No. 24-693

In the Supreme Court of the United States

JAKE'S FIREWORKS, INC., PETITIONER

v.

CONSUMER PRODUCT SAFETY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

SARAH M. HARRIS
Acting Solicitor General
Counsel of Record
YAAKOV M. ROTH
Acting Assistant Attorney General
DANIEL TENNY
CYNTHIA A. BARMORE
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether notices from the Compliance Office of the Consumer Product Safety Commission, which advised petitioner that certain shipments of fireworks were dangerously overloaded with explosive material and requested voluntary corrective action, constitute final agency action.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and regulations:

Regulations—Continued: Page

In the Supreme Court of the United States

No. 24-693

JAKE'S FIREWORKS, INC., PETITIONER

v.

CONSUMER PRODUCT SAFETY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-14a) is reported at 105 F.4th 627. The opinion of the district court (Pet. App. 16a-39a) is not published in the Federal Supplement but is available at 2023 WL 3058845. The memorandum and order of the district court in a previous suit filed by petitioner (Pet. App. 40a-65a) is reported at 498 F. Supp. 3d 792.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 2024. A petition for rehearing was denied on August 26, 2024 (Pet. App. 1a). On November 1, 2024, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 24, 2024, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT

1. The Consumer Product Safety Commission (Commission) administers numerous statutes related to consumer safety. The Commission regulates consumer fireworks under the Federal Hazardous Substances Act, 15 U.S.C. 1261 *et seq.*, and the Consumer Product Safety Act, 15 U.S.C. 2051 *et seq.* See 16 C.F.R. Pt. 1507. Under those authorities, the Commission prohibits fireworks from being sold in interstate commerce when, among other things, the fireworks are "banned hazardous substance[s]." 15 U.S.C. 1261(q)(1)(B); see 15 U.S.C. 1263(a), 2068(a)(1) and (2)(D).

The Commission has designated several types of fireworks as banned hazardous substances on the ground that they seriously threaten public health and safety. For example, the Commission has banned all reloadable tube aerial shell fireworks with shells larger than 1.75 inches in diameter. 16 C.F.R. 1500.17(a)(11); see 56 Fed. Reg. 37,831 (Aug. 9, 1991). The Commission has also generally banned fireworks (such as cherry bombs) that are "intended to produce audible effects" if the effect "is produced by a charge of more than 2 grains of pyrotechnic composition." 16 C.F.R. 1500.17(a)(3). Such fireworks are "dangerously explosive" and have caused fatalities and serious injuries in adults and children. 35 Fed. Reg. 7415, 7415 (May 13, 1970).

The Commission is composed of up to five Commissioners appointed by the President and confirmed by the Senate. 15 U.S.C. 2053(a). The Commission is authorized to bring administrative enforcement actions to enforce the statutory prohibitions on banned hazardous substances. 15 U.S.C. 1274(a) and (b), 2064(c) and (d). The Commission must vote to issue an administrative complaint. 16 C.F.R. 1025.11(a). The Commission is

also authorized to refer matters to the Department of Justice (DOJ) for civil or criminal enforcement in court; if DOJ declines to pursue a civil action, the Commission may proceed in its own name, but it cannot commence criminal enforcement without the Attorney General's concurrence. 15 U.S.C. 1264, 1265, 1267, 2069-2071, 2076(b)(7). Before entering an administrative order or referring a matter to DOJ for civil or criminal enforcement, the Commission typically provides the regulated entity with notice and an opportunity to be heard or an opportunity to submit contrary argument and evidence. 15 U.S.C. 1266, 1274(e), 2064(f); 16 C.F.R. 1119.5.

Certain subordinate entities support the Commission in its exercise of these responsibilities. As relevant here, "[t]he staff of the Commission includes the Office of Compliance and Field Operations ('Compliance Office'), which aids in investigatory and enforcement matters and provides guidance to industry on complying with product safety rules." Pet. App. 4a; see 16 C.F.R. 1000.21. As part of those duties, Compliance Office field staff regularly sample and test products to determine whether they comport with legal requirements. 16 C.F.R. 1000.21. In connection with those field tests, the Compliance Office will issue notices of noncompliance to inform regulated entities of suspected violations and request voluntary corrective action. Pet. App. 9a. If a party disregards a notice of noncompliance, Compliance Office staff "may request the Commission approve appropriate legal proceedings." *Ibid.* (quoting Office of Compliance & Field Operations, U.S. Consumer Prod. Safety Comm'n, *The Regulated Products Handbook* 19 (May 6, 2013) (*Handbook*)) (emphasis omitted).

