No.

In the Supreme Court of the United States

JAKE'S FIREWORKS INC.,
Petitioner,

v.

UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Through a series of Notices of Non-Compliance and related communications, Respondent Consumer Product Safety Commission determined (a) that Petitioner Jake's Fireworks' common backyard fireworks are subject to certain regulations under the Federal Hazardous Substances Act and (b) that samples of Jake's products are "banned hazardous substances" thereunder. These Notices, issued by the Commission's Compliance Office on official Commission letterhead, also ordered destruction of Jake's products and threatened significant civil and criminal penalties for non-compliance. After Jake's requests for further administrative consideration were rejected, it sought judicial review under the Administrative Procedure Act. The Fourth Circuit affirmed the district court's dismissal, reasoning—contrary to the holdings of this Court and other circuit courts—that only the Commission's formal enforcement was reviewable under the APA.

The question presented is whether judicial review under the Administrative Procedure Act for such notices of violation is unavailable until the agency further acts through formal enforcement.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner Jake's Fireworks Inc. was plaintiff in the district court and appellant in the court below.

Respondents were defendants in the district court and appellees in the court below. They are the U.S. Consumer Product Safety Commission (CPSC) and Alexander Hoehn-Saric, in his official capacity as Chairman of the CPSC.

Petitioner Jake's Fireworks Inc. is a wholly owned subsidiary of Marivest Holdings, Inc., and no publicly held corporation owns any stock in it.

STATEMENT OF RELATED CASES

These proceedings are directly related to the above-captioned case under Rule 14.1(b)(iii):

Jake's Fireworks Inc. v. Consumer Prod. Safety Comm'n, No. 23-1661 (4th Cir.), order denying petition for rehearing en banc entered August 26, 2024; opinion and judgment entered June 26, 2024

Jake's Fireworks Inc. v. Consumer Prod. Safety Comm'n, No. 8:21-CV-2058-TDC (D. Md.), judgment entered April 24, 2023

Jake's Fireworks, Inc. v. Consumer Prod. Safety Comm'n, No. 19-CV-1161-PWG (D. Md.), judgment entered Oct. 30, 2020

TABLE OF CONTENTS

Petition for a Writ of Certiorari 1
Opinions Below 1
Jurisdiction 1
Statutory Provisions Involved..... 1
Introduction 3
Statement of the Case 3
A. Statutory and regulatory background: Jake's fireworks are not banned hazardous substances 3
B. The Commission nonetheless repeatedly asserts that Jake's fireworks are banned hazardous substances 4
C. The Fourth Circuit holds that final agency action short of a formal enforcement decision is not subject to judicial review..... 10
Reasons for Granting the Petition 12
I. The Fourth Circuit's Holding, that Only Formal Enforcement Decisions are Final Agency Actions under the APA, Squarely Conflicts with Jurisprudence from This Court and Other Circuits..... 12
A. Because judicial review of agency action is presumed, this Court has long applied a pragmatic "final agency action" analysis..... 12
B. Other circuit courts follow this Court's jurisprudence and likewise reject the Fourth Circuit's conflation of finality with formal enforcement..... 16

C. The Fourth Circuit's straightjacket reliance on the availability of formal enforcement clashes with this Court's and other circuit courts' approach 21
II. The Question Presented Is Important 26
A. Agency manipulation of finality to achieve "voluntary" compliance while avoiding pre-enforcement review would diminish both the APA's promise and this Court's presumption of review 26
B. Following the APA and requiring review for final agency action short of formal enforcement decisions has not opened the litigation floodgates 29
III. This Case Is an Excellent Vehicle 30
Conclusion 32

APPENDIX

U.S. Court of Appeals for the Fourth Circuit No. 23-1661, Order Denying Petition for Rehearing En Banc (Aug. 26, 2024) 1a
U.S. Court of Appeals for the Fourth Circuit No. 23-1661, Opinion (June 26, 2024) 2a
U.S. District Court, District of Maryland, No. 8:21-CV-2058-TDC, Order Granting Motion to Dismiss (Apr. 24, 2023) 15a
U.S. District Court, District of Maryland, No. 8:21-CV-2058-TDC, Memorandum Opinion, 2023 WL 3058845 (Apr. 24, 2023) 16a
U.S. District Court, District of Maryland, No. 8:19-cv-1161-PWG, Memorandum and Order, 498 F. Supp. 3d 792 (Oct. 30, 2020) 40a

U.S. Court of Appeals for the Fourth Circuit
No. 23-1661, Excerpts of Transcript of
Oral Argument held on May 8, 2024 ..... 66a
5 U.S.C. § 704..... 70a

TABLE OF AUTHORITIES

Page(s)

Cases

Abbott Labs. v. Gardner,
387 U.S. 136 (1967) 3, 12-14, 19
Almendarez-Torres v. United States,
523 U.S. 224 (1998) 23
Appalachian Power Co. v. EPA,
208 F.3d 1015 (D.C. Cir. 2000)..... 24
Bellion Spirits, LLC v. United States,
7 F.4th 1201 (D.C. Cir. 2021)..... 25
Bennett v. Spear,
520 U.S. 154 (1997) 10, 13, 15, 19, 21, 26, 29-30
Bowen v. Michigan Acad. of Fam. Physicians,
476 U.S. 667 (1986) 13
Califano v. Sanders,
430 U.S. 99 (1977) 12
Ciba–Geigy Corp. v. EPA,
801 F.2d 430 (D.C. Cir. 1986) 18-20
City of Arlington, Tex. v. FCC,
569 U.S. 290 (2013) 23, 26
Colum. Broad. Sys. v. United States,
316 U.S. 407 (1942) 14
Corner Post v. Bd. of Governors of the Fed. Res. Sys.,
603 U.S. 799 (2024) 13
Doe v. Tenenbaum,
127 F. Supp. 3d 426 (D. Md. 2012) 27
Free Enterprise Fund v. PCAOB,
561 U.S. 477 (2010) 28
Frozen Food Express v. United States,
351 U.S. 40 (1956) 15

