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 OPPOSITION TO COMPLAINT COUNSEL'S MOTION FOR SUMMARY DECISION AND MEMORANDUM IN SUPPORT OF OPPOSITION TO COMPLAINT COUNSEL'S MOTION FOR SUMMARY DECISION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

Complaint Counsel bears the burden of establishing that a Commission order is necessary here pursuant to the limiting criteria and purpose of the Consumer Product Safety Act ("CPSA"). It has failed to meet that burden. Congress never intended to empower the Commission to order repetitive rounds of consumer messaging just to align with specific wording preferred by agency staff. Nor did Congress intend to enable duplicative and punitive remedies. In reading Complaint Counsel's brief, one would be simply unaware that Amazon quickly halted sales of all Subject Products, removed the items from Amazon.com, identified all past purchasers, sent personalized emails to each of those purchasers, identified the product hazards in detail, issued full refunds with no strings attached, and provided clear instructions to dispose of the products without delay. Those actions were more than sufficient to protect consumers from unreasonable risk, and fulfilled all of the purposes of the CPSA, consistent with the Commission's own guidance and practices.

Complaint Counsel's Motion essentially ignores these key facts, instead focusing on propositions of little relevance to the remaining remedial legal issues in this case. The Motion's lengthy discussion of the potential hazards posed by the Subject Products, for example, is irrelevant because the Parties have already stipulated that the Subject Products meet the requirements for a substantial product hazard under the CPSA. Similarly, Complaint Counsel's recitation of inapposite legislative history discussing the general nature of product risks and the virtues of government prescription does not address whether the Commission has the authority to order the actual remedies requested by Complaint Counsel here.

Also missing from Complaint Counsel's motion is evidence that the additional notice or remedial actions it seeks would advance the public interest. Instead, Complaint Counsel points to the agency's internal guidance documents, which, in turn, are based on vague references to

"experience"—a series of unsubstantiated assertions built on a foundation of *ipse dixit*. *See Am. Petroleum Inst. v. EPA*, 661 F.2d 340, 349 (5th Cir. 1981) (judicial review "must be based on something more than trust and faith in [the agency's] experience," and courts "are no longer content with mere administrative *ipse dixits* based on supposed administrative expertise" (citation omitted)).

"[S]o-called expertise" cannot constitute substantial evidence when there is no evidence in the record addressing a particular question. *Baltimore & O. R. Co. v. Aberdeen & Rockfish R. Co.*, 393 U.S. 87, 92 (1968). It is particularly insufficient given the dispute here, where Amazon has already taken extensive actions that conform with the Commission's guidelines and past recall practices. Reliance on vague and unsupported notions of "experience" to characterize those actions as insufficient does not meet Complaint Counsel's burden of proof.

To compensate for the absence of evidence, Complaint Counsel would treat the "public interest" standard as essentially meaningless, arguing that the Commission may "draw its own conclusions as to the basic public interest" so long as the Commission's view is "not inconsistent with the purposes of the Act and . . . furthers some recognized public good or minimizes a public harm." Compl. Counsel Mot. at 24. But that is not the law and would give the Commission *carte blanche* to make any demand at any time—no matter how burdensome or prescriptive—and regardless of whether the demand is authorized by statute, only marginally useful, or even undermines the public interest. It is well-established, however, that the public interest standard is not so unfettered. Instead, it looks to the purpose of the statute for "ascertainable criteria" that provide a "standard to guide determinations" of the agency. *New York Cent. Sec. Co. v. United States*, 287 U.S. 12, 24–25 (1932). Blind deference to the Commission in this case would be contrary to precedent and raise serious non-delegation concerns—a subject of renewed attention

by the Supreme Court. *See NFIB v. OSHA*, 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring). Here, the express statutory purpose of the CPSA is to address *unreasonable* risks to consumers in a manner that helps them exercise independent judgment in response to product hazards, not to empower the Commission to order *any* action wherever it can conceive some hypothetical, marginal benefit to consumer safety.

None of the requested remedial actions are needed to address an unreasonable risk. Complaint Counsel's request for additional notice fails because Amazon's notice provided all of the key information required by the CPSA, adequately warned consumers, and was sent to 100 percent of customers who purchased the Subject Products on Amazon.com. Complaint Counsel's proposal would impermissibly expand the agency's mandate to the elimination of *all* possible risks, something Congress never intended.

Additionally, many of the forms of relief the Commission seeks exceed its statutory authority. The CPSA does not authorize the Commission to order action regarding "functionally equivalent" products. Nor does it empower the agency to order product returns, or the issuance of a punitive order requiring a respondent to issue a refund *and* a replacement to the *same* consumer.

By using modern technology and direct customer data, rather than outmoded forms of mass-disseminated press releases, Amazon efficiently and effectively reached all purchasers of the relevant products and provided them with a full refund. Amazon's proactive steps protected consumers from unreasonable risks. Further action is neither in the public interest nor justified under the Administrative Procedure Act ("APA"). Complaint Counsel's Motion for Summary Decision should be denied.[1]

[1] Amazon hereby incorporates the Statement of Undisputed Material Facts ("Amazon SUMF") set forth in its Motion for Summary Decision ("Amazon's Motion"). For ease of reference, Amazon

ARGUMENT

I. The Commission Bears the Burden of Proof to Demonstrate that an Order Is in the Public Interest and Supported by Substantial Evidence.

A. A Substantial Product Hazard Determination Does not Entitle the Commission to Order Corrective Action.

Complaint Counsel devotes eight pages of its brief to arguing about an uncontested issue: whether the Subject Products present a substantial product hazard. That discussion is apparently predicated on the theory that the Commission is automatically entitled to relief based on that issue alone. But that is plainly wrong.

As a threshold matter, the Commission's regulations set a low bar for a substantial product hazard. As Complaint Counsel notes, "[e]ven one defective product can present a substantial risk of injury and provide a basis for a substantial product hazard determination under section 15 of the CPSA." 16 C.F.R. § 1115.12(g)(1)(ii); Compl. Counsel Mot. at 18. But what, if any, remedial action is appropriate is a separate question from whether a substantial product hazard exists—particularly where, as here, Amazon has already taken extensive steps to address any hazard.

Complaint counsel's strategy seems to be to justify a deferential remedial standard—found nowhere in the statute or case law—merely by stressing the potential dangers of the Subject Products. As a factual matter, however, Complaint Counsel fails to identify any instances of property damage, injury, or death in connection with the Subject Products. Neither Complaint Counsel's Motion nor its Statement of Undisputed Facts identifies any such instances. Regardless, the potential danger associated with the Subject Products—in and of itself—does not provide the

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has continued exhibit numbering from its Motion. Amazon Exhibits 1–106 are attached to the September 23, 2022 Declaration of Joshua González filed in support of Amazon's Motion. Amazon Exhibits 107–122 are attached to the October 21, 2022 Declaration of Nicholas Griepsma filed in support of Amazon's Opposition to Complaint Counsel's Motion for Summary Decision.

Commission with greater powers than those conferred by the CPSA, nor can it alleviate Complaint Counsel of its burden in establishing that its proposed remedies are indeed necessary.

Where a substantial product hazard exists, the Commission must determine whether any corrective action requested by Complaint Counsel "is in the public interest" or that notification "is required in order to adequately protect the public." 15 U.S.C. § 2064(c),(d) (Commission "may" order relief after making substantial product hazard *and* public interest determinations). As Complaint Counsel acknowledges, the hazard and public interest determinations are two separate requirements: even if a product poses a substantial product hazard, "an order may be issued only if the Commission determines that such action is in the public interest." *In the Matter of Dye and Dye*, 1989 WL 435534, at *21 (C.P.S.C. 1991). And as established below, Complaint Counsel's proposed test for evaluating the "public interest" finds no support in the CPSA.

B. The "Public Interest" and Substantial Evidence Requirements Limit the Commission's Discretion.

Congress did not include the term "public interest" in the CPSA as a mere makeweight. It reflects a threshold statutory requirement that has "ascertainable criteria," which are determined "from the purposes of the regulatory legislation." *Nat'l Ass'n for Advancement of Colored People v. Fed. Power Comm'n*, 425 U.S. 662, 669 (1976). As established in Amazon's Motion, because the phrase "public interest" is interpreted in light of the relevant statutory purpose, and one of the CPSA's principal purposes is the protection of consumers from "unreasonable risks of injury," it follows that an action by the Commission is in the public interest only if it would protect consumers from an unreasonable risk (or serve another statutory purpose). Amazon Mot. at 8–10.

Complaint Counsel acknowledges that Supreme Court precedent dictates this purpose-based approach to defining the public interest. Yet Complaint Counsel offers a dramatically different interpretation, based on a pair of fifty-year-old district court decisions, that the

Commission may "draw its own conclusions" about what constitutes the public interest so long as the agency's view is "not inconsistent with the purposes of the Act and . . . furthers some recognized public good or minimizes a public harm."[2] Complaint Counsel's overly-deferential interpretation of the phrase "public interest" lacks merit.

