No. 18-722

IN THE

Supreme Court of the United States

SOUNDBOARD ASSOCIATION,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

On Petition for a Writ of Certiorari
to the U.S. Court of Appeals for the D.C. Circuit

BRIEF FOR THE CATO INSTITUTE AND SOUTHEASTERN LEGAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Despite an administrative agency's self-serving intent to evade judicial review, do petitioners have a right to Administrative Procedure Act review of a staff advisory opinion that effectively creates a new rule, chills protected speech, and shutters an industry—and which was procedurally and substantively invalid?

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INTEREST OF THE *AMICI CURIAE*[1]

The Cato Institute is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files amicus briefs in this and other courts.

Southeastern Legal Foundation is a national nonprofit, public-interest law firm and policy center that advocates individual liberty, limited government, and free enterprise. In particular, SLF advocates for the protection of individual rights and the framework set forth to protect such rights in the Constitution. This advocacy is reflected in the regular representation of those challenging overreaching governmental and other actions in violation of the constitutional framework. *See, e.g.*, *Util. Air Reg. Grp. v. EPA*, 134 S. Ct. 2427 (2014), and *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617 (2018). SLF also regularly files *amicus curiae* briefs with this Court about issues of agency overreach and deference.

This case concerns *amici* because of the importance of judicial review in an expansive regulatory state as a means of protecting constitutional liberty.

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[1] Rule 37 statement: All parties received timely notice of intent to file this brief and gave consent. Further, no counsel for any party authored this brief in whole or in part and no person or entity other than *amici* funded its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

When determining whether an agency's action is final for the purposes of judicial review, courts apply this Court's test in *Bennett v. Spear*, 520 U.S. 154 (1997). Under *Bennett*, an action will be considered final if it (1) marks the consummation of the agency's decision-making process, and (2) if it determines rights or obligations from which legal consequences will flow. *Id*. at 177-78. Unfortunately, courts are unsure how to apply these tests, and the confusion only grows the more informal agencies' actions become.

The court below, for example, applied the *Bennett* test in a way that ignores the substance of the agency's actions. But if pragmatism is to guide a court in evaluating the finality of agency action, then an assessment of that action's legal consequences is required. Here, regardless of whether the letter is a legislative or interpretive rule, it carries the force of law and should be subject to judicial review. Moreover, a plain reading of the APA makes clear that the 2016 Letter is final agency action—with very real and immediate legal consequences. Indeed, if an agency or its staff cannot guarantee the effectiveness of the advice it gives, it shouldn't be giving advice in the first place.

The Court should thus grant the petition to resolve the issues surrounding the finality of agency actions. The Court should also determine the extent to which informal rules are subject to judicial review. A proper understanding of the *Bennett* test will resolve these issues, giving clear direction to agency officials and credence to any guidance they issue.

ARGUMENT

I. This Court Should Clarify that Courts Must Assess the Legal Consequences of Agency Actions When Determining Their Finality

The Administrative Procedure Act ("APA") permits judicial review of a "final agency action." 5 U.S.C. § 704. The term "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act. 5 U.S.C. § 701(b)(2) (citing 5 U.S.C. § 551(13)). An agency "acts" when it implements, interprets, or prescribes law or policy. *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 435 (D.C. Cir. 1986) (citing *Nat'l Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689, 698 (D.C. Cir. 1971)). The APA does not define "final" agency action that is subject to judicial review, but this Court in *Bennett v. Spear*, 520 U.S. 154 (1997), provided the test lower courts should apply when confronted with this question of finality.

Under *Bennett*, an action will be considered final if it (1) marks the consummation of the agency's decision-making process, and (2) if it determines rights or obligations from which legal consequences will flow. *Id*. at 177-78. In that case, the Court held as final action an opinion letter that "altered the legal regime" under which the Interior Department's Bureau of Reclamation operated. *Id.* at 169, 178. While the Bureau was free to reject the advice in the letter, the Court said, "it does so at its own peril (and that of its employees)," citing the heavy fines and lengthy prison sentences an employee could be subjected to if he or she violated agency regulations. *Id.*

Bennett's acceptance of an informal action as a final action appears to depart from an earlier test outlined in *Abbott Labs v. Gardner*, 387 U.S. 136 (1967). There, the Court found that a Food & Drug Administration rule requiring pharmaceutical companies to relabel their products was final agency action subject to pre-enforcement judicial review. The Court took a "flexible" approach to finality. *Id.* at 150. "There is no hint that this regulation is informal, or only the ruling of a subordinate official, or tentative. It was made effective upon publication, and . . . compliance was expected." *Id.* at 151 (internal citations omitted). The rule, promulgated after a period of notice and comment, "purport[ed] to give an authoritative interpretation of a statutory provision that [had] a direct effect on the day to day business of [the regulated industry]." *Id.* at 152. Thus, "where a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, access to the courts under the Administrative Procedure Act . . . must be permitted." *Id.* at 153.

