UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of Amazon.com, Inc., *Respondent*	CPSC Docket No. 21-2

RESPONDENT AMAZON.COM, INC.'S APPEAL BRIEF

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I. Introduction

Over two years ago, the Commission voted to bring this lawsuit against Respondent Amazon.com, Inc. ("Amazon") on a tenuous and unprecedented legal theory: that Amazon—which operates an online store and provides logistics services to independent third-party sellers through its Fulfillment by Amazon ("FBA") program—is responsible for recalling hazardous sleepwear, hair dryers, and carbon monoxide detectors (the "Subject Products") that were manufactured and sold by third parties (the "Third-Party Sellers"). The Acting Chair of the Commission expressly questioned the statutory basis for the lawsuit,[1] with good reason: Amazon is not a "distributor" of the Subject Products under the Consumer Product Safety Act ("CPSA" or the "Act").

Even if the Commission concludes Amazon was a distributor for purposes of these Subject Products, Amazon had already acted long before this suit was even filed, by directly notifying each purchaser of the hazard, instructing them to dispose of the product, and providing full refunds of the purchase price. These actions are precisely what the Commission should want a responsible company to do in order to protect consumers. Even if a subset of agency staff would have preferred that Amazon use slightly different language in its messages or withhold refunds from consumers unless they return the products, the record makes clear that consumers are better off when a firm acts swiftly to notify them about and remediate a potential hazard.

The initial Presiding Officer's determination that Amazon is a distributor was in error. The most-recent Presiding Officer likewise erred in ordering additional,

[1] *Statement of Acting Chairman Robert S. Adler on the Vote to Approve Filing of An Administrative Complaint Against Amazon.com*, CONSUMER PRODUCT SAFETY COMMISSION (July 14, 2021), https://www.cpsc.gov/s3fs-public/Statement%20on%20Amazon%20RSA%207.14.pdf.

unnecessary relief beyond the steps Amazon had already taken to protect consumers, including that Amazon cease distribution of products that had already been removed from its website, reissue duplicative notices, and reissue duplicative refunds conditioned on product returns or proof of destruction by the purchaser. These holdings should be reversed for several reasons.

First, Amazon is not a distributor of the Subject Products, and the entire suit should therefore be dismissed. Congress carefully limited the activities that constituted "distribution" to include only "selling" or "introducing" products in commerce, as well as holding such products "for sale or distribution." 15 U.S.C. §§ 2052(a)(7), (8). Amazon's online store and its FBA logistics service do not qualify. Amazon never took title to any of the Subject Products, and the Commission has never asserted otherwise. Instead, Amazon is a "third-party logistics provider," a type of entity that Congress expressly excepted from coverage under the CPSA in 2008. The Presiding Officer erred by interpreting this exception too narrowly, and defining "distributor" too broadly.

Second, it is undisputed that Amazon already refunded the purchasers of the Subject Products in full—more than $20 million in total—over two years ago. And yet, the July 10, 2023 Initial Decision and Order ("Initial Decision") found those full refunds to be inadequate because Amazon did not withhold refunds from purchasers who did not provide proof of destruction or return the Subject Products. The Commission lacks statutory authority to order firms to mandate such action by individual purchasers, or to make refunds contingent on proof of product destruction or return. To the contrary, a still-operative Commission Directive to staff says the opposite: [redacted]

Third, the Commission cannot order Amazon to take action with regard to any products except those it has formally determined to pose a "substantial product hazard." *See* 15 U.S.C. §§ 2064(c), (d). And yet, the final Presiding Officer did so for 20 children's sleepwear products that the Commission has never seen before, let alone inspected, tested, or analyzed. The Commission's authority extends only to the Subject Products.

Fourth, the Initial Decision erroneously and unnecessarily prescribes the content of Amazon's direct email notices to purchasers and commandeers Amazon's primary social media accounts in the process. Over two years ago, Amazon emailed the approximately 400,000 purchasers of the Subject Products, describing the nature of the hazards in easy-to-understand language. Amazon's ability to send targeted emails to every purchaser of the Subject Products obviated the need for mass public notices commonly utilized for products sold in other venues, such as "brick-and-mortar" retail stores. Nevertheless, the Presiding Officer ordered that new messages—this time altered by agency staff—should be sent to all of those individuals, not once, but twice in a two-week period. In doing so, the Presiding Officer misconstrued the express requirements of the CPSA and the Mandatory Recall Rule, both of which direct the Commission to consider whether notice is required to adequately protect the public on a case-by-case basis. The Initial Decision failed to make that determination, let alone base the determination on substantial evidence from the undisputed factual record.

Amazon successfully utilized modern technology—rather than slow and outmoded forms of recall notice and remedies—to efficiently and effectively reach the Subject Product purchasers and provide full refunds. While agency staff would have micromanaged Amazon's notice and remedy process differently based on agency preferences, Complaint Counsel failed to meet its burden in establishing that the public

interest requires the entire process to essentially restart from scratch. Amazon continues to leverage modern technology in its role as a marketplace facilitator for third-party sellers, but neither the CPSA nor its corresponding regulations were enacted to regulate such facilitator services. This adjudication is the wrong vehicle to harmonize the Commission's recall practices with marketplace facilitators such as Amazon. The proper course for the Commission would be to pursue amendment to the CPSA or engage in rulemaking, a process which Amazon would actively support.

For these reasons, the Commission should reverse and vacate the above-referenced rulings incorporated in the Initial Decision.

II. Statement of the Case

A. Factual Background

This adjudication concerns three categories of Subject Products—children's sleepwear, hair dryers, and carbon monoxide detectors. All were sold by certain third-party entities (the "Third-Party Sellers") that utilized Amazon's FBA third-party logistics service. Dkt. 1.[2]

1. The Third-Party Sellers Sold the Subject Products Through the FBA Service.

Amazon's FBA service allows third-party entities to list and sell their products on Amazon.com in exchange for fees. Dkt. 2, ¶ 16. Subject to basic guidelines, third-party entities set the prices for their products and create the product listings on Amazon.com,

[2] Pursuant to the Administrative Procedure Act ("APA"), the exclusive record in this appeal consists of "[t]he transcript of testimony and exhibits, together with all papers and requests filed in the proceeding[.]" 5 U.S.C. § 556(e). Amazon thus cites record material according to docket number, and will file an appendix containing copies of all cited material for the Commission's convenience upon the completion of briefing.

including the product name and description. *See* Dkt. 2, ¶ 17.[3] The listings for these products make clear that the products are "sold by" third-party entities and "shipped by Amazon." Dkt. 24, ¶¶ 4, 7–8.

Third-party entities utilizing the FBA service send their products to Amazon's fulfillment centers and Amazon, in turn, fulfills orders placed by customers for such products by providing logistics services, including storing the products at those fulfillment centers, delivering or arranging for delivery to customers, and facilitating logistics necessary for product returns. *See* Dkt. 24, ¶ 10; *see also* Dkt. 2 at 11. Per FBA Service Terms, third-party entities retain title to (*i.e.*, legal ownership) their products at all times prior to their sale. Dkt. 24, ¶¶ 3, 7. At no point does Amazon take title to any products that are sold by third-party entities using the FBA service. *Id.* The Subject Products at issue in this adjudication were sold by the Third-Party Sellers using the FBA logistics service and in accordance with these policies.

2. Amazon Swiftly Stopped the Sale of, Quarantined, and Destroyed the Subject Products.

Between January 2020 and March 2021, CPSC staff notified Amazon that the Subject Products posed a potential hazard to consumers.[4] The Commission provided Amazon with records of testing conducted by CPSC staff indicating potential hazards for a specific list of products. *See, e.g.,* Dkt. 76, Amazon Ex. 106.[5] Amazon reviewed the

[3] *See also Program Policies: Product Detail Page Rules*, Amazon SellerCentral, https://sellercentral.amazon.com/gp/help/external/G200390640.

[4] Dkt. 87, ¶¶ 10, 30, 46, 66, 80, 97.

[5] [redacted]

Commission's testing information, quickly removed the Subject Products from its online store so they could not be sold, and quarantined all units in its fulfillment centers.[6] Amazon also took the proactive and voluntary measure of reviewing product images offered by the same Third-Party Sellers and attempting to identify products varying only by size, color, or print pattern from the Subject Products, and removed those items from its store. *See* Dkt. 113, Amazon Ex. 130 at 2–3. Indeed, none of the Subject Products, or the additional products that Amazon identified as potentially posing the same hazard, have been listed or available for sale on Amazon.com in over two years. Dkt. 87, ¶ 5. Per its policies, Amazon has permanently prohibited the listing and sale of the Subject Products on Amazon's website. *See* Dkt. 76, Amazon Ex. 2, Goldberg Dep. 306:21–307:2.

Amazon also quickly initiated the destruction of any Subject Product units in its fulfillment centers' inventory. Dkt. 87, ¶ 117. As of September 23, 2022, Amazon had destroyed all but six units of the Subject Products in its fulfillment centers. Dkt. 87, ¶ 120.

3. Amazon Notified All Purchasers of the Safety Risks Posed by the Subject Products.

Amazon sent direct consumer safety notifications via email to every original purchaser of the Subject Products. Dkt. 87, ¶ 110. These notices were also sent to purchasers through the "Message Center" of their Amazon.com accounts. *See, e.g.,* Dkt. 11, Ex. F. The original purchasers were alerted to the importance of the notifications, which used the phrase "Important Safety Notice" in their subject lines.[7] The notifications identified the specific Subject Product purchased by the consumer, listing the customer's

[6] *See* Dkt. 87, ¶¶ 5, 11–14, 31–34, 43–45, 62–64, 80, 84–85, 97–99.

[7] *See, e.g., id.* at ¶¶ 18, 51, 70, 86, 100.

Order ID number, the name of the product, and the product's Amazon Standard Identification Number.[8] The notifications also described the potential hazards posed by the relevant Subject Product[9] and included instructions for the purchaser to dispose of the product and alert any secondary users to do the same.[10]

4. Amazon Provided Full Refunds to All Subject Product Purchasers.

Amazon provided full refunds, in the form of Amazon gift cards, to all original purchasers of the Subject Products.[11] All purchasers of the Subject Products were notified that Amazon applied a refund of the full purchase price to their Amazon accounts. *Id.*

5. Amazon Has Routinely Assisted the Commission with Recalls of FBA Products.

Prior to this matter, the Commission did not consider and did not treat Amazon as a "distributor" of products sold by third-party entities using the FBA logistics service. Instead, Amazon has routinely assisted the Commission with recalls that the agency has jointly conducted with recalling third-party entities who sold their products on Amazon.com. *See* Dkt. 15, Appendix A. Indeed, for at least one of the Subject Product categories at issue (children's sleepwear), the Commission [redacted][12] Amazon cooperated with the

[8] *See id.* at ¶¶ 18, 20, 52–53, 71–72, 87–88, 101–102, 167.

[9] *See id.* at ¶¶ 19, 21, 52, 54, 71, 74, 87, 90, 101, 103, 168.

[10] *See id.* at ¶¶ 19, 22, 52, 56, 71, 74, 87, 91, 101, 104, 111, 170.

[11] *Id.* at ¶¶ 25, 39, 58, 76, 93, 106.

[12] *Id.* at ¶¶ 8–10, 29–30, 43, 46, 62, 65.

Commission and [redacted]. Dkt. 87, ¶ 123.

B. Procedural History

Despite Amazon's direct notification and refunds to all purchasers of the Subject Products, the agency incorrectly concluded that [redacted] Dkt. 76, Amazon Ex. 40, Williams Dep. 156:4–14. Put simply—and according to agency staff—Amazon [redacted] *Id.* On July 14, 2021, Complaint Counsel filed an administrative complaint under Sections 15(c) and (d) of the CPSA, 15 U.S.C. §§ 2064(c), (d), against Amazon, alleging for the first time that Amazon was a distributor of the Subject Products and "seeking public notification and remedial action." Dkt. 1 at 1.

On October 13, 2021, Complaint Counsel moved for partial summary decision on the issue of whether Amazon is a distributor. *See* Dkt. 9. Amazon opposed Complaint Counsel's motion and moved to dismiss the complaint or, alternatively, for summary decision, in part, on the ground that it is a third-party logistics provider—not a distributor—of the Subject Products. *See* Dkts. 14, 15. On January 19, 2022, Administrative Law Judge ("ALJ") Grimes, the first Presiding Officer, issued an order holding that Amazon "meets the statutory definition of the term distributor." Dkt. 27 at 27. Judge Grimes also concluded that "Amazon can't be ordered to provide refunds" for the Subject Products in this adjudication, because they had already been provided by Amazon. *Id.* at 21.

On April 16, 2022, the parties stipulated that, for the purposes of this adjudication, the Subject Products meet the requirements for a substantial product hazard

determination under the CPSA. *See* Dkts. 35, 37. The parties then proceeded to conduct discovery on the remedial relief sought by Complaint Counsel.

Amazon challenged several of Complaint Counsel's discovery failings. For instance, Complaint Counsel largely refused to comply with Amazon's requests for documents relating to the Commission's past recall policies and practices. *See* Dkt. 47. Because Complaint Counsel lacked sufficient legal basis to withhold those materials, Amazon moved to compel their production. *Id.* Then-Presiding Officer Grimes granted Amazon's motion in part and directed Complaint Counsel to disclose those materials. *See* Dkt. 48. Amazon also moved *in limine* to exclude Complaint Counsel's proposed expert testimony as inadmissible due to the deponent's lack of expertise. *See* Dkt. 72. The Presiding Officer denied the motion, but nonetheless declined to "rely on that expert report" in rendering the Initial Decision. Dkt. 109 at 2.

On September 23, 2022, both parties filed motions for summary decision on the issue of remedy. *See* Dkts. 74, 78. On May 8, 2023, Presiding Officer Patil issued an order denying Amazon's motion and granting in part, but denying in part, Complaint Counsel's motion. *See* Dkt. 109. The Presiding Officer held that "Amazon will be ordered to cease distributing the products" and requested additional briefing regarding "the scope of the notice, refund or replacement, and monitoring remedies." *Id.* at 1. While Amazon reserved its right to challenge the totality of the Presiding Officer's forthcoming Initial Decision, both parties submitted supplemental briefs on the remedy-related issues. *See* Dkts. 110, 112.

