IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SOUNDBOARD ASSOCIATION, Plaintiff, v. UNITED STATES FEDERAL TRADE COMMISSION, Defendant.	)	Case No. 1:17-cv-00150

MEMORANDUM IN SUPPORT OF PLAINTIFF'S
APPLICATION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

MEMORANDUM IN SUPPORT OF PLAINTIFF'S
APPLICATION FOR PRELIMINARY INJUNCTION

Plaintiff Soundboard Association ("SBA") seeks a preliminary injunction to enjoin the effect of the challenged final agency action of Defendant United States Federal Trade Commission ("FTC"), at least until this Court has fully considered and decided the issues and arguments raised in SBA's Complaint. Specifically, SBA asks this Court to enjoin and toll the six-month "compliance" deadline established by the November 10, 2016 letter from the FTC's Bureau of Consumer Protection, Division of Marketing Practices, to Michael Bills. *See* Compl. Ex. 1 ("November 10 letter"). As alleged in the Complaint, that letter effectively amends (by substantively expanding) the FTC's Telemarketing Sales Rule ("TSR"), 16 C.F.R. Part 310, by announcing that a particular provision of the TSR (the prohibition on so-called "robocalls") will, as of May 12, 2017, be expanded to apply *for the first time* to telemarketing calls that use soundboard technology (described below) to augment and improve the quality, content, and compliance of those calls. The FTC's letter does this despite the FTC never having proposed its action in the Federal Register for public comment on it, as federal law requires. For that reason, it cannot stand.

More immediately, SBA's members, who manufacture and use soundboard technology, will be devastated by the FTC's action. By expanding the robocall prohibition to apply to calls using soundboard technology, the FTC stands to decimate an entire industry sector. Already, in light of the six-month deadline imposed by the November 10 letter, SBA member companies are confronting the prospect of crippling economic losses. Especially in light of the brief timeframe the FTC has imposed for industry to comply with the November 10 letter, a preliminary injunction is critical to stave off hemorrhaging of SBA member business and operations until the Court has fully considered and decided the matter.

In addition to the financial harm and economic impact of the November 10 letter, the FTC's action infringes the free speech rights of charitable and other advocacy organizations and their fundraisers based on the content of their message. The FTC's November 10 letter prohibits calls made using soundboard to prospective members or that contain messages requesting a first-time contribution to causes of social, religious, and political import. At the same time, however, the letter permits calls made using soundboard to existing members and messages requesting contributions from previous donors. 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. Such content-based restrictions on protected speech, reviewed under the strict scrutiny standard, cannot stand.

As alleged in the Complaint and elaborated upon below and in the attached supporting declarations of Arthur Coombs III (Ex. 1), Scott Stepek (Ex. 2), and Jacob Munns (Ex. 3), the FTC's letter of November 10 effectively amends the TSR, is practically binding on the affected industry, restricts SBA members' constitutional right to free speech, and will have crippling — perhaps business-shuttering — repercussions for SBA's member companies (and others). Because (1) SBA is likely to succeed on the merits of its claims under the Administrative Procedure Act ("APA") and the First Amendment; (2) SBA's members will suffer irreparable harm if a preliminary injunction is not issued to enjoin the effect of the November 10 letter; and (3) the public interest and balance of the equities favor a preliminary injunction, SBA respectfully asks that this Court issue a preliminary injunction enjoining the effect of the letter until the Court has fully considered and decided the issues raised in the Complaint.

BACKGROUND

SBA members include companies that make or use soundboard technology ("soundboard"), a technology that is used widely within the telemarketing industry (among others) to improve the call experience for both the consumer and the seller, and to facilitate compliance with federal and local regulations governing telemarketing.

A. Soundboard Technology

Generally stated, telemarketing is the use of the telephone for outbound calls to consumers by sellers of goods and services or to donors by certain fundraisers. Sellers may market their products to consumers directly or through third-party agents (*e.g.*, consumer engagement centers, also known as call centers). Soundboard is a particular technology used widely in the industry to enhance the quality, consistency, and compliance of all telemarketing calls.

Soundboard works by allowing call center agents to interact and converse with consumers on a real-time basis using recorded audio clips in lieu of or in combination with the agent's own voice, in the same manner that call center agents would conduct compliant live telemarketing calls reading a pre-determined script and responding appropriately to queries and interjections from consumers. So, for example, if a consumer asks a particular question during a conversation, the call center agent using soundboard technology (*i.e.*, the soundboard agent) can respond by playing the audio clip that best answers the consumer's question. Each script, and the accompanying library of available audio clips, is tailored to the needs of a particular marketing campaign, and, in most cases, is developed and revised based on assessments of actual calls. Soundboard agents are highly trained and skilled, and their ability to timely, accurately, and appropriately interact with consumers using soundboard technology can be monitored during training and during telemarketing campaigns using real-time soundboard metrics. In addition, soundboard

agents also have access to "response keys" connected to common interactive conversational responses such as "I understand," "exactly," and "yeah." The result is that the consumer experiences a completely natural conversation complete with positive affirmation and, most importantly, natural, two-way interaction. In the vast majority of instances, consumers who receive soundboard calls are not aware that the conversation used audio clips. And, in situations where a consumer asks a question for which there is no audio-clip response, well-trained soundboard agents in compliant soundboard campaigns will either interject their own voice or select an audio-clip response to explain that he or she is a real person using audio clips to communicate clearly and effectively, and to offer the consumer the choice between continuing the soundboard call or speaking with a live operator's own voice for the duration of the call. *See generally* Coombs Decl. ¶ 14 & Compl. Ex. 6 (video).

Soundboard has been utilized for more than 15 years to effectively conduct telemarketing and other types of outbound and inbound calls in numerous regulated industries, including but not limited to financial services, insurance, and healthcare. Soundboard provides numerous regulatory compliance and consumer-protection benefits because of its ability to control scripts and minimize non-compliant variations, to accurately document and analyze calls, to support and monitor the effectiveness of call center agents, and to ensure a positive consumer experience. For instance, the use of soundboard keeps agents from misstating offers, programs, incentives, or other terms and conditions. It ensures that all federal and state-specific mandatory disclosures are properly conveyed to customers and donors; and it can deter agents from improperly terminating calls if, for example, a consumer or donor asks to be placed on a do-not-call list. *See* Coombs Decl. ¶ 11; Stepek Decl. ¶ 5.

B. The FTC's Telemarketing Sales Rule

In 1994, Congress enacted the Telemarketing and Consumer Fraud and Abuse Prevention Act to, among other things, protect consumers from deceptive and abusive forms of telemarketing. *See* Pub. L. 103–297, 108 Stat. 1545 (1994), 15 U.S.C. § 6101 *et seq.*

("Telemarketing Act"). Section 3 of the Telemarketing Act directs the FTC to "prescribe rules prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices." 15 U.S.C. § 6102.

The Telemarketing Act directs the FTC to promulgate related regulations in accordance with the rulemaking provisions of the APA, 5 U.S.C. § 553. 15 U.S.C. § 6102(b). Pursuant to its authority granted by the Telemarketing Act, the FTC promulgated the TSR in 1995. *See* 60 Fed. Reg. 43842 (Aug. 23, 1995). In its original form, the TSR was generally concerned with requiring telemarketers to disclose certain material information, prohibiting certain types of misrepresentations, limiting the times at which telemarketers could call consumers, prohibiting calls to consumers who had asked not to be called again, and setting restrictions on sales of certain goods and services by telemarketers. *See generally id.* at 43842. As originally promulgated, the TSR did not prohibit telemarketers from making "robocalls" — a term that commonly refers to a one-way communication that delivers an automated, prerecorded message, and does not provide for any interaction between the consumer and the caller or the opportunity for the consumer to have questions answered or to speak with a human during delivery of the prerecorded message. That revision came years later.

In 2003, the FTC amended the TSR to prohibit "call abandonment," which occurs when a telemarketer uses predictive dialing technology to simultaneously place multiple phone calls (to optimize the probability of reaching a consumer while minimizing idle time) but then, after connecting with one consumer, either hangs up on or leaves unattended other consumers who answer any of the other calls that were placed simultaneously. *See* 68 Fed. Reg. 4580 (Jan. 29, 2003). The call abandonment prohibition made it illegal for a telemarketer to place an outbound call if it could not connect the call to a human sales representative within two seconds of the call

being answered by a person. *Id.* at 4583. Although the call abandonment prohibition contained a limited safe harbor, applicable if certain conditions were met (including metrics such as the call abandonment rate for the overall campaign), a telemarketer exclusively using "a prerecorded message" could not satisfy that safe harbor and would inevitably violate the TSR prohibition because the consumer could never be connected with a human sales representative. *See* 73 Fed. Reg. 51164, 51165 (Aug. 29, 2008) (explaining the call abandonment prohibition). Accordingly, as of the 2003 promulgation of the call abandonment prohibition, the TSR effectively prohibited the delivery of a prerecorded message for telemarketing except under certain limited conditions.

