UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of Amazon.com, Inc., Respondent.	CPSC Docket No. 21-2 Hon. Carol Fox Foelak Presiding Officer

RESPONDENT AMAZON'S MOTION FOR SUMMARY DECISION AND MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY DECISION

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INTRODUCTION

The Consumer Product Safety Commission ("CPSC" or "Commission") did not bring this case because Amazon's customers needed further protection from safety hazards posed by the products identified in the Complaint ("Subject Products"). Amazon fully addressed those concerns—before initiation of this action—by promptly removing the Subject Products from its online store and issuing direct notices and full refunds to all customers who purchased the Subject Products. Over a year ago, Amazon sent to purchasers of the Subject Products individualized emails that informed them of the relevant safety hazard and instructed them to immediately stop using and dispose of the products. Notwithstanding Amazon's actions, and long after customers had been notified and remedied, Complaint Counsel brought this case to try to establish Amazon's status as a distributor under the Consumer Product Safety Act ("CPSA"). Now that the case has reached the remedy stage, Complaint Counsel is left to seek remedies that are not available under the statute, would not meaningfully protect customers, are inconsistent with the agency's past practice, and are not in the public interest.

In the CPSA, Congress empowered the Commission to order a limited set of remedies to protect consumers from *unreasonable* risks posed by *substantial* product hazards. In particular, the CPSA authorizes the Commission to order companies to issue product hazard notices that describe the product, the hazard, and the remedy. The Act further authorizes the Commission to require three—and only three—possible product hazard remedies: repair, replacement, or refund. These three remedies are commonly referred to as "product recalls" although the term "recall" does not appear in the relevant provisions of the Act.

In this case, consistent with these statutory provisions, and in consultation with the Commission, Amazon directly notified and fully refunded every consumer who purchased one or more of the three categories of products at issue, alerted customers of the nature of the hazard in

terms commonly used in agency-approved recall notices, and instructed the customers to immediately stop using and dispose of the products. There is no dispute that the Commission considers such direct notice the most effective form of public notice. It is also undisputed that automatically issuing full refunds to every affected purchaser represents a 100 percent "correction rate", which is significantly higher than typical Commission recall effectiveness rates.

Amazon also immediately halted all sales of the affected products by removing product listings (identified by Amazon Standard Identification Numbers or "ASINs") from Amazon.com, quarantined warehouse inventory to prevent shipment of the products, and slated the inventoried products for destruction. Despite Amazon's proactive steps, the Commission decided to sue only Amazon—not the manufacturers, third-party sellers, or any other online stores selling the same noncompliant products.

Complaint Counsel's requests for relief fall, *inter alia*, into three principal categories: (1) requiring Amazon to provide additional direct and indirect notice, using language dictated by the Commission, (2) requiring Amazon to facilitate product returns from customers and destruction of the products upon receipt, and (3) requiring Amazon to take action on "functionally equivalent products." The Commission's requested remedies—and its alleged rationale for these remedies—are unsupported by the plain language of the CPSA, its implementing regulations, agency recall guidance, or the Commission's past practice as reflected in public recall notices. Accordingly, such additional remedies would not serve the "public interest" of protecting consumers from unreasonable risk of injury from substantial product hazards. And undisputed evidence also demonstrates that the Commission's requests for relief are arbitrary and capricious, unreasonable or contrary to law, and in violation of the Administrative Procedure Act.

First, with respect to the requested supplemental notices, the CPSC fails to explain how additional notices—a year or more after the initial notices were sent and featuring slightly different verbiage—serve the public interest. In every product recall regime in the United States, expedited safety messaging is key, and neither the CPSA nor the Commission's mandatory recall rule prescribe rigid content requirements. The Commission asserts that further notice is warranted because specific wording could possibly be more effective in motivating consumers to heed hazard instructions. But the Commission's attempt to compel Amazon to use words other than "may" and "potential" in describing a product risk is contradicted by numerous Commission-approved recall notices that have used identical language. The Commission's semantic preferences are based not on empirical evidence or studies, but on speculation. Nor do they align with the public interest cornerstone of the CPSA: Congress has made clear that consumers must be trusted to make reasonable decisions upon receipt of hazard notifications. Moreover, the Commission's prescriptive language runs afoul of the First Amendment's prohibition against compelled speech. Accordingly, sending supplemental notices to purchasers, whether by direct or indirect means, would not serve the public interest. To the contrary, a second notice—sent at least a year or two after the customer purchased the product and received a direct notice, and after consumers have already been fully refunded—will only confuse consumers.

Second, instructing customers—who have already been directed to *dispose* of the products and received refunds—to now *return* the products is both unauthorized by statute and counter-productive as a practical matter. The CPSA authorizes the Commission only to order the repair, replacement, or refund of a product—it does not authorize mandatory returns. As the Presiding Officer noted in the partial summary decision, "[g]iven that refunds are the proposed incentive for

returning products for destruction, destruction of products in consumers' possession is an end that cannot be achieved, at least not by the means Complaint Counsel proposes." Dkt. 27 at 21.

Third, the Commission lacks authority to require Amazon to take action with respect to what it describes as "functionally equivalent products." That vague and undefined phrase does not appear anywhere in the CPSA or related regulations, which provide for mandatory remedial orders only for *specific* products that have been formally determined by the Commission to present a substantial product hazard.

Reaching all customers directly and providing full refunds to every purchaser, as Amazon did, far exceeds the effectiveness of a typical Commission-administered recall. The Commission, as well as the Government Accountability Office and Congress, have recognized that CPSC recalls are often slow, ineffective, and bureaucratic. The public interest in consumer product safety has been far better served by the swift and effective safety notices and refunds provided directly to consumers.

For these reasons, the Presiding Officer should grant Amazon's Motion for Summary Decision and deny Complaint Counsel's requested relief.

BACKGROUND

Three categories of consumer products are at issue in this case: children's sleepwear, carbon monoxide detectors, and electric hair dryers (collectively the "Subject Products"). *See* Statement of Undisputed Material Facts ("SUMF") ¶¶ 1. The Subject Products were sold by third-parties through Amazon.com as part of Amazon's Fulfilled By Amazon program between June 2019 and March 2021. SUMF ¶¶ 1–3. Between January 2020 and March 2021, the Commission notified Amazon that the Subject Products posed a potential hazard to consumers.[1]

A. Amazon's Stop-Sale, Quarantine, and Destruction of the Subject Products

Within days of being notified by the Commission that the Subject Products posed a potential hazard to consumers, Amazon removed the Subject Products from its online store and quarantined any units in its fulfillment centers.[2] In doing so, Amazon ensured that no additional units would be sold to customers, SUMF ¶ 116, and prevented shipment of the Subject Products from Amazon warehouses. SUMF ¶ 121. Amazon also initiated a process to destroy all units of the Subject Products stored in Amazon fulfillment centers. SUMF ¶ 117. As of September 23, 2022, only 6 units remained under quarantine, slated for destruction.[3] SUMF ¶ 120.

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[1] For the purposes of this proceeding, the Parties have stipulated that the Subject Product children's sleepwear garments failed to meet current flammability requirements for children's sleepwear, Dkt. 35 ¶ 1, the Subject Product hair dryers did not contain an immersion protection device integral to the power cord, *id.* ¶ 3, and the Subject Product carbon monoxide detectors failed to alarm within 15 minutes when subjected to 400 parts per million of carbon monoxide, *id.* ¶ 2. As a result, for purposes of this proceeding, the Subject Products meet the requirements for a substantial product hazard under Section 15(a)(1) of the Consumer Product Safety Act ("CPSA"). *See* Dkt. 35. The Subject Products do not include any purported "functionally equivalent" products.

[2] *See, e.g.*, SUMF ¶¶ 5, 11–14, 31–34, 43–45, 62–64, 80, 84, 85, 97–99.

[3] Amazon's fulfillment centers destroy products in the order they are received. SUMF ¶ 117. The destruction process can take time due to the large number of products at issue. SUMF ¶ 118. All items that are awaiting destruction remain unavailable for sale and quarantined, meaning they cannot be sold or shipped to customers. SUMF ¶ 121.

B. Amazon's Direct Notice to All Purchasers of the Subject Products

Amazon also sent direct consumer safety notifications, via email, to all purchasers of the Subject Products. SUMF ¶¶ 110. The notices contained the following:

1. The subject lines said: "Important safety notice about your past Amazon Order."[4]
2. In the body of the notifications, Amazon identified the specific products by listing the customer's order ID, the name of the product, and the product ASIN.[5]
3. The notifications described the potential hazard (burn risk, electric shock, CO poisoning) posed by the relevant product.[6]
4. The notifications directed consumers to "stop using [the product] immediately and dispose of the item," or, if the product was purchased for or given to someone else, to "notify the recipient immediately and let them know they should dispose of the item."[7]
5. The notifications informed consumers that Amazon had "appl[ied] a refund in the form of a gift card to [each purchaser's] Account," and included links where purchasers could view their available balance.[8]

C. Amazon's Full Refunds & Correction Rate

Amazon provided all purchasers of the Subject Products a full refund and, in total, refunded purchasers of the Subject Products over $20 million. *See, e.g.*, SUMF ¶¶ 25, 39, 58, 76, 93, 106, 112. Refunding all purchasers the full purchase price of the product amounts to a 100 percent correction rate. SUMF ¶ 130. The correction rate—the proportion of product units that have been

[4] *See, e.g.*, SUMF ¶¶ 18, 51, 70, 86, 100.
[5] *See, e.g.*, SUMF ¶¶ 18, 20, 52–53, 71–72, 87–88, 101, 102, 167.
[6] *See, e.g.*, SUMF ¶¶ 19, 21, 52, 54, 71, 73, 87, 90, 101, 103, 168.
[7] *See, e.g.*, SUMF ¶¶ 19, 22, 52, 56, 71, 74, 87, 91, 101, 104, 111, 170.
[8] *See, e.g.*, SUMF ¶¶ 19, 23, 52, 57, 71, 75, 87, 92, 101, 105, 111, 169.

remedied (*i.e.*, refunded, replaced, or repaired)—is a measure used by the Commission to determine recall effectiveness. SUMF ¶¶ 127–28. From 2013 to 2016, the Commission's overall recall correction rate was approximately 65 percent. SUMF ¶ 135. As of 2017, recalls for which the Commission issued a Press Release had a consumer correction rate of approximately 6 percent, SUMF ¶ 138, and cases in which the Commission issued a Recall Alert (*i.e.*, a Commission-issued public notice that is not disseminated to media where the recalling firm can contact at least 95 percent of consumers), had a correction rate of approximately 50 percent. SUMF ¶ 144.

D. Complaint Counsel's Requested Relief

Despite Amazon's 100 percent correction rate, Complaint Counsel seeks an order requiring Amazon to take additional notification and remedial steps. Specifically, Complaint Counsel requests an Order directing Amazon to: (1) issue an additional Commission-approved direct notice to purchasers of the Subject Products; (2) issue a joint press release with the Commission informing the public of the recalls; (3) arrange for the return of the Subject Products, and destroy them upon receipt; (4) identify, cease distribution of, and remove any "functionally identical products"; (5) halt distribution of the Subject Products, and ensure Amazon will not distribute them in the future; and (6) provide monthly progress reports that (a) reflect the number of Subject Products in Amazon's inventory, (b) identify all "functionally equivalent products" removed by Amazon, and (c) summarize incident data. Dkt. 1 at 18–20.