Her Majesty the Queen in Right of Ontario v. EPA, 912 F.2d 1525 (D.C. Cir. 1990) 18
Ipsen Biopharms. v. Azar, 943 F.3d 953 (D.C. Cir. 2019) 16-17, 24
MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118 (2007) 28
Nat'l Automatic Laundry & Cleaning Council v. Shultz, 443 F.2d 689 (D.C. Cir. 1971) 18
Navajo Nation v. Dep't of Interior, 819 F.3d 1084 (9th Cir. 2016) 21
NLRB v. United Food & Com. Workers Union, 484 U.S. 112 (1987) 13
Rhea Lana, Inc. v. Dep't of Labor, 824 F.3d 1023 (D.C. Cir. 2016) 17-18
Sackett v. EPA, 566 U.S. 120 (2012) 10-11, 14, 21, 25-26, 29-31
San Francisco Herring Ass'n v. Dep't of Interior, 946 F.3d 564 (9th Cir. 2019) 20-21
U.S. Army Corps of Eng'rs v. Hawkes Co., 578 U.S. 590 (2016) 3, 13-16, 21, 25, 28, 30-31
United States v. Shelton Wholesale, Inc., 34 F. Supp. 2d 1147 (W.D. Mo. 1999), *aff'd on other grounds*, 277 F.3d 998 (8th Cir. 2002), *cert. denied*, 537 U.S. 1000 (2002) 8-9, 24
United States v. Shelton Wholesale, Inc., Nos. 96-6131-CV-SJ, 97-6021-CV-SJ, 1998 WL 251273 (W.D. Mo. Apr. 28, 1998) 9

Statutes

5 U.S.C. § 552(a)(1)(A) 23

5 U.S.C. § 702 ..... 3, 12
5 U.S.C. § 704 ..... 1, 23
7 U.S.C. § 1361 20
15 U.S.C. § 1263(a) 4
15 U.S.C. § 1264 ..... 4, 11
15 U.S.C. § 1273(a) 6
15 U.S.C. § 2066(b) 6
15 U.S.C. § 2068(a)(1) 4
15 U.S.C. § 2069 ..... 4, 11
15 U.S.C. § 2076(b)(10) 13
15 U.S.C. § 2079(a) 5
28 U.S.C. § 1254 1
29 U.S.C. § 216 17
33 U.S.C. § 1319(b) 14
33 U.S.C. § 1319(g) 14
42 U.S.C. § 1396r-8(b)(3)(C)(ii) 16
47 U.S.C. § 155(c)(7) 13

Other Authorities

16 C.F.R. § 1000.21 ..... 6, 22-23
16 C.F.R. § 1500.14(b)(7) 7
16 C.F.R. § 1500.17(a)(11)(i) 4
16 C.F.R. § 1500.17(a)(11)(ii)(C) 4
16 C.F.R. § 1500.17(a)(11)(ii)(D) 4
35 Fed. Reg. 7415 (May 13, 1970) 4-5
38 Fed. Reg. 27012 (Sept. 27, 1973) 5
55 Fed. Reg. 31069 (July 31, 1990) 4
56 Fed. Reg. 37831 (Aug. 9, 1991) 4
71 Fed. Reg. 5165 (Feb. 1, 2006) 23

Baumann, Beau J. & Mina, Greg, *Clowning Around with Final Agency Action*, 28 Cornell J.L. & Pub. Pol'y 329 (2018) 22, 27-28

Hylas, Stephen, *Final Agency Action in the Administrative Procedure Act*, 92 N.Y.U. L. Rev. 1644 (2017)..... 26

S. Rep. No. 752, 79th Cong., 1st Sess. (1945) 13

PETITION FOR A WRIT OF CERTIORARI

Petitioner Jake's Fireworks Inc. respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 2a-14a) is reported at 105 F.4th 627. The decision of the district court (App. 16a-39a) is not reported but is available at 2023 WL 3058845.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 2024. A petition for rehearing was denied on August 26, 2024. The Chief Justice granted Jake's Fireworks' application to extend the time to file a petition for a writ of certiorari to December 24, 2024. No. 24A397 (Nov. 1, 2024). This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

STATUTORY PROVISION INVOLVED

5 U.S.C. § 704, "Actions Reviewable," provides:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless

the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

INTRODUCTION

This Court has long held that the Administrative Procedure Act (APA) "embodies the basic presumption of judicial review to one 'suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.'" *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967) (quoting 5 U.S.C. § 702). The Court thus demands a "'pragmatic' approach" to determine whether agency action is final for purposes of judicial review. *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 599 (2016) (quoting *Abbott Labs.*, 387 U.S. at 149).

The Fourth Circuit turns this analysis on its head, jettisoning the Court's pragmatic approach in favor of a hyper-formalistic test that results in a presumption against pre-enforcement judicial review. The court's decision will incentivize agencies to postpone—indefinitely—formal enforcement actions as a means of evading judicial review of their asserted regulatory interpretations. Parties like Jake's must either succumb, and comply with "unreviewable" agency decisions, or invite agency enforcement at the risk of potentially ruinous civil and criminal penalties. This Court's review is needed so that the Fourth Circuit's rigid presumption against finality does not become entrenched across the administrative state.

STATEMENT OF THE CASE

A. Statutory and regulatory background: Jake's fireworks are not banned hazardous substances

Jake's imports small consumer fireworks called reloadable aerial shells or reloadable tube aerial shells. (They are "small" because their outside diameter is

1.75 inches or less.) These devices are common backyard fireworks intended to produce a visual display after being launched 40 to 50 feet into the air. Compl., ECF 1, ¶¶ 19-20, 57-58.[1]

In 1990, pursuant to the Federal Hazardous Substances Act (FHSA), the Commission considered banning these fireworks, noting that, "[u]nder [its] [then-]existing regulations, reloadable tube aerial shell fireworks devices are not banned hazardous substances." 55 Fed. Reg. 31069, 31069 (July 31, 1990) (Advanced Notice of Proposed Rulemaking). The decision is significant, for under the FHSA and the Consumer Product Safety Act (CPSA), banned hazardous substances may not be imported into the United States or otherwise introduced into commerce. 15 U.S.C. §§ 1263(a), 2068(a)(1). Violations may result in civil and criminal penalties, including imprisonment. *Id.* §§ 1264, 2069.

Ultimately, the Commission decided to ban only those fireworks that use shells larger than 1.75 inches in outer diameter. 56 Fed. Reg. 37831 (Aug. 9, 1991) (Final Rule); *see* 16 C.F.R. § 1500.17(a)(11)(i) (codifying ban). As the Commission conceded below, this regulation does not ban Jake's small aerial shells. *See* Br. for Appellees (Doc. 19) at 6; *see also* 16 C.F.R. § 1500.17(a)(11)(ii)(C), (D).

B. The Commission nonetheless repeatedly asserts that Jake's fireworks are banned hazardous substances

1. Over a half-century ago, the Commission's predecessor enacted the Audible Effects Regulation.

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[1] Filings are from *Jake's Fireworks Inc. v. CPSC*, No. 8:21-CV-02058-TDC (D. Md.).

35 Fed. Reg. 7415 (May 13, 1970).[2] This regulation applies to hand-held devices that are intended to produce, not a visual display, but an especially loud audible effect (a "report"); they're often used by farmers to scare away pests. *Id.* at 7415. The rule banned the distribution of these hand-held devices (except to farmers), but the rule's preamble confirmed its "intention" "not to ban so-called 'Class C' [*i.e.*, reloadable aerial shell] common fireworks." *Ibid.*; *see* Compl. ¶¶ 22-27.

