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 the United States District Court
for the District of Columbia
No. 17-cv-00150
Hon. Amit P. Mehta

OPPOSITION OF THE FEDERAL TRADE COMMISSION TO PETITION FOR REHEARING *EN BANC*

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INTRODUCTION AND SUMMARY

The Court should deny the Soundboard Association's petition for rehearing *en banc*. This case does not meet the exacting standards for *en banc* review. The panel majority held in a carefully reasoned opinion that an informal advisory opinion issued by FTC staff, which was neither approved by the Commission itself nor binding upon it, was not a "final agency action" under the Administrative Procedure Act. The panel majority scrupulously followed the Supreme Court's two-part test set forth in *Bennett v. Spear*, 520 U.S. 154 (1997), which the dissent agreed was the correct approach. The decision does not conflict with any decision of the Supreme Court or of this Court. This Court routinely finds similar staff advisory statements nonfinal. *See, e.g.*, *Holistic Candler & Consumers Ass'n v. FDA*, 664 F.3d 940, 944 (D.C. Cir. 2012); *Reliable Automatic Sprinkler Co. v. CPSC*, 324 F.3d 726, 732-33 (D.C. Cir. 2003).

Nor does the petition present a question of exceptional importance. The disagreement between the panel majority and Judge Millett's dissent turns on a fact-bound dispute over the proper interpretation of FTC regulations authorizing staff to issue advisory opinions—hardly the kind of exceptionally important question for which *en banc* review is appropriate. There was no dispute between the majority and Judge Millett as to the core principle that action is not final unless

it marks the consummation of the agency's decisionmaking process. Nor could there be, in light of the Supreme Court's clear holding in *Bennett*.

BACKGROUND

A. FTC Regulations on Advisory Opinions

The FTC is a five-member, bipartisan agency that enforces the FTC Act, 15 U.S.C. § 41 *et seq.*, and many other consumer protection statutes. The FTC can enforce these laws either through administrative proceedings, *see id.* § 45(b), or civil actions for injunctions in federal court, *see id.* § 53(b). It may also seek civil penalties against a defendant that violates an FTC rule with "actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule." *Id.* § 45(m)(1)(A).[1]

The Commission is assisted in its work by staff attorneys, to which it has delegated various responsibilities. For example, the Commission has delegated "limited authority" to certain senior staff members to open and close investigations into potential wrongdoing. 16 C.F.R. §§ 2.1, 2.14(d). But should staff uncover a violation, it may only *recommend* that the Commission undertake enforcement action. FTC regulations provide that "[w]hen an investigation indicates that

[1] The maximum penalty is currently $41,484 per violation, *see* 83 Fed. Reg. 2902 (Jan. 22, 2018), but in determining the amount of any penalty the court must "take into account the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require." 15 U.S.C. § 45(m)(1)(C).

corrective action is warranted … *the Commission* may initiate further proceedings." *Id.* § 2.14(a) (emphasis added). Thus, all enforcement actions must be authorized by majority vote of the Commissioners. *Id.* §§ 3.11(a); 4.14(c).

To provide guidance to the business community, the FTC has also adopted mechanisms enabling businesses to seek advisory opinions on whether particular actions would be lawful. 16 C.F.R. § 1.1. A business may seek an advisory opinion either from the Commission itself or from the FTC staff. FTC regulations specify that Commission opinions--which must be approved by a majority vote of the Commissioners—provide a safe harbor against future enforcement: "The Commission will not proceed against the requesting party with respect to any action taken in good faith reliance upon the Commission's advice" so long as "all the relevant facts were fully, completely, and accurately presented to the Commission." *Id.* § 1.3(b). But staff opinions, which are not approved by the Commission, provide no such safe harbor: "Advice rendered by the staff is without prejudice to the right of the Commission later to rescind the advice and, where appropriate, to commence an enforcement proceeding." *Id.* § 1.3(c).