LEGAL STANDARDS

A. Motion for Summary Decision Standard

A party may move "for a Summary Decision and Order in its favor upon all or any of the issues in controversy." CPSC Rules of Practice for Adjudicative Procedures, 16 C.F.R. § 1025.25(a). The motion "shall be granted if the pleadings and depositions, answers to interrogatories, admissions, or affidavits show there is no genuine issue as to any material fact and

that the moving party is entitled to Summary Decision and Order as a matter of law." *Id.* § 1025.25(c).

While Federal Rule of Civil Procedure 56 is not binding here, "[m]any agencies habitually look to Rule 56 case law for guidance in respect to administrative summary judgments." *Puerto Rico Aqueduct & Sewer Auth. v. EPA*, 35 F.3d 600, 607 (1st Cir. 1994) (collecting cases); *see also* 45 Fed. Reg. 29,206, 29,206 (May 1, 1980) (Commission's Rules of Practice for Adjudicative Proceedings are "patterned on the Federal Rules of Civil Procedure").

The movant bears the initial burden of identifying those portions of the record that show a lack of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A fact is material if it "might affect the outcome of the suit under the governing law," and a dispute is genuine if "the evidence is such that a reasonable [factfinder] could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The nonmoving party must thereafter "designate specific facts showing that there is a genuine issue for trial." *Celotex Corp.*, 477 U.S. at 324.

Because the non-movant must supply evidence that, if true, would allow a reasonable jury to find in its favor, a "mere . . . scintilla of evidence in support of" the non-movant's position cannot defeat a motion for summary judgment. *Anderson*, 477 U.S. at 252. Further, if the non-movant's evidence is "merely colorable, or is not significantly probative," the Court may grant summary judgment. *Id.* at 249–50.

B. Public Interest and Administrative Procedure Act Standards

Once the Commission has "determined" after a formal hearing that a product presents a "substantial product hazard," the Commission may order a firm to cease distribution of the product and provide notice to purchasers as "required in order to adequately protect the public" from the hazard. 15 U.S.C. § 2064(c)(1). In addition, the Commission may order a firm to "repair,"

"replace," or "refund the purchase price" of the product, but only if such a remedy would be "in the public interest." *Id.* at § 2064(d). Accordingly, to obtain relief here, Complaint Counsel must demonstrate that (1) any requested relief is within the scope of the Commission's statutory authority, and (2) that it is in the "public interest" to grant such relief.

The Supreme Court has "consistently held that the use of the words 'public interest' in a regulatory statute is not a broad license to promote the general public welfare. Rather, the words take meaning from the purposes of the regulatory legislation." *NAACP v. Fed. Power Comm'n*, 425 U.S. 662, 669 (1976). Here, the relevant purposes of the CPSA are to (1) protect consumers from "unreasonable risks of injury" and (2) "assist consumers in evaluating the comparative safety of consumer products." 15 U.S.C. § 2051(b). These statutory purposes guide any assessment of whether a remedy is in the public interest.

First, by limiting the purpose of the CPSA to the mitigation of "unreasonable" risks, Congress has made clear that mitigation of *all* risk (an impossibility) is not the goal. Instead, the express purpose of the statute contemplates mitigation of risks to *reasonable* levels. In the context of the CPSA, the Supreme Court has observed that assessing reasonableness of risk mitigation requires a "generalized balancing of costs and benefits." *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 512 n.30 (1981).[9] Although the agency is not obligated to prepare a formal

[9] In *Donovan*, the Court observed "that the determination of unreasonable product hazard will involve the Commission in balancing the probability that risk will result in harm and the gravity of the harm against the effect on the product's utility, cost, and availability to the consumer." 452 U.S. at 512 n.30 (quotation marks and citation omitted); *see also Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Occupational Safety & Health Admin.*, 938 F.2d 1310, 1319 (D.C. Cir. 1991) ("[W]here Congress authorized the Consumer Product Safety Commission to regulate hazards that create 'an unreasonable risk' of consumer injury, we understood it to invoke the balancing test of negligence law and to authorize regulation only where the severity of the injury (adjusted for likelihood) offset the harm that the regulation would impose on manufacturers and consumers.").

comparison of the costs and benefits, 15 U.S.C. § 2064(h), it must perform a generalized assessment of costs and benefits (risk versus utility) in evaluating "unreasonable" risk. In sum, because the express purpose of the CPSA is to mitigate "unreasonable" risks, the Commission's remedial authority is limited to only those actions necessary to reduce consumer risks to reasonable levels pursuant to a general balancing test—nothing more.

Second, the statute provides that the purpose of the CPSA is to "assist" consumers in making their own informed decisions. 15 U.S.C. § 2051(b)(2). Rather than dictating a consumer's actions or imposing burdens on consumers, the goal is to provide clear information to consumers to "assist" them in exercising independent judgment. *See Aqua Slip 'N' Dive Corp. v. CPSC*, 569 F.2d 831, 839 (5th Cir. 1978) (noting that "[i]f consumers have accurate information, and still choose to incur the risk, then their judgment may well be reasonable"). The public interest is therefore served when consumers receive information that will assist them in making decisions about product hazards (such as immediately ceasing use and disposing of the product). It is *not* served where the Commission would inundate consumers with duplicative, indirect, delayed, and confusing communications that would not meaningfully assist them in making their own risk assessments, or require burdensome returns rather than allow simple disposal of the products.

This public interest limitation is mandatory, and any remedial order must be rejected if the agency fails to consider any "component of a public interest determination." *Cent. Power & Light Co. v. FERC*, 575 F.2d 937, 939 (D.C. Cir. 1978). As a result, the Commission must consider all relevant facts in the record. *See Nat'l Audubon Soc. v. Hodel*, 606 F. Supp. 825, 834 (D. Alaska 1984). In particular, the Commission's decision must be "based upon a consideration of the entire record and shall be supported by reliable, probative, and substantial evidence." 16 C.F.R. § 1025.51(b).

Finally, Complaint Counsel's request for relief is subject to Administrative Procedure Act ("APA") requirements. *See* 15 U.S.C. § 2064(f); *see also* 5 U.S.C. § 706 (it is unlawful for an agency to take action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law"). *First*, the agency "must articulate with reasonable clarity its reasons for decision … so that a court may ensure that the public interest finding results from reasoned decision-making." *Comm. To Save WEAM v. FCC*, 808 F.2d 113, 116 (D.C. Cir. 1986). *Second*, the agency must treat like cases alike—"[w]here an agency applies different standards to similarly situated entities and fails to support this disparate treatment with a reasoned explanation and substantial evidence in the record, its action is arbitrary and capricious and cannot be upheld." *Burlington N. & Santa Fe. Ry. Co. v. STB*, 403 F.3d 771, 777 (D.C. Cir. 2005). *Third*, the agency must acknowledge whether its decisions constitute a change in established practice or policy, and if so, supply reasoned explanation for the change. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009).

ARGUMENT

Complaint Counsel's requested remedies are unwarranted here in light of the substantial remedial action already taken by Amazon. As a general matter, discovery has confirmed that any such requests are moot because there is no "effectual relief" left to be granted. Dkt. 27 at 20 (quoting *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012)). Regardless, an order directing Amazon to provide additional notices would not be in the public interest because Amazon has already notified 100 percent of purchasers and achieved a 100 percent correction rate, far in excess of typical Commission-overseen recalls. An order directing returns exceeds the Commission's statutory authority, which is limited to ordering repairs, replacements, and refunds. Moreover, because all consumers have been refunded, there is no need to provide an additional remedy. And the request for Amazon to address "functionally equivalent products" is outside the

scope of the CPSA, which grants recall authority only with respect to specific products determined to present substantial safety hazards.

I. The Commission's Request for Additional Notice Is Not in The Public Interest and Violates the APA.

Amazon has directly notified every customer who purchased the Subject Products about the hazard, instructed them to dispose of the product, and provided full refunds. In terms of providing consumers information to facilitate their independent decision-making, there is nothing left to accomplish. Complaint Counsel's request for additional notice therefore does not serve the public interest, as required under the CPSA. The request is likewise arbitrary and capricious due to Complaint Counsel's inconsistent application of the agency's own policies and contrary treatment of recalls of similar products.

A. Amazon's Direct Notification of Consumers Is More Effective than Typical Commission Recall Notifications.

It is undisputed that Amazon sent a direct notification to all purchasers of the Subject Products via email, informing them of the hazard, instructing them to immediately stop using and dispose of the products, and refunding the purchase price. *See supra* FN 4–8; Ex. 2, Goldberg Dep. 152:19–22, 153:1–5 [redacted]); Ex. 14, Amazon-CPSC-FBA-00002397, Consumer Messaging Data.[10]

The Commission classifies these types of emails—known as direct notifications—as "the most effective form of a recall notice." 16 C.F.R. § 1115.26(a)(4); *see also* 83 Fed. Reg. 29,102,

[10] All exhibits cited herein are attached to the Declaration of Joshua González dated September 23, 2022.

29,102 (June 22, 2018) ("Direct notice recalls have proven to be the most effective recalls").[11] Similarly, empirical research has "consistently . . . identified" direct notice as "a preferred and effective method of contacting most population segments."[12]

Amazon is well positioned—due to its online ordering system—to ensure 100 percent purchaser notification through direct notice alone. "Most recall notices," on the other hand, "are disseminated to broad or, on occasion, partially-targeted audiences," and are less effective as a result. 74 Fed. Reg. 11,883, 11,884 (Mar. 20, 2009). As a consequence of Amazon's ability to directly contact every product purchaser, Amazon's recall correction rate vastly exceeds the Commission's average correction rate for recalls which, as of 2017, was approximately 6 percent.[13] And the Commission's own representative testified that 6 percent is [redacted] SUMF ¶ 140; Ex. 30, Rose Dep. 89:8–90:6.

Simply put, Amazon's notice and refund has already far exceeded the effectiveness of a typical Commission-directed recall. Accordingly, further notification is not in the public interest in this case.

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[11] *See also* SUMF ¶¶ 162, 165; Ex. 90, CPSC_AM0011464 at 11481, CPSC 2021 Recall Handbook ("Direct notice is the most effective method of engaging consumers for recalls"); Ex. 91, CPSC_AM0011459 at 11462, CPSC Recall Effectiveness Workshop Report 2018 ("[D]irect notice has a substantial impact on consumer return rate" and "direct notice recalls have proven to be the most effective"); Ex. 92, CPSC_AM0009669 at 9680, Blake G. Rose, Director, Defect Investigations Division of CPSC, *Review of Recall Process and Standard Notifications* at 12 (July 25, 2017) ("[D]irect notice" to "known purchasers of recalled product" is "most effective").

[12] SUMF ¶ 164; Ex. 93, Department for Business, Energy & Industrial Strategy, *Insights into Product Recall Effectiveness* at 5 (Sept. 2020).

[13] *See* SUMF ¶ 138; Ex. 1, Complaint Counsel's Objections and Responses to Respondent's First Set of Requests for Admission at 11; *see also* SUMF ¶ 139; Ex. 70, Amazon-CPSC-FBA-00001348, at 01386–87, Tr. of Effectiveness Workshop (statement by Ms. Carol Cave, Deputy Director, Office of Compliance & Field Operations, that products with a retail price under $19 had only a 4 percent correction rate).