Despite this express regulatory intent, the Commission has more recently determined that reloadable aerial shells *are* subject to the Audible Effects Regulation. But this determination was not made through formal rulemaking. Instead, the agency confirmed this decision in a series of Notices of Non-Compliance issued to Jake's, related correspondence, and a meeting between Jake's counsel and the Director of the CPSC's Office of Compliance and Field Operations (Compliance Office) that took place between 2014 and 2021.[3] Thus, through its enforcement of the FHSA

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[2] The Regulation was adopted by the FDA, which was originally charged with administering the FHSA. When the Commission took over FHSA responsibility, 15 U.S.C. § 2079(a), it adopted existing FDA regulations without change, 38 Fed. Reg. 27012 (Sept. 27, 1973).

[3] Compl. ¶¶ 57-91. Jake's attached to its Complaint a sampling of the Notices and related correspondence. *See id.* Ex. C, ECF 1-3 (Sept. 18, 2018 Notice); Ex. E, ECF 1-5 (Aug. 19, 2014 Notice); Ex. I, ECF 1-9 (May 20, 2015 Notice); Ex. J, ECF 1-10 (Mar. 7, 2016 Notice); Ex. K, ECF 1-11 (three Notices dated Dec. 20, 2018); Ex. L, ECF 1-12 (Apr. 9, 2019 Notice); Exs. F, ECF 1-6; H, ECF 1-8; N, ECF 1-14; P, ECF 1-16 (Letters from Jake's Counsel to CPSC, dated May 26, 2016, Oct. 14, 2014, Nov. 13, 2020, & Jan. 11, 2021); Ex. G, ECF 1-7 (Letter from Compliance Office to

and CPSA, the Commission has decided that the Audible Effects Regulation applies to Jake's common fireworks and that several samples of those fireworks are banned hazardous substances.

The Commission's Regulated Products Handbook (Handbook) explains "how CPSC enforces its statutes." Ex. B, ECF 1-2, at 7 (capitalization altered); *see also* 16 C.F.R. § 1000.21 (providing that the Compliance Office, *inter alia*, "conducts compliance and administrative enforcement activities under all administered acts"). And a representative example shows how the process worked here.

In March 2018, a Commission compliance officer, pursuant to the agency's authority under 15 U.S.C. §§ 1273(a) and 2066(b), selected for testing four samples of Jake's products held at a port of entry. Ex. A, ECF 1-1. To determine if the Audible Effects Regulation applies to the samples—that is, to determine whether particular shells are intended to have an audible effect, the Commission employs a "poof/bang" "test." This "test" involves Commission staff—perhaps an individual—launching a shell into the air—under undisclosed conditions—and listening for a "poof" or a "bang." If staff thinks the shell made a "bang," rather than a mere "poof," the device is (supposedly) intended to have an audible effect and is thereby subject to the Audible Effects Regulation. *See* Compl. ¶¶ 5, 46-47.

Several months later, after the Compliance Office applied this "poof/bang" "test" to Jake's products, the

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Jake's counsel, dated Oct. 3, 2014); Exs. O, ECF 1-15; Q, ECF 1-17 (Letters from Director of Compliance Office to Jake's counsel, dated Dec. 16, 2020 & Feb. 8, 2021). The terms "Ex." or "Exs." in this Petition refer to these exhibits.

same compliance officer sent Jake's a Notice of Non-Compliance. Ex. C, ECF 1-3. The Notice, issued on official CPSC letterhead, informed Jake's that the samples "*failed* to comply" with "the requirement" under the Audible Effects Regulation and, as a result, the "sampled lots *are* banned hazardous substances." Ex. C at 1 (emphasis added); *see also* Ex. K (Dec. 20, 2018 Notice), ECF 1-11, at 1 (the tested lot "*is* a banned hazardous substance") (emphasis added).

This Notice also stated that "it is a prohibited act to introduce or deliver for introduction into interstate commerce or receive in interstate commerce any banned hazardous substance." Ex. C at 2-3. Any violation, the Notice continued, "could subject" Jake's to (a) "civil penalties of up to $110,000 per violation" and up to a "maximum of $16.025 million" for a "related series of violations," and (b) criminal penalties, including up to five years' imprisonment. *Id*. at 3. The Notice also warned Jake's of the "possibility of further action, including reasonably anticipated litigation." *Ibid*. The Notice instructed Jake's that it "must abide by continuing legal obligation" to "preserve" all information related to the sampled products. *Ibid*.[4]

Further, like most Notices issued to Jake's, the September 2018 Notice ordered, in bold, **"The sampled lots must be destroyed within 90 days from the date of this letter unless an extension of time**

[4] A few Notices also stated that some aerial shells were *mislabeled* hazardous substances because they did not indicate the presence of "reports." *See, e.g.*, Ex. E, ECF 1-5, at 1-2; Ex. G, ECF 1-7, at 2-3. Jake's objects to this conclusion, too. Compl. ¶ 67. The Commission has never identified the legal authority requiring labels for the "presence of reports." And while certain specific hazards identified in 16 C.F.R. § 1500.14(b)(7) must be included on labels, "the presence of reports" is not among them.

is requested and approved by the [Compliance Office.]" Ex. C at 2.

All Notices demanded a response "outlining the specific corrective action" that Jake's "plans to take to address the future sale of these products and any other products subject to the mandatory requirements." Ex. C at 4.

2. Jake's disagreed with the Notices' legal conclusions and factual determinations, and followed the process in the Commission's Handbook, which tells firms what to do when they contend that their products are not subject to the laws or regulations applied or when they disagree with the agency's findings of violation. Ex. B, ECF 1-2, at 5-6, 18-19.

Jake's responded in writing to the Notices and maintained (and still maintains), *inter alia*, that the Audible Effects Regulation does not apply to Jake's aerial shells; that the "poof/bang" test is arbitrary and capricious; and that because the Audible Effects Regulation does not apply to Jake's products, they cannot and do not violate the Regulation. Compl. ¶¶ 65, 68, 70-71.

The Compliance Office, however, rejected Jake's objections to the application of the Audible Effects Regulation and reaffirmed that various samples of Jake's products were unlawful. *See, e.g.*, Ex. G, ECF 1-7, at 2 (citing *United States v. Shelton Wholesale, Inc.*, 34 F. Supp. 2d 1147, 1158 (W.D. Mo. 1999), *aff'd on other grounds*, 277 F.3d 998 (8th Cir. 2002), *cert. denied*, 537 U.S. 1000 (2002)). The Compliance Office's reliance on the Commission's lawsuit in *Shelton* is noteworthy for two reasons. First, in *Shelton*, "the CPSC argue[d] that the [Audible Effects R]egulation may be applied to . . . products [that produce aerial

visual displays]," like Jake's products here. 34 F. Supp. 2d at 1158. Second, the Commission sought penalties for "knowing" violations of the FHSA based on the importer's receipt of non-compliance notices. *See United States v. Shelton Wholesale, Inc.*, Nos. 96-6131-CV-SJ, 97-6021-CV-SJ, 1998 WL 251273, at *11 (W.D. Mo. Apr. 28, 1998).

