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 REPLY 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 Ass'n 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).

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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

STATUTES AND REGULATIONS

Except for the following, all applicable statutes, etc., are contained in the Statutory Addendum to the Corrected Opening Brief for Appellant.

15 U.S.C. § 44

The words defined in this section shall have the following meaning when found in this Act, to wit:

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"Corporation" shall be deemed to include any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members, and has shares of capital or capital stock or certificates of interest, and any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, without shares of capital or capital stock or certificates of interest, except partnerships, which is organized to carry on business for its own profit or that of its members.

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15 U.S.C. 6106

For purposes of this Act:

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(4) The term "telemarketing" means a plan, program, or campaign which is conducted to induce purchases of goods or services, or a charitable contribution, donation, or gift of money or any other thing of value, by use of one or more telephones and which involves more than one interstate telephone call. The term does not include the solicitation of sales through the mailing of a catalog which--

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16 C.F.R. § 1.98

This section makes inflation adjustments in the dollar amounts of civil monetary penalties provided by law within the Commission's jurisdiction. The following civil penalty amounts apply to violations occurring after January 24, 2017.

(a) Section 7A(g)(1) of the Clayton Act, 15 U.S.C. 18a(g)(1)--$ 40,654;

(b) Section 11(l) of the Clayton Act, 15 U.S.C. 21(l)--$ 21,598;

(c) Section 5(l) of the FTC Act, 15 U.S.C. 45(l)--$ 40,654;

(d) Section 5(m)(1)(A) of the FTC Act, 15 U.S.C. 45(m)(1)(A)--$ 40,654;

(e) Section 5(m)(1)(B) of the FTC Act, 15 U.S.C. 45(m)(1)(B)--$ 40,654;

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SUMMARY OF ARGUMENT

FTC mischaracterizes SBA's First Amendment argument and seeks to improperly dismiss it as either untimely or waived. SBA challenges FTC's November 10, 2016 letter because it applies for the first time the content-based restrictions of the 2008 robocall prohibition to Soundboard technology. The FTC's robocall prohibition as applied to SBA and its members in November 2016 cannot withstand strict scrutiny. FTC's attempt to relegate charitable speech to mere commercial speech as a justification for the content-based ban fails under decades of First Amendment jurisprudence. SBA raises no new claims or arguments on appeal. Accordingly, SBA's First Amendment claim is timely and procedurally proper.

The Government places emphasis on the formal line of command at FTC, stressing that "staff" cannot bind the agency. But that argument places form over substance, and ignores this Court's "practically binding" jurisprudence as cited by SBA and relied upon by the district court. FTC also relies on cases arising in the investigative or enforcement context to argue against finality; however, the district court properly rejected this argument. The challenged November letter is a final, legislative rule that binds SBA, its members and industry. It restricts SBA members' constitutional right to free speech and arbitrarily so as it failed to issue through notice

and comment as required by the Telemarketing Act and the APA. Accordingly, it violates the First Amendment and the APA.

ARGUMENT

I. The November 2016 letter imposes a content-based restriction on certain fully protected charitable speech and, therefore, violates the First Amendment rights of SBA and its members.

A. SBA's First Amendment challenge is timely.

FTC's argument that SBA's claim is time barred lacks merit. By FTC's own confirmation in its letter of September 11, 2009, the TSR's robocall ban does not apply to Soundboard calls. FTC's subsequent letter of November 10, 2016 revoking its 2009 letter and imposing the content-based robocall prohibition on Soundboard technology effective May 12, 2017 constitutes a new legislative rule broadening the scope of the robocall prohibition to apply to future Soundboard calls. FTC cannot assert that the statute of limitations has run against a plaintiff to whom the unconstitutional rule did not apply until now. Because the TSR's robocall prohibition did not previously apply to SBA, as FTC contends, its statute of limitations claim fails.

FTC's September 2009 letter affirms that Soundboard calls do not fit within the class of calls regulated by the robocall prohibition, 16 C.F.R. § 310.4 (b)(1)(v). *See* JA038. Seven years later, FTC reversed course. In its November 2016 letter, FTC declares, "It is *now* staff's opinion that outbound telemarketing calls that utilize

soundboard technology are subject to the TSR's prerecorded call provisions . . . of 16 C.F.R. § 310.4(b)(1)(v)." JA032 (citing to and *now* applying the robocall prohibition to Soundboard technology effective May 2017) (emphasis added). FTC gave industry six months to bring themselves into compliance with this new legislative rule. FTC's apparent argument that this new rule is retroactive strains credulity given its prior confirmation to the contrary.

