UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of AMAZON.COM, INC. Respondent.	)	CPSC DOCKET NO.: 21-2

COMPLAINT COUNSEL'S ANSWERING BRIEF TO
RESPONDENT AMAZON.COM, INC.'S APPEAL BRIEF

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COMPLAINT COUNSEL'S ANSWERING BRIEF

Pursuant to 16 C.F.R. § 1025.53(c), Complaint Counsel files this Answering Brief in response to Respondent Amazon.com, Inc.'s ("Amazon's" or "Respondent's") Appeal Brief (Dkt. No. 127, hereinafter "Amazon Brief").

I. INTRODUCTION

Throughout this Section 15 proceeding, and again here at the appeal stage, Amazon—by any measure, one of the single largest firms in the market for consumer goods in the United States—has repeatedly sought to exempt itself from federal consumer product safety laws. Despite its direct involvement in every step of the sale and distribution of millions of consumer products through its Fulfillment By Amazon ("FBA") program, Amazon claims its activities are not regulated by the Consumer Product Safety Commission ("CPSC" or the "Commission"). Indeed, despite acknowledging that, through its FBA program and Amazon.com, it delivered to consumers at least 400,000 dangerous hair dryers, children's sleepwear garments, and carbon monoxide detectors (the "Subject Products"), Amazon argues that the only recourse for consumers is to rely on Amazon's good will and self-regulation. Amazon believes that it cannot be made to refund consumers except in its own chosen manner, that it can unilaterally narrow a remedial order if the full scope of hazardous products conflicts with its proprietary product listing system, and that it can refuse to provide notice of a product hazard in any form that differs from what Amazon deems to be sufficient. If that were not enough, Amazon also claims that any attempt by the Commission to remediate a product hazard in the public interest—rather than in Amazon's business interests—violates the Constitution.

This is precisely the opposite of what the Consumer Product Safety Act ("CPSA") requires. Congress created the Commission in 1972 because the existing patchwork regime of state laws and

industry self-regulation had led to "an unacceptable number of consumer products which present unreasonable risks of injury [being] distributed in commerce." *See* 15 U.S.C. § 2051(a). As a result, among other things, the law empowers the Commission to establish and enforce rules and regulations governing distributors of consumer products, *see* 15 U.S.C. § 2052, and it grants the Commission the authority to initiate mandatory enforcement proceedings against such distributors to remedy products that the Commission determines present a substantial product hazard to the public. 15 U.S.C. § 2064. Through these proceedings, Congress granted the Commission discretion to order distributors to "refund the purchase price" of hazardous products and to "specify . . . the persons to whom the refunds must be made." 15 U.S.C. § 2064(d)(1)(C), (d)(2). Further, to inform consumers about the product hazard and the available remedies, Congress granted the Commission discretion to order distributors to give "notice to every person to whom . . . such product was delivered or sold" and to "specify the form and content" of that notice. 15 U.S.C. § 2064(c)(1)(F). These are straightforward statutory provisions that the Presiding Officers have applied to the facts of this case in a routine manner. Amazon's arguments to the contrary would let business interests prevail over consumer safety, are unsupported as a matter of law, and are unavailing as a matter of fact.

First, contrary to Amazon's claims, the initial Administrative Law Judge ("ALJ") in this proceeding, James E. Grimes (hereinafter "ALJ Grimes"), correctly found that Amazon is a distributor of FBA program products under the CPSA, because it "holds" FBA products both "for sale" and "for distribution." Second, contrary to Amazon's assertion that it qualifies for an exception applicable to certain third-party logistics providers, ALJ Grimes correctly held that Amazon does not meet the statutory definition for a third-party logistics provider, given the broad range of its activities in the FBA program and its considerable involvement in the sale and

servicing of the Subject Products. For many of the same reasons, Amazon falls outside the narrow exception for certain entities whose only role is to receive and transport goods. Third, while Amazon raises various challenges to the Commission's authority to order a refund conditioned on product tender or proof of destruction, the second ALJ assigned in this matter, Jason S. Patil (hereinafter "ALJ Patil"), correctly held that such a remedy was authorized by the CPSA, consistent with Commission practice and precedent, and in the public interest in this case. Further, Amazon's suggestion that an ordered refund would be an unconstitutional transfer of Amazon's funds to purchasers of the Subject Products has no support in the law. Fourth, despite Amazon's efforts to narrow this case to particular product listings, the scope of any ordered remedies should apply to all Subject Products, regardless of any cosmetic variations and regardless of how such products distributed through the FBA program appear on Amazon.com. Fifth, contrary to Amazon's arguments that notice to consumers via direct messages and Amazon's primary social media accounts is not required to adequately protect the public, ALJ Patil correctly ordered these forms of notice to address the ongoing hazard presented by the Subject Products. And despite Amazon's assertions, ordering such notice does not violate the First Amendment. Finally, Amazon's additional constitutional challenges to the structure of the Commission and of this proceeding are unsuited to resolution in this forum and also fail as a matter of law.