B. Amazon's Direct Notice Is Consistent with Relevant Commission Guidance and Practice.

The Commission has provided guidelines for mandatory recall communications in an interpretive rule. *See* 16 C.F.R. §§ 1115.23–29 (the "Mandatory Recall Rule"). Importantly, the Commission's interpretive rule provides guidance on what constitutes adequate notice of a product hazard but is not legally binding.

First, the rule has no truly "mandatory" provisions—it is a non-binding set of guidelines for consideration by the Commission in evaluating the adequacy of a product hazard notice. The Commission issued the rule in response to a statutory directive to promulgate "guidelines," not binding requirements. 15 U.S.C. § 2064(i). And as the Commission has confirmed, these guidelines "are essentially a statement of policy," not a binding regulation. 74 Fed. Reg. at 11,885; *see also Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 97 (2015) ("Interpretive rules do not have the force and effect of law[.]" (quotation marks and citation omitted)).

Second, in drafting the rule, "the Commission did not rely on quantifiable 'data,'" meaning that *none* of its provisions reflect an empirical basis or determination that particular words or topics are effective. 75 Fed. Reg. 3,355, 3,357 (Jan. 21, 2010). The Commission instead purports to rely on its "experience," as "summarized in [its] Recall Handbook," *id.*, but the instructions in the Handbook have changed over time, and, as discussed below, key portions of the Handbook in effect at the time Amazon's direct notices were sent support Amazon's action. In any event, conclusory references to agency "expertise" and "experience" are insufficient to fulfill the APA requirement that agencies base their decisions on substantial record evidence. *See Am. Petroleum Inst. v. EPA*, 661 F.2d 340, 349 (5th Cir. 1981) (judicial review "must be based on something more than trust and faith in [the agency's] experience," and courts "are no longer content with mere administrative *ipse dixits* based on supposed administrative expertise" (citation omitted)).

Third, the Commission itself has acknowledged that it has discretion to deviate from these guidelines, *see* 16 C.F.R. § 1115.29(a); Ex. 30, Rose Dep. 136:15–20, and the Commission may not impose requirements that do not promote the public interest. *See* 75 Fed. Reg. at 3,359. At the same time, the agency remains bound by the APA's requirements, including the obligation to provide a reasoned explanation for treating like cases dissimilarly. *See Burlington*, 403 F.3d at 776. Each individual guideline therefore should be read in light of the overarching purpose, which is to "effectively help[] consumers and other persons to: (1) [i]dentify the specific product to which the recall notice pertains; (2) [u]nderstand the product's actual or potential hazards to which the recall notice pertains, and information relating to such hazards; and (3) [u]nderstand all remedies available to consumers concerning the product to which the recall notice pertains." 16 C.F.R. § 1115.23(b).

In sum, the Commission's guidelines are flexible and non-binding on the Presiding Officer and the Commission. As discussed below, while those guidelines provide for various possible components to a recall notice, Amazon's messages included the components best suited to serve the public interest under the CPSA. Amazon's messages were effective, and, as the Commission's Deputy Director of the Office of Communications admitted, [redacted] SUMF ¶¶ 24, 171; Ex. 16, Davis Dep. 146:21; *see also* Ex. 104, Mohorovic Dep. 198:11–12 ([redacted]). Complaint Counsel's request that Amazon be ordered to re-send new Commission-approved notifications is unnecessary and would not serve the public interest.

1. Description of the Product

Amazon's direct notice emails contained "a clear and concise statement of the information that will enable consumers and other persons to readily and accurately identify the specific product and distinguish it from similar products." 16 C.F.R. § 1115.27(c). They contained the key pieces

of information necessary for any consumer to identify the product: product code, product name, and order identification number. *See supra* FN 5; Ex. 29, Amazon-CPSC-FBA-00000212–14, Amazon's Direct Product Safety Notification Emails; Ex. 62, Mohorovic Rep. at 14. One of the Commission's compliance officers agreed that [redacted] SUMF ¶ 89; Ex. 40, Williams Dep. 62:15–63:1. The Commission has admitted that [redacted] SUMF ¶ 173; Ex. 30, Rose Dep. 144:4–9 ([redacted]).

The Commission's guidelines list other information for possible inclusion, such as the region where the product was sold, the number of units sold, dates of manufacture, or approximate price, 16 C.F.R. § 1115.27(c), but such information is beneficial only in circumstances where consumers may be unsure whether the product they purchased is indeed the product addressed in the notice. Indeed, such information is typically posted in brick-and-mortar retail establishments (which lack direct notification capability) to enable passing consumers to evaluate whether they may have purchased an affected product. Here, the purchasers already know that they purchased the product at issue—Amazon verified that information and said so in the direct notice email. *Id.* § 1115.27(c) (information must be included only "[t]o the extent applicable"); 15 U.S.C. § 2064(i)(2) (product identifying information may be omitted when "unnecessary or inappropriate under the circumstances"); *see also* SUMF ¶¶ 167; Ex. 62, Mohorovic Rep. at 14. No further information is necessary for the purchaser to identify the Subject Product.

2. Description of the Hazard

Amazon's direct notice also contained a clear and concise description of the Subject Product hazards. 16 C.F.R. § 1115.27(f). The importance of the email is made clear at the outset—the subject line states: "Important Safety Notice." *See supra* FN 4; Ex. 29, Amazon-CPSC-FBA-

00000213, Amazon's Direct Product Safety Notification Emails. The message goes on to use the word "safety" four additional times. SUMF ¶¶ 19, 52, 71, 87, 101. Amazon then described the defect or noncompliance for each product, saying for example that the hair dryers "may fail to have mandatory immersion protection." Ex. 29, Amazon-CPSC-FBA-00000213. And it provided a description of the type of risk, *e.g.*, that the "children's sleepwear[] pos[e] a risk of burn injuries to children." *Id.* at 212. [redacted] Ex. 104, Mohorovic Dep. 198:3–8; *see also* 16 C.F.R. § 1115.23(b) (purpose of the notice, *inter alia*, is to help consumers "[u]nderstand the product's actual or potential hazards to which the recall notice pertains, and information relating to such hazards").

Amazon's language is comparable—and in some instances identical—to Commission-approved messaging regarding similar products and hazards. It is therefore unsurprising that the Commission's Rule 30(b)(6) representative (Blake Rose, the Commission's former Director of the Defect Investigations Division), testified that [redacted] SUMF ¶ 55; Ex. 30, Rose Dep. 155:10–18.

Carbon Monoxide Detectors	
Amazon's Notice	**Commission-Approved Notice**
Product "may fail to alarm on time, posing a risk of exposure to potentially dangerous levels of Carbon Monoxide."	Commission Recall No. 22-111: "The alarms can fail to alert consumers to the presence of a hazardous level of carbon monoxide, posing a risk of carbon monoxide poisoning or death. Carbon monoxide (CO) is an odorless, colorless, poisonous gas."[14]
Children's Sleepwear	
Amazon's Notice	**Commission-Approved Notice**
Product "failed to meet the federal safety standard for the flammability of children's	Commission Recall No. 20-066: "The children's robes fail to meet the federal

[14] SUMF ¶ 154; Ex. 73, CPSC Recall No. 22-111.

sleepwear, posing a risk of burn injuries to children"	flammability standards for children's sleepwear, posing a risk of burn injuries to children."[15]
Hair Dryers	
Amazon's Notice	**Commission-Approved Notice**
Product "may fail to have mandatory immersion protection, posing a risk of electric shock if the hair dryer comes in contact with water."	Commission Recall No. 20-738: "The hair dryers do not have an immersion protection device, posing an electrocution or shock hazard if the dryer falls into water when plugged in."[16]

The Commission guidelines also state that a notice should describe instances in which the Subject Product caused property damage, injuries, or deaths. *See* 16 C.F.R. § 1115.27(m). But the Commission has failed to identify any such instances involving the Subject Products.

Complaint Counsel has suggested that Amazon's notices were not sufficiently forceful because (1) Amazon's notices used words like "may" or "potentially," rather than supposedly more strongly worded language like "can," and (2) that Amazon's notifications did not adequately motivate consumers by informing consumers that they "should" dispose of the Subject Products. *See* Ex. 104, Mohorovic Dep. 164:20–166:17, 196:22–199:8.

Both arguments lack merit. Complaint Counsel has failed to identify *any* evidence indicating that Amazon's use of the words "may" or "potentially" are factually inaccurate. Nor do they cite to any empirical evidence that these semantic changes would be perceived differently by consumers or would be more likely to motivate them to act. *See PREVOR v. Food & Drug Admin.*, 895 F. Supp. 2d 90, 98 (D.D.C. 2012) (holding "agency's ipse dixit cannot substitute for the

[15] SUMF ¶ 151; Ex. 83, CPSC Recall No. 20-066.
[16] SUMF ¶ 153; Ex. 72, CPSC Recall No. 20-738.

'qualitative analysis' or 'scientific information'"); *see also Music Choice v. Copyright Royalty Bd.*, 970 F.3d 418, 429 (D.C. Cir. 2020). And the Commission routinely approves indirect recall notices virtually identical to Amazon's direct notices, both using "may" and "can,"[17] as well as telling customers they "should"[18] take certain actions. Such inconsistent treatment of Amazon violates the APA. *See Burlington*, 403 F.3d at 777 ("Where an agency applies different standards to similarly situated entities and fails to support this disparate treatment with a reasoned explanation and substantial evidence in the record, its action is arbitrary and capricious and cannot be upheld.").

Complaint Counsel likewise cannot demonstrate that the public interest is served by an agency order directing re-notification to thousands of customers using the word "can" instead of "may" when Complaint Counsel cannot *first* demonstrate that such a minute change is necessary to adequately alert consumers of unreasonable risks. *See* 15 U.S.C. § 2051(b). Such a failure cannot survive the generalized cost-benefit prerequisite for the exercise of agency authority under the CPSA. Even if Complaint Counsel could provide an evidentiary justification for its wordsmithing (it has not), such changes do not outweigh the fact that the customers were provided nearly-identical information over a year ago. Balanced against the absence of unreasonable risk from already-remedied products, the Commission's insistence that Amazon use terms that are

[17] *See, e.g.*, SUMF ¶ 159; Ex. 79, CPSC Recall No. 17-102 (hazard description states vehicle "master cylinder may cause unintended brake drag"); Ex. 81, CPSC Recall 15-159 (hazard description states "[e]lectrical arcing may cause the lamp to overheat"); Ex. 80, CPSC Recall No 12-021 ("Burners on range tops operating on liquefied petroleum . . . may fail to ignite or light[.]"); Ex. 78, CPSC Recall No. 11-711 ("Vibration from the ignition module may cause the trimmer head to loosen and detach[.]").

[18] *See, e.g.,* SUMF ¶ 160; Ex. 82, CPSC Recall No. 20-163 ("Consumers should immediately stop using the recalled lawn dart sets[.]"); Ex. 83, CPSC Recall No. 20-066 ("Consumers should immediately stop using" recalled product and "should destroy" a certain part of it).

different than the terms previously used and approved in other recalls is unreasonable under the APA.

