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 REPLY BRIEF

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I. Introduction

Complaint Counsel's Answering Brief underscores the two core flaws in its case. *First*, the plain text of the Consumer Product Safety Act ("CPSA") does not authorize Complaint Counsel's requests for relief. Complaint Counsel both ignores statutory terms (with its overly restrictive interpretation of "third-party logistics provider") and adds new terms to the statute (with its claim that the CPSA authorizes mandatory tender as a refund requirement). *Second*, Complaint Counsel has not met its burden to justify its requested remedial actions. Complaint Counsel's arguments that various remedies are in the public interest and that duplicative notice is necessary to protect the public are not supported with facts, but rather by vague references to agency "experience." The absence of substantial evidence is dispositive, especially given the extensive record establishing that the requested remedies are not in the public interest.

Doubling down on a reading of the statute that the Presiding Officer aptly called "silly," Complaint Counsel insists that Amazon is not a third-party logistics provider under the CPSA. Courts applying the common law have reached an emerging consensus that Amazon is not a distributor, and Complaint Counsel does not dispute that courts and the Commission have previously relied on the common law in interpreting the CPSA.

Complaint Counsel's attempt to read a mandatory tender requirement into the CPSA is similarly indefensible. It rests primarily on a 1976 Commission decision that *agrees* that the text of the CPSA lacks such a requirement, but nonetheless inserts mandatory tender into the statute based on purported legislative history. Binding principles of statutory interpretation disfavor such reliance. Even if mandatory tender is authorized under the CPSA, Complaint Counsel has failed to carry its factual burden. Amazon's extensive record—including a formal study conducted by Commission staff—

shows that mandatory tender reduces recall effectiveness. Complaint Counsel presents no evidence rebutting the conclusion that burdening consumers with mandatory return or proof of product destruction as preconditions for refunds years after the fact undermines—rather than promotes—consumer safety.

Complaint Counsel's impermissible attempt to categorize an entire class of products as hazardous (and thus subject to recall requirements) was rejected—and rightly so—in the Initial Decision. The allegations in the Complaint were limited to a particular set of "Subject Products" tested and evaluated by agency personnel. Amazon and Complaint Counsel agreed to stipulate that those products—and those products alone—posed a substantial product hazard under the CPSA. Yet Complaint Counsel seeks an order stating that *all* products that bear cosmetic similarity must be designated as substantial product hazards, without any testing or other evidence to demonstrate that they are actually hazardous. The Presiding Officer correctly recognized that purported cosmetic differences can indeed have a material impact on the existence of a product hazard. Complaint Counsel's request is therefore unjustifiable under the plain text of the CPSA.

Complaint Counsel's request that Amazon repeat direct email notice to nearly 400,000 Subject Product purchasers and post recall notices to its primary social media pages is further unwarranted on the established factual record. Complaint Counsel points to certain *default* components in *typical* notices as provided in the CPSA and mandatory recall rule (such as use of the word "recall" or the date range of when the product was sold), but fails to explain why those particular components are necessary to protect the public here. Amazon has already notified consumers of the hazards of the Subject

Products through the most effective means available, and re-notification—which is not required to adequately protect the public—would confuse customers.

Finally, Complaint Counsel errs in arguing that the Commission may not rule on Amazon's constitutional arguments. To the contrary, the Commission is obligated by law to do so, and those arguments demonstrate that this proceeding is unconstitutionally structured.

The Commission should reverse and vacate the Initial Decision because it is contrary to the law and unsupported by the extensive factual record.

II. Argument

A. Amazon Is Not a Distributor Under the CPSA.

1. Complaint Counsel's Interpretation of "Third-Party Logistics Provider" Would Impermissibly Render the Exception a Nullity.

In 2008, Congress amended the CPSA to carve out "third-party logistics provider[s]"—*i.e.*, those who "solely receive[], hold[], or otherwise transport[]" consumer products—from the requirements of the Act. 15 U.S.C. § 2052(a)(16). Yet, under Complaint Counsel's interpretation, that amendment accomplished nothing: Complaint Counsel interprets "solely" so restrictively that no real-world commercial entity could satisfy its terms. Dkt. 129 at 27–28. Presiding Officer Grimes rightly rejected this "unqualified perspective" as "silly," because it would mean that a provider could not, among other activities, "verify that it has received the correct products or that they are undamaged." Dkt. 27 at 11.

At oral argument before the Presiding Officer, Complaint Counsel cited entities such as FedEx and UPS—who provide logistics services similar to Amazon—as examples of third-party logistics providers under the CPSA. *See* Transcript of Oral Argument at 10–

12 (Dec. 16, 2021). Now on appeal, however, Complaint Counsel has reversed itself to argue that those companies are not necessarily covered by the third-party logistics provider exception and might be subject to Commission jurisdiction as distributors. Dkt. 129 at 31. The Commission should reject Complaint Counsel's twisted interpretation.

To justify its flawed reading, Complaint Counsel resorts to outdated and disfavored methods of statutory interpretation.[1] Complaint Counsel primarily argues that Amazon "fails to provide any legislative history" in support of its commonsense position that explicit addition of an exception to the CPSA was not a meaningless exercise. Dkt. 129 at 35–39. But that turns ordinary principles of statutory interpretation upside down: "When 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) (emphasis added) (cleaned up).

Complaint Counsel's reliance on general statements in the legislative history that the Consumer Product Safety Improvement Act of 2008 ("CPSIA") was intended to "strengthen" the Commission[2] do not rebut that presumption. Not one of those statements includes the term "third-party logistics provider" or even "distributor." Dkt. 129 at 36. Vague notions of statutory purpose cannot supplant the plain text: 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 purposes." *MCI*

[1] Complaint Counsel also cites *Helvering v. Sw. Consol. Corp.*, but that case supports Amazon's position. 315 U.S. 194 (1942). There, the Court gave an amendment to a statute restricting the authority of the IRS full effect, noting that the result would have been different, and the IRS would have prevailed, prior to the amendment. *Id.* at 198–99.

[2] *See, e.g.*, Dkt. 129 at 37 (citing individual statements made by members of Congress at the time of the CPSIA's enactment).

Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 230–31 n.4 (1994); *accord Hearth, Patio & Barbecue Ass'n v. U.S. Dep't of Energy*, 706 F.3d 499, 506–07 (D.C. Cir. 2013) (applying this principle to an effort to regulate consumer products). Congress chose to expand the Commission's authority in the discrete ways enacted in the text and summarized by Complaint Counsel—*i.e.*, "increas[ing] overall funding for the CPSC; increas[ing] CPSC staffing; prohibit[ing] the use of dangerous phthalates in children's toys and child care articles; streamlin[ing] product safety rulemaking procedures" and others.[3] Dkt. 129 at 37 (quoting 154 Cong. Rec. S7867, 7870 (statement of Sen. Levin)).[4] These expansions have nothing to do with—and did not alter—the plain text of the definition of "third-party logistics provider."

Alternatively, Complaint Counsel contends that the CPSA excepts only "common, carrier[s], contract carrier[s], [and] third-party logistics provider[s] . . . by reason of [their activities] *as such a carrier or forwarder*," 15 U.S.C. § 2052(b) (emphasis added), and suggests that Amazon's activities as a logistics provider would not qualify as a result,

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[3] Complaint Counsel relies on the statements of individual legislators which are especially unreliable. Dkt. 129 at 37–38. "The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history," *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979), particularly where, as here, the record lacks "evidence of an agreement among legislators on the subject," *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 308–09 n.8 (1994).

[4] Relatedly, Complaint Counsel also that claims that the CPSA must be "interpreted broadly" as a remedial statute. Dkt. 129 at 14 n.5. But the Supreme Court has rejected that type of assertion as a flawed "substitute for a conclusion grounded in the statute's text and structure." *CTS Corp. v. Waldburger*, 573 U.S. 1, 12 (2014). "After all, almost every statute might be described as remedial in the sense that all statutes are designed to remedy some problem. And even if the Court identified some subset of statutes as especially remedial, the Court has emphasized that 'no legislation pursues its purposes at all costs.' Congressional intent is discerned primarily from the statutory text." *Id.* (internal citation omitted). Thus, courts have explained that this principle of interpretation is "of dubious value" and "widely criticized," and has been repeatedly rejected by the Supreme Court since 1995. *Regions Bank v. Legal Outsource PA*, 936 F.3d 1184, 1195 (11th Cir. 2019).

Dkt. 129 at 35. But this reading is illogical and would again render the third-party logistics exception superfluous. If third-party logistics providers qualify for the exception only when acting "as such a carrier or forwarder"—*i.e.*, as a common carrier, contract carrier, or freight forwarder—then the category would have no separate meaning and its inclusion in the CPSA would be unnecessary. Given that the statutory provision applies to a "common carrier, contract carrier, third-party logistics provider, or freight forwarder," 15 U.S.C. § 2052(b), Complaint Counsel's insistence that a third-party logistics provider must be a common carrier, contract carrier, or freight forwarder would read the term "third-party logistics provider" out of the statute entirely.