In short, Amazon's appeal fails to establish any of its challenges to the Initial Decision.[1] More fundamentally, Amazon is wrong that either its decision to avoid taking title to FBA

[1] There are three separate decisions that are the subject of Amazon's appeal: one order issued by ALJ Grimes (Dkt. No. 27, Order on Motion to Dismiss and Motion for Summary Judgment), and two issued by ALJ Patil (Dkt. No. 109, Order on Summary Decision Motions, and Dkt. No. 119, Initial Decision and Order on Remedies, which incorporated Dkt. Nos. 27 and 109). For ease of reference, Complaint Counsel will refer to the three decisions as the "Initial Decision," citing to the applicable docket numbers for each individual order.

products, or its decision to take unilateral remedial action, in any way limits the Commission's authority or discretion to order the full remedies and notice available under the CPSA. To allow Amazon to evade its legal obligations under the CPSA to take corrective action regarding unsafe FBA products, including unsafe products manufactured by difficult-to-reach foreign entities, would invite hazardous products to flood U.S. markets with impunity and thwart the fundamental purpose of the federal regulatory regime for consumer products.

II. UNDISPUTED FACTS REGARDING AMAZON'S FBA PROGRAM AND THE SUBJECT PRODUCTS

Amazon operates Amazon.com, a website on which products are sold to consumers. Dkt. No. 10, Complaint Counsel's Statement of Undisputed Material Facts (hereinafter "SUMF") ¶ 1. One business lane through which products are sold on Amazon.com is Amazon's FBA program, in which entities list products for sale on Amazon.com. SUMF ¶ 2. When sellers contract with Amazon in its FBA program, Amazon, among other things, "stores products and delivers [them] to customers." *Id.*[2]

Participation in Amazon's FBA program "is governed by a Business Services Agreement and other policies." *Id.* at ¶ 5. Products on Amazon.com are automatically assigned and identified by product listings known as Amazon Standard Identification Numbers ("ASINs"). *Id.* Amazon also requires third-party sellers to abide by specific FBA features, services, and fees that it communicates to them via its online seller central portal. *See id.* ¶ 19.

Through its Amazon Services Business Solutions Agreement ("BSA"), Amazon requires that sellers represent and warrant to Amazon that they have "all necessary rights to distribute" the

[2] Amazon also operates at least two other business lanes though which products are sold on Amazon.com. One in which Amazon sells products on Amazon.com as a retailer, and another in which third parties participate in Amazon's Merchant Fulfilled Network ("MFN") and "elect to store products and fulfill orders on their own." SUMF ¶ 3.

products that they list on Amazon.com. *Id.* ¶ 6. However, sellers participating in Amazon's FBA program do not send their products to customers who order them through Amazon.com. *Id.* ¶ 7. Instead, the sellers deliver their products to Amazon. *Id.*; *see also* Dkt. No. 27 at 7 n. 7. Amazon does not take legal title to these products, but Amazon does control the products throughout the sale process. In addition, Amazon possesses the authority to refuse registration in the FBA program of any product, including on the basis that the product violates any applicable FBA program policies. SUMF ¶ 23 (referencing Section F-1 of the Fulfillment By Amazon Service Terms).

After receiving an FBA product, Amazon provides a number of services, including "storing . . . sellers' products in Amazon fulfillment centers; using technology to track, move, and ship products to customers; processing product returns; and delivering or arranging for delivery to customers." SUMF ¶ 8. As part of its FBA program, Amazon "generally maintains electronic records to track products, including products belonging to . . . sellers, at Amazon warehouses and facilities . . . ." *Id.* ¶ 10. This tracking facilitates Amazon's provision of services through its FBA program. *Id.*

After storing sellers' products, Amazon "fulfills orders placed by customers for products sold by . . . sellers on Amazon.com." *Id.* ¶ 11. When fulfilling orders, "multiple products ordered by a customer from different third-party sellers may be combined in one shipment to that customer." *Id.* ¶ 12. Amazon "employees and equipment may be used to fulfill orders for products sold by third-party sellers." *Id.* ¶ 13.

In addition to storage and shipping services, Amazon provides 24/7 customer service to purchasers of an FBA seller's products as part of its FBA program. *Id.* ¶ 14. Indeed, to the extent

that sellers need to communicate with customers regarding orders on Amazon.com, they must do so exclusively through the Amazon platform. *Id.* ¶ 15.

Amazon's role continues well after the consumer receives ordered FBA products. Upon receiving a returned product from a customer, Amazon "inspects it and decides whether it can be resold." Dkt. No. 27 at 6. Such products may be "shipped to Amazon for processing, and thereafter may be returned to the third-party seller, handled by Amazon in accordance with the third-party seller's instructions, or transferred by the third-party seller to Amazon for later sale through the 'Amazon Warehouse' program." SUMF ¶ 16; Dkt. No. 109 at 7.[3]

Sellers pay Amazon fees for the services Amazon provides through its FBA program. SUMF ¶ 18. Amazon's "FBA fulfillment fee" information, provided via link in its Answer to the Complaint, lists at least 5 categories of fees that may be charged through Amazon's FBA program. *Id.* ¶ 19. These categories include fulfillment fees for FBA orders, monthly inventory storage fees, long-term storage fees, removal order fees, returns processing fees, and unplanned service fees. *Id.* Amazon processes customer payments, charging the payment instrument designated in the customer's account, and remits the agreed-upon monies to the seller minus the FBA program fees set forth in the applicable contract. *Id.* ¶¶ 20, 27.

Amazon also applies a Fair Pricing Policy to prices charged by third-party sellers using its FBA program, and that Policy allows Amazon to take action against sellers whose pricing practices

[3] When a product is transferred to Amazon through the Amazon Warehouse program, Amazon takes legal title to it and is contractually empowered to sell the product as a retailer. SUMF ¶ 17. Amazon therefore possesses the contractual authority, such as that set forth in Section F-9.3 of the Fulfillment By Amazon Service Terms, to receive an FBA product through a customer return, handle the product, and sell it on Amazon.com. *Id.*

violate the policy. Prohibited pricing practices include "setting a price on a product or service [on Amazon.com] that is significantly higher than recent prices offered on or off Amazon." *Id.* ¶ 21.