The timing of FTC's newly announced position has serious collateral consequences. It would be patently unfair for FTC to dodge judicial review because its staff, without rulemaking authority, "interpreted" the robocall prohibition with fresh eyes to say something different, nine years after it was promulgated, and far beyond the scope of the statute of limitations. The Court should be satisfied that the FTC's long period of taking no enforcement action against Soundboard calls under the robocall prohibition affirms that Soundboard calls are not within the scope of that provision. *See Christopher v. SmithKline Beecham* Corp., 132 S. Ct. 2156, 2168 (2012). The lack of enforcement action supports the FTC's written confirmation of 2009 that Soundboard calls are outside the scope of the robocall prohibition. Accordingly, SBA's constitutional challenge to the November 2016 letter's recent application of the robocall prohibition to SBA and its members is timely.

B. FTC's robocall prohibition as applied to Soundboard calls by the November 2016 letter is content-based, requiring strict scrutiny.

SBA raises no new argument on appeal. As argued before the district court, FTC's November 2016 letter imposes a content-based restriction on protected speech that "suppresses some messages — certain charitable calls — and poses differential burdens on others — commercial calls and other charitable calls — based on content." JA133-34 ("applying the prohibition to some types of calls but not others, based on their content"). Specifically, the "November 10 letter outright bans certain *charitable* calls and effectively prohibits all *sales* calls using soundboard technology as of May 12, 2017, while it permits a narrow class of other *charitable* and *political* calls made using soundboard technology to continue unrestricted." JA102 (emphasis added). As SBA explained to the lower court, "[s]uch content-based restrictions on protected speech, reviewed under the strict scrutiny standard, cannot stand." JA102, JA024-25.

SBA has demonstrated that the November 2016 letter, insofar as it amends (by expanding) the TSR robocall prohibition to apply to Soundboard calls, draws unconstitutional distinctions between different kinds of speech by SBA member companies made on behalf of charitable and other nonprofit advocacy organizations based on the content of the message conveyed in violation of the speaker's constitutional right to free speech. JA024; *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228 (2015); *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 658 (1994). The terms of

the November letter leave affected industry with no choice but to comply with the new rule or face enforcement consequences. JA024. Affected industry is thus bound by the November letter. *Id.*

1. The robocall prohibition's content-based restrictions

The November 2016 letter imposes the content-based robocall prohibition on Soundboard technology effective May 12, 2017. The robocall prohibition is content-based in three fatal respects. First, as explained above and before the district court, the robocall prohibition treats Soundboard messages differently based on their subject matter — it bans some *charitable* messages and all *commercial* messages while permitting other *charitable* messages and purely *political* messages. 16 C.F.R. § 310.4(b)(1)(v) (what is not exempted is banned); 68 Fed. Reg. 4580, 4589 (Jan. 29, 2003). Second, the robocall prohibition treats fully protected charitable speech (i.e., noncommercial speech) disparately and, therefore, unlawfully, by effectively banning Soundboard charitable messages that contain a request for a *first-time charitable contribution* but allowing Soundboard charitable calls that include a request for continued support.[1] Third, because a violation of the robocall prohibition as applied to Soundboard charitable calls *cannot be determined without examining*

[1] This content-based restriction is not a mere consequence of jurisdictional limitations as FTC fallaciously argues given it allegedly has jurisdiction over both the charitable solicitations it bans and the charitable solicitations it permits to continue unrestricted because both kinds of affected charitable speech are made via telephone on behalf of charitable organizations pursuant to 15 U.S.C. § 6102(a)(1).

the content of the call itself — i.e., by reviewing the script, transcript or recording of the message conveyed — the restriction is content-based. *Reed*, 135 S. Ct. at 2222, 2227; *McCullen v. Coakley*, 134 S. Ct. 2518, 2531 (2014); *accord Carey v. Brown*, 447 U.S. 455 (1980).

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*, 447 U.S. at 462; *Foti v. City of Menlo Park*, 146 F.3d 629, 636 (9th Cir. 1998). This is also the rule under *Reed*, which requires courts to apply strict First Amendment scrutiny where an agency rule 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." *Reed*, 135 S. Ct. at 2227; *Cahaly v. Larosa*, 796 F.3d 399, 405 (4th Cir. 2015). 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." [2] *Reed*, 135 S. Ct. at 2224.