First, Complaint Counsel's interpretation runs afoul of binding precedent holding that "the use of the words 'public interest' in a regulatory statute is not a broad license to promote the general public welfare," and any agency remedial action must actually further the relevant statutory purpose. *Nat'l Ass'n for Advancement of Colored People*, 425 U.S. at 669. The notion that the Commission can simply decide for itself what is in the public interest, so long as it is not *inconsistent* with the purpose of the statute and furthers some general notion of good, is a mere restatement of the rejected "general public welfare" approach. Indeed, even the authority Complaint Counsel relies on for its sweeping interpretation recognizes that "the ultimate findings in this respect [*i.e.*, regarding the public interest] must be predicated on proper statutory criteria and amply supported by factual findings." *Buckner Trucking, Inc. v. United States*, 354 F. Supp. 1210, 1222 (S.D. Tex. 1973).[3]

[2] Compl. Counsel Mot. at 24 (citing *Buckner Trucking, Inc. v. United States*, 354 F. Supp. 1210 (S.D. Tex. 1973); *Citizens Organized to Defend Env't, Inc. v. Volpe*, 353 F. Supp. 520 (S.D. Ohio 1972)).

[3] The other case upon which Complaint Counsel relies simply asserts, without citation or explanation, that, with respect to the Transportation Secretary's authority to approve highway construction under the Highway Act, "[a] use is 'in the public interest' if it is not inconsistent with the purposes of the Act and it either furthers some recognized public good or minimizes a public harm." *Citizens Organized*, 353 F. Supp. at 531. This case, however, pre-dates the Supreme Court's subsequent holding in *Nat'l Ass'n for Advancement of Colored People* rejecting "public interest" criteria based on the "general public welfare." For good reason, no court has ever cited or relied upon *Citizens Organized* for its unsupported, outdated, and impermissible public interest test.

Second, Complaint Counsel's interpretation overstates the purpose of the CPSA by arguing that "a primary purpose of the law is to *ensure* the protection of consumer safety above and beyond what industry may deem sufficient." Compl. Counsel Mot. at 25 (emphasis added). The statute itself says otherwise. In its own words, its purpose is "to protect the public against unreasonable risks of injury associated with consumer products," not to *ensure* the absolute protection of consumers from *any* risk. 15 U.S.C. § 2501(b)(1); *see also* 15 U.S.C. § 2051(a)(3) (stating that "the public should be protected against unreasonable risks of injury associated with consumer products"). The Commission may require that notice be issued only if "*required* in order to *adequately* protect the public." 15 U.S.C. § 2064(c)(1) (emphasis added). That more-grounded purpose is sensible because the "achievement of absolute safety" is "an impossible standard." *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 514 (1981). Under Complaint Counsel's formulation, however, *any* remedial action that has *any* safety benefit, no matter how marginal, would be in the "public interest." Not only does that formulation not square with the statutory text, it would again confer essentially unfettered discretion on the Commission to impose any remedy that has even the smallest safety benefit—and install the Commission as the arbiter of whether that benefit exists.

Third, Complaint Counsel simply ignores another purpose of the CPSA: "to *assist* consumers in evaluating the comparative safety of consumer products." 15 U.S.C. § 2051(b)(2) (emphasis added); *see Aqua Slide 'N' Dive Corp. v. CPSC*, 569 F.2d 831, 839 (5th Cir. 1978). Complaint Counsel's contention that the public interest is served by agency actions designed to "ensure" consumer safety seeks to expand the agency's authority beyond the original statutory purpose of the CPSA. The statute contains no language indicating that Congress ever intended such sweeping authority.

Complaint Counsel's overly-expansive interpretation of the "public interest" requirement is not only flawed on its own terms, but also raises serious constitutional concerns. For a congressional delegation of authority to be permissible, the statute must provide "specific restrictions" that "meaningfully constrain[]" agency discretion. *Touby v. United States*, 500 U.S. 160, 166–67 (1991). Providing the Commission with "unfettered discretion to determine" the public interest—as would be the case if the term was left for the agency to determine without meaningful limitation—"presents a constitutional non-delegation issue." *City of Chicago v. Barr*, 961 F.3d 882, 907 (7th Cir. 2020) (*citing Gundy v. United States*, 139 S. Ct. 2116, 2144 (2019) (Gorsuch, J., dissenting)); *see also NFIB*, 142 S. Ct. at 669 (Gorsuch, J., concurring) ("Under OSHA's reading, the law would afford it almost unlimited discretion—and certainly impose no 'specific restrictions' that 'meaningfully constrai[n]' the agency." (citation omitted)). "A construction of the statute that avoids this kind of open-ended grant should certainly be favored." *Indus. Union Dep't v. Am. Petroleum Inst.*, 448 U.S. 607, 646 (1980) (plurality op.); *see Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (reciting the "rule" that statutes must be construed to avoid "serious constitutional problems").

Indeed, the Supreme Court originally upheld a "public interest" test against a non-delegation challenge precisely because it contained "ascertainable criteria" that provide a "standard to guide determinations" of the agency. *New York Cent. Sec. Co.*, 287 U.S. at 24–25. Accordingly, the "public interest" standard must be interpreted "so that it serves . . . as a source of true guidance for the Commission," rather than a standard "so vague as to fail to provide judicially-enforceable constraints on the Commission's exercise of authority." *Office of Commc'n of United Church of Christ v. FCC*, 707 F.2d 1413, 1423–24 (D.C. Cir. 1983).

Complaint Counsel relies on cherry-picked legislative history in an attempt to stress the importance of the Commission's remedial authority. But, for good reason, "legislative history is not the law." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1631 (2018). Nor can Complaint Counsel successfully rely on legislative history to read language "into a statute that is otherwise silent on the subject." *Demby v. Schweiker*, 671 F.2d 507, 511 (D.C. Cir. 1981). Complaint Counsel's reliance on legislator statements and similar material is particularly problematic—these materials are "the sort of stuff [the Supreme Court] ha[s] called 'among the least illuminating forms of legislative history.'" *Advocate Health Network v. Stapleton*, 137 S. Ct. 1652, 1661 (2017).

In any event, the legislative history sheds little light on either the meaning of the phrase "public interest" or the substantive issues presented in this case. Most of the statements Complaint Counsel recites are simply general statements about the importance of addressing dangerous products or the 2008 Consumer Product Safety Improvement Act's ("CPSIA") strengthening of the Commission's authority. *See* Compl. Counsel Mot. at 21–25. But none of that bears on the specific questions presented here: what does the phrase "public interest" mean, and is there substantial evidence demonstrating that the remedial actions requested by Complaint Counsel actually further the public interest in this case? Even to the extent the CPSIA granted the Commission "more power to negotiate and order appropriate remedies," Compl. Counsel Mot. at 21, the legislative history does not clarify in a manner relevant to this case *what* additional powers were conveyed to the agency by Congress, nor does it meaningfully explain the nature and extent of those powers.

Finally, the substantial evidence and other APA requirements further limit the Commission's discretion. Any public interest determination—and issuance of any accompanying order—must comport with the requirements of the APA. *See* 15 U.S.C. § 2064(f). *First*, any

public interest finding must be supported by substantial evidence—and "requiring substantial evidence for public-interest findings … is not just a statutory technicality," but a real requirement. *NRDC v. EPA*, 857 F.3d 1030, 1040 (9th Cir. 2017); *see also* 5 U.S.C. § 556(d) (order must be based on "reliable, probative, and substantial evidence"). *Second*, 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 omitted). *Third*, the agency must treat like cases alike—"[w]here an agency applies different standards to similarly situated entities and fails to support this disparate treatment with a reasoned explanation and substantial evidence in the record, its action is arbitrary and capricious and cannot be upheld." *Burlington N. & Santa Fe. Ry. Co. v. STB*, 403 F.3d 771, 777 (D.C. Cir. 2005). *Fourth*, changes in agency policy must be explicit and supported by reasoned explanation. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009).

In sum, the Commission's authority is not as open-ended as Complaint Counsel asserts and remains limited by the "public interest" standard under the CPSA and well-established arbitrary and capricious standards under the APA. For the reasons set forth below, Complaint Counsel's remedial requests fail to comport with these bedrock requirements.

II. Complaint Counsel's Request for Additional Notice Is Unsupported and Counterproductive.

For the reasons set forth in Amazon's Motion, the additional notice Complaint Counsel seeks is not in the public interest and is arbitrary and capricious. *See* Amazon Mot. at 12–29.

A. Complaint Counsel's Requested Relief Lacks Empirical Support.

Complaint Counsel does not cite a single piece of empirical evidence in its brief or statement of undisputed facts that the additional notice it seeks would have any appreciable safety benefit. It has thus failed to carry its evidentiary burden that additional notice is justified.

In support of its request for additional notice, Complaint Counsel refers instead to (1) agency guidelines regarding the notice content of mandatory recalls; (2) the agency's non-binding Recall Handbook; (3) a non-public, recently-adopted corrective action plan ("CAP") template; (4) internal CPSC Office of Communications guidance about recall alert content; and (5) the Commission's acceptance of recalls in the past that include the notice Complaint Counsel now seeks. *See* Compl. Counsel Mot. at 31–41; Amazon SUMF ¶¶ 115–162. None of these documents or practices reflect analysis of any data evaluating the practical effectiveness of notice. To the contrary, in its final rule promulgating the mandatory recall notice guidelines, "the Commission did not rely on quantifiable 'data.'"[4] 75 Fed. Reg. 3,355, 3,358 (Jan. 21, 2010). And the Recall Handbook, CAP template, and communications guidance likewise contain no citation or basis for any of their notice recommendations.

