No. 24-693

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The following is undisputed. Beginning more than ten years ago, CPSC's Compliance Office issued Jake's Fireworks numerous Notices of Non-Compliance, on official Commission letterhead, stating that Jake's sampled fireworks "are" banned hazardous substances because they violate (a) the Audible Effects Regulation—which, according to CPSC's public regulatory filings, does not even apply to the fireworks at issue (*see* Pet. 3-5); or (b) a reports-labeling regulation—which CPSC has never identified (*see id.* 7 n.4). Having received the Notices, Jake's risks civil and criminal sanctions for knowingly selling "banned" products. Jake's thus spent over five years pursuing internal review through the Compliance Office, the office tasked with CPSC's "compliance and administrative enforcement activities." 16 C.F.R. § 1000.21. The agency's interpretive decisions were repeated and affirmed, and Jake's has no further administrative options available. Pet. 8-10; BIO 5.

CPSC's actions thus have "all of the hallmarks of APA finality that [this Court's] opinions establish," *Sackett v. EPA*, 566 U.S. 120, 126 (2012), and Jake's sought judicial review under the APA. Its primary question was and remains a legal one: Do the asserted regulations apply to Jake's products or not? But the courts below dismissed Jake's APA claims because, the Fourth Circuit concluded, CPSC's Notices do "not trigger any of the administrative, civil, or criminal proceedings that the Commission could pursue." Pet. App. 9a.

This enforcement-proceeding requirement is plainly wrong on the merits and, more critically, the Fourth Circuit's final-agency-action analysis is flatly incon-

sistent with the APA, contradicts this Court's precedents, and cements an inflexible presumption against judicial review.

Not surprisingly, the Commission defends its advantage and, like the Fourth Circuit, it spurns the APA's "generous review provisions." *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967) (citation omitted). As a result, the Commission claims effectively unreviewable authority to decide whether regulated parties may be permitted to seek judicial review.

But this Court's long-settled precedents confirm that agency action need not "trigger" enforcement proceedings to be final, and regulated parties need not wait for agencies to pursue enforcement before seeking judicial review. Here, the Commission has arrived at a definitive conclusion on the applicability (and violations) of the Audible Effects Regulation and the non-existent reports-labeling regulation. The Commission "may still have to deliberate over whether it is confident enough about this conclusion to initiate litigation, but that is a separate subject." *Sackett*, 566 U.S. at 129.

* * *

In the Fourth Circuit, regulated parties like Jake's are stuck in limbo, unable to challenge agencies' considered legal interpretations without risking potentially ruinous civil and criminal penalties. And agencies like CPSC are incentivized to postpone enforcement proceedings indefinitely to evade judicial review.

The Petition should be granted so that regulated parties in the Fourth Circuit may "have their day in court." *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 578 U.S. 590, 600 (2016).

ARGUMENT

I. The Court Should Grant the Petition to Align the Fourth Circuit with the Pragmatic Inquiry Required by the APA and This Court and Faithfully Applied by Other Circuits

A. This Court has long held that the APA's "generous review provisions must be given a hospitable interpretation" and that "only upon a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Labs.*, 387 U.S. at 141 (cleaned up; citations omitted). Accordingly, this Court requires a pragmatic approach to regulated parties' APA claims, subject to a presumption of judicial review. *Id.* at 140-41, 149.

The Fourth Circuit paid only lip service to this well-settled standard. It acknowledged the two finality conditions from *Bennett v. Spear*, 520 U.S. 154 (1997). Pet. App. 7a. But contrary to *Bennett* and related precedents, the court failed to acknowledge that these conditions are not prescribed elements that must be strictly proved, but rather, that they represent a "distill[ation] from [this Court's] precedents . . . that generally must be satisfied for agency action to be 'final' under the APA." *Hawkes*, 578 U.S. at 597, 601-02.

The Commission's response to Jake's Petition suffers from the same flaw. Rather than presuming judicial review, the Commission's standard effectively requires regulated parties to present clear and convincing evidence that agencies have achieved Platonic finality. Indeed, like the Fourth Circuit's opinion, the

Commission's briefs here and before the Fourth Circuit never once use the word "pragmatic" or "presumption" (or "presume").[1] This Court's pragmatic approach is thus repudiated in favor of a hyper-formalistic test that resolves all doubt *against* judicial review.