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[2] FTC misstates the test for content-based discrimination under *Reed*. FTC Br. 34-35. Contrary to FTC's assertion, a law regulating speech is not content-based only if it discriminates against a particular viewpoint, the topic discussed or the idea expressed. As SBA briefed, "Speech regulations can be viewpoint-neutral but content-based." *See, e.g., Planet Aid v. City of St. Johns*, 782 F.3d 318, 329 (6th Cir. 2014) (applying strict scrutiny to content-based restriction on charitable solicitations); *Nat'l Fed'n of the Blind of Texas, Inc. v. Abbott*, 647 F.3d 202, 212

Here, SBA challenges the FTC's obvious subject matter distinctions as well as its more subtle facial distinctions, which define a subcategory of fully protected charitable speech as banned because of the content of the message itself (a request for a first-time contribution), its purpose (to induce a charitable contribution) and its function (the restriction cannot be justified without reference to the content of the message). SBA Br. 20, 22. Either way, each and all "are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny." *Reed*, 135 S. Ct. at 2224.

FTC's counter-argument is that its subject matter distinctions do not reflect a content preference but are merely a result of its jurisdictional limitation (Congress broadened the definition of telemarketing to include charitable solicitations). *Id.* However, FTC's content-based restriction on some charitable speech (including requests for first-time charitable contributions) but not other charitable speech (including requests for continued support), all of which FTC concedes is within its jurisdiction if spoken by paid telefundraisers like SBA members, belies this argument. *Id.* So does the FTC's conflation of charitable speech and commercial speech arguing that its restriction applies only against commercial speech and therefore is somehow constitutional. FTC makes this argument despite decades of

(5th Cir. 2011) (same); *Cahaly*, 796 F.3d at 405 (applying strict scrutiny to content-based robocall statute targeting consumer and political speech).

Supreme Court precedent to the contrary and the argument's constitutional insufficiency in *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993). Thus, the FTC's use of its "jurisdictionally limited" defense is misplaced because SBA does not assert that it discriminated against content outside its jurisdiction.[3] Rather, it merely points out the subject matter distinctions in both the language of the ban and its exceptions as unconstitutional under *Reed*.

FTC's reliance on *National Federation of the Blind v. FTC*, 420 F.3d 331 (4th Cir. 2005) is similarly misguided. FTC relies on this inapposite case for the proposition that the Fourth Circuit rejected SBA's "identical" First Amendment argument in 2005. That decision did not even consider the TSR's robocall prohibition, which SBA challenges here, because the robocall prohibition was not

[3] As SBA explained in its opening brief, the robocall prohibition also targets political calls that include an eleemosynary appeal but not purely political calls. SBA Br. 26. FTC extends its "jurisdictional limitations" defense to political calls as well, but this misses SBA's point — i.e., both political speech and charitable speech are fully protected under the First Amendment; thus, FTC's disparate treatment of some fully protected charitable speech (which extends to political speech that includes an eleemosynary purpose) cannot withstand strict scrutiny. In the end, it is FTC that relies on the fact that there are various subject matters outside FTC's jurisdiction and untouched by the robocall prohibition and not SBA. FTC Br. 38 ("informational" calls, "political" calls, and "healthcare" calls, and "many" charitable calls unaffected). It is the "many" charitable calls that are treated differently — based on subject matter, content of the message, and function — under the robocall prohibition as recently applied to Soundboard that SBA challenges as content-based discrimination.

promulgated until 2008, three years after the Fourth Circuit's decision in *National Federation of the Blind*.

2. The November 2016 letter is substantially overbroad.

As SBA explained in its Complaint, the FTC's November 2016 letter extending the robocall prohibition to Soundboard calls is substantially overbroad because it bans more speech than is required to achieve any conceivable government interest. JA025. FTC acknowledges that its purpose in promulgating the robocall prohibition was to ban incessant sales/commercial robocalls that turn the telephone into a one-way radio. FTC Br. 38 ("Congress may choose to regulate commercial speech in one industry but not another . . . That is exactly what Congress did here"), 40 (targeting "commercial speech"); 42 (implying that robocall prohibition applies "*only* to commercial telemarketing calls"); 43 (seeking "regulation of commercial telemarketing"); and 44 ("Unsolicited robocalls are 'uniquely intrusive' and . . . the lack of a live person makes the call frustrating"; hence the "prohibition on purely commercial robocalls"). However, the November 2016 letter reaches far more speech than the targeted commercial robocalls (1) because it reaches Soundboard calls, which are interactive, two-way communications that always have a live person on the other end and, therefore, are not robocalls; and (2) because it reaches some fully protected charitable speech, which is subject to the strictest First Amendment protection. JA018, JA024-25; SBA Br. 32, 46, 49; *Riley v. Nat'l Fed'n of the Blind*,

487 U.S. 781, 789 (1988). Thus, the November letter is substantially overbroad because it restricts more speech than is required to achieve its stated interest in curbing commercial robocalls. JA025; SBA Br. 26.

3. The government confuses the categories of speech targeted (commercial robocalls) and the categories actually reached (charitable Soundboard calls) by the November 2016 letter's application of the robocall prohibition.