2. Amazon's Interpretation Gives Full Effect to the Actual Text of the Statute.

As Presiding Officer Grimes held, a third-party logistics provider "must be able to perform activities ancillary to receiving, holding, or transporting" products and still be exempted from the Act's definition of distributor. Dkt. 27 at 11. The alternative would lead to absurd results and nullify the exception for something as simple as inspecting a package for damage while en route to the destination. *See id.* Further, even if an activity is not "ancillary," it must amount to *distribution* in order to fall outside the scope of the exception.

As explained in Amazon's Appeal Brief, this second requirement follows from the text and structure of the Act and is necessary to give effect to Congress's amendment of the statute in 2008. 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 court in *Thrasher-Lyon v. CCS Commercial, LLC*, No. 11-c-4473, 2012 WL 3835089 (N.D. Ill. Sept. 4, 2012), applied this principle in interpreting another statute to

conclude that "[b]ecause the prohibition applies only to" certain conduct, "the exception is similarly limited," *id.* at *2. Complaint Counsel's response—that this case did not involve the CPSA, Dkt. 129 at 32 n.15—merely states the obvious without articulating any reason why the same rule of construction should not be applied here.

Indeed, as Complaint Counsel discusses in its own brief, CPSC staff articulated this interpretation in a 2013 proposed rule, noting that "a carrier who *also* serves as an importer of record" is subject to the Act, notwithstanding the Act's exclusion of carriers, freight forwarders, and logistics providers. 78 Fed. Reg. 28,080, 28,083 (May 13, 2013) (emphasis added); *see also* 15 U.S.C. § 2052(b). Stated differently, when an entity otherwise exempt *engages in additional activities that are regulated under the CPSA*, the safe harbor is no longer available.

The remaining activities discussed by Complaint Counsel and Presiding Officer Grimes are either ancillary or do not themselves amount to distribution. Complaint Counsel primarily focuses on the fact that Amazon operates Amazon.com, on which buyers and sellers are connected. Dkt. 129 at 28–29. But multiple courts have held, with respect to Amazon specifically, that this *does not* render Amazon a distributor or seller under product liability law.[5] These cases are fully consistent with historic precedent about other marketplace facilitators: Courts have consistently held that auction houses, which

[5] *See, e.g.*, *State Farm Fire & Cas. Co. v. Amazon.com, Inc.*, 835 F. App'x 213, 216 (9th Cir. 2020) ("While Amazon provides a website for third-party sellers and facilitates sales for those sellers, it is not a 'seller' under Arizona's strict liability law for the third-party hoverboard sales at issue here."); *State Farm Fire & Cas. Co. v. Amazon.com, Inc.*, 528 F. Supp. 3d 686, 695 (W.D. Ky. 2021) (noting Amazon's "unique relationship with sellers and buyers" through its website, and holding "[r]egardless of which approach Kentucky courts would use" Amazon was not subject to products liability, including because "Amazon never held title").

similarly connect buyers and sellers and can take physical possession of the product, are not sellers or distributors.[6]

Complaint Counsel also suggests that a logistics provider may not accept returns of products that it has shipped. Dkt. 129 at 30. But this claim does not withstand scrutiny: nothing in the definition of "third-party logistics provider" indicates the direction in which products must flow. Indeed, processing product returns is a quintessential logistics activity, so much so that CPSC itself refers to this practice as "reverse logistics."[7]

As explained in its Appeal Brief, the remaining actions Amazon takes, such as providing "round-the-clock customer service" and processing payments for transactions completed by others, Dkt. 127 at 28–29, are either ancillary to receiving or transporting goods or do not amount to distribution. Complaint Counsel's only rebuttal is its absolutist interpretation that *any* activity besides holding, receiving, and transporting products enables CPSC jurisdiction. For the reasons given above, Complaint Counsel's interpretation is incorrect.

3. Amazon Qualifies As a Third-Party Logistics Provider Under the Proper Interpretation of the Statute.

Complaint Counsel does not dispute that Amazon "receives, holds, [and] otherwise transports . . . consumer product[s] in the ordinary course of business" and "does not take

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[6] *See Pelnar v. Rosen Sys., Inc.*, 964 F. Supp. 1277, 1283 (E.D. Wis. 1997) (defendant who appraised and auctioned machinery for seller not strictly liable); *Musser v. Vilsmeier Auction, Inc.*, 562 A.2d 279, 283 (Pa. 1989) ("An auctioneer is . . . an *ad hoc* salesman of the goods of another . . . . He bears no relationship to the manufacturer or the goods, beyond their immediate sale."); *Tauber-Arons Auctioneers Co. v. Super. Ct.*, 101 Cal. App. 3d 268, 277 (Cal. Ct. App. 1980) (Strict liability did not apply to an auction provider because its connection to the product was its "random and accidental role in transferring the planer from one consumer to another." (citation and internal quotation marks omitted)).

[7] *See Recall Checklist*, CPSC, https://www.cpsc.gov/Business--Manufacturing/Recall-Guidance/Recall-Checklist (last visited Oct. 13, 2023).

title" to such products. 15 U.S.C. § 2052(a)(16). Rather, it argues that Amazon does not "solely" provide those services and only those services, *i.e.*, the services Amazon provides amount to further "distribution in commerce," which the CPSA defines as, *inter alia*, "hold[ing] for sale" after introduction into commerce and "hold[ing] . . . for distribution" after introduction into commerce. *Id.* § 2052(a)(7). Amazon, however, does neither.

a) Amazon Does Not Hold Products "For" Sale.

It is undisputed that Amazon did not "sell" the Subject Products. By extension, then, Amazon did not hold them "for sale," either. As multiple courts have held, "for" indicates the "object, aim, or purpose of an action or activity," *Jackson v. Vtech Telecomms. Ltd.*, No. 01-C-8001, 2003 WL 25815373, at *6 (N.D. Ill. Oct. 23, 2003) (citation omitted); *see also Applera Corp. v. MJ Rsch. Inc.*, 292 F. Supp. 2d 348, 363 (D. Conn. 2003) (defining "for" as "with the aim or purpose of"). Because Amazon never intended to sell the Subject Products (that was always for the third-party sellers to do), it never held them "for" sale. Rather, it held them "for" potential shipment, as contemplated by the third-party logistics provider exception.

Complaint Counsel opposes this ordinary meaning of "for," but fails to offer an alternate interpretation of the term. Complaint Counsel instead asserts—without textual basis—that an entity can hold a product "for sale" when the sale will be made by someone else. The D.C. Circuit rejected a similar argument in *Loan Syndications & Trading Ass'n v. SEC*, 882 F.3d 220 (D.C. Cir. 2018). There, the SEC advanced an interpretation of a statute under which a "third-party can be said to 'transfer' something if it is somehow the *cause* of a transfer between two other parties." *Id.* at 224. The court rejected this interpretation, holding instead that the regulated entity itself had to "transfer" the object

(a securitized loan), and that the agency overstepped its authority in concluding otherwise. *Id.* So too here.

b) Amazon Does Not Hold Products for Distribution.

As established above, Amazon's FBA services are, at most, ancillary to its status as a third-party logistics provider. At the same time, those services do not constitute distribution under the CPSA. Complaint Counsel concedes the "settled principle" that the CPSA must be interpreted against the background of common law product liability concepts, as both courts, and the Commission itself, have repeatedly done. *See Sekhar v. United States*, 570 U.S. 729, 732 (2013); Dkt. 129 at 26–27. 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. 1988).

That common law understanding, now and at the time the CPSA was passed[8] is that "a distributor must, at some point, own the defective product." *Eberhart*, 325 F. Supp. 3d at 398. The best evidence of this consensus is the Third Restatement of Torts, where "every example of a 'seller or distributor' . . . is an entity that owns the product." *Id.* The Restatement is by far the most comprehensive review of state products liability case law, reflecting years of careful research, and as a result is the most reliable source for summarizing the common law view.[9] Unsurprisingly, numerous decisions have followed

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

[9] *See* Restatement (Third) of Torts: Prod. Liab. Intro. (Am. L. Inst. 1998) (noting that the Restatement's drafters considered "thousands of judicial decisions that had fine-tuned

the Restatement position and held that Amazon is not a distributor because it does not take title. *See Phila. Indem. Ins. Co. v. Amazon.com, Inc.*, 425 F. Supp. 3d 158, 164 (E.D.N.Y. 2019) ("[f]inding the reasoning in *Eberhart* persuasive," including the conclusion that "failure to take title to the product at issue placed it outside the chain of distribution"); *see also Erie Ins. Co. v. Amazon.com, Inc.*, 925 F.3d 135, 144 (4th Cir. 2019) (holding that Amazon was not liable for certain FBA products because it was not a seller "who transfers ownership of property for a price"); *Milo & Gabby LLC v. Amazon.com, Inc.*, 693 F. App'x 879, 890 (Fed. Cir. 2017) (holding that Amazon is not a seller of third-party products because "the third-party sellers retain title to the [products] at all times"); *Allstate N.J. Ins. Co. v. Amazon.com, Inc.*, No. 17-2738, 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) ("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.").