Nowhere is this clearer than in CPSC's reading of *Sackett*. In *Sackett*, EPA argued that its so-called "compliance order" was just "a step in the deliberative process" because the order merely sought to "resolv[e] the issues through voluntary compliance" and couldn't be enforced except through a separate enforcement proceeding. 566 U.S. at 127-29. This Court rejected the argument. It held that EPA's order "mark[ed] the 'consummation' of the agency's decisionmaking process" because "EPA's 'deliberation' over whether the [challengers] are in violation of the [Clean Water] Act is at an end[.]" *Id.* at 129. Despite this Court's clear holding, the Commission maintains that *Sackett* is distinguishable on the ground that EPA had issued a "binding" order under statutory authorization. BIO 10; *see also* Pet. App. 9a, 12a. Not so.

The critical holding of *Sackett*, for purposes of *Bennett*'s consummation prong, is that the nature of the order (binding or non-self-executing) is not dispositive. The dispositive question is whether an agency has reached a final interpretive decision, i.e., whether the agency's interpretive "deliberation . . . is at an end." *Sackett*, 566 U.S. at 129. Therefore, while EPA's order in *Sackett*, like the Commission's Notices here, "must be enforced by the Agency in a plenary judicial

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[1] This error runs deep. In the two district court opinions below (Pet. App. 16a-65a), "pragmatic" appears once (*id.* 55a), and the word "presumption" or "presume" never.

action[,] . . . the APA provides for judicial review of all final agency actions, not just those that impose a self-executing sanction." *Id.*[2]

Perhaps anticipating this point, the Commission further argues that EPA's order was final because it was not subject to further review within the agency. BIO 10. But the same is true here. The key question, elided by CPSC here, is whether the *regulated party* may obtain (additional) administrative review, not whether the agency "is confident enough about [its] conclusion to initiate litigation[;]" that, after all, is "a separate" final decision. *Sackett*, 566 U.S. at 129.

Therefore, while an agency may decide not to enforce its considered view of the law, that decision is distinct from, and thus its potential does not de-finalize, the agency's prescinding legal determination. This principle is doubly violated by the Fourth Circuit's ruling: Not only is the Commission's enforcement discretion (i.e., enforcement it "could" pursue (Pet. App. 9a)) distinct from any conclusions of regulatory application or findings of violation, but the Commission doesn't offer the public an administrative process through which those conclusions and findings (i.e., Notices) can be disavowed by the Commission itself.

Nonetheless, under CPSC's (and the lower courts') rationale, Jake's is "blocked from access to the courts" "[u]ntil [CPSC] sues," and CPSC "may wait as long as it wants before deciding to sue." *Sackett*, 566 U.S. at

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[2] As Jake's noted (Pet. 8-9, 24), CPSC enforced its interpretation of the Audible Effects Regulation in *United States v. Shelton Wholesale, Inc.*, 34 F. Supp. 2d 1147 (W.D. Mo. 1999) (subsequent history omitted). And CPSC has never wavered from its assertion that this Regulation so applies.

132 (Alito, J., concurring). The only way Jake's can obtain judicial review then is by selling "banned" products and risking potentially ruinous sanctions. This runs afoul of this Court's settled law, which emphasizes that regulated parties need not "wait[] for [an agency] to 'drop the hammer' in order to have their day in court." *Hawkes*, 578 U.S. at 600 (quoting *Sackett*, 566 U.S. at 127).

The Commission (BIO 11) tries a different tack and faults Jake's for citing cases involving "formal" agency determinations (e.g., formally adopted rules). This objection fails for at least two reasons. First, "the APA provides for judicial review of *all* final agency actions," *Sackett*, 566 U.S. at 129 (emphasis added), not just formal ones. Therefore, Jake's reliance on cases involving different types of final agency action does not at all undermine its argument. Second, the cases in question (*see* Pet. 14-16) support the long-standing proposition that an agency "order" may be immediately reviewable even though the order "ha[s] no authority except to give notice of how the Commission interpret[s]" the law. *Hawkes*, 578 U.S. at 599-600 (quoting *Abbott Labs.*, 387 U.S. at 150; citing *Frozen Food Express v. United States*, 351 U.S. 40, 44-45 (1956)). Thus, contrary to CPSC's argument, 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; citations omitted).