If the Compliance Office recommends that the Commission take enforcement action, the Commission will

consult with the Office of the General Counsel, which advises the Commission on both administrative and judicial actions. 16 C.F.R. 1000.14. The Office of the General Counsel will conduct its own review and make a recommendation to the Commission regarding potential legal violations. *Ibid.*

2. Petitioner is a large importer and distributor of consumer fireworks. Pet. App. 4a. As relevant here, petitioner imports reloadable shells that are manufactured in China and are small enough not to be subject to the categorical ban on large reloadable shells. Gov't C.A. Br. 6, 10.

On several occasions between 2014 and 2018, the Commission's laboratory staff tested samples of petitioner's fireworks shipments for compliance with federal law. Several samples failed those tests. About one-third of tested samples "indicated that the fireworks were dangerously overloaded with explosive material, rendering them 'banned hazardous substances' under the agency's regulations." Pet. App. 4a. For example, the average amount of explosive material in some samples was between 50 and 72 times the legal limit set out in 16 C.F.R. 1500.17(a)(3). C.A. App. 108.

Based on those test results, the Compliance Office sent petitioner several notices of noncompliance. Pet. App. 4a, 17a-18a; see, *e.g.*, C.A. App. 164-167. The notices informed petitioner of the test results indicating that the fireworks were banned hazardous substances. Pet. App. 4a. The notices additionally "request[ed]" that petitioner destroy the shipments and warned of potential legal action if petitioner sold the fireworks to the public. *Ibid.* (citation omitted); see, *e.g.*, C.A. App. 165 (notice stating that "the staff requests that the distribution of the

sampled lots not take place and that the existing inventory be destroyed") (emphasis omitted).

In 2017, petitioner sought further review from the Compliance Office, but staff members adhered to their initial views. Pet. App. 18a. The Compliance Office has not sent petitioner a similar notice of noncompliance since April 2019. *Id.* at 18a-19a. To date, the Commission has not taken any action with respect to the fireworks shipments in question. "As a result of the Notices, [petitioner] asserts that it has not sold the [fireworks shipments], which has caused it significant financial harm." *Id.* at 19a.

3. In 2019, petitioner filed suit in federal district court challenging the noncompliance notices under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, 701 *et seq.* The district court held that the notices did not "mark the consummation of the agency's decision-making process," Pet. App. 54a (citation omitted); see *id.* at 58a, and thus were not final agency action subject to judicial review under the APA, *id.* at 64a. The court noted that petitioner had not exhausted all avenues for agency review and that the Compliance Office "lacks the independent authority to initiate enforcement." *Id.* at 58a; see *id.* at 57a-64a.

In 2021, after pursuing avenues for review within the Compliance Office, petitioner filed a second complaint in federal district court. Pet. App. 6a, 32a. The district court again dismissed the suit for lack of final agency action on the ground that the notices do not mark the "consummation of the Commission's decision-making process." *Id.* at 31a (citation omitted). "At this point," the court observed, "all that has occurred is that the [Compliance Office] staff has requested voluntary compliance." *Id.* at 33a. The court again emphasized that

the Compliance Office cannot itself pursue either administrative or judicial enforcement. *Id.* at 34a, 36a.

4. The court of appeals affirmed. Pet. App. 3a-14a. Applying the two-prong test for final agency action set forth in *Bennett* v. *Spear*, 520 U.S. 154 (1997), see Pet. App. 7a, the court of appeals agreed with the district court that the noncompliance notices "are not final" under the first prong of that test because the notices "do not 'mark the consummation of the agency's decisionmaking process,'" *id.* at 8a (citation omitted).

The court of appeals explained that "[i]t is the Commission itself, not its Compliance Office, that makes final determinations on whether goods are banned hazardous substances under the Federal Hazardous Substances Act and the Consumer Product Safety Act." Pet. App. 8a; see *id.* at 9a. The court observed that "[o]nly the Commission itself may vote to authorize an administrative complaint seeking to compel a firm to take corrective action," and that "[o]nly the Commission itself may refer matters to the Department of Justice for potential civil or criminal enforcement." *Id.* at 8a. The court further noted that, while "the Commission *could* delegate this authority" to issue final determinations on behalf of the Commission "to its staff," see 15 U.S.C. 2076(b)(10), the Commission "has not done so." Pet. App. 10a (citing and discussing 16 C.F.R. 1000.21). The court accordingly concluded that the noncompliance notices merely "represent the conclusions and advice of agency staff" and are not a "final and binding determination" regarding petitioner's liability or obligations. *Id.* at 9a (citation omitted).