Overall, a customer ordering, receiving, and getting notices relating to an FBA product will deal only with Amazon. *Id.* ¶¶ 24-32. This control is illustrated by the experience of a CPSC Internet Investigative Analyst who purchased one of the Subject Products at issue in this matter, a carbon monoxide detector, in July 2020.[4] *Id.* ¶ 24. When the Analyst purchased the product, it was listed as "Sold by TJTQQZHZ and Fulfilled by Amazon." *Id.* ¶ 26. After purchasing the product, the Analyst received an email from Amazon (auto-confirm@amazon.com) confirming the order and stating "[t]he payment for your invoice is processed by Amazon Payments, Inc. P.O. Box 81226 Seattle, Washington 98108-1226." *Id.* ¶ 27. On the order page for the product, the Analyst also received numerous advertisements for other products she recently purchased or may be interested in "based on your [her] shopping trends." *Id.* ¶ 28. She received the product on August 5, 2020. *Id.* ¶ 29.

More than ten months after receiving the product, on June 11, 2021, the Analyst received an email from Amazon Product Safety (order-update@amazon.com) with the Subject Line "Attention: Important safety notice about your past Amazon order." *Id.* ¶ 30. The message informed the Analyst that "We [Amazon] have learned of a potential safety issue that may impact your Amazon

[4] The CPSC Internet Investigative Analyst is competent to attest to the experience of a customer ordering, receiving, and getting a safety notice for an FBA product from Amazon as she is an Internet Investigative Analyst with personal knowledge of all that she attests to, she routinely purchases products as part of her duties, and the documents she relies upon are complete and part of her regular conduct of business. *See Walling v. Fairmont Creamery Co*., 139 F.2d 318, 322 (8th Cir. 1943); *Zampos v. U.S. Smelting, Ref. & Min. Co.*, 206 F.2d 171,174 (10th Cir. 1953) (stating that an affidavit supporting a motion for summary judgment must be made not only on personal knowledge of the affiant, but must show that the affiant possesses the knowledge asserted, and must fully exhibit any written documents relied upon).

purchase(s) below:" and then listed the Order ID numbers of the affected purchases. *Id.* ¶ 31. The notice further stated that there was no need for the Analyst to return the product, and that Amazon was applying a refund in the form of a gift card to her Amazon Account. *Id.* ¶ 32. It included a link to view her available balance and activity on Amazon.com. *Id.* The message was signed "Sincerely, Customer Service, Amazon.com." *Id.* At no point during the purchase, notification, or refund process did Amazon refer to the seller when dealing with the purchasing consumer. *Id.* ¶ 33.

The products at issue in this case are violative children's sleepwear garments and defective carbon monoxide detectors and hair dryers (the "Subject Products"), as identified in Section V of the Complaint. The record establishes that the Subject Products are consumer products. SUMF ¶¶ 34, 37, 40. The parties stipulated to the fact and the record shows that the Subject Products meet the requirements for a substantial product hazard: the children's sleepwear fail flammability standards, the carbon monoxide detectors fail to detect carbon monoxide, and the hair dryers lack parts necessary to prevent electrocution. Dkt. No. 109 at 4-6. ALJ Patil found that there was no dispute as to whether each category of Subject Product presented a substantial product hazard and further found that the children's sleepwear garments risk the occurrence of fire that could lead to death, *id.* at 13, the carbon monoxide detectors place consumers at risk of "serious health consequences," *id.* at 14, and the hair dryers pose "a significant electric shock and electrocution hazard to consumers." *Id.* at 15.

More than 400,000 units of Subject Products were sold to consumers by sellers on Amazon.com through Amazon's FBA program. Dkt. No. 109 at 4. Accordingly, the Subject Products were delivered to Amazon by the sellers. Dkt. No. 27 at 7 n. 7. Amazon received and stored the Subject Products under the FBA program. SUMF ¶¶ 35, 38, 41. In summary, the

Subject Products listed in the Complaint "were sold by third-party sellers on Amazon.com and the orders for the Subject Products were fulfilled by Amazon through its" FBA program, "except for a limited number of units of the Subject Products that were transferred from third-party sellers to Amazon and later sold through the 'Amazon Warehouse' program" in which Amazon is the retailer. *Id.* ¶ 4; *see also* Dkt. No. 27 at 23; SUMF ¶ 43 (admitting that Amazon received approximately 28 units of the carbon monoxide detectors and approximately 4 units of the hair dryers from consumer returns and "sold" those products on Amazon.com through the "Amazon Warehouse" program).

[redacted], *see* Dkt. No. 80 ¶¶ 62-64, A[redacted] *Id.* ¶ 66. Amazon did not agree to the issuance of a recall with CPSC to inform the public—including second-hand purchasers—of the substantial product hazards presented by the Subject Products. *Id.* ¶ 96. [redacted] Dkt. No. 109 at 31. [redacted] *Id.* ¶ 95.