B. The TSR's Anti-Robocall Rule and Its Application to Soundboard

At the direction of Congress, *see* 15 U.S.C. § 6102(a)(1), the FTC issued the Telemarketing Sales Rule ("TSR"), which is intended to protect American consumers from deceptive and abusive telemarketing calls. In 2008, the FTC

amended the TSR to bar most telemarketing calls that "deliver[] a prerecorded message." 16 C.F.R. § 310.4(b)(1)(v). Prerecorded-message calls, commonly known as "robocalls," are a familiar nuisance that is one of the most common and fastest growing sources of consumer complaints to the FTC.

This case concerns the application of the TSR's anti-robocall provisions to a technology known as "soundboard." Soundboard calls use short prerecorded messages in lieu of an agent's own voice; the agent can select an appropriate prerecorded clip to respond to the call recipient's responses. In 2009, a company sought an advisory opinion from FTC staff as to whether its use of soundboard in telemarketing calls would violate the TSR. JA230-35. The company represented that it would use the technology in a way that was indistinguishable from a live two-way conversation, with one agent handling one call at a time. JA231, 234. Based on that representation, staff issued an opinion letter advising that "to the extent that actual company practices conform to the material submitted for review," the anti-robocall rule would not prohibit such calls. JA038-39. The staff letter cautioned that its opinion was not binding on the Commission. JA039.

In the ensuing years, the FTC received numerous consumer complaints about telemarketing calls using soundboard. Investigation revealed that soundboard calls generally did not resemble two-way conversation and were functionally equivalent to ordinary robocalls. Accordingly, in 2016 FTC staff

issued a new advisory opinion—the letter now on review—revoking the 2009 letter and opining that soundboard telemarketing calls violate the anti-robocall rule. JA030-34. Staff once again cautioned that its opinion had not been approved or adopted by the Commission and was not binding upon it. JA033.

C. Proceedings In This Case

SBA represents users and manufacturers of soundboard technology. It challenged the 2016 staff opinion letter under the APA, asserting that it is a legislative rule that required notice and comment and that certain aspects of it violate the First Amendment. The district court granted summary judgment to the FTC. It held that the letter was a "final agency action" reviewable under the APA, but that it was an interpretive rule not subject to notice and comment. The court also rejected SBA's First Amendment challenge.

On appeal, a divided panel vacated the district court decision and dismissed the case for lack of finality. The panel majority applied the two-part test for finality articulated by the Supreme Court in *Bennett*, under which an agency action is final only if it (1) "mark[s] the consummation of the agency's decisionmaking process" and is not "of a merely tentative or interlocutory nature;" and (2) is an action "by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett*, 520 U.S. at 177-78 (internal quotation marks omitted). The panel majority held that the 2016 staff letter did not satisfy the first

Bennett prong, because it represented merely staff's opinion and not the conclusive view of the Commission. A14. The panel majority emphasized that the FTC regulations "expressly delineate between advice from the Commission and advice from its staff," and concluded that staff had not been delegated the authority to speak on behalf of the Commission. A16-19. Because the letter failed the first prong of the test, the panel majority did not reach the second prong.

Judge Millett dissented. She agreed that the two-prong *Bennett* test controlled the finality question. But she would have held that the 2016 staff letter satisfied that test, based on her reading of the FTC regulations. Judge Millett concluded that "when staff issues advisory opinions to industry, it does so at the Commission's direction and as its delegate." A30. On that understanding, she concluded, there is no meaningful distinction between a regulation "authoriz[ing]" staff to issue advisory opinions and one "delegat[ing]" authority to staff. A31. In Judge Millett's view, this case is analogous to *Sackett v. EPA*, 566 U.S. 120 (2012), which held that an EPA compliance order directing the plaintiffs to remedy violations was final. A32-33. Judge Millett went on to consider the second prong of *Bennett*, concluding that the possibility that soundboard users could face civil penalties for TSR violations (if the Commission authorized an enforcement action) meant that legal consequences would flow from the staff opinion. A41-45.

