
RECENT CASES

ADMINISTRATIVE LAW — FINALITY OF AGENCY ACTIONS — D.C. CIRCUIT HOLDS THAT INFORMAL STAFF LETTERS ARE NOT ELIGIBLE FOR JUDICIAL REVIEW UNDER THE ADMINISTRATIVE PROCEDURE ACT. — *Soundboard Ass'n v. FTC*, 888 F.3d 1261 (D.C. Cir. 2018).

Federal agencies dictate permissible pollution levels, regulate immigration enforcement, and much more, yet often claim they have not decided to do anything at all.¹ This perplexing behavior stems from the finality requirement, which serves as a threshold question for any party challenging agency action under the Administrative Procedure Act² (APA). A court must ask: Has the agency really reached a decision? And did that decision produce real, legal consequences? Both answers must be “yes” for a party to have her day in court.³ Recently, in *Soundboard Ass'n v. FTC*,⁴ the United States Court of Appeals for the District of Columbia Circuit held that an informal staff guidance document did not constitute final agency action and was therefore unreviewable.⁵ In *Soundboard*, the D.C. Circuit articulated a formal test of finality that stands in tension with recent precedent emphasizing functional considerations. As a result, *Soundboard* could allow agencies to hide behind formal tests of finality to avoid judicial scrutiny of their actions, including ones that negatively impact lives and organizations across the country.

If you have ever received a robocall, it may have been made possible by the Soundboard Association.⁶ Soundboard is a trade group that advocates on behalf of companies using soundboard technology, which allows businesses to use prerecorded audio clips in phone calls as part of a “two-way communication.”⁷ In 1994, Congress enacted the Telemarketing and Consumer Fraud and Abuse Prevention Act,⁸ which directs the Federal Trade Commission (FTC) to craft “rules prohibiting

¹ See, e.g., *Sierra Club v. EPA*, 873 F.3d 946, 953 (D.C. Cir. 2017) (holding guidance document changing pollution regulation not final agency action); *California ex rel. Becerra v. Sessions*, 284 F. Supp. 3d 1015, 1031 (N.D. Cal. 2018) (DOJ asserting no final agency action in immigration context).

² Ch. 324, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551, 553–559, 701–706 (2012)); see also 5 U.S.C. § 704 (requiring “final agency action” for a lawsuit to proceed).

³ *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997).

⁴ 888 F.3d 1261 (D.C. Cir. 2018).

⁵ *Id.* at 1274.

⁶ See SOUNDBOARD ASS'N, <http://soundboardassociation.org/#about> [<https://perma.cc/6Z3W-6XQZ>] (explaining that the technology “allow[s] contact center agents to interact and converse with consumers on a real-time basis using recorded sound files”).

⁷ See *Soundboard Ass'n v. FTC*, 251 F. Supp. 3d 55, 58 (D.D.C. 2017).

⁸ Pub. L. No. 103-297, 108 Stat. 1545 (codified as amended at 5 U.S.C. §§ 6101–6108 (2012)).

deceptive telemarketing acts or practices.”⁹ A year later, the FTC did just that by promulgating the Telemarketing Sales Rule (TSR) to regulate the use of robocall technology.¹⁰

After the FTC finalized TSR amendments regulating robocalls, a telemarketing firm sought guidance on whether its technology fell within the scope of the TSR’s robocall definition.¹¹ The FTC responded with an informal staff opinion (the 2009 Letter) indicating that, based on the firm’s description of soundboard technology, the telemarketers’ use of the technology did not fall within the regulatory scheme.¹² Telemarketing companies subsequently tried to use the 2009 Letter to evade lawsuits pertaining to robocalls, as it offered a potential liability shield.¹³

But the FTC changed course. Following the 2009 Letter, consumer complaints led the FTC staff to reconsider the bases underlying their prior opinion. After a factfinding investigation, they concluded that soundboard technology did, in fact, implicate robocall regulations.¹⁴ In 2016, the agency issued a new staff opinion (the 2016 Letter).¹⁵ It informed the telemarketing industry that the 2009 Letter would be “revoke[d]”¹⁶ and that the new guidance would take effect in six months in order to “give industry sufficient time to make any necessary changes to bring themselves into compliance.”¹⁷ The 2016 Letter concluded with an admonishment: the decision had not been “approved or adopted by” the FTC as a whole, but rather “reflect[ed] the views of staff members charged with enforcement of the TSR.”¹⁸

In response, Soundboard sued. It argued that the FTC both violated the APA by not issuing the regulation following notice-and-comment rulemaking and unlawfully infringed on the First Amendment rights of

⁹ *Id.* § 6102.