In general, the FTC lacks jurisdiction over non-profit organizations, *see* 15 U.S.C. §§ 44–45, which necessarily includes non-profit organizations engaged in charitable work. As part of the same 2003 rulemaking noted above, however, the FTC amended the TSR to incorporate relevant provisions of the USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001), which expanded the definition of "telemarketing" under the Telemarketing Act to include calls intended to induce "a charitable contribution, donation, or gift of money or any other thing of value." 15 U.S.C. § 6106(4)). The PATRIOT Act added "fraudulent charitable solicitations" as a deceptive practice and directed the FTC to include rules in its regulations (*i.e.*, amend the TSR) with respect to such solicitations. *See* 15 U.S.C. § 6102(a)(2). Yet Congress neither provided a definition of "charitable organization" or the like nor expanded the FTC's jurisdiction to cover non-profit organizations. Therefore, to bridge the tension between its lack of jurisdiction over non-profit organizations on one end and its newfound jurisdiction over charitable contributions on the other, *inter alia*, the FTC articulated the following distinction:

> Reading the amendments to the Telemarketing Act effectuated by § 1011 of the USA PATRIOT Act together with the unchanged sections of the Telemarketing Act compels the conclusion that for-profit entities that solicit charitable donations

> now must comply with the TSR, although the Rule's applicability to charitable organizations themselves is unaffected.

68 Fed. Reg. at 4585.

In 2004, an interested party petitioned the FTC to amend the TSR's call abandonment prohibition to permit telemarketers to use a prerecorded message when contacting consumers who had an established business relationship with the seller on whose behalf the telemarketer was calling — basically requesting an additional exemption or safe harbor. The FTC published a notice of proposed rulemaking on this subject and announced that, during the pendency of the rulemaking, it would forbear taking enforcement actions against sellers and telemarketers who used a prerecorded message consistent with the terms of the proposed amendment (*i.e.*, only with consumers with whom the sellers had an established business relationship). *See* 69 Fed. Reg. 67287, 67290 (Nov. 17, 2004).

What resulted following public comment was an amended TSR very different from what the petitioning party had sought. First, the FTC denied the requested safe harbor and withdrew its interim policy of forbearance. Second, the FTC proposed its own amendment to explicitly prohibit the use of a prerecorded message in telemarketing calls except where the consumer has signed an express written agreement, in advance, authorizing the seller to place the call to the given telephone number. *See* 71 Fed. Reg. 58716 (Oct. 4, 2006).

The FTC promulgated the robocall prohibition in August 2008, and provided telemarketers one year — until September 1, 2009 — to bring themselves into compliance. *See* 73 Fed. Reg. at 51164. Subject to exception when certain conditions are met, the robocall prohibition makes it an "abusive" (and thus illegal) telemarking act to "[i]nitiat[e] any outbound telephone call that delivers a prerecorded message." 16 C.F.R. § 310.4(b)(1)(v). The preamble of the robocall prohibition makes clear that the target of the prohibition was calls that made it

impossible for the recipient of the call to communicate or interact with the caller, thus eliminating the possibility of two-way communication and turning the telephone into nothing more than a one-way sales device. The preamble explains, for instance, that these calls "'are by their very nature one-sided conversations,'" and approvingly cites an industry comment that:

> '[P]rerecorded message' telemarketing . . . consists largely of one-way audio broadcasts designed to convey information to consumers. Such 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). These campaigns are widely regarded as a nuisance and a burden because consumers are powerless to interact with them.

73 Fed. Reg. at 51173. As the preamble notes, "[f]or the great majority of consumers . . . the ringing of the telephone is anything but a minor invasion of the privacy of their homes, *particularly when the call they answer converts a two-way instrument of communication into a one-way broadcast of a prerecorded advertisement*." *Id.* at 51177 (emphasis added). Accordingly, the FTC found that "a consumer right to privacy may be exacerbated immeasurably when there is no human being on the other end of the line." *Id.* at 51180.

Within the scope of the 2008 robocall prohibition were prerecorded messages soliciting charitable contributions made by *paid* fundraisers on behalf of charitable organizations to *prospective* members or donors. 16 C.F.R. § 310.4(b)(1)(v)(B); 73 Fed. Reg. at 51193. The term "charitable organization" has never been defined in the TSR.

C. The Robocall Prohibition Does Not Apply to Calls Using Soundboard

The robocall prohibition prohibits "initiating any outbound telephone call that delivers a prerecorded message [without the express written consent of the call recipient]." 16 C.F.R. § 310.4(b)(1)(v)(A). The TSR does not define the term "prerecorded message," but that term is commonly understood to mean a single, automated, prerecorded communication that provides no opportunity for the call recipient to interact with the telemarketer while the message is being

delivered or for the telemarketer to tailor its message in response to interjections from a particular call recipient. Other provisions of the TSR support this understanding. For instance, the TSR also requires all outbound calls that deliver a prerecorded telemarketing message to include an automated interactive opt-out mechanism if the call is capable of being answered by a live person. *Id*. at § 310.4(b)(1)(v)(B)(ii)(A). The reason an interactive opt-out mechanism is required for a prerecorded message, but not live-operator calls, is because consumers would otherwise be unable to make a do-not-call request during a prerecorded message (due to the one-way nature of such calls). By contrast, consumers can make a do-not-call request at any time during soundboard calls because those calls involve two-way communication with a live agent. The TSR also requires a prerecorded message to provide mandatory disclosures — the caller's name, the entity on whose behalf the call is made, and the purpose of the call — during the first two seconds of the call. *Id*. at § 310.4(b)(1)(v)(B)(ii). That requirement implies that the term "prerecorded message" means a one-time, inflexible message during any particular call, not a series of audio-clip responses controlled in real time by a live operator that provides for a two-way conversation tailored to each call recipient.

The purpose of the robocall prohibition was to prohibit a specific type of call: a prerecorded, automated message that makes two-way communication impossible. *See, e.g.*, 73 Fed. Reg. at 51173, 51177, 51180. Because a soundboard call is a two-way, interactive conversation, it is not "a prerecorded message." It also does not implicate the same consumer protection concerns as do robocalls. Conventional robocall technology allows for unlimited call volume, denies consumers any opportunity to interact with the caller, and creates significant documentation and enforcement challenges. Just the opposite is true of soundboard: it facilitates compliance with consumer protection laws and regulations by ensuring that all mandatory disclosures are made during calls; by providing clarity, consistency, and accountability throughout a telemarketing campaign; and by

preventing "rogue" call center agents from abandoning scripts to engage in unfair, deceptive, or abusive acts or practices.

Distinctions between robocalls and soundboard calls include the following:

ROBOCALL	**SOUNDBOARD**
No human interaction	Always human interaction
One-way communication	Two-way communication
Unclear communication	Clear communication
Non-responsive to call recipient's request to be placed on do-not-call list	Responsive to call recipient's request to be placed on do-not-call list

In 2009, after the FTC's promulgation of the TSR robocall prohibition but before it took effect, a company that employed soundboard sent a letter ("the Call Assistant letter") to the FTC seeking confirmation that the robocall prohibition did not implicate soundboard calls. That letter — from Michael Bills, the CEO of Call Assistant, LLC — described the application of soundboard within the sales-call context:

> A live agent using [soundboard] places a call to a consumer and hears the consumer greeting. In response to the greeting, the agent may elect to speak to the call recipient using his or her voice, or may press a button to play an appropriate recorded script segment. After the agent's response, the agent listens to the consumer customer's reply. After listening to the consumer's reply, the live agent again chooses whether to speak to the call recipient in his or her own voice, or another recording. At all times, even during the playing of any recorded segment, the agent retains the power to interrupt any recorded message to listen to the consumer and respond appropriately.

See Compl. Ex. 2 (quoting Call Assistant letter).

In a responsive letter of September 11, 2009 ("the September 2009 letter"), the FTC confirmed that understanding. *See id.* It explained that:

> The [robocall prohibition] prohibit[s] calls that deliver a prerecorded message and do not allow interaction with call recipients in a manner virtually indistinguishable from calls conducted by live operators. Unlike the technology that you describe [i.e., soundboard], 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.
>
> In adopting the [robocall prohibition], the Commission noted that the intrusion of a telemarketing call on a consumer's right to privacy "may be exacerbated immeasurably when there is no human being on the other end of the line." The Commission observed that special restrictions on prerecorded telemarketing messages were warranted because they "convert the phone from an instrument for two-way conversations into a one-way device for transmitting advertisements." Consequently, in Staff's view, the concerns about prerecorded messages addressed in the [robocall prohibition] do not apply to the calls described [by Bills, i.e., soundboard calls], in which a live human being continuously interacts with the recipient of a call in a two-way conversation, but is permitted to respond by selecting recorded statements.

Id. at 2.