On July 10, 2023, the Presiding Officer issued an Initial Decision and Order "incorporat[ing] the findings and conclusions made in the January 2022 and May 2023 orders." Dkt. 119 at 1. The Presiding Officer ordered that Amazon cease distribution of

the Subject Products (which Amazon had done years ago); issue new direct notifications relating to the Subject Products; post notices to the "Product Safety and Recalls" and "Your Orders" pages on Amazon.com; post additional notices to Amazon's primary social media accounts; and issue additional refunds conditioned on purchasers returning the product to Amazon or providing proof of destruction. *Id.* at 13–17. Importantly, the directive to issue repeat refunds meant that Amazon would be forced in some cases to refund double the purchase price of the Subject Products.

Amazon timely filed its Notice of Intent to Appeal on July 20, 2023. *See* Dkt. 120. Complaint Counsel likewise filed a Notice of Intent to Appeal on July 20. *See* Dkt. 121.

III. Legal Standards

A. The Presiding Officer's Initial Decision Is Subject to *De Novo* Review by the Commission.

The APA "authorizes the Commission to review an [ALJ's] findings and determinations *de novo*." *Ryan v. Commodity Futures Trading Comm'n*, 145 F.3d 910, 917 (7th Cir. 1998); *see also Mr. Sprout, Inc. v. U.S.*, 8 F.3d 118, 123 (2d Cir. 1993) (noting that "all issues raised by a party's administrative appeal of an ALJ's initial decision are considered *de novo* by the Commission"); *Starrett v. Special Couns.*, 792 F.2d 1246, 1252 (4th Cir. 1986) ("Under administrative law principles, an agency or board is free either to adopt or reject an ALJ's findings and conclusions of law.").

On appeal, the Commission "has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule." 5 U.S.C. § 557(b); *see also Vineland Fireworks Co. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 544 F.3d 509, 514 (3d Cir. 2008) ("Congress permits the agency to limit its review using its regulation-promulgating powers, but if it chooses not to do so, it exercises *de novo*

review over the ALJ's decision."). The Commission's Rules of Practice for Adjudicative Proceedings "do[] not limit its standard of review," *Zen Magnets*, CPSC Dkt. No. 12-2, Final Decision and Order (C.P.S.C. Oct. 26, 2017) at 7, and, indeed, reflect the APA standard articulated in 5 U.S.C. § 557(b), that the Commission "shall, to the extent necessary or desirable, exercise all the powers which it could have exercised if it had made the Initial Decision," 16 C.F.R. § 1025.55. *See also Zen Magnets*, CPSC Dkt. No. 12-2, Final Decision and Order (C.P.S.C. Oct. 26, 2017) at 7 (describing the Commission's powers on appeal as "nearly identical to Section 557(b) of the APA"). In exercising such powers, "the Commission shall consider the record as a whole or such parts of the record as are cited or as may be necessary to resolve the issues presented." 16 C.F.R. § 1025.55.

B. The APA Requires Administrative Decisions to be Supported by Substantial Evidence and Reasoned Explanation.

The Presiding Officer held that the APA does not govern the Commission's consideration of remedies under the CPSA. Dkt. 109 at 4. This is incorrect. As previously recognized by the Commission, the APA "governs this adjudication." *Zen Magnets*, CPSC Dkt. No. 12-2, Final Decision and Order (C.P.S.C. Oct. 26, 2017) at 6 (citing 5 U.S.C. § 557). It is a bedrock principle of administrative law that agency action is unlawful to the extent it is "arbitrary, capricious . . . or otherwise not in accordance with the law." 5 U.S.C. § 706. Courts have elaborated on the key considerations for evaluating whether agency action violates these requirements.

First, an agency "must articulate with reasonable clarity its reasons for decision." *Comm. To Save WEAM v. FCC*, 808 F.2d 113, 116 (D.C. Cir. 1986). In doing so, the agency must support its decision with "reliable, probative, and substantial evidence." 5 U.S.C. § 556(d). Substantial evidence, in turn, requires "more than a mere scintilla." *Richardson*

v. Perales, 402 U.S. 389, 401 (1971). Nor may unsubstantiated reliance on agency "experience" fulfil this requirement. *See Am. Petroleum Inst. v. EPA*, 661 F.2d 340, 349 (5th Cir. 1981) (agency decision "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)). Indeed, "so-called expertise" cannot constitute substantial evidence when there is no evidence in the record addressing a particular question. *Baltimore & O. R. Co. v. Aberdeen & Rockfish R. Co.*, 393 U.S. 87, 92 (1968).

Second, the agency must treat like cases alike. "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." *Burlington N. & Santa Fe. Ry. Co. v. STB*, 403 F.3d 771, 777 (D.C. Cir. 2005).

Third, to the extent the agency seeks to execute a change in policy or practice, it must acknowledge the change and supply a reasoned explanation for the change. *See FCC v. Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009). Agencies cannot "depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." *Id.*

IV. Statement of the Issues

Pursuant to 16 C.F.R. § 1025.53, Amazon identifies the following "reasons why the party believes the Initial Decision is incorrect":

1. Amazon is not a "distributor" under the CPSA, but rather a "third-party logistics provider," and thus not subject to a remedial order issued pursuant to Section 15 of the Act.

2. The Commission lacks statutory authority to order a recalling firm to conduct a second round of duplicative refunds and otherwise withhold refunds from Subject Product purchasers unless those purchasers first take Commission-mandated actions such as return the product to the recalling firm or destroy the products and provide proof of destruction to Amazon.

3. The Presiding Officer erred in ordering Amazon to take action with regard to 20 additional products never inspected, tested, or analyzed by the Commission.

4. Additional direct notice is not required by the CPSA because the record does not establish that, absent Complaint Counsel's requested wording changes, the public was not adequately protected by the notice already provided to Subject Product purchasers by Amazon over two years ago.

5. Appropriation of Amazon's primary social media accounts to publicize the hazard and remedy is not factually or legally required to adequately protect the public.

6. This proceeding is unlawful because the Commission is unconstitutionally structured, the Presiding Officer is unconstitutionally insulated from removal, and the Commission serves as both prosecutor and judge.

V. Argument

A. Amazon Acted As a Third-Party Logistics Provider, Not a Distributor, of the Subject Products.

Amazon is not subject to the CPSA for the Subject Products because it falls within the statute's "third-party logistics provider" exception for those products. In 2008, Congress amended the CPSA to except "third-party logistics providers" from Section 15

recall requirements. The initial Presiding Officer erred by adopting an unduly narrow interpretation of this exception, rooted in the word "solely." That interpretation both renders the exception a nullity and is inconsistent with the plain text of the exception and the statutory scheme and purpose as a whole. To fall outside this exception and qualify as a distributor, Amazon must engage in *distribution* activity *beyond* what is excepted by the third-party logistics provider provision, which Amazon does not do.

1. Amazon Receives, Holds, and Transports Consumer Products and Is Thus a Third-Party Logistics Provider.

A third-party logistics provider is defined as a "person who solely receives, holds, or otherwise transports a consumer product in the ordinary course of business but who does not take title to the product." 15 U.S.C. § 2052(a)(16). The CPSA provides that a "third-party logistics provider . . . *shall not* . . . be deemed to be a manufacturer, distributor, or retailer of a consumer product solely by reason of receiving or transporting a consumer product in the ordinary course of its business as such a carrier or forwarder." *Id.* § 2064(b) (emphasis added).

Under the definition's plain text, Amazon is a third-party logistics provider with respect to the Subject Products. It is undisputed that Amazon has never owned or held title to the Subject Products—the Third-Party Sellers did so. *See* Dkt. 1, Compl. ¶ 14; *see also* Dkt. 24, ¶¶ 4, 7. And, as the Presiding Officer found, Amazon "receives, holds, [and] transports" consumer products:

> Third-party sellers send their products to Amazon. Amazon stores third-party sellers' products in Amazon fulfillment centers; uses technology to track, move, and ship products to customers; processes product returns; and delivers or arranges for delivery of Program products to customers. Under the Program's terms, third-party sellers retain title to their products while the products are in the Program.

Dkt. 27 at 22 (quotations, brackets, citations omitted). Courts have rightly observed that third-party logistics providers engage in exactly these types of activities—they "coordinat[e] the shipment of the load"[13] and "help[] businesses with their shipping and transportation needs."[14] Accordingly, Amazon cannot be deemed a distributor by virtue of these activities, which fall squarely within the scope of the third-party logistics provider exception.

Indeed, sources contemporaneous to the 2008 amendment adding this definition to the CPSA routinely treated Amazon as a third-party logistics provider. One 2007 publication, for example, explained that "there's a new third-party logistics player on the block"—Amazon FBA.[15] Another highlighted Amazon's entry into the circle of the "many [third-party logistics] companies who warehouse, fill orders, track orders, accept returns and provide basic customer service functions."[16] More recent publications likewise speak of Amazon the same way.[17] The common understanding—the plain meaning of the phrase "third-party logistics provider" is thus just what Amazon does.

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[13] *Schramm v. Foster*, 341 F. Supp. 2d 536, 550 (D. Md. 2004) (describing these as responsibilities of a "third-party logistics company").

[14] *JSW Steel (USA), Inc. v. Pittsburgh Logistics Systems, Inc.*, No. 3:20-CV-00127, 2020 WL 13239017, at *1 (S.D. Tex. Jul. 16, 2020).

[15] William Hoffman, *Pushing the Shopping Cart*, Shipping Digest (May 21, 2007).

[16] Sam Kandel, *To Expand, Make Use of Outsourcing*, Poughkeepsie J. (July 22, 2007).

[17] For example, a panel of CEOs, surveyed by Supply Chain Quarterly in 2014, concluded that "Amazon does already act as a [third-party logistics provider] in many situations." Mark Millar, *Global Supply Chain Ecosystems: Strategies for Competitive Advantage in a Complex*, CONNECTED WORLD, 204–05 (Kogan Page: 2015) (citing Robert C. Lieb & Kristin J. Lieb, *Is Amazon a 3PL?*, CSCMP'S SUPPLY CHAIN Q., Oct. 27, 2014)). In 2016, the U.S. Postal Service classified Amazon as a third-party logistics provider. Office of the Inspector Gen., U.S. Postal Srv., Rpt. No. RARC-WP-16-015, *The Evolving Logistics Landscape and the U.S. Postal Service* (Aug. 15, 2016), at 4, 8–9 ("Amazon has entered and transformed the logistics market in important ways" and "may even be in the process

2. The Word "Solely" Does Not Disqualify Amazon from Being a Third-Party Logistics Provider.

The Presiding Officer nonetheless concluded Amazon was not a third-party logistics provider because it did not "solely" engage in logistics activities with respect to the Subject Products.

As the Presiding Officer correctly held, "solely" cannot—and does not—mean "to the exclusion of all else" in this context. Dkt. 27 at 10 (quoting dictionary definition). Because the statutory definition of "third-party logistics provider" lists only receiving, holding, and transporting as qualifying activities, a literal interpretation of "solely" would make the exception impossible to satisfy: A logistics provider could not inspect products it received, sell packaging for the goods it transports, offer to insure any shipment, or engage in any number of other activities in which such businesses routinely engage. *See* Dkt. 27 at 10–11. FedEx and UPS—the two entities Complaint Counsel used as examples

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of transitioning itself into a logistics company."). In 2017, the Wall Street Journal noted that Amazon "is openly acting as a global freight forwarder and third-party logistics provider." Laura Stevens, *Amazon Expands into Ocean Freight*, Wall Street Journal (Jan. 25, 2017). Amazon will provide copies of these public sources, and those cited in *supra* notes 15–16, its its forthcoming appendix. *See supra* note 2.

at oral argument—would not qualify, as each engages in these types of activities.[18] *See* Oral Arg. Tr. 11:14–16, Dec. 16, 2021; *see also id.* at 17:3–5.[19]

Although the Presiding Officer rightly concluded that logistics providers could engage in certain ancillary activities, he erred in reading "solely" to encompass every non-ancillary activity of any kind. That is, the Presiding Officer concluded incorrectly that *any activity* that was not "ancillary to receiving, holding or transporting" disqualified an entity from being a third-party logistics provider. Dkt. 27 at 11. Rather, as explained below, the use of the word "solely" was intended to disqualify companies that engage in activities tantamount to *distribution* from being third-party logistics providers. This interpretation is correct for several reasons.

First, it follows from the text and structure of the CPSA. The "third-party logistics provider" definition is an *exception* to the term "distributor." Thus, the word "solely" must be interpreted in that definitional context: the sole *distribution* activity in which a third-party logistics provider can engage is holding, receiving, or otherwise transporting goods. *See Thraser-Lyon v. CCS Commercial, LLC*, No. 11-cv-4473, 2012 WL 3835089, at *2 (N.D. Ill. Sept. 4, 2012) (interpreting an exception to a prohibition in light of the

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[18] *See, e.g.*, FedEx, *Packing Services and Shipping Supplies*, https://www.fedex.com/en-us/shipping/packing.html (last visited Aug. 17, 2023); FedEx, *Declared Value & Limits of Liability for Shipments*, https://www.fedex.com/en-us/shipping/declared-value.html (last visited Aug. 17, 2023); UPS, *Packaging and Shipping Supplies*, https://www.ups.com/us/en/shipping/order-supplies.page (last visited Aug. 17, 2023). UPS has a warehousing and fulfillment network program called Ware2Go which, along with transporting and holding products for sellers, also includes a "cloud-based platform that . . . offers customized inventory and distribution insights based on customer data." *See* UPS, *Ware2Go*, https://ware2go.co/our-solution/ (last visited Aug. 17, 2023).

[19] The CPSC's Rules of Practice provide that hearing transcripts "shall be a part of the record of proceedings." 16 C.F.R. § 1025.47. For the Commission's convenience, Amazon will include a copy of the oral argument hearing transcript in its appendix of cited material. *See supra* note 1.

scope of the prohibition itself: "Because the prohibition applies only to" certain conduct, "the exception is similarly limited"); *see also Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 101 (2012) ("Statutory language, however, 'cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" (quoting *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989)). The provision thus does not mean that a third-party logistics provider may not perform any other activities not amounting to distribution, such as payment processing and customer service. The plain text makes this clear: the activities referenced in the "third-party logistics provider" definition echo the activities referenced in the "distribution in commerce" definition. To "distribute in commerce" is defined as "to sell in commerce, to introduce or deliver for introduction into commerce, or to hold for sale or distribution after introduction into commerce." 15 U.S.C. § 2052(a)(7). The "third-party logistics provider" carve-out mirrors this language, excepting each person who solely "receives, holds, or otherwise transports" consumer products.