¹⁰ Telemarketing Sales Rule, 16 C.F.R. § 310 (2018). The TSR created a “do not call” list requirement, *id.* § 310.4(b)(iii)(B), and restricted calls to certain times of day, among other requirements, *id.* § 310.4(c).

¹¹ *Soundboard*, 251 F. Supp. 3d at 60.

¹² *See id.* at 61.

¹³ *Soundboard*, 888 F.3d at 1265 (noting that telemarketing companies “were using the 2009 Letter as a defense against consumer lawsuits”).

¹⁴ *Soundboard*, 251 F. Supp. 3d at 61. Indications that the telemarketing industry misused the robocall technology undergirded the FTC staff’s evolving view. While they had predicated their 2009 view on the fact that a live agent could always intervene in a call made using soundboard technology, *see id.* at 60–61, subsequent consumer complaints revealed that “live operators were not intervening in calls,” *id.* at 61. This, combined with the discovery that telemarketing companies used soundboard technology to make multiple calls simultaneously, led staffers to shift their stance. *Id.*

¹⁵ *See* Fed. Trade Comm’n, Opinion Letter on Soundboard Technology (Nov. 10, 2016), https://www.ftc.gov/system/files/documents/advisory_opinions/letter-lois-greisman-associate-director-division-marketing-practices-michael-bills/161110staffopsoundboarding.pdf [<https://perma.cc/CHG5-U46L>].

¹⁶ *Id.* at 3.

¹⁷ *Id.* at 4.

¹⁸ *Id.*

telemarketing companies.¹⁹ Soundboard sought declaratory relief and a preliminary injunction barring enforcement of the 2016 Letter.²⁰ The FTC filed a cross-motion for summary judgment, arguing that the APA provided no relief because the 2016 Letter did not constitute “final agency action, and in any event was an interpretive rule not subject to notice and comment.”²¹

The district court held the 2016 Letter constituted final agency action, but ruled in favor of the FTC on the merits. Analyzing the letter under the two-prong test articulated in the Supreme Court’s decision in *Bennett v. Spear*,²² the court held the agency’s action both (1) “mark[ed] the consummation of the agency’s decisionmaking”²³ and (2) would produce legal consequences.²⁴ Alongside the *Bennett* factors, the court also analyzed the 2016 Letter in the context of the D.C. Circuit’s decision in *Ciba-Geigy Corp. v. EPA*,²⁵ which it characterized as requiring a “‘flexible’ and ‘pragmatic’” finality inquiry.²⁶ The court reasoned that “for all intents and purposes, the agency’s review of whether the robocall regulation applies to soundboard calls is at an end.”²⁷ It emphasized the 2016 Letter’s “‘immediate and practical impact’ on the telemarketing industry”²⁸ in rendering it final agency action. Nevertheless, the court granted summary judgment in favor of the FTC because it saw the agency’s action as an interpretive, rather than legislative, rule.²⁹

The D.C. Circuit affirmed, though on different grounds. Writing for the panel, Judge Wilkins³⁰ held the district court improperly found the letter to be “final agency action” under the APA.³¹ The panel relied heavily on the two-part test employed in *Bennett*.³² It reasoned that it need not reach the second prong of the test because the 2016 Letter did not mark the consummation of the agency’s decisionmaking.³³ Judge

¹⁹ *Soundboard*, 251 F. Supp. 3d at 62.

²⁰ *Id.*

²¹ *Soundboard*, 888 F.3d at 1266. In addition, the FTC challenged Soundboard’s First Amendment claim on the grounds that the TSR constituted a “reasonable time, place, and manner restriction.” *Id.*

²² 520 U.S. 154 (1997).

²³ *Soundboard*, 251 F. Supp. 3d at 63 (quoting *Bennett*, 520 U.S. at 178); *see id.* at 63–66.

²⁴ *See id.* at 66–67.

²⁵ 801 F.2d 430 (D.C. Cir. 1986); *see id.* at 435.

²⁶ *Soundboard*, 251 F. Supp. 3d at 63 (quoting *Ciba-Geigy*, 801 F.2d at 435).