D. The FTC's *De Facto* Amendment of the Robocall Prohibition

The use of soundboard in telemarketing sales operations increased after the promulgation of the robocall prohibition precisely because calls made using soundboard are not robocalls. *See, e.g.*, Stepek Decl. ¶ 6. The telemarketing industry relied on the plain understanding of the robocall prohibition, as confirmed by the September 2009 letter from the FTC, and the fact that at no point (before 2016) did the FTC ever indicate its intention to subject calls using soundboard to the robocall prohibition. Coombs Decl. ¶ 18.

The FTC's November 10 letter has unsettled the law by adopting the new position that "calls made using soundboard technology are subject to the provisions of [the robocall prohibition]." The November 10 letter, which is premised on inaccuracies and omissions about soundboard, is, by its terms, legally binding. In particular, it states that:

> 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. 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.

See Compl. Ex. 1 at 4. Although the November 10 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," *id.*, the FTC staff represented to SBA — in response to SBA's prior request (reiterated again just before the letter was issued) that the SBA be permitted to communicate with FTC components other than the Bureau of Consumer Protection about the matter before any letter was issued — that the letter had been provided in its final form to the offices of each of the three then-sitting Commissioners. In any event, the November 10 letter concludes by stating that the views expressed in it "do reflect the views of staff members charged with enforcement of the TSR." *Id.*

E. Irreparable Harm to SBA Member Companies as a Result of the *De Facto* Amendment of the Robocall Prohibition

The November 10 letter makes it clear to sellers and call centers (as well as to charitable fundraisers that call prospective members or donors) that if they continue to use soundboard, they will face enforcement consequences under the TSR. The robocall prohibition, which has never before applied to entities using soundboard, now applies to them in full, with devastating effects.

For example, SBA member company Associated Community Services, Inc. (ACS), which is engaged primarily in charitable fundraising, uses soundboard technology for approximately 90% of its fundraising calls. Stepek Decl. ¶¶ 3, 8. In the last five years, ACS has invested more than $3 million in the related technology, equipment, and training. *Id.* ¶ 9. A prohibition on outbound sales and fundraising calls using soundboard will render these investments stranded assets and lost costs.

Id. Worse, ACS will be forced to lay off approximately 200 trained and skilled employees if the November 10 letter stands. *Id.* ¶ 10.

SBA member company Perfect Pitch is in similar straits. It has invested substantial sums of time and money developing and improving soundboard technology for use by other companies, and has done so in reliance on the understanding that the TSR allows soundboard. Munns Decl. ¶ 4. If the November 10 letter takes effect, Perfect Pitch will be forced to dramatically scale back its domestic operations, and will be left with no choice but to consider letting go most of its employees. *Id.* ¶ 7. The November 10 letter will have similarly disastrous effects on Perfect Pitch's clients, who train and pay employees to use Perfect Pitch's soundboard technology. *Id.* ¶ 8. Those employees' positions are also in jeopardy because of the November 10 letter. *Id.*

SBA President Arthur Coombs III, who is both President of the SBA as well as the CEO of his own SBA-member company, KomBea, puts the harm in even starker terms, attesting that the "November 10 letter poses an existential threat to KomBea and other SBA member companies." Coombs Decl. ¶ 7. For KomBea alone, the FTC's announced prohibition of soundboard sales calls will result immediately in an 80% revenue loss. *Id.* ¶ 31. He also notes that the harms anticipated and directly addressed by the likes of KomBea, ACS, and Perfect Pitch are expected to befall many other SBA-member companies. As Mr. Coombs states:

> Because the letter largely outlaws soundboard, the many businesses that manufacture or distribute soundboard technology will have no choice but to close down entirely or, at a minimum, dramatically scale back their operations. That will lead to the loss of thousands of jobs across those industries alone.

Id. ¶ 33; *see also id.* ¶ 34. Mr. Coombs points out that there will also be a stigmatizing effect to the FTC's action which could lead to further rejection of the technology within industry, even for uses that are not covered by the robocall prohibition (*e.g.*, internal routing of incoming calls). *Id.* ¶ 31.

ARGUMENT

I. LEGAL STANDARD

A court will issue injunctive relief when a movant shows "[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). In applying those four factors, courts in this Circuit use the so-called "sliding scale" framework, whereby a particularly strong showing on one of the factors might compensate for a weaker showing on another factor. *See Mills v. Dist. of Columbia*, 571 F.3d 1304, 1308 (D.C. Cir. 2009); *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 11–12 (D.D.C. 2009).

II. SBA IS ENTITLED TO PRELIMINARY INJUNCTIVE RELIEF.

Each of the four preliminary injunction factors favors granting SBA the preliminary injunction it seeks.

A. SBA Is Likely To Prevail On The Merits.

Two questions are presented. The first is whether, in substance, the FTC's edict in its November 10 letter requiring call centers and other telemarketers that are currently and lawfully using soundboard technology for sales-related calls to "make any necessary changes to bring themselves into compliance" with the robocall prohibition by May 12, 2017, constitutes a substantive amendment to the TSR. If the answer is "yes" — which it is — then the letter cannot stand because the Telemarketing Act requires the FTC to follow the notice-and-comment rulemaking procedures of the APA. *See* 15 U.S.C. § 6102(b). The FTC is not free to make new substantive law by sub-regulatory decree.

The second is whether the November 10 letter unconstitutionally abridges protected speech. It does. The letter restricts the free speech rights of charitable and other advocacy organizations that

utilize for-profit fundraisers based on the content of their message. It is therefore subject to strict scrutiny by this Court. 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(A)–(C).

1. The November 10 Letter Is a *De Facto* Legislative Rule.

a. The FTC may not avoid notice-and-comment rulemaking by characterizing a change in substantive policy as a staff opinion.

The APA distinguishes between legislative rules and policy statements. Legislative rules "have the force and effect of law." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302–03 (1979). Policy statements do not. Because legislative rules have the force and effect of law, the APA requires them to go through notice-and-comment rulemaking. 5 U.S.C. § 553(b)(3)(A); *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015).

What distinguishes a legislative rule from a policy statement — *i.e.*, what determines whether an agency pronouncement requires notice-and-comment procedures — is "whether [the] document expresses a change in substantive law or policy (that is not an interpretation) which the agency intends to make binding, or administers with binding effect." *Catawba Cty. v. E.P.A.*, 571 F.3d 20, 33 (D.C. Cir. 2009). If so, then the document is a legislative rule.

The D.C. Circuit applies a practical approach in deciding whether an agency pronouncement is sufficiently binding in its effects to qualify as a legislative rule. *See, e.g.*, *Gen. Elec. Co. v. E.P.A.*, 290 F.3d 377, 383 (D.C. Cir. 2002) ("[A]n agency pronouncement will be considered binding as a practical matter if it either appears on its face to be binding . . . or is applied by the agency in a way that indicates it is binding."); *see also McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1321 (D.C. Cir. 1988) (EPA model had "present-day binding

effect" on regulated parties because "EPA was simply unready to hear new argument on it"). In particular, it has held that:

> If an agency acts as if a document issued at headquarters is controlling in the field, if it treats the document in the same manner as it treats a legislative rule, if it bases enforcement actions on the policies or interpretations formulated in the document*, if it leads private parties or State permitting authorities to believe that it will [exercise its enforcement powers] unless they comply with the terms of the document,* then the agency's document is for all practical purposes "binding."

Appalachian Power Co. v. E.P.A., 208 F.3d 1015, 1021 (D.C. Cir. 2000) (emphasis added).

The "practically binding" doctrine thus prevents agencies from avoiding the scrutiny of notice-and-comment rulemaking simply by labeling their otherwise binding pronouncements as policy statements or guidance documents. *See id.* at 1020; *Gen. Elec. Co.*, 290 F.3d at 383. That is true regardless of whether the agency pronouncement attempts to create new requirements or amend or repeal existing ones. *See* 5 U.S.C. § 551(5) (defining "rule making" to mean "agency process for formulating, amending, or repealing a rule"); *Sprint Corp. v. F.C.C.*, 315 F.3d 369, 374 (D.C. Cir. 2003) ("[N]ew rules that work substantive changes to prior regulations are subject to the APA's procedures."). Indeed, the D.C. Circuit has repeatedly invalidated purported policy statements, guidance documents, or interpretive rules on the ground that, because they were practically binding in actual effect, they were really legislative rules, and therefore invalid for not having gone through notice and comment. *See, e.g.*, *Elec. Privacy Info. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 6–8 (D.C. Cir. 2011); *NRDC v. EPA*, 643 F.3d 311, 320–21 (D.C. Cir. 2011); *Cohen v. United States*, 578 F.3d 1, 9 (D.C. Cir. 2009); *U.S. Telecom Ass'n v. F.C.C.*, 400 F.3d 29, 35 (D.C. Cir. 2005); *Sprint Corp.*, 315 F.3d at 377; *Gen. Elec. Co.*, 290 F.3d at 385; *Appalachian Power Co.*, 208 F.3d at 1023; *Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 946–47

(D.C. Cir. 1987).[1] Other courts have likewise held that purported agency policy statements were legislative rules because they had binding effects. *See, e.g.*, *Iowa League of Cities v. E.P.A.*, 711 F.3d 844, 875 (8th Cir. 2013); *Manufactured Hous. Inst. v. E.P.A.*, 467 F.3d 391, 399 (4th Cir. 2006).

b. The November 10 letter is practically binding and has enforcement consequences.