The email that Amazon sent to direct purchasers of the Subject Products did not use the word "recall" anywhere in the subject line or body of the message, and the email did not provide a photograph of the product at issue. *Id.* ¶¶ 67-88; Dkt. No. 109 at 7-10. The email stated that Amazon had "learned of a potential safety issue" or that the product "may fail" applicable standards or, for the carbon monoxide detectors, "may fail to alarm on time," but the email did not inform consumers of the risk of death presented by the Subject Products. Dkt. No. 80 ¶¶ 76, 78, 83; *see also* Dkt. No. 109 at 7-10. Although Amazon recognized that the original purchaser may

have "purchased this product for someone else," Amazon made no attempt to contact any second-hand possessors of the Subject Product. Dkt. No. 80 ¶¶ 72, 79, 86; Dkt. No. 109 at 34. Amazon instead asked the original purchaser to notify any gift recipients. Dkt. No. 80 ¶¶ 72, 79, 86.

The email did not provide any Amazon customer service information for consumers to contact Amazon (other than a general reference to amazon.com) if the consumer had any questions, [redacted] *Id.* ¶ 89. The email expressly stated it was sent from a "notification-only [email] address that cannot accept incoming e-mail. Please do not reply to this message." *Id.* ¶¶ 74, 81, 88.

Amazon also did not require consumers to return or provide proof of destruction of the Subject Products prior to receiving its gift card credit in order to incentivize consumers to remove the hazardous products from consumers' homes and to prevent their reentry in commerce. Instead, Amazon provided an automatic Amazon gift card credit to the Amazon accounts of original purchasers and simply asked consumers to "dispose" of the item. *Id.* ¶¶ 73, 80, 87. The email expressly stated, "There is no need for you to return the product." *Id.* ¶¶ 72, 79, 86. Amazon did not track whether any consumers opened the email, if any consumers actually disposed of the Subject Products, or if any consumers told any gift recipients or subsequent possessors of the Subject Products about the substantial product hazards. Dkt. No. 109 at 40.

III. LEGAL STANDARD

On appeal, "the Commission shall consider the record as a whole or such parts of the record as are cited or as may be necessary to resolve the issues presented," and the Commission "shall, to the extent necessary or desirable, exercise all the powers which it could have exercised if it had made the Initial Decision." 16 C.F.R. § 1025.55(a). The Commission has the authority to "adopt, modify, or set aside the findings, conclusions, and order contained in the Initial Decision," 16

C.F.R. § 1025.55(b), with respect to the issues of substantial product hazard and remedy.

For substantial product hazard determinations, the Commission has concluded that the "preponderance of the evidence" standard applies. *See In re Zen Magnets, LLC*, CPSC Dkt. No. 12-2, Final Decision and Order, 2017 WL 11672449, at *7 (Oct. 26, 2017), *vacated on other grounds*, 2018 WL 2938326 (D. Colo June 12, 2018), *amended in part*, 2019 WL 9512983 (D. Colo. Mar. 6, 2019), *aff'd in part*, *rev'd in part,* 986 F.3d 1156 (10th Cir. 2020) ("*Zen Magnets Final Decision and Order*"); *see also Steadman v. S.E.C.*, 450 U.S. 91 (1981). The preponderance standard "simply means that the record must be sufficient to find that a fact is more likely to be true than untrue." *Zen Magnets Final Decision and Order*, 2017 WL 11672449, at *7. Here, the Initial Decision ratified the parties' stipulation that the Subject Products meet the requirements for a substantial product hazard determination under the CPSA. Dkt. 109 at 13.

Once a substantial product hazard is established, Section 15 of the CPSA merely requires that any remedial order be "required in order to adequately protect the public" or be in the "public interest." *See* 15 U.S.C. § 2064(c)(1); 15 U.S.C. § 2064(d)(1). Specifically, if the Commission determines that a product presents a substantial product hazard and that notification is required to adequately protect the public from the substantial product hazard, the Commission may order a distributor to take "any one or more" of the remedial actions set forth in Section 15(c) of the CPSA with an order that "shall specify the form and content of any notice required." 15 U.S.C. § 2064(c). And, if the Commission determines that a product presents a substantial product hazard and that action under Section 15(d) is in the public interest, the Commission may order a distributor to provide the notice set forth in Section 15(c) and "to take any one or more" of the actions outlined in Section 15(d), including providing replacements and refunds, while requiring the distributor "to

submit a plan for approval by the Commission," for taking the action ordered. 15 U.S.C. § 2064(d)(1), (2).

Statutory authority to order remedial action in the "public interest" is a "supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy." *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940). As ALJ Patil explained, "courts have found the public interest to be broad and allow agency discretion, within limits." Dkt. No. 109 at 20. The Commission, of course, may not act in an arbitrary or capricious manner and may not seek to promote the general public welfare in areas beyond its statutory purview. *See* Dkt. No. 109 at 21 (citing futile or impossible remedies as not being in the public interest). The Commission may, however, order remedial action consistent with the statutory purposes of the CPSA, including to "protect the public against unreasonable risks of injury associated with consumer products." 15 U.S.C. § 2051(b)(1). *See, e.g.*, *Zen Magnets Final Decision and Order*, 2017 WL 11672449, at *45-46; *In re Dye and Dye*, CPSC Dkt. No. 88-1, Opinion and Order, 1989 WL 435534, at *23 (July 17, 1991). Such is the relief ordered in the Initial Decision.