FTC conflates charitable speech and commercial speech in violation of well-established First Amendment law and Supreme Court jurisprudence. FTC Br. 34-40, 42. FTC asserts that the definition of telemarketing "does not cover political calls or other noncommercial calls," thereby implying that calls made to induce a charitable contribution are necessarily commercial calls because they are included in the definition of telemarketing at 15 U.S.C. § 6106(4). FTC Br. 36-37. Not so. Unlike commercial speech (i.e., consumer sales and advertising), charitable speech (i.e., charitable solicitation) is fully protected under the First Amendment. *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980); *Sec'y of State of Maryland v. Joseph H. Munson Company*, 467 U.S. 947, 959 (1984); *Riley*, 487 U.S. at 789. Charitable solicitations are "characteristically intertwined with informative and . . . persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues." *Schaumburg*, 444 U.S. at 632.

The Supreme Court has made it clear that charitable speech enjoys full First Amendment protection, including both messages that contain a request for a charitable contribution and purely informational messages. *Riley*, 487 U.S. at 496. The request for financial or other support cannot be parceled out from the fully protected whole of the charitable message.[4] *Id.* FTC's attempt to circumvent this well-established free-speech protection by conflating charitable speech and commercial speech lacks merit.

4. The government's argument that it merely restricts the relationship of the caller and the call recipient is wrong.

FTC will have you believe that it is not the content of the charitable message that it regulates but, rather, the relationship of the charitable organization to the call recipient. Even if its purpose were to regulate only the relationship of the parties, the FTC's prohibition as drafted and applied to Soundboard calls by the November 2016 letter restricts both the relationship *and the content* of the charitable message. A benign, content-neutral purpose cannot save a prohibition that is content-based on its face or in its function. *Reed*, 135 S. Ct. at 2228; ("an innocuous justification cannot transform a facially content-based law into one that is content neutral"); SBA

[4] "This is the teaching of *Schaumburg* and *Munson*, in which we refused to separate the component parts of charitable solicitations from the fully protected whole." *Riley*, 487 U.S. at 796.

Br. 29 n.1; JA134. As explained above and below, such a facially content-based restriction requires strict scrutiny under *Reed*, *Cahaly* and *McCullen*.

Like FTC, the district court mistakenly relied on *Patriotic Veterans, Inc. v. Zoeller*, 845 F.3d 303 (7th Cir. 2017) in determining that the robocall prohibition as applied to Soundboard calls regulates merely the relationship of the caller and the call recipient. Again, *Zoeller* is distinguishable and should not be followed here. 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. SBA Br. 24-25; *Foti*, 146 F.3d at 636 (citation omitted) (when "exceptions to the restriction on noncommercial speech are based on content, the restriction itself is based on content.")).

This case is materially different. Unlike *Zoeller*, SBA does not challenge only the language of the exceptions to the robocall prohibition as amended by the November 2016 letter. Rather, like *Cahaly* and *Reed*, SBA challenges the whole construct of the robocall prohibition as applied to Soundboard calls, including the language of the ban itself, which prohibits certain Soundboard charitable calls based on the content of the message (a request for a first-time donation), its purpose ("to induce a charitable contribution") and its function. Thus, *Reed* and *McCullen* (and not *Zoeller*) control this case.

Regarding the functional enforcement of this content-based prohibition, FTC asserts that "Big Brother" can simply look at who was called to determine whether the call recipient is a prior or prospective donor and, therefore, whether the prohibition was violated. FTC Br. 33; s*ee* George Orwell, *1984* (1949). Not so. Membership and donor lists of nonprofit organizations are confidential, proprietary information owned by the charity, and not the telefundraiser. *See NAACP v. Ala.*, 357 U.S. 449 (1958) (First Amendment protects right of individuals and associations to speak anonymously and to associate freely, especially in support of unpopular or politically disfavored causes); *Thomas More Law Ctr. v. Harris*, 2016 U.S. Dist. LEXIS 158851, at *10 (C.D. Cal. 2016) (enjoining California Attorney General from obtaining confidential donor lists directly from nonprofit organization); *Americans for Prosperity Found. v. Harris*, 182 F. Supp. 3d 1049, 1059 (C.D. Cal. 2016) (same). Further, FTC lacks jurisdiction over nonprofit organizations. 15 U.S.C. § 44; FTC Br. 7 n.3.

