UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

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

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

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INTRODUCTION

Complaint Counsel's Opposition suffers from four fundamental flaws: a lack of statutory support, a lack of evidence, an appeal to nearly-limitless Commission discretion, and a failure to rebut Amazon's evidence that its notice and refund practices were effective in promoting consumer product safety (and more effective than the vast majority of CPSC-administered recalls).

The Commission lacks the statutory authority to order the relief requested. For example, Complaint Counsel requests an order requiring the recall of "functionally equivalent products," a phrase that does not appear in the Consumer Product Safety Act ("CPSA"). This omission contrasts with other statutes, entirely ignored by Complaint Counsel, in which Congress included statutory provisions applicable to both a product and its functional equivalents. Indeed, the CPSA *itself* contemplates potential replacement of products with a "like or equivalent product," but contains no similar provision authorizing the Commission to make a substantial product hazard determination or order relief for like or equivalent products. With no statutory support, Complaint Counsel instead relies on a 1976 Commission opinion that did not analyze the issue of similar products. And rather than clarify its definition of "equivalent" products, Complaint Counsel's vague descriptions of characteristics that *might* make two products equivalent are wholly conclusory and unsupported by any substantial evidence, further solidifying that regardless of the lack of statutory authority, its requested relief is unworkable.

Similarly, the CPSA limits the Commission's remedies to repairs, replacements, and refunds. The statute does not include a "return" remedy. Nonetheless, Complaint Counsel asks the Presiding Officer to read into the statute a remedy that would allow the Commission to require that consumer refunds be conditioned on product returns. Moreover, because Amazon has already provided purchasers with a refund, applying this tender requirement for a refund would be confusing and ineffective, and would penalize Amazon by requiring a double refund to consumers.

Absent statutory support for the agency's remedial requests, Complaint Counsel relies on administrative opinions, ambiguous legislative history, and the Commission's non-binding guidance, none of which adequately support its attempts to endow the Commission with extra-statutory powers beyond its authority to order repair, replacement, or refund. 15 U.S.C. § 2064(d)

Compounding the lack of statutory support is Complaint Counsel's reliance on the Commission's "experiences" rather than record evidence in support of its positions. By providing plainly insufficient evidence, or none at all, Complaint Counsel falls short of its burden to provide substantial evidence justifying its requested relief. For example, Amazon's Motion for Summary Decision included significant evidence that "recall fatigue" is a real phenomenon, undermines the effectiveness of multiple recall notices, and ultimately harms the public interest by unnecessarily crowding out other safety warnings. Complaint Counsel contests those conclusions but presents no competing evidence. The record is thus one-sided: statements from multiple CPSC officials, testimony from the CPSC's witnesses, and Amazon's expert testimony demonstrate that recall fatigue exists, and that the issuance of repetitive public notice long after Amazon provided direct notices and refunds to all consumers would be counter-productive.

Similarly, the undisputed evidence shows that Amazon already instructed consumers in its direct notices to discard the Subject Products. The Commission presents no evidence that ordering Amazon to provide additional instructions to consumers for the return or destruction of the Subject Products would have any meaningful safety impact. Finally, Complaint Counsel criticizes how Amazon notified consumers of the potential hazards posed by the Subject Products. But it is undisputed that Amazon notified 100 percent of the purchasers of the products and provided all of them with a full refund, representing a much greater percentage of affected consumers than normally reached by a typical CPSC-directed recall. Simply put, the record establishes that the

additional remedial actions demanded by Complaint Counsel are unwarranted, particularly in light of the extensive remedial efforts already undertaken by Amazon.

With little or no statutory or evidentiary support for the requested relief, Complaint Counsel invokes sweeping notions of agency discretion to order any relief Complaint Counsel might hypothesize would be marginally beneficial. In doing so, Complaint Counsel adopts a conception of the "public interest" standard so broad as to be meaningless and likely unconstitutional. The agency's concept of public interest reads the "substantial evidence" requirement out of the statute and would require the Presiding Officer to defer to Complaint Counsel's proposals without regard for the guardrails imposed by the Consumer Product Safety Act, the Administrative Procedure Act, and judicial precedent.

For these reasons, Complaint Counsel has failed to substantially support their requests for relief. Complaint Counsel's motion for summary decision should therefore be denied, and Amazon's cross-motion should be granted.[1]

ARGUMENT

I. Complaint Counsel Mischaracterizes the Governing Legal Standards.

A. Complaint Counsel's Proposed Test for Determining the "Public Interest" Is Precluded by the CPSA and Well-Established Precedent.

Complaint Counsel relies on Section 15(d) of the CPSA to authorize the remedy it seeks here. Complaint Counsel does not dispute, however, that Congress established a prerequisite criterion for any Section 15(d) remedy: the remedy must be in the "public interest." 15 U.S.C. § 2064(d). As demonstrated in Amazon's Opposition to Complaint Counsel's Motion, where

[1] For ease of reference, Amazon has continued exhibit numbering from its Motion and its Opposition to Complaint Counsel's Motion. Amazon Exhibits 123–29 are attached to the November 21, 2022 Declaration of Nicholas Griepsma. Amazon Exhibits 107–122 are attached to the October 21, 2022 Declaration of Nicholas Griepsma. Amazon Exhibits 1–106 are attached to the September 23, 2022 Declaration of Joshua González.

Congress employs a "public interest" requirement, agencies and courts must look to the enumerated purposes of the statute to discern "ascertainable criteria" that cabin the agency's public interest determination. *NAACP v. Fed. Power Comm'n*, 425 U.S. 662, 669 (1976) (citation omitted). As required by controlling Supreme Court precedent, the "ascertainable criteria" that define the public interest stem from the purposes of the statute. *Id.* They are (1) protection of consumers from "*unreasonable* risks of injury," and (2) "*assist[ing]* consumers in evaluating the comparative safety of products." 15 U.S.C. § 2051(b) (emphasis added). In addition to these statutory purposes, Section 15(c), which also governs this proceeding, provides that the Commission may require additional notification only if it "is *required* in order to *adequately* protect the public." 15 U.S.C. § 2064(c)(1) (emphasis added).

Complaint Counsel fails to offer any competing interpretation of "public interest" tied to the statutory purposes or the requirements of Section 15(c). Instead, Complaint Counsel argues that because a 1990 amendment to the statute added a provision indicating that a cost-benefit analysis is not required, the Commission need not consider whether the benefits of ordering particular relief bear any relation to the practical costs of implementation. That is incorrect. A key purpose of the CPSA is to guard against "unreasonable risk," and assessment of "unreasonable risk" inherently involves a "*generalized* balancing of costs and benefits." *Am. Textile Workers Inst. Inc. v. Donovan*, 452 U.S. 490, 512 n.30 (1981) (emphasis added). While the 1990 amendments make clear that a formal cost-benefit analysis is not required, they do not say that generalized cost-benefit considerations are irrelevant to whether particular relief is warranted under the CPSA.[2] Indeed, as former CPSC Commissioner Robert Adler has noted, "[p]resumably,

[2] Nor does the provision state that consideration of such factors is expressly forbidden. Indeed, courts have similarly held that a regulatory provision promulgated under the National

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."[3] *Cf. Michigan v. EPA*, 576 U.S. 743, 752 (2015) (finding statutory phrase "appropriate and necessary" "requires at least some attention to cost. One would not say that it is even rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits.").

A cost benefit-analysis, as that term was understood when the CPSA was amended in 1990, commonly involved a formal listing and analysis of various technical and economic factors. For example, in 1981, the Supreme Court used "cost-benefit analysis" as a term of art requiring "systematic enumeration of all benefits and all costs, tangible and intangible, whether readily quantifiable or difficult to measure, that will accrue to all members of society if a particular project is adopted." *Donovan*, 452 U.S. at 508 n.26; *accord Nat'l Grain & Feed Ass'n v. OSHA*, 866 F.2d 717, 730 n.24 (5th Cir. 1988); *Forging Indus. Ass'n v. Sec'y of Labor*, 773 F.2d 1436, 1452 n.21 (4th Cir. 1985). Likewise, the D.C. Circuit has explained that a formal cost-benefit analysis entailed 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).

The same legislative history on which Complaint Counsel relies also shows that Congress intended to address *formal* and systematic cost-benefit analysis in the 1990 amendments, not a

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Environmental Policy Act ("NEPA") stating that "agencies need not display the weighing of the merits and drawbacks of the various alternatives in a monetary cost-benefit analysis," 40 C.F.R. § 1502.22, does not stand for the proposition that agencies cannot employ generalized cost-benefit factors. *High Country Conservation Advocs. v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1182 (D. Colo. 2014); *see also Wilderness Workshop v. Bureau of Land Mgmt.*, 342 F. Supp. 3d 1145, 1159 (D. Colo. 2018) (same).