Second, this interpretation effectuates Congress' clear intent. Congress added the exception for third-party logistics providers in 2008. Until that point, the exception already applied to common carriers, contract carriers, and freight forwarders. By making this addition, Congress necessarily meant to reach entities providing services *beyond* those of common carriers, contract carriers, or freight forwarders. Courts should not "interpret[] any statutory provision in a manner that would render another provision superfluous," and "[t]his principle, of course, applies to interpreting any two provisions in the U.S. Code, even when Congress enacted the provisions at different times." *Bilski v. Kappos*, 561 U.S. 593, 607–08 (2010)

The Presiding Officer suggested that the term "third-party logistics provider" is merely a redundancy with no distinct meaning from more traditional carriers of goods, relying primarily on two circuit cases.[20] But it is well-established that "[w]hen Congress amends legislation, courts must presume it intends the change to have real and substantial effect." *Ross v. Blake*, 578 U.S. 632, 641–42 (2016) (cleaned up). The cases the Presiding Officer cites to the contrary are the exceptions that prove the rule: in each, the court identified evidence *besides the change in statutory language itself* that Congress intended the words to have a mere clarifying effect.[21] Here, neither the Presiding Officer nor Complaint Counsel cite any such evidence that Congress was adding surplusage. The Presiding Officer also invokes *noscitur a sociis—i.e.*, a word is known by the company it keeps—to argue that the revision of the statute effected no meaningful change. But, as the Supreme Court has held, that canon cannot "deny[] [a word] independent meaning . . . . [T]o the contrary . . . [it] suggests that Congress meant that term to serve a particular function . . . consistent with, but distinct from, the functions of the other" words. *Babbitt v. Sweet Home Chapter of Cmties. for a Great Oregon*, 515 U.S. 687, 702 (1995). In the context of an amended statute, this means that Congress was trying to reach additional conduct beyond what was already covered by the exception.

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[20] *See* Dkt. 27 at 12 (citing *Brown v. Thompson*, 374 F.3d 253, 259 (4th Cir. 2004) and *NCNB Tex. Nat. Bank v. Cowden*, 895 F.2d 1488, 1500 (5th Cir. 1990)).

[21] In *Brown,* the court relied on multiple explicit statements in both the titles of the relevant provisions and the legislative history to determine that the purpose of the amendment was clarifying. 374 F.3d at 259. In *Cowden*, much as in *Brown*, the court relied at least in part on legislative history to determine that the relevant amendment was clarifying: "What little legislative history there is suggests Congress was primarily concerned with clarifying existing law." 895 F.2d at 1500.

Third, the Commission's own prior interpretation of the CPSA buttresses this view. In a 2013 proposed rule,[22] the Commission dealt with whether "a carrier who *also* serves as an importer of record" should be treated as an 'importer'" notwithstanding the Act's exclusion of carriers, freight forwarders, and logistics providers. 78 Fed. Reg. 28,080, 28,084 (May 13, 2013) (emphasis added); *see also* 15 U.S.C. 2052(b). The Commission explained:

> This provision [15 U.S.C. 2052(b)] protects carriers from being 'deemed' a manufacturer, importer, distributor, or retailer, based "solely" on "receiving or transporting a consumer product" in the ordinary course of business as a carrier. Under the proposed rule, imposing importer-related certification requirements on a carrier that *chooses to become a licensed customs broker and that agrees to serve as the importer of record is* based on the carrier's status as importer of record and related customs functions rather than on the carrier's transportation-related functions.

Id. (emphasis added). Stated differently, when a carrier otherwise exempt from the CPSA *engages in additional activities that constitute importation*, it cannot take advantage of the safe harbor. So too here: when an entity engages in additional activities that further constitute distribution, it cannot take advantage of the exception for third-party logistics provides. But, with respect to the Subject Products, Amazon undertakes no additional distribution activity.

Finally, Amazon's interpretation avoids absurd results. As logistics needs have evolved in the modern online marketplace, so too have the entities Complaint Counsel espouses as logistics providers such as UPS and FedEx. Those entities now provide ancillary services going well beyond mere shipment of goods, such as warehousing, inventory tools, and back-end analytics. *See supra* note 18. But it would be nonsensical to employ an interpretation that would render UPS and FedEx distributors: those

[22] This proposal appears not to have been finalized. 78 Fed. Reg. 28,080 (May 13, 2013).

services have nothing to do with the distribution of consumer products, and do not make an entity that provides them more knowledgeable about potential hazards or capable of conducting a recall.

3. Amazon's Activities Other Than Receiving, Holding, and Transporting Products Do Not Amount to "Distribution."

The additional activities that Amazon offers for FBA products are either the type of "ancillary" activity commonly engaged in by a third-party logistics provider, or do not relate to or amount to distribution.

The Presiding Officer focused primarily on Amazon's (1) operation of Amazon.com, on which consumers can buy products; (2) administration of a fair pricing policy and exercise of some authority to restrict sales; (3) provision of "round-the-clock customer service" to consumers who purchase products, and (4) processing of product returns. Dkt. 27 at 26–27. As discussed, however, the CPSA narrowly defines "distribution in commerce" to mean "to sell in commerce," "to introduce or deliver for introduction into commerce," or "to hold for sale or distribution after introduction into commerce," 15 U.S.C. § 2052(a)(7).

First, Amazon did not sell—and could not have "sold"—the Subject Products to purchasers through Amazon.com or any FBA service. A "sale" requires "the transfer of ownership of and title to property from one person to another for a price." *Sale*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/sale (last visited Aug. 17, 2023); *see also Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012) (using dictionaries to ascertain meaning of "term[s] . . . undefined in a statute"). Amazon cannot sell something it does not own, and the Presiding Officer did not hold otherwise, noting it is the third-party "merchants who want to sell consumer goods" through

Amazon.com. *See* Dkt. 27 at 11. As the Fourth Circuit concluded in analyzing Amazon.com, "Amazon's services . . . are no more meaningful to the analysis than are the services provided by UPS Ground, which deliver[s]" products. *Erie Ins. Co. v. Amazon.com, Inc.*, 925 F.3d 135, 142 (4th Cir. 2019).

Similarly, providing customer support or processing payments for a product it did not own does not render Amazon a seller or a distributor, as courts have held. *See, e.g., Hendrickson v. Amazon.Com,* Inc., 298 F. Supp. 2d 914, 918 (C.D. Cal. 2003) ("While Amazon does provide transaction processing for credit card purchases, that additional service does not give Amazon control over the sale."); *see also Antone v. Greater Arizona Auto Auction*, 155 P.3d 1074, 1080 (Ariz. Ct. App. 2007) (auction house that "facilitat[ed] sales transactions" not subject to products liability); *Joseph v. Yenkin Majestic Paint Corp.*, 661 N.Y.S.2d 728, 730 (N.Y. Sup Ct., Kings County 1997) (finding that party who provided a "a billing or bookkeeping function" was not a distributor).

Nor does it matter, as the Presiding Officer held, that Amazon can influence the transactions between the Third-Party Sellers and consumers to some extent by administering a fair pricing policy or delisting products from Amazon.com. Dkt. 27 at 26–27. If Congress wished to exclude these types of behaviors, it knew how to do so. For example, the Drug Supply Chain Security Act, passed in 2013, defines "third-party logistics provider" as an "entity that provides or coordinates warehousing, or other logistics services of a product in interstate commerce on behalf of a manufacturer, wholesale distributor, or dispenser of a product," but *excludes* those who "have responsibility to direct the sale or disposition of the product." 21 U.S.C. § 360eee. The CPSA lacks any similar language prohibiting such providers from being involved in the "sale or disposition of the product," and the Commission should decline to read similar

language into the statute, including because of how closely in time the two provisions were enacted.

Processing product returns also does not render Amazon a seller or distributor—such a service is exactly the type of "ancillary" activity offered by third-party logistics providers. Recognized providers like FedEx and UPS provide similar services, facilitating returns of online orders shipped by retailers using their services.[23] Courts have recognized that such "reverse logistics" are a common function of third-party logistics providers. *See XPO Logistics, Inc. v. Anis*, No. 16-CVS-10677, 2016 WL 3944081, at *2 (N.C. Super. Ct. Jul. 12, 2016) (noting that third-party logistics provider plaintiff offered "a variety of customized logistics solutions to its customers, including . . . reverse logistics"). So does the industry: One article notes that third-party logistics companies can "oversee all your product returns on your behalf, relieving you of time-consuming logistics,"[24] while another notes that third-party logistics providers "offer[] . . . reverse logistics and returns in addition to other essential services"[25]

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[23] FedEx facilitates returns of online orders of products that were shipped by retailers using FedEx. *See* FedEx, *How to return a package with FedEx*, https://www.fedex.com/en-us/shipping/returns.html (last visited Aug. 17, 2023). Indeed, FedEx has a Package Returns Program for businesses that "involve[] regular product returns by [their] customers." FedEx, *FedEx Group PRP (Package Returns Program)*, https://www.fedex.com/en-ca/shipping-services/service-options/package-returns-program.html (last visited Aug. 17, 2023). UPS has a similar program. *See* UPS, *How To Return a Package*, https://www.ups.com/us/en/support/shipping-support/print-shipping-labels/how-to-write-address/how-to-return-a-package.page (last visited Aug. 17, 2023).

[24] *See* Freightos, *Outsourcing Reverse Logistics to a 3PL Provider: Services, Benefits & Companies*, https://www.freightos.com/freight-101/3pl-third-party-logistics-providers/reverse-logistics-3pl/ (last visited Aug. 17, 2023) (discussing 3PL's role in reverse logistics).

[25] Max Freedman, *3PL Logistics Guide*, Business News Daily (May 17, 2023), https://www.businessnewsdaily.com/15954-3pl-logistics-guide.html.

Second, Amazon also did not introduce or deliver the Subject Products for introduction into commerce. Instead, it was the Third-Party Sellers—not Amazon—that introduced the Subject Products into commerce by shipping the Subject Products to Amazon for fulfillment. As longstanding interpretations by the CPSC's General Counsel make clear, this prong of the distributor definition covers only the *initial* placement of the Subject Products into commerce, which had already occurred by the time Amazon took possession. In a 1973 Advisory Opinion issued soon after the CPSA was enacted, the agency's chief legal officer concluded that "the phrase 'introduced into interstate commerce' was intended to mean 'the *first* shipment of an individual finished product in interstate commerce.' A shipment of goods by a manufacturer in interstate commerce to a central warehouse owned by the manufacturer would be a 'first shipment in interstate commerce.'" CPSC General Counsel Advisory Opinion No. 6 (July 6, 1973) (emphasis added). Another opinion similarly explains that "[t]he phrase 'introduced into interstate commerce' was intended to mean the first shipment of an individual finished product in interstate commerce." CPSC General Counsel Advisory Opinion No. 8 (July 12, 1973).

Because the first shipment of the Subject Products was initiated by the Third-Party Sellers—a point uncontested by either Complaint Counsel or the Presiding Officer—Amazon did not introduce or deliver them into commerce. Courts, unsurprisingly, have agreed with this conclusion in the product liability context, finding that Amazon does not place products into the stream of commerce by offering its FBA logistics service. *See, e.g., Amazon.com, Inc. v. McMillan*, 625 S.W.3d 101, 112 (Tex. 2021) (holding that Amazon was not a seller of certain goods because Amazon "was not 'engaged in the business of distributing or otherwise placing' the [product] into the stream of commerce"). The

Presiding Officer "accept[ed] this contention" that the "'introduction into commerce' occurs before Amazon receives the consumer goods." Dkt. 27 at 25.

Third, Amazon did not "hold [the Subject Products*] for sale or distribution* after introduction into commerce." 15 U.S.C. § 2052(a)(7) (emphasis added). The Presiding Officer erred in holding that Amazon holds products for both sale and distribution.

The Presiding Officer did not give proper weight to the word "for" in determining whether Amazon holds products "for sale or distribution." Used in this context, the word "for" serves as a connector between two actions: (1) holding and selling, or (2) holding and distributing. When interpreting words or phrases connected by the word "for," therefore, the subsequent phrase "cannot be divorced from the antecedent phrase." *Altria Grp., Inc. v. United States*, 580 F. Supp. 3d 298, 309 (E.D. Va. 2022).

According to the Presiding Officer, because "Amazon holds a Subject Product while it waits for a customer to purchase it," Amazon thus holds the product "for sale." Dkt. 27 at 25. But this is not the appropriate reading of the phrase "hold for sale." Instead, as worded in the CPSA, the entity doing the "hold[ing]" must also do the selling. This is confirmed by courts who regularly interpret the word "for" as connoting a purpose or intent, meaning in connection to an action being taken by the subject entity. *Cf. Jackson v. Vtech Telecomms. Ltd.*, No. 01-C-8001, 2003 WL 25815373, at *6 (N.D. Ill. Oct. 23, 2003) (quoting dictionary definition of "for" as indicating the "object, aim, or purpose of an action or activity" (citation omitted)); *Applera Corp. v. MJ Rsch. Inc.*, 292 F. Supp. 2d 348, 363 (D. Conn. 2003) ("The word "for" is defined as "with the aim or purpose of[.]"). Here, Amazon does not hold products with the intent of selling them, because it has no legal authority to make a sale. Instead, Amazon holds products with the intent of

eventually shipping those products, either to a customer of third-party entities or back to the third-party entities.

Nor does Amazon hold the Subject Products "for distribution." Indeed, this is impossible, because a careful reading of the statutory text shows that Amazon cannot "distribute" products to which it does not take title (and therefore cannot not hold them "for distribution").

As discussed *supra*, Congress excluded third-party logistics providers who do "not take title to the product" from the definition of "distributor." This makes clear that ownership of the products at issue is essential in order for an entity to distribute products in commerce under the statute. 15 U.S.C. § 2052(a)(16). This reading is confirmed by "settled principle[s]" of statutory interpretation. *Sekhar v. United States*, 570 U.S. 729, 732 (2013). "[A]bsent other indication, 'Congress intends to incorporate the well-settled meaning of the common-law terms it uses.'" *Id.* (quoting *Neder v. United States*, 527 U.S. 1, 23 (1999)).