Without jurisdiction to compel the information necessary to determine whether a violation occurred (i.e., a charity's donor or member lists), the agency must look to the content of the message itself. Therefore, FTC enforcement authorities must inevitably examine the scripts, transcripts and/or recordings of Soundboard calls produced by a telefundraiser to determine whether a violation has occurred (i.e., whether it includes a request for a first-time contribution). This is not

a mere "cursory" examination as FTC argues. FTC Br. 35. It is a forensic inspection. Even if it were cursory, however, FTC's sole reliance on *Hill v. Colorado*, 530 U.S. 703, 721-22 (2000), for the proposition that "cursory examinations" for content are permissible falls flat because *Hill* is no longer good law after *McCullen* and *Reed*. *See* Eugene Volokh, *Supreme Court reaffirms broad prohibition on content-based speech restrictions, in today's Reed v. Town of Gilbert decision*, Wash. Post June 18, 2015 (*Reed* implicitly overrules the logic of the *Hill* majority opinion), *available at* https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/18/supreme-court-reaffirms-broad-prohibition-on-content-based-speech-restrictions-in-todays-reed-v-town-of-gilbert-decision/?utm_term=.0accb086b45d.

Because FTC must examine the content of the message itself to determine whether a violation has occurred, it is content-based under *Reed* and *McCullen.* Thus, it is content-based both on its face and in function.

C. The robocall prohibition as applied to Soundboard charitable calls fails under all potentially applicable tests.

FTC bears the burden of demonstrating that the November 2016 amendment to the robocall prohibition serves a compelling interest and is narrowly tailored such that no less restrictive alternatives are available. *Reed*, 135 S. Ct. at 2226; *R. A. V. v. St. Paul*, 505 U. S. 377, 395 (1992); *Riley*, 487 U.S. at 800.

FTC cannot point to a case where a court has found its stated privacy interest to be compelling. All of the cases relied upon by FTC found no more than a

substantial privacy interest if any. *See* FTC Br. 43 (citing *FTC v. Mainstream Mkg. Servs., Inc.*, 345 F.3d 850 (10th Cir. 2003); *Van Bergen v. Minn.*, 59 F.3d 1541, 1554 (8th Cir. 1995); *Bland v. Fessler*, 88 F.3d 729, 734-35 (1996); *Zoeller*, 845 F.3d at 305-06; *Nat'l Fed'n of the Blind v. FTC*, 420 F.3d 331). Thus, FTC fails to establish that its interest is compelling.

Even assuming the government's privacy interest is compelling (and it is not), the robocall prohibition is not narrowly tailored to achieve the government's goal of alleviating unwanted commercial robocalls because it reaches Soundboard charitable calls, which are outside the government's stated aim. *See* FTC Br. 38, 40, 42-44, *supra*. Charitable calls are not commercial calls. *Riley*, 487 U.S. at 788-89; *Munson*, 467 U.S. at 959; *Schaumburg*, 444 U.S. at 632. Likewise, Soundboard calls are not robocalls. *See* 73 Fed. Reg. 51164, 51167, 51173, 51180 (Aug. 29, 2008); JA037-39, *supra*. A live operator's use of Soundboard technology to make a call using her own voice does not somehow cause a charitable message to lose its charitable character or otherwise render it commercial. *See Riley*, 487 U.S. at 796.

FTC's robocall prohibition as applied to Soundboard technology sweeps fully protected charitable speech within its proscription. In addition, it leaves ample less restrictive alternatives available to FTC enforcement officials to achieve their end. In *Cahaly*, the Seventh Circuit found the anti-robocall rule not narrowly tailored because there were "[p]lausible less restrictive alternatives" such as "time-of-day

limitations, mandatory disclosure of the caller's identity, or do-not-call lists." *Cahaly*, 796 F.3d at 405; FTC Br. 47. These less restrictive alternatives (and more) are currently available to the FTC under other provisions of the TSR. *See id.*; 16 C.F.R. § 310.4.

FTC states that it has tried other regulatory measures and implies that they have failed. FTC Br. 47. However, FTC points to no evidence or specific example of any alternative not working. *Id.* The burden is on FTC to explain why any of the ample less restrictive alternatives are insufficient to protect consumers' privacy interests. *Reed*, 135 S. Ct. at 2231; JA134, JA139. FTC has failed to meet that burden. Therefore, the robocall prohibition is substantially overbroad and not narrowly tailored.

Notwithstanding the foregoing, even if this Court were to find that the robocall prohibition is a content-neutral restriction on the time, place, and manner of speech (and it is not),[5] FTC's November 2016 rule still fails intermediate scrutiny as applied by the time, place and manner test. SBA Br. 33. The Supreme Court's decision in *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), demonstrates this principle. There, the city argued that its prohibition on commercial newsracks, while at the same time permitting the proliferation of noncommercial newsracks, was

[5] Time, place and manner restrictions regulate "when" or "where" or "at what decibel" something may be said, and not "what can be said." SBA Br. 34. The TSR's recently expanded robocall prohibition restricts "what can be said." *Id.*

narrowly tailored to serve its interests in safety and aesthetics. *Id.* The Court rejected this argument. Here, FTC crosses the line even further also banning some fully protected non-commercial speech (charitable speech), which fails under any applicable test.