Instead, in each of the materials it cites, Complaint Counsel purports to rely on "experience conducting recalls," and states that it has ordered similar relief in other cases. 75 Fed. Reg. at 3,357 (noting recall "experience . . . summarized in the recall handbook"); Ex. 89, 2021 Recall Handbook at 4 (noting "staff's expertise in designing and carrying out" corrective action plans); Voluntary Recall Rule, 78 Fed. Reg. at 69,794 (citing "Commission experience"). But "[u]narticulated reliance on Commission 'experience' . . . does not add one jot to the record evidence," and cannot warrant agency action under the APA. *Aqua Slide 'N' Dive Corp.*, 569 F.2d at 841.

[4] The same is true with the Commission's proposed voluntary recall rule. 78 Fed. Reg. 69,793, 69,794 (Nov. 21, 2013) (based on "Commission experience" the "information contained in agency recall guidance materials, including the Recall Handbook," and the mandatory recall rule [16 C.F.R. Part 1115, subpart c]).

The Commission may only issue a remedial order if "supported by and in accordance with . . . reliable, probative, and substantial evidence." 5 U.S.C. § 556(d). Conclusory assertions of expertise and experience do not constitute substantial evidence: "an agency's statement of what it 'normally' does or has done before . . . is not, by itself" sufficient. *CS Wind Vietnam Co. v. United States*, 832 F.3d 1367, 1377 (Fed. Cir. 2016) (citation omitted); *see also In re Sang Su Lee*, 277 F.3d 1338, 1345 (Fed. Cir. 2002) (noting that "[c]ommon knowledge and common sense, even if assumed to derive from the agency's expertise" is not a valid basis for agency action (quotation marks and citation omitted)). "[S]o-called expertise" is not sufficient to constitute substantial evidence when there is no evidence in the record addressing the particular question at issue. *Baltimore & O. R. Co.*, 393 U.S. at 91–92 (invalidating agency determination that a rate "fairly represent[ed]" certain traffic when the record did not contain any evidence of what that was).

The same standard applies to public interest findings: 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." *NRDC*, 857 F.3d at 1041–42 (quotation marks and citation omitted). Where courts *have* found agency experience to be sufficient, agencies have "provided a 'reasoned explanation' by explaining *what* the '[a]gency experience' was and *how* it informed the determination." *Int'l Union v. MSHA*, 626 F.3d 84, 94 (D.C. Cir. 2010) (citation omitted). In part, this is required so that the "experience" is "made part of the record and susceptible to judicial review," and the agency has "adequately record[ed] and explain[ed] that experience." *Nat'l Tour Brokers Ass'n v. ICC*, 671 F.2d 528, 533 (D.C. Cir. 1982). No such explanation appears in any of the cited CPSC materials.

Moreover, the Commission's purported "experience" has shifted over time. For example, the Commission's 2012 Recall Handbook—in effect when Amazon sent its messages—stated that the term "'Important Safety Notice'"—the term used by Amazon in its notices—"should appear" in email notifications. Ex. 60, 2012 Recall Handbook at 24 (discussing "other forms of notice" such as email). By contrast, the 2021 Handbook asserts that "the consistent use of the term 'recall,'" including in direct notices, "is *currently* the best way to ensure consumers' attention."[5] Ex. 89, 2021 Recall Handbook at 17 (emphasis added). Similarly, the position in the 2021 CAP template that [redacted], Eustice Decl. Ex. T, appears nowhere in the 2012 Recall Handbook, which states only that "direct notice to consumers known to have the product"—which Amazon did long ago—"may be appropriate." Ex. 60, 2012 Recall Handbook at 18. Against this background, Complaint Counsel therefore provides no evidence that the relief it seeks above and beyond what Amazon has already done is anything other than its current preference *du jour*. More importantly, to justify its change in policy, the agency is required to acknowledge the change and provide justification for doing so. *Fox Television Stations*, 556 U.S. at 513. Complaint Counsel fails to acknowledge any change in policy or practice, let alone provide the required justification.

Complaint Counsel is further incorrect to imply that the CAP template and Recall Handbook are authoritative agency policy documents to which the Presiding Officer must defer. For example, the agency's Rule 30(b)(6) representative testified that [redacted]

[5] As discussed *infra* Part II.C, even if the term recall is generally "best," it is inappropriate here because it does not accurately describe what Amazon actually instructed consumers to do: dispose of the products rather than return them to Amazon.

[redacted]. Ex. 30, Rose Dep. 187:15–189:22. 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); *cf. Kisor v. Wilke*, 139 S. Ct. 2400, 2416 (2019) (to warrant deference, the agency pronouncement must "emanate" from the agency head or his chief advisors "using vehicles understood to make authoritative policy" such as notice and comment review); *Pub. Citizen, Inc. v. U.S. Dep't of Health & Hum. Servs.*, 332 F.3d 654, 660 (D.C. Cir. 2003) ("[T]he Supreme Court has twice cited 'agency manuals' as an archetype of the kind of document that is not entitled to [*Chevron*] deference.").

Complaint Counsel also points to past recalls which included the notice it seeks here, but these do not establish that those notices are superior to Amazon's. *See* Compl. Counsel Mot. at 35, 37, 39. As the Commission itself has stated, it has "relatively little systematic data" about these corrective actions. 78 Fed. Reg. 49,480, 49,481 (Aug. 14, 2013). The Government Accountability Office ("GAO") has repeatedly reviewed Commission programs and agrees, concluding that the agency "does not systematically track" recall effectiveness data submitted through monthly progress reports[6] and "lack[s] . . . systematized descriptive information on past or ongoing projects."[7] Indeed, what little data the Commission has collected suggests that past recalls have been *ineffective*. As of 2017, the Commission's average correction rate for recalls was approximately 6 percent, which the Commission's own representative testified [redacted] Ex. 30, Rose Dep. 89:8–90:6. And, the Commission has approved many voluntary

[6] Ex. 61, 2020 GAO Rep. at 25.
[7] Ex. 107, 1997 GAO Rep. at 2; Ex. 108, 2009 GAO Rep. Abstract (noting "lack of data" about how minority populations are affected by CPSC activities and product recalls).

recall notices that lack the content Complaint Counsel now seeks. *See, e.g.*, Amazon Mot. at 22 (listing consumer communications that did not use the word "recall"); *id.* at 36 n.34 (listing "corrective actions where the consumer is instructed to either dispose of the product or repair it, without any follow up to verify that the consumer completed the task").

In short, because there is no record evidence demonstrating that the notice Complaint Counsel seeks would be more effective than that already sent by Amazon, Complaint Counsel has failed to carry its evidentiary burden that additional notice is justified.

B. The Additional Notice Content Complaint Counsel Seeks is Unnecessary And Is Not in the Public Interest.

As explained in Amazon's Motion, it has already provided direct notice to 100 percent of customers who purchased the Subject Products on Amazon.com—a rate that far exceeds that of a typical Commission-directed recall. Amazon Mot. at 6, 12–14. Complaint Counsel does not dispute this fact, but instead argues that Amazon's notice was insufficient, and therefore requests *additional* notice that (1) uses the term "recall"; (2) is "announced in coordination with the government agency in charge of consumer product safety"; (3) provides additional information about the hazard, including the possibility of death; and (4) includes a photograph. Compl. Counsel Mot at 31–33, 41. However, these quibbles with Amazon's notice do not render Amazon's direct notice insufficient. Nor do they demonstrate that consumers face an unreasonable risk absent a second round of notice.

The first three items are fully addressed in Amazon's Motion. *First*, use of the term recall is inappropriate and would create consumer confusion where, as here, the Subject Products are not being returned, and requiring the word would be inconsistent with Commission guidance in effect at the time the notices were sent. *See* Amazon Mot. at 21–23. *Second*, additional reference to the Commission is not required by any statutory or regulatory requirement, and Complaint Counsel

offers no evidence that doing so will motivate consumer behavior. *See id.* at 23–24. *Third*, Amazon's direct notices described the hazards of the Subject Products and were consistent with hazard descriptions in other Commission-approved recalls of similar products. *See* Amazon Mot. at 16–20.

A product photograph is likewise "unnecessary" here, notwithstanding that the Commission sometimes includes photographs in mandatory recall cases. 15 U.S.C. § 2064(i)(2)(A)(iii). Amazon identified every purchaser with 100 percent accuracy and sent each a personalized message with an order ID code, item number, and item description of the product they had actually bought.[8] The purpose of including a photograph—to allow consumers to "readily and accurately identify the specific product"—is satisfied. 16 C.F.R. § 1115.27(c); *see also* 78 Fed. Reg. at 69,801 (same for voluntary recall notices).

In any event, Amazon provided consumers the ability to view photographs of the Subject Products. Every purchaser's Amazon account, available on Amazon.com, contains a "Your Orders" page. Oct. 14, 2022 Decl. of Laruen Shrem ("Shrem Decl.") ¶ 9. Here, purchasers can view identifying information about the Subject Product, including a photograph, its name, the order ID, and when it was ordered. *Id.* ¶ 10. Every customer notification that Amazon sent to purchasers contained a clickable link that would take consumers directly to this information; they could also navigate there from Amazon's website directly. *Id.* ¶¶ 11–12. Complaint Counsel's request for Amazon to re-send thousands of new communications to customers is therefore unnecessary and confusing—to the extent any customer was unsure of the product being referenced in the message that Amazon previously sent, the message provided access to a photograph of the Subject Product.