Complaint Counsel's purportedly contrary authority is insufficient to overcome the "emerging consensus against construing Amazon as a 'seller' or 'distributor.'" *Eberhart*, 325 F. Supp. 3d at 400. For example, it cites to decisions from California intermediate appellate courts, one of which concedes that California is "inconsistent" in applying the Restatement, *Bolger v. Amazon.com, LLC*, 53 Cal. App. 5th 431, 455 n.6 (Cal. Ct. App.

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the law of products liability"); *see also* Victor E. Schwartz, *The Restatement, Third, Torts: Products Liability: A Model of Fairness and Balance*, 10 KAN. J.L. & PUB. POL'Y 41, 41 (2000) (describing the Restatement as "a model of fairness and balance . . . based on case law written by America's judges").

2020), and is therefore a minority jurisdiction. Another outlier case was decided on policy grounds because the manufacturer was not "amenable to suit in th[e] state"—a fact that Complaint Counsel has not proven with record evidence in this proceeding. *State Farm Fire & Cas. Co. v. Amazon.com, Inc.*, 390 F. Supp. 3d 964, 973 (W.D. Wis. 2019). The decision noted that "the manufacturer is the preferred target." *Id.* at 970.

Finally, in an attempt to undercut *Eberhart*, which interpreted New York law, Complaint Counsel cites a single New York State trial court that came to a different conclusion (before the case was settled). *State Farm Fire & Cas. Co. v. Amazon.com Servs., Inc.*, 137 N.Y.S.3d 697 (N.Y. Sup. Ct. 2020). But that cannot tip the scales, even within New York. After that decision was issued, another New York appellate court cited *Eberhart* approvingly in a case against Amazon. *See Wallace v. Tri-State Assembly, LLC*, 201 A.D.3d 65, 68 (N.Y. App. Div. 2021). The result in *Wallace* is consistent not only with the multiple New York appellate decisions cited in *Eberhart*, but also the fact that the New York Court of Appeals relies on the Restatement. *See Eberhart v. Amazon.com, Inc.*, 325 F. Supp. 3d 393, 398 & n.4 (S.D.N.Y. 2018).

c) Complaint Counsel's Remaining Textual Arguments Are Not Persuasive.

Complaint Counsel notes that the exception for third-party logistics providers states that such a provider shall not be deemed a distributor "solely by reason of receiving or transporting a consumer product," without any reference to "holding" such a product. Dkt. 129 at 34; 15 U.S.C. § 2052(b). Complaint Counsel thus suggests Amazon cannot qualify because it "holds" products. Dkt. 129 at 34. This reading should be rejected because no entity would satisfy it: Complaint Counsel is arguing that logistics companies can only receive and instantaneously ship products without keeping them in storage for

any period of time, which does not reflect business (or actual) reality. *See Greenwich Fin. Servs. Distressed Mortg. Fund 3 LLC v. Countrywide Fin. Corp.*, 603 F.3d 23, 32 (2d Cir. 2010) (rejecting interpretation of an exception containing the phrase "solely involves" that would result in the exception becoming "essentially meaningless").

Complaint Counsel also asserts that distributor is defined as "a person to whom a consumer product is *delivered* or sold," 15 U.S.C. § 2052(a)(8) (emphasis added), and that the latter involves taking title, so the former necessarily does not. Dkt. 129 at 16. Given the well-established common law understanding of the term "distributor," however, the CPSA's reference to delivery is naturally read to encompass distributors who receive title to a product without purchasing it. Such a reading avoids a potential loophole in the regulatory scheme where corporations could avoid distributor status by providing products to their subsidiaries or shell corporations without remuneration.[10]

Finally, Complaint Counsel suggests that the definition of "consumer product" disproves Amazon's interpretation because a good can qualify as a consumer product if it is "distributed" not only for "sale," but also for "use" by consumers. *See* Dkt. 129 at 18 n.8; 15 U.S.C. § 2052(a)(5). But it does not follow that just because a *consumer* need not take title for the item to qualify as a "consumer product," that a *distributor* need not take title to qualify as a "distributor." There are good reasons why Congress might choose to define the *type of product* subject to Commission jurisdiction more broadly than the *type of entity* subject to responsibility for those products under the Act. As further evidence that the definition of "consumer product" does not elucidate the responsibilities of a

[10] *See Eberhart*, 325 F. Supp. 3d at 398 (discussing the common law understanding that "the failure to take title to a product places that entity on the outside" of the distribution chain).

"distributor," the former uses the term "distributed" (which is not defined in the CPSA), while the latter speaks to products "distribute[d] in commerce," (which is a term given special meaning). 15 U.S.C. § 2052(a)(5), (a)(7). Had Congress intended the definition of "consumer product" to assist in classifying distributor entities, it would have used the same phrase, "distribute in commerce," in both definitions.[11]

In sum, Complaint Counsel's artificial and extreme interpretations of the CPSA would lead to absurd and illogical results inconsistent with Congressional intent. The plainest possible reading of the CPSA, properly viewed against the common law backdrop, is that Amazon is a third-party logistics provider, not a distributor.

B. The Commission Cannot Order Duplicative Refunds Conditioned on Return or Destruction.

1. The Commission Must Take Amazon's Prior Refunds into Account for Purposes of This Adjudication.

Complaint Counsel attacks a straw man in arguing that Amazon's proactive refunds were not issued pursuant to a Section 15 adjudicatory order—Amazon has never disputed that position. Of course refunds issued by Amazon *before* the Commission initiated this action were not issued pursuant to any such order. The problem lies with the conclusion Complaint Counsel seeks to draw from that fact: that the Commission may proceed as if Amazon's refunds *never occurred at all*. Complaint Counsel fails to cite any authority for such an extreme proposition. Instead, the Commission must consider the fact that Amazon has already issued refunds when evaluating whether a "refund" remedy

[11] *See, e.g.*, *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."); *see also United States v. Jones*, 60 F.4th 230, 234 (4th Cir. 2023) (explaining that the presumption of consistent usage provides that "a material variation in terms suggests a variation in meaning").

is authorized by the statute here, *see* 15 U.S.C. § 2064(d), especially when those refunds would issue multiple years after the original refunds.

Complaint Counsel's reliance on provisions governing voluntary actions is a red herring. *See* Dkt. 129 at 40. That the Commission must approve voluntary corrective action plans, 16 C.F.R. § 1150.20, has no bearing on the factors the Commission must consider—including past actions by the recalling firm—when ordering mandatory remedial action pursuant to Section 15 of the CPSA. Regardless, Complaint Counsel's underlying premise is wrong—even when approving voluntary consent order agreements, the Commission must expressly state that it is acting pursuant to Section 15 of the CPSA, *id.* § 1115.20(b)(iv), which, in turn, limits the Commission's authority to order remedies only to the extent necessary for the public interest, 15 U.S.C. § 2064(d).[12] Similarly unavailing are provisions allowing follow-up remedial action by the Commission upon learning "new facts" or if the original "corrective action plan does not sufficiently protect the public." 16 C.F.R. § 1115.20(a); *see also* 15 U.S.C. § 2064(d)(3)(B) (similar). Such provisions only confirm that the Commission must consider all pertinent context when evaluating the public interest.[13] Accordingly, the various provisions cited by Complaint

[12] Nor does *In re Mattel, Inc.*, 588 F. Supp. 2d 1111 (C.D. Cal. 2008), contradict this point. That decision simply notes—in the context of discussing whether a voluntary recall preempts common-law claims by consumers—that a voluntary recall does not bar the Commission "from seeking greater remedies at a later date." *Id.* at 1115. It does *not* hold that voluntary action by a firm is entirely irrelevant or can be ignored in determining whether the Commission may order further relief. *Cf. id.*

[13] Complaint Counsel's attempt to excise cost-benefit considerations from the CPSA is nonsensical and cannot be justified by cherry-picking language from the legislative history of the CPSA. *See* Dkt. 94 at 4–7. In the legislative process leading up to the 1990 amendment, for example, the Commission made clear that "i[n] considering action under Section 15 of the CPSA, it is appropriate to take into account potential economic consequences of the action being considered" but simply eschewed a need for "formal cost-benefit" analyses. *Consumer Product Safety Commission: Hearing Before the Subcomm. on the Consumer of the S. Comm. on Com., Sci., and Transp.*, 101st Cong., 1st

Counsel make clear that the Commission *must* consider past actions by a firm when evaluating whether follow-on action is required for the public interest.