The same is true for Complaint Counsel's assertion that re-notification is necessary because Amazon's recommendation that customers "should" dispose of the product was not sufficiently commanding. Complaint Counsel, however, cannot identify any Congressional mandate empowering the agency to order action on the part of consumers. By extension, the Commission's position that Amazon should somehow force consumers to dispose of the products (or return them) is an overreach that goes beyond the public interest requirement of the CPSA. The public interest is served in providing accurate, timely information to consumers and letting them decide what to do. It is not served by an order directing firms to undertake duplicative messaging to supplant the agency's judgment for that of the consumer.

3. Description of the Corrective Action

Amazon's notice contained a "clear and concise statement" of both the actions Amazon was "taking concerning the [Subject Products]" and the remedies "available to . . . consumers" as well as "how to participate in the recall." 16 C.F.R. § 1115.27(d), (n). Amazon clearly stated that consumers should "stop using [the product] immediately and dispose of" it; should notify others who may be in possession of the item "immediately and let them know they should dispose of the item"; that there is "no need . . . to return the product"; and that Amazon was "applying a refund in the form of a gift card." SUMF ¶¶ 19, 52, 71, 87, 101; Ex. 29, Amazon-CPSC-FBA-00000212–14, Amazon's Direct Product Safety Notification Emails.

There is no dispute as to this portion of Amazon's notice—agency compliance staff agreed that this language [redacted]

[redacted]. Ex. 40, Williams Dep. 64:6–22; *see also* SUMF ¶¶ 110–11. Nothing more is required.[19]

4. Description of Relevant Commercial Entities

The notice also "identif[ied]" Amazon with sufficient specificity for the purchaser to know what entity was providing the remedy. 16 C.F.R. § 1115.27(g); *see* Ex. 29, Amazon-CPSC-FBA-00000212–14, Amazon's Direct Product Safety Notification Emails. Although the guidelines list other categories of information for possible inclusion such as legal name, corporate headquarters, and characterization as manufacturer, retailer, or distributor under the Consumer Product Safety Act, such additional information would not help consumers identify Amazon, particularly given Amazon's brand recognition. *See infra* Section I.C.

Identification of the product manufacturer is similarly unnecessary here. *See* 16 C.F.R. § 1115.27(h). Consumers had easy access to information about the third-party sellers, which would be reflected in their account or order confirmation, both of which were hyperlinked in Amazon's direct email notice. Nor is there any need to identify the product's retailers where, as here, consumers were told with one hundred percent certainty that they had purchased the Subject Product. *See id.* § 1115.27(i); 75 Fed. Reg. at 3,358 ("The sole purpose of identifying retailers in the recall notice is to assist consumers with product identification.").

5. **Use of the Term "Recall"**

The Commission contends that further notice is justified because Amazon's messages did not use the word "recall." *See* Ex. 30, Rose Dep. 122:7–16. This argument fails for three reasons.

[19] Unsurprisingly, the messages also contained the date they were sent, addressing that aspect of the guidelines. *See* Ex. 29, Amazon-CPSC-FBA-00000212–14; 16 C.F.R. § 1115.27(b) (notice "must include its date of release").

First, use of the word "recall" is not required by any statute, regulation, or agency policy, and requiring Amazon to do so would violate the Commission's recall guidelines and deviate from the Commission's established practice. The Commission's recall guidelines state that that "[a] direct recall notice" may include "'Safety Recall' *or other appropriate terms* in an electronic mail subject line." 16 C.F.R. § 1115.26(b)(2) (emphasis added). Amazon's subject line included the term "Important Safety Notice," which meets this guideline. Indeed, the Commission's 2012 Recall Handbook—in effect when Amazon sent its messages—stated that the term "'Important Safety Notice' . . . should appear" in "other forms of notice," which include email notifications. SUMF ¶ 204; Ex. 60, CPSC 2012 Recall Handbook; Ex. 30, Rose Dep. 177:3–5 ([redacted]). Amazon's notice language was therefore in accordance with the recommendations the Commission had in place at the time Amazon sent its email messages. Complaint Counsel lacks any reasonable basis to seek re-notification based on Amazon's use of language that was encouraged in the Commission's own public Handbook.

Notably, the Commission has approved numerous press releases and notifications in recent years utilizing this same "Important Safety Notice" language, including at least one notification issued *after* Amazon provided its direct notifications to purchasers of the Subject Products in June 2021. *See, e.g.*, SUMF ¶ 157; Ex. 77, CPSC Recall No. 22-039 (press release about portable bed rails directing consumers to visit company website "and click on 'Important Safety Notice' at the top of the page . . . for more information"); Ex. 76, CPSC Recall No. 18-090 (same for cordless electric chainsaw); Ex. 75, CPSC Recall No. 17-168 (same for cordless electric lawn movers). Complaint Counsel must adequately justify any attempt to treat Amazon differently. *See Burlington*, 403 F.3d at 776. It has not.

Second, using the term recall would be inaccurate, unnecessary, and would create consumer confusion, because consumers were previously instructed to *dispose* of the products, not *return* them to Amazon. *See* Ex. 105, *Recall*, Merriam Webster Dictionary (defining recall as "a public call by a manufacturer for the return of a product that may be defective or contaminated"); *infra* Section I.D. Empirical research has specifically addressed the question whether the word "recall" should be used in notifications, and concluded instead that "use of different terminology" is appropriate where, as here, the term does not actually describe what action consumers should take with the product. SUMF ¶ 155; Ex. 74, Jennifer A. Cowley & Michael S. Wogalter, *Analysis of Terms Comprising Potential Names for a Recall Notification Campaign, Proceedings of the Human Factors and Ergonomics Society*, 1698, 1702 (2008) (noting that certain products "cannot be 'recalled'" because "[r]eturn to the manufacturer cannot be easily accomplished"). Complaint Counsel fails to identify any empirical data to the contrary, *i.e.*, showing that use of the term "recall" is sufficiently impactful—especially where the remedy is a refund—such that Amazon should be ordered to re-send notifications to thousands of customers. Complaint Counsel therefore lacks a colorable basis to assert that re-notification of all purchasers now, using the word "recall", is in the public interest.

6. **Action Announced in Conjunction with the Commission**

Additional notice is not justified to inform purchasers that the corrective action is being taken in conjunction with the Commission. *See* Ex. 45, Complaint Counsel's Obj. and Resp. to Amazon ROG ¶ 6 (seeking direct notice stating "the action is in conjunction with the CPSC"). There is no statutory or regulatory requirement anywhere that mandates express reference to the Commission in a safety notice. Even so, Amazon's emails *did* reference the Commission, stating, for example, that "[t]he U.S. Consumer Product Safety Commission (CPSC) has informed [Amazon] that the products" described in the message pose a safety risk. SUMF ¶¶ 19, 52, 71, 87,

101; Ex. 29, Amazon-CPSC-FBA-00000212, Amazon's Direct Product Safety Notification Emails.

There is also no evidence that additional reference to the Commission would further motivate consumer behavior: Amazon is a well-known brand and trusted source of information, and academic research shows its reputation increases the likelihood that its messages were heeded. *See* SUMF ¶ 206; Ex. 62, Mohorovic Rep. at 16–18. By contrast, the Commission has repeatedly admitted that it is "not a well-recognized agency," SUMF ¶ 208 (Ex. 102 at 24, CPSC Draft Strategic Plan 2023–2026), that has "little systematic data" about consumer "awareness of the agency, the CPSC's programs, and recalls," 78 Fed. Reg. 49,480, 49,481 (August 19, 2013). Thus, there is no evidentiary basis to conclude that consumers would be more likely to take additional steps simply because of the Commission's express involvement.[20] To the contrary, Amazon's notice makes express reference to the Commission where it counts most: as the source of the factual premise for the entire message, *i.e.*, the product hazard. Whether Amazon is working with the Commission on the remedy is immaterial and inconsequential to the consumer. It is therefore no surprise that Commission-approved press releases published to the agency's website lack the type of language that it seeks to impose here. *See* Ex. 30, Rose Dep. 125:4–126:9.

* * *

As detailed above, Amazon's direct notifications to consumers not only exceeded the effectiveness of a typical Commission-approved notification, but those notifications contained all of the components identified in the Commission's non-binding guidelines that were necessary to

[20] *See also* SUMF ¶ 209; Ex. 103, Government Accountability Office, *Consumer Product Safety Commission: Awareness, Use, and Usefulness of SaferProducts.gov* at 8 (March 2013) (noting only one third of consumers asked to assess Commission's website "were aware of the CPSC or its mission").

serve the public interest. Complaint Counsel cannot justify on purported public interest grounds an order from the Commission requiring re-notification of all purchasers years after the fact in order to make a few immaterial semantic alterations.

C. A Press Release or Recall Alert Is Not in the Public Interest.

Complaint Counsel also seeks public notification regarding the Subject Products for the purported purpose of informing other members of the public—aside from the actual product purchasers Amazon has already contacted—about the Subject Products. Similar to additional direct notice, Complaint Counsel's requested relief is unnecessary in light of the actions Amazon has already taken, and could potentially undercut consumer safety.

In different circumstances, such as when a recalling "firm does not have contact information for most purchasers," public notification may serve a useful role. *See* SUMF ¶ 137; Ex. 68, Patty Davis, Goals for CPSC Recall Press Releases at 5 (July 25, 2017). But as the Commission recognizes, "[w]ith direct notification, media assistance is not as important." *Id.*; *see also* SUMF ¶ 166; Ex. 62, Mohorovic Rep. at 10–11 ([redacted]).

Here, public notice would not provide consumers with meaningful new information: Amazon's direct messages enabled every customer who purchased a Subject Product through Amazon's store to identify the affected product, described the hazard, and instructed them on the appropriate remedy, *supra* FN 4–8, which compares favorably to Commission-approved public notices. Indeed, the Commission's proposal to send out an indirect "mass blast" press release to consumers and others who never purchased or used the Subject Products would be *harmful* because of its contribution to recall fatigue, detracting from the messages of the Commission (and other agencies) regarding hazards to which consumers might *actually* have been exposed. *See infra* Section I.D.

Public notice is also unnecessary to alert secondhand owners of Subject Product hazards. *See* Dkt. 23 at 32. Amazon's direct notices included explicit instructions for purchasers to contact others who might have received the product, telling them "[i]f you purchased this item for someone else, [to] please notify the recipient immediately and let them know they should dispose of the item." *See supra* FN 7; Ex. 29, Amazon-CPSC-FBA-00000212–14, Amazon's Direct Product Safety Notification Emails. The Commission has recognized this as an effective approach: "the purchasers may have given the product to other consumers, for example, as a gift. In [that] case, if the purchaser received the recall notice, the purchaser will generally know to whom the purchaser gave the product and will likely be able to contact the recipient about the recall notice. . . . the persons exposed to the product and its hazard will be more likely to receive the direct recall notice than to receive a broadly-disseminated recall notice." 74 Fed. Reg. at 11,884; *accord* 75 Fed. Reg. at 3,360.

Moreover, requiring a joint press release would be inconsistent with longstanding Commission policy. The agency uses another form of notice known as a recall alert—not a press release—when [redacted] Ex. 64, CPSC_AM0013521 at 13526, Section 15 Manual; *see also* SUMF ¶ 146. Unlike a press release, recall alerts [redacted] SUMF ¶ 143; Ex. 64, CPSC_AM0013521 at 13526. Current agency written policy states that [redacted]. SUMF ¶ 147; Ex. 64, CPSC_AM0013521 at 13526 ([redacted]).[21] Because Complaint

[21] The Commission's written policy aligns with the flexibility afforded to the Commission in the Mandatory Recall Rule to determine the necessary forms of notice to be used in each particular

Counsel has provided no justification or basis for its proposed deviation from this policy, its proposed remedy would violate the APA. *See Fox Television Stations*, 556 U.S. at 513.