²⁷ *Id.* at 64.

²⁸ *Id.* at 66 (quoting *Frozen Food Express v. United States*, 351 U.S. 40, 44 (1956)).

²⁹ *Id.* at 71. It also ruled against Soundboard with respect to its First Amendment claim. *See id.* at 73 (finding the TSR’s robocall regulation content neutral).

³⁰ Judge Wilkins was joined by Judge Rodgers.

³¹ *Soundboard*, 888 F.3d at 1263.

³² *Id.* at 1267.

³³ *Id.* at 1271 (citing *Sw. Airlines Co. v. U.S. Dep’t of Transp.*, 832 F.3d 270, 275 (D.C. Cir. 2016), for the proposition that *both* prongs of the *Bennett* test must be satisfied for an agency action to be deemed final under the APA).

Wilkins noted that in determining whether a decision is final under *Bennett*'s first prong, the key consideration was whether the action was "informal, or only the ruling of a subordinate official, or tentative."³⁴

Three primary factors motivated the majority's reasoning. First, Judge Wilkins observed that the 2016 Letter "explicitly and repeatedly state[d]" that it represented only the views of the staff and not those of the FTC itself.³⁵ Second, the letter was subject to further review by the agency because Soundboard could have simply requested that the FTC evaluate the issue anew, and the guidance was "subject to rescission any time without notice."³⁶ Third, the FTC's statutory scheme did not permit staff opinions to bind the agency; the FTC did not delegate decisionmaking authority to the staff.³⁷ Given those underlying rationales, the majority found the 2016 Letter did not constitute final agency action because it failed *Bennett*'s first prong.³⁸

Judge Millett dissented. She began by posing a question at the heart of her critique: "Why let reality get in the way of a good bureaucratic construct?"³⁹ Judge Millett then articulated a more "flexible and pragmatic" approach to finality, one that looked to both *Bennett* prongs simultaneously and also asked whether the agency's action "conclude[d] the administrative process for the foreseeable future."⁴⁰ She first argued that because the FTC authorized staff to speak on key issues, it effectively delegated to them the power to conclude the FTC's consideration of a matter.⁴¹ She then observed that "nothing in the regulations governing advisory opinions label[ed] those delegated decisions as non-final."⁴² After concluding that the 2016 Letter constituted the consummation of the agency's decisionmaking process, she explained the practical consequences of the action, which upended an entire business.⁴³ Judge Millett appealed to core tenets of administrative law: "[F]inality is about agency accountability for the decisions it makes and the consequences it unleashes."⁴⁴

³⁴ *Id.* at 1267 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 151 (1967) (citations omitted), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977)).

³⁵ *Id.* at 1268.

³⁶ *Id.*; *see id.* at 1268–69 (explaining that this factor distinguished the case from other precedent, such as the Supreme Court's decision in *Sackett v. EPA*, 566 U.S. 120, 127 (2012), in which orders were deemed final actions because they were not subject to further review).

³⁷ *Id.* at 1270.

³⁸ *Id.* at 1274.

³⁹ *Id.* (Millett, J., dissenting).

⁴⁰ *Id.* at 1275 (citing *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016), for the idea that the finality evaluation is a pragmatic one).

⁴¹ *Id.* at 1276.

⁴² *Id.* at 1277.

⁴³ *Id.* at 1282.

⁴⁴ *Id.* at 1284.

The Supreme Court has long emphasized that functional concerns animate finality analysis. If *Bennett* seemed to mark a shift to a more formal approach, recent cases in both the Supreme Court and the D.C. Circuit suggest that the functional approach is very much alive and well. *Soundboard's* formal tack stands in tension with recent precedent in both courts. Rather than look to the impact of the FTC's command, the majority narrowly focused on statutory structure and played within the strict confines of *Bennett's* stated two-prong test. This formal approach could stymie individuals and organizations harmed by federal agencies — by articulating policy positions through enforcement staff, agencies may simply avoid judicial review altogether.