IV. ARGUMENT

Contrary to Amazon's claims in its Appeal Brief, ALJ Grimes properly held that Amazon is a distributor of its FBA products under the CPSA, not a third-party logistics provider. ALJ Patil also correctly found, contrary to Amazon's objections, that irrespective of any gift cards Amazon issued to original purchasers of the Subject Products, Amazon must issue refunds to consumers pursuant to Section 15 of the CPSA conditioned on tender or proof of destruction to remediate the substantial product hazards presented by the Subject Products. In addition, Amazon's attempt to minimize the scope of the products subject to ALJ Patil's remedial order fails, because the Subject

Products should include all products that are the same, including those that have mere cosmetic differences. Further, Amazon's attack on the notice ordered by ALJ Patil fails because both direct notice and social media notice are authorized by the CPSA, are required here to adequately protect the public, and fully comport with the First Amendment of the Constitution. Finally, Amazon's constitutional arguments that this case violates the separation of powers doctrine and the due process clause fail as a matter of law.

A. The ALJ Correctly Found That Amazon Is a Distributor of Consumer Products Through the FBA Program and Amazon's Objections to That Finding Are Unavailing

ALJ Grimes correctly found Amazon to be a distributor under the CPSA based on the plain language of the statute, which he correctly recognized is the "starting point" for legal analysis of this issue. Dkt. No. 27 at 6. Specifically, under the CPSA, a distributor is a "person to whom a consumer product is delivered or sold for purposes of distribution in commerce." 15 U.S.C. § 2052(a)(8). Thus, under the plain language of the statute, Amazon's status as a distributor depends on whether the Subject Products were "delivered" to Amazon "for purposes of distribution in commerce." "Distribution in commerce" is defined under the Act as "to sell in commerce, to introduce or deliver for introduction into commerce, or to hold for sale or distribution after introduction into commerce." 15 U.S.C. § 2052(a)(7). ALJ Grimes correctly found that Amazon is a distributor of its FBA consumer products because the FBA products are delivered to Amazon, and through the FBA program Amazon "'hold[s]' the products 'for sale or distribution after introduction into commerce.'" Dkt. No. 27 at 7 (citing 15 U.S.C. § 2052(a)(7)) ("Amazon meets the statutory definition of the term *distributor*") (emphasis in original).

In reaching this conclusion, ALJ Grimes relied on the undisputed factual record concerning Amazon's FBA program. Under this program, sellers of products on Amazon.com do not send

them to customers directly. "Instead, the . . . sellers send their products to Amazon." Dkt. No. 27 at 22. Amazon then stores the products in fulfillment centers, uses technology to track, move, and ship products to customers, processes product returns, and delivers or arranges for delivery of FBA program products to customers. *Id.* (citing Complaint Counsel's Statement of Undisputed Material Facts).

After concluding that the Subject Products were unquestionably "delivered" to Amazon, the ALJ further correctly found that the Subject Products were delivered "for purposes of distribution in commerce," confirming that Amazon is a distributor of the products under the CPSA. Dkt. 27 at 25-26. In his analysis, ALJ Grimes closely examined the definition of "distribution in commerce" under the CPSA, noting that it can be broken down into five activities: "'to' (1) 'sell in commerce,' (2) 'introduce … for introduction into commerce,' (3) 'deliver for introduction into commerce,' (4) 'hold for sale … after introduction into commerce,' or (5) 'hold for … distribution after introduction into commerce.' 15 U.S.C. § 2052(a)(7)." Dkt. No. 27 at 25. ALJ Grimes correctly found that Amazon meets the requirements for both (4) and (5) of the "distribution in commerce" definition.[5]

[5] ALJ Grimes came to the correct conclusions based on the plain language of the CPSA without reference to the well-recognized tenet that the language of the Act "must be liberally construed in order to effectuate its purpose, *i.e.*, the protection of the public from injury from hazardous products." *United States v. One Hazardous Product Consisting of a Refuse Bin*, 487 F. Supp. 581, 588 (D.N.J. 1980). This means that its terms should be interpreted broadly in furtherance of that purpose. *See, e.g.*, *Consumer Prod. Safety Comm'n v. Chance Mfg. Co.*, 441 F. Supp. 228 (D.D.C. 1977) (finding at summary judgment stage that the congressional intent was for the definition of "consumer product" to be construed broadly to advance the Act's purpose); *Consumer Prod. Safety Comm'n v. Anaconda Co.*, 593 F.2d 1314 (D.C. Cir. 1979) (discussing CPSC's "broad jurisdiction" over consumer products, provided they meet the definition of "consumer product" under the CPSA).

Specifically, ALJ Grimes found that Amazon holds FBA program products for sale to consumers after introduction into commerce and holds those products for distribution after introduction into commerce. *Id.* at 25-26. For these findings, ALJ Grimes relied upon the record, which shows that the FBA products are delivered to Amazon (*see* Dkt. No. 27 at 7 n.7), that Amazon stores FBA products at its facilities (*id.* at 7-8), that Amazon retrieves FBA products from its inventory when a consumer purchases them (*id.* at 8), that Amazon places the FBA products in shipping containers (*id.*), and finally that Amazon delivers the FBA products to consumers "by Amazon delivery vehicles or by carriers with whom Amazon contracts" (*id.*).[6] Because "Amazon holds the product while it waits for a consumer to purchase it," "it constitutes 'hold[ing] for sale . . . after introduction into commerce.'" Dkt. No. 27 at 25. Because Amazon holds the product until