2. Congress Has Not Authorized the Commission To Withhold Refunds from Consumers.

Complaint Counsel offers no counter to the self-evident precept that repeat refunds for the same products would be fundamentally improper, arbitrary, and unfair. That should be the end of the matter: consumers have already been fully refunded, and there is no basis in the statute to authorize duplicative refunds that would exceed the full purchase price of the product twice over. Instead, Complaint Counsel relies entirely on the assertion that Amazon's refunds were not *true* refunds because Amazon did not withhold payment from customers who did not return the products or failed to otherwise prove that they had destroyed the products. But no such requirement is incorporated into the term "refund" in the CPSA.

The plain meaning of Section 15(d)'s remedy provisions squarely forecloses Complaint Counsel's assertion that the term "refund" somehow incorporates the wholly-distinct concept of mandatory tender. Notably, as Complaint Counsel does not contest, the ordinary definition of "refund" simply means to "reimburse or repay (a person)." *Refund*, Oxford English Dictionary (3d ed. 2009). Complaint Counsel offered no contrary definition of "refund" in its brief. And the Commission must interpret the statutory text in accordance with its ordinary meaning. *See, e.g.*, *Sandifer v. U.S. Steel Corp.*, 571 U.S.

Sess. at 54 (May 13, 1989); *see also* Dkt. 95, Amazon Ex. 124, *CPSC Authorization: Hearing Before the Subcomm. on the Consumer of the S. Comm. on Com., Sci., and Transp.*, 100th Cong., 1st Sess. at 43 (May 13, 1987) (CPSC Chairman Scanlon testimony that, "[b]y quantifying advantages and disadvantages, cost-benefit can help both the Commission and the manufacturer evaluate the various options and reach mutually satisfactory decisions").

220, 227 (2014) ("[U]nless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." (citation omitted)).

Furthermore, Congress chose to distinguish between the "recall" of a product and the issuance of a "refund" when enumerating specific remedies available for adjudications. Again, Complaint Counsel offers no contrary ordinary meaning of the term "recall," which means to "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).

The structure of the CPSA further confirms that Congress employed an ordinary understanding of "refund" when enumerating the remedies available to the Commission. On this key point, too, Complaint Counsel offers no response. Section 12 of the CPSA includes the term "recall" in a disjunctive list of possible actions to be ordered by a court for products posing an "imminent and unreasonable risk of death": "[s]uch relief may include a mandatory order requiring the notification of such risk to purchasers of such product known to the defendant, public notice, the recall, the repair or the replacement of, or refund for, such product." 15 U.S.C. § 2061(a)–(b)(1). In such instances where Congress utilizes a series of terms in a disjunctive list—denoted here by use of the word "or"—the terms must "be given separate meanings, unless the context dictates otherwise." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). Accordingly, as used by Congress in identifying specific remedies available under the CPSA, the term "recall" necessarily carries a separate meaning from "repair," "replacement," or "refund." 15 U.S.C. § 2061(b)(1). Complaint Counsel's contrary assertion that Congress intended for "recall" to mean each of those three terms (repair, replacement, and refund) simultaneously in the

remedy context, would render the term "recall" in Section 12 completely superfluous. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (noting the "cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant" (citation and internal quotation marks omitted)).

Complaint Counsel cites inapposite CPSA provisions containing the term "recall," but none of those provisions are tasked with enumerating the discrete set of remedial actions available to the Commission. Indeed, courts consistently give the most weight to interpretations premised on the comparison of provisions which are essentially identical aside from the absence (or use) of the term at issue. *See, e.g.*, *Russello*, 464 U.S. at 23 ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (citation omitted)). That is exactly the case for CPSA Sections 12 and 15, which supply near-identical lists of remedial actions available to the Commission, except that Congress elected to include "recall" as a remedy for products posing imminent risk of death, but declined to enumerate that remedy for products posing the lesser "substantial product hazard."

Alternatively, Complaint Counsel relies on an inapposite provision requiring the Commission to "specify in the order the persons to whom refunds must be made." Dkt. 129 at 43 (quoting 15 U.S.C. § 2064(d)(2)). Inclusion of this instruction by Congress makes sense, but not as a backdoor for the Commission to impose mandatory tender. Varying types of products, for example, could have differing likelihoods of resale. And in situations where the likelihood is high that a particular product was widely resold by original purchasers, the Commission may need to specify in that instance whether

circumstances warrant inclusion of those individuals in the refund pool. Thus, the Commission "is intended to have authority to specify whether present owners or only first purchasers are entitled to a refund." Dkt. 90, Amazon Ex. 114, H. Interstate & Foreign Com. Comm., H. Rep. No. 92-1153 at 43 (June 20, 1972). Nothing in the CPSA indicates that Congress intended for this provision to expand the Commission's remedial authority.

3. The Interpretive Method Applied in *Relco* Has Been Overruled by Intervening Precedent.

Complaint Counsel inappropriately relies on the Commission's decision in *Relco* while ignoring a core basis for that decision. There, the Commission analyzed the plain text of the CPSA and reached the same conclusion as Amazon here: the actual text of the statute does not provide for mandatory tender. *Relco, Inc.*, CPSC Dkt. No. 74-4, Decision and Order at 4 (C.P.S.C. Oct. 27, 1976). Complaint Counsel cannot treat *Relco* as binding authority without also treating the Commission's starting point as equally binding, *i.e.*, the CPSA's text does not provide for mandatory tender.

The problem with *Relco*—decided in 1976—is one of shifting statutory interpretation standards. Whereas courts and agencies of that era (including the Commission in *Relco*) would often acknowledge the absence of requisite express statutory language but nonetheless read such language into the statute based on legislative history alone, such methods have since been rejected as improper.[14] The *Relco* decision thus suffers a fatal flaw: it readily acknowledged that the CPSA's text does not provide for mandatory tender, but proceeded to read such authority into the statute based solely on

[14] *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.").

its interpretation of the legislative history. That approach is especially problematic in the context of agency authority, where courts are even more reluctant to recognize authority absent express grants by Congress in the statutory text.[15] On this basis alone, *Relco* cannot bear the weight Complaint Counsel seeks to place on the decision.

Moreover, Complaint Counsel continues to mischaracterize the CPSA's legislative history. According to Complaint Counsel, a House Committee report imparts statutory authority for mandatory tender "premised on concerns about exposing consumers to hazard[.]" Dkt. 129 at 45. But the actual language in the report says no such thing. The House report makes clear that the concern the Committee had (consumers demonstrating "proof of claim" to be entitled to "recover the purchase price") could be relieved by two alternative mechanisms: via tender *or* via "sales slip or some other proof of purchase or ownership." *See* Dkt. 90, Amazon Ex. 114, H. Interstate & Foreign Com. Comm., H. Rep. No. 92-1153 at 43 (Jun. 20, 1972). Given that the House Committee's purported concern could be alleviated by something other than tender—*e.g.*, proof of purchase—Complaint Counsel's characterization is demonstrably wrong. If forced removal of products from consumers was the goal, then mere proof of purchase would be insufficient. Yet the report makes clear that proof of purchase would sufficiently address the underlying concern. Accordingly, only Amazon's reading accounts for both mechanisms, *i.e.*, Congress was concerned about refunds being issued *only* to persons who could prove that they

[15] "Agencies have only those powers given to them by Congress, and enabling legislation is generally not an open book to which the agency may add pages and change the plot line." *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (cleaned up). "Were courts to presume a delegation of power absent an express withholding of such power, agencies would enjoy virtually limitless hegemony[.]" *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995). Complaint Counsel does not challenge this bedrock principle.

purchased or possessed a product, either via tender or proof of purchase.[16] The legislative history, even on its own terms, does not support reading a tender requirement into the CPSA.

4. Mandatory Tender Is Not in the Public Interest.

Complaint Counsel was required to present a preponderance of evidence in its brief establishing that mandatory tender in these particular circumstances is in the public interest. Remarkably, Complaint Counsel's brief fails to cite even a single piece of record evidence to substantiate the multiple factual assumptions on which its request for mandatory tender rests. Instead, Complaint Counsel simply rests on *ipse dixit* assertions, or staff documents premised on such assertions, without any underlying factual support. There is no basis for the Commission to hold that mandatory tender is in the public interest in the face of extensive record evidence presented by Amazon showing that it is not, and it would otherwise amount to a punitive refund requirement exceeding the full purchase price if imposed here.

The central pillar of Complaint Counsel's argument is that agency practice—as purportedly reflected in staff documents such as the Recall Handbook and CAP Template—*per se* establishes that an action is in the public interest. Based on this assumption, Complaint Counsel ignores its burden to show that the practices purportedly reflected in staff documents are based on actual evidence as opposed to vague and nebulous references to agency "experience."