Both courts and the Commission have recognized that the CPSA should be interpreted against the background of common law product liability concepts. For example, in *Zepik v. Tidewater Midwest, Inc.*, the Seventh Circuit read into the Act "conventional notions of causation . . . [at] common law" "in the absence of any indication that Congress intended to depart from" them. 856 F.2d 936, 942 (7th Cir. 1998). And for almost 40 years, the Commission has considered "the case law in the area of products liability" as relevant to the determination of whether a product is "defective"—another common law concept—for purposes of the CPSA. *See* 16 C.F.R. § 1115.4(e); 49 Fed. Reg. 13,820, 13,825 (Apr. 6, 1984). In 2006, the Commission added factors to its guidance on what constitutes a "defect," borrowed from "the product liability area, as reflected in the

Restatement of Torts." *Substantial Product Hazard Reports*, 71 Fed. Reg. 42,028, 42,030 (Jul. 25, 2006). The Commission thus "ma[de] explicit what was already implicit in the Commission's regulation." *Id.* So too here.[26]

Congress did exactly this with the term "distributor" in the CPSA. The long-established understanding at common law, including at the time the CPSA was passed,[27] is that distributors take ownership of products before selling them to the next recipient in the supply chain. As one court held with respect to the FBA program, "regardless of what attributes are necessary to place an entity within the chain of distribution, the failure to take title to a product places that entity on the outside." *Eberhart v. Amazon.com, Inc.*, 325 F. Supp. 3d 393, 398 (S.D.N.Y. 2018); *see also Berkley Regional Ins. Co. v. John Doe Battery Mfr.*, No. 20-CV-2382, 2023 WL 375934, at *4 (D. Minn. Jan. 24, 2023) (finding that Amazon's "provision of services [through its FBA program] falls outside the scope of distributor liability").

Indeed, as recognized by *Eberhart*, the third Restatement of Torts makes clear "[t]he requirement that a distributor must, at some point, own the defective product."

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[26] The Presiding Officer cites a single instance of a statute where a distributor is defined to include an ownership requirement for the proposition that no such requirement exists in the CPSA. *See* Dkt. 27 at 9 n.12. But that statute dealt with distribution of economic power in the automotive fuels market, an area in which there was no pre-existing, well-established common law understanding of a distributor. *See* PL 95–297 (HR 130), PL 95–297, June 19, 1978, 92 Stat. 322 (purpose of the law was to "protect[ing] . . . franchised distributors and retailers of motor fuels" in order to "conserv[e] automotive gasoline and competition,"). It is thus unlike the CPSA, which borrows from and builds on common law products liability principles.

[27] *See, e.g., Edwards v. Scott & Fetzer, Inc.*, 154 F. Supp. 41, 45 (M.D.N.C. 1957) (distinguishing "distributor who buys and takes title" from a "mere salesman or broker"); *Thomas v. J. C. Penney Co.*, 186 Cal. App. 2d 223, 230 (Ct. App. 1960) (distinguishing "independent distributor in California who took title" from "Sales Agents [who] do not take title").

325 F. Supp. 3d at 398 (citing Restatement (Third) of Torts: Prod. Liab. § 1 (1998)). Like the definition of "distributor" contained in the CPSA, "the *Restatement* does not explicitly include a title requirement, [but] every example of a 'seller or distributor' that the *Restatement* supplies is an entity that owns the product it later sells or distributes." *Id.*

The Presiding Officer attempted to distinguish *Eberhart*, describing it as "a diversity case in which a court interpreted and applied New York law," rather than "interpret[ing] Section 2052" of the CPSA. Dkt. No. 27 at 8. But that merely proves Amazon's point that the common law—*i.e.*, the background against which the CPSA was drafted—includes an ownership requirement. Other attempts to distinguish *Eberhart* amount to distinctions without a difference, and the Presiding Officer's assertion that the case did not "h[o]ld that title is necessary . . . for an entity to be a distributor" is plainly inaccurate. The decision explicitly held that Amazon "is not a distributor," and that "a distributor must, at some point, own the defective product." 325 F. Supp. 3d at 398–99.

For these reasons, Amazon is not a "distributor" of the Subject Products as that term is defined by the CPSA—a conclusion consistent with numerous decisions in the common law context. *See Erie*, 925 F.3d at 144 (4th Cir. 2019) (holding that Amazon was not liable for certain products sold using the FBA service because it was not a seller "who transfers ownership of property for a price"); *Allstate New Jersey Ins. Co. v. Amazon.com, Inc.*, No. CV172738FLWLHG, 2018 WL 3546197, at *8 (D.N.J. Jul. 24, 2018) (Amazon did not "exercise control over the product" to be "part of the chain of distribution" for purposes of liability, including because "Amazon never held title to the product"); *Amazon.com, Inc. v. McMillan*, 625 S.W.3d 101, 112 (Tex. 2021) (under Amazon's FBA logistics service, "Amazon did not make the ultimate consumer sale because Amazon did not hold title to the" product and "was not 'engaged in the business

of distributing or otherwise placing' the [FBA] product] into the stream of commerce"); *State Farm Fire & Cas. Co. v. Amazon.com, Inc.*, 528 F. Supp. 3d 686, 695 (W.D. Ky. 2021) (noting "Amazon's role for purposes of this matter was that of a marketplace").[28]

B. The Commission Lacks Authority to Order Multiple Refunds for the Same Products.

Despite Amazon's prompt issuance of refunds to *all* of the Subject Product purchasers years ago and the initial Presiding Officer's conclusion that, as a result, "Amazon can't be ordered to issue refunds," Dkt. 27 at 21, the most-recent Presiding Officer held that Amazon must re-issue refunds to those same purchasers, conditioned on product return or proof of destruction. According to the Presiding Officer, requiring additional refunds was justified because Amazon did not sufficiently incentivize consumers "to take an action to remove any Subject Product from the marketplace." Dkt. 109 at 40. But the Commission lacks authority to issue such an order. Congress set forth three—and *only* three—remedies for the Commission to choose from when ordering relief under Section 15 of the CPSA, none of which include product returns, proof of destruction, or issuance of multiple duplicative refunds.

The Commission may order a firm to "repair" the product, "replace" the product, or "refund the purchase price" of the product—nothing else. *See* 15 U.S.C. § 2064(d)(1). Although firms may—and often do—negotiate with the Commission to include product returns as part of a *voluntary* recall scheme, that separate category of agency action does not create statutory authority to order product returns or proof of destruction in a

[28] The Presiding Officer attempted to distinguish these and other cases on the grounds that they held that Amazon is not a "seller" of the product, Dkt. 27 at 9 n.9, neglecting to mention that "distributors" in these cases are a subcategory of entities subject to "seller" liability. *See, e.g.*, *McMillan*, 625 S.W.3d at 107 (noting that "non-manufacturing distributors" could be held to have "seller liability"); *Allstate*, 2018 WL 3456197, at *7.

mandatory recall. *See Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 389 (1992) (via settlement, parties may agree to do "more than what a court would have ordered absent a settlement"). Indeed, the Initial Decision openly acknowledges that the actual text of the CPSA does not make "tender mandatory in exchange for a refund," Dkt. 109 at 42, but the Presiding Officer nonetheless elected to write such authority into the CPSA based on notions of Congressional intent and the agency's perception of how recalls should be managed. Those bases cannot override the plain text of the CPSA, and the Presiding Officer's holding on this issue must therefore be set aside.

The Commission's authority is limited to those powers expressly enumerated by Congress—it "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)). Because the Commission "possesses no . . . inherent equitable power," unlike an Article III federal court, it cannot impose remedies aside from those expressly authorized by Congress. *Id.*; *see also Cognoleum v. CPSC*, 602 F.2d 220, 226 (9th Cir. 1979). The four corners of the Commission's remedial authority are therefore governed by Section 15(d)(1) of the CPSA:

> If the Commission determines . . . that a product . . . presents a substantial product hazard . . . it may order the manufacturer or any distributor or any retailer . . . to take any one or more of the following actions it determines to be in the public interest: (A) . . . to repair the defect in such product[,] (B) [t]o replace such product[,] (C) [t]o refund the purchase price of such product[.]

In acknowledging that the text of the CPSA does not reference mandatory tender, the Presiding Officer nonetheless held that such a requirement should be imposed on Amazon because "(1) no effort was made to track what number, if any, of each Subject Product was actually disposed; and (2) the scheme did not require any purchaser to take

an action to remove any Subject Product from the marketplace before receiving a refund." Dkt. 109 at 40. As demonstrated below, neither of these premises are found in the text of the CPSA or otherwise grounded in law.

1. The Commission Lacks Authority to Order Remedies Other than Repair, Replacement, or Refund of a Product.

The text and structure of the CPSA confirm that the three remedies enumerated in Section 15(d)(1) are exhaustive; the Commission cannot add to the list.

In identifying the three remedies available to the Commission (*i.e.*, replacement, repair, or refund), Congress employed a prefatory clause of particular import: the Commission may order a manufacturer, distributor, or retailer to "take *any one or more of the following actions*[.]" 15 U.S.C. § 2064(d)(1) (emphasis added). It is well-established that in electing to use the phrase "one or more of the following," Congress is presumed to have deliberately cabined the possible remedies to *only* those enumerated in the list. *See Akhtar v. Burzynski*, 384 F.3d 1193, 1199 (9th Cir. 2004) (where Congress used the phrase "any of the following," it "explicitly enumerated circumstances by which [certain benefits could be terminated]," thus triggering "the presumption [that] Congress purposefully excluded all other possible means [for termination]."). [29]

Congress fixed the available list of remedies in Section 15(d)(1) to repair, replacement, or refund; thus, the Commission cannot order a firm to take any action aside from those three enumerated remedies. *See* 15 U.S.C. § 2064(d)(1).

[29] *See also St. Vincent's Med. Ctr. v. Burwell*, 222 F. Supp. 3d 17, 23 n.4 (D.D.C. 2016) ("By modifying the list of submission methods with the phrase 'any one of the following ways,' the Rule indicates that only one of those three ways is acceptable."); *Luvert v. Chicago Hous. Auth.*, 142 F. Supp. 3d 701, 712 (N.D. Ill. 2015) (similar); *Kadingo v. Johnson*, No. 15-CV-02835, 2017 WL 3478494, at *7 (D. Colo. Aug. 14, 2017) (similar).

2. The Plain Meaning of "Refund" or "Replace" Does Not Include Product Return or Product Destruction.

The most-recent Presiding Officer correctly acknowledged that "Congress elected not to make tender mandatory in exchange for a refund under the CPSA." Dkt. 109 at 42. Nor did Complaint Counsel cite any authority to define "refund" or "replace" in a way that somehow incorporates mandatory tender into those terms. To the contrary, traditional interpretive tools confirm that Section 15(d)(1) does not authorize double refunds, much less a second refund contingent on mandatory tender.

To start, courts often look to dictionary definitions in discerning the plain meaning of statutory terms. *See Kemp v. United States*, 142 S. Ct. 1856, 1862 (2022). Here, the dictionary definition of "refund" simply means to "reimburse or repay (a person)." *Refund*, Oxford English Dictionary (3d ed. 2009). The definition of "replace" similarly means to simply "provide a substitute for; to put an equivalent in place of (something lost, broken, etc.); [t]o fill the place of (a person or thing) with (also by) a substitute." *See Replace*, Oxford English Dictionary 3d ed. 2009).

Contrast these definitions with the term "recall," which is *not* one of the remedies authorized by Section 15. In passing the CPSA, Congress established two separate tiers of recall authority according to the product's hazard level. The lower tier of authority—covered by Section 15—involves products creating a "substantial risk of injury to the public." 15 U.S.C. § 2064(a). For such products, the Commission may order "any one or more" of "repair," "replace[ment]," or "refund." *Id.* § 2064(d). The higher tier of recall authority—covered by Section 12—involves products presenting an "imminent and unreasonable risk of death, serious illness, or severe injury." *Id.* § 2061(a). For such products, a federal district court may order "the recall, the repair or the replacement, or

refund for, such product." *Id.* § 2061(b). Thus, Congress extends authority to "recall" a product for actions brought under Section 12 of the CPSA, but not Section 15. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where 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 purposefully in the disparate inclusion or exclusion.").

The plain text of the CPSA similarly disqualifies any notion that a "recall" return remedy can be baked into the terms "replace" or "refund." Although the statute does not define the term "recall," the common meaning of the term is to "retrieve," "ask or order to return," "recollect," or "call back." *See Audionics Sys, Inc. v. AAMP of Fla., Inc.*, No. CV-12-10763, 2013 WL 9602634, at *26 (C.D. Cal. Sept. 12, 2013) (quoting American Heritage Dictionary (5th ed. 2011) and The Free Merriam-Webster Dictionary). Accordingly, the meaning of "recall" is wholly distinct from replacement or refund.

This distinction is confirmed by the statutory text. In "construing a statute, [courts] are obliged to give effect, if possible to every word Congress used." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). A key corollary of this rule is that "terms disconnected by a disjunctive be given *separate* meanings, unless the context dictates otherwise[.]" *Id.* (emphasis added). Here, in listing the remedies available to the district court when adjudicating a claim under Section 12 of the CPSA, Congress listed four remedies—recall, repair, replacement, or refund—all separated by the disjunctive connector "or." 15 U.S.C. § 2061(b). Accordingly, "recall" has a separate and distinct

meaning from repair, replacement, or refund—none of those terms could be baked into any of the other terms.[30]

Nor did Congress silently incorporate any notion of product destruction into the terms "replace" or "refund." When Congress has provided for product destruction, it has done so explicitly. *See, e.g.*, 15 U.S.C. § 2066(e) ("Products refused admission into the customs territory of the United States shall be destroyed unless . . . the Secretary of the Treasury permits the export."); 15 U.S.C. § 2088(a) (Commission may "recommend to U.S. Customs and Border Protection a bond amount sufficient to cover the cost of destruction of such products or substances"). And because Congress made no such reference in connection with product refunds or replacement in Section 15(d)(1), it did not intend to somehow incorporate such action into refunds or replacement. *See Russello*, 464 U.S. at 23.[31]

3. The Canon of Constitutional Avoidance Requires Interpreting the Statute to Not Allow for Multiple, Duplicative Refunds.

A Commission interpretation that the CPSA authorizes repeat payments to persons who *already received* full purchase-price payments would run afoul of the Fifth

[30] This is confirmed by other statutes. For instance, one statute relating to certain drinking water coolers directed the CPSC to "issue an order requiring the manufacturers and importers of such coolers to repair, replace, or recall and provide a refund for such coolers." 42 U.S.C. § 300j-22.

[31] That Congress used such terms multiple times in other provisions of the CPSA further solidifies the applicability of this interpretive canon. *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).

Amendment's Takings Clause. *See* U.S. Const. amend. V ("Nor shall private property be taken for public use, without just compensation."). The Takings Clause prohibits the "transfer [of] property from one private party to another" where such a transfer is not for "public use," *i.e.*, where it would only "benefit a particular class of identifiable individuals." *Kelo v. City of New London*, 545 U.S. 469, 478 (2005). Here, because the purchasers have been refunded, any second refund would fall into this prohibited category.