[3] 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).

generalized analysis of benefits and harms caused by agency action.[4] In advocating against a cost-benefit analysis requirement in connection with the 1990 amendments, a former CPSC Commissioner explained that "[t]o impose on the Section 15 process an analytical technique that requires the analyst to assign a range of estimated and assumed variables to a variety of unknowns merely to generate a numerical analysis makes very little sense. It does not improve the quality of decisionmaking; it merely makes the analysis—now reduced to numbers—appear to be more 'objective.'" Ex. 124, *CPSC Authorization: Hearing Before the Subcomm. on the Consumer of the Senate Comm. on Commerce, Science, and Transportation*, 100th Cong., 1st Sess. at 50 (May 13, 1987). Similarly, Congress was "most concerned" about the agency's "mechanical" application of cost-benefit analysis as a means to delay or slow agency determinations. *See* Ex. 126, S. Rep. 101-37 Committee on Commerce, Science, and Transportation at 9–10 (May 25, 1989). Congress was not considering the utility of a generalized assessment of costs and benefits to determine whether particular relief is appropriate in a particular circumstance (*i.e.*, whether its benefits are roughly proportionate to its costs). *See id.* ("Especially in the past several years, the CPSC has almost routinely imposed a mechanical cost-benefit process which critics maintain has delayed enforcement activity by the CPSC."). Indeed, consumer advocates had previously explained to Congress that "there's a world of difference between informal assessment of these factors and the kind of formal, mechanistic approach being pushed by the current CPSC Chairman." Ex. 124, *CPSC Authorization: Hearing Before the Subcomm. on the Consumer of the*

[4] For example, the CPSC recently prepared a 31-page formal cost benefit analysis relating to phthalates, which conducts a detailed analysis of the compliance costs as well as the benefits of the rule. *See* Ex. 125, *Cost-Benefit Analysis of Continuing the Interim DINP Prohibition in the Final Rule: 16 CFR Part 1307* (February 2022). This is the type of cost-benefit analysis that Section 15(h) makes clear is not required in a recall-related enforcement action.

Senate Comm. on Commerce, Science, and Transportation, 100th Cong., 1st Sess. at 62 (May 13, 1987).

Notably, in the legislative process leading up to the 1990 amendment, 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 explained that "formal cost-benefit" analyses are not required.[5] Ultimately, both contemporary understanding of the phrase "cost benefit analysis" and the legislative history make clear that the 1990 amendment was designed to limit only formal, detailed cost-benefit analyses, not generalized assessments of costs and benefits.

Complaint Counsel's interpretation, in effect, is that any consideration of any downside of the requested remedial relief would constitute a "cost-benefit analysis." Without looking at the costs or possible negative consequences, the public interest standard would practically always be met, an absurd result. So long as there was a single consumer who may not have received the notice, the public interest, in Complaint Counsel's view, would support ordering additional action. On that reading, "public interest" does not circumscribe agency action; it authorizes unlimited action. That does not square with well-settled law or the plain language of Sections 15(c) and 15(d). *See, e.g.*, *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 216 (1943) (stating that the "public interest" standard is not meant to "confer an unlimited power"); *see also* 15 U.S.C. §

[5] Ex. 127, *Consumer Product Safety Commission*: *Hearing Before the Subcomm. on the Consumer of the Senate Comm. on Commerce, Science, and Transportation*, 101st Cong., 1st Sess. 54 (Mar. 19, 1989); *see also* Ex. 124, *CPSC Authorization: Hearing Before the Subcomm. on the Consumer of the Senate Comm. on Commerce, Science, and Transportation*, 100th Cong., 1st Sess. at 43 (May 13, 1987) (CPSC Chairman Scanlan testimony to Congress 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").

2064(c)(1) (the Commission may require additional notification only if it "is *required* in order to *adequately* protect the public").[6]

B. Amazon's Administrative Procedure Act Arguments Are Not Premature.

As explained in Amazon's Motion, the Presiding Officer should decline to order the remedies requested by Complaint Counsel because doing so would be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law" under the Administrative Procedure Act ("APA"). 5 U.S.C. § 706. In its Opposition, Complaint Counsel asserts that these APA arguments are somehow "premature." Compl. Counsel Opp. at 55. Complaint Counsel is mistaken.

Amazon's point is simple: the APA "requires agencies to engage in reasoned decisionmaking." *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020). Any "agency action must be the *product* of such reasoned decisionmaking." *Farrell v. Blinken*, 4 F.4th 124, 137 (D.C. Cir. 2021) (emphasis added). Accordingly, reasoned decisionmaking is required *before* any order is issued. Moreover, Complaint Counsel cites nothing for the counterintuitive notion that it is "premature" for Amazon to argue that the Presiding Officer should decline to order relief that would later be invalidated upon judicial review under the APA for being arbitrary, capricious, or otherwise contrary to law.

[6] Complaint Counsel also notes that the 2008 amendments to the CPSA authorized the Commission, rather than the respondent, to select the remedy in mandatory recall actions, and argues that the phrase "public interest" merely transfers decisionmaking authority from the latter to the former. This argument is inconsistent with the structure of Section 15(d), which uses the "public interest" as a limitation on Commission action. *See* 15 U.S.C. § 2064(d) (Commission "may order . . . notice . . . and [for a respondent] to take anyone one or more of the following actions it determines to be in the public interest" (emphasis added)). It would also eliminate any limit on the Commission's discretion to pick remedies, which, as discussed in Amazon's prior briefs, raises impermissible constitutional concerns. *See* Amazon Opp. at 8.

Amazon is not arguing for interlocutory judicial review or that the mere filing of an administrative complaint gives rise to an APA violation here. *Cf.* Compl. Counsel Opp. at 56–57. Rather, Amazon argues that in order to engage in reasoned decisionmaking, the Presiding Officer must consider and satisfy all of the relevant factors and requirements specified by the APA.[7]

II. Additional Notice Is Not Required by the CPSA, Is Not in the Public Interest, and Would Violate the APA.

A. Complaint Counsel Fails to Establish that Additional Notice Is Required to Adequately Protect the Public.

The CPSA authorizes the Commission to order, following a hearing and a substantial product hazard determination, that notice be provided if "required in order to adequately protect the public." 15 U.S.C. § 2064(c)(1). The statute also contains a provision governing the contents of such notifications. § 2064(i). Complaint Counsel, however, applies those provisions wrongly to the circumstances in this case. Amazon voluntarily provided adequate notice outside of the process set out in the relevant statutory provisions, *see* § 2064(c)(1), which are limited to mandatory recall notifications, and thus plainly do not apply to the notifications sent by Amazon. Nor does the statute's specification of presumptive content for mandatory post-hearing notices mean that Amazon's voluntary pre-hearing notice was *per se* insufficient. The threshold question presented here is not whether the provisions of subsection 15(i) were satisfied, but rather whether

[7] Complaint Counsel is incorrect that the Presiding Officer held in its Order on Amazon's Motion to Dismiss and for Summary Judgment that all of Amazon's arguments under the APA were premature. *See* Compl. Counsel Opp. at 55. To the contrary, the Presiding Officer considered premature only Amazon's argument that the Commission should have proceeded by rulemaking in this matter because Complaint Counsel was seeking to redefine the statutory term "distributor," and "the Commission is prohibited from expanding the reach of the Act through a novel interpretation announced through adjudication." Dkt No. 27, at 15. The Presiding Officer held this argument "premature," because, *inter alia*, "Amazon has no way to predict how the Commission will rule." *Id.* at 15. Nothing in the Presiding Officer's order purported to find other APA arguments Amazon might raise in this adjudication to be premature.

additional notice is "required in order to adequately protect the public." 15 U.S.C. § 2064(c)(1). In any event, the notice content provisions contained in subsection 15(i) and the Commission's non-binding guidelines do not suggest that Amazon's notice suffered from any meaningful flaws.[8]

Direct Notice. Complaint Counsel cannot demonstrate that additional direct notice is required to adequately protect the public. Complaint Counsel does not dispute, for example, that Amazon sent notification emails directly to all purchasers of the Subject Products or that the direct electronic notices informed purchasers that (1) the products had been tested by the CPSC and were determined to pose a hazard, (2) they should cease using the product, (3) they should dispose of the product, and (4) they should inform any other persons who may possess the product about the hazard and the need to dispose the product. Compl. Counsel Resp. to Amazon SUMF ¶¶ 17–22, 37–39, 50–54, 56, 70–74, 86–87, 100–01. Amazon's notice provided consumers with the information necessary to fulfill the key purposes of the CPSA, *i.e.*, assisting consumers in evaluating safety risks and empowering them to take appropriate action to guard against unreasonable risk.