[16] For this reason, Complaint Counsel's reliance on *Zen Magnets* is misplaced. *See* Dkt. 129 at 41–42, 54. 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. *Zen Magnets, LLC*, CPSC Dkt. No. 12-2, Opinion and Order at 9 (C.P.S.C. Dec. 8, 2017).

Complaint Counsel asserts that mandatory tender "does not *in any way* create a disincentive for the consumer to dispose of the product on their own," Dkt. 129 at 55 n.32 (emphasis added), because "consumers can execute [mandatory tender] with minimal effort," *id.* at 52. These bare assertions have no substantiating record or evidentiary citations whatsoever. *See id.*[17] Nor can they stand against [redacted] Dkt. 76, Amazon Ex. 65, CPSC_AM0014049 at 14091.[18]

Moreover, Complaint Counsel's assertions do not align with the agency's actual thinking about recall effectiveness. Just last year, the Executive Director stated that in instances where "the consumer really no longer needs the product, and so they don't avail themselves of the [replacement] remedy, but they have received the information, maybe they just dispose of the product. That is, in many ways, an effective recall, right? The hazard is being removed from the stream of commerce."[19] Amazon agrees, and the record confirms that recalls are effective when consumers dispose of products themselves.

Complaint Counsel argues that the Commission can base its factual findings on vague notions of agency "experience" alone, but that is wrong. *See, e.g.*, *Am. Petroleum*

[17] Complaint Counsel's brief insinuates that such material exists in citing to a page from its briefing to the Presiding Officer. *See* Dkt. 129 at 55 n.32 (citing Dkt. 86 at 48). But that page from Complaint Counsel's prior briefing, in turn, fails to cite to a single piece of record evidence for the assertion that mandatory tender has no impact on the likelihood of a consumer disposing of the product. *See* Dkt. 86 at 48.

[18] Complaint Counsel may (unpersuasively) attempt to argue that Compliance Office staff are free to ignore this Directive (they are not), but it cannot dispute the results of this study, which are unambiguously stated in the Directive.

[19] Society of Product Safety Professionals, *The CPSC Speaks – Chairman Hoehn-Saric and his Executive Team Discuss the Future of the CPSC* at 35:25 (YouTube Oct. 21, 2022), *available at* https://www.youtube.com/watch?v=iInoUCP3iaY.

Inst. v. EPA, 661 F.2d 340, 349 (5th Cir. 1981) ("[S]omething more than trust and faith in [the agency's] experience" is required. (citation omitted)). To the extent Complaint Counsel attempts to couch its assertions as common sense, that too is insufficient (and incorrect). *See, e.g.*, *In re Sang-Su Lee*, 277 F.3d 1338, 1344 (Fed. Cir. 2002) ("'[C]ommon knowledge and common sense' . . . are not the specialized knowledge and expertise contemplated by the Administrative Procedure Act." (citation omitted)). Complaint Counsel's excuse for failing to compile actual "empirical data or evidence" is that such information "is not always available," but if this excuse were sufficient, then any time an agency could not meet its evidentiary burden, the burden would simply disappear. Dkt. 129 at 51. That cannot be. Moreover, Complaint Counsel makes no attempt to explain how such information was not available here. The agency certainly could have conducted empirical testing or studies—[redacted]. *See* Dkt. 76, Amazon Ex. 65, CPSC_AM0014049 at 14091. The failure to do so is therefore dispositive here given that agencies are not entitled to merely assume factual propositions. *See PREVOR v. FDA*, 895 F. Supp. 2d 90, 98 (D.D.C. 2012) (holding "agency's *ipse dixit* cannot substitute for . . . 'qualitative analysis' or 'scientific information'").[20] Supporting empirical data or evidence for Complaint Counsel's factual assertions simply does not exist in the developed record.

Complaint Counsel's reliance on unsubstantiated assertions cannot support a Commission finding—on this record—that the public interest requires mandatory tender.

[20] Just weeks ago, the D.C. Circuit found in the rulemaking context that agency consideration of a deadline was arbitrary where the agency failed to "explain why" contrary feedback to the deadline was incorrect. *See Window Covering Mfrs. Ass'n v. CPSC*, — F.4th —, No. 22-1300, Slip Op. at 26 (D.C. Cir. Sept. 12, 2023). Complaint Counsel's failure to provide evidence-based explanation here is similarly arbitrary.

5. In These Circumstances, Duplicative Refunds Would Violate the Takings Clause.

Complaint Counsel's assertion that the CPSA requires repeat refunds in these circumstances would result in an unconstitutional taking. Complaint Counsel attempts to sidestep the takings analysis in advocating for a categorical rule that "regulatory actions requiring the payment of money are not takings." Dkt. 129 at 58 (citation omitted). But this is a mischaracterization of the case law—no such *per se* rule exists, and, contrary to Complaint Counsel's argument, monetary sanctions can constitute takings under the Fifth Amendment. The Commission should therefore reject Complaint Counsel's request for repeat refunds. *See Clark v. Martinez*, 543 U.S. 371, 381–82 (2005) (when presented with two "competing plausible interpretations," the Commission must favor the interpretation that does not carry "serious constitutional doubts").

First, none of the cases cited by Complaint Counsel involved repeat payments to the same recipient of the kind at issue here. *Second*, Complaint Counsel argues that, pursuant to *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) (plurality opinion), regulatory payments of money must relate to real property or a specific financial account. This is incorrect—the Supreme Court has clarified since *Eastern Enterprises* that property interests related to "personal property" are likewise protected by the Takings Clause. *See Horne v. Dep't of Agric.*, 576 U.S. 350, 358 (2015). And this adjudication centers on interests in personal property, *i.e.*, the Subject Products. *See Valancourt Books, LLC v. Garland*, No. 21-5203, 2023 WL 5536195, at *9 (D.C. Cir. Aug. 29, 2023) ("When the government commands the relinquishment of funds linked to a specific, identifiable property interest such as a piece of personal property, the *per se* takings approach [applies]." (cleaned up)).

Second, even the case law cited by Complaint Counsel shows that regulatory payments of money can indeed give rise to a taking based on "1) the severe financial penalty the act imposed; 2) the disproportionate nature of the benefit to be conferred compared with the burden to be applied; and 3) the retroactive nature of the imposition." *McCarthy v. City of Clev.*, 626 F.3d 280, 285 (6th Cir. 2010) (citing *Eastern Enters.*, 524 U.S. at 529–37 (plurality opinion)). As to the first factor, the *Eastern Enterprises* plurality made clear that sums into the tens of millions of dollars are sufficiently "severe" to threaten a taking. *See* 524 U.S. at 529 (plurality opinion). Here, Amazon has already refunded over $20 million—repeating these refunds would be severe. As to the second factor, the record shows that, in these circumstances—where Complaint Counsel has failed to provide any evidence of the amount by which mandatory tender would increase recall effectiveness—the burden outweighs the purely hypothetical benefit to be conferred. As to the third factor, Amazon executed these refunds over two years ago.

Third, Complaint Counsel is similarly wrong to insinuate that retail commerce in the United States is a "regulated industry" in the vein of other specialized markets such as securities or healthcare. *See* Dkt. 129 at 60. Complaint Counsel cites no case law for such a sweeping proposition, and Supreme Court precedent is to the contrary. *See Horne*, 576 U.S. at 365–66. Accordingly, the risk that Complaint Counsel's request for repeat refunds in these circumstances would constitute a taking remains "serious," and thus tips the scales in favor of Amazon's interpretation of the CPSA under which mandatory tender is not required here.

C. Complaint Counsel's Attempt To Extend the Final Decision Beyond the Subject Products Has No Basis in Law or Fact.

Complaint Counsel appears to concede that the Final Decision should extend only to the Subject Products. Dkt. 129 at 61 ("It is the Subject Products—identified by ASIN in the Complaint and further clarified by Amazon during discovery—that are subject to remedial order.").[21] To the extent that is Complaint Counsel's actual position, there is no dispute. Amazon agrees.

Complaint Counsel's articulation of which products the Final Decision should encompass, however, has morphed and contorted multiple times over the course of this adjudication. Earlier in the adjudication, Complaint Counsel requested that the Initial Decision also extend to a *separate* category of products that it referred to as "functionally equivalent" or "functionally identical" products. Dkt 1. Complaint Counsel struggled to define or restrict those terms, and so the Presiding Officer rightfully rejected Complaint Counsel's attempt to use the Initial Decision to expand the order to an entire class of products, *i.e.*, the Subject Products *and* all functionally equivalent products.[22] Dkt. 119.