There is no dispute that the Subject Product purchasers already received a refund for the full purchase price of the Subject Products.[32] Any repeat payment would be an impermissible, one-sided transfer of property from Amazon for the "benefit" of a "particular class of identifiable individuals." *See id.* In other words, a repeat payment may not be ordered because "the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*." *Id.* at 477.

Under the well-established canon of constitutional avoidance, to the extent a statutory provision is susceptible to "competing plausible interpretations," interpretations raising "serious constitutional doubts" must be rejected. *Clark v. Martinez*, 543 U.S. 371, 381–82 (2005). A far preferable interpretration is readily available: purchasers are entitled to only a "refund of the purchase price of such product," and no more. 15 U.S.C. § 2064(d)(1)(C). Given the constitutional doubts inherent to the Initial Decision's attempt to order repeat payments to Subject Product purchasers, that interpretation must give way to the plain text interpretation barring mandatory tender or multiple refunds.

[32] *See* Dkt. 87, ¶¶ 25, 39, 58, 76, 93, 106.

4. Mischaracterized Legislative History Cannot Override Plain Statutory Language.

In asserting that purchasers must be required to return or destroy the Subject Products, the Presiding Officer incorporates the misplaced reasoning of a forty-seven-year-old Commission decision.

The Presiding Officer relied on *Relco, Inc.*, a decision in which the Commission squarely acknowledged that the CPSA "is silent as to any mandatory tender requirement." *Relco, Inc.*, CPSC Dkt. No. 74-4, Order at 4 (Oct. 27, 1976). Notwithstanding this legislative silence, the Commission nonetheless held that "the legislative history [of the CPSA] clearly expresses Congressional intent that the Commission possesses the authority to specify a tender requirement where the refund option is elected." *Id.* at 4–5. Far from presenting a "clear" survey of legislative history, however, the Commission relied on just a single excerpt from a single House Report as the purportedly-representative intent of the entire Congress. *Id.* at 5 (". . . the Commission is intended to have authority to specify . . . whether the product must be tendered . . ." (citation omitted)). The Commission likewise—without citation to any specific CPSA provision—declared "the obvious statutory purpose of section 15, to protect the public by encouraging removal of dangerous products from the marketplace." *Id.* at 6.

In the 47 years since *Relco* was decided, the legal landscape for statutory interpretation has changed significantly, including the role (or lack thereof) that legislative history is permitted to play when determining Congressional intent. Since 1976, the Supreme Court and circuit courts have clarified that statutory text—not legislative history—is the determinative source for statutory meaning. *See, e.g.*, *Epic Sys. Corp.*, 138 S. Ct. 1612, 1631 (2018) ("[L]egislative history is not the law."); *Soliman v.*

Gonzales, 419 F.3d 276, 281–82 (4th Cir. 2005) ("[U]nder settled rules, the plain language of the statute in question is deemed the most reliable indicator of Congressional intent."). Accordingly, courts and agencies are barred from reading text into statutes based on mere silence by Congress, especially when enumerating agency authority. *See Demby v. Schweiker*, 671 F.2d 507, 511 (D.C. Cir. 1981) (courts "cannot simply read into a statute that is otherwise silent on the subject"); *see also Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995) ("Were courts to presume a delegation of power absent an express withholding of such power, agencies would enjoy virtually limitless hegemony[.]").[33] Nor may text be read into statutes based on broad notions of statutory purpose. *See MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 230–31 & n.4 (1994) (agencies "are bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purpose.").

In *Relco*, the Commission failed to abide by these now-established principles. It readily acknowledged that Congress *declined* to include a mandatory tender requirement in the CPSA, but proceeded to write such a requirement into the statute based merely on legislative history and an inaccurate gloss on the purpose of the CPSA. *See Relco* at 6. On that basis alone, the Presiding Officer's incorporation of the reasoning in *Relco* cannot stand. But even if *Relco*'s interpretive methods were permissible, its premise is wrong.

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[33] Such reliance on silence is known as a "nothing-equals-something" argument, "which would turn congressional silence into a 'mere gap' . . . to fill" at the agency's pleasure. *Gulf Fishermen's Ass'n v. Nat'l Marine Fisheries Serv.*, 968 F.3d 454, 460 (5th Cir. 2020) ("[T]he agency argues it has the power to regulate 'aquaculture' because the [MSA] 'do[es] not unambiguously express Congress's intent to prohibit the regulation of aquaculture. This nothing equals something argument is barred[.]"). Instead, courts "construe [a statute's] silence as exactly that: silence." *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 774 (2015).

The summary of the CPSA's legislative history in *Relco* is inaccurate and incomplete. Omitted from the quotation provided in *Relco*, the House Report states that, to the extent the CPSA includes a tender requirement, it serves as a means to ensure refunds would not be inadvertently provided to individuals who had not purchased the product—not as a means to coerce consumers into disposing of the products. *See* Dkt. 90, Amazon Ex. 114, House Interstate and Foreign Commerce Committee, H. Rep. No. 92-1153 at 52 (Jun. 21, 1972) ("[T]he Commission is intended to have authority to specify . . . whether the product must be tendered or whether the sales slip or some other *proof of purchase or ownership must be made*." (emphasis added)).[34] Simply put, product tender was a mechanism for fraud mitigation—not a license to force consumers to take action in order to receive a refund.

In relying on a single quotation, the *Relco* decision likewise fails to acknowledge additional contrary examples in the full legislative history of the CPSA. The Senate version of the bill, for example, contained the exact language the Presiding Officer now reads into the CPSA, *i.e.*, requiring a firm to "refund the purchase price of such product *upon its tender*." *See* Ex. 112, 118 Cong. Rec. 21,768, 21,910 (Jun. 21, 1972). But Congress rejected that version of the bill.[35] Thus, properly read, the legislative history cuts *against*

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[34] For this reason, the Presiding Officer's reliance on *In re Zen Magnets, LLC*, Dkt 109 at 41, is misplaced. *See* CPSC Dkt. No. 12-2, Final Decision and Order, 2017 WL 11672449 (C.P.S.C. Oct. 26, 2017); CPSC Dkt. No. 12-2, Opinion and Order, 2017 WL 11672451 (C.P.S.C. Dec. 8, 2017). The Commission was not presented with the question of its authority to condition refunds on returns under the CPSA because the respondent sought to impose a proof of purchase requirement. Opinion and Order, 2017 WL11672451, at *8.

[35] At conference, the conferees agreed to the House version of the provision, which did not include that language, *see* Dkt. 95, Amazon Ex. 115 (H. Rep. No. 92-1593 at 52 (Oct. 12, 1972)), and the full Senate adopted the conference report before the bill was signed into law, *see* Dkt. 95, Amazon Ex. 116, 118 Cong. Rec. 36,170, 36,199 (Oct. 14, 1972).

interpreting the statute as allowing the Commission to condition refunds on returns. But at a minimum, the legislative history is inconclusive, and thus insufficient to read a mandatory tender requirement into the statute.

5. No CPSC Regulation Grants Authority to Order Mandatory Tender.

In lieu of any on-point statutory authority, the Presiding Officer relied on three CPSC regulations for the proposition that the Commission may condition a refund on consumer action. *See* Dkt. 109 at 40–41 (discussing 16 C.F.R. §§ 1115.26(a)(1), 1115.27(d), (n)). As a threshold matter, a regulation cannot confer statutory authority where none exists. *Cf. Plaskett v. Wormuth*, 18 F.4th at 1087 ("[An agency] has no powers except those specifically conferred upon it by statute." (citation omitted)). In any event, none of those regulations even purport to provide such authority.

These regulations are simply irrelevant here because they address the content of remedial notices, *not* the substance of what remedies the Commission can order. The CPSC made that clear in promulgating the regulation, stating in no uncertain terms that "[t]he nature of remedies approved as part of a corrective action plan goes to the substance of a corrective action plan, which is not at issue in the final rule." 75 Fed. Reg. 3,355, 3,363 (Jan. 21, 2010). Indeed, the Presiding Officer acknowledged that Section 1115.27 was promulgated pursuant to Section 15(i) of the CPSA, not Section 15(d). Dkt. 109 at 40 n.34. As with the regulations, Section 15(i) similarly governs how firms are to formulate recall notices, not the Commission's underlying remedial authority. *See* 15 U.S.C. § 2064(i).[36]

[36] To be sure, Section 15(i) states that a recall notice should provide a "description" of the "remedy available to the consumer," including "any action a consumer must take to obtain

Moreover, the text of the regulations themselves do not purport to authorize any particular remedial action; instead, the rules simply describe the potential content of notices. The first regulation deals not with remedies ordered pursuant to Section 15(d) of the CPSA, but rather the content of notices issued pursuant to Section 15(c). *See* 16 C.F.R. § 1115.26(a)(1). As quoted by the Presiding Officer, a notice must provide "motivation for consumers . . . to identify the product . . . and to respond and take the stated action." *Id.* The Initial Decision presumes that the only "motivation" contemplated by the rule is a withholding of a refund, but that is not so. Quoted in full, the regulation makes clear that the motivation contemplated is a clear description of the hazard: "A recall notice should provide sufficient information and motivation for consumers and other persons to identify the product and its actual and potential hazards, and to respond and take the stated action. *A recall notice should clearly and concisely state the potential for injury or death*." 16 C.F.R. § 1115.26(a)(1) (emphasis added). This comports with an enumerated purpose of the CPSA: "to assist consumers in evaluating the comparative safety of consumer products." 15 U.S.C. § 2015(b)(2).

The other two regulations—both in Section 1115.27—concern the level of detail required in recall notices, not the Commission's authority to order certain remedial actions:

- "A recall notice must contain a clear and concise statement of the actions that a firm is taking concerning the product. These actions may include, but are not limited to, one or more of the following: [s]top sale and distribution in commerce;

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a remedy," but the provision immediately clarifies that the "action" contemplated by Congress is clerical in nature, *i.e.*, contacting the firm to obtain the refund. *See* 15 U.S.C. § 2064(i)(2)(H) (firm must provide "information a consumer needs in order to obtain a remedy or information about a remedy, such as mailing addresses, telephone numbers, fax numbers, and email addresses."). Nothing in Section 15(i) indicates Congressional intent to empower the Commission to force consumers to return products.

recall to the distributor, retailer, or consumer level; repair; request return and provide a replacement; and request return and provide a refund." 16 C.F.R. § 1115.27(d).

- "A recall notice must contain . . . [a]ll specific actions that a consumer must take to obtain each remedy including, but not limited to, instructions on how to participate in the recall. These actions may include but are not limited to . . . removing the product from use, discarding the product, [or] returning part or all of the product[.]" 16 C.F.R. § 1115.27(n).

Even if these rules *could* somehow be read as expanding the Commission's remedial authority, the Commission must interpret the rules to avoid conflict with the CPSA. *See, e.g.*, *Robbins v. Bentsen*, 41 F.3d 1195, 1198 (7th Cir. 1994) ("Regulations cannot trump the plain language of statutes, and we will not read the two to conflict where such a reading is unnecessary."). As established above, the CPSA itself does not convey authority to order mandatory tender. To the extent there are competing interpretations of the regulations, a reading which aligns with the plain text of the CPSA must be adopted. Such an interpretation is easily conceivable—in describing how firms should formulate recall notices, Section 1115.27 provides various hypothetical examples, but those examples are not to be read as standalone grants of authority. Indeed, as previously shown, the Commission expressly disclaimed any intent to expand the "substance" of its remedial authority in promulgating the rules. *See* 75 Fed. Reg. at 3,363. Thus, no Commission regulation provides authority otherwise lacking in the actual text of the CPSA.

6. Mandatory Tender Contradicts Operative Agency Policy and Is Not in the Public Interest.

The Presiding Officer's Initial Decision relies on the 2021 version of the "Product Safety Planning, Reporting, and Recall Handbook" (the "Recall Handbook"), *see, e.g.*, Dkt. 119 at 6–9, a document published by a subset of staff from the CPSC Office of

Compliance after this adjudication was initiated, *see* Dkt. 76, Amazon Ex. 89 at 1. But the Recall Handbook cannot override contrary statutory language in mandating product returns. Nor may it countermand a still-operative agency Directive—more authoritative than the Recall Handbook—[redacted] *See infra* Part V.6.b. The Initial Decision altogether ignores this Directive. It likewise fails to acknowledge well-reasoned opinions by Amazon's expert, as supported by a CPSC-commissioned scientific literature review. *See generally* Dkt. 76, Amazon Ex. 62, Mohorovic R. at 18–20; Amazon Ex. 104, Mohorovic Dep. 262:13–268:11. Given the record, there is no basis to hold that mandatory tender is permissible under the CPSA or the APA.

a) The Recall Handbook Is Not Persuasive or Authoritative.

The Presiding Officer invokes the Recall Handbook as authority for reading a mandatory tender requirement into the CPSA, *see* Dkt. 109 at 41, but an informal staff document cannot grant any such authority. For example, the May Order cites to a statement by agency staff in the Handbook that "incentives such as money . . . encourage consumers to return the product." *Id.* (quoting 2012 Recall Handbook at 20). Although the Presiding Officer declined to ascribe binding authority to such statements, he nonetheless ascribed "persuasive" weight pursuant to *Skidmore v. Swift & Co.*, in light of the purported "degree of the agency's care, . . . consistency, formality, and relative expertness" reflected in the document. Dkt. 109 at 17 (quoting *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001)) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). Upon inspection, however, none of these factors support deference to the Recall Handbook.

While the Recall Handbook expresses the *preferences* of a subset of CPSC Compliance Office staff, it does not cite, identify, or provide an underlying or supporting factual basis—*i.e.*, indicia of "expertness"—for those preferences aside from amorphous references to experience of agency personnel. Nor does such factual basis appear to exist. As the Commission itself has stated, it has "relatively little systematic data" about the efficacy of its preferred corrective actions. 78 Fed. Reg. 49,480, 49,481 (Aug. 14, 2013). The Government Accountability Office ("GAO") has repeatedly reviewed Commission programs and concluded that the agency "[d]oes [n]ot [s]ystematically [t]rack" recall effectiveness data submitted through monthly progress reports, Dkt. 76, Amazon Ex. 61 at 25, and "lack[s] . . . systematized descriptive information on past or ongoing projects," Dkt. 90, Amazon Ex. 107 at 2.[37] Nor can the Presiding Officer's reliance on purported agency "experience" overcome this deficiency—more is required. *See Aqua Slide 'N' Dive Corp. v. CPSC*, 569 F.2d 831, 841–42 (5th Cir. 1978) ("Unarticulated reliance on Commission 'experience' . . . does not add one jot to the record evidence."). Without a demonstrable factual basis for the agency's assertions in the Recall Handbook, there is no basis for deference.[38]

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[37] Indeed, what little data the Commission has collected suggests that past recalls have been ineffective. As of 2017, [redacted] Dkt. 76, Amazon Ex. 30, Rose Dep. 89:8–90:6.

