missed the point. Notice and comment is not necessary merely to make the FTC a better-informed regulator. It is necessary because what the FTC was considering (*e.g.*, consumer complaints about robocalls; allegations about the misuse of Soundboard) prompted it to expand the reach of its existing prohibition on robocalls to, for the first time, sweep in Soundboard calls. That is, by definition, legislative rulemaking.

[4] *See Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166–67 (2012); *see also id.* at 2168 (noting the "practice of deferring to an agency's interpretation of its own ambiguous regulations undoubtedly has important advantages, but this practice also creates a risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit, thereby frustrat[ing] the notice and predictability purposes of rulemaking.") (citation and internal quotation marks omitted).

To dismiss the role of notice and comment is to say that procedural rights are not important.

Because the robocall prohibition promulgated in 2008 plainly did not apply to Soundboard calls, the FTC may prohibit Soundboard calls, if at all, only after proposing a rule to do so and receiving comment from the public.

III. The district court placed form over substance in faulting SBA for not attacking the November letter as arbitrary and capricious.

The district court's analysis appears to have been materially handicapped by its odd insistence that it could not consider SBA's questioning of the inconsistency between the November 2016 letter and the 2008 robocall prohibition because SBA did not expressly label the November letter "arbitrary and capricious." *See* JA443-44 (positing that, "because [SBA] expressly disavowed the claim that the November 2016 letter was an arbitrary and capricious application of the robocall prohibition, the question of how to weigh the preamble's language in interpreting the term 'prerecorded message' was not squarely before the court"). To put a finer point on it, the district court ignored the crux of SBA's procedural argument because SBA did not frame its APA claim as an arbitrary-and-capricious challenge.

The district court was wrong about that for two reasons. First, it was working from a mistaken premise. Second, and in any event, the district court's analytical approach runs counter to precedent. To the contrary, under all known precedent courts analyze APA claims under the full standard of review set forth in 5 U.S.C. §

706—i.e., the full spectrum of grounds enumerated in sections (1) and (2) and all subsections thereunder.

As for the district court's mistaken premise, SBA never "disavowed" a claim that the November 2016 letter was an arbitrary and capricious application of the *2008 regulation*. To the contrary, SBA did not make any such concession — it devoted more than ten pages of briefing to the point that the November letter exceeded the scope of the FTC's existing robocall prohibition. *See* JA116, JA120-23, JA125-26; JA253, JA263-67. And, as it explained in both its briefs and at oral argument, it structured its argument as a procedural challenge because an arbitrary-and-capricious challenge would have been premature, since the FTC had not followed the proper Telemarketing Act rulemaking procedure in the first instance. JA265; JA337-38.

Thus, it was precisely because the FTC did not engage in the notice-and-comment process that SBA has framed its APA claim as a procedural one. Because the November 2016 letter imposes new restrictions that exceed the outer limits of the 2008 regulation, the letter cannot be embraced as a mere "interpretation" of the 2008 regulation, and thus must be vacated on procedural grounds. There is, therefore, no need for SBA to also argue, in express terms, that the November letter is an "arbitrary and capricious" application of the 2008 regulation. It effectively makes that very argument by way of its procedural challenge, such that an arbitrary

and capricious challenge would be, at most, redundant, as counsel explained to the district court at oral argument. *See* JA342. Both the FTC and the district court recognized this much. *See, e.g.*, JA120-30; JA300-01; JA442; JA204-05; Appellee's Opp. to Appellant's Emergency Mot. Inj. Pending Appeal p. 2.

In any event, there is no precedent for the district court's thesis that the failure to frame an APA claim as an arbitrary-and-capricious challenge is fatal to that claim. Indeed, this Court's seminal decision in *American Mining Congress v. Mine Safety & Health Administration*, 995 F.2d 1106 (1993) points in exactly the opposite direction. In that case, as in this one, the complaining parties contended that an agency pronouncement was a de facto legislative rule because it exceeded the textual scope of the regulation it purported to interpret. *See Am. Mining Cong.*, 995 F.2d at 1112. In that case, as in this one, the complaining parties did not separately claim that the challenged pronouncement was arbitrary or capricious. *See* Br. for Pet'rs, *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106 (1993) (Nos. 91-1501, 92-1188, 82-1331), 1992 WL 12599857, at *7 n.3 (disclaiming reliance on an arbitrary-and-capricious claim).

Despite the absence of a separately styled arbitrary-and-capricious claim, however, this Court did not hesitate to address the *American Mining Congress* plaintiffs' arguments about the extent to which the challenged pronouncement went beyond the text of the restriction that it purported to regulate. *See Am. Mining Cong.*,

995 F.2d at 1112–13. *American Mining Congress* thus illustrates that the district court was simply wrong to conclude that a plaintiff's ability to prevail on an APA claim such as SBA's requires the plaintiff to frame its argument as an arbitrary-and-capricious claim when its styled procedural claim, under the same statutory provisions, is in substance and effect one and the same. The particular terminology used by SBA to frame its APA argument reflects a stylistic decision; it has nothing to do with the substance of the argument, which here can hardly be mistaken.

The FTC has ample tools to accomplish its substantive ends; it should be required to adhere to them. If it is dissatisfied with the scope of its existing regulations, there are ways for it to fix that perceived defect. It may, for instance, engage in notice-and-comment rulemaking under its existing authority. Or it may petition Congress for a law granting it additional powers. What it may *not* do, however, is simply impose by fiat a new rule arrogating for itself powers beyond the ones it possesses under existing regulations. Because the FTC's November 2016 letter substantively expands the robocall prohibition, it is, de facto, a legislative rule. And because the FTC did not subject the November 2016 letter to notice and comment before promulgating it, the letter is procedurally invalid and this Court should vacate it.

CONCLUSION

For the above reasons, SBA respectfully asks this Court to reverse the decision of the district court and to set aside the November 2016 letter.

Respectfully submitted,

/s/ Karen Donnelly
Karen Donnelly

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7) of the Federal Rules of Appellate Procedure and this Court's Circuit Rule 32(a), I hereby certify that the foregoing brief is proportionately spaced, has a typeface of 14 points or more, and contains 12,558 words (excluding the exempted portions of the brief), as determined by the word counting feature of Microsoft Word 2013.

Dated: August 25, 2017.

Respectfully submitted,

/s/Karen Donnelly
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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Final Brief for Appellant and the Statutory Addendum on the following parties via the Court's CM/ECF electronic filing system, or if the party does not participate in Notice of Electronic Filing, by electronic mail, on this 25th day of August 2017, to:

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A paper copy of the Final Brief for Appellant and the Statutory Addendum were also served on counsel for the Federal Trade Commission via First Class mail.

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