ARGUMENT

Petitioner contends (Pet. 12-31) that the notices it received from the Commission's Compliance Office are fi-

nal agency action subject to judicial review under the APA. That argument lacks merit. The notices at issue do not mark the consummation of the process by which the Commission decides whether a product is a banned hazardous substance and whether to pursue an enforcement action. And the court of appeals' fact-bound application of this Court's established precedent does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. a. The court of appeals correctly articulated the governing legal standard under longstanding precedent of this Court. The APA permits judicial review "of only 'final agency action[s].'" Pet. App. 6a (quoting 5 U.S.C. 704) (brackets in original). "An agency action must satisfy two conditions in order to be deemed 'final' under the APA: First, 'the action must mark the *consummation* of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.'" *Id.* at 7a (quoting *United States Army Corps of Eng'rs* v. *Hawkes Co.*, 578 U.S. 590, 597 (2016)). "An action must meet both prongs" of this test, as set forth in *Bennett* v. *Spear*, 520 U.S. 154, 177-178 (1997), "to be final." Pet. App. 7a.

With respect to the first prong, the court of appeals observed that "[a]n action that is 'informal, or only the ruling of a subordinate official, or tentative' ordinarily does not conclude an agency's decisionmaking process." Pet. App. 7a (quoting *Soundboard Ass'n* v. *FTC*, 888 F.3d 1261, 1267 (D.C. Cir. 2018), cert. denied, 587 U.S. 937 (2019)); see *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 151 (1967) (same). The court further recognized that "the statutes and regulations that govern the agency ac-

tion at issue" in a particular case are "'key to determining whether an action is properly attributable to the agency itself and represents the culmination of that agency's consideration of an issue.'" Pet. App. 7a (quoting *Soundboard*, 888 F.3d at 1267).

The court of appeals correctly applied those standards to the facts of this case in holding that the notices from the Commission's Compliance Office "do not 'mark the consummation of the agency's decisionmaking process.'" Pet. App. 8a (citation omitted). The court recognized that, under the statutes and regulations that govern the Commission, "the power to make a final determination as to whether a violation has occurred and whether to pursue enforcement rests with the Commission itself." *Id.* at 9a. Thus, "[o]nly the Commission" may authorize an administrative complaint seeking to compel corrective action or refer matters to the Department of Justice, and the Commission takes those steps "in consultation with the Office of the General Counsel." *Id.* at 8a.

In contrast, the court of appeals explained, the Compliance Office fulfills a role that is "subordinate, investigatory, and advisory to the Commission." Pet. App. 8a. Notices of noncompliance "represent the conclusions and advice of agency staff, not of the Commission itself." *Id.* at 9a. The Compliance Office "'*may request*'" that the Commission pursue an enforcement action if a party ignores a notice of noncompliance, but no "statute, regulation, or Handbook language require[s] the Commission to follow the recommendation of its Compliance Office." *Ibid.* (quoting *Handbook* 19). "A Notice of Noncompliance thus constitutes 'the ruling of a subordinate official' which, at most, functions 'more like a tentative recommendation than a final and binding de-

termination.'" *Ibid.* (quoting *Dalton* v. *Specter*, 511 U.S. 462, 469-470 (1994)).

The court of appeals also correctly concluded that the notices at issue "fit squarely within the Compliance Office's advisory and investigatory functions." Pet. App. 8a-9a. A notice of noncompliance "informs the firm of the specific product and violation that has occurred; requests that the firm take specific corrective actions[;] . . . and informs the firm of legal actions available to the Commission." *Id.* at 9a (quoting *Handbook* 5) (brackets in original). And in this case, "the language of the Notices confirms that they convey preliminary findings and advice from agency staff rather than a final determination from the Commission itself." *Id.* at 11a. The notices state "that '*the staff requests*' that [petitioner] destroy the products," but they do not "command any action." *Ibid.* The court therefore correctly concluded that the notices "simply do not represent the Commission's last word on this matter" and instead "merely provide preliminary findings and warnings by agency staff." *Id.* at 13a.

b. Petitioner's contrary argument is premised on a misunderstanding of the court of appeals' rationale. The court did not hold that "only formal enforcement decisions are final agency actions under the APA." Pet. 12 (capitalization omitted). Nor did the court hold that an agency's "authority to initiate a formal enforcement action" is dispositive. Pet. 11.