[8] *See, e.g.*, Amazon SUMF ¶¶ 18, 20, 52–53, 71–72, 87–88, 101, 102, 110, 167.

C. The Additional Forms of Notice Complaint Counsel Seek are Unnecessary and Would not Contribute to the Public Interest.

Despite Amazon's direct message to every purchaser of the Subject Products, Complaint Counsel seeks no less than *five* additional forms of notice: (1) additional direct notification; (2) a joint press release, (3) notice on Amazon's website, (4) notice on Amazon's social media, and (5) notification to second-hand sellers.

At the outset, additional and late notice has significant downsides. That is because consumers are constantly bombarded with safety and other notices. Sending out additional duplicative notices would exhaust consumers' mental bandwidth to receive, process, and act on safety messaging, a phenomenon referred to as "recall fatigue." Amazon SUMF ¶¶ 177–88. Each recall communication has an opportunity cost because it commands consumer attention that could otherwise be focused on other hazards, including the hundreds of other recalls the Commission oversees each year. As Amazon's Motion explains, this is a real problem: the CPSC's Deputy Director of Communications agrees that recall fatigue is real, as do former CPSC Commissioners and other government officials. Amazon Mot. at 27–28. Any benefits of additional notice must be weighed against this harm.

Here, the benefit of additional notice is speculative at best, and Amazon's Motion explains why additional direct notice would not serve the public interest. Amazon has *already* identified 100 percent of the purchasers of the Subject Products and sent them a personalized email that described the product in detail; identified the hazard; and clearly instructed them to dispose of the product. Amazon Mot. at 12–21. Amazon's notice contained the key elements of an effective corrective action communication, and is consistent with relevant Commission guidance and practice. Any additional direct notice would come years after consumers had bought the products, meaning they would be less effective: "[s]peed, efficiency," and a "shorter turnaround" are critical

when reaching consumers. Ex. 109, CPSC, Recall Effectiveness Workshop Consolidated Discussion Notes at 1–2 (2017). Thus, additional direct notice would be unnecessary.

Public notice would not provide consumers with meaningful new information, given the strength of Amazon's direct messaging. The Commission's own internal analyses confirm that direct notice recalls are over *nine times more effective* than those involving the type of joint press release Complaint Counsel seeks. *See* Ex. 66, CPSC Presentation, *CPSC Defect Recall Data* at 9–10 (correction rate of 6 percent versus a correction rate of 50 percent). Other agencies have recognized the wisdom of limiting public notice when complete direct notice is possible: the Food and Drug Administration ("FDA"), for example reserves public notice for "urgent situations," 21 C.F.R. § 7.42(b)(2), and guidance states that it is not the default option when "the recalling firm has records that show exactly where the products have gone," in contrast to a scenario where distributors "cannot identify persons to whom the drug or device was dispensed," Ex. 110 (FDA, *Public Warning and Notification of Recalls Under 21 CFR Part 7, Subpart C, Guidance for Industry and FDA Staff* at 6 (Feb. 2019)).

A joint press release would also be inconsistent with established agency policy. The Commission uses "recall alerts,"—another form of notice which are *not* distributed to national news services—when a company can identify all the purchasers for the product. *See* Amazon Mot. at 26–27. Said otherwise, Commission practice and policy makes clear that joint releases are unnecessary when all purchasers can be directly contacted. Complaint Counsel never explains why Amazon's situation is different, even though it has identified all product purchasers.

For similar reasons, inundating social media and Amazon's website would not advance any safety interest. Distributing information more widely to those who did not purchase the Subject Products would not meaningfully improve safety and would contribute to recall fatigue. Moreover,

contrary to Complaint Counsel's characterization, Subject Product information is *already* available to every purchaser on their Amazon.com account. As described above, this information can be readily accessed through the "Your Orders" page. Shrem. Decl. ¶ 10.

Finally, Complaint Counsel seeks an order requiring Amazon to notify potential second-hand sellers of the Subject Products. But Amazon's notice already addressed this concern in precisely the way the Commission has acknowledged is appropriate. Amazon's direct notices included explicit instructions for purchasers to contact others who might have received the product: "[i]f you purchased this item for someone else, please notify the recipient immediately and let them know they should dispose of the item." Amazon SUMF ¶¶ 19, 52, 71, 87, 101. Contrary to Complaint Counsel's suggestion that Amazon foisted this responsibility on to consumers, the Commission has explicitly *endorsed* this approach, stating that "the purchaser will generally know to whom the purchaser gave the product and will likely be able to contact the recipient about the recall notice." 74 Fed. Reg. 11,883, 11,884 (Mar. 20, 2009). Indeed, the Commission has explained that this method of reaching second hand consumers makes them "more likely to receive the direct recall notice than to receive a broadly-disseminated recall notice." *Id.*

Further, Complaint Counsel has produced no evidence that such a step is required: it cites no evidence that there is (or ever was) an active secondary market for any of the Subject Products, despite the agency having a "dedicated e-commerce team that monitors websites for recalled and banned products" and "searches for new and used products that pose a safety hazard and should not be sold." Ex. 111, CPSC, *For Buying and Selling Products Online* at 1. And at least one category of the Subject Products is largely beyond its useful life: the agency's Compliance Officer for sleepwear testified that [redacted]

see Ex. 67 (Carlin Dep. 60:21–61:3), and Amazon ceased distribution of the sleepwear Subject Products roughly two years ago. Amazon SUMF ¶ 5.

D. Ordering Additional Notice Would Violate the First Amendment.

As explained in Amazon's Motion, Complaint Counsel's requested relief would unconstitutionally compel speech by a private entity. Amazon Mot. at 29–30. "For corporations as for individuals, the choice to speak includes within it the choice of what not to say." *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 16 (1986) (plurality opinion); *see also Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 574 (1995) (the government "may not compel affirmance of a belief with which the speaker disagrees" and this "rule's benefit . . . [is] enjoyed by business corporations"). Complaint Counsel's position that Amazon should be forced to send out additional notices, participate in a joint press release, and use its website and social media platforms to communicate Commission-curated messages with specific verbiage underscores the intrusive and involuntary nature of the speech at issue.

To satisfy the First Amendment, Complaint Counsel must prove at a minimum that additional notice "directly advance[s] the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose." *Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 564 (1980). Additionally, "if the governmental interest could be served as well by a more limited restriction," the "excessive restrictions cannot survive." *Id.* Complaint Counsel cannot make this required showing. For the reasons discussed above, further notice would not directly advance any public safety interest. Complaint Counsel offers no meaningful information beyond what Amazon has already provided, and risks crowding out other safety messages as a result of recall fatigue.

III. An Order Directing Amazon to Cease Distribution of the Subject Products is Moot and an Impermissible "Obey-the-Law" Order.

Complaint Counsel's request for an order requiring Amazon to cease distribution of the Subject Products is unnecessary. *See* Compl. Counsel Mot. at 27. Amazon stopped selling the Subject Products within days after receiving the relevant notices from the Commission, quarantined all Subject Product inventory in Amazon's fulfillment centers, and permanently prohibited their sale on Amazon.com. The Subject Products cannot be sold due to a software block that prevents them from even being listed on Amazon.com. Amazon SUMF ¶¶ 7, 28, 42, 61, 79, 96, 109, 116. Complaint Counsel cites no evidence—because none exists—that there have been subsequent sales of *any* of the Subject Products in the almost two years since they were removed from the website. And, as explained in Amazon's Motion at 38–43 (as well as in Part IV, *infra*), the Commission lacks the authority in this proceeding to order Amazon to take action with respect to any products other than the Subject Products.

Complaint Counsel acknowledges that Amazon has already ceased distribution of the Subject Products, but nonetheless argues for a "mandatory, enforceable order" that Amazon not resume distribution of those same Subject Products. Compl. Counsel Mot. at 27–30. But Amazon is already obligated to withhold the Subject Products from sale on Amazon.com. *See* 15 U.S.C. § 2068. The CPSA makes it "unlawful for any person to . . . sell [or] distribute in commerce . . . any consumer product . . . not in conformity with an applicable consumer product safety rule . . . or any similar . . . standard." *Id.* § 2068(a)(1). And Amazon has already stipulated that the Subject Products meet the requirements for a substantial product hazard under the CPSA. Complaint Counsel's request is therefore akin to an impermissible "obey-the-law" injunction. These types of injunctions are largely unenforceable and generally disfavored. *See SEC. v. Goble*, 682 F.3d 934, 949 (11th Cir. 2012) (citing *Burton v. City of Belle Glade,* 178 F.3d 1175, 1201

(11th Cir. 1999) (an injunction which only instructed defendant to "obey the law" would not satisfy the specificity requirements of Rule 65(d)); *Hughey,* 78 F.3d at 1531 ("[A]ppellate courts will not countenance injunctions that merely require someone to 'obey the law.'").