[6] ALJ Grimes accepted Amazon's contention that "introduction into commerce," the second of the five acts he broke down as constituting "distribution in commerce," for FBA products "occurs before Amazon receives the consumer goods sent from third-party sellers." Dkt. No. 27 at 25. However, Amazon acts as a consignee for foreign FBA products and therefore plays a role in bringing and distributing foreign products into the U.S. market. *See* Amazon.com's Seller Central web portal (https://sellercentral.amazon.com/gp/help/external/200280280) at "Ultimate consignee" (Amazon "may be listed as ultimate consignee on your customs entry documentation — but only if in care of FBA is listed before the name of the Amazon entity. […] Your shipment should be physically delivered to the Amazon fulfillment center identified on the bill of lading."); *see also* U.S. Customs and Border Protection Directive 3550-079A, "Ultimate Consignee at Time of Entry Release" at 6.3 ("If at the time of entry or release the imported merchandise has not been sold, then the Ultimate Consignee at the time of entry or release is defined as the party in the United States to whom the overseas shipper consigned the imported merchandise."). Amazon's instrumental role in bringing foreign products into the U.S. market and in setting pricing policies that govern the sale of FBA products further supports the conclusion that Amazon is a distributor. *See* 15 U.S.C. § 2052(a)(8) (defining "distribution in commerce" to include "to sell in commerce, to introduce or deliver for introduction into commerce, or to hold for sale or distribution after introduction into commerce"); *cf. United States v. Dotterweich*, 320 U.S. 277, 284 (1943) (explaining that a Federal Food, Drug, and Cosmetic Act offense is committed "by all who do have such a responsible share in the furtherance of the transaction which the statute outlaws, namely, to put into the stream of interstate commerce adulterated or misbranded drugs").

it "deliver[s] or arrange[s] for delivery" of the product, "it constitutes 'hold[ing] for . . . distribution after introduction into commerce.'" Dkt. No. 27 at 26.

In a vain attempt to reject the ALJ's sound conclusion that Amazon is a distributor of FBA products, Amazon makes two unavailing arguments. First, contrary to the plain language of the statute, Amazon argues that it cannot be a distributor of products to which it does not take title. Second, Amazon makes a contrived argument involving the word "for," but Amazon's argument misconstrues the caselaw it cites and, at its core, merely regurgitates its failed title argument. Finally, Amazon's attempts to rely on inapplicable precedent from state-law product liability cases are unavailing. In sum, the plain language of the statute applied to the undisputed facts compels adoption of the ALJ's conclusion that Amazon is a distributor of FBA products.

1. Amazon Wrongly Claims That It Is Not a Distributor Under the CPSA Because It Does Not Take Title to its FBA Products

Although Amazon contends that it cannot be a distributor of products to which it does not take title, the plain language of the statute refutes the notion that distribution hinges on ownership of a product. Rather, the CPSA broadly defines a "distributor" as a "person to whom a consumer product ***is delivered*** or sold for purposes of distribution in commerce." 15 U.S.C. § 2052(a)(7) (emphasis added). As commonly understood, to "deliver" something is "to take [something] and hand over to or leave for another." Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/deliver (last visited Sept. 8, 2023). This definition makes no mention of ownership or title. Conversely, as conceded by Amazon in its Appeal Brief, a "sale" requires "the transfer of ownership of and title to property from one person to another for a price." Amazon Brief at 21 (Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/sale (last visited Aug. 17, 2023)). Hence, to "deliver" does not require a transfer of title while a "sale" does.

Only delivery to a person for purposes of distribution in commerce is required by the CPSA to make such person a distributor.

Courts "assum[e] that the ordinary meaning of [the statutory] language accurately expresses the legislative purpose," *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010). *See also Dodd v. United States,* 545 U.S. 353, 357 (2005) (citation omitted) (explaining that the court must "presume that [the] legislature says in a statute what it means and means in a statute what it says there"). By this "ordinary meaning" of "deliver," Amazon cannot dispute that its FBA products are delivered to Amazon prior to making their way to consumers. Although Amazon essentially asks this court to delete the word "delivered" from the definition, "such a deletion would directly contradict a canon that counsels [the court] to give effect to 'every clause and word'" of a statute. *Pub. Citizen, Inc. v. Rubber Manufacturers Ass'n*, 533 F.3d 810, 817 (D.C. Cir. 2008). Courts "must enforce [the] plain and unambiguous statutory language according to its terms." *Hardt*, 560 U.S. at 251.

Because Amazon finds no support for its title argument in the statutory language of the term "distributor," Amazon instead attempts to look to the definition of a "third-party logistics provider" for support. But the definition of "third-party logistics provider," which refers to title of a product, does not magically add words to the definition of "distributor," which does not refer to title of a product. Indeed, ALJ Grimes explained that the concluding phrase in Section 2052(a)(16)'s definition of a "third-party logistics provider," "but who does not take title to the product," "qualifies the rest of [Section 2052](a)(16)." Dkt. No. 27 at 14. In other words, instead of saying anything about the definition of a "distributor," this phrase recognizes that "entities that would otherwise qualify as third-party logistics providers will not qualify if they take title to a product."

Id.[7] In this same explicit manner, Congress could have stated that those who do not take title cannot be a distributor—it did not.