The FTC's November 10 letter is practically binding because it rigidly demands compliance with the agency's far more expansive view of the scope of the robocall prohibition, on pain of FTC enforcement action and related injunctive relief, equitable relief, and potential civil penalties for those regulated entities that do not fall in line. For instance, the letter emphasizes that the six-month grace period it prescribes is intended "to give industry sufficient time to make any necessary changes to bring themselves into compliance" with the FTC's newly revised robocall prohibition, and that the FTC will not credit any claims of reliance on the position expressed in the FTC's September 2009 letter. There is nothing uncertain or equivocal about the November 10 letter. Quite the opposite, it matter-of-factly gives SBA's members their marching orders: henceforth, and subject to narrow and onerous exceptions, "outbound telemarketing calls made using soundboard technology *are* subject to the [robocall prohibition]" (emphasis added). The November 10 letter is, thus, precisely the type of edict that the D.C. Circuit has long found to amount to a legislative rule. *See*, *e.g.*, *Appalachian Power*, 208 F.3d at 1023 ("[T]he entire Guidance, from beginning to end . . . reads like a ukase. It commands, it requires, it orders, it dictates.").

[1] *Cf. Agric. Retailers Ass'n v. OSHA*, 837 F.3d 60 (D.C. Cir. 2016) (holding that agency memorandum adopting a revised interpretation of a standard constituted a standard in its own right that was required by the Occupational Safety and Health Act to be promulgated, if at all, pursuant to notice-and-comment rulemaking), *reh'g denied* (Dec. 20, 2016).

It is of no moment that the November 10 letter concludes by pointing out that: (1) it represents only the views of "staff," subject to the limitations of 16 C.F.R. § 1.3; (2) it was not "approved or adopted by the Commission; and (3) is not binding on the Commission. First, as the D.C. Circuit observed regarding similar caveat language at issue in the *Appalachian Power* case, this is all "boilerplate" that should not distract the court from the rest of the document. 208 F.3d at 1023; *see*, *e.g.*, Compl. Ex. 2 (Sept. 11, 2009 letter) (using similar language to that in the November 10 letter). Second, it has never been the rule that, in order for a sub-regulatory agency pronouncement to constitute a "legislative rule," it must come from the agency head(s). The "guidance" at issue in *Appalachian Power* demonstrates the point: that came out of two sub-offices of 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.

Third, whether or not the November 10 letter was formally "approved or adopted" by the Commission is beside the point; it comes from "staff members charged with enforcement of the TSR," and tells "industry" in no uncertain terms that they have six months to "come into compliance" or face enforcement for violating the TSR. The whole premise of the "practically binding" principle is that agencies may not evade notice-and-comment rulemaking and judicial review by characterizing as "non-binding" agency actions that, as a practical matter, have the same significance — to the agency, to the regulated community, or both — as a legislative rule. The November 10 letter constrains all regulated parties in the very same manner as if the FTC had done what it was legally required to do: promulgated a revised robocall prohibition through notice-and-comment rulemaking.

Fourth, and finally, it hardly matters whether the November 10 letter is binding on the Commission. Presumably the letter means to convey that the FTC reserves the right to — but

might not actually — take enforcement action against telemarketers who use soundboard technology. That is, at most, tautological — where enforcement is concerned, it is arguably the case that an enforcement agency is *never* truly bound to enforce its regulations (at least on a case-by-case basis) because it always has inherent prosecutorial discretion. *See Heckler v. Chaney*, 470 U.S. 821, 830–31 (1985). The FTC is most certainly accountable for the enforcement of the robocall prohibition, however. More importantly, the November 10 letter comes from the FTC "staff members charged with enforcement of the TSR," so, again, the letter is plainly binding in a practical sense on the affected industry. Industry is being told to expect FTC enforcement action and related injunctive relief, equitable relief, and potential civil penalties if it does not promptly comply with the letter's terms (whether the FTC takes action is beside the point).

The November 10 letter is the archetypal "practically binding" agency action that lies at the root of *Appalachian Power* and its kin. It directs the FTC's enforcement authority in an entirely new direction and demands compliance on pain of FTC enforcement action and related injunctive relief, equitable relief, and potential civil penalties. In simple terms, as of May 12, 2017, companies using soundboard technology for telemarketing will be subject to FTC regulation and enforcement in a way that they were not on May 11, 2017. For them, the status quo will have changed on account of the agency's actions. The November 10 letter creates new legal consequences that simply did not previously exist. That is, by definition, a legislative rule. *See U.S. Telecom Ass'n*, 400 F.3d at 35 (where agency action effects a "substantive regulatory change," it is a legislative rule for which notice and comment is required); *Chrysler Corp.*, 441 U.S. at 302–03 (noting that legislative rules are ones having the "force and effect of law"); *see*

also Manufactured Hous. Inst., 467 F.3d at 398–99 (deciding whether policy is a legislative rule by examining its actual consequences).

c. The TSR's robocall prohibition does not apply to soundboard calls.

The FTC's newfound position on the reach of the robocall prohibition is flatly inconsistent with that provision of the TSR. The robocall prohibition by its terms prohibits "initiating any outbound telephone call that delivers a prerecorded message [without the express written consent of the call recipient]." 16 C.F.R. § 310.4(b)(1)(v)(A). The entire purpose of the prohibition was to prohibit a specific type of call: a prerecorded, automated message (*i.e.*, robocall) that makes two-way communication impossible. A soundboard call is not *a* prerecorded message, *i.e.*, it is not a single recording that plays automatically from start to finish, independently of a sales agent on one end of the line, and unresponsive to the call recipient on the other end of the line. A soundboard call is, rather, a customized call, controlled by a live agent, that utilizes short audio clips to augment and enhance what is already a two-way communication. By crafting the 2008 TSR robocall prohibition in the singular in relation to the term "prerecorded message," the FTC was clearly focused on single, uninterrupted automated sales calls — robocalls — that are impervious to human interaction.

The terms "deliver" and "prerecorded message" are not defined in the TSR; however, when used in conjunction, they imply a one-way prerecorded communication that provides no opportunity for the call recipient to interact with the sender of the message. This interpretation is supported by other provisions of the TSR, which provide contextual guidance. For instance, for calls that are capable of being answered in person by a consumer, the TSR requires outbound calls that deliver a prerecorded message to include an automated interactive opt-out mechanism to make a do-not-call request. *Id*. at § 310.4(b)(1)(v)(B)(ii)(A). That requirement makes sense for calls that do not involve live operators because consumers would otherwise be unable to make a do-not-call request

during a prerecorded message (due to the one-way nature of such calls). By contrast, consumers can make a verbal do-not-call request at any time during calls that utilize soundboard.

The FTC also requires a prerecorded message to provide mandatory disclosures during the first two seconds of the call (*e.g.*, the name of the individual caller, and the name of the entity on whose behalf the call is made and the purpose of the call). *Id*. at § 310.4(b)(1)(v)(B)(ii). This implies a telemarketing call that is a single, uninterruptable recording that is not tailored to any specific call recipients and does not permit two-way interaction.

Moreover, in the robocall prohibition, the FTC was focused on the invasion of privacy caused by calls that made two-way communication impossible and turned the telephone into nothing more than a sales device. The preamble to the robocall prohibition spells this out. It states that "prerecorded calls 'are by their very nature one-sided conversations.'" 73 Fed. Reg. at 51167 (quoting Comment No. 529 filed by National Consumers League). It also cites an industry comment that refers to prerecorded messages as "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). These campaigns are widely regarded as a nuisance and a burden to consumers because consumers are powerless to interact with them." *Id*. at 51173 (quoting Comment No. 571 filed by Interactions Corp.) (emphasis added). Accordingly, the FTC found that "a consumer right to privacy may be exacerbated immeasurably when there is *no human being* on the other end of the line." *Id*. at 51180. Soundboard, by contrast, always has a live agent on the other end of the line and empowers consumers to interact in a dynamic, two-way communication with that agent.