[38] *See, e.g.*, *De La Mota v. U.S. Dep't of Educ.*, 412 F.3d 71, 81 (2d Cir. 2005) (noting the importance of an agency pronouncement being substantiated by evidence); *Krzalic v. Republic Title Co.*, 314 F.3d 875, 878-79 (7th Cir. 2002) ("[T]he more deliberative and empirical the procedures employed in arriving at [an agency's decision, the greater the deference that a reviewing court will give it" under *Skidmore*.); *see also Am. Petroleum Inst.*, 661 F.2d at 349 (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)).

Formality is likewise lacking in the Recall Handbook—as with other agency documents not entitled to deference, it was "made at a low level within the agency and . . . does not necessarily represent the views of the agency as a whole." *Cathedral Candle Co. v. U.S. Int'l Trade Comm'n*, 400 F.3d 1352, 1367 (Fed. Cir. 2005); *see also* Dkt. 76, Amazon Ex. 104, Mohorovic Dep. 73:19–74:5 [redacted]). The Presiding Officer readily acknowledged that "[t]he handbook was prepared by CPSC staff, and has not been reviewed or approved by, and may not necessarily reflect the views, of the Commission." Dkt. 109 at 16 (quoting Recall Handbook). He nonetheless held that the Commission has a "longstanding practice of recognizing the importance of the handbook." Dkt. 109 at 17–18 & n.17–19. But none of the materials cited by the Presiding Officer give such sweeping weight to the Recall Handbook or its actual contents—they do little more than reflect Commission acknowledgement of the existence of the Recall Handbook.[39]

The Presiding Officer noted that Commission staff discussed the Recall Handbook with private parties at two meetings. *See* Dkt. 109 at 18–19. But this is no substitute for notice-and-comment scrutiny. To the contrary, the Handbook's drafters ignored important feedback from regulated entities. During a 2017 "Recall Effectiveness Workshop," for example, an industry representative pointed out that consumer disposal (*i.e.*, throwing a product away) is a more effective method of removing a recalled product

[39] The Presiding Officer cited to a number of statements by former Commission representatives to Congress referencing the existence of the Handbook, but those references stop short of characterizing the Handbook as formal agency policy, nor do they identify any source material for the Handbook. *See, e.g.*, *Consumer Product Safety Commission Reauthorization: Hearing before the Subcomm. on Com., Consumer Prot., and Competitiveness of the H. Comm. on Energy and Com.*, 101st Cong. 40 (1989) (statement of Anne Graham, Acting Chair, CPSC).

from circulation than product returns. *See* Dkt. 76, Amazon Ex. 69, Recall Effectiveness Workshop Tr. 17–18. This industry feedback is nowhere addressed in the Handbook, an absence made all the more glaring by the fact that, during the workshop, a CPSC Compliance Officer agreed with the sentiment, explaining that "if I've got to package up a stroller and send it back and drop it off at a UPS store . . . chances of me doing that are probably slim to none." *Id* at 18.

In sum, the Recall Handbook is not the sort of document that merits deference with regard to a mandatory tender for Section 15(d) refunds, *Skidmore* or otherwise.

b) Operative Agency Policy Discourages Mandatory Tender Requirements.

CPSC Compliance Office staff are required to follow the agency's Section 15 Manual, which in turn makes clear that [redacted] Dkt. 76, Amazon Ex. 64, CPSC_AM0013521 at 13522 n.56. CPSC Directives constitute express agency policy and are the product of a more-formal and more-deliberate approval process than the Recall Handbook, which "has not been reviewed or approved by, and may not necessarily reflect the views of, the Commission." Dkt. 76, Amazon Ex. 89, CPSC_AM0011464 at 11464.[40] Titled [redacted] Dkt. 76, Amazon Ex. 65, CPSC_AM0014049 at 14049. The Directive states

[40] As summarized on the CPSC website, "[t]he Directives System . . . serves as the repository for agency-wide policies and procedures and provides guidance regarding the conduct of Agency employees and the distribution and performance of Agency business." CPSC Directive No. 0100, *Directive on Directives and Delegations of Authority* (Sept. 21, 2022), https://www.cpsc.gov/s3fs-public/0100-Directive-on-Directives-and-Delegations-of-Authority.pdf?VersionId=srT26cKBsYP0l2UfV3vw06bov.6PKNbv. Unlike the Recall Handbook, which is authored and published by Compliance Office staff, all agency Directives are reviewed and authorized by the agency's Executive Director and General Counsel. *See id*.

that [redacted] *Id.* at 14091. [redacted] *Id.* The Section 15 Manual clearly states [redacted] Dkt. 76, Amazon Ex. 64, CPSC_AM0013521 at 13522 n.56. [redacted]

The Presiding Officer failed to acknowledge this Directive when characterizing the Recall Handbook as the agency's position with regard to mandatory tender. But to the extent the Presiding Officer sought to change agency course and effectively override a still-operative Directive, he was required to (1) acknowledge the change in policy, and (2) provide a reasoned explanation for the change supported by substantial evidence. *See Fox Television Stations*, 556 U.S. at 515; *NRDC v. EPA*, 857 F.3d 1030, 1040 (9th Cir. 2017); *see also* 5 U.S.C. § 556(d).

As noted above, the basis for the policy announced in the Directive was [redacted]. Amazon's expert—a highly respected and knowledgeable former CPSC Commissioner—echoed the conclusions of the Commission's Directive, *i.e.*, that mandatory tender [redacted]. Dkt. 76, Amazon Ex. 62, Mohorovic R. at 18–20; *see also* Dkt. 74 at 36. Those opinions are bolstered by a scientific literature review commissioned by the CPSC concluding that "in-home" remedies "increase . . . the average recall effectiveness rate" compared to a

"remedy that required consumers to return the product."[41] This record material makes clear that (1) consumer disposal is a legitimate means of removing hazards from the marketplace, and (2) the likelihood of hazard correction is at its highest when little is required of consumers, *e.g.*, simply throwing a product away rather than going through the burden of packaging and returning it. Complaint Counsel failed to rebut the opinion of Amazon's expert or otherwise undermine the [redacted] cited in the Directive or the literature review later commissioned by the agency.

The Commission got it right in the Directive, electing to let informed study of consumer behavior drive its practices, not staff inclinations or preferences. The Directive recognizes that [redacted]. And while agency staff may not trust consumers to act in their own best interest, Congress did, and the CPSA's enshrinement of that principle trumps any informal agency documents to the contrary.

c) The Initial Decision Fails To Establish That Mandatory Tender Is in the Public Interest.

The CPSA requires that any order issued under Section 15(d) be in the "public interest." 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), and provide "ascertainable criteria" that provide a "standard to guide determinations" of the agency, *New York Cent.*

[41] Dkt. 76, Amazon Ex. 94, Heiden Associates, *Recall Effectiveness Research*, CPSC_AM0010101 at 10126 (citation omitted); *see also* Dkt. 76, Amazon 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).

Sec. Corp. v. United States, 287 U.S. 12, 24–25 (1932). Congress expressly defined the purposes of CPSA, as relevant here, to be: (1) to protect consumers from "unreasonable risks of injury" and (2) to "assist consumers in evaluating the comparative safety of consumer products." 15 U.S.C. § 2051(b).

The "public interest" standard must be interpreted "so that it serves . . . as a source of true guidance for the Commission," rather than a standard "so vague as to fail to provide judicially-enforceable constraints on the Commission's exercise of authority." *Off. of Commc'n of United Church of Christ v. FCC*, 707 F.2d 1413, 1423–24 (D.C. Cir. 1983). 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). While the Presiding Officer noted these authorities, he nonetheless made several errors in their application.

First, the Presiding Officer failed to consider all of the purposes of the CPSA, focusing exclusively on the protection against unreasonable risks. Dkt. 27 at 20–21. But another purpose of the Act is to "assist consumers" in evaluating product safety. 15 U.S.C. § 2051(b)(2). "If consumers have accurate information, and still choose to incur the risk, then their judgment may well be reasonable." *Aqua Slip 'N' Dive Corp.*, 569 F.2d at 839. 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). As the Presiding Officer acknowledged in his May Order, it is not served where the "remedy would be futile." Dkt. 109 at 21. Nor is it served, as established above, when consumers are compelled to take an action regarding a product—particularly where it makes the consumer less likely to act. *See supra* Part V.B.6.b.

Second, the public interest standard requires a "generalized balancing of costs and benefits." *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 512 n.30 (1981). The Presiding Officer asserts that *Donovan* is limited to instances of rulemaking, Dkt. 109 at 22–23, but *Donovan* was not so circumscribed: it explained Congress' use of the term "unreasonable risk," which is an animating purpose of the *entire* Act, not just the CPSA's rulemaking provisions. *Donovan*, 452 U.S. at 512 n.30. Nor does Section 15(h) of the CPSA preclude general cost-benefit considerations.[42] As former Acting Chair Adler has noted, "it would not be 'in the public interest' for the agency to insist on a recall where a product presented little risk and the costs of the recall were enormous."[43]

Here, the Initial Decision relies in large part on the Recall Handbook to attempt to meet its public interest burden and justify its proposed change to policy as required by the APA. But the Recall Handbook does not supply the requisite underlying factual or legal authority for its assertions. *See supra* Part V.B.6.a. And while Complaint Counsel and the Presiding Officer attempt to supplement those assertions with *ipse dixit* reasoning for why they think "tender should be required" and is otherwise "appropriate" in their estimation, Dkt. 109 at 42, more is required in meeting the agency's burden to establish a public interest justification for a requested remedy. *See Am. Petroleum Inst.*, 661 F.2d at 349 (agency decision "must be based on something more than trust and faith

[42] Section 15(h) targets *formal* cost benefit analysis—a "systematic" calculation of actual "values for lost years of human life and for suffering and other losses from non-fatal injuries," *UAW v. OSHA*, 938 F.2d 1310, 1320 (D.C. Cir. 1991), not the generalized balancing required by the public interest standard. Where Congress seeks to bar any *consideration* of costs and benefits, it does so explicitly. *See, e.g.*, 15 U.S.C. § 2605(b)(4)(A) (directing EPA to take action "without consideration of costs").

[43] Dkt. 95, Amazon Ex. 123, Robert S. Adler, *From "Model Agency" to Basket Case—Can the Consumer Product Safety Commission be Redeemed?*, 41 ADMIN. L. REV. 61, 126 n.380 (1989).

in [the agency's] experience," and courts "are no longer content with mere administrative ipse dixits based on supposed administrative expertise" (citation omitted)).

In failing to identify a sufficient public interest basis for its mandatory tender holding, the Presiding Officer improperly flipped the burden on Amazon, holding that "Amazon has failed to raise any fact issue indicating that tender or confirmation of destruction would be impracticable or present a danger to consumers." Dkt. 109 at 42. But that is not the operative public interest standard; it is Complaint Counsel who carries the burden of establishing that mandatory tender is in the public interest. And, as established above, Complaint Counsel failed to carry that burden and the Initial Decision's adoption of Complaint Counsel's position was therefore erroneous.

C. The Commission Cannot Order Actions for Products Without Formally Determining That Those Products Constitute a "Substantial Product Hazard."

Sections 15(c) and (d) of the CPSA set an express limit on the universe of products for which the Commission may order action: those which the Commission "determines," based on substantial evidence in an adjudication, to be a "substantial product hazard." 15 U.S.C. §§ 2064(c), (d). In bringing this adjudication, Complaint Counsel requested that the Commission's order apply not only to the discrete list of Subject Products identified in the Complaint, but also to any other product that might be "functionally equivalent" to any one of the Subject Product children's sleepwear garments, hair dryers, or carbon monoxide detectors. The Presiding Officer rightly rejected that request, recognizing that an order of such breadth was not authorized by the CPSA and was otherwise "unreasonable" and "excessive." Dkt. 109 at 30. But the Presiding Officer nonetheless failed to limit the Initial Decision to the Subject Products as required by the CPSA. Instead, he ordered Amazon to take action with regard to a list of 20 children's sleepwear

products that the Commission has never seen, let alone inspected, tested, or analyzed for purposes of this adjudication. This was error, both legal and factual. Those 20 products must be excluded from any Final Decision.

In his May Order, the Presiding Officer appeared to rely on 16 C.F.R. § 1120.3 as legal support for a categorical notion of equivalency between children's sleepwear products. Dkt. 109 at 29. But that regulation merely provides a formula to convert children's clothing sizes denoted as "small," "medium," and "large" to a numerical size label (e.g., size 2T to 16). *See* 16 C.F.R. § 1120.3(b)(2). The regulation's assertion that a garment labeled size "large" is equivalent, as a matter of industry standard, to a garment labeled size "12," says nothing about whether garments of different sizes, colors, or styles are, in fact, equivalent for purposes of "hazard" under Section 15 of the CPSA. *See id*.

In lieu of any express grant of statutory or regulatory authority, the Presiding Officer rests on the premise that the Commission may assume—for purposes of a Section 15 formal hazard determination—that any children's sleepwear garment that Amazon elected to remove from Amazon.com pursuant to its own removal criteria poses a "substantial product hazard" under the CPSA. Dkt. 119 at 2. This premise is faulty.

The Commission's usual process for determining substantial product hazards includes [redacted].[44] For purposes of this adjudication, agency staff completed that process with regard to each individual Subject Product before they notified Amazon of the potential hazards posed by those products.[45] Complaint Counsel also specified

[44] Dkt. 80, ¶¶ 15, 16, 19, 29, 30, 42, 50, 51.

[45] *See, e.g.*, Dkt. 76, Amazon Ex. 7 at 2 [redacted]; Amazon Ex. 39 at 2 [redacted]

those individual Subject Products according to their Amazon Standard Identification Number ("ASIN") in the Complaint.[46] And it was in reliance on the agency's process that Amazon stipulated that the *discrete list* of Subject Products—actually procured and tested by trained Commission staff—met the requirements for a "substantial product hazard" under the CPSA. *See* Dkt. 35.