Instead, the decision below rested on the Compliance Office's lack of authority to finally determine on behalf of the agency *either* that a violation had occurred *or* that an enforcement action should follow. See Pet. App. 8a ("It is the Commission itself, not its Compliance Office, that makes final determinations on *whether goods are*

banned hazardous substances.") (emphasis added); *id.* at 9a ("[T]he power to make a final determination *as to whether a violation has occurred* and *whether to pursue enforcement* rests with the Commission itself.") (emphases added). Only the Commission is authorized to make those determinations, and the Commission has not made either determination here. Rather, at this juncture, all that petitioner has received is advice from subordinate agency staff, expressing their nonbinding view that certain fireworks shipments violate applicable fireworks regulations and requesting voluntary action. See *id.* at 9a, 11a-12a.

Because petitioner misunderstands the rationale for the court of appeals' decision, petitioner's reliance (Pet. 10-11, 14) on this Court's decision in *Sackett* v. *EPA*, 566 U.S. 120 (2012), is misplaced. As the court of appeals recognized (Pet. App. 12a), the EPA in *Sackett* had issued a binding administrative compliance order under a statute that authorized the EPA to do so, thereby imposing on the plaintiffs a "legal obligation" to take certain actions. 566 U.S. at 126; see *id.* at 122. Although that order had not yet been enforced in court, it was not subject to further review within the agency. For that reason, EPA's "'deliberation' over whether the [plaintiffs] [we]re in violation of the Act [wa]s at an end," and the only remaining question for the agency was whether "to initiate litigation." *Id.* at 129. Here, in contrast, neither the Compliance Office nor the Commission has issued a final binding order, and the Compliance Office lacks authority to speak for the Commission regarding petitioner's legal obligations. See Pet. App. 12a (observing that "the Compliance Office lacks authority to

issue binding orders independently of the Commission and the process set forth in its governing framework").*

Petitioner's reliance (Pet. 15-16) on cases that involved formal and binding agency determinations is likewise misplaced. Those decisions "aris[e] from other regulatory contexts, each of which differs markedly from the one" here. Pet. App. 12a. For instance, *Hawkes*, *supra*, concerned a jurisdictional determination made by the Army Corps of Engineers. It was undisputed that the determination was the consummation of the agency's decisionmaking process, given that "the Army Corps's own regulations deemed the jurisdictional determination at issue a 'final agency action.'" *Id.* at 13a (citation omitted); see *Soundboard*, 888 F.3d at 1268 (noting that the jurisdictional determination in *Hawkes* was "bind[ing on] the Corps for five years") (citation omitted; brackets in original). "Here, in contrast, the Commission's Handbook clarifies the Notices are only advisory." Pet. App. 13a. Similarly, *Frozen Food Express* v. *United States*, 351 U.S. 40 (1956), involved "a formal, published report and order of the Interstate Commerce Commission, not its staff, following an investigation and formal public hearing." *Soundboard*, 888 F.3d at 1268 (describing *Frozen Food*); see Pet. App. 13a (distinguishing other cases, including *Abbott Labs.*, *supra*, as involving "legislative rules or final certifica-

---

* Petitioner suggests (Pet. 22-23) that the Commission has delegated its relevant decision-making authority to the Compliance Office. But while the court of appeals concluded that "the Commission *could* delegate" such authority to its staff pursuant to 15 U.S.C. 2076(b)(10), the court agreed with the Commission's representations that the agency "has not done so." Pet. App. 10a. Petitioner's apparent disagreement with that fact-specific determination does not warrant this Court's review.

tions issued by federal and state agencies after notice-and-comment").

2. The decision below does not conflict with any decision of another court of appeals. To the contrary, the court of appeals persuasively distinguished the D.C. Circuit and Ninth Circuit cases identified by petitioner and recognized that those decisions "provide [petitioner] little support." Pet. App. 13a n.3.