Even over the course of its current brief, Complaint Counsel's request appears to change. As discussed above, Complaint Counsel first limits the scope of its request to the Subject Products. Dkt. 129 at 61. But the final paragraph in that section proposes that

[21] The Complaint defines the "Subject Products" as "the children's sleepwear garments, carbon monoxide detectors, and hair dryers . . . identified in Section V." Dkt. 1 ¶ 47. Section V of the Complaint, in turn, lists specific products, each with their own Amazon Standard Identification Number ("ASIN"). *See id.* ¶¶ 20–46. Complaint Counsel alleged that each and every one of those products were individually tested or evaluated by agency staff and found to violate a safety standard or otherwise pose a hazard. *See id.*

[22] In rejecting Complaint Counsel's request, the Presiding Officer appears to have misinterpreted a portion of the record related to ASINs of certain children's sleepwear garments, and Amazon explained the basis for that error in its Appeal Brief. *See* Dkt. 127 at 60–62.

"Amazon should be ordered not to distribute products that are *the same as* the Subject Products." Dkt. 129 at 62 (emphasis added). Thus, Complaint Counsel's new argument raised for the first time on appeal is that "Subject Products" means not just the products listed in the Complaint, but rather an entire class of products that have "cosmetic" differences from one another. This is because, according to Complaint Counsel, when Congress empowered the Commission to order action related to a "product," Congress must have intended the term "product" to apply to entire classes of items. *Id.* at 61.

Complaint Counsel's newest version of the argument fails for two reasons. *First*, Complaint Counsel's drastic reading of the term "products" finds no support in the actual text or structure of the CPSA as established in Amazon's Answering Brief. Dkt. 128 at 5–8. *Second*, Complaint Counsel's argument rests on an incorrect *per se* assumption that products with cosmetic differences are nevertheless the "same." Dkt. 129 at 61. Indeed, Complaint Counsel fails to refute the clear record evidence showing that cosmetic variations can have material impact on hazard. Dkt. 128 at 10–12.[23] And if two products can have different hazard levels based on cosmetic differences, those products, by definition, cannot be classified as the "same" products under Section 15. Thus, Complaint Counsel's rhetorical makeover cannot save its argument already rejected by the Presiding Officer.[24]

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[23] Nor do the two cases cited by Complaint Counsel support such an assumption here, as established in Amazon's Answering Brief. *See* Dkt. 128 at 12 (discussing *JCW Invs., Inc. v. Novelty, Inc.*, 482 F.3d 910, 916 (7th Cir. 2007); *Beaty v. Ford Motor Co.*, 854 F. App'x 845, 848–49 (9th Cir. 2021)).

[24] Staking its entire position on its extreme reading of "products" in the CPSA, Complaint Counsel makes no attempt to refute Amazon's arguments concerning the Presiding Officer's mistaken interpretation of the record material explaining Amazon's process for removing children's sleepwear garments from Amazon.com. *See* Dkt. 127 at 53; Dkt. 129 at 60–62.

D. The Additional Direct Notices and Social Media Posts That Complaint Counsel Seeks Are Not Required To Adequately Protect the Public.

Over two years ago, Amazon voluntarily and directly notified every Subject Product purchaser of the potential hazards, provided instructions for purchasers to dispose of products in their possession, and confirmed that a full refund had been applied to purchasers' Amazon accounts.[25] Amazon also inserted a hyperlink banner to customers' "Your Orders" pages, notifying them of a new entry to their individualized "Your Recalls and Product Safety Alerts" pages, which contained the same hazard and remedy information previously sent by email. Dkt. 103 at 2–3. In the face of record evidence supporting the adequacy of Amazon's prior actions,[26] Complaint Counsel nevertheless continues to insist that Amazon must issue multiple, additional direct notices to the same population of consumers who have already received at least three forms of direct notice regarding the Subject Products. Complaint Counsel also contends that Amazon must publish repetitive posts on its primary social media pages. But Complaint Counsel has failed to show, as the CPSA requires, that any such additional notice is "required in order to adequately protect the public." 15 U.S.C. § 2064(c)(1).

Contrary to Complaint Counsel's claims, the standard set forth by the CPSA is neither "broad" nor "discretionary." Dkt. 129 at 64. Instead, the standard limits the Commission's authority to order direct notice to situations where the Commission "determines" that notice is necessary in order "to adequately protect the public." 15 U.S.C.

[25] *See, e.g.*, Dkt. 76, Amazon Ex. 29; Dkt. 11, CPSC Ex. F.

[26] *See, e.g.*, Dkt. 87 ¶¶ 17–22, 37–39, 50–54, 56, 70–74, 86–87, 100–01; Dkt. 76, Amazon Ex. 30, Rose Dep. 144:4–9; Amazon Ex. 16, Davis Dep. 146:21; Amazon Ex. 40, Williams Dep. 62:15–63:1; Amazon Ex. 62 at 7.

§ 2064(c)(1); *see also Zen Magnets, LLC*, CPSC Dkt. No. 12-2, Final Decision and Order at 50 (C.P.S.C. Oct. 26, 2017) (equating "required" with "necessary" under Section 15(c) of the CPSA). Such a determination, in turn, must be grounded in substantial evidence under the APA. *See* 5 U.S.C. § 556(d) (requiring "reliable, probative, and substantial evidence"); *see also NRDC v. EPA*, 857 F.3d 1030, 1040 (9th Cir. 2017). While Complaint Counsel might believe that it is not obligated to justify the notice requirements it seeks to impose in a Section 15 proceeding, *see* Dkt. 129 at 67, the APA says otherwise. Indeed, the agency "must articulate with reasonable clarity its reasons for decision so that a court may ensure that the public interest finding results from reasoned decision-making." *Comm. To Save WEAM v. FCC*, 808 F.2d 113, 116 (D.C. Cir. 1986) (citation and internal quotation marks omitted).

As Amazon has shown, Complaint Counsel has not met (and cannot meet) its burden. *See* Dkt. 127 at 54–66. It has not shown that additional direct notice or repetitive social media notices are required in order to adequately protect the public. Finally, Complaint Counsel's content-based notice demands violate the First Amendment.

1. Complaint Counsel Has Failed to Establish That Additional Direct Notice Is Necessary.

Complaint Counsel's latest arguments in support of its request to impose additional direct notice requirements on Amazon are deficient for two reasons. *First*, Complaint Counsel's reliance on staff preferences—as captured in non-binding, staff-prepared documents—fall short of the requisite evidence needed to establish that the public will not be adequately protected unless Amazon essentially repeats the entire

notice process two years later with a few wording adjustments.[27] *Second*, Complaint Counsel's decision to forego the identification and submission of factual evidence in support of its requested notice components is based on an incorrect reading of the CPSA and mandatory recall rule.

Complaint Counsel again argues that staff-prepared documents, such as the Recall Handbook and the CAP Template, "demonstrate the judgment of the agency, based on decades of conducting product safety recalls" and, on that basis, "substantiate[] the benefits of multiple rounds of direct notice in properly informing the public." Dkt. 129 at 69. But Complaint Counsel continues to ignore the fundamental flaw in its reliance on these documents: none of the purported guidance included therein is supported by empirical, scientific, or documented evidence. *See id.* at 59–61. Indeed, despite declaring that "[t]he administrative record in this case substantiates" its claims, Complaint Counsel does not provide record evidence to substantiate the factual basis for the purported "experience" relayed in these staff documents. *Id.* at 50–51, 69.

Lacking adequate support for its requested relief, Complaint Counsel attempts to sidestep its evidentiary obligations entirely by presenting arguments that are irrelevant to the core question of whether additional direct notice is necessary. None are persuasive.

Complaint Counsel first suggests that Amazon's prior direct notices should not matter because "Amazon's unilateral email does not constitute statutory notice under Section 15(c)." Dkt. 129 at 64. That is beside the point: the non-"statutory" label that Complaint Counsel assigns to Amazon's prior direct notifications is of little relevance to

[27] Complaint Counsel asserts that Amazon's notices failed to include (1) the word "recall," (2) the number of total units subject to the recall, (3) the dates when the products were sold, (4) contact details for information about the remedy, (5) a photo of the product, and (6) mention of risk of "death" in the hazard description. Dkt. 129 at 31–32.

determining whether *additional* notice is now required. The Commission must consider those prior notices in evaluating whether further notice is required to adequately protect the public.

To be sure, Section 15(i) and the mandatory recall rule identify certain default components for direct notices. Complaint Counsel argues however, that because Amazon did not include each and every component listed in those provisions, additional direct notice is required. Dkt. 129 at 65–69. That is plainly wrong—both Section 15(i) and the mandatory recall rule make clear that the Commission is required to consider whether the particular notice components listed in those provisions are appropriate in these particular circumstances.[28] Complaint Counsel failed to do so, resting instead on the mere presence of those default components in Section 15(i) and the mandatory recall rule. By contrast, Amazon has provided evidence—both factual and expert—showing that the particular components Complaint Counsel focuses on here are not necessary for the protection of the public. Indeed, as Amazon has shown, the Commission itself has approved notices that did not include the components that Complaint Counsel insists are *per se* required in order to adequately protect the public.[29]

[28] *See* 16 U.S.C. § 2064(i)(2) (directing the Commission to consider whether "one or more of the following [notice components] is unnecessary or inappropriate under the circumstances"); 16 C.F.R. § 1115.29(b) (directing the Commission to consider whether "one or more of the recall notice requirements set forth in this subpart in not required, and will not be included, in a recall notice").