Complaint Counsel's request for an order directing Amazon to notify "others in the distribution chain" to immediately cease their own independent distribution of the Subject Products is unnecessary. Amazon has removed the Subject Products from Amazon.com and has already notified the third-party manufacturers of the Commission's findings regarding the Subject Products. *See, e.g.*, Ex. 113, Amazon-CPSC-FBA-00002346 (notifying seller that [redacted]); Amazon SUMF ¶¶ 122–24.

Complaint Counsel's Proposed Order includes a request that Amazon also immediately cease distribution or sale of purported "functionally equivalent products." Compl. Counsel Proposed Order at 2. Complaint Counsel's brief, however, fails to acknowledge that this request was made only in the proposed order, nor does it provide explanatory argument in support of such relief. And it is well-settled that arguments raised "only summarily, without explanation or reasoning" are waived. *City of Waukesha v. EPA*, 320 F.3d 228, 250–51 & n.22 (D.C. Cir. 2003) (arguments "must be sufficiently developed lest waived" (quotation marks and citation omitted)). Even so, Complaint Counsel's requests involving "functionally equivalent" products fail for the reasons discussed below.

IV. The Commission Lacks Authority to Order Amazon to Take Actions Regarding "Functionally Equivalent" Products.

The Commission lacks authority to order Amazon to take remedial action with regard to unspecified products that Complaint Counsel contends are "functionally equivalent" to the

specified Subject Products. For the reasons set forth in Amazon's Motion, nothing in the CPSA empowers the Commission to order such relief, and doing so would violate the APA. *See* Amazon Mot. at 38–43. Complaint Counsel's motion does not explain the statutory basis for this nebulous request or how it could be practically implemented.

The Commission lacks statutory authority to order action regarding "functionally equivalent" products. As established in Amazon's Motion, before the Commission can order *any* remedy in response to a substantial product hazard, it must expressly "determine" that "the product" at issue constitutes a substantial product hazard. *See* 15 U.S.C. § 2064(d). The Commission therefore lacks statutory authority to order remedies for products *not* expressly determined to pose a substantial product hazard, or to make a hazard determination on a class-wide basis.

Basic rules of statutory interpretation make this clear. The text of Section 15 permits the Commission to order replacement of a particular subject product by providing a "like or equivalent product," *id.* § 2064(d)(1)(B), making clear that Congress knows how to make reference to "equivalent" products when it so desires. Such language appears nowhere in the portions of Sections 15(c) and 15(d) identifying the subject products at issue in a Commission adjudication. Here, the Complaint identified a discrete list of products, and the Parties' hazard stipulation pertains only to that discrete list of products. Under the plain language of Section 15(d), the Commission therefore cannot order relief for any products aside from the Subject Products identified by Amazon Standard Identification Number ("ASIN") in the Complaint.

Comparing the CPSA to similar safety recall-related statutes provides further indication that Congress knew how to give the CPSC authority to order remedial action for equivalent products if that was its intent. *Boumediene v. Bush*, 553 U.S. 723, 776 (2008) ("When interpreting

a statute, we examine related provisions in other parts of the U.S. Code."). For instance, the National Traffic and Motor Vehicle Safety Act's ("MVSA") importation provision requires that vehicles "decided to be substantially similar" presumptively share defects and any noncompliance with safety standards. 49 U.S.C. § 30147. And similar to Section 15, the MVSA authorizes the National Highway Traffic Safety Administration ("NHTSA") to order a recalling entity to replace a defective or noncomplying vehicle with a "reasonably equivalent" one. *Id.* § 30120(a)(1)(A)(ii). Congress clearly knew how to refer to "similar" or "equivalent" products when authoring Section 15, but declined to extend such authority to the Commission when outlining the limits of the agency's remedial authority. *See Boumediene*, 553 U.S. at 776; *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 448 n.3 (2006) ("Our more natural reading is confirmed by the use of the word . . . elsewhere in the U.S. Code.").

The MVSA also includes in its definition of "motor vehicle equipment" any "system, part, or component of a motor vehicle as originally manufactured" and "any similar part or component manufactured or sold for replacement or improvement of a system, part, or component." *Id.* § 301012. An analogous definition is used in the Motor Vehicle Information and Cost Savings Act, which defines "passenger motor vehicle equipment" as "a system, part, or component of a passenger motor vehicle as originally made" or "a similar part or component made or sold for replacement or improvement of a system, part, or component." *Id.* § 32101. *See also Marek v. Chesny*, 473 U.S. 1, 24 (1985) (Brennan, J., dissenting) ("[T]wo consumer safety statutes, the Motor Vehicle Information and Cost Savings Act and the Consumer Product Safety Act[] were enacted in the same congressional session and are similar in purpose and structure."). Where Congress enacts two statutes of similar subject matter—*e.g.*, safety recall authority—in the same session, courts will presume that Congress was aware of the language used in the other statute and

any differences between the two are therefore deliberate. *See, e.g.*, *Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2072 (2018) ("The Congress that enacted both of these [companion statutes] knew well the difference between 'money' and 'all' forms of remuneration. Its choice to use the narrower term in [one of the statutes] requires respect, not disregard.").

As part of its commitment to product safety, Amazon voluntarily goes to great efforts to identify and remove products that could *potentially* pose the same hazard as those determined to pose a substantial product hazard after Commission evaluation and testing. Amazon's efforts related to the Subject Products were indeed extensive, and much of its direct messaging and refund efforts involved additional products never identified to Amazon by the Commission. But the fact that Amazon voluntarily undertakes these efforts does not mean the Commission has statutory authority to *order* Amazon—on pain of penalties for noncompliance—to take those actions. *Cf. Plaskett v. Wormuth*, 18 F.4th 1072, 1087 (9th Cir. 2021) (agency "has no powers except those specifically conferred upon it by statute" (quotation marks and citation omitted)).

Complaint Counsel also fails to provide an administrable standard by which any entity—be it the Commission or Amazon—could reasonably determine whether another product is "functionally equivalent" to a Subject Product. Complaint Counsel suggests that Amazon possesses "technologically advanced internal search mechanisms" that could flawlessly identify all "functionally equivalent" products. Compl. Counsel Mot. at 30. But this argument simply repeats the incorrect assertion that because Amazon voluntarily undertakes certain actions, it can be ordered to undertake those actions as a matter of law. Regardless, any company would be limited in its ability to identify products that pose the same hazard based on product marketing images alone—no such search function can actually determine with any degree of certainty that a different product indeed poses a substantial product hazard under the CPSA.

Complaint Counsel's description of the steps *the agency* undertook to identify purportedly "equivalent" products further demonstrates the extreme difficulty in determining that a product presents the same hazard as another product. For example, Complaint Counsel states that to purportedly conclude that other non-Subject Products were "functionally equivalent" to certain Subject Products, [redacted]

As established above, the Commission may order relief only for products it has expressly determined pose substantial product hazards—not products for which testing "suggests" that a product is similar to another product which posed a hazard. *Cf. Genuine Parts Co. v. EPA*, 890 F.3d 304, 315 (D.C. Cir. 2018) (reliance on "equivocal" report language is insufficient under substantial evidence and APA standards). Given that the Commission's own testing was not definitive, Complaint Counsel lacks any reasonable basis to request an order directing Amazon to identify—let alone take action with regard to—products other than the Subject Products.

Complaint Counsel suggests that this type of request "is not new." Compl. Counsel Mot. at 30. [redacted] *See id.* (citing Eustice Decl. Ex. AA (CPSC_AM0015627 [redacted]

[redacted]). The distinction between manufacturers and distributors is important. [redacted] *See id*. Complaint Counsel's example of a Commission order to cease the manufacture and sale of a welder and "other electric welder[s] of similar design or construction" was likewise directed at the manufacturer. *See* Compl. Counsel Mot. at 29 (citing Eustice Decl. Ex. EE, *In the Matter of Relco, Inc.*, CPSC Dkt. No. 74-4 (Oct. 27, 1976)).[9] Indeed, the Commission's order to investigate products of "similar design or construction" presumes knowledge of those characteristics—knowledge possessed by the manufacturer who has special insight into the design, assembly, and components utilized across product lines.

Given the absence of any statutory authority to order remedies involving products other than the Subject Products, any administrable standard by which Amazon would be required to identify such products, and any historical basis to direct such a remedy to a non-manufacturer, Complaint Counsel's requests for relief involving "functionally equivalent products" must be denied.

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

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

As established in Amazon's Motion, the CPSA specifies three remedies—repair, replace, and refund—none of which include the word "return." *See* Amazon Mot. at 31–34. Complaint

[9] Moreover, *Relco* carries no precedential weight on the notion of purportedly "equivalent" products given that the question was not squarely addressed or litigated in that case. *See Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004) ("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)).

Counsel agrees that those are the only three remedies, Compl. Counsel Mot. at 23, but then goes on to argue that, because of the statutory "purpose," Amazon should be required to facilitate the return and destruction of the Subject Products.