Complaint Counsel relies solely on an incorrect premise in seeking a remedial order requiring marginally revised notice content. The notice content identified in the CPSA and Commission guidelines are not *per se* appropriate in all cases. Complaint Counsel must do more to meet its burden than to cite to other options available to the Commission generally. Neither the CPSA nor Commission guidelines comport with Complaint Counsel's reading, and its failure to

[8] The statute makes clear that the Section 15(i) notice provisions are not mandatory. The Commission may "determine[] with respect to a particular product" that any content is "unnecessary or inappropriate under the circumstances." 15 U.S.C. § 2064(i)(2). Accordingly, "the Commission or a court ordering that a recall notice issue retains final authority over the form and content of mandatory recall notice," reflecting that "all recall notices . . . should be tailored to the specific product and circumstances." Guidelines and Requirements for Mandatory Recall Notices, 75 Fed. Reg. 3,355, 3,356 (Jan. 21, 2010).

provide substantial evidence—showing that its requested relief is required in order to adequately protect the public—is dispositive.

Complaint Counsel cites the list of notice components identified in Section 15(i) of the CPSA, but that provision only addresses the content of a notice issued *after* a hearing finding, among other things, that notice is "required in order to adequately protect the public." Section 15(i) is thus inapplicable to Amazon's notices, which were issued *before* this action was initiated. Rather, the applicable question is whether *additional* notice is "required," at this time, "to adequately protect the public." 15 U.S.C. § 2064(c)(1).

In any event, Section 15(i) is not absolute: it provides an exemption for any or all of the content specified. The Commission may "determine[] with respect to a particular product" that any content is "unnecessary or inappropriate under the circumstances." *Id.* Accordingly, "the Commission or a court ordering that a recall notice issue retains final authority over the form and content of mandatory recall notice," reflecting that "all recall notices . . . should be tailored to the specific product and circumstances." Guidelines and Requirements for Mandatory Recall Notices, 75 Fed. Reg. at 3,356. Complaint Counsel's argument that certain content is "statutorily mandated" ignores that the statute does not speak in absolutes. In so doing, Complaint Counsel ignores the role of the Presiding Officer to determine if any further action is appropriate. And that determination must be made in accordance with the APA's requirement of reasoned decisionmaking, as explained below.

The Commission's recall guidelines do not support Complaint Counsel's arguments. The guidelines are intended to "give the Commission and/or a court the flexibility to add or remove requirements from a particular recall notice as necessary and appropriate . . . ." *Id.* at 3,359; 16 C.F.R. § 1115.29. Rather than suggesting that the statutory scheme indicates that any particular

form of notice or content is necessary "to adequately protect the public," the non-binding guidelines recognize that the form and content of notice should depend on the circumstances.[9]

Complaint Counsel resorts to setting a new bar for measuring recall effectiveness in an attempt to undercut Amazon's successful issuance of notification and refunds to 100 percent of the Subject Product purchasers. According to Complaint Counsel, "[c]orrection requires the hazardous product to be *corrected, i.e. removed from the stream of commerce*." Compl. Counsel Opp. at 33. This premise relies on the uncorroborated testimony of their own witness—a line-level CPSC Compliance Officer—that [redacted][10] But this testimony is unsupported by any statutory authority or record evidence, and it is contradicted by statements of the Commission and other recalls. For example, in the context of repair remedies, as explained by

[9] The guidelines themselves are not a binding legislative rule. Complaint Counsel's references to the fact that the guidelines went through notice and comment, Compl. Counsel Opp. at 21, bear little relevance: that process cannot create binding requirements where the Commission itself explicitly sought to retain flexibility. *See Jerri's Ceramic Arts, Inc. v. CPSC*, 874 F.2d 205, 208 (4th Cir. 1989) ("In deciding whether [a Commission regulation] is an interpretative [or legislative] rule, this court should consider the Commission's intent in authoring it . . . ."). Moreover, Complaint Counsel's assertion that merely because the Guidelines went through notice and comment, they are necessarily a legislative rule, misstates basic administrative law principles: agencies have the discretion to subject non-binding guidance to notice and comment, and often do so. *See, e.g.*, *New Jersey v. U.S. Nuclear Reg. Comm'n.*, 526 F.3d 98, 103 (3d Cir. 2008) (non-binding agency guidance issued by Nuclear Regulatory Commission was "submitted . . . for public notice and comment . . . as a matter of agency discretion"); *see also* Ex. 128, Office of Management and Budget, *Final Bulletin for Agency Good Guidance Practices* (agencies should "observe the notice-and-comment procedures" for non-binding guidance that could nonetheless lead to "changes in behavior by the private sector or governmental authorities"); *see generally Vermont Yankee Nuclear Power Corp. v. NRDC, Inc.*, 435 U.S. 519, 524 (1978) ("Agencies are free to grant additional procedural rights in the exercise of their discretion . . . .").

[10] Complaint Counsel's only other support for this new standard is a quote from its Rule 30(b)(6) deponent that [redacted] This, however, is not a description of CPSC's *policy* regarding how correction rates are determined or tracked.

the CPSC's then-Deputy Director of Compliance, the "consumer correction rate" used by the Commission does not track "how many [consumers] installed the repair kit," only whether one was sent. Ex. 69, CPSC, Transcript of Recall Effectiveness Workshop Early Session at 40:2–11 (July 25, 2017).[11] Indeed, agency staff have routinely approved recalls in which the remedy was deemed complete, and effective—for similar product categories—without any verification that the product had been removed from consumer hands, as Complaint Counsel insists must be done here. *See* Ex. 62, Mohorovic Rep. at 22.[12]

Amazon has previously addressed in detail how its notices provided clear and sufficient information for consumers 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). Complaint Counsel fails to present substantial evidence that an average reader of Amazon's notice email would have been unable to identify the product at issue, understand the type of hazard at issue, or understand the remedy that Amazon would be issuing the consumer. And as discussed *infra*, Complaint Counsel cites no evidence—empirical, expert, or otherwise—that any further notice or authorized remedy would materially mitigate an unreasonable risk. In short, Complaint Counsel fails to demonstrate that additional direct notice is required to adequately protect the public.

Press Release. Complaint Counsel likewise fails to demonstrate that a press release disseminated to media outlets—not directed at any particular purchaser—is required to adequately

[11] *See also* Ex. 69, Amazon-CPSC-FBA-00001348, at 00001413 (comment of Carol Cave, Deputy Director, CPSC Office of Compliance and Field Operations); Ex. 66, CPSC_AM0009637 at 09638 (CPSC Recall Defect Data).

[12] Complaint Counsel does not present any expert opinion to counter former-Commissioner Mohorovic's expert analysis of these prior recalls.

protect the public. Complaint Counsel offers no evidence to overcome the fact that Amazon provided direct notification to 100 percent of the Subject Product purchasers. Compl. Counsel Resp. to Amazon SUMF ¶¶ 17, 37, 50, 70, 86, 100. Nor does Complaint Counsel offer substantial evidence to counter the extensive empirical and agency evidence presented by Amazon concerning the effectiveness of direct notice and the ineffectiveness of press releases. Amazon Mot. at 12–13, 25–27. Nor does it identify a single piece of evidence indicating (1) the number of persons who are likely to possess a Subject Product but did not receive Amazon's direct notice, (2) the likelihood that a press release would reach such individuals, or (3) the likelihood that such an individual would in fact read and act on such a press release.

Complaint Counsel makes a number of factual assertions, including that posting to "websites and social media platforms" is necessary "to adequately inform consumers;" that information posted to the CPSC's website is "valuable" to a material portion of the public; and that reliance on emails "could miss a large population." Compl. Counsel Opp. at 17–18. But Complaint Counsel fails to substantiate these assertions with record evidence. *See, e.g.*, *NRDC v. EPA*, 857 F.3d 1030, 1041 (9th Cir. 2017) (an agency "must support its predicted public-interest scenario with 'substantial evidence when considered on the record as a whole,'" and "where an essential premise of a public-interest finding is only supported by bare assumptions, as in the present case, [a court] will find substantial evidence lacking." (citation omitted)).