[29] *See* Dkt. 74 at 17–18.

2. Complaint Counsel Has Not Shown That Multiple Rounds of Notice on Amazon's Primary Social Media Pages Are Necessary.

Complaint Counsel has failed to proffer substantial evidence that any postings to Amazon's primary social media pages—much less multiple, repetitive rounds of social media posts—are required in order to adequately protect the public. *See* Dkt. 125 at 61–63; Dkt. 129 at 22–25. Nor has Complaint Counsel adequately addressed critical policy considerations implicated by its request to commandeer Amazon's social media accounts. Finally, Amazon's primary social media pages are not the appropriate platform for any social media notices regarding the Subject Products.

Once again, Complaint Counsel attempts to rest on the agency's purported "ordinary practice of requiring multiple rounds of social media notice on a firm's primary social media accounts," Dkt. 129 at 72, without providing any factual basis or underpinning for that purported practice. *See supra* § II(B)(4). Absent sufficient accompanying factual support (which Complaint Counsel has not presented), "so-called expertise" cannot satisfy the APA. *Balt. & Ohio R.R. Co. v. Aberdeen & Rockfish R.R. Co.*, 393 U.S. 87, 92 (1968).

Additionally, Complaint Counsel's failure to address concerns regarding the Commission's usurpation of Amazon's primary social media accounts for product-specific recalls highlights a crucial deficiency in Complaint Counsel's position. Complaint Counsel brushes aside Amazon's interest as a "pure business concern . . . outweighed by the interests of public safety that can be achieved" through the use of Amazon's primary accounts. Dkt. 129 at 72. But the CPSA requires more than conclusory notions of prospective utility. Outside of the FBA program, Amazon provides a wide range of products and services, and its primary social media pages circulate crucial, top-level

information to its customer base regarding *all* of those products and services. Coopting those pages for recall related postings would effectively nullify the overall utility of those pages.

To the extent that Complaint Counsel can show that the public cannot be adequately protected absent some form of social media notice, Amazon's customer support-oriented "Amazon Help" accounts are the appropriate vehicle for such notices. *See* Dkt. 112 at 11. The Amazon Help social media pages, which collectively have over 500,000 followers across several platforms,[30] would enable customers to liaise directly with Amazon's customer service team, who are trained on recall and product safety-related issues, all with the click of a "reply" button. Those pages are thus far better for circulating notifications regarding the Subject Products than Amazon's primary social media pages.

3. Complaint Counsel's Requested Notice Runs Afoul of the First Amendment.

"[T]he power to prohibit or to regulate particular conduct does not necessarily include the power to prohibit or regulate speech about that conduct." *Greater New*

[30] *See* Amazon Help, @AmazonHelp, X (Twitter), https://twitter.com/amazonhelp (listing 494.K followers as of September 27, 2023); Amazon Help, Facebook, https://www.facebook.com/AmazonHelp (listing 20K likes and 31K followers as of September 27, 2023). Complaint Counsel contends that the Amazon Help pages do not receive enough "traffic" to support "broad-based public notice of the hazardous Subject Products." Dkt. 129 at 70–71. In making that argument, Complaint Counsel cites a CPSC news release touting the benefits of the agency's "official presence" on social media. *Id.* 129 at 70 n.38; News Release, CPSC, *'CPSC 2.0' Launches Product Safety Agency into Social Media[]Consumers to Be Informed of Important Safety Issues Faster and More Frequently* (Sept. 22, 2009), https://www.cpsc.gov/Newsroom/News-Releases/2009/CPSC-20-Launches-Product-Safety-Agency-into-Social-MediaConsumers-to-Be-Informed-of-Important-Safety-Issues-Faster-and-More-Frequently. Notably, Amazon Help's pages collectively have nearly three times the number of followers as the agency's social media accounts.

Orleans Broad. Ass'n, Inc. v. United States, 527 U.S. 173, 174 (1999). As Amazon has established, Complaint Counsel's notice-related demands constitute an impermissible compulsion of a private entity's speech, and must therefore be rejected as inconsistent with the First Amendment. Dkt. 127 at 63–66.

Complaint Counsel concedes that the intermediate scrutiny test that the Supreme Court laid out in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), applies to this adjudication.[31] Under *Central Hudson*, Complaint Counsel must show that the notice-related requirements it seeks to impose on Amazon "directly advance[]" the substantial "governmental interest asserted," and that those requirements are not "more extensive than is necessary to serve that interest." *Id.* at 566. In other words, there must be a sufficient "fit" between the agency's "ends and the means chosen to accomplish those ends." *United States v. Edge Broad. Co.*, 509 U.S. 418, 427–28 (1993) (quoting *Posadas de Puerto Rico Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 341 (1986)).

Complaint Counsel has not made the requisite showing here. Even assuming that Complaint Counsel's bare assertion that the Commission has a "substantial interest" in notifying consumers *again* about the hazards posed by the Subject Products holds true, it has failed to show that there is an adequate "fit" between that interest and the extensive speech it seeks to compel from Amazon. Dkt. 129 at 73. Contrary to its claims, Complaint Counsel is not absolved of its obligation to "show how the Section 15 notice requirements,

[31] Attempts to compel non-commercial speech are actually subject to strict scrutiny under the First Amendment. *See* Dkt. 127 at 64 n.56 (citing *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 even meet *Central Hudson*'s intermediate scrutiny requirements. *See Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 524 (D.C. Cir. 2015).

as applied to Amazon in this individual case, will 'directly advance' the Commission's interest." *Id.* at 74.

Relying on the Supreme Court's decision in *Edge Broadcasting*, Complaint Counsel suggests that it need not show that the specific notice-related demands it seeks to impose on Amazon will advance governmental interests because the analysis "require[s] consideration of the 'regulation's general application to others.'" *Id.* at 75 (quoting *Edge Broad.*, 509 U.S. at 428). This misrepresents the Court's ruling. The Court in *Edge Broadcasting* did not forego consideration of a regulation's validity as applied to a "particular case." Dkt. 129 at 75. To the contrary, as the Court explained, "the validity" of a regulation as applied to the entity at issue is "properly . . . dealt with under the fourth factor of the *Central Hudson* test," which proscribes compelled speech that is "more extensive than is necessary to serve" the government's claimed interest. *Edge Broadcasting*, 509 U.S. at 428–29.

Further, *Edge Broadcasting* is readily distinguishable. *First*, *Edge Broadcasting* concerned statutory speech restrictions on lottery advertisements, not government attempts to compel speech. *Second*, the regulations at issue were generally applicable to all members of a specific class (in that case, all broadcasters in non-lottery states), whereas this case would only apply to Amazon. *See id.* at 422–23, 431.

Most importantly, Complaint Counsel's requested micromanagement of Amazon's speech is not pursuant to a general, mandatory rule as in *Edge Broadcasting*. To the contrary, the recall notice content guidelines in Section 15(i) of the CPSA and in the Commission regulations are not mandatory—the Commission must make circumstance-specific findings about the necessity of all notice-related orders. *See, e.g.*, 15 U.S.C. § 2064(i)(2) (noting Commission's evaluation of whether "one or more of the following

items is unnecessary or inappropriate under the circumstances"). "Sound reasons justify reviewing the latter type of commercial speech regulation more carefully." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996) (Stevens, J., concurring).

Edge Broadcasting therefore does not insulate circumstance-specific adjudications such as this from First Amendment scrutiny. Indeed, six years after *Edge Broadcasting*, the Court struck down a provision of the same statute at issue in that case as applied to radio and television stations in other states, finding that the "operation of [the statute] and its attendant regulatory regime is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it" from the requirements of *Central Hudson*. *Greater New Orleans Broad. Ass'n*, 527 U.S. at 174–90. In so ruling, the Court reasoned that there was "no . . . convincing basis" for a "regulation" that "distinguishes among the indistinct, permitting a variety of speech that poses the same risks the Government purports to fear." *Id.* at 195.

So too here. Complaint Counsel suggests that the notice-related requirements it seeks to impose "materially advance the Commission's public safety interest" because Amazon's prior notifications "failed to adequately describe the hazards associated with the Subject Products, and failed to incentivize or account for the removal of those products from the hands of consumers." Dkt. 129 at 73–74. Yet, as the record makes clear, the notices that Complaint Counsel claims are deficient are substantially similar—and, in many cases, identical—to Commission-approved notices in recalls of similar products posing similar hazards.[32] Indeed, as the Commission's Rule 30(b)(6) representative testified, [redacted]

[32] *See* Dkt. 74 at 17–18. *See also* Dkt. 76, Amazon Ex. 72 (CPSC Recall No. 20-738); Amazon Ex. 73 (CPSC Recall No. 22-111); Amazon Ex. 83 (CPSC Recall No. 20-066).