To begin with, that position contradicts bedrock administrative law principles, namely that an agency "has no powers except those *specifically* conferred upon it by statute." *Plaskett v. Wormuth*, 18 F.4th 1072, 1087 (9th Cir. 2021) (emphasis added) (quoting *Int'l Union of Elec., Radio & Mach. Workers v. NLRB*, 502 F.2d 349, 352 n.* (D.C. Cir. 1974)). Complaint Counsel fails to identify *any* reference whatsoever to product returns in Section 15. In the absence of such provisions, the Commission lacks authority to order any remedy not expressly prescribed in the plain language of the CPSA.

Despite the absence of a return remedy in the statutory text, Complaint Counsel seeks to create one by requiring that consumers "tender" products to Amazon in order to receive a refund. As a threshold matter, this argument is beside the point: all purchasers have received a refund already, so there is nothing to be had in exchange for the tender. Amazon SUMF ¶¶ 25, 39, 58, 76, 93, 106, 112. The Commission has no authority to order Amazon to claw-back those refunds and impose a new tender requirement—no portion of the CPSA contemplates making it *harder* for a consumer to obtain their refund. Nor does it have authority to order Amazon to order multiple refunds to the same consumer. *See infra* Part V.C.

In any event, Complaint Counsel's attempt to create a fourth category of remedy—a return in the form of a blanket tender requirement—is unsupported by the statute. Complaint Counsel relies heavily on a 1976 Commission decision, but that opinion openly acknowledges that the CPSA is "silent as to any mandatory tender requirement." On that basis alone, the Commission cannot order product returns—courts must presume that when Congress sets forth an enumerated

list, any items excluded from the list were excluded deliberately. *See Akhtar v. Burzynski*, 384 F.3d 1193, 1199 (9th Cir. 2004). Additionally, in authorizing the Commission to take "one or more of the following actions," Congress is presumed to have deliberately cabined the possible remedies to *only* those enumerated in the list. *See id.* (where Congress used the phrase "any of the following," it "explicitly enumerated circumstances by which [certain benefits could be terminated]," thus triggering "the presumption [that] Congress purposefully excluded all other possible means [for termination]."). [10] Accordingly, the list of remedies identified in Section 15(d)—repair, replacement, or refund—is exhaustive, and precludes authority to order unlisted remedies such as "returns."[11]

Complaint Counsel's reliance on *In the Matter of Relco, Inc.*, is misplaced. Compl. Counsel Mot. at 43 (citing *In the Matter of Relco, Inc.*, CPSC Dkt. No. 74-4, Order at 4–5 (Oct. 27, 1976)). Although the Commission ordered mandatory tender in that particular case, it expressly acknowledged that the CPSA is "silent as to any mandatory tender requirement." CPSC Dkt. No. 74-4, Order at 4–5. *Reclo* also relied solely on legislative history to support its tender requirement, and in doing so defied the maxim that new terms cannot be read into a statute based on legislative history alone. *See Epic Sys. Corp.*, 138 S. Ct. at 1631 ("[L]egislative history is not the law."); *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004) ("[W]hen the statute's language

[10] *See also St. Vincent's Med. Ctr. v. Burwell*, 222 F. Supp. 3d 17, 23 n.4 (D.D.C. 2016) ("By modifying the list of submission methods with the phrase 'any one of the following ways,' the Rule indicates that only one of those three ways is acceptable."); *Luvert v. Chicago Hous. Auth.*, 142 F. Supp. 3d 701, 712 (N.D. Ill. 2015) (use of the phrase "any or all of the following" negated inclusion of any other items in a list); *Kadingo v. Johnson*, 2017 WL 3478494, at *7 (D. Colo. Aug. 14, 2017) (use of the phrase "any of the following" imposed a "negative implication" that anything else not enumerated in the list does not "govern" the subject matter).

[11] Nor may Complaint Counsel rely on references to product return in 16 C.F.R. § 1115.27(d) for propositions foreclosed or contradicted by the Commission's enabling statute. As previously noted, it is Congress who enumerates agency authority, not the agency itself. *See Plaskett*, 18 F.4th at 1087.

is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." (quotation marks and citation omitted)). Indeed, purported Congressional intentions derived from legislative history "regarding a certain subject, where these intentions conflict with the express provisions of existing law, cannot simply be read into a statute that is otherwise silent on the subject." *Demby v. Schweiker*, 671 F.2d 507, 511 (D.C. Cir. 1981). Complaint Counsel's reliance on the statutory purpose as a mechanism to read language into the CPSA is equally unavailing: 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 Telecommunications Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 230–31 & n.4 (1994); *accord, e.g.*, *Hearth, Patio & Barbecue Ass'n v. DOE*, 706 F.3d 499, 506–07 (D.C. Cir. 2013) (applying this principle to effort to regulate consumer products).

Even taken on its own terms, the legislative history does not support product tender as a mandatory prerequisite for a return remedy. Instead, the legislative history suggests that the purpose of any tender requirement was to ensure that remedy recipients had actually purchased the product. *Relco* quotes only a snippet of the relevant committee report. Compl. Counsel Mot. at 43 (citing *Relco, Inc.*, CPSC Dkt. No. 74-4, Order at 5). Quoted in full the House Report states that the Commission was "authorized to specify which persons are to receive refunds where that remedy is elected. This would permit the Commission to control not only who will be entitled to refund but also *what proof of claim* must be made in order for a person to recover the purchase price. Accordingly, the Commission is intended to have authority to specify . . . whether the product must be tendered or whether the sales slip or some other proof of purchase or ownership must be made." Ex. 114, House Interstate and Foreign Commerce Committee, H. Rep. No. 92-1153 at 52 (June 21, 1972) (emphasis added). Thus, the Committee was focused on tender as proof

that a consumer had actually purchased a product, not as a mechanism for creating a *de facto* return remedy.

Notably, the Senate version of the bill contained the language that Complaint Counsel seeks to read into the eventually-enacted version of the CPSA, but Congress ultimately—and deliberately—chose not to use that language. The Senate version of what became Section 15(d) provided that the Commission could order a firm to "refund the purchaser price of such product upon its tender." Ex. 112, 118 Cong. Rec. 21,768, 21,910 (June 21, 1972). At conference, the conferees agreed to the House version of the provision, which did not include that language, Ex. 115 (H. Rep. No. 92-1593 at 52 (Oct. 12, 1972)), and the full Senate adopted the conference report before the bill was signed into law. Ex. 116, 118 Cong. Rec. 36,170, 36,199 (Oct. 14, 1972). Congress plainly considered and rejected the inclusion of a tender requirement for product refunds in the CPSA.[12] And to the extent that an abridged snippet from a House committee report suggests that the Commission nevertheless has authority to require products to be tendered, the purpose of such a condition was to verify that purchasers actually purchased the product, which is not at issue in this case given Amazon's ability to verify purchases electronically.

Complaint Counsel also seeks to read authority to require tenders into a provision that says nothing of the sort. *See* Compl. Counsel Mot. at 45 ("The Commission has broad authority to order refunds and broad authority to 'specify in the order the persons to whom refunds must be made.'" (quoting 15 U.S.C. § 2064(d)(2)). Quoted in full, however, the provision states: "[t]he Commission shall specify in the order the persons to whom refunds must be made if the

[12] *See Goncalves v. Reno*, 144 F.3d 110, 132 (1st Cir. 1998) ("A contrast in statutory language is 'particularly telling' when it represents a decision by a conference committee to resolve a dispute in two versions of a bill, and the committee's choice is then approved by both Houses of Congress.").

Commission orders the action described in subparagraph [1](C)." 15 U.S.C. § 2064(d)(2). Nothing in that sentence suggests that the Commission has authority to order returns, or condition refunds on returns.

Complaint Counsel is also incorrect in asserting that this sentence confers "broad authority"—*i.e.*, the authority to condition refunds upon the return of a subject product. The mere fact that the Commission can specify the persons to whom refunds are to be made does not suggest that the Commission can use that as a vehicle to require product tender and create a return remedy. Instead, the plain-text reading of this provision is that it requires the Commission to specify the persons (manufacturers, distributors, retailers, or individual purchasers) to whom refunds must be issued, and to clarify which individuals are eligible for refunds (*e.g.*, current product owners vs. first-hand purchasers). This reading is supported by Section 15(e)(1), which makes clear that multiple categories of purchasers within a distribution chain could receive a remedy. *See id.* § 2064(e)(1) ("No charge shall be made to any person (other than a manufacturer, distributor, or retailer) who avails himself of any remedy provided under an order issued under subsection (d)[.]"). The legislative history likewise supports this interpretation: the Commission "is intended to have authority to specify whether present owners or only first purchasers are entitled to refund." Ex. 114, House Interstate and Foreign Commerce Committee, H. Rep. No. 92-1153 at 43 (June 21, 1972).

Complaint Counsel's reliance on *In re Zen Magnets, LLC*, is similarly misplaced. *See* CPSC Dkt. No. 12-2, Final Decision and Order, 2017 WL 11672449 (C.P.S.C. Oct. 26, 2017); CPSC Dkt. No. 12-2, Opinion and Order, 2017 WL 11672451 (C.P.S.C. Dec. 8, 2017). There, the respondent sought to limit the extent of any refunds in two ways. First, it sought to provide less than full refunds to consumers who were unable to locate and return at least half of the magnets in

a set exceeding over 1,700 magnets in total. *See Zen Magnets*, Opinion and Order, 2017 WL 11672451, at *10. Second, it sought to exclude purchasers whose magnets were no longer within the useful lifespan of the product, which was approximately three to six months. *See id.* at *8. Pursuant to *Zen Magnets*, the CPSA requirement to specify the persons to whom refunds will be issued therefore addresses situations where a consumer possesses only part of a product, or the product is not within its useful life—it does not confer back-door authority to mandate product returns.