In lieu of record evidence, Complaint Counsel looks to non-binding agency staff documents, which, in turn, fail to identify or cite supporting evidence. Complaint Counsel's assertions concerning purported "secondhand purchasers" are illustrative. Complaint Counsel asserts the existence of an active "secondary market" for the Subject Products through which those products are sold or donated. It offers no record evidence, however, that this market exists for the

Subject Products, instead relying entirely on presuppositions contained in its various manuals. *See* CC Resp. to Amazon SUMF at 145 (citing "[t]he current recall handbook" which suggests that "[n]otices to thrift stores and other secondhand retailers" may be "appropriate"); Amazon Resp. to CPSC SUMF at 152 (stating that [redacted].[13] But such self-serving statements do not suffice as substantial evidence under the Administrative Procedure Act. *See Tex Tin Corp. v. EPA*, 992 F.2d 353, 356 (D.C. Cir. 1993) (agency "was not entitled merely to assume" proposition where it could have conducted testing, but declined or failed to do so); *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'").

Nor is it sufficient to assert that the existence of a secondhand market for these particular products is "common sense." *In re Sang-Su Lee*, 277 F.3d 1338, 1344–45 (Fed. Cir. 2002) ("'Common knowledge and common sense,' even if assumed to derive from the agency's expertise, do not substitute for authority when the law requires authority."); *Ohio Star Transp. LLC v. Roadway Exp., Inc.*, 2010 WL 3666982, at *4 (S.D. Ohio Sept. 14, 2010) (noting "'common sense' is not evidence sufficient to withstand a summary judgment motion"); *Williams v. Atchison, Topeka & Santa Fe Ry. Corp.*, 1993 WL 195147, at *6 (D. Kan. May 3, 1993) (asserting that a fact is "self-evident," when "[n]o evidence supports [the] assertion" is "[o]bviously . . . insufficient . . . for summary judgment"). Complaint Counsel fails to identify any evidence which indicates

[13] Complaint Counsel cites the testimony of its 30(b)(6) designee with similar effect. *See* Compl. Counsel Opp. at 27 n.16, 34, 48 (quoting deposition testimony of [redacted]). This fleeting reference, even if repeated three times, is insufficient to create a genuine issue of fact.

the magnitude or likelihood of secondary markets for these particular product categories that would inform a public interest analysis specific to these facts.

Likewise, Complaint Counsel fails to offer substantial evidence rebutting Amazon's well-developed evidence on recall fatigue. Complaint Counsel asserts that "the very existence of recall fatigue is subject to debate." Compl. Counsel Opp. at 36. But "conclusory . . . denials, without more, are insufficient to preclude granting the summary judgment motion." *Sedar v. Reston Town Ctr. Prop., LLC*, 988 F.3d 756, 761 (4th Cir. 2021). Complaint Counsel does not offer deposition testimony from any of its employees that recall fatigue is illusory, policy documents defending its position that additional warnings are always net beneficial, or any other record evidence contesting the existence of recall fatigue. Complaint Counsel asserts only that some academics have expressed uncertainty about the topic, in studies that predate the extensive materials Amazon presents on this topic. This bare showing is insufficient to create a genuine dispute of material fact and, regardless, even the studies by the authors relied on by Complaint Counsel admit that the concept should be taken seriously. Ex. 129, Wogalter and Leonard 1999 ("people have limited pools of mental resources that are used for attending and for working (conscious) memory" and "we cannot simultaneously attend to everything around us, as it would exceed the available attention capacity"); Ex. 96, Wogalter and Vigilante 2006 (noting that even though research has not yet "clearly verified" over-warning, "careful planning is necessary in using and designing warnings, particularly in terms of prioritization of content, formatting, and placement").

Complaint Counsel similarly fails to justify its request for a press release rather than a recall alert. The agency's own staff documents contradict Complaint Counsel's assertions. The Commission's Section 15 Manual states, for example, that [redacted]

[redacted]. Amazon has done so here. The Commission's Recall Handbook says the same: "to make use of a recall alert, a company must have direct notice capability for all, or nearly all, consumers." Ex. 89, 2021 Recall Handbook at 22. And while a recall alert is unwarranted for the same reasons established above, Complaint Counsel's request for a press release is particularly dubious. Indeed, Complaint Counsel cites no statute, rule, or policy establishing different criteria justifying a press release and cites no examples of past recalls in which a press release was issued when 100% of affected purchasers were identified and contacted.[14] It thus violates well-established administrative law principles that agencies must "treat like cases alike" and provide compelling explanations for deviations from policy. *See Westar Energy, Inc. v. FERC*, 473 F.3d 1239, 1241 (D.C. Cir. 2007). At a minimum, the APA requires that the Commission provide a rational justification for the change in policy. *FCC v. Fox Television Stations*, 556 U.S. 502, 513 (2009).

B. Complaint Counsel's Proposed Compulsory Notice Requirements Would Violate the First Amendment as Applied to Amazon.

As explained in Amazon's Motion, ordering Amazon to issue an additional recall notice with language dictated by the Commission would violate the First Amendment. Under the framework set out in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), which Complaint Counsel does not dispute governs here, the Commission bears the burden of showing that the speech Complaint Counsel seeks to compel would "directly advance" a substantial state interest, rather than "[p]rovide only ineffective or

[14] Complaint Counsel states that "hundreds of press releases issued by CPSC involve products sold online," Compl. Counsel Opp. at 20 n.12, but cites no evidence about the percentage of purchasers who could be directly notified in any of these recalls.

remote support for the government's purpose." *Id.* at 564. Moreover, the Commission must also show that "more limited" measures would not serve to achieve the purpose. *Id.* None of Complaint Counsel's arguments raise a genuine issue as to whether the Commission can carry that burden.[15]

First, Complaint Counsel argues that the Presiding Officer lacks authority to entertain the First Amendment issue by inaccurately recasting Amazon's *as-applied* challenge to Complaint Counsel's proposed remedy as a *facial* challenge to the CPSA. *See* Compl. Counsel Opp. at 38. This argument rests on a mistaken premise. Amazon does not claim that the provisions of the CPSA authorizing the Commission to order a recall notice or laying out the presumptive content of such notices are *facially* unconstitutional. Instead, Amazon argues only that requiring it to issue a second notice with Commission-dictated language here—*i.e.*, where Amazon has already issued a robust notice—would violate the First Amendment *as applied to the particular facts of this case*. *See* Amazon Mot. at 30 (arguing that "Complaint Counsel's requested communications . . . violate the First Amendment *as applied to Amazon*") (emphasis added). As a result, the Presiding Officer can (and must) address the First Amendment argument. *See, e.g.*, *Jones Brothers, Inc. v. Sec'y of Labor*, 898 F.3d 669, 674 (6th Cir. 2018) ("[A]dministrative agencies may [not] look the other way when it comes to as-applied constitutional challenges," but instead "must continually interpret and apply their statutory duties in light of constitutional boundaries."); *United Space All., LLC v.*

[15] Complaint Counsel notes in its Opposition that Amazon did not raise this First Amendment argument in its Answer, but does *not* assert that this argument is thereby procedurally defaulted. *See* Compl. Counsel Opp. at 37. Complaint Counsel's insinuation falls short of an actual waiver argument. *See, e.g., United States v. Pollard*, 959 F.2d 1011, 1019 (D.C. Cir. 1992) (government had likely "waived its waiver claim" because it "was quite imprecise" in referencing waiver below). The Presiding Officer should not make a finding of default *sua sponte*, particularly as Complaint Counsel does not assert that it was prejudiced in any way by Amazon not having invoked its First Amendment argument earlier in this adjudication. *See, e.g.*, *Allied Chem. Corp. v. Mackay*, 695 F.2d 854, 855-56 (5th Cir. 1983) (Where a defense is later presented "in a manner that does not result in unfair surprise," failure to raise it in an answer "is not fatal.").

Solis, 824 F. Supp. 2d 68, 97 n.10 (D.D.C. 2011) ("'Although government agencies may not entertain a constitutional challenge to authorizing statutes they must decide constitutional challenges to their own policies whether embodied in generic rules or as applied in an individual case.' The administrative law judge was plainly wrong to suggest otherwise." (quoting *Lepre v. Dep't of Labor*, 275 F.3d 59, 75 (D.C. Cir. 2001) (Silberman, J., concurring)).

Indeed, courts have made clear that when a party objects to an agency's unduly "expansive interpretation of the statute" that would run afoul of a constitutional limitation, "the agency must be mindful of the higher demands of the constitution," and thus must consider the constitutional issue in interpreting and applying the statute. *Cont'l Airlines v. DOT*, 843 F.2d 1444, 1455–56 (D.C. Cir. 1989); *see also Nat'l Treasury Emps. Union v. FLRA*, 986 F.2d 537, 540 (D.C. Cir. 1993) (agency required to consider constitutional issues in interpreting statute). Here, Complaint Counsel's unduly expansive interpretation of the phrase "required to adequately protect the public" in this case runs afoul of First Amendment considerations.