The fact that the FTC, contemporaneous with the robocall prohibition, affirmed its position in the September 2009 letter that the robocall prohibition did not extend to calls using soundboard, only

serves to confirm the SBA's reading of the robocall prohibition. *See Cmty. for Creative Non-Violence v. Watt*, 670 F.2d 1213, 1216 (D.C. Cir. 1982) ("[I]n interpreting an agency's regulations, a court may rely upon the agency's contemporaneously issued Policy Statement as an accurate representation of the agency's intent."). The facts of how soundboard is employed and utilized have not changed in the past seven years. When used as intended, a soundboard call is functionally no different than a call between two live humans. *See* Coombs Decl. ¶ 11; *see also* Stepek Decl. ¶¶ 5–6. Indeed, the fact that soundboard actually facilitates compliance with consumer protection laws and regulations by ensuring all mandatory disclosures are made during calls and preventing soundboard agents from abandoning scripts to engage in unfair, deceptive, or abusive acts or practices further illustrates the clear line between prerecorded messages and soundboard calls. *See* Stepek Decl. ¶ 5; Coombs Decl. ¶¶ 11–12.

It is well and good for the FTC to want to eliminate noncompliant calls made by unscrupulous telemarketers, regardless of the technology used, to protect consumers, and to avoid putting legitimate businesses that comply with the letter and spirit of federal and state consumer protection laws at a competitive disadvantage. But an agency is bound by the limits of its regulations as much as the regulated community is bound by their application. The FTC has ample means, through the TSR and other enforcement tools, to address consumer complaints about unscrupulous and non-compliant telemarketing companies (including companies that abuse or misuse soundboard technology). *See*, *e.g.*, *United States v. Corps. for Character, L.C.*, 116 F. Supp. 3d 1258, 1263 (D. Utah 2015) (granting summary judgment on a number of TSR violations, including misleading claims, in an FTC enforcement action against a telemarketer using soundboard). To the extent it perceives a need to prohibit specific technologies used in compliant telemarketing sales calls, the FTC at the very least it is required by the Telemarketing

Act to pursue any such action through the APA's public notice-and-comment rulemaking process. *See Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000) (recognizing that where an agency interpretation of one of its own regulations is inconsistent with the regulation, the interpretation should not be permitted because it would "create *de facto* a new regulation"); *AT&T Corp. v. F.C.C.*, 841 F.3d 1047, 1049 (D.C. Cir. 2016); *U.S. Telecom. Ass'n*, 400 F.3d at 38.[2]

d. The November 10 letter evinces newly conceived qualitative judgments by the FTC concerning soundboard that demonstrate why public comment is required.

As noted above, soundboard technology existed and was in use at the time the FTC considered and promulgated the 2008 robocall prohibition. Tellingly, there is not a single mention of soundboard — either by name or by description of functionally equivalent technology — in the entire preamble to the 2008 rulemaking, notwithstanding the FTC's seemingly careful review of and response to the numerous comments submitted, and the extensive concerns expressed about the invasiveness of pre-recorded messages. That omission is notable — one would have expected some discussion of this type of telemarketing call had the FTC contemplated its coverage within the scope of the robocall prohibition. *E.g., Allina Health Servs. v. Sebelius,* 746 F.3d 1102, 1107–09 (D.C. Cir. 2014) (vacating, for lack of adequate notice, part of a rule setting hospital reimbursement rates where it was diametrically opposed to the proposed rule); *cf. Christopher v. SmithKline*

[2] For the reasons stated here, the term "prerecorded message" is not ambiguous and simply does not permit the FTC's revisionist interpretation as reflected in the November 10 letter. Thus, the FTC's position cannot be credited. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997). Indeed, the APA's notice-and-comment requirements would be "disserved" if the FTC could get away with a revised interpretation of the term "prerecorded message," many years after the promulgation of the robocall prohibition, that bears no resemblance to what the agency intended at the time of promulgation. *Elec. Privacy Info.*, 653 F.3d at 7; *see also Comcast Cable Commc'ns, LLC v. F.C.C.*, 717 F.3d 982, 1003 (D.C. Cir. 2013) (court "need not defer to an agency's interpretation of a disputed regulation" when that interpretation "flies in the face of the agency's intent at the time of promulgation of [the regulation]").

Beecham Corp., 132 S. Ct. 2156, 2168 (2012) (observing that an agency's long period of taking no enforcement action under a regulation against a particular type of conduct signals that conduct was not within the scope of the regulation in the first instance).

Notwithstanding what sets soundboard calls apart from the type of prerecorded message that was the focus of the 2008 rulemaking, the FTC made numerous factual assertions or assumptions about soundboard in its November 10 letter — many of which are wrong or at least reflect a poor understanding of soundboard and how it is used — that typify the type of policy-making judgments that can and should be fairly made by an agency *only after* having received the benefit of public comment to test the agency's hypotheses, judgments, and policy proposals. *See Syncor Int'l Corp. v. Shalala,* 127 F.3d 90, 95 (D.C. Cir. 1997) (observing that the promulgation of a regulation is itself "lawmaking" and it is for that reason that the APA requires notice and comment). The September 2016 draft letter contained or reflected a number of factual errors or oversights. Among other things, it asserted:

- that the FTC had received numerous consumer complaints that calls using soundboard were not actually being manned by live agents and that the technology was not responding appropriately to consumer questions or concerns;
- that soundboard was being utilized to increase the number of calls a call center could make;
- that using soundboard to allow soundboard agents to make multiple calls at once was inconsistent with the observation in the FTC's 2009 Letter that soundboard calls were virtually indistinguishable from calls made by live agents; and
- that soundboard calls were in fact "prerecorded messages" thus falling within the scope of the TSR's robocall prohibition.

Compl. Ex. 3; *see also* Coombs Decl. ¶ 21.

The FTC got it wrong. As a factual matter, calls that utilize soundboard are real-time, two-way conversations between a live agent and a consumer. As a policy matter, soundboard calls do not implicate the same consumer-protection concerns as prerecorded messages (*e.g.*, unlimited call

volume and consumers' inability to interact with the caller). In fact, soundboard facilitates compliance with consumer-protection laws and regulations by ensuring that all mandatory disclosures are made during calls and preventing soundboard agents from abandoning scripts to engage in unfair, deceptive, or abusive acts or practices. Coombs Decl. ¶ 12. This benefits both consumers (who receive all information necessary to make informed decisions and experience a consumer-friendly interaction) and businesses (which retain more control over employees' communications with consumers and reduce regulatory risks). In these ways and others, soundboard promotes compliant and positive two-way consumer interaction and does not deliver the type of one-way communication covered by the TSR's robocall prohibition. *Id.* ¶ 14. In addition, by concluding that all telemarketing uses of soundboard are prohibited by the existing TSR prohibition, the FTC conflates the mere use of soundboard technology with the use of soundboard by telemarketers who engage in unlawful telemarketing practices in violation of the TSR, the FTC's organic act, and general consumer protection principles. Telemarketers who do not comply with applicable law are subject to FTC enforcement, without regard to whether they use soundboard technology to engage in their unlawful practices, and the FTC already has ample enforcement powers to address unlawful telemarketing conduct and discourage improper use of soundboard.

But regardless of whether the FTC got it wrong or right, if the FTC disagrees with the policy position of the SBA and others within the regulated community — and indeed with its own longstanding position — about the value of soundboard in the telemarketing industry, *the law* does not allow it to simply impose by fiat a new rule prohibiting the use of that technology. And yet that is precisely what the FTC did. The November 10 letter depicts newly conceived qualitative judgments about soundboard that have never been vetted through public notice and comment. When an agency expands the scope of a regulation, it imposes a new binding norm, something it may only

do by way of rulemaking (absent statutory authority permitting otherwise). *See Syncor Int'l Corp.*, 127 F.3d at 95 (stating "a substantive rule *modifies* or *adds* to a legal norm based on the agency's *own authority*") (emphasis in original); *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); *Iowa League of Cities*, 711 F.3d at 873 ("Expanding the footprint of a regulation by imposing new requirements, rather than simply interpreting the legal norms Congress or the agency itself has previously created, is the hallmark of legislative rules.").

This case illustrates the wisdom of notice and comment. Had the FTC given the affected industry the chance, the record developed through a public comment period would have illustrated the salutary purposes and uses of soundboard technology. Through public comment, the FTC would have been told of how soundboard actually provides added consumer-protection benefits that would not otherwise exist and reduces concerns regarding privacy to those associated with other live operator calls. *See, e.g.*, Coombs Decl. ¶¶ 12.