Jake's got nowhere, even after meeting with the Director of the Compliance Office in 2017. During that meeting, Jake's was informed that staff intended to enforce the regulations, as articulated in the Notices, and that there was no further decisionmaking process on these issues. Compl. ¶ 78. And Jake's received Notices after this meeting. *Id.* ¶ 79.

3. Jake's initially sought judicial review of CPSC's determinations in 2019. But the district court dismissed the action without prejudice (App. 40a-66a), asserting that the Commission had not yet taken "final agency action" because, "[w]hile the process [was] nearing its end, there [we]re still steps that Jake's Fireworks [could] take, such as request a hearing or reconsideration." App. 64a.

Jake's followed the district court's instruction and re-engaged the Commission. Jake's wrote to the Compliance Office Director and restated its contentions. Jake's also noted the district court's instruction to request a hearing and asked for one, if necessary, but otherwise sought confirmation that Jake's had no further administrative appeal. Compl. ¶¶ 84, 86; Ex. N, ECF 1-14; Ex. P, ECF 1-16. In response, the Director claimed that no final decision had been made and dismissed Jake's request for an informal hearing as "premature because we have not notified you that the Commission intends to take *further* action against

Jake's or the products." Compl. ¶¶ 85, 87-88; Ex. Q, ECF 1-17, at 2 (emphasis added).

C. The Fourth Circuit holds that final agency action short of a formal enforcement decision is not subject to judicial review

Having followed the district court's direction to reengage with the Commission, and with no administrative path available, Jake's again sought judicial review of the Commission's legal and factual determinations. Compl. ¶¶ 104-118. But the district court again dismissed without prejudice for lack of final agency action. App. 16a-39a.

The Fourth Circuit affirmed, holding that the Commission had not consummated its decisionmaking process under *Bennett v. Spear*, 520 U.S. 154, 178 (1997). App. 2a-14a. But the court's rationale, which departs from this Court's jurisprudence, conflated finality with formal enforcement. App. 7a-9a. According to the court, the final determinations made in the Notices (and related written and oral statements) were irrelevant, because only the Commission, not the Compliance Office, could compel corrective action through a formal administrative enforcement action or a referral to the Justice Department. App. 8a. Therefore, the court reasoned, the Notices "hardly constitute the culmination of the Commission's decisionmaking process" because a Notice "does not trigger any of the administrative, civil, or criminal proceedings that the Commission could pursue." App. 9a.

The court reached this decision by misreading the Court's decision in *Sackett v. EPA*, 566 U.S. 120 (2012). According to the Fourth Circuit, *Sackett* involved "a compliance order issued via EPA's authority to enter *binding* administrative orders under the

Clean Water Act." App. 12a (emphasis added). But in *Sackett*, EPA's "compliance" order was not self-executing. *Id.* at 129. Indeed, precisely because EPA's order sought voluntary compliance, the government argued that the order was non-final and could be enforced only through a formal enforcement action. *Id.* at 128-29. This Court nonetheless held that finality does not turn on the possibility of future enforcement. Rather, the Court held that (a) the determinations in EPA's compliance order and (b) decisions to proceed with formal enforcement were independent *final* decisions under the APA. *Ibid.*

By rigidly considering only whether the Commission here had statutory authority to initiate a formal enforcement action, the Fourth Circuit failed to apply a "pragmatic" finality analysis. It thus ignored all indicia of finality—unwavering statements about the applicability of the Audible Effects Regulation, the lack of any indication that the interpretation was preliminary or interim, the application of the Regulation to specific samples of Jake's products (*i.e.*, not merely a restatement of law), the potential that Jake's receipt of the Notices subjects it to civil and criminal penalties for knowing violations, and Jake's powerlessness to initiate further administrative review.

* * *

Jake's remains in limbo, quarantining more than $2.6 million of fireworks (Compl. ¶ 81) because selling them could trigger the sanctions threatened in the Notices, including criminal and civil penalties for "knowing" violations based on Jake's receipt of the Notices. 15 U.S.C. §§ 1264, 2069.

REASONS FOR GRANTING THE PETITION

The Fourth Circuit's holding that judicial review is unavailable for these final agency actions clashes with the APA's presumption of judicial review—as confirmed by this Court and other circuits. The question presented is crucial for Americans whose good-faith attempts to follow regulation are met with confusing, arbitrary, and unpredictable interpretations and applications. If the Fourth Circuit's opinion stands, regulatory agencies will be able to compel broad "voluntary" compliance with novel and shifting statutory and regulatory interpretations, while evading pre-enforcement APA review. The Court should grant the petition.

I. The Fourth Circuit's Holding, that Only Formal Enforcement Decisions are Final Agency Actions under the APA, Squarely Conflicts with Jurisprudence from This Court and Other Circuits

A. Because judicial review of agency action is presumed, this Court has long applied a pragmatic "final agency action" analysis

This Court has confirmed that the APA "evinces Congress' intention and understanding that judicial review should be widely available to challenge the actions of federal administrative officials." *Califano v. Sanders*, 430 U.S. 99, 104 (1977). The APA "embodies the basic presumption of judicial review to one 'suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.'" *Abbott Labs.*, 387 U.S. at 140 (quoting 5 U.S.C. § 702); *see id.* 139-41 (describing Congress's strong preference—both before

and after enactment of the APA—for judicial review of agency action). This "basic presumption," alongside "our deep-rooted historic tradition that everyone should have his own day in court," was reaffirmed just last Term. *Corner Post v. Bd. of Governors of the Fed. Res. Sys.*, 603 U.S. 799, 824 (2024) (cleaned up).

Accordingly, when deciding whether an agency action is subject to judicial review, the Court gives the APA's "generous" review provisions a "hospitable" interpretation. *Abbott Labs.*, 387 U.S. at 141. The Court has emphasized that "'[v]ery rarely do statutes withhold judicial review;'" otherwise, "'statutes would in effect be blank checks drawn to the credit of some administrative officer or board.'" *Bowen v. Michigan Acad. of Fam. Physicians*, 476 U.S. 667, 671 (1986) (quoting S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)). And "statutory preclusion of judicial review must be demonstrated clearly and convincingly." *NLRB v. United Food & Com. Workers Union*, 484 U.S. 112, 131 (1987).[5]

This Court has "distilled" two conditions that "generally speaking" must be satisfied for finality: the action (1) must be the "consummation of the agency's decisionmaking process" and (2) "must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Hawkes*, 578 U.S. at 597 (quoting *Bennett*, 520 U.S. at 178). But the

[5] Congress knows how to overcome the presumption of judicial review. *Compare* 47 U.S.C. § 155(c)(7) (requiring a filing of an application for review by the full Federal Communications Commission before judicial review of actions taken by staff under delegated authority) *with* 15 U.S.C. § 2076(b)(10) (allowing CPSC to delegate any of its functions or powers, except issuing subpoenas, to any officer or employee and providing no such limitation on judicial review).