ARGUMENT

En banc review is appropriate only where (1) the panel decision conflicts with a decision of the Supreme Court or this Court or (2) the proceeding involves "one or more questions of exceptional importance." Fed. R. App. P. 35(b)(1). SBA's petition satisfies neither condition.

I. THE PANEL DECISION DOES NOT CONFLICT WITH ANY DECISION OF THE SUPREME COURT OR THIS COURT.

The panel majority faithfully followed and applied the finality test established by the Supreme Court in *Bennett*. Its decision does not conflict with any of the other Supreme Court decisions cited in SBA's petition.

SBA relies most heavily on *Sackett*—a case it did not even cite in its briefs before the panel. But as the panel majority held, "*Sackett* is a very different case." A15. *Sackett* turned on the fact that the EPA's findings and conclusions "were not subject to further agency review." A16 (quoting *Sackett*, 566 U.S. at 127). Here, by contrast "the informal staff opinion is 'subject to further agency review' in at least two ways." *Id*. First, SBA may "request an opinion from the Commission itself." *Id*. Second, any enforcement action would require further administrative process: "if at some future date the FTC staff make the further decision to recommend a TSR enforcement action against a soundboard user, proceeding on that recommendation would require the Commission to decide—itself, for the first

time—whether the 2016 Letter's interpretation of the TSR is correct, and to vote on whether to issue a complaint." *Id*. A potential target of enforcement action would typically have an opportunity to meet individually with the Commissioners in advance of the Commission's vote.

Moreover, EPA is organized very differently from the FTC. Much of the EPA Administrator's authority has been expressly delegated to subordinate officers and components in a detailed manual.[2] By contrast, as the panel majority held, the Commission has not delegated to staff either the authority to issue binding interpretations of the FTC Act or to initiate enforcement proceedings. A13, 16-19. And in *Sackett*, EPA had issued a compliance order making enforceable factual findings and legal conclusions and directing the plaintiffs to take remedial action. Here, the Commission has made no ruling as to whether soundboard calls violate the anti-robocall rule and has not ordered SBA or its members to do anything. Staff has merely issued a nonbinding opinion as to its interpretation of the TSR.

The panel decision is likewise consistent with the other Supreme Court cases SBA cites. As the panel majority noted, *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807 (2016), involved a jurisdictional determination that was expressly deemed final by regulation and was binding on the agency. A13. *Abbott*

[2] *See Amigos Bravos v. EPA*, 324 F.3d 1166, 1172 & n.1 (10th Cir. 2003); *Am. Vanguard Corp. v. Jackson*, 803 F. Supp. 2d 8, 14 (D.D.C. 2011).

Laboratories v. Gardner, 387 U.S. 136 (1967), involved a regulation issued by the Commissioner of Food and Drugs, "exercising authority delegated to him by the Secretary [of Health, Education, and Welfare]." *Id.* at 138. *Frozen Food Express v. United States*, 351 U.S. 40 (1956), "involved a formal, published report and order of the Interstate Commerce Commission, not its staff, following an investigation and formal public hearing." A13. None of these decisions suggests that a nonbinding advisory opinion issued by agency staff is final under *Bennett*.

Nor does the panel decision conflict with any prior decision of this Court. The Court has frequently applied *Bennett* to find similar informal agency staff letters nonfinal. For example, in *Reliable Automatic Sprinkler*, CPSC staff issued a letter preliminarily determining that a company's product presented a hazard. The Court held the letter nonfinal because the Commission itself had never considered the issue. 324 F.3d at 732-32. In *Holistic Candlers*, the Court held likewise held that letters issued by FDA staff warning of possible enforcement actions if violations were not corrected were nonfinal. 664 F.3d at 944. The panel majority's decision fits comfortably within the framework of these cases.

By contrast, the cases relied on by SBA are plainly distinguishable. In *Safari Club Int'l v. Jewell*, 842 F.3d 1280 (D.C. Cir. 2016), the Fish & Wildlife Service issued a "definitive" decision not to issue certain permits for calendar year 2014. *Id.* at 1289. Similarly, in *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430 (D.C. Cir.