Petitioner relies on *Ipsen Biopharmaceuticals, Inc.* v. *Azar*, 943 F.3d 953 (D.C. Cir. 2019), and *Rhea Lana, Inc.* v. *Department of Labor*, 824 F.3d 1023 (D.C. Cir. 2016). See Pet. 16-18. In those cases, however, the "agency did not dispute *Bennett*'s consummation prong." Pet. App. 13a n.3 (distinguishing *Ipsen*); see *Rhea Lana*, 824 F.3d at 1027 (noting that the agency had "conceded the first finality requisite"). Those D.C. Circuit decisions therefore did not address that requirement, which was the only issue that the court of appeals decided in this case.

Petitioner also relies on two D.C. Circuit decisions that predate this Court's articulation of the *Bennett* v. *Spear* standard for determining whether particular agency pronouncements constitute final agency action. Pet. 18-20 (citing *Her Majesty the Queen in Right of Ontario* v. *EPA*, 912 F.2d 1525 (D.C. Cir. 1990), and *Ciba-Geigy Corp.* v. *EPA*, 801 F.2d 430 (D.C. Cir. 1986)). Given this Court's intervening clarification of the governing legal framework, those decisions have limited relevance to the question presented. In any event, the cases involved agency determinations that were far more conclusive than the staff letters at issue here. See *Her Majesty*, 912 F.2d at 1531-1532 (reviewing letters that expressed "a definitive position" by a senior agency official who "was speaking for the EPA," and emphasizing

that the court had "no reason to question his authority" to do so); *Ciba-Geigy*, 801 F.2d at 436-437 (similar).

The Ninth Circuit's decision in *San Francisco Herring Association* v. *U.S. Department of the Interior*, 946 F.3d 564 (2019), is similarly distinguishable. As the court of appeals recognized below, *San Francisco Herring* concerned warning letters that "became reviewable once Park Service officers relied on them to order fishermen to stop fishing." Pet. App. 13a n.3. The agency had "state[d] a definitive position in formal notices, confirm[ed] that position orally, and then sen[t] officers out into the field to execute on the directive." *San Francisco Herring*, 946 F.3d at 579. There, unlike here, it was clear that the agency "had 'arrived at a definitive position.'" *Id.* at 578 (quoting *Oregon Natural Desert Ass'n* v. *United States Forest Serv.*, 465 F.3d 977, 985 (9th Cir. 2006)).

3. The court of appeals' fact-bound application of the governing legal standard for identifying final agency action does not warrant review. The notices at issue in this case do not prevent petitioner from selling the subject fireworks shipments or from taking any other action. Petitioner remains free to reject the Compliance Office's advice if it disagrees with the staff's view that the shipments violate federal fireworks law. Petitioner also overstates the risks it would face if it chose that course. To date, the Commission has not taken any action with respect to the contested shipments. Civil and criminal penalties under the relevant statutes are available only for "knowing" violations of law. See Pet. 11. If the Commission ever pursued an action to impose penalties based on sales of the relevant goods, a factfinder would consider all evidence and arguments relevant to peti-

tioner's knowledge, including any efforts by petitioner to obtain the Commission's definitive views.

Petitioner has not identified any broader effect on its business beyond its reluctance to sell the specific shipments identified in the notices. Petitioner does not seek to remedy any pattern of ongoing behavior by the agency; it has not received a similar notice of noncompliance since 2019. Petitioner suggests (Pet. 26) that significant practical harms may occur if agencies are "permitted to collapse otherwise final agency action with an agency's decision to formally enforce its determinations." But as discussed, the court of appeals' decision did not rest on the lack of formal enforcement. See pp. 9-10, *supra*.

On the other side of the ledger, permitting judicial review of agency communications like these could have significant detrimental effects. As the court of appeals recognized, the notices at issue "merely provide preliminary findings and warnings by agency staff, like countless other letters and guides that federal agencies issue throughout the year." Pet. App. 13a. Permitting judicial review of such notices "'would quickly muzzle any informal communications between agencies and their regulated communities—communications that are vital to the smooth operation of both government and business.'" *Ibid.* (quoting *Independent Equip. Dealers Ass'n* v. *EPA*, 372 F.3d 420, 428 (D.C. Cir. 2004) (Roberts, J.)). The likely result would be "that many voluntary and helpful comments from agency staff would be withheld altogether." *Id.* at 13a-14a (quoting *Sanitary Bd.* v. *Wheeler*, 918 F.3d 324, 338 (4th Cir. 2019)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SARAH M. HARRIS
Acting Solicitor General
YAAKOV M. ROTH
Acting Assistant Attorney General
DANIEL TENNY
CYNTHIA A. BARMORE
Attorneys

MARCH 2025