B. The Commission's attempts to harmonize the Fourth Circuit ruling with cases from other circuit courts—cases that involve informal agency actions—do not withstand scrutiny.

The Commission argues that two D.C. Circuit cases cited by Jake's were decided before *Bennett*'s

supposed "clarification of the governing legal framework." BIO 12. But *Bennett* did not change "the 'pragmatic' approach [this Court has] long taken to finality." *Hawkes*, 578 U.S. at 599 (citing earlier cases); *see id.* at 604 n.* (Ginsburg, J., concurring) (stating that *Bennett* "does not displace or alter the approach to finality established by" *Abbott Laboratories* and *Frozen Food Express*). CPSC's wish to evade this Court's pragmatic and review-presuming standard fails.

CPSC's attempt to distinguish *Her Majesty the Queen in Right of Ontario v. EPA*, 912 F.2d 1525 (D.C. Cir. 1990), is especially perplexing, as it describes a situation substantially identical to this case. As CPSC explains, *Her Majesty* involved "letters that expressed 'a definitive position' by a senior agency official [EPA's Acting Assistant Administrator for Air and Radiation] who 'was speaking for the EPA,'" and the D.C. Circuit "emphasiz[ed] that [it] had 'no reason to question his authority' to do so." BIO at 12-13. Here, the Notices confirm CPSC's application of the Audible Effects Regulation and, in some cases, the (non-existent) reports-labeling regulation; they further state that Jake's sampled product "*is* a banned hazardous substance[,]" "*fails* to bear adequate cautionary labeling[,]" and "**must be destroyed**[.]" Compl., Ex. E, ECF 1-5, at 1, 3 (italicized emphasis added); *see* Pet. 5-8. The Notices, issued on official CPSC letterhead, are signed by a "Compliance Officer" in CPSC's "Regulatory Enforcement Division." Ex. E at 4. The legal conclusions and factual determinations were affirmed by the Compliance Office's Director. Exs. O, Q. CPSC Notices are expressly contemplated in CPSC's Handbook, which explains "how *CPSC* enforces its statutes." Compl., Ex. B, ECF 1-2, at 5, 7 (emphasis added, capitalization altered). And, as noted above,

the Compliance Office is authorized to conduct the agency's "compliance and administrative enforcement activities." 16 C.F.R. § 1000.21. Accordingly, as in *Her Majesty*, the Fourth Circuit had no reason to question the authority of CPSC's Compliance Office to issue (or its Director to affirm) Notices of Non-Compliance—no reason, that is, except the Commission's post-hoc litigation position.

Next, the Commission claims that in *San Francisco Herring Association v. U.S. Department of the Interior*, 946 F.3d 564 (9th Cir. 2019), "*unlike here*, it was clear that the agency 'had arrived at a definitive position.'" BIO 13 (emphasis added). Once again, the Commission's position here was repeatedly conveyed to Jake's, affirmed when Jake's requested review, and has been enforced against a similarly situated regulated party in federal litigation. *See Shelton*, 34 F. Supp. 2d at 1158. Thus, the Commission cannot defend its claim that the Notices represent "just 'a step in the deliberative process' when [it] rejected [Jake's] attempt to obtain a hearing and when the *next* step will either be taken by [Jake's] (if [it] compl[ies] with the [Notices]) or will involve [an enforcement proceeding] (if the [Commission] brings an [] action)." *Sackett*, 566 U.S. at 129.

Finally, with respect to several D.C. Circuit cases involving correspondence from lower-level officials, CPSC notes that the government didn't contest the consummation prong. BIO 12. That the government takes inconsistent positions depending on the circuit only underscores the importance of this Court's review. CPSC's long-standing practice of evading judicial review through strategic maneuverings (*see* Pet. 26-27) must be stopped. Regulated parties deserve

their day in court without having to risk civil and criminal sanctions.