The Supreme Court has long afforded heightened First Amendment protection to charitable solicitations under *Schaumburg*, *Munson* and *Riley*. Even if, as FTC asserts, the robocall prohibition as applied to Soundboard were content neutral (and it is not), it still fails to pass the heightened First Amendment scrutiny FTC argues is applicable to charitable solicitations in this case. *See* FTC Br. 42-43. The FTC's interest is no more compelling under this test than under strict scrutiny analysis. Further, the narrowly tailored requirement is the same here as under strict scrutiny analysis, *see Riley* 487 U.S. 788, and, again, the prohibition fails. The robocall prohibition, which sweeps charitable Soundboard calls within its proscription, is substantially overbroad and insufficiently tailored to further the government's stated interest in curbing unwanted commercial robocalls. Accordingly, the FTC's ban on charitable Soundboard calls that includes a request for a first-time contribution fails under any applicable test.

FTC should enforce existing laws and regulations rather than promulgate new substantially overbroad regulations that offend free speech rights of SBA and its members. As the Supreme Court stated in *Near v. Minnesota*, 283 U.S. 697 (1931),

subsequent punishment of unlawful speech is much preferred to the prior suppression of protected speech. *Id.* at 714.

II. The November 2016 letter is final agency action.

The district court correctly held that the FTC's November 2016 letter is reviewable as a final agency action. *See* JA287-96. The FTC's action is final under *Bennett v. Spears* because it (1) "mark[s] the consummation of the agency's decision-making process," and (2) determine[s] "rights or obligations" and "legal consequences." 520 U.S. 154, 177–78 (1997) (quotation marks omitted).[6]

A. The November 2016 letter marked the consummation of the decision-making process.

The FTC's argument that its November 2016 letter does not speak for the agency on whether calls made using Soundboard technology constitute prohibited robocalls asks this Court to suspend reality. After all, the letter was issued by the Division of Marketing Practices, the FTC component that "issues, revises, and enforces . . . [t]he Telemarketing Sales Rule,"[7] and as the district court observed, FTC counsel conceded at argument that the FTC's deliberation on the legality of

[6] This Court occasionally applies a supplemental test from *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430 (D.C. Cir. 1986). The district court ruled the November 2016 letter constitutes a final agency action under that test as well. JA288.

[7] *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).

telemarketing calls using Soundboard was completed. *See* JA289.[8] FTC staff considered consumer complaints, sought out and received input from certain members of industry, and the Commission has no plans to review the position. *Id*. Thus, "the agency's review of whether the robocall regulation applies to Soundboard calls is at an end." *Id*.

FTC contends that decisions made by subordinate officials within the Environmental Protection Agency may constitute final action, but the same is not true within the FTC, because it is organized differently. FTC Br. 20-21. This cannot be. Indeed, the FTC's argument would have the perverse effect of empowering agencies to capriciously evade judicial review of final agency action on the grounds that the final and binding decision was issued by a subordinate that does not have supreme authority at the Commission, thereby leaving the public with no means to challenge arbitrary or unlawful agency action (because it was allegedly not the highest power that issued the binding, final action and directly caused the harm). To the contrary, "the November 2016 letter is not a 'ruling' or 'recommendation' from a subordinate official that is still subject to review and therefore not a final agency action." JA290 (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 151 (1967); *Anglers*

[8] FTC's policy-based argument that a decision in SBA's favor would create within FTC staff a "strong disincentive not to provide informal advice" (FTC Br. 19) lacks merit. The November 2016 letter was not informal. The only disincentive created by a decision in SBA's favor on the APA claim is to announce legislative rules without first affording the required notice and comment rulemaking.

Conservation Network v. Pritzker, 809 F.3d 664, 669-70 (D.C. Cir. 2016)). Rather, the November letter is an authoritative statement and the agency's final, formal opinion on the matter. FTC has admitted this much. *See* JA289. Frankly, it matters not who at FTC penned this final, binding rule as it is a "definitive" statement of FTC's legal position under *Bennett*, 520 U.S. at 178.