Zen Magnets does not address—let alone support—the argument that the CPSA authorizes the Commission to order product returns. The Commission made no such holding: both the respondent and Complaint Counsel sought to impose product returns in that case. The respondent-manufacturer sought to impose proof of purchase and other conditions on the receipt of a refund in a manner that would reduce the total refund obligation of the company. Opinion and Order, 2017 WL 11672451, at *8. Complaint Counsel, on the other hand, sought returns as a means to force removal of the products from consumers' hands. Compl. Counsel Mot. at 46 (citing Final Decision and Order, 2017 WL 11672449, at *45). Because both Parties sought returns in *Zen Magnets*—albeit for distinct reasons—the underlying question of whether the Commission has authority to require returns was not addressed—the only decision made was what the scope of the return requirement would be.

In sum, the Commission lacks statutory authority to mandate product returns or condition refunds on product returns.

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

Ordering Amazon to demand return of the Subject Products also is not in the public interest. To start, the Commission's operative policy belies Complaint Counsel's unsupported assertions

about the importance of, or need for, returns. As noted in Amazon's Motion, currently operative agency policy states that recall notices should *not* instruct consumers to "take or send the product somewhere for correction or refund" because such actions result in lower correction rates. *See* Amazon SUMF ¶ 133; Ex. 65, CPSC_AM0014049 at 14091 (Commission Directive).[13] To the extent that the Commission now seeks to change course, the APA requires that it (1) acknowledge the change in policy, and (2) provide reasoned explanation for the change. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009). The Commission has done neither.

Additionally, Complaint Counsel largely ignores its burden to establish that the product returns it seeks are in fact in the public interest. Instead, Complaint Counsel bases its requested remedy on a hypothetical: "[w]ithout tender of the Subject Product or proof of the Subject Product's destruction, a consumer could conceivably receive a remedy—like Amazon's issuance of an Amazon credit—and then continue to use the product or give it or sell it to someone else." Compl. Counsel Mot. at 43–44. But reliance on "conceivabl[e]" hypotheticals for the issuance of an adjudicative order is insufficient—the Commission's decision must be "supported by reliable, probative, and substantial evidence." 16 C.F.R. § 1025.51(b); *Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173, 188 (1999) (agencies cannot rely on "mere speculation or conjecture"). Nor can Complaint Counsel avoid its evidentiary burden by attempting to couch its generalized assertions as "commonsense." Compl. Counsel Mot. at 26. "'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." *In re Sang-Su Lee*, 277 F.3d 1338, 1344–45 (Fed. Cir.

[13] To the extent agency Compliance Officers are actively disregarding formal agency policy through their use of a Microsoft Word document known internally as the "CAP template," Complaint Counsel's invitation to rely on such practice and documents as authoritative is wholly improper. *See supra* Part II.A.

2002) ("'[C]ommon knowledge and common sense' . . . are not the specialized knowledge and expertise contemplated by the Administrative Procedure Act." (citation omitted)). Indeed, courts have made clear that to "pass" the public interest "test," an agency "must support its finding with substantial evidence," and "may not satisfy the requirement by simply finding that" an action "has the 'potential' to be in the public interest. Accordingly, where an essential premise of a public-interest finding is only supported by bare assumptions, as in the present case, [courts] will find substantial evidence lacking." *NRDC*, 857 F.3d at 1042.

The same reasoning applies to Complaint Counsel's assertion that "[a]bsent proof that the Subject Products have been removed from commerce, the threat to the safety of consumers remains." Compl. Counsel Mot. at 44. Complaint Counsel both inverts the burden of proof and fails to provide a *single* citation to any supporting evidence in support of this proposition, let alone substantial evidence. *See* 5 U.S.C. § 556(d), 16 C.F.R. § 1025.43(b); *Nat'l Gypsum Co. v. U.S. E.P.A.*, 968 F.2d 40, 44 (D.C. Cir. 1992) (agency failed to satisfy substantial evidence requirement in failing to cite scientific evidence or conduct testing or studies that could have provided such evidence); *Tex Tin Corp. v. U.S. E.P.A.*, 992 F.2d 353, 356 (D.C. Cir. 1993) (agency "was not entitled to merely to assume" proposition where it could have conducted testing, but declined or failed to do so); *PREVOR v. Food & Drug Admin.*, 895 F. Supp. 2d 90, 98 (D.D.C. 2012) (holding "agency's ipse dixit cannot substitute for . . . 'qualitative analysis' or 'scientific information'").

Amazon has already instructed consumers to discard the Subject Products, and the Commission has presented no evidence that ordering returns or destruction would have any meaningful additional safety benefit. The Commission's own Rule 30(b)(6) representative agreed that [redacted] Amazon SUMF ¶ 175; Ex. 30, Rose Dep. 239:2–240:21. And Amazon's direct notice emails advised purchasers

to *immediately* dispose of the product and to inform any other second-hand users to do the same. *See, e.g.*, Amazon SUMF ¶¶ 19, 22, 52, 56, 71, 74, 87, 91, 101, 104, 111, 170. A scientific literature review commissioned by the CPSC further noted that "in-home" remedies "increase . . . the average recall effectiveness rate" compared to a remedy that required consumers to return the product. Amazon SUMF ¶ 132 (citing Ex. 94, CPSC_AM0010101 at 10126 (Heiden Associates & XL Associates, *Recall Effectiveness Research: A Review and Summary of the Literature on Consumer Motivation and Behavior*)). To meet its public interest burden, Complaint Counsel therefore bore the burden of presenting evidence that a meaningful number of consumers who did not respond to Amazon's request to dispose of the products would nevertheless respond, years later, to a request that they go out of their way to return the product. But the record is devoid of evidence indicating that even a *single* such consumer would take action—or even that a single consumer still has a Subject Product.[14]

Complaint Counsel's citations to instances in which the Commission sought product returns in recalls involving children's sleepwear, carbon monoxide detectors, and hair dryers misses the point. Compl. Counsel Mot. at 45–46. Although Complaint Counsel is correct that the Commission frequently approves refund remedies mandating return of the product, the agency also

[14] Complaint Counsel repeatedly asserts—without any supporting evidence—that Amazon's refusal to attach strings to purchaser refunds was a selfish business decision aimed at maximizing cost reduction. Not so. If cost reduction (as opposed to purchaser safety and satisfaction) were the driving factor behind Amazon's decisions, Amazon would not have issued refunds for the numerous additional products not identified by the Commission. And Complaint Counsel's failure to present any evidence in support of its assertion makes sense—it is equally likely that requiring product returns as a condition for receiving a refund would significantly reduce the number of refunds Amazon would be required to issue given that most of the Subject Products were purchased over a year ago. *See, e.g.*, *Zen Magnets*, Opinion and Order, 2017 WL 11672451, at *10 (consumers who failed to return the product would receive no refund and consumers who returned less than 50 percent of the product would only receive a prorated refund). Amazon instead elected to issue refunds to consumers in reliance on its own internal purchase verification information, thus ensuring that *all* product purchasers received a refund.

frequently approves refund remedies that do *not* mandate return of the product. *See* Eustice Decl. Ex. Y, CPSC_AM0015053–391 (Commission approved at least 21 non-return recalls involving children's sleepwear garments, at least one involving hair dryers, and at least two involving carbon monoxide detectors). To the extent the agency approves recalls that did not require product returns as a condition for receipt of a refund but seeks to do so here, the Commission is obligated to supply justification for treating like cases dissimilarly. *See Burlington N. & Santa Fe. Ry. Co. v. STB*, 403 F.3d 771, 777 (D.C. Cir. 2005) ("Where an agency applies different standards to similarly situated entities and fails to support this disparate treatment with a reasoned explanation and substantial evidence in the record, its action is arbitrary and capricious and cannot be upheld."). The Commission failed to do so.

C. The Commission Cannot Order More than One Refund for the Same Product.

For the first time in this case, Complaint Counsel requests that multiple refunds be issued for the same product. But Section 15(d) makes clear that a "refund" is not to exceed "the purchase price" of the Subject Product. 15 U.S.C. § 2064(d)(1)(C). Here, Amazon (not third-party sellers) issued full refunds to all original purchasers of the Subject Products. This was a substantial undertaking by Amazon—it provided in excess of 20 million dollars in refunds. Amazon SUMF ¶ 112. The Commission cannot (and should not) order duplicative refunds that would necessarily exceed "the purchase price" of the Subject Products. *See* 15 U.S.C. § 2064(d)(1)(C). Simply put, there is no plausible reading of the statute that authorizes the Commission to order a second refund when the purchaser has already received a full purchase price refund.

Once again, Complaint Counsel turns to legislative history, which in fact cuts against its request for duplicative refunds. According to the House Report, the Commission "is intended to have authority to specify whether present owners *or only* first purchasers are entitled to refund." Ex. 114, House Interstate and Foreign Commerce Committee, H. Rep. No. 92-1153 at 43 (June

21, 1972) (emphasis added). This report thus indicates that remedies could be provided to present owners of the product (which could be original or second-hand purchasers) "or only" original purchasers, but not both. More than one person cannot receive a remedy for the same Subject Product.