Dkt. 76, Amazon Ex. 30, Rose Dep. 155:10-18. Complaint Counsel has not shown why Amazon's notices fail, but similar Commission-approved notices do not.

Had Complaint Counsel "adopted a more coherent policy, . . . this might be a different case." *Greater New Orleans Broad. Ass'n*, 527 U.S. at 195. But it has not. Complaint Counsel therefore cannot sidestep its duty to prove that its notice-related demands directly advance the agency's purported public safety interest. As Amazon has shown, Complaint Counsel cannot do so.

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

This adjudication is unconstitutional in three ways: *first*, the CPSC Commissioners who approved the adjudication and will decide this administrative appeal may only be removed from their offices for good cause; *second*, the Presiding Officer who issued the Initial Decision on appeal is an administrative law judge ("ALJ") who enjoys two layers of protection from presidential removal; and *third*, the Commissioners' exercise of investigative, prosecutorial, and adjudicatory powers, in this particular instance, violates the Fifth Amendment's Due Process Clause. Complaint Counsel raises unpersuasive arguments as to why this adjudication does not violate the Constitution and why the Commission should ignore these constitutional problems altogether.

1. This Proceeding Is an Appropriate Forum To Raise the Constitutional Challenges.

Complaint Counsel first argues that an administrative adjudication is not the appropriate forum to raise constitutional challenges and that dismissing the case would be inconsistent with Congressional intent. But this argument ignores agency responsibility to "continually interpret and apply their statutory duties in light of constitutional boundaries." *Jones Bros., Inc. v. Sec'y of Lab.*, 898 F.3d 669, 674 (6th Cir.

2018). Indeed, the D.C. Circuit recently recognized that even if an agency could not alter Congress's statutory scheme, it "*could*, in the rulemaking process, decide for itself that a statute unconstitutionally delegates too much power, rendering a rule unlawful." *Heating, Air Conditioning & Refrigeration Distribs. Int'l v. EPA*, 71 F.4th 59, 65 n.1 (D.C. Cir. 2023). Similarly, even if the Commission lacks the ability to invalidate the challenged removal restrictions, it may still remedy this particular unconstitutional adjudication by dismissing it.

Moreover, the Supreme Court's decision in *Axon Enterprise, Inc. v. FTC*, 598 U.S. 175 (2023), did not strip agencies of the authority to hear constitutional challenges. Post-*Axon*, at least two courts of appeal have imposed exhaustion requirements on some litigants who fail to raise constitutional arguments during agency proceedings. *See, e.g.*, *Heating, Air Conditioning & Refrigeration*, 71 F.4th at 65 n.2 (requiring petitioner to first raise a nondelegation challenge before the EPA); *Smith v. Bd. of Governors of Fed. Rsrv. Sys.*, 73 F.4th 815, 823 n.9 (10th Cir. 2023) (requiring petitioner to first raise an Appointments Clause challenge before the Board of Governors).

Even if Complaint Counsel were correct that the Commission is unable to rule on these constitutional issues, Amazon raises them now to preserve them for judicial review. *Cf. Fleming v. U.S. Dep't of Agric.*, 987 F.3d 1093, 1097–98 (D.C. Cir. 2021).

2. The Removal Protections for the CPSC Commissioners and Presiding Officer Are Unconstitutional.

Complaint Counsel first argues that the for-cause removal protections for CPSC Commissioners are constitutional because the Commission is a multimember body. This argument misapprehends the relevant inquiry under Supreme Court precedent. A narrow exception to the general requirement of at-will removal by the President may apply to

multimember agencies, but only if they "*do not wield substantial executive power*." *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2199–2200 (2020) (emphasis added); *see also Calcutt v. FDIC*, 37 F.4th 293, 313–14 (6th Cir. 2022) ("To determine whether an agency falls within this category, we consider whether . . . the agency is closer to a mere legislative or judicial aid that was said not to exercise any enforcement power.") (citation and internal quotation marks omitted). The Commission exercises broad executive powers, including promulgating regulations for consumer products, *see* 15 U.S.C. §§ 1262, 2056, 2057, and bringing enforcement actions for significant fines and injunctive relief, *see id.* §§ 2061, 2069, 2071, 2076(b)(7). Because these functions are "quintessentially executive power[s] not considered in *Humphrey's Executor*," this narrow exception does not apply to the Commission. *Seila Law*, 140 S. Ct. at 2200.[33]

Complaint Counsel also relies on inapposite case law in defense of the dual layer removal protections for the Presiding Officer. Complaint Counsel cites *United States v. Perkins*, 116 U.S. 483 (1886), and *Morrison v. Olson*, 487 U.S. 654 (1988), as examples of the Court upholding removal restrictions for inferior officers. Neither case, however, involved an inferior officer insulated by two layers of for-cause removal protection. *See Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 494–95 (2010) (discussing *Perkins* and *Morrison* before describing the issue of double-layer removal protection as a matter of first impression). As the Court explained in *Free Enterprise Fund*, "[t]he

[33] Complaint Counsel also argues that the narrow exception created in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), should apply to the Commission because the 1935 Federal Trade Commission ("FTC") exercised similar powers. Even if the 1935 FTC had similar authority, "what matters is the set of powers the Court considered as the basis for its decision." *Seila Law*, 140 S. Ct. at 2200 n.4. And as discussed above, the Commission exercises powers "not considered in *Humphrey's Executor*." *Id.* at 2200.

added layer of tenure protection makes a difference" by unconstitutionally impairing the President's "ability to execute the laws." *Id.* at 495–96.

Complaint Counsel attempts to distinguish the removal protections and authority of the Public Company Accounting Oversight Board at issue in *Free Enterprise Fund* and the Presiding Officer here. The Fifth Circuit, however, recently rejected the same argument in *Jarkesy v. SEC*, 34 F.4th 446, 463–64 (5th Cir. 2022), *cert. granted,* 143 S. Ct. 2688 (Jun. 30, 2023) (No. 22-859). There, the panel held that two layers of removal protection for Securities and Exchange Commission ("SEC") ALJs violated the Constitution. *Id.* at 464–65. The authority exercised by ALJs renders them "sufficiently important to executing the laws that the Constitution requires that the President be able to exercise authority over their functions." *Id.* at 464. Since the ALJs could only be removed for good cause by SEC Commissioners, who in turn can only be removed by the President for good cause, the ALJs' removal restrictions violated the Constitution. *Id.*

The same is true for the Presiding Officer here. The Presiding Officer can be removed only for good cause by the Merit Systems Protection Board ("MSPB"). 5 U.S.C. § 7521(a). And MSPB officers are removable by the President only for "inefficiency, neglect of duty, or malfeasance in office." *Id.* § 1202(d). This structure cannot stand under Supreme Court precedent; thus, the dual layer removal protections for the Presiding Officer are unconstitutional.

3. This Adjudication Fails To Satisfy the Guarantees of the Due Process Clause.

Lastly, Complaint Counsel relies on Section 554(d)(2)(c) of the Administrative Procedure Act to justify the Commission's exercise of investigatory, prosecutorial, and judicial functions. But this statutory provision cannot deprive Amazon of the right to

appear before an unbiased decisionmaker—a "basic requirement of due process." *Withrow v. Larkin*, 421 U.S. 35, 46 (1975) (citation omitted).

In *Withrow*, the Court recognized that situations may arise where "the special facts and circumstances present in the case" make "the risk of unfairness . . . intolerably high." *Id.* at 58. Notably, the Court considered whether "the Board had been prejudiced by its investigation or would be disabled from hearing and deciding on the basis of the evidence to be presented at the contested hearing." *Id.* at 55. Under such circumstances, "an unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case." *Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016). The record shows how the Commission pre-judged Amazon's case.[34] Complaint Counsel offers no alternative interpretation of the record, aside from its assertion that Complaint Counsel may not engage in *ex parte* communications with the Commission after the adjudication has been initiated. Dkt. 129 at 88. But that argument fails to account for prejudicial participation and statements by the Commission *before* the adjudication was initiated. Such prejudice violates Amazon's Due Process rights.

Because this adjudication is unconstitutional in three separate ways, the Commission should terminate and vacate these proceedings.

[34] *See* Dkt. 127 at 72–73 & n.62 (citing *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 (describing the purpose of the Commission's action as "to require [Amazon] to take responsibility for recalling products sold under their 'Fulfilled by Amazon' channel")).

III. 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 portions of the Initial Decision identified in Amazon's Appeal Brief.

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CERTIFICATE OF SERVICE

I hereby certify that on October 18, 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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