Court continues to require a "'pragmatic' approach" to final-agency-action determinations. *Id.* at 599 (quoting *Abbott Labs.*, 387 U.S. at 149).

In *Sackett*, 566 U.S. 120, EPA's Director of Ecosystems, Tribal and Public Affairs, at EPA Region 10, issued landowners a non-self-executing "compliance order."[6] As discussed above, the Court rejected the government's claim—copied by the Commission here—that since EPA had not formally enforced this voluntary order, it was merely an intermediate step in the deliberative process. 566 U.S. at 128-29.

This Court held that the order "mark[ed] the 'consummation' of the agency's decision-making process" even though—like the Notices of Non-Compliance here—that order could be enforced only through a separate, formal enforcement action.[7] *Id.* at 127. The Court recognized that "the EPA's 'deliberation' over whether the [challengers] are in violation of the [Clean Water] Act is at an end; the [EPA] may still have to deliberate over whether it is confident enough about this conclusion to initiate litigation, but that is a separate subject." *Id.* at 129. This pragmatic understanding of finality pre-dates the APA. *See Colum. Broad. Sys. v. United States*, 316 U.S. 407, 417-18 (1942) (A final order "does not cease to be so merely because it is not certain whether the Commission will institute proceedings to enforce the penalty incurred under its regulations for non-compliance.") (citation omitted). Thus, contrary to the Fourth Circuit's rea-

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[6] *See Sackett v. EPA*, No. 2:08-cv-185-EJL (D. Idaho), Compl. Attachment A, ECF 1-2.

[7] EPA may seek enforcement through administrative or judicial actions. 33 U.S.C. § 1319(b), (g).

soning, the availability of formal enforcement—administrative or judicial—does not make final agency action non-final.

Similarly, in *Hawkes*, mining companies sought review of a "jurisdictional determination"—a U.S. Army Corps of Engineers decision issued to property owners as to whether a particular property contains "waters of the United States" subject to the Clean Water Act. 578 U.S. at 593. While the government conceded that the jurisdictional determination satisfied the first *Bennett* condition, the Court's analysis of the second condition is instructive. Again, the Court rejected the government's argument that agency action—the jurisdictional determination—was not final merely because it didn't trigger enforcement proceedings. *Id.* at 599-600; *compare* App. 9a (Fourth Circuit's relying on the fact that Notices "do[ ] not trigger any of the administrative, civil, or criminal proceedings that the Commission could pursue").

The Court in *Hawkes* relied in part on *Frozen Food Express v. United States*, 351 U.S. 40 (1956), which involved an ICC order that "had no authority except to give notice of how the Commission interpreted the relevant statute, and would have effect only if and when a particular action was brought against a particular carrier." *Hawkes*, 578 U.S. at 599-600 (cleaned up). Emphasizing the "pragmatic approach [it had] long taken to finality," the Court "held that the [ICC] order was nonetheless immediately reviewable." *Ibid.* Like the Notices' effect on Jake's here, the order in *Frozen Food* "warn[ed] every carrier, who does not have authority from the Commission to transport those commodities, that it does so at the risk of incurring criminal penalties." 351 U.S. at 44.

Finally, the Court in *Hawkes* recognized that "the Clean Water Act makes no reference to standalone jurisdictional determinations, so there is little basis for inferring anything from it concerning the reviewability of such distinct final agency action." 578 U.S. at 601 (cleaned up). The "mere fact that [future, hypothetical enforcement] decisions are reviewable should not suffice to support an implication of exclusion as to other agency actions . . . ." *Id.* at 602 (cleaned up).

B. Other circuit courts follow this Court's jurisprudence and likewise reject the Fourth Circuit's conflation of finality with formal enforcement

1. Because the D.C. Circuit adheres to this Court's final-agency-action holdings, it routinely concludes that even guidance documents from lower-level staff constitute reviewable final agency action.

In *Ipsen Biopharms. v. Azar*, 943 F.3d 953, 954, 959 (D.C. Cir. 2019), the court held that a "series of letters" from the Centers for Medicare and Medicaid Services (CMS) constituted final agency action. These letters designated pricing information that Ipsen was required to report to CMS. *Id.* at 954. The court agreed that Ipsen's receipt of the letters "significantly increased its risk of a statutory civil penalty being levied for 'knowingly provid[ing] false information,'" *ibid.* (quoting 42 U.S.C. § 1396r-8(b)(3)(C)(ii)), despite CMS's argument—like the Commission's—that the letters were merely "relevant evidence" that did not result in legal consequences because no regulation announces that actions contrary to the agency's position will be deemed willful, *id.* at 958. Further, like Jake's here, Ipsen had "no further agency action . . . to invoke or to exhaust to plead its cause." *Ibid.* The regulatory

scheme left Ipsen "in a quandary: Either accept CMS's interpretation to avert civil penalties . . . or proceed in defiance of that risk, with penalties growing each quarter." *Id.* at 959. Finally, again as here, CMS's letters "expressly applied [its] interpretation of the governing law to the specific facts of Ipsen's case." *Ibid.* As such, "the agency action at issue here closely resembles an individual adjudication, which is a well-recognized form of final agency action." *Ibid.*

Similarly, in *Rhea Lana, Inc. v. Dep't of Labor*, 824 F.3d 1023 (D.C. Cir. 2016), the court held that the Department of Labor had reached final agency action when a district director of the Department's Wage and Hour Division advised Rhea Lana by letter that the Division considered Rhea Lana's volunteer workers to be employees under the Fair Labor Standards Act (FLSA) and entitled to wages. *Id.* at 1025-26. The district director's letter stated that no penalty was being imposed then but that Rhea Lana "will be subject to . . . penalties" "[i]f at any time in the future [it] is found to have violated the monetary provisions of the FLSA." *Id.* at 1026. Under the relevant statutory scheme, the Labor Secretary could have issued an administrative determination, giving a responding party 15 days to object, after which a hearing would have been held. 29 U.S.C. § 216. But Rhea Lana sued under the APA to challenge the determination that its volunteers were employees. The district court granted the Department's motion to dismiss on the basis that there was no final agency action. *Id.* The D.C. Circuit reversed. While it found that the letter created no legal obligations beyond those already imposed under the FLSA, it nevertheless concluded "that legal consequences flow[ed] from the [l]etter because it ma[de]

Rhea Lana eligible for civil penalties in any future enforcement action." *Id.* at 1028.

