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Justices Won't Be Sounding Board on 'Final Agency Action'

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The justices on Monday declined to hear arguments in Soundboard Association v. Federal Trade Commission, a case that was on the watchlist of administrative law devotees and the business community because of its potential impact on all regulated industries and federal agencies.

Soundboard was appealing a decision by a divided panel of the U.S. Court of Appeals for the D.C. Circuit. The appellate court had dismissed the association's challenge to an FTC staff opinion letter that its technology delivered "robocalls" under the agency's Telemarketing Sales Rule.

For Soundboard, an association of companies that use soundboard technology to facilitate voice-assisted communication over the telephone, the staff opinion meant that its companies had two choices: shut down or risk "ruinous penalties," or invite an agency enforcement action that could result in "tens of millions of dollars" in civil penalties for violations, according to Soundboard's counsel, Karen Donnelly of Copilevitz & Canter in Kansas City, Missouri.

Donnelly asked the justices whether businesses have a right to immediate judicial review of an agency's "staff advisory opinion" which, in effect, creates a new rule and did not comply with the Administrative Procedure Act. The crux of the case centered on whether the opinion letter was "final agency action."

Donnelly argued the D.C. Circuit erroneously deferred "exclusively" to the agency's own characterization of its action rather than its effect on the Association.

But U.S. Solicitor General Noel Francisco, on behalf of the FTC, said high court review was not warranted.
The opinion letter, Francisco (at left) said, was not "final agency action" because it did not "mark the 'consummation' of the agency's decisionmaking process." The advisory opinion here was from the staff, Francisco said, and was not binding on the Commission.

The commission could rescind the staff advice for any reason and at any time, Francisco argued.

Soundboard drew amicus support from the U.S. Chamber of Commerce and the National Federation of Independent Business in a brief by Ruthanne Deutsch of Deutsch Hunt; the Cato

Institute and Southeastern Legal Foundation in a brief by Cato's Ilya Shapiro, and the Professional Association for Customer Engagement in a brief by Michele Shuster of MacMurray & Shuster in New Albany, Ohio.

Soon after the D.C. Circuit decision was announced, one of those administrative law devotees, Jonathan Adler of Case Western Reserve University School of Law, wrote on the Volokh blog that until the Supreme Court clarifies what is "final agency action" under the Administrative Procedure Act, "I would not be surprised for [this case] to become a staple of Administrative Law syllabi in the near future. I know I will include it on mine."

George Conway Returns to SCOTUS

Among the lawyers attentively watching the argument in Iancu v. Brunetti on Monday was George Conway III, of counsel at Wachtell, Lipton, Rosen & Katz.

But Conway (above), the Trump critic who is married to Kellyanne Conway, one of Trump's closest advisers, was not just there to hear how lawyers and justices managed to avoid uttering the word "FUCT," the name of a clothing company at the center of the trademark case.

Instead, Conway was waiting for the second argument Monday in the securities fraud case Emulex v. Varjabedian. Conway authored an amicus brief for the U.S. Chamber of Commerce in the case, an important test of whether and how a private plaintiff can sue companies claiming violation of Section 14(e) of the Securities Exchange Act of 1934.

"By holding that private claims under Section 14(e) may be pleaded and proven by meeting only a negligence standard instead of a scienter standard, the decision below threatens to increase the litigation burdens faced by the Chamber's members," wrote Conway, a securities expert.

Conway argued and won a Supreme Court case 10 years ago: Morrison v. National Australia Bank, which limited the extraterritorial reach of U.S. security laws.