D. Additional Notice, Whether Direct or Indirect, Would Contribute to Recall Fatigue, Harming the Public Interest.

Complaint Counsel's request that Amazon send repetitive notice to thousands of consumers ignores an acknowledged alternative consequence that would harm the public interest: the problem of recall fatigue. This refers to the concept that additional communications to consumers will make them less likely to respond to safety messaging as a whole, undermining initiatives to tackle other hazards. *See* Ex. 62, Mohorovic Rep. at 26.

Each additional consumer communication comes at a cost. Consumers are exposed to literally thousands of recalls per year, and have limited bandwidth to track, understand, and act on them all. *See* SUMF ¶¶ 179–81; Ex. 62, Mohorovic Rep. at 25–26 ([redacted]); Ex. 96, Michael S. Wogalter & William J. Vigilante, Jr., Attention Switch and Maintenance, *in* Handbook of Warnings 245, 245 (M.S. Wogalter ed., 2006) (consumers "have a limited capacity of attention or mental resources to be used for active processing" and "cannot attend to everything around us"). As a result, [redacted]. SUMF ¶ 182; Ex. 62, Mohorovic Rep. at 26.

It is undisputed that recall fatigue is a real phenomenon. In her deposition testimony, the Commission's Deputy Director of Communications agreed [redacted]

instance. *See* 16 C.F.R. § 1115.29 ("[The Commission] may determine that one or more of the recall notice requirements set forth in this subpart is not required[.]"). Although the agency guidelines entail issuance of public notice in addition to direct notice, the guidelines also make clear that 100 percent direct notice is the ideal outcome. *See id.* § 1115.26. The Commission's written policy therefore does not call for press releases for products sold via the internet in accordance with the Commission's authority to determine that such notice is sufficient.

[redacted] SUMF ¶¶ 184; 15; Ex. 16, Davis Dep. 191:2–19; *see also* SUMF ¶ 185; Ex. 62, Mohorovic Rep. at 26 ([redacted]). Then-Commissioner Buerkle noted in a 2015 Congressional hearing that "I think on some levels, at least for CPSC, there may be a recall fatigue issue that we really need to address."[22] That same year, the NHTSA Administrator testified that "there is so much discussion about recall fatigue and how much information is out there, do people know where to go; it is a huge problem."[23]

Increased recall fatigue makes consumers "simply ignore urgent calls to destroy or return defective goods,"[24] because they "tune out the news because they have been bombarded by repetition."[25] Redundant warnings also exacerbate distrust of safety messaging: Polling shows more than 60 percent of consumers believe that recalls are "primarily exercises in red tape," and "less about protecting consumers and more about government regulations."[26]

Thus, any benefit of further notice must be weighed against its contributions to recall fatigue. Given the effectiveness of the actions Amazon has already taken, additional messaging will likely prove a net negative to safety, and detract from the Commission's ability to effectively communicate regarding other hazards, *e.g.*, those for which no notice has been issued.

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[22] SUMF ¶ 185; Ex. 99, *Consumer Product Safety and the Recall Process*, Hearing Before the Subcomm. on Consumer Protection, Product Safety, Insurance, and Data Security of the Senate Comm. On Commerce, 114th Cong. (Oct. 8, 2015).
[23] Ex. 100, *Update on the Recalls of Defective Takata Air Bags and NHTSA's Vehicle Safety Efforts*, Senate Comm. On Commerce, 114th Cong. (June 23, 2015); *see also* SUMF ¶ 186.
[24] SUMF ¶ 178; Ex. 95, Lyndsey Layton, *Officials Worry About Consumers Lost Among the Recalls*, The Washington Post (July 2, 2010).
[25] SUMF ¶ 181; Ex, 97, Anita Bernstein, *Voluntary Recalls*, 1(10) UNIV. CHICAGO LEGAL FORUM 359, 396 (2013).
[26] SUMF ¶ 183; Ex. 98, Stericycle Expert Solutions, *Product Recalls: Big Brother or Caring for One Another?* (June 12, 2018).

E. Compulsory Notice Content Requirements Would Violate the First Amendment.

The Commission's attempt to micromanage the wording of Amazon's safety message also runs afoul of First Amendment principles: the agency seeks to compel speech without adequate justification. Such attempts must be rejected unless Complaint Counsel can satisfy the "demanding" intermediate scrutiny test prescribed by *Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980). *See, e.g.*, *Nat'l Ass'n of Mfrs. v. S.E.C.*, 800 F.3d 518, 526 (D.C. Cir. 2015) (applying *Central Hudson*).[27]

Under *Central Hudson*, for speech that concerns lawful activity and is not misleading, the government carries the burden of asserting "a substantial interest" and the compelled speech must "directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose." 447 U.S. at 564.[28] It is well established that the government's burden under this rigorous test "is not satisfied by mere speculation or conjecture; rather [the government] must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173, 188 (1999).

Even assuming that the Commission has a substantial government interest in seeking to dictate the content of Amazon's speech on grounds of public safety, it has failed to identify how its proposed wording will directly and materially advance that interest and is otherwise no more

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[27] Attempts to compel non-commercial speech are subject to strict scrutiny under the First Amendment. *Stuart v. Cambitz*, 774 F.3d 238, 246 (4th Cir. 2014). As in *National Association of Manufacturers*, however, the Presiding Officer need not reach the question of whether the speech at issue is commercial in nature because Complaint Counsel's request to compel speech cannot meet the demanding intermediate scrutiny requirements articulated in *Central Hudson*. *See* 800 F.3d at 524.

[28] There is no credible evidence that Amazon's communications with consumers regarding the Subject Products were misleading. *See, e.g.*, *Safelite Grp., Inc. v. Jepsen*, 764 F.3d 258, 264 (2d Cir. 2014) (asking whether communications were "tainted by lies" or had an "illegal purpose").

extensive than necessary. For the reasons given above, each of Complaint Counsel's requests—both its general requests for direct and public notice, and its specific requests for particular wording—fall far short of this threshold. Amazon's language satisfied the Commission's guidelines in every relevant respect, and the agency invokes only speculation and conjecture that further notice using its preferred language will "directly and materially advance" any safety purpose.

In applying *Central Hudson*, courts have rejected agency attempts to compel speech in similar circumstances. *See, e.g.*, *Nat'l Ass'n of Manufacturers*, 800 F.3d at 526 (SEC disclosure requirement was unconstitutional where agency "was unable to quantify any benefits of the forced disclosure" or demonstrate how compelled speech would alleviate alleged harms "to a material degree") (citation omitted)); *Safelite Grp.*, 764 F.3d at 265 (state disclosure law violated First Amendment where compelled disclosure would have "an indiscernible or *de minimis*" effect on the alleged substantial interest).[29] Accordingly, even if Complaint Counsel's requested communications might in some attenuated and abstract sense advance the public interest (and they do not), they violate the First Amendment as applied to Amazon.

[29] *See also, e.g.*, *Am. Beverage Ass'n v. City & County of San Francisco*, 916 F.3d 749, 757 (9th Cir. 2019) (en banc) (striking down warning requirement not supported by adequate evidence); *Cal-Almond, Inc. v. U.S. Dep't of Agric.*, 14 F.3d 429, 437 (9th Cir. 1993) (striking down compelled advertisement not shown to be effective in achieving governmental aims); *Nat'l Assoc. of Wheat Growers v. Becerra*, 468 F. Supp. 3d 1247, 1264 (E.D. Cal. 2020) (striking down compelled cancer warning where government lacked evidence that chemical caused cancer).

II. Complaint Counsel's Return Remedy Request Exceeds the Commission's Statutory Authority, Is Contrary to the Public Interest, and Violates the APA.

A. The Commission Lacks Statutory Authority to Order Amazon to Facilitate the Return and Destruction of the Subject Products.

The CPSA authorizes the Commission to order a firm to "repair," "replace," or "refund" a product—nothing more. Complaint Counsel's attempt to require Amazon to facilitate returns or destroy products therefore exceeds the agency's statutory authority.

"An administrative agency" such as the Commission "is a creature of the statute that brought it into existence"; it thus "has no powers except those specifically conferred upon it by statute." *Plaskett v. Wormuth*, 18 F.4th 1072, 1087 (9th Cir. 2021) (quoting *Int'l Union of Elec., Radio & Mach. Workers v. NLRB*, 502 F.2d 349, 352 n.* (D.C. Cir. 1974)). Unlike a federal court, the Commission "possesses no . . . inherent equitable power" to fashion remedies other than those expressly provided for by statute. *Id.*; *see also Am. Library Ass'n v. FCC*, 406 F.3d 689, 689–98 (D.C. Cir. 2005) (An agency "literally has no power to act . . . unless and until Congress confers power upon it.") (quoting *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986)).

Here, Section 2064(d) permits the Commission to order Amazon to take three—and *only* three—types of remedial actions. *First*, to make a *repair—i.e.*, "[t]o bring such product into conformity with the requirements of the applicable rule, regulation, standard, or ban or to repair the defect in such product." § 2064(d)(1)(A). *Second*, to provide a *replacement—i.e.*, "[t]o replace such product with a like or equivalent product which complies with the applicable rule, regulation, standard, or ban or which does not contain the defect." § 2064(d)(1)(B). And *third*, to offer a *refund—i.e.*, "[t]o refund the purchase price of such product." § 2064(d)(1)(C).

The text and structure of the CPSA confirm that these three remedies are exhaustive. *First*, the CPSA provides that the Commission may order a manufacturer, distributor or retailer to "take *any one or more of the following actions*"—thus limiting the Commission to the subsequently

listed actions. § 2064(d)(1) (emphasis added). *Second*, those listed actions (repairs, replacements, and refunds) are broken into standalone subparagraphs—thus structurally indicating that those actions are distinct remedial alternatives, not examples in an illustrative list. § 2064(d)(1)(A)–(C). And *third*, the CPSA "require[s]" the subject of a Commission order under Section 2064(d) "to submit a plan, for approval by the Commission, for taking action *under whichever of the preceding subparagraphs under which such person has been ordered to act*"—thus contemplating that the Commission will issue its orders under one or more of the specific subparagraphs concerning repairs, replacements, and refunds. § 2064(d)(2) (emphasis added).

Complaint Counsel's request for an order requiring Amazon to "facilitate the return and destruction of the Subject Products" falls outside the scope of these three categories. Dkt. 1 ¶ 4. Simply put, no provision of the CPSA authorizes the Commission to order either the "return" or "destruction" of products presenting a substantial product hazard. *See* 15 U.S.C. § 2064(d)(1). Tellingly, Complaint Counsel does not identify which of the subparagraphs of Section 2064(d)(1) it believes authorizes an order requiring facilitation of returns and product destruction. None of them do.