As the district court held, the FTC's continued reliance on *Reliable Automatic Sprinkler Co. v. Consumer Product Safety Commission*, 324 F.3d 726, and *Holistic Candlers and Consumers Ass'n v. FDA*, 664 F.3d 940 (D.C. Cir. 2012) is also misplaced as those "cases are distinguishable from the facts presently before the court." JA293-94. Unlike *Reliable Automatic Sprinkler*, the November 2016 letter does not arise in an investigative context. *Id.* Rather, this claim arises in the rulemaking context. *Id.* There is nothing tentative about it and it applies to everyone in the industry that uses Soundboard for outbound telemarketing purposes. That FTC staff may have investigated the pros and cons of its proposed rule before issuing its final rule on November 10, 2016, FTC Br. 23, does not somehow render this a civil investigation or enforcement action against individual companies within the meaning of *Reliable Automatic Sprinkler*. Nor does the November letter constitute a request for "voluntary" compliance like the letters at issue in *Holistic Candlers* and *Reliable Automatic Sprinkler*. *Id.* at 16. There is nothing voluntary about this — in

no uncertain terms, the letter compels compliance with the new rule within six months.

FTC relies heavily on cases that arose in the "enforcement" context in arguing why the November letter did not mark the consummation of the decision-making process. The district court properly rejected that same argument, pointing out that there is a material difference between when an agency acts in an enforcement context and when an agency acts by speaking more broadly to the entire industry. *See* JA290-91. Had FTC gone after a single telemarketer based on specific facts, alleging that the use of Soundboard by that company constituted the making of prohibited robocalls, that would be a different case, and the target entity might well be left to raise the APA argument SBA raises here (among others) from a defensive posture. But while an agency like FTC is generally free to choose between announcing new positions by rulemaking or enforcement, *see SEC v. Chenery Corp.*, 332 U.S. 194, 202–03 (1947), the manner that it chooses has consequences for how its actions can be challenged by affected parties, *see Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016) ("As we have long held, parties need not await enforcement proceedings before challenging final agency action where such proceedings carry the risk of 'serious criminal and civil penalties.'").

B. The letter creates new obligations and has legal consequences.

The November 2016 letter concludes that "calls made using Soundboard technology *are* subject to the [robocall prohibition]," and "*can only* be made legally" in a narrow set of circumstances. JA032 (emphasis added). The November letter imposes immediate and significant burdens on SBA and its members as it bans outbound commercial telemarketing calls and certain charitable telefundraising calls using Soundboard, and threatens enforcement actions if SBA's members persist in using Soundboard. This decision not only infringes constitutional rights, it forces SBA's members to choose 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.

FTC submits that its November 2016 letter did not determine rights or obligations or have legal consequences. FTC Br. 25. Its letter belies that contention. The FTC's November letter tells affected industry participants that the technology around which they have constructed their businesses and that they have been using for years—will no longer be legal within six months' time. There can be no greater example of an "obligation" than a newly announced prohibition on the very piece of technology around which a business plan is built, and the legal consequences for

failing to cease and desist in the use of the technology should be obvious in light of the FTC's substantial enforcement authority.[9]

Because it treated the preliminary injunction briefs as cross-motions for summary judgment, the district court had no occasion to make findings related to irreparable harm. But the supporting declarations submitted by SBA highlights the far-reaching consequences of the FTC's newly imposed legal obligation: mass layoffs and even full shuttering of operations. *See* JA152, JA156-58. Surely the FTC understands this.

C. FTC's position would unfairly evade notice-and-comment rulemaking.

Common to all of FTC's finality arguments is an insistence on a formalistic approach to finality — exactly the sort that the Supreme Court and this Court have consistently eschewed. *See, e.g.*, *Abbott Labs.*, 387 U.S. at 149 ("cases dealing with judicial review of administrative actions have interpreted the 'finality' element in a pragmatic way."); *Safari Club Int'l v. Jewell*, 842 F.3d 1280, 1289 (D.C. Cir. 2016)

[9] Violators of the TSR are subject to civil penalties of up to $40,000 per violation. 16 C.F.R. § 1.98. The Commission's "45 cases against 163 companies and 121 individuals responsible for billions of illegal robocalls, as well as numerous Do-Not-Call violations" have thus far yielded "judgments totaling more than $500 million in civil penalties, redress, or disgorgement, with $29 million in collected judgments." Lois Greisman, *Prepared Statement of The Federal Trade Commission Before the Senate Special Committee on Aging on Stopping Senior Scams: Developments in Financial Fraud Affecting Seniors*, at 5–6 (Feb. 15, 2017), *available at* www.ftc.gov/system/files/documents/public_statements/1069573/p134405_commission_testimony_re_stopping_senior_scams_senate_02152017.pdf.

("The finality inquiry is a pragmatic and flexible one.") (quotation marks omitted). FTC's position also touches on fairness and administrative due process stemming from the timing of the FTC's newly announced position, and its prejudicial collateral consequences for SBA and the Soundboard industry.