1986), EPA's warning letter provided the agency's "final word on the matter short of an enforcement action." *Id.* at 437 (cleaned up). In contrast, the Commission here has made no decision at all; staff has merely expressed its opinion, which the Commission is free to accept or reject.

Similarly, *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000), involved an EPA guidance document that was binding on agency field staff and on state regulators; by contrast, staff's opinion here binds neither the Commission nor anyone else. *Her Majesty the Queen in Right of Ontario v. EPA*, 912 F.2d 1525 (D.C. Cir. 1990), involved a letter written by EPA's acting Assistant Administrator who had "authority to speak for the EPA." *Id.* at 1532. Here, under FTC regulations, staff had no authority to speak for the Commission. SBA's cases do not involve agencies with a regulatory structure similar to the FTC's or the kind of informal, nonbinding advisory opinion that the FTC staff issued here.

II. THIS CASE DOES NOT INVOLVE A QUESTION OF EXCEPTIONAL IMPORTANCE.

SBA asserts generally that this case "involves issues of exceptional importance" (Pet. 3), but it has not "concisely stated" what those issues are, as required by Rule 35(b)(1), and it does not even address the issue in its "Argument" section. Those failures are sufficient reason to deny the petition.[3]

[3] SBA does not contend that the panel's opinion conflicts another circuit's law.

In any event, this case does not present a question of exceptional importance. The difference between the majority opinion and the dissent boils down to diverging interpretations of the FTC's rules governing staff opinion letters. The majority interpreted the regulations to mean that staff action was not the agency's final word on an issue; the dissent read the same regulations differently. Both sides applied the same law (principally *Bennett* and its progeny). The difference amounts at bottom to a narrow, fact-bound disagreement over the Commission's delegation of authority to its staff, with little application beyond the confines of this case.

This Court has squarely held that "[a]n order must satisfy both prongs of the *Bennett* test to be considered final." *Southwest Airlines Co. v. U.S. Dep't of Transp.*, 832 F.3d 270, 275 (D.C. Cir. 2016). Judge Millett did not dispute that principle, but disagreed with the majority regarding the effect of the FTC regulations authorizing staff to issue advisory opinions. The panel majority relied on the fact that the Commission itself has never considered the applicability of the TSR to soundboard, and that the FTC regulations do not authorize staff to speak for the Commission itself. A16-19. In contrast, Judge Millett read the regulations to mean that "when staff issues advisory opinions to industry, it does so at the Commission's direction and as its delegate." A30. A disagreement over the

interpretation of FTC regulations, which has little effect beyond this case, is not the kind of exceptionally important question that warrants *en banc* review.

Furthermore, the panel majority's reading of the regulations is correct. As the panel majority noted, "[w]hen the Commission delegates its authority to staff, it does so expressly." A18. Judge Millett's dissent turns on the proposition that there is no difference between "authoriz[ing]" staff to render advice and "delegat[ing]" the Commission's authority to staff. A31. But these words do not mean the same thing. "Authorize" means "[t]o give legal authority; to empower." *Black's Law Dictionary* (10th ed. 2014). "Delegate" means "[t]o give part of one's power or work to someone in a lower position within one's organization." *Id.* Thus as the panel majority correctly noted, "[d]elegation may be one species of authorization, but the distinction is material." A19. Here, the Commission has authorized staff to issue informal, nonbinding advisory opinions, but it has not delegated to staff the power either to definitively interpret the TSR or to initiate enforcement proceedings.[4]

Judge Millett also expressed concern that treating the staff's advisory opinion as nonfinal would force telemarketers that used soundboard in reliance on

[4] Judge Millett was mistaken in stating that "the Commission itself has already decided that this matter does not warrant a Commission decision" and that it "directed the staff to issue an opinion." A30. No request for a Commission decision was ever made. The original requester sought only an informal staff opinion. JA37, 230. Staff reconsidered that opinion in 2016 on its own initiative.

the FTC staff's 2009 letter to either restructure their businesses or face a risk of costly civil penalties. A41-45. But as she expressly acknowledged (A41), this argument relates to the second prong of *Bennett*, which looks to whether "legal consequences will flow" from the agency's action. *Bennett*, 520 U.S. at 178. The panel majority's opinion turned on the first prong of *Bennett*, and as discussed above the law is clear that both prongs must be satisfied for agency action to be deemed final.