D. Complaint Counsel Cannot Seek Product Replacement as a Remedy, Nor Would Such a Remedy Promote the Public Interest.

In an attempt to skirt around the plain language of the CPSA, Complaint Counsel now suddenly requests, for the first time in this action, that Amazon be directed to provide replacement products. Complaint Counsel cannot seek new remedies at this stage, and even it if could, such a remedy is not in the public interest.

The Complaint makes no reference to product replacement. To the contrary, it states that Complaint Counsel seeks an order that Amazon "[r]efund the full purchase price to all consumers who purchased the Subject Products and, to the extent not already completed, condition such refunds on consumers returning the Subject Products or providing proof of destruction." Compl., Relief Sought ¶ 4(a). Nor did Complaint Counsel provide any notice to Amazon of its intent to seek a product replacement remedy in the discovery phase of the action, including in its response to Amazon's Interrogatory seeking more detail about the Prayer for Relief. *See* Ex. 45, Responses to Respondent's First Set of Interrogatories at 26.[15] Any new demand is thus prejudicial, as Amazon lacked a fair opportunity to explore that potential remedy in discovery. Complaint Counsel effectively seeks to amend its Complaint, but failed to seek leave to do so as required

[15] Amazon's Interrogatory No. 14 asked Complaint Counsel to "describe fully and completely the remedy or remedies you seek." In response, Complaint Counsel only made reference to its request for product returns: "[r]espondent must facilitate the return and destruction of the Subject Products[.]" Ex. 45, Responses to Respondent's First Set of Interrogatories at 26. Complaint Counsel then provided a bare bones statement that the remedy would "promote[] the removal of hazardous Subject Products from homes and the stream of commerce." *Id.*

under the CPSC Rules of Practice. *See* 16 C.F.R. § 1025.13 (the Presiding Officer may only allow "appropriate" amendments "which do not unduly broaden the issues in the proceedings or cause undue delay"). Complaint Counsel has made no effort to establish that those requirements are fulfilled, nor could it. Indeed, Amazon is entitled to fair notice of the remedial aspects of the case. *See, e.g.*, *Santa Clara Valley Water Dist. v. Olin Corp.*, 2009 WL 667429, at *2 (N.D. Cal. Mar. 13, 2009) ("Due process plainly requires" notice "of the nature or magnitude of the [requested] relief"). Complaint Counsel is therefore barred from seeking an entirely new remedy in its present motion.

In any event, the statute does not authorize Complaint Counsel's replacement request on these facts. While the statute authorizes the Commission to order "any one or more" of the prescribed remedies: repair, replacement, or refund, Compl. Counsel Mot. at 42 (quoting 15 U.S.C. § 2064(d)(1)), it does not indicate that multiple remedies can be issued *to the same consumer*. The statute is designed to address unreasonable risk in a fashion that makes the consumers whole—*i.e.*, that replaces or repairs the product, or refunds the consumer's purchase price.[16] For example, in providing a remedy, a company must not "charge" any person, and must "reimburse each person . . . who is entitled to such a remedy for any reasonable and foreseeable expenses incurred by such person in availing himself of such remedy," so that the consumer is actually made whole. 15 U.S.C. § 2064(e)(1). But ordering a replacement in addition to a refund would go beyond making consumers whole, and instead effectively penalize companies.

[16] *See, e.g.*, Ex. 69, Amazon-CPSC-FBA-00001348, at 01414, Tr. of Effectiveness Workshop (statement of Tanya Topka, former Compliance Lead in CPSC's Office of Compliance and Field Operations) (goal of a recall is "making sure that a consumer gets made whole"); Ex. 117, H. Rep. No. 110-501 at 40 (Dec. 19, 2007) (the purpose of the statute is to "ensure that repairs or other remedies offered after a recall meet the needs of consumers and continue to provide the functionality that consumers expected when initially purchasing a product").

The Commission's authority to order more than one form of relief is designed to address differently-situated consumers. The joint press releases involving similar products confirm this common-sense reading of the statute. In such instances, firms offered both replacements and refunds, but each individual consumer would choose to select one or the other, *but not* both.[17] The novel relief Complaint Counsel seeks relief beyond the plain language of the CPSA and is contradicted by the agency's own practices.

Complaint Counsel offers nothing in terms of establishing how replacement (as opposed to a refund) is necessary for the public interest here. Complaint Counsel simply rests on the unsupported assertion that "[t]he public interest demands" product replacement. Compl. Counsel Mot. at 50. But Complaint Counsel's mere say-so does not carry its burden, and the failure to advance any evidence on this point is dispositive. *Greater New Orleans Broadcasting Ass'n*, 527 U.S. at 188 (agencies cannot rely on "mere speculation or conjecture"). Complaint Counsel's eleventh hour and unsupported request for a duplicative replacement remedy should be denied.

VI. Complaint Counsel Tacitly Acknowledges that the Commission Lacks the Statutory Authority to Require Amazon to Submit Monthly Progress Reports.

As explained in Amazon's Motion, at 44–45, the Commission lacks the statutory authority to require firms to submit monthly progress reports. This omission stands in stark contrast to other agencies that Congress has specifically authorized to require periodic progress reports. For

[17] *See, e.g.*, Ex. 118, CPSC Recall No. 19-747 at 3 ("Consumers should immediately take the recalled sleep sacks away from children, stop using them and contact American Apparel for a full refund or a replacement product of similar value."); Ex. 119, CPSC Recall No. 14-017 at 3 ("Consumers should immediately take the recalled pajama sets away from children and contact L.L. Bean to receive a free replacement garment, a full refund or store gift certificate."); Ex. 120, CPSC Recall No. 15-122 at 3 ("Consumers should immediately take the recalled pajamas away from children, stop using them and return them to Roberta Roller Rabbit for instructions on receiving a free replacement pajama set or a full refund."); Ex. 121, CPSC Recall No. 22-080 at 6 ("Consumers should immediately take the recalled sleepwear garments away from children, stop using them and contact the firm for a free replacement garment or a full refund.").

example, Congress expressly empowered the FDA to collect "periodic reports . . . describing the progress of the recall," 21 U.S.C. § 360h(e)(2(A). The NHTSA's enabling statute—passed 6 years before the CPSA, similarly requires that the relevant commercial entity submit "quarterly" and "annual report[s]" on the status of notification campaigns, 49 U.S.C. § 30118(f)(1); *see also Acree v. Republic of Iraq*, 370 F.3d 41, 61 (D.C. Cir. 2004) (Roberts, J., concurring) ("[U]se of different language in two statutes so analogous in their form and content, enacted so close in time, suggests that the statutes differ in their meaning, and that the facially broader language was in fact intended to have the broader scope."). These are just two of many examples. *See* Amazon Mot. at 44–45 (noting the authority of the Secretary of Health and Human Services under 21 U.S.C. § 3501(d)(1)(C) to "require periodic reports . . . describing the progress of the [food safety] recall"). Congress knew how to empower an agency to order and collect periodic reports from a private entity, but chose to do otherwise in the CPSA.

Rather than cite to actual statutory authorization, Complaint Counsel insists that the staff-created CPSC Recall Handbook and CAP template documents provide the needed basis for a Commission order mandating monthly progress. Compl. Counsel Mot. at 52. Of course, such agency-generated documents cannot convey new authority to the agency not granted by Congress—the agency's authority is limited to that which is prescribed expressly in the CPSA. *See Plaskett*, 18 F.4th at 1087 (agency "has no powers except those specifically conferred upon it by statute"). Reliance on such documents is further insufficient for the reasons set forth below.

First, Complaint Counsel relies on the 2021 version of the CPSC Recall Handbook, which was not in effect at the time that that Amazon removed the Subject Products from Amazon.com and sent the corresponding notices and refunds to the product purchasers. Amazon SUMF ¶ 156.

Complaint Counsel fails to acknowledge—let alone justify—its attempt to rely on a document that went into effect *after* the time period at issue in this case.

Second, the cover of the Handbook plainly states that the document was drafted by staff and was never approved or ratified by the Commission: "[t]his handbook was prepared by the CPSC staff, and has not been reviewed or approved by, and may not necessarily reflect the views of, the Commission." Ex. 89, 2021 Recall Handbook at 1. A non-binding guidance document obviously cannot confer additional statutory powers on the Commission, nor is it entitled to *Chevron* deference as it does not "speak with the force of law." *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001).

Third, as previously established, the CAP template [redacted]

See id. It has no legally binding effect and does not grant the Commission the authority to require monthly progress reports, particularly in the context of a mandatory recall proceeding. *See* 16 C.F.R. § 1115.20(a).

In any case, Amazon has verified that the Subject Products are no longer available on Amazon.com, that all purchasers have received refunds, and that all but six units of inventory have been destroyed. *See* Amazon Mot. at 45. Requiring monthly progress reports on actions that have essentially been completed serves no purpose and thus is not in the public interest.

CONCLUSION

For the foregoing reasons, the Presiding Officer should deny Complaint Counsel's motion for summary decision.

Dated: October 21, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 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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