Second, Complaint Counsel asserts that Amazon may not raise its First Amendment argument in this adjudication because it has not complied with the Attorney General notification requirement of Federal Rule of Civil Procedure 5.1. This argument is frivolous: these proceedings are not governed by the Federal Rules of Civil Procedure, and even if they were, Rule 5.1 requires such notification only when a party "draw[s] into question the constitutionality of a federal or state statute" *and* the "parties do not include the United States [or] one of its agencies." Fed. R. Civ. P. 5.1(a). Here, neither requirement is met: Amazon's as-applied constitutional argument does not draw the constitutionality of the CPSA into question, and the parties to this adjudication include a federal agency (*i.e.*, the Commission).

Third, Complaint Counsel does not raise a genuine issue of whether it can satisfy *Central Hudson*'s "demanding" standard for compelled speech. 447 U.S. at 566. Even assuming that the Commission has a substantial generalized interest in providing information to affected individuals about substantial product hazards, Complaint Counsel fails to show how compelling Amazon to issue a second recall notice with Commission-dictated language would "directly advance" that interest. *Id*. Moreover, Complaint Counsel "may not rest on such speculation or conjecture," but rather has "the burden of demonstrating that the measure it adopted would 'in fact alleviate' the harms it recited 'to a material degree.'" *Nat'l Ass'n of Manufacturers v. SEC*, 800 F.3d 518, 527 (D.C. Cir. 2015).

Rather than present evidence making that showing, the only argument Complaint Counsel makes to this effect in its Opposition is that "Congress clearly recognized the substantial government interest in ensuring that consumers are fully informed of substantial product hazards when enacting the CPSA, and the statute directly advances that government interest in effectively communicating recall information." Compl. Counsel Opp. at 40. But that is a facial defense of the recall notice provisions of the CPSA (which are not being challenged here), not an argument that Complaint Counsel's request to dictate the language of a second recall notice, or compel other forms of notice, would directly advance the Commission's interests in informing affected consumers of substantial product hazards as applied to this adjudication. As explained above, such additional notice would not advance that interest. At most, the rationale for the compelled speech sought by Complaint Counsel amounts to "ineffective or remote support for the government's purpose" insufficient to pass constitutional muster under *Central Hudson*. 447 U.S. at 565; *see also, e.g.*, *N.A. of Wheat Growers v. Becerra,* 468 F. Supp. 3d 1247, 1251, 1264 (E.D. Cal. 2020) (holding that statutory warning requirement violated the First Amendment "as applied to the

chemical glyphosate," because, although the State had a "substantial interest" in "inform[ing] the people of California about exposures to chemicals that cause cancer," the state's proposed warnings concerning glyphosate would not "directly advance that interest").

III. Complaint Counsel Fails to Identify Any Statutory Authority or Substantial Evidence for Conditioning Refunds on the Return of the Subject Products.

Amazon issued full refunds to purchasers with an instruction to dispose of the Subject Product *over a year ago*. And yet, Complaint Counsel now seeks an order in which purchasers would be instructed to return those same products notwithstanding the absurdity of that direction, particularly following an instruction to dispose of the product and the extensive record evidence showing that mandatory product tender requirements decrease correction rates. Complaint Counsel's request defies both the CPSA and common sense, and it should be rejected.

A. Complaint Counsel Fails to Identify Any Authority to Withhold Refunds from Consumers Unless They Return the Subject Products.

Complaint Counsel cites no authority to counter the well-established principle that an administrative agency "has no powers except those specifically conferred upon it by statute." *Plaskett v. Wormuth*, 18 F.4th 1072, 1087 (9th Cir. 2021) (citation omitted). The Commission "literally has no power to act . . . unless and until Congress confers power upon it." *Am. Libr. Ass'n. v. FCC*, 406 F.3d 689, 698 (D.C. Cir. 2005) (citation omitted). Because the CPSA expressly identifies the actions that the Commission may take when ordering relief, the agency lacks statutory authority to require any other actions besides those enumerated in the statute.

1. Nothing in the Plain Language of the CPSA Permits Conditioning Refunds on Product Returns.

Complaint Counsel cites no authority, case law, dictionary definition, or other traditional interpretive tools for its conclusory assertion that the "plain meaning" of the terms "replace" and "refund" imply that the original product must be returned or exchanged. Compl. Counsel Opp. at

41. Nor do such interpretive tools support Complaint Counsel's position. For example, courts customarily turn to dictionaries for help in determining whether a word in a statute has a plain or a common meaning. *See Kemp v. United States*, 142 S. Ct. 1856, 1862 (2022). Here, the dictionary definitions of "replace" and "refund" indeed convey a plain meaning, but none that incorporates the return of the product being replaced or refunded. The term "replace" means to "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). The term "refund" means to "reimburse or repay (a person)." *See Refund*, Oxford English Dictionary (3d ed. 2009). Saying that a product was replaced or that a consumer was given a refund for that product make perfect sense even if that product was lost or stolen. That could not be the case if either term necessarily implied that the consumer had returned the product. Complaint Counsel's plain language argument thus runs afoul of the basic dictionary definitions and common usage, and should be rejected.

No other provision in Section 15(d) authorizes the Commission to make a "return" a prerequisite of the "replacement" or "refund" of a Subject Product. Complaint Counsel relies on a statutory provision governing recall plans, arguing that any remedy that the Commission can conceive of that would make a recall "effective" is permissible under the statute, because the Commission could amend a corrective action plan to include such a remedy. Compl. Counsel Opp. at 43–44 (quoting 15 U.S.C. § 2064(d)). But the corrective action plan is limited to a plan for "taking action under whichever of the preceding paragraphs under which such person has been ordered to act." § 2064(d)(2). Accordingly, the statutory provision authorizing the Commission to "amend, or require amendment of, the action plan," § 2064(d)(3)(B), merely provides that the Commission retains authority to adjust the remedy within the statutory parameters. Said otherwise,

this provision implements the agency's ability to order corrective action plans; it does not expand its authority to do so beyond that provided for in other subsections of the CPSA. The interpretations suggested by Complaint Counsel would lead to an irrational consequence whereby the Commission could order any extra-statutory action so long as the Commission believes that it would make a recall "effective." That cannot be squared with the statute's specification of only three forms of remedies: repair, replacement, and refund.

Complaint Counsel insinuates that the Commission reached this issue in *Zen Magnets*, but that is likewise incorrect. *See* Compl. Counsel Opp. at 41, 43 (citing CPSC Dkt. No. 12-2, Final Decision and Order, 2017 WL 11672449 (C.P.S.C. Oct. 26, 2017)). In fact, both the respondent and Complaint Counsel in *Zen Magnets* sought to impose product returns as a condition for refunds, and so whether the Commission had authority to condition refunds upon product return was not at issue. *See Cooper Indus., Inc. v. Aviall Servs.*, 543 U.S. 157, 170 (2004) ("Questions . . . neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." (quotation marks and citation omitted)).

Complaint Counsel further contends that broad notions of the Commission's "mandate" under the CPSA supply authority to condition refunds on product returns, Compl. Counsel. Opp. at 41. That is not the law. To the contrary, courts have held that 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." *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 230–31 & n.4 (1994). Complaint Counsel's nebulous references to the purpose of the CPSA cannot authorize ordering product returns.

2. The Legislative History Does Not Support Complaint Counsel's Requested Relief.

In lieu of any statutory authorization for its requested relief, Complaint Counsel invites the Presiding Officer to rely on legislative history to write additional language into the CPSA. As previously explained, however, legislative history cannot create powers not conferred by the statute itself. Amazon Mot. at 29–30. Moreover, Complaint Counsel cites to just one authority purportedly addressing this issue: a Commission order from 1976 citing legislative history. Compl. Counsel. Opp. at 42–43 (citing *In the Matter of Relco, Inc.*, CPSC Dkt. No. 74-4, Order at 5 (Oct. 27, 1976)). As established in Amazon's Opposition, *Relco*'s acknowledgement that the CPSA is "silent as to any mandatory tender requirement" should end the inquiry—modern interpretative standards preclude reading a tender requirement into the CPSA not contained within the actual statute. Amazon Opp. at 29–30. Even so, when quoted in full, those legislative history excerpts make clear that Congress was focused on protecting firms from having to issue remedies to those who did not purchase the relevant products. The legislative history thus contemplated "proof of claims" as a prerequisite for a refund. Ex. 114, House Interstate and Foreign Commerce Committee, H. Rep. No. 92-1153 at 52 (June 21, 1972) (emphasis added). Here, proof of ownership is not at issue. Amazon was able to confirm each purchaser's entitlement to a refund based on existing electronic records. Amazon SUMF ¶¶ 101–111. Thus, even assuming the legislative history could somehow confer statutory authority on the CPSC, it would not justify a tender requirement here.