Other provisions of the CPSA (none of which are relevant here) contemplate the destruction of products. For instance, "[p]roducts refused admission into the customs territory of the United States *shall be destroyed* unless, upon application by the owner, consignee, or importer of record, the Secretary of the Treasury permits the export of the product in lieu of destruction." 15 U.S.C. § 2066(e) (emphasis added); *see also* 15 U.S.C. § 2088(a) (providing for the

Commission to "recommend to U.S. Customs and Border Protection a bond amount sufficient to cover the cost of destruction of such products or substances").[30]

Clearly, where Congress wanted to authorize the return or destruction of particular products, it did so explicitly. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). That Congress did not do so under Section 2064(d) forecloses the Commission from issuing an order requiring facilitation of product returns or destruction.[31]

Indeed, courts have rejected Commission attempts to order a "recall" when it lacks statutory authority to do so. In *Congoleum Industries Inc. v. CPSC*, 602 F.2d 220 (9th Cir. 1979), the Ninth Circuit vacated a recall order sought by the Commission under the Flammable Fabrics Act, rejecting the Commission's contention that it had "inherent" authority to issue a recall order under that statute. *Id.* at 225. As the Ninth Circuit explained, "Congress has acted frequently and carefully in vesting . . . the CPSC with remedial authority but has never sought to impose the rigorous duties or penalties which the CPSC now presses upon us to approve." *Id.* at 226. That same reasoning explains why the Commission's requested return-and-destroy request must

[30] Likewise, other agencies have been expressly authorized to order the destruction of products in the recall context. For example, the Environmental Protection Agency may "issue requirements and procedures for the disposal of any pesticide the registration of which has been canceled." 7 U.S.C. § 136q(a)(2)(C).

[31] The presumption that Congress acts intentionally and purposely in the disparate inclusion or exclusion of a statutory term applies with special force where, as here, related provisions repeatedly use the omitted term. *See, e.g.*, *Mays v. Chevron Pipe Line Co*., 968 F.3d 442, 449 (5th Cir. 2020) (applying *Russello* to statutes "contain[ing] numerous, express references to" omitted term); *Sioux Honey Ass'n v. Hartford Fire Ins. Co.*, 672 F.3d 1041, 1052 (Fed. Cir. 2012) (applying *Russello* to statute "refer[ring] to" omitted word "numerous times in neighboring provisions"); *Bluewater Network v. EPA*, 370 F.3d 1, 14 (D.C. Cir. 2004) (applying *Russello* where related provisions "repeated[ly] use[d]" omitted language).

likewise be rejected here. *See also, e.g.*, *Center for Auto Safety v. Ruckelshaus*, 747 F.2d 1, 5 (D.C. Cir. 1984) (holding that the Environmental Protection Agency exceeded its statutory authority by "accept[ing]" company's proposal to remedy the nonconformity of its motor vehicles through future emissions offsets, because Clean Air Act "requires recall and repair as the only statutory remedy for nonconformity").

Nor can the Commission require facilitation of product returns or destruction as a condition of issuing a product refund. Permitting the Commission to bootstrap its refund authority into further power to require burdensome return-and-destroy remedies would be to let the tail wag the dog—particularly given that Congress did *not* provide the Commission with return or destruction authority in this context. *Cf. Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990) ("[I]t is fundamental that an agency may not bootstrap itself into an area in which it has no jurisdiction.") (quotation marks omitted); *Center for Auto Safety v. Ruckelshaus*, 747 F.2d 1, 6 (D.C. Cir. 1984) ("The mere fact that [an agency] has discretion in imposing the only remedy discussed that is authorized by the statute in no way implies that [it] has discretion to impose other remedies as well."). More fundamentally, the Commission's proposal to order Amazon to condition its refunds on return of the Subject Products or proof of their destruction is both illogical and impossible here, where those refunds *have already been provided* to all affected customers.[32]

B. Ordering Return or Destruction of the Subject Products Is Not in the Public Interest and Violates the APA.

Even if the Commission had authority to order returns, such an order would not be in the public interest here. Ordering Amazon to facilitate product returns goes beyond merely bringing consumer risks to reasonable levels as required under the public interest standard, because Amazon has already instructed consumers to discard the Subject Products, and there is no record evidence

[32] *See, e.g.*, SUMF ¶¶ 25, 39, 58, 76, 93, 106, 112.

that another notice directing them to return products—a more time consuming effort for the consumer—would provide any meaningful incremental benefit to consumer safety.

It is undisputed that consumers have already been instructed to discard the Subject Products. And, as previously summarized, the CPSA itself is premised on the public interest principle that consumers must be trusted to take the actions they deem appropriate in light of information they receive. *See* 15 U.S.C. § 2051(b)(2). As the Commission's own Rule 30(b)(6) representative agreed, [redacted] SUMF ¶ 175; Ex. 30, Rose Dep. 239:2–240:21. [redacted] SUMF ¶ 173; Ex. 30, Rose Dep. 143:10–144:9.[33]

There is no evidence indicating that an additional instruction to return the Subject Products would result in any further remediation. Instead, the only rationale that Complaint Counsel has proffered is that ordering facilitation of returns would "promot[e] the removal of hazardous Subject Products from homes and the stream of commerce." *See* Ex. 45, Complaint Counsel's Resp. to Amazon Interrogatory No. 3. But a Commission remedial order cannot be based on this sort of speculation or generalities—it must be founded on "consideration of the entire record and . . . supported by reliable, probative, and substantial evidence." 16 C.F.R. § 1025.51(b); *Greater New Orleans Broadcasting* 527 U.S. at 188 (agencies cannot rely on "mere speculation or conjecture").

[33] S*ee also* SUMF ¶¶ 172, 174; Ex. 61, U.S. Gov't Accountability Off., GAO-21-56, *Consumer Product Safety Commission: Actions Needed to Improve Processes for Addressing Product Defect Cases* at 27 (Nov. 2020) (when "consumers . . . throw away the product . . . the recall is effective in alerting the consumer and removing the hazard"); Ex. 94, CPSC_AM0010101 at 10104, Heiden Associates & XL Associates, *Recall Effectiveness Research: A Review and Summary of the Literature on Consumer Motivation and Behavior* (July 2003) (noting "the goal of hazard reduction may be accomplished through . . . discarding the product").

Moreover, asking consumers to do more makes it less likely they will do anything: "Consumers are less likely to comply where compliance is inconvenient," and research has shown that "in-home" remedies "increase . . . the average recall effectiveness rate" compared to "a remedy that required consumers to return the product." Ex. 94, CPSC_AM0010101 at 10126, Heiden Associates, *Recall Effectiveness Research* (citation omitted); *see also* SUMF ¶¶ 131–32; Ex. 63, Michael S. Wogalter *et al.*, *Effectiveness of Warnings* at 609 (imposing even a "moderate cost" to comply with safety message reduced compliance rate by 94 percent). It is far simpler for consumers to place the Subject Product in the trash than it is for them to request return labels, package the good, and drop off the package for shipment to Amazon. *See* SUMF ¶¶ 187–88; Ex. 62, Mohorovic Rep. at 18–20.

Complaint Counsel's request that Amazon be ordered to facilitate product returns also contradicts the agency's own policy and practice and is therefore arbitrary and capricious.

First, the Commission routinely authorizes corrective actions where the consumer is instructed to either dispose of the product or repair it, without any follow up to verify that the consumer completed the task.[34] In those instances, the Commission may only approve the corrective action if it determines that the action will "protect the public" in accordance with the CPSA. 16 C.F.R. § 1115.20. Given that the agency determined in those instances that its actions would protect the public in accordance with the CPSA, there can be no basis to say that the public

[34] *See, e.g.*, SUMF ¶ 161; Ex. 84, CPSC Recall No. 22-022 ("[C]onsumers should dispose of the old collar by discarding it into the trash"); Ex. 83, CPSC Recall No. 20-066 ("[C]onsumers should destroy the triangle piece[.]"); Ex 85, CPSC Recall No. 21-114 (consumers should remove and dispose of youth jacket draw strings to eliminate hazard); Ex. 86, CPSC Recall No. 20-018; Ex. 87, CPSC Recall No. 21-705 (consumers should stop using oven liners which present carbon monoxide hazard); Ex. 88, CPSC Recall No. 18-023 (consumers should "remove the drawstring to eliminate the hazard").

interest requires a different approach here. That is the essence of arbitrary treatment and is impermissible under the APA. *See Burlington*, 403 F.3d at 776 (agencies must treat like cases alike).

Second, under the Commission's metric for tracking recall effectiveness, known as the "correction rate," [redacted] *See* SUMF ¶ 129; Ex. 62, Mohorovic Rep. at 21–22. Under this metric, Amazon's correction rate is 100 percent—refunds were successfully issued to all purchasers. Complaint Counsel has failed to articulate any reason why Amazon, or the Subject Products, should be treated differently given the 100 percent correction rate achieved by its successful refunds. It would be arbitrary and capricious for the Commission to ignore its own recall effectiveness metric in determining an appropriate remedy. *See Fox Television Stations*, 556 U.S. at 513 (agencies must provide "good reasons" for departures from established policy).

Third, Complaint Counsel's request contradicts the Commission's currently-operative written directive to agency staff stating that [redacted] *See* SUMF ¶ 133; Ex. 65, CPSC_AM0014049 at 14091, Directive Order No. [redacted]. [redacted] *See* SUMF ¶ 133; Ex. 64, CPSC_AM0013521 at 13522, Section 15 Manual ([redacted]). Again, it would be arbitrary and capricious for the agency to ignore its own directive by requiring the return of products here. *See Fox Television Stations*, 556 U.S. at 513. Nor can Complaint Counsel point to any mandatory agency guidance or policy to the contrary. In fact, the agency's

staff manuals and guidance material are silent as to criteria or considerations in ordering facilitation of product returns.

Finally, with respect to destruction of products in Amazon's inventory, Amazon initiated a process to destroy the Subject Products remaining within its inventory.[35] The destruction process has proceeded as rapidly as possible As of the date of this filing, only 6 units remain under quarantine and are in line to be destroyed, SUMF ¶ 120, and in any event, will not enter the stream of commerce.

III. The Commission Lacks Statutory Authority to Order Amazon to Take Action Regarding "Functionally Equivalent" Products.

The Commission likewise lacks statutory authority to require Amazon to take remedial action with regard to unspecified products that are supposedly "functionally equivalent" to the Subject Products. Dkt. 1, Relief Sought, ¶ 4(a). As a threshold matter, the Complaint identifies the Subject Products by specific ASINs and makes no reference to any specific products that are "functionally equivalent" or "identical" to the Subject Products, thereby waiving this argument. In any event, the CPSA says nothing about "functionally equivalent" products, and imposing requirements based on this vague and undefined phrase would run afoul of basic principles of fair notice.

In a Section 2064(d) adjudication, the Commission is limited to determining whether "*a* product . . . presents a substantial product hazard," in which case it may "order the manufacturer or any distributor or retailer *of such product*" to provide a repair, replacement, or refund to the

[35] *See, e.g.*, SUMF ¶¶ 84, 85, 94, 98–99, 107; Ex. 41, Amazon-CPSC-FBA-00001617, ASIN Destruction Data ([redacted]); Ex. 33, Amazon-CPSC-FBA-00002583, Stop-Sale of HOYMN ([redacted]); Ex. 21, Amazon-CPSC-FBA-00002017, Stop-Sale of IDGIRLS ([redacted]).

product purchaser. 15 U.S.C. § 2064(d)(1) (emphases added). The language of the CPSA thus, on its face, does not contemplate that the Commission may declare entire classes of "functionally equivalent" products to be substantial product hazards in an adjudication. To the contrary, the Commission may only order relief involving a specific product that it has formally determined to constitute a substantial product hazard. *See id.* And while Amazon has stipulated that the Subject Products meet the requirements for a substantial product hazard under the CPSA, it has made no such stipulation with regard to any other unspecified products not listed by ASIN in the Complaint. *See* Dkt. 35. Nor has Complaint Counsel identified a list of "functionally equivalent" products for which it seeks relief, let alone met the CPSA requirement of establishing that those products indeed present substantial product hazards.