As Amazon's corporate representative testified, the process by which Amazon identified other *potentially* hazardous products was [redacted]. *See* Dkt. 76, Amazon Ex. 2, Goldberg Dep. 286:1–20. In turn, record testimony by the Commission's designated representative expressly contradicts the Presiding Officer's underlying logical premise:

[redacted]

Dkt. 76, Amazon Ex. 30, Rose Dep. 342:4–18. Similarly, the Presiding Officer openly acknowledged that "variances in color might affect flammability (such as by virtue of

[redacted]); *see also* Dkt. 76, Amazon Ex. 30, Rose Dep. 339:12–343:9 [redacted]).

[46] *See* Dkt. 1, ¶¶ 21, 30, 39.

different dyes increasing or decreasing that risk)[.]" Dkt. 119 at 2. The record therefore makes clear that Amazon's process for identifying additional products to remove from Amazon.com has inherent uncertainty. Despite that uncertainty, Amazon took proactive steps to mitigate the risk of *possible* hazard based on its steadfast commitment to customer safety. But it is the Commission's responsibiity to make hazard determinations under Section 15. Amazon's criteria are not determinative of hazard. It is therefore legally insufficient for the Presiding Officer to simply adopt those criteria as the Commission's basis for a formal "substantial product hazard" determination.

Finally, the Presiding Officer was also mistaken in his interpretation of record material explaining Amazon's process for removing children's sleepwear garments from Amazon.com. [redacted]

Initially, Complaint Counsel failed to specify child ASINs for the children's sleepwear products listed in the Complaint, including for the brand "HOYMN." *See* Dkt. 1. [redacted]

[redacted]. *See* Dkt. 119 at 2. Compounding that error, he held that in lieu of knowing which "child" ASIN had been tested by the CPSC (which again, was listed in the interrogatory response) and incorrectly assuming that all "child" ASINs pose identical hazards because they may bear visual simularities, he included all 20 of the additional ASINs in the Initial Decision. *See id.* at 2–3. As established above, however, those assumptions are contradicted by the record and were made in error.

D. Additional Notice Is Unnecessary.

1. The Presiding Officer Failed To Determine That Additional Direct Notice Is Required To Adequately Protect the Public.

Before Complaint Counsel initiated this adjudication, Amazon took sufficient action to notify every purchaser of the Subject Products via email about the potential hazards. Those email messages contained the key information necessary to provide the notice contemplated by the CPSA. And while the CPSA contains a list of default components for inclusion in a direct notice, the statute also directs the Commission to consider which of those components are indeed necessary to adequately protect the public on a case by case basis. *See* 15 U.S.C. §§ 2064(c)(1), (i)(2).

Here, the Presiding Officer found that Amazon's original email notices failed to include (1) the word "recall," (2) the number of total units subject to recall, (3) the dates when the product was sold, (4) contact details for information about the remedy, (5) a high resolution photo of the product, and (6) mention of risk of "death" in the hazard description. Dkt. 109 at 31–32. The problem, however, is that the Presiding Officer's

analysis essentially stops there. Under the CPSA, the fundamental question is whether additional rounds of direct notice, notwithstanding a purportedly defective initial notice, are "required in order to adequately protect the public." 15 U.S.C. § 2064(c)(1). That Amazon's notices did not include a few of the default notice components does not, in and of itself, prove that additional notice is required. And for the reasons set forth below, neither Complaint Counsel nor the Initial Decision establish that, absent these components, the notice is not adequate, particularly given the now two year gap since the initial notice was sent.

The Commission is not without a lodestar in determining whether certain notice components are necessary to protect the public. The express purpose of a notice 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). To justify re-notification, the Presiding Officer was required to determine that these goals cannot be fulfilled without the components purportedly missing from Amazon's first round of email messages. And in doing so, he was required to provide reasoning for that conclusion based on substantial evidence. *See NRDC*, 857 F.3d at 1040; *see also* 5 U.S.C. § 556(d).

But none of the notice components cited by Complaint Counsel or the Presiding Officer are necessary to achieve these goals, and certainly are not so necessary that the *only* way to achieve them is to re-issue the notifications with those components included.

Identify the Product. The Presiding Officer ignored record evidence making clear that the language in Amazon's original messages contained sufficient information

for the customer to readily and quickly identify the product. Amazon's notice made clear that the message was in reference to an item actually purchased by the recipient ("your past Amazon Order"), and it clearly identified the customer's order identification number, the name of the product, and the product's Amazon Standard Identification Number.[47] Critically, it provided a link to a page with more details about the product, including a photo.[48] Amazon's expert confirmed that such information is sufficient for the average consumer to identify the relevant product. *See* Dkt. 76, Amazon Ex. 62, Mohorovic R. at 14. Indeed, the Commission's own compliance officer agreed that, as worded, Amazon's messages [redacted] Dkt. 87, ¶ 89 (quoting Dkt. 76, Amazon Ex. 40, Williams Dep. 62:15–63:1). Given such evidence, none of which was acknowledged by the Presiding Officer, certain default notice components sometimes useful for product identification—*e.g.*, the number of total units subject to recall, high resolution photos (beyond those already provided) and the dates when the product was sold—were unnecessary. Nor did the Presiding Officer identify any record evidence establishing that without such information, the recipient would have had any difficulty in identifying the product at issue.

Understand the Hazard. From the outset, Amazon's email messages utilized attention-grabbing language—"Important Safety Notice"—in the subject line.[49] It further identified the hazards associated with each Subject Product category:

[47] *See, e.g.*, Dkt. 87, ¶¶ 18, 20, 52–53, 71–72, 87–88, 101, 102, 167.

[48] *Id.*

[49] *See, e.g.*, *id.* at ¶¶ 18, 51, 70, 86, 100.

- Carbon Monoxide Detectors: "risk of exposure to potentially dangerous levels of Carbon Monoxide"[50];
- Hair Dryers: "risk of electric shock if the hair dryer comes in contact with water"[51]; and
- Children's Sleepwear: "a risk of burn injuries to children."[52]

The Presiding Officer held that because Amazon's messages did not contain the word "recall" in the subject lines, the messages were automatically inadequate. As established above, however, the Mandatory Recall Rule makes clear that listed terms may be unnecessary if the message conveys the necessary substance. *See* 16 C.F.R. § 1115.29(b). The Presiding Officer was thus required to evaluate whether Amazon's particular messages could protect the public without use of the word "recall," *i.e.*, whether the alternative language "Important Safety Notice" could be effective. Amazon's expert—a former Commissioner—opined that [redacted] Dkt. 76, Amazon Ex. 62, Mohorovic R. at 13. And while Complaint Counsel asserted that certain agency staff prefer the term "recall," it was unable to refute Mr. Mohorovic's statement that he is [redacted] *Id.* at 14. Accordingly, there is no empirical or evidentiary basis to support any claim that a direct notice cannot protect the public unless it contains the word "recall."

The Presiding Officer also held that because the Mandatory Recall Rule contemplates use of the word "death" in a hazard description, use of that word is automatically necessary. Again—that is not the law, nor is it supported by the record. To

[50] *See*, *e.g.*, Dkt. 76, Amazon Ex. 29, Amazon-CPSC-FBA-00000212 at 214.

[51] *See*, *e.g.*, *id.* at 213.

[52] *See*, *e.g.*, *id.* at 212.

the contrary, Amazon's messaging was emulating language currently utilized in numerous CPSC-approved recall notices. In fact, none of the Commission-approved recall notices involving children's sleepwear in 2023 to date have warned of the risk of death. *See* Dkt. 112 at 8. Amazon should not be penalized for using the same wording.

Understand the Remedy. The Presiding Officer raised two purported deficiencies with the remedy description in Amazon's emails. *First*, the Presiding Officer criticized Amazon's notices because they did not include instructions for mandatory product tender or proof of destruction. *See* Dkt. 109 at 44. For the reasons established in Section V.B, *supra*, however, because that portion of the order cannot stand, there is no need for corresponding language concerning mandatory product tender in the email messages. *Second*, the Presiding Officer held that because the Mandatory Recall Rule contemplates inclusion of "contact details for information about the remedy," Amazon's failure to list a phone number or email address for questions was problematic. *See* Dkt. 109 at 31. But again, the refund remedy was already successfully executed by the time the purchaser was reading the message. And the email *did* include a link to a page in which the purchaser could verify that their account had indeed been credited as described. *See, e.g.*, Dkt. 76, Amazon Ex. 29, Amazon-CPSC-FBA00000212. The link thus provided means to obtain information from Amazon about the remedy, and in the rare instance where a consumer still had a question or concern, that webpage—like all Amazon webpages—had a link to Amazon's help page which intuitively and easily directs customers to the correct source for further support.

In sum, the Presiding Officer did not acknowledge or account for this record evidence in determining that Amazon must re-issue notices. To the contrary, Complaint Counsel was required to show that each component purportedly missing from Amazon's

email messages were so necessary to protect the public that additional emails to thousands of purchasers was required. Because Complaint Counsel failed to identify such material, there is no basis to affirm the Presiding Officer's order to send two additional rounds of email notice to thousands of customers.

2. There Is No Legal Basis For Multiple Rounds of Direct Messages.

As with the purported deficiencies regarding the content of Amazon's emails, there is no legal basis for the Presiding Officer's order that Amazon send a repeat round of email messages to approximately 400,000 customers within two weeks of the first round. Dkt. 119 at 4–5. The Presiding Officer appears to have relied—paradoxically—on a vague notion that Amazon was "wrong" for sending proactive notices to its customers, Dkt. 109 at 24, but offers no support for that contention beyond contrary preferences by certain agency staff. It is entirely illogical to suggest that consumers would be better off if Amazon had waited to notify them about the product hazard until staff had fully litigated the issue.

The Presiding Officer did not cite any legal authority to order repeat direct notices pursuant to Section 15(c). Instead, he based his order on the notion that "two rounds of direct notice are typical," a claim asserted by Complaint Counsel. Dkt. 109 at 36. Complaint Counsel, in turn, relied on just one document—the Corrective Action Plan Template ("CAP Template")—for the proposition that [redacted]. Dkt. 92, ¶¶ 144–45. But the Commission does not derive authority to order mandatory recall action based on what agency staff consider to be "typical." Rather, Complaint Counsel must demonstrate that doing so is required to adequately protect the public as established by substantial evidence. Reliance on the CAP Template or Recall Handbook cannot carry that burden.

First, reliance on the CAP Template as an authoritative document is highly problematic, even more so than the Recall Handbook. The CAP Template is [redacted] And not only has the CAP Template not gone through notice-and-comment procedures, the agency has actively worked to keep the actual contents of the CAP Template away from the public. Even in this adjudication, Complaint Counsel has redacted any quotations to the content of the CAP Template in public filings. This is not reflective of a document that is intended to formally convey agency policy.

Second, Complaint Counsel's general reliance on the Recall Handbook only undercuts its request for relief. The 2012 Recall Handbook (in effect at the time Amazon issued its direct notices) makes no reference to repeat direct notices. *See* Dkt. 76, Amazon Ex. 60, 2012 Recall Handbook at 18–19 (merely stating that "direct notice to consumers known to have the product" "may be appropriate"). And to the extent agency staff now seek to change direct notices requirements via the 2021 Handbook, the Commission is required to acknowledge the change and provide justification for doing so that is rooted in some factual basis. *See Fox Television Stations*, 556 U.S. at 515. Accordingly, the

Presiding Officer's order to issue multiple rounds of direct notices to the same purchasers must be vacated.

3. The Commission Should Exercise Restraint in Ordering Social Media Postings.

Amazon's social media accounts are a critical business tool with wide-ranging importance to one of the largest companies in the world.[53] Indeed, the content on Amazon's social media pages is the result of careful planning and deliberate curation. An international company of Amazon's scale utilizes multiple social media accounts for specific subject matters and purposes. *See* Dkt. 112 at 11–12.

Complaint Counsel's reflexive request that Amazon be ordered to post recall notices to its primary accounts on Twitter, Instagram, and Facebook lacks proportionality. *See* Dkt. 110 at 7–8. At Complaint Counsel's invitation—and with little explanation—the Presiding Officer ordered that Amazon utilize those accounts in a manner never used before. *See* Dkt. 119 at 7–8. But the Presiding Officer failed to give full consideration to the practicality, necessity, and potentially-precedential nature of that order, and the Officer's ruling should be adjusted accordingly by the Commission. *See id.*

First, Complaint Counsel failed to provide a sufficient factual basis to demonstrate the necessity of *any* postings to Amazon's social media pages. Amazon was able to send direct notices to every single person who purchased the Subject Products from the Third-Party Sellers and will likewise post links to the CPSC press releases on Amazon.com. *See* Dkt. 110 at 7–8. In this respect, Amazon differs significantly from brick-and-mortar

[53] Oral. Arg. Tr. 45:7–16, Mar. 28, 2023 (the Presiding Officer noted that "Amazon is not a typical company" utilized by "billions of people").

establishments where individual purchaser contact information is difficult to obtain.[54] To commandeer the primary social media page of one of the largest companies in the world, Complaint Counsel and the Initial Decision needed to provide some sort of reasoned estimation, based on substantial evidence, of the number of people would *fail* to see Amazon's direct notices, the Commission's own online notices, and Amazon's online notices, but *would* see the notices on Amazon's social media pages. Neither Complaint Counsel nor the Initial Decision identify such evidence.

Second, the Presiding Officer failed to give due consideration to the broader policy issues associated with the use of Amazon's main social media accounts for recall-related information specific to individual products. The Subject Products are a very small portion of the total volume of recalls related to third-party products sold using the FBA service. *See* Dkt. 112 at 11–12. Accordingly, it is likely that utilization of Amazon's primary social media accounts for product-specific recalls would foreseeably overtake those pages in terms of content, effectively nullifying their utility to Amazon's customers for updates concerning Amazon's core services. Such outcomes are not justifiable given the very small possible number of people in possession of a Subject Product who will not receive a direct message (and who might view Amazon's main social media pages).

The Presiding Officer declined to weigh these important considerations, merely surmising that they seem "speculative." Dkt. 119 at 7. But it was Complaint Counsel's basis for seeking to use those social media accounts that was impermissibly "speculative," given the absence of evidence that any purchasers have not been actually noticed. That is

[54] Industry representatives discussed these distinctions with Commission representatives. *See, e.g.*, Dkt. 76, Amazon Ex. 69, Recall Effectiveness Workshop Tr. 11–12 (addressing differing public notice needs for "purely brick and mortar" retailers in comparison with companies that operate "more online").

doubly true given that Complaint Counsel—not Amazon—carries that burden. *See* 15 U.S.C. § 2064(c)(1).