As ALJ Grimes concluded, "The undisputed facts show that the consumer goods at issue were delivered to Amazon." Dkt. No. 27 at 25. This satisfies the concept of delivery to a distributor under the CPSA; no conveyance of title is required.[8]

2. Amazon's Contrived Argument Based on a Novel and Incorrect Interpretation of the Word "For" Fails as a Matter of Law

Amazon next argues that ALJ Grimes erred in finding that Amazon holds FBA program products "for sale . . . after introduction into commerce," Dkt. No. 27 at 25, and holds such products "for . . . distribution after introduction to commerce." *Id.* at 26. These claims rely on Amazon's faulty title argument and a misinterpretation of the word "for." First, Amazon argues that it does not hold FBA products "for sale" because it cannot sell the products without title. Amazon Brief at 21. Second, Amazon argues that it does not hold FBA products "for sale" by others because the word "for" in the CPSA indicates that the "entity doing the 'hold[ing]' must also

[7] Amazon's purported case support is also unavailing. The *Sekhar* case involved an interpretation of an undefined property right in the context of a conviction for extortion. *Sekhar v. United States*, 570 U.S. 729 (2013) (emphasis added). The court used the common-law to interpret the term "property," undefined in the Hobbs Act. Specifically, the court found that the acts alleged in *Sekhar* do not amount to extortion because, under a common-law understanding, the "property" extorted must be transferable. *Id.* at 734. Here, however, the term at issue, "distributor," is defined by Congress, which determined not to include a title requirement when it could have done so.

[8] In addition, the particular language chosen by Congress in another key definition in the CPSA also counters the notion that a sale or transfer of title are necessary elements for an entity to be considered a "distributor" under the CPSA. Indeed, the definition of "consumer product" includes a product "distributed" not only for "sale," but also "for . . . use," consistent with the notion that distribution of a consumer product does not require title. 15 U.S.C. § 2052(a)(5); *see also* H. Rpt. 92-1153 at 29 (1972) ("It is not necessary that a product be actually sold to a consumer, but only that it be produced or distributed for his use. Thus, products which are manufactured for lease and products distributed without charge (for promotional purposes or otherwise) are included within the definition.").

do the selling." Amazon Brief at 25. Third, Amazon claims that it does not hold FBA products "for distribution" because, again, it lacks title and title is necessary to "distribute" products under the CPSA. *Id.* at 26.

Amazon's first argument is a strawman. Complaint Counsel did not argue and ALJ Grimes did not hold that Amazon holds FBA products and itself sells those products—because by its plain terms the statute does not require that the holder also be the seller. Congress could have included that requirement very easily by defining a distributor as "person to whom a consumer product is delivered or sold for purposes of ***that person selling*** in commerce." It did not. Accordingly, ALJ Grimes correctly found that Amazon is a distributor because it holds FBA products while it waits for a customer to purchase the products on amazon.com (and for Amazon to then deliver them). Dkt. No. 27 at 25.

This leads to Amazon's second argument, that the phrase "hold for sale" in the CPSA nonetheless requires that only entities that both "hold" and sell can be distributors. Amazon Brief at 25. To reach this conclusion, Amazon proffers a contorted interpretation of the word "for." 15 U.S.C. § 2052(a)(8). Specifically, Amazon claims that courts regularly construe the word "for" as "connoting a purpose or intent, meaning in connection to an action being taken by the subject entity." Amazon Brief at 25. However, the cases Amazon relies on to make this leap—*Jackson v. Vtech Telecomms. Ltd.*, No. 01-C-8001, 2003 WL 25815373, at *6 (N.D. Ill. Oct. 23, 2003) and *Applera Corp. v. MJ Rsch. Inc.*, 292 F. Supp. 2d 348, 363 (D. Conn. 2003)—do not support it. First, neither case directly addresses the question of whether one entity can hold a product for sale by another entity under this or any other statutory construct. Second, neither case finds that the use of the word "for" requires a single actor take both actions connected by that term.

The *Jackson* case involves a patent claim and did not involve any analysis of the word "for" as it relates to the entity engaged in the activity at issue. Rather, *Jackson* stands for the unremarkable idea that "for" indicates "purpose or intent, rather than direct causation." *Jackson*, 2003 WL 25815373, at *6. The language at issue in *Jackson* was "for producing a corresponding control signal" and the court rejected defendants' claim that "for producing" should be interpreted as "by producing" in order to capture a direct causal relationship, instead holding that the word "for" indicates purpose or intent, and not "direct causation." *Id.* Similarly, *Applera Corp.* is a patent case that discusses the word "for" in the context of a preamble provision: "An apparatus for controlled automated performance of polymerase chain reactions." The court found that "for" means "with the aim or purpose of; suitable to; appropriate for" and thus the preamble at issue "describes an intended use for the invention." 292 F. Supp. 2d at 363. Again, the case does not involve any analysis over who or what entity may use the invention for that purpose.[9]

Amazon's argument thus boils down to a claim that it cannot hold FBA products "with the intent of selling them" because Amazon has no legal authority to sell such products. Amazon Brief at 25. But Amazon can and does hold FBA program products with the aim or purpose of the

[9] Amazon also cites *Altria Grp., Inc. v. United States*, 580 F. Supp. 3d 298 (E.D. Va. 2022) for the proposition that phrases connected by the word "for" "cannot be divorced from the antecedent phrase." Amazon Brief at 25. This misconstrues the decision. In *Altria*, the court was interpreting a federal tax law that prevented deducting payments made "for any fine or similar penalty paid to a government for the violation of any law." *Altria*, 580 F. Supp. 3d at 302. Writing that the subsequent phrase "cannot be divorced from the antecedent phrase," the *Altria* court simply explained that "for the violation of any law" could not be separated from "paid to a government," because a payment is only disallowed if it was made "for the violation." *Id.* In other words, the deduction could only be prevented if it is both "for the violation" and "paid to a government." Applying that semantic logic to the phrase "hold for sale" would require only that the product is both "held" and "sold," which FBA products are. Again, like *Altria*, the language at issue here does not require that a single actor perform each of the verbs connected by "for" in the statute.

products being sold to consumers on its website, which in turn triggers Amazon's processes to deliver the products to consumers. In fact, it is through its actions effectuating those purposes that Amazon profits from each FBA sale.