A functional approach has guided the Supreme Court in determining finality since shortly after Congress passed the APA. Over a half-century ago, in *Frozen Food Express v. United States*,⁴⁵ the Court assessed whether an Interstate Commerce Commission order classifying agricultural good carriers as nonexempt from a certificate requirement constituted final agency action.⁴⁶ Justice Douglas wrote the majority opinion, finding finality because the order “ha[d] an immediate and practical impact” and served as “the basis for carriers in . . . arranging their affairs.”⁴⁷ About a decade later in *Abbott Laboratories v. Gardner*,⁴⁸ the Court furthered its focus on functionality: it highlighted an agency action’s “direct effect on the day-to-day business”⁴⁹ and reasoned that finality analysis should be conducted “in a pragmatic way.”⁵⁰ In the *Frozen Food* line of cases, the Court has framed the finality threshold not as a bright-line rule, but as an inquiry into the everyday impact of federal action.

Bennett seemed to alter the calculus, but a recent Supreme Court decision has buoyed the functional approach in the modern era. In *Bennett*, Justice Scalia wrote for a unanimous court in articulating a clear, two-part test of finality.⁵¹ But three years ago, the Court breathed

⁴⁵ 351 U.S. 40 (1956).

⁴⁶ See *id.* at 41, 43–44.

⁴⁷ *Id.* at 44. The Court’s pragmatism is also illustrated by its focus on the real-world effect of the order. *Id.* (“The consequences we have summarized are not conjectural.”).

⁴⁸ 387 U.S. 136 (1967), *abrogated on other grounds by* Califano v. Sanders, 430 U.S. 99 (1977). In holding that a proposal published by the Commissioner of Food and Drugs constituted final agency action, the Court acknowledged that even prior to enforcement, some regulations may “require[] an immediate and significant change” in conduct. *Id.* at 153.

⁴⁹ *Id.* at 152. That said, in assessing the definitiveness of agency action, the Court noted that finality could not flow only from “the ruling of a subordinate official.” *Id.* at 151.

⁵⁰ *Id.* at 149. Subsequently, in *FTC v. Standard Oil Co.*, 449 U.S. 232 (1980), the Court emphasized “pragmatic considerations” in determining finality. *Id.* at 243.

⁵¹ 520 U.S. 154, 177–78 (1997) (“As a general matter, two conditions must be satisfied for agency action to be ‘final’: 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

new life into the functional approach. In *U.S. Army Corps of Engineers v. Hawkes Co.*,⁵² Chief Justice Roberts concluded that an Army Corps jurisdictional determination under the Clean Water Act constituted final agency action.⁵³ After proceeding through *Bennett*'s two-part test, he reasoned that the Court's conclusion "track[ed] the 'pragmatic' approach [it had] long taken to finality."⁵⁴ In that way, *Hawkes* endorsed a functional assessment. The Court quoted *Abbott Laboratories* and *Frozen Food*, and further remarked that the Corps's action warned the plaintiffs about the consequences of noncompliance.⁵⁵ Some argue that *Hawkes* mandates a "'pragmatic' application of *Bennett*,"⁵⁶ and the D.C. Circuit has seemingly embraced that view.⁵⁷ If in *Bennett* the Court seemed to infuse finality with formulaic formality, *Hawkes* nudged its jurisprudence back toward a functional approach.⁵⁸

Recent D.C. Circuit rulings confirm that functional considerations ground the inquiry, even within *Bennett*'s first "consummation" prong. Three years ago, in *Friedman v. FAA*,⁵⁹ the court ruled that the FAA's constructive denial of a pilot's petition for a commercial license constituted final agency action.⁶⁰ Judge Brown noted that finality doctrine was "hardly crisp" and embraced a "pragmatic and flexible nature" that applied to the *entire inquiry*.⁶¹ The court focused on the fact that "in practical effect if not formal acknowledgment" the agency had "made up its mind."⁶² Indeed, just one month before *Soundboard*, the D.C.

will flow." (internal citations omitted) (first quoting *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948); and then quoting *Port of Bos. Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)). The opinion conspicuously omitted the word "pragmatic." For more on the Court's shift in *Bennett*, see Steven J. Lindsay, *Timing Judicial Review of Agency Interpretations in Chevron's Shadow*, 127 YALE L.J. 2448, 2458–65 (2018).

⁵² 136 S. Ct. 1807 (2016). Like in *Bennett*, the Court's judgment in *Hawkes* was unanimous.

⁵³ *Id.* at 1813.

⁵⁴ *Id.* at 1815. For background on the Court's reinsertion of pragmatic concerns into finality, see William Funk, *Final Agency Action After Hawkes*, 11 N.Y.U. J.L. & LIBERTY 285, 289–91 (2017).