Although *Abbott Labs* concerned a legislative rule, it is easy to see that the Court carefully considered the extent to which the challenged action would affect the regulated industry if implemented. While the Court in *Bennett* did not include the informality and subordinate-official factors mentioned in *Abbott Labs* (indeed, the *Bennett* Court did not cite *Abbott Labs* at all), lower courts continue to refer to these factors in their analyses. *See*, *e.g.*, *Soundboard Ass'n. v. FTC*, 888 F.3d 1261, 1267 (D.C. Cir. 2018); *Air Brake Sys. v. Mineta*, 357 F.3d 632, 640 (6th Cir. 2004); *Impact Energy Res., LLC v. Salazar*, 693 F.3d 1239, 1256 (10th Cir. 2012) (Seymour, J., concurring). Yet this Court does not show signs of abandoning either prong of the *Bennett*

test and continues to prefer a pragmatic approach to finality. *See U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807, 1813-1814 (2016).

While some lower courts have expressed a desire to maintain *Abbott Labs*' flexibility and pragmatism as it applies to *Bennett*'s first prong, the same cannot be said for the second prong. The D.C. Circuit's finality jurisprudence since *Bennett* has taken a dramatic turn away from an analysis of the action's legal consequences for regulated parties and towards a view of finality "from the agency's perspective." *Soundboard Ass'n*, 888 F.3d at 1271. Such an exclusive view of finality unfairly prejudices regulated parties like the petitioners in this case, who face losing thousands of workers to layoffs if they comply with the agency's rules, and millions in financial penalties if they do not. *Id.* at 1280-1281. (Millet, J., dissenting) (citation omitted). The D.C. Circuit has also held, for example, that interpretive rules and statements of policy are not subject to review. *See Ass'n of Flight Attendants v. Huerta*, 785 F.3d 710, 717 (D.C. Cir. 2015) (holding that neither internal guidance documents nor interpretive rules carry the force of law).

Interpretive rules traditionally were not binding on a reviewing court and thus did not have the force of law. *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1211 (2015) (Scalia, J., concurring in judgment). That may have been true at the time of the APA's adoption, but the Court has since "developed an elaborate law of deference to agencies' interpretations of statutes and regulations." *Id.* "[If] an interpretive rule gets deference, the people are bound to obey it on pain of sanction, no less surely than they are bound to obey substantive rules, which are accorded similar deference.

Interpretive rules that command deference *do* have the force of law." *Id.* at 1212 (emphasis in original).

If such rules are to continue to receive deference, they must be considered final agency action. This view is consistent with the purpose of the APA, where legal consequences were widely considered the "central determinant for whether a given agency action was judicially reviewable." Stephen Lindsay, Note, *Timing Judicial Review of Agency Interpretations in* Chevron*'s Shadow*, 127 Yale L.J. 2448 (2018).

II. Regardless of Whether the Staff Letter Here Is a Legislative or Interpretive Rule, It Carries the Force of Law and Should Be Subject to Judicial Review

A*mici* take no position on whether the rule promulgated in the 2016 Letter is a legislative or interpretive rule, but that characterization is irrelevant to the question of finality.

If the letter is an interpretive rule, what it's interpreting is the Telemarketing Sales Rule of 1995 ("TSR"), 16 C.F.R. § 310.4. That would entitle the letter to *Auer* deference, which means it has the force of law and bears legal consequences. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

If, on the other hand, the letter is a legislative rule, "the agency's position is definitive and [it] has a direct and immediate . . . effect on the day-to-day business of the parties challenging the action." *Ciba-Geigy Corp.,* 801 F.2d at 435-36 (D.C. Cir. 1986) (citing *FTC v. Standard Oil of California*, 449 U.S. 232, 239 (1980)).