This approach is long-standing in the D.C. Circuit. In *Her Majesty the Queen in Right of Ontario v. EPA*, the court considered letters from EPA's Acting Assistant Administrator for Air and Radiation. 912 F.2d 1525, 1531-32 (D.C. Cir. 1990). EPA argued that the letters were not final agency action because, among other things, the letters included a disclaimer by the Acting Assistant Administrator, who wrote that the response "represent[ed] only my thoughts on this issue, and does not necessarily reflect the position of the [EPA] Administrator." *Id.* at 1530. But the court held that the letters were final agency action. The court explained that "agency inaction may represent effectively final agency action that the agency has not frankly acknowledged." *Id.* at 1531 (citation omitted).[8] Therefore, the "absence of a formal statement of the agency's position . . . is not dispositive" because an agency "may not, for example, avoid judicial review 'merely by choosing the form of a letter to express its definitive position on a general question of statutory interpretation.'" *Ibid.* (quoting *Ciba–Geigy Corp. v. EPA*, 801 F.2d 430, 438 n.9 (D.C. Cir. 1986)). The court observed that the Acting Assistant Administrator was obviously speaking for EPA, that he was the "principal advisor to the Administrator in matters pertaining to air and radiation programs," and there

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[8] *See also Nat'l Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689, 698 (D.C. Cir. 1971) ("The issue of finality is . . . determined not by the name assigned by the agency to its action but in a pragmatic way. The Court has found final action in a wide array of pronouncements and communications having the contemplation and likely consequence of expected conformity.") (cleaned up).

was "no reason to question his authority to speak for the EPA." *Id.* at 1532 (citations omitted). Finally, there was "nothing tentative" about EPA's interpretation of Section 115, and there was nothing new about EPA's view. *Ibid.* Therefore, although no decision was made on the Section 115 petitions, the Acting Assistant Administrator's letters did—like the Notices here, *see* above at 4-10—set forth a *definitive legal interpretation*.

Finally, in *Ciba-Geigy*, after EPA advised companies that labeling changes were required for a certain pesticide, Ciba-Geigy sought clarification from the Director of EPA's Office of Pesticide Programs. 801 F.2d at 432-33. Ciba-Geigy maintained that EPA could not require labeling changes without going through the process set forth in the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). *Id.* at 433. The Director responded that "the Agency does not agree with your interpretation" of FIFRA. *Ibid.* Ciba-Geigy then sued in federal court. *Ibid.* The D.C. Circuit held that the Director's response was final agency action under the pragmatic "balancing" of the *Bennett* factors. *Id.* at 434. Ciba-Geigy's complaint raised only a "pure legal question as to what procedures EPA was obliged to follow before requiring a labeling change. That narrow legal question [was] entirely independent of and separable from the largely factual question whether [the pesticide] poses a substantial danger . . . ." *Id.* at 435. The court had "no reason to believe that the EPA Director of Pesticide Programs lack[ed] authority to speak for EPA on this issue or that his statement of the agency's position was 'only the ruling of a subordinate official' that could be appealed to a higher level of EPA's hierarchy." *Id.* at 437 (quoting *Abbott Labs.*, 387 U.S. at 151). Once again, APA review was allowed

despite the agency's authority to pursue administrative enforcement (7 U.S.C. § 1361).

2. The Ninth Circuit, too, splits from the Fourth Circuit's overly formal test. In *San Francisco Herring Association v. Department of the Interior*, for example, the court held that final agency action was reached after a series of formal written notices—in which the National Park Service asserted authority over commercial herring fishing in certain waters, stated that this fishing was prohibited under federal law, and warned that violations could lead to civil penalties and jail—and in-person warnings to fishermen by park officials and California wildlife wardens. 946 F.3d 564, 567-68 (9th Cir. 2019). The fishermen understood that by ignoring the government officials and continuing to fish, they risked criminal prosecution. *Id.* at 572-73.

After the fishermen sued, the Service claimed that no final decisions had been made because the Service had merely restated what already existed in statutes, regulations, and rulings. *Id.* at 577. The court rejected that argument: "ordering fishermen not to fish on pain of fines and imprisonment—backed by formal agency notices clearing up the 'reported confusion over the jurisdiction of the [Service]' in the [waters at issue]—is not analogous to a mere 'restatement' of the law." *Ibid.* Further, applying this Court's "pragmatic" approach, the court held that the government's actions did constitute the consummation of its decisionmaking authority. *Id.* at 578. The government had, for years, "definitively assert[ed] federal jurisdiction" over the waters in question and exposed commercial fishermen to civil penalties and jail; this was followed by orders from subordinate government officials

to stop fishing or risk civil and criminal penalties. *Ibid.*

Thus, the Service had "arrived at a definitive position," namely, that "it had jurisdiction over [certain] waters . . . and the fishermen . . . were violating federal law by fishing there." *Ibid.* (citation omitted). The court relied on an earlier decision, which likewise relied on this Court's decisions in *Bennett*, *Sackett*, and *Hawkes*: "[a]s to the first *Bennett* requirement, an agency's determination of its jurisdiction is the consummation of agency decisionmaking regarding that issue." *S.F. Herring*, 946 F.3d at 578 (quoting *Navajo Nation v. Dep't of Interior*, 819 F.3d 1084, 1091 (9th Cir. 2016); citing *Hawkes*, 578 U.S. at 598 (citing *Sackett*, 566 U.S. at 131 (Ginsburg, J., concurring))).

Like the Commission and its determination that the Audible Effects Regulation applies to Jake's products, the Service did "not suggest it is still in the middle of trying to figure out its position on whether it ha[d] jurisdiction." *Ibid.* And the fishermen, like Jake's, had no entitlement to further agency review. *Id.* at 579. Finally, the court explained, "a central rationale of the final agency action requirement is to prevent premature intrusion into the agency's deliberations; it is not to require regulated parties to keep knocking at the agency's door when the agency has already made its position clear." *Ibid.*

C. The Fourth Circuit's straightjacket reliance on the availability of formal enforcement clashes with this Court's and other circuit courts' approach

1. Unlike this Court and other circuit courts, the Fourth Circuit eschews a pragmatic consideration of the facts and focuses solely on the agency's authority

to initiate a formal enforcement action. As noted above, this overly formalistic approach conflated finality with enforcement here: "the Notices from the Compliance Office hardly constitute the culmination of the Commission's decisionmaking process [because] . . . a Notice of Noncompliance does not trigger any of the administrative, civil, or criminal proceedings that the Commission could pursue." App. 9a.