⁵⁵ *Hawkes*, 136 S. Ct. at 1815. In a concurrence, Justice Ginsburg specifically called out the "immediate and practical impact" of the action. *Id.* at 1817 (Ginsburg, J., concurring in part and concurring in the judgment) (quoting *Frozen Food Express v. United States*, 351 U.S. 40, 44 (1956)).

⁵⁶ See Lindsay, *supra* note 51, at 2465; see also Funk, *supra* note 54, at 304 (arguing that the Supreme Court applies the *Bennett* test "pragmatically" in *Hawkes*'s wake).

⁵⁷ See, e.g., *Rhea Lana, Inc. v. Dep't of Labor*, 824 F.3d 1023, 1027 (D.C. Cir. 2016) (citing *Hawkes* for the proposition that finality requires a pragmatic inquiry).

⁵⁸ One view is that the Court has simply adopted a dual-strand approach by viewing finality through both "formal" and "functional" tests at the same time. See Stephen Hylas, *Final Agency Action in the Administrative Procedure Act*, 92 N.Y.U. L. REV. 1644, 1648 (2017).

⁵⁹ 841 F.3d 537 (D.C. Cir. 2016).

⁶⁰ *Id.* at 539.

⁶¹ *Id.* at 541 (quoting *Rhea Lana*, 824 F.3d at 1027). By specifically noting "the inquiry as a whole," *id.*, the court made clear that the functional approach applies not only to *Bennett*'s second prong, but also to its first — the consummation prong.

⁶² *Id.* at 542. Judge Brown further noted that an agency could not simply avoid judicial review by "holding out a vague prospect of reconsideration." *Id.* at 543.

Circuit reiterated that functional assessment: in interpreting the consummation prong in a case about FAA-approved flight paths, the court asked “whether the *impact of the order* [was] sufficiently ‘final’ to warrant review.”⁶³ If perhaps the *Soundboard* majority imagined that functional considerations were appropriate in *Bennett*’s second prong (legal consequences),⁶⁴ just not in its first (consummation), these recent cases suggest that interpretation is untenable.

The D.C. Circuit has also enunciated how the functional approach should play out. Recent cases emphasize the importance of definitive language and the presence of a factfinding investigation in assessing *Bennett*’s first prong. The nature of an agency’s words can hint at whether an action is definitive or merely tentative.⁶⁵ In *Appalachian Power Co. v. EPA*,⁶⁶ the court found that an EPA guidance document related to the Clean Air Act constituted final agency action.⁶⁷ It noted that, with the exception of boilerplate text in the last paragraph, the rest of the agency’s document “command[ed], it require[d], it order[ed], it dictate[d].”⁶⁸ Investigatory steps also imply consummation — decisions following an extensive factfinding process are viewed more definitively.⁶⁹

Soundboard’s method broke from the functional analysis used by both the Supreme Court and the D.C. Circuit. Rather than apply *Hawkes*’s hybrid reasoning, the *Soundboard* majority stuck to a formal approach. It did not once use the word “pragmatic.”⁷⁰ Instead, the panel opened and shut its case with a narrow focus on the agency’s statutory framework. It reasoned that, under the agency’s statutory scheme, the FTC could always override the enforcement staff’s position in the future.⁷¹ But this reliance is confounding given the established principle that an agency’s ability to change course does not affect

⁶³ *Citizens Ass’n of Georgetown v. FAA*, 896 F.3d 425, 431 (D.C. Cir. 2018) (emphasis added) (quoting *Friedman*, 841 F.3d at 542).

⁶⁴ *Soundboard*, 888 F.3d at 1273 (exploring “legal and practical consequences” in the context of *Bennett*’s second prong).

⁶⁵ See, e.g., *Am. Airlines, Inc. v. Transp. Sec. Admin.*, 665 F.3d 170, 174 (D.C. Cir. 2011) (finding finality because a letter claimed “the Administrator had ‘concluded’ and had made a ‘decision’”); cf. *Holistic Candles & Consumers Ass’n v. FDA*, 664 F.3d 940, 944 (D.C. Cir. 2012) (finding an action nonfinal because the agency warned the regulated party that it “w[ould] evaluate” submitted information and that its conduct “appear[ed]” to fall within its statutory scheme).

⁶⁶ 208 F.3d 1015 (D.C. Cir. 2000).