To the extent the Commission identifies a legally sufficient basis to conclude that the public cannot be adequately protected in these circumstances without some form of social media posting, Amazon identified customer-service-focused social media pages suited—and designed—for that purpose. *See* Dkt. 112 at 11 (identifying the @AmazonHelp Twitter account and the AmazonHelp Facebook Page). The Presiding Officer found that—in his own personal estimation—the number of followers for those pages was too low. Dkt. 119 at 7. But that statement—absent any evidence—is not a permissible basis for agency rulings. *See Am. Petroleum Inst.*, 661 F.2d at 349.

Accordingly, Complaint Counsel failed to build the necessary record to justify the commandeering of Amazon's main social media accounts. The Initial Decision thus lacks the requisite justification for its holding.

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

The Initial Decision's micromanagement of the wording of Amazon's safety messaging and utilization of Amazon's social media accounts cannot satisfy the demanding intermediate scrutiny test established in C*entral Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980), and thus must be rejected as inconsistent with the First Amendment.[55]

[55] The Presiding Officer correctly rejected Complaint Counsel's various arguments that Amazon's First Amendment arguments are either not properly preserved or otherwise unsuitable for review. *See* Dkt. 109 at 32–35.

The Presiding Officer's contrary conclusion was premised on a clear error of law. Even though Amazon and Complaint Counsel both applied the *Central Hudson* framework to this question,[56] the Presiding Officer *sua sponte* applied more lenient two-step test set out in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985). Under *Zauderer*, compelled disclosure of "purely factual and uncontroversial" information in "advertising" is permissible if it is "reasonably related to the State's interest in preventing deception of consumers" and not "unduly burdensome." *Id.* at 651. As the D.C. Circuit has explained, however, "*Zauderer* is confined to advertising," and does not apply to "compelled disclosures that are unconnected to advertising or product labeling at the point of sale." *Nat'l Ass'n of Mfrs.*, 800 F.3d at 522. Because Complaint Counsel's request to compel Amazon to issue Commission-scripted notifications and other safety messaging does not concern "advertising" or point-of-sale labeling, *Central Hudson*—not *Zauderer*—governs. *See id.* ("[T]he Court was not holding [in *Zauderer*] that any time a government forces a commercial entity to state a message of the government's devising, that entity's First Amendment interest is minimal," and thus subject to *Zauderer*'s more lenient analysis).[57]

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[56] Attempts to compel non-commercial speech are subject to strict scrutiny under the First Amendment. *Stuart v. Camnitz*, 774 F.3d 238, 246 (4th Cir. 2014). The Commission need not reach the question of whether the speech at issue here is commercial in nature, however, because Complaint Counsel's request to compel speech cannot meet the intermediate scrutiny requirements articulated in *Central Hudson*. *See Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 524 (D.C. Cir. 2015).

[57] In any event, as explained, *supra*, the Commission's request to control the content of Amazon's speech would fail even under *Zauderer*, because such control is not reasonably related to the Commission's legitimate interests and is unduly burdensome in light of the voluntary measures Amazon has already taken to remediate any risks posed by the Subject Products.

Under *Central Hudson*, the Commission carries the burden of identifying "a substantial interest" that would be served by dictating exactly how Amazon handles its safety messaging, as well as showing that doing so would "*directly advance* the state interest involved," not just that the messaging otherwise would be "ineffective or remote support for the [Commission's] purpose." 447 U.S. at 564 (emphasis added). Moreover, the Commission must also show that "more limited" measures would not suffice. *Id.* The Commission's burden under this rigorous test "is not satisfied by mere speculation or conjecture; rather [the Commission] 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 Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 188 (1999). The Initial Decision does not meet this standard.

Even assuming that the Commission has a substantial interest in seeking to compel Amazon's speech on grounds of public safety, Complaint Counsel failed to identify how Commission control over nearly every word of the notice, or utilization of Amazon's primary social media accounts, is necessary to directly and materially advance that interest and is otherwise no more extensive than necessary.[58] The plain language utilized by Amazon in its direct notices sent to all Subject Product purchasers achieved the notice goals of the CPSA, and the agency invokes only speculation and conjecture that repeat notices using its preferred language will "directly and materially advance" safety purposes.

[58] In his May Order, the Presiding Officer stated that "Amazon conceded that if the ordered notice meets the requirements of sections 15(c) and (d), it does not 'run afoul of the First Amendment.'" Dkt. 109 at 36 n.32 (citation omitted). Amazon conceded no such thing, but only explained that sections 15(c) and (d) can be "construe[d] . . . in a way that doesn't run afoul of the First Amendment." Oral Arg. Tr., Mar. 28, 2023, 114:22–115:2.

Courts have applied *Central Hudson* to reject agency attempts to compel speech in similar circumstances. *See, e.g.*, *Nat'l Ass'n of Mfrs.*, 800 F.3d at 526 (disclosure requirement violated First Amendment 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., Inc. v. Jepsen*, 764 F.3d 258, 265 (2d Cir. 2014) (state disclosure law violated First Amendment where disclosure would have "an indiscernible or *de minimis*" effect on the alleged substantial interest).[59] The Presiding Officer's reasons for concluding that Commission-dictated safety messaging would serve the Commission's interests are thus premised on misreadings of the law and unsupported by the factual record, as explained, *supra* Part V.D.1–3, and cannot justify the Commission's effort to compel Amazon's speech.

E. This Adjudication Violates the Separation of Powers Doctrine and the Due Process Clause.

In three respects, this proceeding has been—and continues to be—unconstitutional. *First*, the Commissioners who approved an adjudication against Amazon and who will decide this administrative appeal may only be removed for good cause. *Second*, the Presiding Officer who issued the Initial Decision on appeal is an ALJ who enjoys two layers of protection from presidential removal. *Third*, the Commissioners are exercising powers as both prosecutor and adjudicator in violation of the Fifth Amendment Due Process Clause.

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[59] *See also, e.g.*, *Am. Beverage Ass'n v. City & Cnty. 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 Ass'n 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).

1. The Commission Can Address the Constitutional Defects in This Adjudication.

The Presiding Officer did not rule on Amazon's objections to the unconstitutionality of this adjudication, concluding instead that the Commission lacked jurisdiction to address them. That was mistaken. Regardless, the Commission has not only the authority, but also the obligation, to address the constitutional infirmities in this proceeding now.

While the Commission may not be able to invalidate the challenged removal restrictions itself, it *can* put a stop to this adjudication based on its conclusion that those restrictions are unconstitutional. *Cf. Jones Bros., Inc. v. Sec'y of Lab.*, 898 F.3d 669, 674, 677 (6th Cir. 2018) (agencies "must continually interpret and apply their statutory duties in light of constitutional boundaries," and the Department of Labor was "fully suited to entertain" an "alleged constitutional defect" concerning an Appointments Clause challenge to Department ALJ); *Battat v. C.I.R.*, 148 T.C. 32, 52 (U.S.T.C. Feb. 2, 2017) ("[U]nder the Rule of Necessity we may properly act on petitioners' motion. There is indeed a necessity that we do so."). The Commission cannot ignore Amazon's argument that the for-cause removal protections insulating the Commissioners and the Presiding Officer from presidential removal violate the constitutional separation of powers.[60]

[60] Indeed, a respondent in another pending Commission adjudication has raised a similar challenge to the for-cause 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. *See Leachco, Inc. v. CPSC*, No. 6:22-cv-00232 (E.D. Okla. filed Aug. 17, 2022). Plaintiffs' appeal of the denial of that injunction is currently pending before the 10th Circuit. *See Leachco, Inc. v. CPSC*, No. 22-7060 (10th Cir. filed Dec. 6, 2022).

Even if the Commission were unable to rule on the constitutionality of the challenged removal restrictions (which it is not), Amazon raises these issues now to preserve them for federal judicial review. *Cf. Fleming v. U.S. Dep't of Agric.*, 987 F.3d 1093, 1097–98 (D.C. Cir. 2021).

2. 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 LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2192 (2020). In *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), the Supreme Court 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' Rsch. 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' Rsch.*, 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' Rsch.*, 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' Rsch.*, 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 involve exercise of executive power. *See Consumers' Rsch.*, 2022 WL 1577222 at *11 ("The Government does not dispute that these are executive powers."). 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*.'" *Id.* at *10 (quoting *Seila Law*, 140 S. Ct. at 2200). The Commission therefore cannot avail itself of the *Humphrey's Executor* exception to *Myers*.

3. 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 v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 495 (2010). 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 ALJs 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), *cert. granted*, 143 S.Ct. 2688 (Jun. 30, 2023) (No. 22-859), 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*, 987 F.3d at 1104 (Rao, J., concurring in part) (reaching similar conclusion).

It therefore necessarily follows from *Free Enterprise Fund* and *Lucia* that dual layer removal protections for the Presiding Officer are unconstitutional.

4. The Combination of Investigatory, Prosecutorial, and Judicial Roles of the Commissioners Violates the Due Process Clause.

The Fifth Amendment's due-process protections guarantee Amazon the right to an impartial adjudication before an impartial Commission. *See* U.S. Const. amend. V (no person shall be "deprived of life, liberty, or property, without due process of law"). In current practice, however, the Commissioners execute simultaneous functions that preclude a fair and impartial adjudication.

Pursuant to the ancient maxim, *nemo iudex in causa sua*, "no one should be a judge in his own cause." *See generally The Federalist No. 10* ("No man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and not improbably, corrupt his integrity.") (Madison). This maxim takes constitutional form in the Due Process Clause. *See, e.g.*, *Chrysafis v. Marks*, 141 S. Ct. 2482, 2482 (2021) (noting "the Court's longstanding teaching that ordinarily 'no man can be a judge in his own case' consistent with the Due Process Clause"). "Not only is a biased decisionmaker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.'" *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

Here, however, the structure of the Commission necessarily makes it the judge in its own case and creates a probability of unfairness, because the Commission serves both

as prosecutor and as the judge. The Commissioners retain the authority to direct agency staff to initiate investigations of potential statutory and regulatory violations. *See* 15 U.S.C. § 2065(a). Commissioners may then, without any adversarial participation by the target firm, review and analyze that information before conferring and voting to approve the issuance of an administrative complaint pursuant to Section 15 of the CPSA.[61] *See* 16 C.F.R. § 1025.11(a) ("Any adjudicative proceedings under this part shall be commenced by the issuance of a complaint, authorized by the Commission . . . ."). The Commissioners further appoint an administrative law judge to serve as Presiding Officer, 16 C.F.R. § 1025.1, and in the event they are dissatisfied with the Presiding Officer's Initial Decision, they may reach their own *de novo* determination on any factual or legal issue, *id.* § 1025.55. The Commission also has sole authority to determine whether and on what terms to settle. *Id.* § 1025.26(f), (g). Such authority to investigate, initiate, oversee, and decide is inherently flawed, and allows the Commission to decide the very action it elected to pursue.

The lack of impartiality inevitably resulting from the Commission's structure runs squarely into the requirement that any adjudicator not prejudge questions of fact or law. *See Amos Treat & Co. v. SEC*, 306 F.2d 260, 267 (D.C. Cir. 1962) ("[A]n administrative hearing of such importance and vast potential consequences must be attended . . . with the very appearance of complete fairness. Only thus can the tribunal conducting a quasi-adjudicatory proceeding meet the basic requirement of due process."). The Commission violated that requirement at the outset of this adjudication. In announcing the vote to

[61] *CPSC Sues Amazon to Force Recall of Hazardous Products Sold on Amazon.com*, CONSUMER PRODUCT SAFETY COMMISSION (July 14, 2021), https://www.cpsc.gov/Newsroom/News-Releases/2021/CPSC-Sues-Amazon-to-Force-Recall-of-Hazardous-Products-Sold-on-Amazon-com.

approve and serve an administrative complaint on Amazon, then-Chairman Adler made clear that the Commission had already pre-judged the core question of Amazon's liability in stating that the purpose of the action is "to require [Amazon] to take responsibility for recalling products sold under their 'Fulfilled by Amazon' channel."[62] Thus, as structured and initiated in this particular instance, Amazon is not subject to an impartial adjudication process as guaranteed by the Due Process Clause.

* * *

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), *aff'd in part and remanded*, 598 U.S. 175 (2023). Because this adjudication is unconstitutional, Amazon should be subjected to it no longer. The Commission should thus terminate and vacate these proceedings.[63]

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[62] *Statement of Acting Chairman Robert S. Adler on the Vote to Approve Filing of An Administrative Complaint Against Amazon.com*, CONSUMER PRODUCT SAFETY COMMISSION (July 14, 2021), https://www.cpsc.gov/s3fs-public/Statement%20on%20Amazon%20RSA%207.14.pdf.

[63] In *Collins v. Yellen*, 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. 141 S. Ct. 1761, 1777–89 (2021). 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.

VI. Conclusion

For these reasons, Amazon is not a distributor under the CPSA, and the adjudication should be dismissed. Alternatively, the Commission should reverse and vacate the above-identified portions of the Initial Decision.

Dated: August 21, 2023

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

[PROPOSED] ORDER

In this proceeding, the Presiding Officer Jason S. Patil issued an Initial Decision and Order ("Initial Decision") on July 10, 2023 granting in part and denying in part Complaint Counsel's Motion for Summary Decision. The Initial Decision also incorporated a prior Order issued by Presiding Officer James E. Grimes on January 19, 2022, granting Complaint Counsel's Motion for Partial Summary Decision. Respondent Amazon.com, Inc. ("Amazon") and Complaint Counsel have appealed the Initial Decision. Upon consideration of the appeals and the record, it is hereby:

ORDERED that Complaint Counsel's appeal is DENIED; and further

ORDERED that Amazon's appeal is GRANTED; and further

ORDERED that the Initial Decision is VACATED; and further

ORDERED that this proceeding is DISMISSED; and further

ORDERED that this Order, along with the accompanying Memorandum Opinion, shall constitute the Final Decision in accordance with 16 C.F.R. § 1025.55; and further

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

DATED:

BY THE COMMISSION:

CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2023, a copy of the foregoing was served upon all parties and participants of record in these proceedings as follows:

- by email to the Secretary of the U.S. Consumer Product Safety Commission, Alberta Mills, at amills@cpsc.gov; and
- by email to Complaint Counsel at jeustice@cpsc.gov, lwolf@cpsc.gov, sanand@cpsc.gov, fmillett@cpsc.gov, and tmendel@cpsc.gov.

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