3. No Other Authority Authorizes the Commission to Order Mandatory Product Returns.

Complaint Counsel cites to alternative sources purportedly tying refunds to mandatory product returns, but none support its position.

First, Complaint Counsel argues that a regulation pertaining to non-binding, voluntary corrective action plans ("CAPs") confers authority on the Commission to order a mandatory product tender in mandatory adjudications. *See* Compl. Counsel Opp. at 45 (citing 16 C.F.R. § 1115.20(a)(1)(vi)). Not so. That regulation addresses only *voluntary* CAPs, which are legally non-binding and in which private parties may agree to take action that the Commission could not order under the statute. A separate regulation governs *mandatory* recalls, and just cross-references the statute. 16 C.F.R. § 1115.21(a). Even on its own terms, the voluntary CAP regulation merely states that "*if* products are to be returned to a subject firm, the corrective action plan should indicate their disposition (*e.g.*, reworked, destroyed, returned to foreign manufacturer)." 16 C.F.R. § 1115.20(a)(1)(vi) (emphasis added). Accordingly, the voluntary regulation simply addresses follow-on actions that firms are to take "if" products are to be returned, not whether the agency has authority to order such returns.

Second, according to Complaint Counsel, two agency documents (the Recall Handbook and CAP template) confirm agency authority to mandate product returns. *See* Compl. Counsel Opp. at 45. Neither staff-prepared document, however, represents anything but a staff—not a Commission—generated list of starting positions used in voluntary recall negotiations.

To begin with, the CAP template does not set out formal agency policy. The agency's Rule 30(b)(6) representative admitted, for example, that [redacted]. As established in Amazon's Opposition, such material reflecting mere "procedure" or "practice"—which has never been ratified by the Commission itself—does "not have the force and effect of

law and [is] not accorded that weight in the adjudicatory process." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 97 (2015) (quotation marks and citation omitted).

Complaint Counsel's reliance on the Recall Handbook similarly fails. The document was neither approved nor ratified by the actual Commission, but was instead authored and disseminated by agency staff. *See* Ex. 60, 2012 Recall Handbook; Ex. 89, 2021 Recall Handbook. Even so, Complaint Counsel cites to the provision in the Recall Handbook regarding development of a plan to quarantine and correct returned products. Compl. Counsel Opp. at 45 (quoting Compl. Counsel SUMF ¶¶ 119, 125). But the Handbook merely addresses returns in situations in which the subject firm has voluntarily negotiated a plan with the agency to require product returns as a mechanism to verify refund entitlement. At most, both the Recall Handbook and the CAP template represent agency starting-point negotiation positions in voluntary recalls, not any policy or regulation that offers any authority in a formal adjudication.

To the extent the Commission seeks to rely on purported policy documents, the most authoritative document in the record cuts against Complaint Counsel's requested relief. [redacted].

Complaint Counsel mischaracterizes the Directive in an attempt to downplay its applicability. [redacted]

[redacted].

In addition to the Directive, public statements by senior Commission staff directly contradict the assertions being made by Complaint Counsel in this adjudication. Just weeks ago, on October 21, 2022, the Executive Director of the CPSC, Jason Levine, stated in a presentation to industry professionals 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."[16] Complaint Counsel cannot meet its burden to establish that the hazard is *not* removed via consumer disposal when the proposition is not fully accepted by the agency itself. If disposal represents an effective recall remedy according to the agency's Executive Director, it is difficult to discern how a second notice requiring return for a refund already provided by Amazon is required to adequately protect the public.

Reliance on the Recall Handbook and CAP Template is indicative of a more fundamental—and erroneous—assumption. According to Complaint Counsel, all remedies ordered by the Commission must be sufficiently "corrective" based only on a staff definition of that term at that particular moment in time. Compl. Counsel Opp. at 47. But Section 15(d) says no such thing. The fact that Section 15(d) prescribes three specific forms of relief (and thus proscribes all others)

[16] *The CPSC Speaks – Chairman Hoehn-Saric and his Executive Team Discuss the Future of the CPSC* at 35:25 (Oct. 21, 2022), *available at* https://www.youtube.com/watch?v=iIn0UCP3iaY&t=8s.

reflects a Congressional determination that those three remedies (repair, replacement, and refund) are, in fact, sufficiently corrective for purposes of product hazard remediation under the CPSA.

B. Complaint Counsel Fails to Meet Its Burden to Establish that Mandatory Product Tender Is in the Public Interest.

Complaint Counsel fails to acknowledge, let alone satisfy, its burden to establish via substantial evidence that its "tender" demand is in the public interest. Instead, Complaint Counsel erroneously attempts to invert the evidentiary burden onto Amazon, but that is not how Congress structured the CPSA. *See* 15 U.S.C. § 2064(d).

In the CPSA, Congress placed the evidentiary burden on Complaint Counsel to establish that its requested relief is in the public interest, by requiring a formal on-the-record adjudicatory hearing satisfying the APA's requirements. §§ 2064(d), (f). If Complaint Counsel fails to carry that burden, its requested relief must be denied. *See Cent. Power & Light Co. v. FERC*, 575 F.2d 937, 939 (D.C. Cir. 1978). Indeed, two separate legal standards set a high bar for Complaint Counsel in meeting its burden to demonstrate that its requested relief is in the public interest. Pursuant to the summary judgment standard, Complaint Counsel was required to "designate specific facts" in support of its requested remedy. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). In addition, any order by the Presiding Officer must be based upon "reliable, probative, and substantial evidence." 16 C.F.R. § 1025.51(b). Complaint Counsel falls short on both requirements.

Complaint Counsel's underlying premise for a tender requirement is that American consumers cannot be trusted to protect themselves by disposing of Subject Products when informed about the hazard. *See* Compl. Counsel Opp. at 47 (assuming that consumers will "continue to use the dangerous product"). In effect, certain agency staff and Complaint Counsel have taken the position that a remedy expressly prescribed by Congress—refund of the purchase

price—is not sufficient unless agency staff deems it to be sufficiently "corrective." As established above, this position contradicts the plain language of the CPSA.

In any event, to support that argument, the law requires Complaint Counsel to identify specific and substantial evidence substantiating that a tender requirement is in the public interest. It has not provided any such evidence.

First, Complaint Counsel claims that it is "undisputed" that Amazon failed to establish that "even a single consumer read Amazon's email." Compl. Counsel Opp. at 47. This purportedly "undisputed" fact, according to Complaint Counsel, fulfills the agency's public interest burden. But Complaint Counsel cites no legal authority for this proposition. To the contrary, it is undisputed that Amazon sent emails to all Subject Product purchasers. Courts routinely hold that where a party establishes that emails were sent, it falls to the opposing party to establish that the emails were not received or read. *See, e.g.*, *Nart v. Open Text Corp.*, 2013 WL 442009, at *2 n.4 (W.D. Tex. Feb. 5, 2013) (listing cases); *Delta Faucet Co. v. Iakovlev*, 2022 WL 900159, at *2 (S.D. Ind. Mar. 28, 2022) ("[C]ourts in this circuit presume that emails are received and read" (citation omitted)). Complaint Counsel has made no attempt to establish that the emails were not received. But even if Complaint Counsel were correct that it fell to Amazon to make such a showing, it would also fall to Complaint Counsel to provide evidence that its requested *additional* notice will be received and read by Subject Product purchasers—a showing it did not make.

Second, Complaint Counsel argues that supposed "common sense" supports its position that a remedy is only "corrective" if purchasers are forced to return the product rather than disposing of the product themselves after being warned of the hazard. Compl. Counsel Opp. at 47. Putting aside the shortcomings in the logic and rigor of Complaint Counsel's "common sense" assessment, an agency cannot rely on purported "common sense" to fulfil its substantial evidence

and public interest burdens. *See* Amazon Opp. at 12 (listing authorities). The same is true regarding purported agency "experience." *See id.* And even if the Commission could rely on common sense instead of evidence, its position makes no sense where purchasers were told over a year ago to destroy the product and provided a full refund. It further makes no sense given that this requested notification would be via email when Complaint Counsel is simultaneously questioning whether such emails are even received by Amazon's customers.