"These indicia of finality are ordinarily controlling because they are highly probative of whether the agency's position is merely tentative or, on the other hand, whether the agency views its deliberative process as sufficiently final to demand compliance with its announced position." *Id.*

That is, either way the letter has immediate and significant legal consequences—which *Bennett* should tell us is the key determinant for finality. This is not to say that the identity of the actor is unimportant, but the suggestion that the actions of subordinate officials do not produce legal consequences for regulated business is a bureaucratic fiction belied by the cold light of reality. *See Soundboard Ass'n*, 888 F.3d at 1274 (Millet, J., dissenting).

The court below determined that the 2016 Letter failed to satisfy the first part of the *Bennett* test. *Id.* at 1268. "Because each prong of *Bennett* must be satisfied independently for agency action to be final, deficiency in either is sufficient to deprive SBA of a cause of action under the APA." *Id.* (citing *Southwest Airlines v. Dep't of Transp.*, 832 F.3d 270, 275 (D.C. Cir. 2016)). Under the majority's view, the 2016 Letter did not mark the consummation of the decision-making process because "it explicitly and repeatedly states that it expresses the views of 'staff,' and it explains that such views do not bind the Commission." *Id.* at 1268.

But a closer examination of the letter's language suggests that FTC staff are "keenly aware of the virtually determinative effect" of their opinions. *Bennett*, 520 U.S. at 170. The letter demands compliance with the staff's advice. It also makes clear that regulation under the TSR will continue indefinitely. "[S]oundboard technology, when used properly, may one day

approach [virtual indistinguishability from live calls]. *If and when* such advances occur . . . parties could seek further amendment of the TSR or exemptions from the prerecorded message provisions." Letter from Lois C. Greisman, Assoc. Dir., Div. Mktg. Practices, to Michael Bills (Nov. 10, 2016), https://bit.ly/2EC69PO (emphasis added). The letter concludes:

> In order to give industry sufficient time to make any necessary changes to bring themselves into compliance, the *revocation* of the September 2009 letter *will be effective* six months from today, on May 12, 2017. As of that date, the September 11, 2009 letter will no longer represent the opinions of FTC staff and cannot be used, relied upon, or cited for any purpose.

Id. (emphasis added).

The lower court's opinion highlights the problem of reviewing agency actions exclusively from the agency's perspective. *Soundboard Ass'n*, 888 F.3d at 1271. Under this reasoning, no agency action is final unless the agency says that it is—a John "Bluto" Blutarksy view of finality, if you will. *Animal House* (Universal Pictures 1978) ("Nothing is over until we decide it is!"). Such a stance makes the regulated parties' perspective irrelevant and ignores the Court's call for pragmatism in *Abbott Labs*.

III. A Plain Reading of the APA Makes Clear that the 2016 Letter Is Final Agency Action

Even if the Court were to decline to review the 2016 Letter from the perspective of the regulated party, the Letter constitutes final agency action under the plain

meaning of the APA. First, the 2016 Letter is a "rule" under 5 U.S.C. § 551(4) because it is a statement of particular applicability and future effect designed to implement or interpret law or policy. *See also Soundboard Ass'n v. FTC*, 251 F. Supp. 3d 55, 69 (D.D.C. 2017) (vacated on other grounds). Second, the Federal Trade Commission is an "agency" within the meaning of 5 U.S.C. § 701(b)(1). Third, as noted *supra*, the letter demands compliance and instructs that it will be enforced for an indefinite period of time. Petitioner elaborates on these points in section III of the Petition.

IV. If an Agency or Its Staff Cannot Guarantee the Effectiveness of Its Advice, It Shouldn't Be Giving Advice

The lower court's focus on the identity of the Letter's author, an agency staff member, relies too heavily on the agency's interpretation of its own regulations. The lower court insisted that the FTC does not have an obligation to investigate facts presented to it in a request for guidance, and that the advice is only as good as the facts on which it is based. *Soundboard Ass'n*, 888 F.3d at 1272 n.5. Yet businesses undoubtedly rely on the advice the regulating agency gives them, regardless of whose name is at the bottom of the guidance given. And if the agency permits its staff to issue guidance, that guidance must necessarily be given some binding meaning. Otherwise, the guidance can hardly be worth the paper it is printed on.

The majority below was critical of this approach, hypothesizing that bad advice from a paralegal could throw the regulatory world into chaos. *Id.* at 1272-1273. But the easiest way for an agency to prevent the public from receiving bad advice from a paralegal is to

prohibit paralegals from issuing advice, not beginning every bit of guidance with a disclaimer that the agency's words are not its bond.

CONCLUSION

For the above reasons, and those stated by the petitioner, the petition should be granted.

Respectfully submitted,

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