Not only is soundboard devoid of the consumer-protection concerns associated with prerecorded messages, it actually provides numerous consumer protection benefits and aids compliance with federal and state consumer protection laws and regulations. By way of example, the TSR requires telemarketers to make specific introductory and payment disclosures, mandates proper authorization for all charges, and prohibits telemarketers from making misrepresentations to consumers. *See* 16 C.F.R. §§ 310.3(a)(1)–(4), (7), 310.4(d)–(e). Similarly, the Dodd-Frank Wall Street Reform and Consumer Protection Act, which is enforced by the Consumer Financial Protection Bureau, requires timely and understandable information to be provided to consumers and prohibits unfair, deceptive and abusive acts or practices in the context of financial products and

services. *See* 12 U.S.C. § 5511(b). Soundboard facilitates compliance with these requirements and prohibitions by using client-approved sound files that:

- Ensure all mandatory disclosures, including the terms and conditions of the offer, are made to consumers;
- Give the business more control over what information is presented to consumers and ensure the information is presented in a manner that consumers can understand (*e.g.*, by ensuring proper enunciation and that disclosures are not made too quickly);
- Prevent soundboard agents from misstating offers, incentives, or other terms and conditions;
- Prevent soundboard agents from engaging in high-pressure sales tactics;
- Readily identify the entity/ies responsible for non-compliant conduct by significantly reducing the risk of individual soundboard agents going off-script or engaging in rogue conduct and by maintaining a complete record of all calls;
- Enable United States call centers to lower their costs, allowing them to better compete with offshore call centers;
- Facilitate the employment of those with certain disabilities and speech impediments who may have difficulty speaking for several hours at a time, if at all;
- Allow employment of those with accents who consumers may have difficulty understanding over the telephone;
- Improve the working conditions of agents who handle highly repetitive calls;
- Encourage focus on agents' performance mastering the technology and communicating with consumers rather than sales performance;
- Deliver the best possible consumer experience by facilitating continuous fine-tuning and optimization of the two-way communication with consumer; and
- Engage the consumer in a natural two-way interaction.

See generally Coombs Decl.; Compl. Exs. 6 & 7.

While it is true that soundboard agents can respond to consumer inquiries and requests by interjecting with their own voice (indeed, as the FTC itself made clear in its September 2009 letter, that is one important reason *why* soundboard is distinguishable from the prerecorded robocalls which

the TSR proscribes), the system is capable of notating when such an interjection occurs; therefore, supervisors can review call recordings whenever such interruption occurs to ensure soundboard agents do not deviate from permissible script flow, provision of information, or engage in any unlawful behavior. Coombs Decl. ¶ 12. By managing the number of calls needing review, this technology allows clients to maintain compliance in a cost-effective manner that could only be duplicated in a full live agent monitoring environment with a significant investment in voice and call analytics that is beyond the means of many companies. *See* Munns Decl. ¶ 5.

In addition to federal regulations, call centers must also comply with myriad state laws and regulations, including mandatory disclosure requirements and rules that require an agent to obtain the consumer's permission before continuing the call and prohibit argument. Soundboard helps businesses comply with these rules by allowing them to build in script rules that inhibit an agent from making a non-compliant rebuttal. Coombs Decl. ¶ 12.

Another tangible benefit of soundboard is that consumers are presented with information in an articulate manner without the fast speech, distraction of accents, or imperfect grammar that permeates traditional live agent calls, while simultaneously allowing the company to employ persons who may not otherwise be employable in this field. Stepek Decl. ¶ 11. For example, a person with a speech impediment, asthma, lung ailment, or other health problem that impedes her or his ability to speak clearly or for long periods of time can converse with a consumer using the recorded audio files while having the ability to interject her or his own voice or connect the call to a supervisor in the event the consumer asks a question for which no recorded response exists. Similarly, an individual with the ability to understand but not clearly speak the consumer's language, or who speaks with an accent unfamiliar to the consumer, could assist the consumer just as well as a speaker fluent in the

language of the call (typically English within the United States). Without this technology, such people could not be employed as call center agents.

Finally, soundboard technology can create a complete record of each call — the date, time, and number called; the interactions between call recipients and soundboard agents, as well as the time and appropriateness of each response; the complete message delivered to each call recipient; and the call disposition, including compliance with requirements for completed sales transactions, placement on the do-not-call registry, and similar compliance-related issues. *Id.* ¶ 13. As a result, users of soundboard can provide federal and state regulators, as well as businesses insistent on compliance with existing federal and state law, with documented and demonstrable evidence of compliance.

The FTC seems willing to justify its newly adopted position based solely on the existence of numerous consumer complaints about the explosion of *robocalls* and a general increase in noncompliant telemarketing practices, without addressing the extent, if any, to which *soundboard* is responsible for those complaints and how elimination of soundboard technology will improve overall TSR compliance. But while complaints may fairly prompt an agency to undertake further inquiry into a purported problem and, ultimately, develop new regulations to address the concerns raised, an appeal for action by one segment of the public does not justify the evasion of the required notice-and-comment rulemaking process. In effect, the FTC has assumed a priori, without the benefit of fact-finding or reasoned analysis, that soundboard calls are robocalls.

This rush to judgment by the FTC is precisely why substantive rules and rule amendments are subject to public notice and comment. As the D.C. Circuit 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 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*., 315 F.3d at 373 (pointing out that notice and public comment also improves the quality of agency rulemaking). Given the many benefits of soundboard for TSR compliance, an FTC that would have taken public comment and its enforcement priorities seriously might even have reached a different conclusion about soundboard's role in telemarketing. *See 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").

Because the FTC was required to, but did not, take public comment on its newly conceived views about the consumer implications of sales calls using soundboard technology, the November 10 letter cannot stand.

e. As a *de facto* substantive amendment to the robocall prohibition, the November 10 letter is actionable now.

As a final matter on the legislative nature of the November 10 letter, it bears emphasizing that SBA members need not hold off on challenging the FTC's action until the six-month deadline passes and telemarketing companies either cease using soundboard products or defy the FTC edict and risk the enforcement consequences of the FTC's newly adopted position. As a practical matter, SBA members are already beginning to anticipate the ruinous consequences of the FTC's action as the SBA and the telemarketing industry brace for the change, as further described below in the explanation of the irreparable harm. Thus, judicial review is necessary now.

Furthermore, as a legal matter, it is well settled that the APA provides for immediate judicial review of final agency action, subject only to the traditional notions of standing (not at issue here, in light of the clear injury SBA members stand to suffer as a result of the FTC action). *See Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967). This is especially true where enforcement or prosecution or the like would be the natural consequence of the agency action. *See Chamber of Commerce v. Fed. Election Comm'n*, 69 F.3d 600, 604 (D.C. Cir. 1995); *see also Nat'l Ass'n of Home Builders v. EPA*, 786 F.3d 34, 45 (D.C. Cir. 2015) (Silberman, J., concurring) ("And the law is rather clear; any party covered by an agency's regulatory action has standing to challenge a rule when it issues – it certainly need not wait until a government agency seeks to enforce a rule."); *Iowa League of Cities*, 711 F.3d at 867 ("We do not require parties to operate beneath the sword of Damocles until the threatened harm actually befalls them.").

2. The November 10 letter runs afoul of the First Amendment because it restricts protected speech based on its content and fails strict scrutiny.

The November 10 letter has a second legal infirmity: it violates protected speech by SBA members engaged in charitable fundraising.

Charitable solicitations involve a variety of speech interests that touch on important social, economic and political issues. *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980); *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 959 (1984); *Riley v. Nat'l Fed'n of the Blind, Inc.*, 487 U.S. 781, 788–89 (1988). Accordingly, they are afforded the strictest First Amendment protection. *Riley*, 487 U.S. at 789.

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.

"Charitable organization" is not a defined under the Telemarketing Act or the TSR. The FTC has, however, given some guidance on how it enforces the TSR with respect to certain charitable calls, including the following example:

> if a for-profit telemarketer on behalf of a (presumably non-profit) political club or constituted religious organization were to engage in a "plan, program, or campaign" involving more than one interstate telephone call to induce a purchase of goods or services or a charitable contribution, that activity would be within the scope of the TSR.

68 Fed. Reg. at 4589–90. Thus, while political calls on behalf of candidates, campaigns, or committees appear to fall outside the FTC's jurisdiction and, therefore, escape regulation under the TSR, all other fundraising calls on behalf of non-profit organizations, including religious and political causes, made to induce a charitable contribution are covered by the TSR. *See id.*

Until the November 10 letter, however, the types of solicitations described in the preceding paragraph falling within the scope of the TSR were not prohibited except where made by "prerecorded message." SBA members were therefore not prohibited from making such calls because soundboard did not come within the scope of the robocall prohibition (because a soundboard call does not rely on a prerecorded message). The November 10 letter changes that. And it does so in an unconstitutional manner, by applying the prohibition to some types of calls but not others, based on their content. This is because the robocall prohibition itself only applies to calls to solicit charitable contributions made to first-time donors. *See* 16 C.F.R. § 310.4(b)(1)(v)(B). By contrast, subject to certain requirements that are readily met, the

robocall prohibition does not apply to calls soliciting charitable contributions made to previous donors. *See id.*

The line drawn by the FTC between what calls may and may not be made using a prerecorded message — to previous donors, generally yes; to first-time donors, generally no — is a content-based one.[3] And now that, with the November 10 letter, the FTC is sweeping into this prohibition calls made using soundboard, SBA member companies whose businesses depend on telemarketing work on behalf of charitable organizations will be the victims of this unconstitutional line drawing. The FTC cannot do this consistent with the First Amendment.

"At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal." *Turner Broad. Sys. v. F.C.C.*, 512 U.S. 622, 641 (1994). Any government "action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential right." *Id.* The Supreme Court's "precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content." *Id.* at 642.