Third, Complaint Counsel cites to Rule 30(b)(6) testimony by a CPSC representative in which he described [redacted] Compl. Counsel. Opp. at 48. Here again, such statements alone do not constitute substantial evidence. None of those snippets of deposition testimony or quotations from the Recall Handbook or CAP Template cite to any empirical evidence.[17] This shortcoming is fatal to Complaint Counsel's requested relief. *See, e.g.*, *NRDC*, 857 F.3d at 1041 (an agency "must support its predicted public-interest scenario with 'substantial evidence when considered on the record as a whole,'" and "where an essential premise of a public-interest finding is only supported by bare assumptions, as in the present case, [a court] will find substantial evidence lacking." (citation omitted)).

Amazon, by contrast, cited extensive evidence, including testimony from the agency's own Rule 30(b)(6) representative and factual findings by the Government Accountability Office, that when a consumer disposes of a product, there is no remaining hazard. *See* Amazon Mot. at 35.

[17] The same applies to the other material cited in Paragraph 129 of Complaint Counsel's Response to Amazon's Statement of Undisputed Material Facts. [redacted]

Amazon cited additional evidence showing that "[c]onsumers are less likely to comply where compliance is inconvenient," and, accordingly, "in-home" remedies "increase . . . the average recall effectiveness rate" compared to a "remedy that required consumers to return the product."[18] As such, Amazon's expert—a highly respected and knowledgeable former CPSC Commissioner—opines that Complaint Counsel's request for product tender "would not be beneficial" to the public. *See* Ex. 62, Mohorovic Rep. at 18–20. Indeed, such evidence 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's Opposition identified no empirical, scientific, or otherwise probative evidence to rebut the extensive academic, government, and expert evidence that product refunds issued in conjunction with information regarding product hazard are sufficient to protect the public interest. Because Complaint Counsel failed to carry its burden, its request to order Amazon to condition refunds on product returns must be denied.

In a last-ditch policy argument, Complaint Counsel attempts to argue that "[c]onditioning a refund on the consumer's return of the Subject Product or proof of its destruction provides an incentive for the consumer to remove the Subject Products from their homes" and "does not in any way create a disincentive for the consumer to dispose of the product on their own." Compl. Counsel Opp. at 48. But this statement by Complaint Counsel is completely nonsensical. Of course consumers are *disincentivized* to dispose of a product on their own when doing so would

[18] Amazon Mot. at 36 (quoting Ex. 94, CPSC_AM0010101 at 10126, Heiden Associates, Recall Effectiveness Research (citation omitted)); *see also* 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).

deprive them of a refund—if they are required to return the product (or take steps to document and prove destruction) as a condition for receiving the refund, then disposing of the product (rather than returning it) would penalize them by depriving them of the refund. And therein lies the fundamental disconnect between Complaint Counsel's view of the agency's authority and the actual text of the statute. As the Fifth Circuit has made clear in interpreting the CPSA, consumers must be trusted to make their own decisions when notified of product hazards: "[i]f consumers have accurate information, and still choose to incur the risk, then their judgment may well be reasonable." *Aqua Slip 'N' Dive Corp. v. CPSC*, 569 F.2d 831, 839 (5th Cir. 1978). And while Complaint Counsel may not be comfortable trusting American consumers to exercise judgment in their own homes, Congress nevertheless has.

IV. No Statutory Authority Permits Ordering Amazon to Take Action Regarding "Functionally Equivalent" Products.

Complaint Counsel asks the Presiding Officer to order Amazon to take action regarding "functionally equivalent" products. In doing so, Complaint Counsel fails to identify any statutory authority that would permit such an order. And the statute itself controverts Complaint Counsel's interpretation. Section 15(d), for example, provides that the Commission may order relief only for "such product[s]" that the Commission has already "determine[d]" to constitute a substantial product hazard. *See* 15 U.S.C. § 2064(d)(1). Complaint Counsel fails to address this limitation. Complaint Counsel similarly fails to acknowledge that Congress is well aware of the terminology for "equivalent" products, as exemplified in its use of such terms in defining a "replacement" product in Section 15(d) itself. *See* Amazon Mot. at 39. But Congress nonetheless declined to use such language when setting the limits of the Commission's remedial authority. *See id.* Nor does Complaint Counsel grapple with congressional usage of similar terminology in other statutes. *See id.* at 40.

Rather than address the key statutory provisions head-on, Complaint Counsel relies on an inapposite provision of Section 15. *See* Compl. Counsel Opp. at 51. In particular, Section 15(b) obligates a firm to report any information that it "obtains" which "reasonably supports the conclusion that [a] product" violates a safety rule or contains a defect which could create a substantial product hazard. *See* 15 U.S.C. § 2064(b). According to Complaint Counsel, because such information at issue in Section 15(b) could encompass more than one product, then Sections 15(c) and 15(d)—which are distinct from Section 15(b)—must be read to apply to entire classes or categories of products. In reality, Section 15(b) establishes a system in which firms notify the agency about products that *may possibly* present a substantial product hazard. *See id.* Once notified of a potentially hazardous product, it is the agency's responsibility to then formally "determine" whether any particular products in fact pose a substantial product hazard. §§ 2064(c)–(d). Notwithstanding information obtained and reported to the Commission, some products may not, in fact, pose a substantial product hazard. Accordingly, Congress included an express prerequisite in Sections 15(c) and (d) that the Commission may not order any remedial action until it has "determine[d]" that each specific product subject to the order, in fact, poses a substantial product hazard. *See* §§ 2064(c)–(d). The Commission's authority to order remedial action under Sections 15(c) and 15(d) therefore does not automatically extend to every product about which it receives notice under Section 15(b)—much less other supposedly functionally equivalent products.

Unable to point to relevant statutory language, Complaint Counsel resorts to the "absurdity" doctrine, arguing that notwithstanding the plain language of the statute, Congress could not have intended to limit the Commission's authority to issue orders relating only to the products which the agency has actually determined to be substantial product hazards. *See* Compl.

Counsel. Mot. at 51. At the outset, Complaint Counsel fails to acknowledge the "high threshold" required to employ the absurdity doctrine. *W. Minn. Mun. Power Agency v. FERC*, 806 F.3d 588, 596 (D.C. Cir. 2015). "Before the Commission can invoke the doctrine of absurd or mischievous consequences to rewrite the statute, it must demonstrate that the plain meaning of the statutory text defies rationality by rendering a statute nonsensical and superfluous." *Id.* (quotation marks and citation omitted). "As long as Congress could have any conceivable justification for a result—even if it carries negative consequences—that result cannot be absurd." *Riccio v. Sentry Credit, Inc.*, 954 F.3d 582, 588 (3d Cir. 2020); *see also Jaskolski v. Daniels*, 427 F.3d 456, 461 (7th Cir. 2005) ("This doctrine does not license courts to improve statutes (or rules) substantively, so that their outcomes accord more closely with judicial beliefs about how matters ought to be resolved.").

Complaint Counsel disagrees, as a matter of policy, with the limits of the Commission's authority under the CPSA. Compl. Counsel Opp. at 51. Complaint Counsel would open the regulatory floodgates by re-writing the CPSA to allow the CPSC to issue a remedial order that would apply to untold "variations" of the Subject Product upon a determination that a particular product poses a hazard. *Id.* But a product that is a "variation" of another product is, by definition, a distinct product. *See Variation*, Oxford English Dictionary (3d ed. 2009) ("The fact of varying in condition, character, degree, or other quality"). As established in Amazon's Motion and Opposition, Congress is well aware of the concept of "equivalent" products, and where it has desired to extend regulatory authority to such products, it has done so expressly. Amazon Mot. at 39; Amazon Opp. at 23–24. Its decision to forego such language here is determinative.

Complaint Counsel likewise fails to carry its burden to identify substantial evidence supporting the various factual claims underpinning its argument. Its conclusory assertion regarding color differences is illustrative. According to Complaint Counsel, two products of the

same size but different colors are functionally equivalent, but Complaint Counsel provides no evidence in support of that claim. Such conclusory assumptions are particularly dubious in the consumer product context where minor changes between products can have important results. Take children's sleepwear, for example. The use of different dyes in the same fabric-type could alter the degree to which that garment is flammable. Indeed, Complaint Counsel fails to acknowledge the example cited in Amazon's Motion in which [redacted]

Complaint Counsel's assertion that products with "style" or "design" similarities necessarily pose the same hazard suffers a similar flaw. Compl. Counsel Opp. at 51–52. Complaint Counsel makes no effort to define what constitutes a "style" or "design" variation, let alone present substantial evidence that such variations necessarily entail the same product hazard. It offers not a single citation to academic, scientific, expert, or any other evidence for these critical assertions.