Furthermore, Judge Millett's concerns are largely misplaced. First of all, as the panel majority held, soundboard telemarketers "do not have any significant or reasonable reliance interests in the 2009 Letter, either by the letter's own terms or under FTC regulations." A20. The staff's opinion in the 2009 letter was narrowly limited to a single company that represented it would use soundboard in a manner indistinguishable from a live two-way conversation, with one agent handling one call at a time. In fact, as staff's 2016 investigation found, most soundboard telemarketers were actually using the technology to field multiple simultaneous calls. Insofar as the soundboard industry "built its business on practices that do not conform to the facts as represented [in the 2009 request letter], they have no cause to complain about the impact of rescinding the 2009 Letter on those practices." A24. Furthermore, the text of the 2009 letter and the FTC regulations made clear

that staff's opinion was not binding on the Commission and would not provide a safe harbor from future enforcement actions.

Additionally, the staff's 2016 letter, by itself, does not and cannot subject telemarketers to penalties. For a telemarketer to face penalties, the Commission would need to vote to authorize a civil penalty action, and potential defendants would have an opportunity to meet with the Commissioners before the vote. If the Commission were to authorize a civil penalty action, it would not be based on the 2016 letter, but on the TSR itself—specifically the provision banning the use of outbound telemarketing calls that deliver a "prerecorded message." 16 C.F.R. § 310.4(b)(1)(v). To prevail in a civil penalty lawsuit, the Commission could not simply rely on the advice of staff that soundboard calls involve delivery of a "prerecorded message"; it would need to persuade a court that this interpretation is correct. In other words, any legal consequences to the soundboard industry flow from the text of the TSR, and not from staff's interpretation.

Finally, in a civil penalty action, it would not be sufficient for the Commission simply to show a violation of the TSR. Penalties may be imposed for violations of an FTC rule only when the FTC can show that the defendant acted with "actual knowledge or knowledge fairly implied on the basis of objective circumstances that [its conduct] is unfair or deceptive and is prohibited by such rule." 15 U.S.C. § 45(m)(1)(A). For all of these reasons, soundboard

telemarketers do not face the purported dilemma described in Judge Millett's dissent.

Finally, not only does this case not present an important question worthy of review, reversal of the opinion would disserve the business community. Advisory opinions allow regulated businesses to get the benefit of staff's views so they can order their affairs in a lawful way and minimize the risk of enforcement proceedings. But, as the panel majority, noted "[t]he possibility of immediate judicial review of informal advice in these circumstances might make guidance harder for industry to request and receive. Not only might staff be less willing to give advice, the advice that is released may take longer and be more costly to develop." A21. Thus, even if it would "serve the short-term interest of SBA's members to bring this particular grievance to court immediately, the incentives of such a result would harm the interest of all regulated parties in access to informal advice and compliance help in general." *Id.* The panel majority properly chose not to impose a finality rule that would limit staff's flexibility and willingness to provide useful advice to the business community.

CONCLUSION

The petition for rehearing *en banc* should be denied.

Respectfully submitted,

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July 16, 2018

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This document complies with the type-volume limit of Fed. R. App. P. 35(b)(2)(A) and the Court's order of June 14, 2018, because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), it contains 3,553 words and is 15 pages long.

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July 16, 2018

/s/ Matthew M. Hoffman
Attorney for the Federal Trade Commission

CERTIFICATE OF SERVICE

I certify that I caused a copy of the foregoing Opposition to be served via the Court's CM/ECF system on all counsel of record this 16th day of July, 2018.

/s/ Matthew M. Hoffman
Attorney for the Federal Trade Commission