This absence of any reference in Section 2064(d) to "functionally equivalent" products contrasts with the many statutes in which Congress has made clear that a given statutory provision applies both to a product and its functional equivalents. In fact, Section 2064(d) *itself* distinguishes between a product and its equivalents, authorizing the Commission to order a manufacturer, retailer, or distributor to "replace [a hazardous] product with a like or equivalent product which complies with the applicable rule." 15 U.S.C. § 2064(d)(1)(B). Congress could readily have provided the CPSC with authority to issue a Section 2064(d) order requiring remediation of any "like or equivalent product," but did not do so. *See Russello*, 464 U.S. at 23 ("We refrain from concluding . . . that the differing language in the two subsections has the same meaning in each."). And the existing reference in Section 2064(d) to provision of a single "like or equivalent" product as a remedy to a consumer is facially distinct from Complaint Counsel's request for an order requiring Amazon to identify all "functionally equivalent" models in Amazon's vast catalog and

take action with regard to those additional products that were never reviewed or tested by the Commission as required under Section 2064.

Congress has likewise acted deliberately in distinguishing between a product and its functional equivalents in other statutes. *See also, e.g.*, 7 U.S.C. § 8102(a)(3)(E) (providing that certain "guidelines shall apply to any purchase or acquisition of a procurement item for which . . . the quantity of the items *or of functionally-equivalent items* . . . was at least $10,000") (emphasis added); 42 U.S.C. § 6962(a) (applying procurement requirements "where the quantity of such items *or of functionally equivalent items* purchased or acquired in the course of the preceding fiscal year was $10,000 or more") (emphasis added); 10 U.S.C. § 3771(b)(4)(A) (proscribing release of technical data with regard to an "item or process (or a physically *or functionally equivalent item* process)") (emphasis added); 47 U.S.C. § 610(b) (defining "telephones used with public mobile services" as "telephones or other customer premises equipment used in whole or in part with air-to-ground radiotelephone services . . . *or any functionally equivalent* unlicensed wireless services") (emphasis added).

The statutory structure similarly indicates that a Section 15(d) order cannot mandate action regarding "functionally equivalent" products. Where the Commission seeks to declare that an entire class of products presents a substantial product hazard, it must do so through rulemaking: the same section of the CPSA provides that "[t]he Commission may specify, *by rule*, for any consumer product or class of consumer products, characteristics whose existence or absence shall be deemed a substantial product hazard." 15 U.S.C. § 2064(j)(1) (emphasis added). Because the Commission seeks here to declare an entire *class* of consumer products—*i.e.*, that class of products encompassing both the Subject Products and their unspecified "functional equivalents"—it was required to proceed by rulemaking. *See id.* The Commission may not evade the requirements of

rulemaking, including notice and comment and the statutorily guaranteed right to judicial review by any affected party, by seeking to regulate a class of "functionally equivalent" products via adjudication. *Id.* § 2064(j)(2).

As a practical matter, moreover, an order requiring Amazon to take remedial action with respect to all "functionally equivalent" products would also be impossible to administer, rendering it not in the public interest as well as arbitrary and capricious. The Commission has never clarified what purportedly makes one product functionally equivalent to another, nor has it ordered remedial action with respect to "functionally equivalent" products in prior cases.[36] In Amazon's communications with the Commission prior to this adjudication, the agency was never able to provide a definition of what it refers to as "functionally equivalent products."[37] How Amazon, or any other entity, is supposed to go about identifying "functionally equivalent" products remains unexplained.

To be sure, Complaint Counsel has invented a definition of "functionally equivalent" products for purposes of this litigation: "products that appear the same as the Subject Products outside of cosmetic difference (*i.e.*, color, size) and present the same hazard." Ex. 106, CPSC's Notice of Deposition of Amazon's Corporate Representative ¶ 4 n.2. That this definition was drawn up by litigation counsel in a discovery request highlights that this lawsuit is an effort to announce a new rule through adjudication. But in any event, this definition does little to provide clarity.

[36] The Commission has also declined to provide a more specific definition of the term "consumer product." *See, e.g.*, *Submission of Information by Manufacturers, Distributors, and Retailers*, 39 Fed. Reg. 6,061, 6,066 (Feb. 19, 1974) ("The Commission finds that the definition provided for 'consumer product' in section 3(a) of the act is adequate and also finds that the term 'unit' is sufficiently understood by the general public and needs to further elaboration.").

[37] *See, e.g.*, Ex. 2, Goldberg Dep. 262:4–9 ([redacted]).

Complaint Counsel's proposed definition connotes a purely visual test for evaluating product equivalence, *i.e.*, determining whether products "appear" the same based on purportedly "cosmetic" differences. *Id*. As the agency's representative testified, [redacted] *See* SUMF ¶ 192; Ex. 30, Rose Dep. 334:18–335:4. This assumption, however, is pure speculation, as the Commission's Rule 30(b)(6) testimony confirms.

The Commission's Rule 30(b)(6) representative testified [redacted] SUMF ¶ 198; Ex. 30, Rose Dep. [redacted]. That is because a determination of functional equivalence by way of cosmetic evaluation—*i.e.*, looking at the product—includes a level of subjectivity. SUMF ¶ 193; Ex. 30, Rose Dep. 338:17–339:1. Instead, testing would be required to determine, as a matter of fact, whether a children's garment or carbon monoxide detector were hazardous, and some sort of inspection beyond mere visual inspection would be required for hair dryers. SUMF ¶¶ 194, 195, 197; Ex. 30, Rose Dep. 342:4–343:17.

Accordingly, for Amazon to determine that a product was a "functionally equivalent" product, it would need to go through a subjective and burdensome two-step process. *First*, it would need to visually compare products—perhaps hundreds of different products—to determine whether they "appear" the same. But as the Commission's representative confirmed, [redacted] SUMF ¶ 198; Ex. 30, Rose Dep. 342:4–11; *see also* Ex. 2, Goldberg Dep. 284:4–12

[redacted]). *Second*, after such a visual comparison, Amazon would then need to conduct scientific testing to determine (as the Commission did for the Subject Products) whether those products are sufficiently "equivalent" to a Subject Product. SUMF ¶¶ 199–201; *see also* Ex. 101, CPSC_AM0014331. For children's sleepwear in particular, the Commission's tests included: [redacted]. SUMF ¶ 200; Ex. 101, CPSC_AM0014331. And even after all of that testing, [redacted] SUMF ¶ 201; Ex. 101, CPSC_AM0014331.

In doing so, however, Amazon is going above and beyond any statutory or regulatory requirements. Complaint Counsel has identified no statutory authority to order Amazon to perform such actions—Section 2064(d) does not authorize the Commission to impose a roving obligation on a respondent to search out unspecified "functionally equivalent" products, particularly where doing so involves both subjective judgment and the need for expert inspection and testing. And to Amazon's knowledge, the Commission has *never* attempted to require this as a remedy. *See Fox Television Stations*, 556 U.S. at 513. The agency therefore cannot do so here.

IV. The Commission's Remaining Requested Additional Relief Is Not in the Public Interest and Is Contrary to Law.

A. Ensuring that the ASINs "Remain Removed," and that the Subject Products Are Not Distributed by Amazon, Is Not In the Public Interest.

The Commission also requests that Amazon "ensure that the ASINs relating to the Subject Products remain removed from Amazon's online marketplace," "destroy the Subject Products … that remain in Amazon's inventory," and be ordered not to distribute the Subject Products in

commerce. However, Amazon has already taken all of these steps, so Complaint Counsel's requests are moot and do not serve the public interest.

Amazon promptly stopped selling and quarantined (*i.e.*, ensured the product couldn't leave Amazon's control) the Subject Products. *See supra* FN 2; Ex. 2, Goldberg Dep. 99:22–100:5. Indeed, Amazon stopped selling and quarantined the Subject Products within a matter of days of receiving a request from the Commission to do so, well before undertaking any assessment or analysis of the suggested hazard. *Cf.* SUMF ¶¶ 4–79 (children's sleepwear), 80–96 (hair dryers), 97–109 (carbon monoxide detectors). The destruction process has proceeded as rapidly as possible and as noted above, only 6 units remain quarantined in Amazon's inventory for destruction. SUMF ¶ 120.

B. The Commission Is Not Authorized to Order Amazon to Provide Monthly Progress Reports.

The Commission also lacks statutory authority to require Amazon to "[p]rovide monthly progress reports to reflect, among other things, the number of Subject Products located in Amazon's inventory, returned by consumers, and destroyed monthly." Complaint, Relief Sought, ¶ 4(c); *see also id.* ¶ 4(d) (requesting similar reports for "functionally equivalent" products). Complaint Counsel identifies no statutory authority in support of this requested monthly-progress-report requirement. None exists.

Section 2064(d) provides only that "[a]n order under this subsection may . . . require the person to whom it applies to submit a plan, satisfactory to the Commission, for taking action under whichever of the preceding paragraphs of this subsection under which such person has elected to act." 15 U.S.C. § 2064(d)(2). But a requirement for a manufacturer, distributor, or retailer to submit *a plan* for complying with a Commission order does not permit the Commission to require the subject of such an order to issue *monthly* progress reports.

Instead, where Congress authorized agencies to require periodic progress reports in connection with a recall, it did so explicitly. *See, e.g.*, 21 U.S.C. § 350l(d)(1)(C) (Secretary of Health and Human Services may "require periodic reports . . . describing the progress of the [food safety] recall"); 21 U.S.C. § 360bbb-8d (Secretary of Health and Human Services may include "schedule for updates to be provided. . . regarding [controlled substances] recall"). That Congress did not do so in Section 2064(d) confirms that the Commission lacks authority to order Amazon to produce the requested monthly progress reports. *See, e.g.*, *Russello*, 464 U.S. at 23.[38]

Furthermore, an order requiring monthly progress reports is unnecessary. Amazon has successfully provided refunds to all purchasers. SUMF ¶¶ 110–11. The Commission is aware of this completion and requires no additional status updates as to consumer corrections. As for Amazon's own actions, Amazon has verified that the Subject Products have been removed from Amazon.com. And as for product destruction, Amazon has substantially completed that process, and requiring periodic reporting for 6 remaining units would not be in the public interest. SUMF ¶ 120.

V. This Adjudication Violates the Constitutional Separation of Powers.

Article II of the U.S. Constitution vests the President with "the executive Power—all of it." *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2191 (2020). Included within that exclusive grant of executive power to the President is "the ability to remove executive officials" from their offices. *Id.* at 2197. *See also Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 483 (2010) ("Since 1789, the Constitution has been understood to empower the President to keep [executive] officers accountable—by removing them from office, if necessary."). Yet, in two respects, this

[38] While monthly progress reports are sometimes part of corrective action plans negotiated with companies undertaking voluntary recalls, such plans have "no legally binding effect." 16 C.F.R. § 1115.20(a).

proceeding is being conducted by agency officials who are unconstitutionally insulated from presidential removal. *First*, the CPSC Commissioners who approved charges against Amazon may only be removed for good cause. *Second*, the administrative law judge ("ALJ") adjudicating this matter enjoys *two* layers of protection from presidential removal. Both sets of removal restrictions violate the President's Article II powers. Amazon should be subjected no longer to an administrative proceeding that is unconstitutionally structured—twice over.