But, as demonstrated above, the availability of formal enforcement does not render final action non-final. The Fourth Circuit ignored this precedent emphasizing a pragmatic inquiry and the presumption of judicial review; it instead fixated on the Commission's regulatory scheme, even deferring to the Commission's interpretation of it. App. 8a-10a. *Cf.* Beau J. Baumann, Greg Mina, *Clowning Around with Final Agency Action*, 28 Cornell J.L. & Pub. Pol'y 329, 331, 350 (2018) (noting "the emerging formalism of the lower federal courts with respect to . . . the final agency action requirement" and recognizing that "the Fourth and Sixth Circuits have adopted formalistic tests for final agency action despite the Court's repeated calls for pragmatism").

Further, the Fourth Circuit's focus on the Commission's statutory authority to initiate formal enforcement blinded the court to the Commission's own structure in the finality analysis. *See* 16 C.F.R. § 1000.21 (providing that the Compliance Office, *inter alia*, "conducts compliance and administrative enforcement activities under all administered acts"); Handbook, Ex. B, ECF 1-2, at 7 (explaining "how CPSC enforces its statutes" through compliance officials) (capitalization altered). The court referred to § 1000.21 as a "housekeeping regulation." App. 10a.

But the APA itself compels the Commission to issue § 1000.21 (*see* 71 Fed. Reg. 5165 (Feb. 1, 2006)) by requiring agencies to inform the public of "the employees . . . from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions." 5 U.S.C. § 552(a)(1)(A). The APA then gives the public a mechanism to challenge those decisions, which is what Jake's has tried for years to do here. *Id.* § 704. To sweep away the Commission's APA-required rule as nugatory "housekeeping," when that information is intended to help parties like Jake's navigate agency interactions, adds insult to injury for Americans trying to comply with the "vast and varied federal bureaucracy and the authority administrative agencies now hold over our economic, social, and political activities." *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting) (cleaned up); *cf. Almendarez-Torres v. United States*, 523 U.S. 224, 266 n.6 (1998) (Scalia, J., dissenting) (observing that the majority opinion "offer[ed] no support for [its] confident characterization" of a statute as a "housekeeping measure").

Thus, the Commission's own rules and Handbook confirm what this Court has long held: agencies may issue final, reviewable decisions short of formal enforcement actions.

2. The Fourth Circuit's overly formalistic test leads to absurd results—as this case demonstrates. Because the Fourth Circuit considered only the Commission's authority to initiate a formal enforcement action (or refer a matter to the Justice Department for civil or criminal enforcement), the court ignored all the indicia of finality that confirm finality here:

- The agency actions—in particular, the Commission's interpretation of its regulations—are documented in writing (the Notices and the follow-up letters from the Compliance Office Director) on official agency letterhead.
- The Notices assert the Commission's consistent interpretation of its regulations. If any question remained, the Commission has argued in federal court its determination that the Audible Effects Regulation applies to the fireworks at issue here. *See Shelton*, 34 F. Supp. 2d at 1158.
- The Notices apply the Commission's interpretation of the law to specific facts and reach definitive determinations.[9]
- The Commission used definitive and mandatory language with respect to those determinations.[10]

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[9] *See Ipsen Biopharms.*, 943 F.3d at 959 (finding final agency action when agency letters "expressly applied [the agency's] interpretation of the governing law to the specific facts of Ipsen's case").

[10] *See Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000) (holding that EPA "guidance" document was final agency action notwithstanding agency disclaimers in part because "[i]t commands, it requires, it orders, it dictates").

The relevant interpretations in the CPSC Notices here can be contrasted with *separate* and explicitly preliminary decisions in the same Notices. *Compare* Ex. E, ECF 1-5 (Aug. 19, 2014 Notice of Non-Compliance) at 1 and 3 (The "sampled lot is a banned hazardous substance" and "**must be destroyed** . . . ."), *with id.* at 3 (stating that the CPSA "gives the CPSC staff authority to *preliminarily* determine if a substantial product hazard exists" under that Act) (italicized emphasis added).

- The determinations were not labeled or characterized as advisory, preliminary, or interim.[11]
- The Commission's action was an affirmative choice; it was not solicited.[12]
- The regulated party subject to agency action has pursued all possible avenues for administrative reconsideration of (a) the legal interpretations asserted in the Notices and (b) the agency's application of its interpretations.[13]
- The Commission affirmed that it was not (and is not) in the process of reconsidering, nor will it do so before it makes a separate decision to enforce, which it admits, in briefing and at oral argument below, may never occur.
- Another government agency treats the Notices as definitive. Here, the Compliance Office retested some samples of Jake's products and found that they complied with the Audible Effects Regulation. As a result, upon the Compliance Office's instruction, U.S. Customs and Border Protection released those samples. Ex. I, ECF 1-9, at 1.

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[11] *See Sackett*, 566 U.S. at 128-29.

[12] *See Hawkes*, 578 U.S. at 602 (rejecting a "count your blessings" argument as an "[in]adequate rejoinder to the assertion of a right to judicial review under the APA").

[13] *See Bellion Spirits, LLC v. United States*, 7 F.4th 1201, 1208-09 (D.C. Cir. 2021) (taking into consideration that advisory letter did not provide any other avenue for plaintiff to affirmatively seek relief).

II. The Question Presented Is Important

A. Agency manipulation of finality to achieve "voluntary" compliance while avoiding pre-enforcement review will diminish both the APA's promise and this Court's presumption of review

If an agency's indefinite postponement of *formal* "finality" renders all other agency action non-final, numerous regulatory agencies will be able to subvert the APA's judicial-review mechanism. *See* Stephen Hylas, *Final Agency Action in the Administrative Procedure Act*, 92 N.Y.U. L. Rev. 1644, 1666 (2017) ("[T]he finality requirement creates incentives for agencies to strategically abuse the prongs of the *Bennett* test to avoid judicial review."); *Sackett*, 566 U.S. at 131 (rejecting agency argument that would "enable the strong-arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review"); *cf. City of Arlington*, 569 U.S. at 315 (Roberts, C.J., dissenting) ("It would be a bit much to describe the result as 'the very definition of tyranny,' but the danger posed by the growing power of the administrative state cannot be dismissed.").

Agencies already have enormous power to obtain voluntary compliance with their statutory and regulatory interpretations due to the expense and risk of litigation. If, as the Fourth Circuit reads the APA, agencies are also permitted to collapse otherwise final agency action with an agency's decision to formally enforce its determinations, regulated parties will be denied pre-enforcement review in even more situations. And all but the largest and deep-pocketed regulated parties will be forced to "voluntarily" comply.