As FTC itself points out in its defense to the First Amendment claim, it would be unfair for FTC to avoid judicial review because its staff, without rulemaking authority, "interpreted" the robocall prohibition *eight years after it was promulgated* to mean something entirely different from the regulation as promulgated. FTC cannot cloak its procedural violation by invoking *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015) (*Perez* does not stand for such a proposition). *See Clean Air Council v. Pruitt*, 862 F.3d 1 (D.C. Cir. 2017) ("Agencies obviously have broad discretion to reconsider a regulation at any time. To do so, however, they must comply with the . . . APA[], including its requirements for notice and comment.")

III. The November 2016 letter is a legislative rule.

FTC conveniently ignores all of the cases cited by SBA for the proposition that a court should look to the contemporaneous pronouncements of the agency (*e.g.*, preamble language) for context about what the agency intended when it promulgated the regulation. Instead, FTC attempts to re-cast history by contending that it anticipated soundboard calls by addressing technological advances in interactive messages. FTC Br. 53. That is Orwellian. The preamble's reference to "interactive

messages" was to traditional robocall technology that has built-in artificial intelligence capable of responding to some degree to the call recipient. *See*, *e.g.*, 73 Fed. Reg. 51180.

In the preamble, FTC notes that "it is aware that the technology used in making prerecorded messages interactive is rapidly evolving, and that affordable technological advances may eventually permit the widespread use of *interactive messages* that are essentially indistinguishable from conversing with a human being." *Id.* First, and fundamentally, Soundboard is not that. A Soundboard call, by design, is already a *live* call with a human being. There is no interaction but with the human call operator. Soundboard provides merely the voice of the call; it does not make the decisions about what to say, as would the "interactive" technology contemplated by FTC in the 2008 preamble. Nothing in the 2008 TSR amendment mentioned or contemplated phone calls made by human beings aided by technology. This is why the phrase "a prerecorded message" as used in the 2008 TSR amendment is important as phrased. It provides meaningful context to what FTC was targeting: messages that are sent and conducted exclusively by machine, without any human interaction.

Second, the preamble provides that "nothing in this notice should be interpreted to foreclose the possibility of *petitions* seeking further amendment of the TSR or exemption from the provisions adopted here." *Id.* (emphasis added). FTC

acknowledges in the preamble that the proper procedure for addressing certain evolutions in technology and for determining whether they constitute a robocall is *petitioning* for amendment of the TSR, which would trigger the required notice and comment rulemaking under the Telemarketing Act and the APA. *Id.* Nowhere in the preamble does FTC contemplate amendment to the rule by regulatory fiat. Nor could it under the APA. If FTC has reconsidered the desired breadth of the TSR's prohibition on outbound telemarketing calls, then its remedy is to amend the TSR in the manner required by the Telemarketing Act and the APA. FTC is correct that it is entitled to change its mind, *see* FTC Br. 54, but this case is not about *whether* FTC can change its mind, but *how* it may effectuate its change of mind.

Indeed, it is impossible to square the FTC's position adopted in this case with the approach it took in 2008 in amending the TSR to prohibit robocalls in the first place. Culminating with the 2008 amendment, FTC interpreted the Telemarketing Act to authorize it to prohibit robocalls as "abusive" telemarketing acts. That FTC would implement its statutory authority by way of notice-and-comment rulemaking was never in doubt; the Telemarketing Act requires it. *See* 15 U.S.C. § 6102(b); 5 U.S.C. § 553. It is no different now: FTC cannot formulate what it concedes is a "new view" of Soundboard calls, "based in part on assessment of additional evidence not presented in 2009," without subjecting its "additional evidence" and related

concerns to notice and comment (and only subsequently revising the TSR if the administrative record would support a revision).

For the reasons stated, had FTC's 2008 amendment actually encompassed Soundboard calls within the meaning of the prohibition on "a prerecorded call," then FTC had an obligation to make that clear. This Court's precedents on the need to follow notice-and-comment rulemaking would be rendered meaningless if FTC is allowed to avoid on-the-record scrutiny of its "new view" of Soundboard calls. SBA members and others were give *no opportunity* to comment for an official administrative record on the prohibition announced in the November letter, and thus *no opportunity* to challenge the FTC's "new view" through the usual APA judicial review process. *See* 5 U.S.C. § 706. FTC's position relegates the APA's important procedural safeguards to the trash bin.

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 FTC to follow the notice-and-comment rulemaking procedures of the APA, *see* 15 U.S.C. § 6102(b), which it failed to do.

CONCLUSION

The judgment of the district court should be reversed.

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 6,398 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 Reply Brief for Appellant 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 Reply Brief for Appellant was also served on counsel for the Federal Trade Commission via First Class mail.

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