C. The Fourth Circuit's and the Commission's warnings, that allowing regulated parties like Jake's to seek judicial review of Notices "could have significant detrimental effects[,]" BIO 14, cannot be squared with the circumstances here. For the reasons discussed in the Petition and above, the Notices are not "mere[] preliminary findings[,]" "informal communications[,]" or "voluntary and helpful comments[.]" *Id.* (quoting the Fourth Circuit's opinion). They do not express hesitancy or doubt, but provide a formal and repeated conclusion as to the application (and existence) of CPSC's regulations. In any event, this Court has rejected similar "count your blessings" arguments. *See Hawkes*, 578 U.S. at 602.

And on "the other side of the ledger," BIO 14, *Sackett* expressly concluded that "[t]he APA's presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all," 566 U.S. at 130; *see also Corner Post, Inc. v. Bd. of Governors of Fed. Res. Sys.*, 603 U.S. 799, 823-25 (2024) (rejecting "pleas of administrative inconvenience" and assertions that interpretation of APA limitations period "spells the end of the United States as we know it"); *Abbott Labs.*, 387 U.S. at 154-56 (rejecting similar government arguments).

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The Commission's position—articulated in Notices and advanced in litigation—is final. If the Commission's indecision as to enforcement renders the agency's stated and consistent view somehow non-final for regulated entities prior to such enforcement,

the Fourth Circuit has charted a path for federal agencies to evade and effectively nullify much pre-enforcement judicial review under the APA. And shown a course by which agency pronouncements are deemed unreviewable, agencies will have a powerful incentive to use it in regulating the public, rather than going through the APA-specified (and congressionally mandated) methods of regulating. Such a circumvention of the APA and this Court's precedent must be rejected.

II. Summary Disposition Would Be Appropriate

A specific request is not required for this Court to enter summary disposition (Rules of the Supreme Court of the United States, Rule 16.1), but if the Court agrees with the Commission (BIO 13) that the Fourth Circuit's "fact-bound" decision does not warrant review, Jake's submits that the Court may wish to consider summary vacatur of the judgment and remand. The decision below involves a clear error of practical importance to all litigants in the Fourth Circuit. Indeed, the court's enforcement requirement is "not just wrong," but it "also committed fundamental errors that this Court has repeatedly admonished courts to avoid." *Sexton v. Beaudreaux*, 585 U.S. 961, 967 (2018). As demonstrated above and in Jake's Petition, this Court has repeatedly and definitively held that plaintiffs "need not assume" civil and criminal penalty "risks while waiting for [the agency] to 'drop the hammer' in order to have their day in court." *Hawkes*, 578 U.S. at 600 (quoting *Sackett*, 566 U.S. at 127). And, again, the Fourth Circuit failed to even acknowledge, much less apply, the Court's longstanding precedents demanding a "flexible" and "pragmatic" approach to

finality or the APA's "presumption" of judicial review. *Abbott Labs.*, 387 U.S. at 140, 149-50.

The posture here would allow the Court to confirm that the Fourth Circuit's approach is incorrect without drawing any further conclusions about the finality of CPSC's Notices. Because the Fourth Circuit did not address the second *Bennett* prong, the Court may, but need not, decide whether the APA finality requirement is fully satisfied.[3]

Summary disposition of this case would be proper to correct the Fourth Circuit's clear misapplication of *Sackett*, *Hawkes*, and this Court's long line of cases requiring a pragmatic approach to finality. *See CNH Indus. N.V. v. Reese*, 583 U.S. 133, 134 (2018) (per curiam) (granting vacatur and remanding because the Sixth Circuit's decision "cannot be squared" with Supreme Court precedent).

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[3] CPSC claims that Jake's "has not identified any broader effect on its business beyond its reluctance to sell the specific shipments identified in the notices[;] it has not received a similar notice of noncompliance since 2019." BIO 14. Given the Notices' assertions that those shipments are banned hazardous substances that must be destroyed at the risk of civil and criminal penalties, "reluctance" is an understatement. But even without these threatened penalties, the Fourth Circuit's strict "consummation" test would *still* preclude Jake's from judicial review.

And while the Commission did voluntarily cease sending Jake's Notices in 2019, BIO 5, that's the same year Jake's began the now-six-year process of trying to get a court to review the propriety of CPSC's decisions. Absent action from this Court on the finality issue, there is no reason to believe the Notices will not resume, with CPSC now safe in the knowledge that any finding, assertion, or threatened enforcement contained in them is insulated from judicial review.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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