A. For-Cause Removal for CPSC Commissioners Is Unconstitutional.

The CPSA provides that a Commissioner "may be removed by the President for neglect of duty or malfeasance in office but for no other cause." 15 U.S.C. § 2053(a). Under *Myers v. United States*, 272 U.S. 52 (1926), however, for-cause removal restrictions are generally impermissible. *See Seila Law*, 140 S. Ct. at 2192. *See also id.* at 2206 ("[T]he President's removal power is the rule, not the exception."). Tenure protections for CPSC Commissioners are thus unlawful unless an exception to *Myers* applies. None does.

In *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), the Supreme Court upheld the structure of the Federal Trade Commission (as it existed in 1935) against constitutional challenge. In so doing, *Humphrey's Executor* recognized a narrow exception to *Myers*' general requirement of at-will removal for members of "a multimember body of experts, balanced along partisan lines, that perform[s] legislative and judicial functions and [i]s said not to exercise any executive power." *Seila Law*, 140 S. Ct. at 2199. CPSC Commissioners cannot avail themselves of this exception, however, because the Commission exercises executive power.

As one federal court recently explained in holding for-cause removal for CPSC Commissioners to be unconstitutional, the Commission exercises a wide range of executive powers. *See Consumers' Research v. CPSC*, No. 6:21-cv-256, 2022 WL 1577222, at *7–12 (E.D. Tex. Mar. 18, 2022). That is so for four primary reasons.

First, the Commission has "broad executive powers to regulate consumer products," *id.* at *1, allowing it to promulgate safety standards for a major segment of the U.S. economy. *See* 15 U.S.C. §§ 1262, 2056, 2057. *Second*, the Commission may "initiate civil [and criminal] enforcement actions in district court," *Consumers' Research*, 2022 WL 1577222 at *1, where it may seek significant fines and injunctive relief and enter into settlements, *see* 15 U.S.C. §§ 2061, 2069, 2071, 2076(b)(7). *Third*, the Commission may "conduct administrative adjudications" like this one, *Consumers' Research*, 2022 WL 1577222, at *1, in which it may unilaterally issue decisions awarding legal and equitable relief, *see* 15 U.S.C. §§ 1274, 2064. And *fourth*, the Commission possesses "the power to issue subpoenas," *Consumers' Research*, 2022 WL 1577222 at *10, and may conduct inspections and investigations of regulated entities, *see* 15 U.S.C. §§ 1270, 2065, 2076(b)(3).

All of these powers involve exercise of "executive" power. *See Consumers' Research*, 2022 WL 1577222 at *11 ("The Government does not dispute that these are executive powers."); a*ccord Arlington v. FCC*, 569 U.S. 290, 304 n.4 (2013) (Even when administrative powers "take legislative and judicial forms," "they are exercises of—indeed, under our constitutional structure they *must be* exercises of—the executive Power.") (internal quotation marks omitted). Indeed, the executive power wielded by the Commission is "substantial" by any measure, and includes "'quintessentially executive power[s] not considered in *Humphrey's Executor*.'" *Consumers'*

Research, 2022 WL 1577222, at *10 (quoting *Seila Law*, 140 S. Ct. at 2200).[39] The Commission therefore cannot avail itself of the *Humphrey's Executor* exception to *Myers*.[40]

B. Dual For-Cause Removal for the Presiding Officer Is Unconstitutional.

This adjudication is further unconstitutional due to the multilevel tenure protections enjoyed by the Presiding Officer, an ALJ assigned to this adjudication from the U.S. Securities and Exchange Commission ("SEC"). ALJs can be removed from their offices "only for good cause established and determined by the Merit Systems Protection Board" ("MSPB"). 5 U.S.C. § 7521(a). MSPB officials are, in turn, removable by the President "only for inefficiency, neglect of duty, or malfeasance in office," *Id.* at § 1202(d). This dual layer tenure protection is unconstitutional under Supreme Court precedent.

In *Morrison v. Olson*, 487 U.S. 654 (1988), the Supreme Court recognized a narrow exception to *Myers* for "inferior officers with limited duties and no policymaking or administrative authority." *Seila Law*, 140 S. Ct. at 2200. Under the *Morrison* exception, however, such inferior officers may only be protected from presidential removal by a *single* layer of for-cause removal protections. *See Free Enter. Fund*, 561 U.S. at 495 ("*Morrison* did not . . . address the

[39] The district court in *Consumers' Research* concluded that the Commission "does not fall within the *Humphrey's Executor* exception" because "the Commission exercises *substantial* executive power." 2022 WL 1577222 at *10 (emphasis added). As noted above, the *Consumers' Research* Court is correct that the executive power wielded by the Commission is "substantial" by any measure. *Consumers' Research*, 2022 WL 1577222 at *10 (quoting *Seila Law*, 140 S. Ct. at 2200). However, as the Supreme Court clarified last term in *Collins v. Yellen*, 141 S. Ct. 1761 (2021), the constitutionality of removal restrictions does not depend on the magnitude of executive power exercised by the agency in question, but merely on the fact that the agency exercises any executive power *at all*. *See id*. at 1785.

[40] A respondent in another pending Commission adjudication has raised a similar challenge to the for-cause removal restrictions, which the ALJ denied without addressing the constitutionality of those removal restrictions. *See In the Matter of Leachco*, CPSC Dkt. No. 22-1, ALJ Order Denying Motion to Disqualify (Sept. 2, 2022). In addition, that respondent filed a lawsuit in federal court raising this and other constitutional challenges to its adjudication, and seeking a preliminary injunction halting the administrative proceedings, which remains pending before the district court. *See Leachco, Inc., v. CPSC*, No. 6:22-cv-00232 (E.D. Okla. filed Aug. 17, 2022).

consequences of more than one level of good-cause tenure."). As the Court explained in *Free Enterprise Fund*, "[a] second level of tenure protection changes the nature of the President's review," "stripp[ing]" the President of "his ability to execute the laws . . . contrary to Article II's vesting of the executive power in the President." *Id.* at 496.

Free Enterprise Fund did not address whether its holding applied specifically to ALJs because, among other things, whether ALJs are "Officers of the United States" for constitutional purposes was still "disputed" at the time. *Id.* at 507 n.10. Subsequently, however, the Supreme Court ruled in *Lucia v. SEC*, 138 S. Ct. 2044 (2018), that SEC ALJs are inferior officers for purposes of the Appointments Clause to the U.S. Constitution. As *Lucia* explained, SEC ALJ's exercise "significant discretion when carrying out . . . important functions," including "tak[ing] testimony, "receiv[ing] evidence, "examin[ing] witnesses," "conduct[ing] trials," "administer[ing] oaths," "rul[ing] on motions, "shap[ing] the administrative record, "enforc[ing] compliance with discovery orders," "punish[ing] all contemptuous conduct," and "issu[ing] decisions." *Id.* at 2053.

Lucia also did not expressly answer "whether the statutory restrictions on removing [SEC] ALJ's are constitutional," because that question was not properly presented in that case. *Id.* at 2051 n.1. As the Fifth Circuit recently recognized in *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022), *petition for reh'g en banc filed*, however, the unconstitutionality of dual for-cause protections for SEC ALJs is "straightforward" after *Free Enterprise Fund* and *Lucia*: "ALJs are insulated from the President by at least two layers of for-cause protection from removal, which is unconstitutional under *Free Enterprise Fund*." *Id.* at 464. *Accord Fleming v. U.S. Dep't of Agric.*, 987 F.3d 1093, 1104 (D.C. Cir. 2021) (Rao, J., concurring in part) (reaching similar conclusion)).

It therefore necessarily follows from *Free Enterprise Fund* and *Lucia* that, because the dual layer removal protections for the Presiding Officer are unconstitutional, the present adjudication is also unconstitutional.

* * *

If Amazon is going to be subjected to an administrative adjudication, it is entitled to one "untainted by separation-of-powers violations." *Cochran v. SEC*, 20 F.4th 194, 210 n.16 (5th Cir. 2021). Because this adjudication is unconstitutional twice over—first, because the Commission is unconstitutionally structured; second, because the Presiding Officer is unconstitutionally insulated from presidential removal by dual layer removal protections—Amazon should be subjected to it no longer. The Presiding Officer should thus terminate and vacate these proceedings.[41]

CONCLUSION

For the reasons stated above, the Presiding Officer should grant Respondent's motion for summary decision.

[41] In *Collins v. Yellen*, 141 S. Ct. 1761 (2021), the Supreme Court held that vacatur of an agency order is required only if the unconstitutional removal provisions infecting the agency's structure bear a causal relationship to the adverse order. *Id.* at 1777–1879. Such a causal showing is only required under *Collins*, however, where a party is seeking the *retrospective* relief of unwinding final agency action. *See id.* at 1787 ("[B]ecause the shareholders no longer have a live claim for prospective relief, the only remaining remedial question concerns retrospective relief.") (citation omitted); *id.* at 1801 (Kagan, J., concurring in part) ("I also agree that plaintiffs alleging a removal violation are entitled to injunctive relief—a rewinding of agency action—only when the President's inability to fire an agency head affected the complained-of decision"). Where, as here, a party does not seek retrospective relief, but instead to prospectively enjoin ongoing agency proceedings, *Collins* does not require the party to establish a causal link between the asserted constitutional defect and the as-yet-unknown result of the administrative proceeding.

Dated: September 23, 2022

Respectfully submitted,

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UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of Amazon.com, Inc., Respondent.	CPSC Docket No. 21-2 Hon. Carol Fox Foelak Presiding Officer

[PROPOSED ORDER]

In this proceeding, Respondent Amazon.com, Inc. ("Amazon") has submitted a Motion for Summary Decision and Complaint Counsel has submitted a Motion for Summary Decision. Upon consideration of the motions and related memoranda, as well as the declarations, exhibits, statements of undisputed facts, and oral argument relating thereto, it is hereby:

ORDERED, that Complaint Counsel's Motion for Summary Decision is DENIED; and further

ORDERED that Amazon's Motion for Summary Decision is GRANTED; and further

ORDERED that Complaint Counsel's requests for relief in this adjudication are DENIED, the action is DISMISSED; and further

ORDERED that this Order, along with the accompanying Memorandum Opinion shall constitute the Initial Decision and Order in accordance with the provisions of 16 C.F.R. §§ 1025.23(d) and 1025.51; and further

ORDERED that a copy of this Order and accompanying Memorandum Opinion shall be entered on the docket and proceedings before the Presiding Officer are hereby terminated.

Dated: _____

_____
Hon. Carol Fox Foelak
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2022, a true and correct copy of the foregoing document was, pursuant to the Order Following Prehearing Conference entered by the Presiding Officer on October 19, 2021:

- filed by email to the Secretary of the U.S. Consumer Product Safety Commission, Alberta Mills, at amills@cpsc.gov, with a copy to the Presiding Officer at alj@sec.gov and to all counsel of record; and
- served to Complaint Counsel by email at jeustice@cpsc.gov, lwolf@cpsc.gov, and sanand@cpsc.gov.

Nicholas Griepsma

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