Nor does Complaint Counsel acknowledge that its request constitutes a major shift in agency policy and practice. It was able to identify a single example in the entire history of the agency (from 1976) in which the Commission purportedly ordered relief for "equivalent" products. *See* Compl. Counsel Opp. at 49 (citing *Relco*, Dkt. No. 74-4, Order at 1). As established in Amazon's Opposition, however, *Relco* carries no weight on the issue of "equivalent" products because the question was not squarely addressed or litigated in that case. *See Cooper Indus., Inc.,* 543 U.S. at 170 ("Questions which merely lurk in the record, neither brought to the attention of

the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." (quotation marks and citation omitted)). Given that the Commission does not, as a matter of practice, order relief for purportedly "equivalent" products, it must justify its departure from the status quo. *See Fox Television Stations, Inc.*, 556 U.S. at 513. In refusing to acknowledge any such departure, Complaint Counsel declines to meet its required burden.

V. An Order to Cease Distribution of the Subject Products Would Serve No Purpose.

Complaint Counsel asks that Amazon be ordered to cease distribution of the Subject Products, but ignores that Amazon has already removed the Subject Products from Amazon.com and destroyed or quarantined those remaining in its possession. Complaint Counsel cites *In re Dye and Dye*, but in that case, no remedial action had yet been taken with respect to the products at issue. Thus, the fact that the manufacturer had stopped producing new units was not dispositive as to whether the manufacturer could continue to introduce products into the stream of commerce by selling or distributing already-produced products. Here, the Subject Products cannot, as a matter of fact, be sold through Amazon. Amazon Mot. at 44. Complaint Counsel's Opposition provides no reason why an order is required to prevent Amazon from distributing products that it voluntarily removed from the market within days of being asked to do so by the CPSC.

Complaint Counsel's only purported justification as to why such an order might be in the public interest has nothing to do with the Subject Products. *See* Compl. Counsel Opp. at 13. Rather, Complaint Counsel argues that a mandatory order is required because of the "hundreds of thousands of [other] products" available on Amazon.com. *Id*. And, as established above, the Commission lacks authority to order relief involving products that it has not actually determined to pose a substantial product hazard. *See* 15 U.S.C. § 2064(d)

VI. The Commission Lacks Authority to Order Monthly Reports.

Complaint Counsel fails to identify any language in the CPSA authorizing the Commission to order Amazon to provide periodic reports to the Commission. Compl. Counsel Mot. at 53–54. Nor does Complaint Counsel offer any retort to the fact that Congress certainly knew how to provide such authorization given that it elected to do so for multiple other federal agencies. *See* Amazon Mot. at 45; Amazon Opp. at 40–41. And while Complaint Counsel may wish that Congress had given Commission staff the same powers it extended to other agencies, it cannot read additional language into the statute as it sees fit.

VII. This Adjudication Violates the Separation of Powers.

As explained in Amazon's Motion, this adjudication is unconstitutionally structured twice over: first, because the CPSC Commissioners who approved the Complaint against Amazon may only be removed from their offices for good cause, and second, because the Presiding Officer is an administrative law judge ("ALJ") enjoying two layers of protection from presidential removal. Complaint Counsel does not defend the constitutionality of the removal restrictions for either the CPSC Commissioners or the Presiding Officer.[19] Instead, Complaint Counsel raises a number of arguments as to why the Presiding Officer should ignore these structural constitutional problems altogether. None are persuasive.

First, Complaint Counsel argues that the Rule of Necessity gives the Presiding Officer license to ignore this issue. *See* Compl. Counsel Opp. at 57 (citing *United States v. Will*, 449 U.S. 200 (1980)). Complaint Counsel misunderstands that doctrine. As Complaint Counsel's cited

[19] Complaint Counsel also does not dispute that, because Amazon seeks only the prospective relief of enjoining agency proceedings, it is "not required to establish a causal link between the asserted constitutional defect"—*i.e.*, the unconstitutional removal restrictions insulating both the CPSC Commissioners and the Presiding Officer from presidential removal—"and the as-yet-unknown result of the administrative proceeding." Amazon Mot. at 50, n.41.

authority confirms, the "Rule of Necessity" permits a judge to . . . take part in the decision of a case in which he has any *personal interest* . . . if the case cannot be heard otherwise." *Will*, 449 U.S. at 213 (quotation marks omitted; emphasis added). Those cases do not stand for the proposition that an adjudicator can ignore a structural constitutional defect if all other adjudicators are also beset by the same defect, a proposition at odds with Supreme Court precedent. *See, e.g.*, *NLRB. v. Noel Canning*, 573 U.S. 513 (2014) (vacating order of the National Labor Relations Board where Board lacked a quorum of constitutionally appointed members due to Appointments Clause violation).

Indeed, at least one tribunal has relied on the Rule of Necessity to conclude that it must address a separation of powers challenge. In a case challenging the removal restrictions relating to Tax Court judges as violative of separation of powers principles, the Tax Court explained that "[w]e conclude that under the Rule of Necessity we may properly act on petitioners' motion. There is indeed a necessity that we do so. Every case before us involves the issue that petitioners here present, and either we must suspend our activity in every case (thereby effectively granting petitioners' motion), or we must go about our business (thereby effectively denying it)." *Battat v. Commissioner*, 148 T.C. 32, 51–52 (2017).

Second, Complaint Counsel argues that the Presiding Officer lacks authority to rule on the constitutionality of either its own removal restrictions or those of the CPSC Commissioners. This argument, too, is unavailing. As to the Presiding Officer's removal restrictions, the Sixth Circuit recently held a similar constitutional claim to be administratively reviewable. *See Jones Brothers*, 898 F.3d at 677 (holding that Department of Labor was "fully suited to entertain" an "alleged constitutional defect" concerning Appointments Clause challenge to Department ALJ). Likewise, as noted, the Tax Court (which is not an Article III court) found it *must* review a separation of

powers challenge provision relating to restrictions on presidential removal. Amazon's challenges to the removal restrictions for CPSC Commissioners are likewise reviewable. Indeed, courts have rejected attempts to bring collateral district court challenges based on appointment or removal clause issues in part because such a claim "arose directly from that enforcement action and serves as an affirmative defense within the proceeding . . . Put another way, the Appointments Clause claim, like accompanying defenses to the merits of the [agency's] charges, is a 'vehicle by which' the appellants seek to prevail in the proceeding." *Tilton v. SEC*, 824 F.3d 276, 288 (2d Cir. 2016).

Third, the Commission is incorrect that Amazon was required to file a motion for disqualification in order to raise the constitutional defects with this proceeding. *See* Compl. Counsel Opp. at 58–89. Presiding Officers can disqualify themselves *sua sponte*. *See* 16 C.F.R. § 1025.42(e)(1) ("When a Presiding Officer considers himself/herself disqualified to preside in any adjudicative proceedings, he/she shall withdraw by notice on the record and shall notify the Chief Administrative Law Judge and the Secretary of such withdrawal."); 5 U.S.C. § 556(b) ("A presiding or participating employee may at any time disqualify himself"). Moreover, as *Tilton* indicates, appointment or removal clause issues "serve[] as an affirmative defense within the proceeding." 824 F.3d at 288. In any event, a motion to disqualify the Presiding Officer would not be a proper vehicle for Amazon to raise its constitutional challenge to the CPSC Commissioners' removal restrictions.

Fourth, even if Complaint Counsel were correct that the Presiding Officer is unable to rule on the constitutionality of the challenged removal restrictions, Amazon still acted properly in preserving these issues for judicial review, which is sometimes but not always required with respect to structural constitutional claims concerning an agency adjudication. *See, e.g.*, *Fleming v. Dep't of Agric.*, 987 F.3d 1093, 1097–98 (D.C. Cir. 2021) (declining to entertain "argument that

the dual layers of for-cause-removal protections for the [Department of Agriculture's] ALJs unconstitutionally limit the President's removal power," because "petitioners did not raise that issue before the ALJ or the Judicial Officer"). Indeed, that courts have suggested this argument may be subject to exhaustion requirements further supports the notion that the ALJ may properly evaluate the argument.

Because this adjudication is unconstitutional, the Presiding Officer should terminate and vacate the proceedings.

CONCLUSION

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

Dated: November 21, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2022, a true and correct copy of the foregoing document was, pursuant to the Order Following Prehearing Conference entered by the Presiding Officer on October 19, 2021:

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

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