⁶⁷ *Id.* at 1023.

⁶⁸ *Id.*

⁶⁹ See, e.g., *Safari Club Int’l v. Jewell*, 842 F.3d 1280, 1289 (D.C. Cir. 2016) (finding finality after the agency made a “considered determination” based on examination of relevant evidence).

⁷⁰ The majority opinion did mention *Frozen Food*, but deemed it inapposite on the facts because the FTC’s 2016 Letter concerned a “regulation that distinguish[ed] between Commission and staff advice, [was] subject to rescission at any time without notice, and [was] not binding on the Commission.” *Soundboard*, 888 F.3d at 1268.

⁷¹ See *id.*

finality in the moment.⁷² If the Chief Justice in *Hawkes* modeled how to marry *Bennett*'s formalism with commonsense practicality, the *Soundboard* majority shied away from that dual approach.

Moreover, *Soundboard* glided past two hallmarks of functionality — definitive language and agency factfinding — highlighted in recent D.C. Circuit opinions. The majority seemed to brush away the definitive nature of the 2016 Letter's language ("revok[ing]"⁷³ the 2009 Letter; demanding "compliance"⁷⁴) and the fact that it followed an investigation.⁷⁵ Rather than follow the court's recent cases to focus on "impact"⁷⁶ within *Bennett*'s first prong, the majority contended that considering "impact on industry" would "bootstrap[] *Bennett*'s second prong into its first."⁷⁷ Had *Soundboard* embraced functionality, the panel might have asked: Did the FTC's action amount to a decision in the eyes of a reasonable regulated party? That framework would avoid incentivizing exactly what the court has tried to circumscribe in the past: agency acrobatics calculated to duck judicial scrutiny.⁷⁸

Soundboard will hamper the ability of those harmed by agency decisions to seek judicial review. The outcome creates an oddity in administrative law — there now appears to be a contorted space in which agencies can functionally compel action, yet still deny they have made up their mind to demand anything at all. This creates a conundrum for regulated parties. Those harmed must either wait to challenge administrative actions until after enforcement, or alter course immediately. The tension here will only grow. Agencies increasingly issue informal guidance documents to dictate policy.⁷⁹ And finality is a frequent issue in lawsuits challenging the Trump Administration on immigration, environmental regulation, and sexual harassment.⁸⁰ In that way, *Soundboard*'s implications extend far beyond pestering, prerecorded phone calls. For the countless individuals and organizations impacted by federal agency decisions, *Soundboard* threatens their very day in court.

⁷² See *Sackett v. EPA*, 566 U.S. 120, 127 (2012) ("The mere possibility that an agency might reconsider . . . does not suffice to make an otherwise final agency action nonfinal.").

⁷³ See Fed. Trade Comm'n, *supra* note 15, at 3.

⁷⁴ *Id.* at 4.

⁷⁵ See *Soundboard Ass'n v. FTC*, 251 F. Supp. 3d 55, 64 (D.D.C. 2017).

⁷⁶ *Citizens Ass'n of Georgetown v. FAA*, 896 F.3d 425, 431 (D.C. Cir. 2018).

⁷⁷ *Soundboard*, 888 F.3d at 1272.

⁷⁸ See *Am. Airlines, Inc. v. Transp. Sec. Admin.*, 665 F.3d 170, 174 (D.C. Cir. 2011) (noting that "[a]n agency's post-hoc and self-serving determination" cannot control finality analysis).

⁷⁹ See Gwendolyn McKee, *Judicial Review of Agency Guidance Documents: Rethinking the Finality Doctrine*, 60 ADMIN. L. REV. 371, 375 (2008).

⁸⁰ See *California ex rel. Becerra v. Sessions*, 284 F. Supp. 3d 1015, 1031–32 (N.D. Cal. 2018) (finding finality where DOJ threatened to withhold federal funds for so-called "sanctuary" cities); *Sierra Club v. EPA*, 873 F.3d 946, 953 (D.C. Cir. 2017) (holding that an EPA guidance document relaxing pollution standards for permitting did not meet finality threshold); *SurvJustice, Inc. v. DeVos*, No. 18-cv-00535, 2018 WL 4770741, at *11 (N.D. Cal. Oct. 1, 2018) (finding a Department of Education guidance document changing Title IX investigation procedures did not constitute final agency action).