The FTC's November 10 letter does just that: It substantively amends the TSR to restrict the use of soundboard technology by fundraisers calling on behalf of charitable organizations based on the content of the message. Further, it suppresses some messages — certain charitable

[3] Put differently, under the FTC's new rule, SBA's members are allowed to use soundboard to express a message along the lines of, "We appreciate your continued support for X, Y, Z and we ask that you donate again," while, under the same rule, SBA's members are forbidden from using soundboard to express a message along the lines of, "We would like you to start supporting X, Y, Z so we are asking for a donation."

calls — and imposes differential burdens on others — commercial calls and other charitable calls — based on content.

"Content-based laws — those that target speech based on its communicative content — are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve a compelling state interest." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015); *see also R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992). The burden of demonstrating that a content-based restriction (1) furthers a compelling state interest and (2) is narrowly tailored to achieve that end rests squarely with the government. *Reed*, 135 S.Ct. at 2231. Accordingly, "it is the 'rare case[ ] in which a speech restriction withstands strict scrutiny.'" *Id.* at 2236 (quoting *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1666 (2015)).

a. The ban on soundboard calls on behalf of charitable organizations to prospective donors or members is content-based on its face under *Reed* and its progeny.

In *Reed v. Town of Gilbert*, 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) (internal quotations omitted). Lower courts have used this framework to strike down content-based restrictions in other "robocall" statutes. *Id.*; *Gresham v. Rutledge*, ___ F. Supp. 3d ___, 2016 WL 4027901, at *3 (E.D. Ark. July 27, 2016). This Court, too, should find that *Reed* controls this case.

Under *Reed*, the first question is whether a restriction on speech is content-based on its face. *See Reed*, 135 S. Ct. at 2228 (stating that, at the first step, the government's justification or purpose in enacting the law is irrelevant.). If the answer is "yes," then the court proceeds to

evaluate the restriction under strict scrutiny. If the answer is "no," then the court must consider whether either (a) the facially content-neutral restriction can only be justified with reference to the content of the regulated speech, or (b) the restriction was adopted by the government because of a disagreement with the message to which it applies. *Cahaly*, 796 F.3d at 405. If either of those latter questions is answered in the affirmative, then the restriction will be deemed content-based, notwithstanding its facial content-neutrality, and subjected to strict scrutiny.

The November 10 letter's extension of the robocall prohibition to soundboard calls is facially based on the content of the message. Reading the relevant provisions together, the robocall prohibition expressly prohibits "any outbound telephone call that delivers a prerecorded message . . . *unless* …" the call is made "to induce a charitable contribution *from a member of, or previous donor to, a non-profit charitable organization* on whose behalf the call is made" and it complies with several other readily achievable requirements. 16 C.F.R. § 310.4(b)(1)(v) (emphasis added). What is not exempted is banned. Accordingly, on its face, the regulation bans prerecorded messages on behalf of charitable organizations to *prospective* donors or members if the call includes a request for a contribution or membership.[4] The FTC thus gives preferential treatment to some charitable speech (to members or previous donors) while suppressing other charitable speech (to prospective members or donors). Looking ahead then, should the newly expanded robocall prohibition as expressed in the November 10 letter stand, speech by SBA members aimed at prospective donors or members will be subject to enforcement

[4] It is important to reiterate, the application of this content-based restriction is jurisdictionally limited to paid speakers calling on behalf of charitable organizations (as opposed to extending the restriction to charitable organizations themselves). The FTC lacks jurisdiction over nonprofit organizations. *See* 68 Fed. Reg. at 4585. Accordingly, the FTC imposes the content-based restriction on the charitable speech spoken by paid speakers hired to call on their behalf, *e.g.*, *SBA member companies*.

while speech aimed at existing members or previous donors will not. The scheme promises enforcement and penalties based on the content of the messages SBA's members convey, which the Constitution forbids unless the FTC can justify the discrimination under strict scrutiny (which it cannot). *See Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974) (statute compelling newspaper to print an editorial reply "exacts a penalty on the basis of the content of a newspaper"); *Riley,* 487 U.S. at 795, 797 (observing that there is no constitutional distinction between compelled speech and compelled silence).

Two courts reached the same conclusion under the first step of the *Reed* test in recent cases striking down other unconstitutional robocall restrictions. In July of 2016, a federal court in Arkansas struck down that state's robocall statute because it prohibited prerecorded messages "for any purpose in connection with a political campaign." *Gresham*, 2016 WL 4027901, at *4–5. In that case, the parties 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.").

In August of 2015, the United States Court of Appeals for the Fourth Circuit reached a similar conclusion, striking down South Carolina's robocall statute. 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. Applying strict scrutiny, the Fourth Circuit held that the law was unconstitutional.

The November 10 letter similarly violates the First Amendment. SBA challenges the letter's extension of the robocall provision to soundboard calls and, therefore, the FTC's newly promulgated prohibition of charitable solicitation calls using soundboard on behalf of non-profit organizations to prospective donors or members. Yet, the letter permits soundboard calls (1) made on behalf of non-profit organizations to existing members or previous donors (provided the call complies with other, readily achievable requirements), and (2) made for sales purposes provided the consumer has given prior consent to be called. *See* 16 C.F.R. § 310.4(b)(1)(v)(A), (B). As in *Gresham* and *Cahaly*, the restriction targets the message conveyed, to wit, a request for a first-time contribution or prospective membership.

Because the robocall prohibition on its face targets speech based on content, it is unconstitutional unless the FTC can justify it under strict scrutiny (which it cannot for the reasons set forth below). And it is actionable now by SBA by virtue of the FTC's having substantively amended the robocall prohibition to sweep in soundboard calls.

But even if this Court concludes the robocall prohibition, as amended by the November 10 letter, is facially content-neutral (which it is not), it would still have to find that the letter's restrictions are content-based in their application because those restrictions cannot be justified without reference to the content of the speech they are targeting. *See Reed*, 135 S. Ct. at 2227; *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). This is because the FTC's prohibition on cold calls to prospective members or donors on behalf of charitable organizations cannot be justified without reference to the content of the regulated speech, *i.e.*, messages (speech) to prospective donors or members seeking a charitable contribution. 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 content-based. *McCullen v. Coakley*, 134 S. Ct. 2518, 2531 (2014); *see also Carey v. Brown*, 447 U.S. 455, 462 (1980). Either way, the prohibition, as now applied to soundboard calls, is subject to strict scrutiny.[5]

b. The ban on soundboard calls on behalf of charitable organizations to prospective donors or members fails strict scrutiny.

Content-based restrictions are subject to strict scrutiny. *See R.A.V.*, 505 U.S. at 394; *Riley*, 487 U.S. at 800. To survive strict scrutiny, a restriction must be narrowly tailored to further a compelling state interest such that no less restrictive alternatives are available to achieve that 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 there are no less restrictive alternatives, "and not simply that the chosen route is easier." *McCullen*, 134 S. Ct. at 2540.

Relevant to this case, in *Gresham*, the court found that the privacy interests articulated by the Arkansas legislature in enacting the state's robocall statute were "not 'compelling.'" *Gresham*, 2016 WL 4027901, at *3. Assuming for the sake of argument that they were compelling, however, the court went on to find that Arkansas' robocall statute was not narrowly tailored. *Id.* Similarly, in *Cahaly*, the Fourth Circuit "assumed" the government's interest was

[5] Any argument by the FTC that the banned speech is merely a "secondary effect" of some other, primary purpose of the ban, such as protecting privacy, should also fail. Protected speech is just that — *protected*. *See*, *e.g.*, *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213 (1975) ("Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them."); *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 799–800 (2011) (applying strict scrutiny and striking down a state regulation on violent video games that had been justified on child protection grounds); *Cohen v. California*, 403 U.S. 15, 21 (1971) (rejecting the argument that the state may restrict speech from the sight of the "unwilling or unsuspecting viewer").

compelling for purposes of analyzing the second prong of the inquiry and, like the court in *Gresham*, found the robocall statute at issue not narrowly tailored. Both courts reached that conclusion because there were sufficiently less restrictive alternatives available to the government and the challenged statutes reached more protected speech than necessary.

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, SBA does not believe it does), this Court would still need to find that the robocall prohibition, as amended by the November 10 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. 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,[6] 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, it bears noting that states and private parties also play a role in "policing" telemarketing practices in this country, such as 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. The TSR in particular requires the caller to identify himself or herself as a paid solicitor, identify the charitable organization on

[6] "Plausible less restrictive alternatives include time-of-day limitations, mandatory disclosure of the caller's identity, or do-not-call lists." *Cahaly*, 796 F.3d at 405.

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 DNC registry. All the while, the call recipient remains at liberty to hang up or ask to speak to a supervisor.

Based on the foregoing, the November 10 letter violates the First Amendment free speech rights of SBA members and their clients and, therefore, is invalid and unenforceable.

* * * * *

For all of these reasons, the SBA is likely to prevail on the merits of its challenge to the FTC's letter of November 10.