The Commission has not been reluctant to press this advantage. Despite sending numerous Notices of Non-Compliance to Jake's, all of which reflected consistent interpretations of Commission regulations and threatened civil and criminal penalties, when asked during oral argument whether the Commission itself would ever formally make those determinations through administrative or judicial enforcement, the Commission's attorney replied: "It may or it may not." App. 68a (Tr. 18:3-11).[14]

This evasion-of-finality practice is nothing new for the Commission. In *Doe v. Tenenbaum*, the court observed that the Commission's "repeated use of the words 'may' and 'could' demonstrate that it has no serious design on taking future action in connection with [its] report." 127 F. Supp. 3d 426, 465 (D. Md. 2012). "Indeed, during oral argument, the Court expressed concern that the Commission's decision 'could never be final' and the Commission conceded that '[t]hat may be.'" *Id.*

The Fourth Circuit's position thus denies regulated parties their statutory right of review by trapping them in limbo through agency-manipulable processes. *Cf.* Baumann & Mina, *Clowning Around with Final*

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[14] Unsophisticated parties who have not parsed the relevant agency's delegations manual or organization chart (if such documents even exist and are made public) will reasonably assume that a "Notice of Non-Compliance," or any other similarly formal warning of unlawful conduct, *is* the agency's final decision. A judge on the panel below acknowledged the obvious effect of the Notices' mandatory language. App. 68a (Tr. 23:12-18) ("[W]ith respect to the orders of destruction, 'You are hereby ordered to destroy these fireworks within 90 days.' I mean, that's pretty definitive. And so Jake's has one option, or two options, either do it or not, in which case they violated an order of the—of the agency.").

Agency Action, 28 Cornell J.L. & Pub. Pol'y at 361 ("It is not difficult to imagine that the Fourth and Sixth Circuits' approach [to final agency action] could be used to game federal jurisdiction."). The Fourth Circuit's deference to agencies on finality will undercut pre-enforcement APA review, giving the government a trump card—through manipulation of its own decisionmaking process—to employ at will.

None of this gamesmanship comports with the Court's precedent. In *Free Enterprise Fund v. PCAOB*, the Court stated that it "normally do[es] not require plaintiffs to 'bet the farm . . . by taking the violative action' before 'testing the validity of the law'" to obtain their day in court. 561 U.S. 477, 490 (2010); *see also MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29 (2007) ("[W]here threatened action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat."). But that's precisely what the government says Jake's must do here. *See, e.g.*, Br. for Appellees (Doc. 19) at 34 ("If Jake's believes that the Compliance Office's legal conclusions are indefensible, nothing prevents Jake's from ignoring the notices and selling the shipments.").

Neither the APA nor this Court's precedents require Jake's to "assume [the risk] while waiting for [the Commission] to 'drop the hammer' in order to have [its] day in court." *Hawkes*, 578 U.S. at 600. To the contrary, the APA's promise of judicial review alleviates this dilemma for regulated parties, and *Bennett*'s distillation of "two conditions that generally must be satisfied" should not be construed to give agencies a roadmap for accomplishing their regulatory goals while postponing—or entirely evading—judicial review. 578 U.S. at 597.

B. Following the APA and requiring review for final agency action short of formal enforcement decisions has not opened the litigation floodgates

Contrary to the government's repeated assertion (given credence by the Fourth Circuit) that finality here would chill informal agency communication with regulated parties, judicial review of final agency actions short of formal enforcement would not change existing practice. That is because the many indicia of finality, combined with standing doctrine and the second part of the *Bennett* analysis, would continue to properly cabin reviewable action to that which is functionally final. Genuinely informal staff advice—no doubt helpful to regulated parties attempting to comply with the web of federal regulations—would be unaffected.

Further, this Court has already responded to the government's (and the Fourth Circuit's) arguments concerning speculative disincentivizing effects on less-formal communication. In *Sackett*, the government warned that EPA would be "less likely to use the [voluntary compliance] orders if they are subject to judicial review." 566 U.S. at 130. But the Court found no reason to think that the Clean Water Act was "uniquely designed to enable the strong-arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review." *Id.* at 130-31. "The APA's presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all." *Id.* at 130. The same is true for statutes administered by the Commission.

Finally, while regulated entities no doubt benefit from communication with regulators and even, perhaps, from unsolicited warnings, it beggars belief that the legal limbo resulting from the issuance of such warning letters, coupled with an agency's unilateral power to deny further review, is a legitimate government objective that this Court should countenance. Indeed, in response to similar arguments from the government about the purported benefits of such agency action, the Court rightly recognized that "such a 'count your blessings' argument is not an adequate rejoinder to the assertion of a right to judicial review under the APA." *Hawkes*, 578 U.S. at 602; *see also Sackett*, 566 U.S. at 131 ("Compliance orders will remain an effective means of securing prompt voluntary compliance in those many cases where there is no substantial basis to question their validity.").

III. This Case Is an Excellent Vehicle

This case comes to the Court on the assumption that there was agency action. *See* App. 31a (assuming Notices were agency actions). And because the Fourth Circuit held only that the Notices and follow-up communications did not consummate the agency's decisionmaking process, App. 14a n.4, this Court can also assume, for purposes of analyzing the question presented here, that legal consequences—potential for civil and criminal sanctions—flow from the agency action, satisfying the second *Bennett* prong.[15] The question before the Court is thus cleanly presented.

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[15] This Court's consideration of the question presented is also narrowed by the determinations in the Notices that Petitioner is *not* challenging. Specifically, Jake's has not challenged here the determinations that its products are subject to the FHSA or the

Further, the Fourth Circuit's analysis is egregiously wrong and cannot be squared with this Court's analysis of APA finality. *See, e.g.*, *Sackett*, 566 U.S. at 129-31; *Hawkes*, 578 U.S. at 597-602. The Fourth Circuit's approach flouts the central reasoning in these (and other) decisions and relies instead on a rigid test that allows agencies to forever postpone pre-enforcement judicial review by leaving open the possibility of formal enforcement. And the lower court's test plainly splits with the pragmatic approach applied by other courts of appeals that reviewed materially similar notices issued by agencies whose statutes allowed for formal enforcement actions. *See supra*, Part I.

Finally, the Fourth Circuit's formalistic approach requires Jake's and all regulated parties in the Fourth Circuit to either yield to "unreviewable" agency action or obtain review by inviting a formal enforcement action—and thereby risk civil and criminal penalties based on the Notices themselves. This "option" denies regulated parties their right to judicial review, and is contrary to the APA, precedent, fairness, and logic. This Court should grant the petition, reverse the Fourth Circuit's opinion, and confirm that a legal and factual determination by an agency is reviewable even though the agency has reserved its decision to enforce that determination.

CPSA; that the Commission has the authority to collect and test samples of imported fireworks; that a certificate of conformity is required for products entered into commerce; that other Commission regulations apply to Jake's products; or that the Commission may promulgate a notice-and-comment regulation to adopt the interpretation of the Audible Effects Regulation set forth in the Notices.

CONCLUSION

The petition for a writ of certiorari should be granted.

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