B. SBA Member Companies Will Suffer Irreparable Harm In The Absence Of Preliminary Injunctive Relief.

The second prong of the preliminary injunction test requires a showing of irreparable harm to the movant. To be considered "irreparable," harm "must be both certain and great, actual and not theoretical, beyond remediation, and of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." *Mexichem Specialty Resins, Inc. v. E.P.A.*, 787 F.3d 544, 555 (D.C. Cir. 2015) (quotation marks omitted). SBA and its member companies can easily make that showing here.

If the robocall prohibition is modified to cover soundboard, then that is the end of soundboard in the telemarketing sales industry. That will wreak havoc on both the manufacturers of the technology and related equipment and call centers that use it. *See* Coombs Decl. ¶ 31–34. SBA member companies include both. *Id.* at ¶ 15.

The November 10 letter is an edict: it directs SBA members (and others) to stop using soundboard technology for telemarketing purposes or face FTC enforcement consequences. Staring down those twin barrels, SBA's member companies will have no choice but to lay off many of their employees and, in most cases, cease soundboard-related operations altogether. *See, e.g.*, Coombs

Decl. ¶ 33; Stepek Decl. ¶ 11; Munns Decl. ¶ 7. The destruction of a whole industry is of sufficient magnitude, and sufficiently irremediable by other means, as to warrant a preliminary injunction. *See, e.g.*, *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 n.2 (D.C. Cir. 1977) ("The destruction of a business is, of course, an essentially economic injury. It is not, however, one of the 'mere' economic injuries which . . . are insufficient to warrant a stay.").

There is nothing hypothetical or theoretical about what will happen if the November 10 letter is permitted to go into effect. As described *supra* at pages 13–15, industry-wide layoffs, business closures, and lost investments and stranded assets are the inevitable results of the FTC's *de facto* amendment of the robocall prohibition to ban almost all use of the technology that is the foundation of SBA's members' businesses. The anticipated and inevitable loss of jobs alone amounts to irreparable harm, *see Sanofi-Synthelabo v. Apotex, Inc.*, 470 F.3d 1368, 1381 (Fed. Cir. 2006) ("potential lay-offs of Sanofi employees" constituted irreparable harm); the viability of business and indeed the industry even more so, *see Collagenex Pharms. Inc. v. Thompson*, No. CIV.A. 03-1405 (RMC), 2003 WL 21697344, at *9 (D.D.C. July 22, 2003), *as amended* (Aug. 26, 2003) (finding agency action resulting in "devastating losses" and affecting the "viability" of the plaintiff company to be irreparable harm).

This, then, is not a case involving bare predictions that are remote or speculative. *Compare Wis. Gas Co. v. F.E.R.C.*, 758 F.2d 669, 675–76 (D.C. Cir. 1985) (denying preliminary injunction in part because "the allegations made by petitioners are so speculative and hypothetical that it would be difficult to conclude that irreparable injury would occur even if the allegations were supported by evidence"). Just the opposite, the impending injury to SBA's members is as actual and imminent as it is substantial and otherwise irreparable. And because SBA member companies will have no recourse against the FTC to recoup their losses, even the purely "economic" losses they stand to

suffer constitute irreparable harm for which a preliminary injunction can and should be issued to prevent those losses. *See*, *e.g.*, *Feinerman v. Bernardi*, 558 F. Supp. 2d 36, 51 (D.D.C. 2008) (finding irreparable harm and granting preliminary injunction "where, as here, the plaintiff in question cannot recover damages from the defendant due to the defendant's sovereign immunity"); *Bracco Diagnostics, Inc. v. Shalala*, 963 F. Supp. 20, 29 (D.D.C. 1997) (noting same).

Indeed, the stigmatization alone that will attach to SBA member companies — as a result of their reliance on a technology banned by the FTC for use in making sales and fundraising calls — will cause customers to turn away, further harming them. *See*, *e.g.*, *Morgan Stanley DW, Inc. v. Rothe*, 150 F. Supp. 2d 67, 77-78 (D.D.C. 2001) (holding that damaged customer relationships constitutes irreparable harm); *Patriot, Inc. v. Dep't of Housing and Urban Dev.*, 963 F. Supp. 1, 5 (D.D.C. 1997) (finding irreparable harm in damage to plaintiff's business reputation); *Sanofi*, 470 F.3d at 1381 (finding "loss of goodwill" to be irreparable harm). Accordingly, SBA satisfies the irreparable harm requirement for obtaining a preliminary injunction.

C. The Balance Of Equities Favors The SBA And The Granting Of Preliminary Injunctive Relief.

When balancing "competing claims of injury," a court "must consider the effect on each party of the granting or withholding of the requested relief," with "particular regard for the public consequences" of an injunction. *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 24 (2008). In view of the calamitous consequences for SBA's members — the loss of thousands of jobs and the shuttering of businesses — if the November 10 letter takes effect, the balance of equities in this case overwhelmingly favors SBA. The only effect on the FTC that will result from enjoining the November 10 rule is that the Commission would be required to continue applying the robocall prohibition exactly as it has done ever since that prohibition was added to the TSR — a course of action that would be, if anything, *less burdensome* on the FTC than the one mandated by the

November 10 letter. The FTC also cannot claim that the issuance of an injunction might "seriously embarrass the accomplishment of important governmental ends." *Hurley v. Kincaid*, 285 U.S. 95, 104 n.3 (1932). If it wishes, the FTC is free to pursue an enlargement of the TSR to regulate soundboard — this time through the notice-and-comment procedures required by the Telemarketing Act and APA.[7] The FTC, thus, stands to lose nothing from the grant of an injunction.

To the extent that the public can be expected to experience any consequences from the grant of a preliminary injunction here, they are negligible. For one thing, an injunction would simply preserve the status quo as it has existed since soundboard went into widespread use after the FTC's September 2009 letter. The public would not face some unprecedented new hardship or in any way be materially worse off than it is now. What's more, the TSR's do-not-call provisions — including the entity-specific one — gives members of the public a quick and easy way to shield themselves from exposure to law-abiding telemarketers using soundboard, and the FTC has broad enforcement powers against telemarketers who fail to comply with all other TSR requirements, regardless of what technology they use. Finally, thousands of members of the public count on soundboard for their livelihoods. They would be seriously harmed by the denial of the requested injunction, since that would mean the end of their employment. For all of those reasons, the balance of equities in this case clearly favors granting the requested injunction.

D. The Public Interest Favors Preliminary Injunctive Relief for the SBA.

The fourth and last prong of the preliminary injunction test — the public interest — also weighs in favor of SBA. The denial of an injunction in this case would mean the loss of thousands of well-paying jobs across the country and the closure of numerous businesses. *See Mo. Edison Co. v.*

[7] SBA takes no position in this case on whether an amendment to the TSR that would restrict or ban altogether the use of soundboard in telemarketing would be lawful or arbitrary and capricious in substance. That issue is not before this Court and would depend on the particulars of whatever final rule the FTC promulgated, and its proffered rationale, *inter alia*.

FPC, 479 F.2d 1185, 1189 (D.C. Cir. 1973) (weighing in public-interest calculus the effects on the local economy, particularly the loss of 500 jobs, if an end-user of natural gas were forced out of business due to higher energy costs caused by agency action). It would result in the extinction of an entire industry sector, one that makes it easier for members of the public — particularly those with certain disabilities, speech impediments, or heavy accents — to find gainful employment as call center agents. *See McGregor Printing Corp. v. Kemp*, 811 F. Supp. 10, 15 (D.D.C. 1993) (holding that employment of blind and handicapped persons counted as an "additional, and perhaps, more important" factor in public interest analysis for purposes of preliminary injunction). And it would enable the FTC to subvert the procedural safeguards Congress put in place through the APA. *See United States v. Oakland Cannabis Buyer's Coop.*, 532 U.S. 483, 497 (2001) ("[A] court sitting in equity cannot ignore the judgment of Congress, deliberately expressed in legislation."). None of that is in the public's interest.

To be sure, members of the public have an interest in not being disturbed in their homes, but that interest can be preserved even with the issuance of an injunction here because the public has other means of vindicating it. In particular, members of the public who object to telemarketing can avail themselves of the TSR's do-not-call provisions and the FTC can avail itself of its existing broad enforcement powers. On balance, therefore, the public interest in this case clearly weighs in favor of granting SBA's motion for a preliminary injunction.

CONCLUSION

For the reasons given, the Court should grant the preliminary injunction and other relief requested in the SBA's Application by entering the attached proposed order.

Respectfully submitted,

/s/ Daniel W. Wolff
Daniel W. Wolff (D.C. Bar. No. 486733)
dwolff@crowell.com
Peter B. Miller
Mark R. Thomson
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington D.C. 20004-2595
Phone: 202-624-2500
Fax: 202-628-5116

Attorneys for Plaintiff
Soundboard Association

January 24, 2017