Amazon's third and final argument—that it must hold title to the Subject Products in order to hold them for ***distribution***—is wholly unsupported. Amazon simply claims, without citation to any supporting authority, that "a careful reading of the statutory text shows that Amazon cannot 'distribute' products to which it does not take title . . . ." Amazon Brief at 26. But, as noted above, the CPSA does not require a transfer of title for an entity to be classified as a distributor, *see* 15 U.S.C. § 2052(a)(7), and the concept of title is wholly absent from the CPSA's definition of "distribution in commerce," *see* 15 U.S.C. § 2052(a)(8). As the ALJ succinctly stated, "neither Paragraph (7) nor (8) include any requirement that an entity must own a product to be its distributor." Dkt. No. 27 at 8. Amazon's unsupported proclamations cannot change the CPSA's definitions.

Despite Amazon's arguments, the record shows that the FBA program, in full view, is designed to distribute consumer goods in commerce. Are consumer products delivered to Amazon? Yes, they are. The Subject Products are consumer products that were delivered to Amazon through its FBA program. SUMF ¶¶ 4, 34, 37, 40. Were the consumer products delivered to Amazon for distribution in commerce? Yes, they were. Among other actions, Amazon held and stored the Subject Products in its warehouses before distributing the Subject Products to consumers, SUMF ¶¶ 2, 4, 8, 10, 35, 38, 41, which means Amazon held the products for distribution as plainly stated in the CPSA. *See* 15 U.S.C. § 2052(a)(8) (defining "distribution in commerce" to include, among other things, "holding" for distribution). These undisputed actions place Amazon squarely within the definition of "distributor."

3. Amazon's Reliance on Non-Controlling State Products Liability Cases Is Misplaced

Amazon next decides to leave statutory interpretation behind and turn to state products liability cases in arguing that ownership or title to products is essential for an entity to distribute products. Amazon Brief at 26. However, ALJ Grimes correctly found that cases citing state law products liability requirements are functionally "inapposite" because those decisions relate to the imposition of "strict liability on a distributor" and not whether an entity falls within defined terms in a regulatory statute. [10] Dkt. No. 27 at 8-9. Such cases do not interpret the CPSA, and the legal requirements for strict liability under state products liability law differ widely by state.

Further, if Congress intended to incorporate a common-law based title requirement for distributors, it could have done so—but it did not. As ALJ Grimes noted, Congress has shown that it "knows how to" add a title or ownership requirement in a definition if it so desires. Dkt. No. 27 at 10 n. 12 (citing 15 U.S.C. § 2801(6)(A)). Here, Congress expressly did not include a title or ownership requirement in the definition of "distributor," while including a reference to not taking title or ownership of a consumer product in the definition of "third-party logistics provider." *Compare* 15 U.S.C. § 2052(a)(7) *with* 15 U.S.C. § 2052(a)(16).

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[10] ALJ Grimes also noted that Congress identified several terms in the CPSA's definition section, placing those terms "in quotation marks followed by the words 'means' or 'mean.'" Dkt. No. 27 at 7 (citing 15 U.S.C. § 2052(a)). When Congress does this, it is making "'absolutely clear that' the term 'is a term of art defined by' what 'follow[s].'" *Id.* (quoting *Biskupski v. Attorney Gen.*, 503 F.3d 274, 280 (3d Cir. 2007)). This means courts and any other adjudicative authority must "'follow that definition, even if it varies from [the defined] term's ordinary meaning.'" *Id.* (quoting *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000)); *also citing W. Union Tel. Co. v. Lenroot*, 323 U.S. 490, 502 (1945) ("[S]tatutory definitions of terms … prevail over colloquial meanings."). Because the terms "distributor" and "distribution in commerce" are clear as applied to Amazon and its FBA program in this case, neither the ALJ nor the Commission need reference other caselaw or interpretations.

Notably, while citing to several cases in which it was not held liable under state law,[11] Amazon ignores state products liability law cases that found it liable under state and common law principles. For example, in *Bolger v. Amazon.com, LLC*, 53 Cal. App. 5th 431 (Cal. Ct. App. 2020), the California Court of Appeals considered whether Amazon was strictly liable for distributing a defective laptop battery that exploded and injured a consumer. The *Bolger* court noted that the entire field of strict liability in California is a "common law doctrine" that "expand[s] and contract[s]" according to those principles and purposes. *Id.* at 459. After conducting a lengthy and holistic analysis of Amazon's role in the sale, the *Bolger* court found that Amazon played an "integral part" in the FBA transaction and therefore must "bear the cost of injuries resulting from [the] defective product[]." *Id.* at 453. Other courts have come to similar conclusions. *See State Farm Fire & Cas. Co. v. Amazon.com, Inc.*, 390 F. Supp. 3d 964 (W.D. Wis. 2019) (finding Amazon liable because it provided "the only conduit" between the Chinese seller of a defective product and the American marketplace); *Loomis v. Amazon.com LLC*, 63 Cal. App. 5th 466 (Cal. Ct. App. 2021) (rejecting Amazon's argument that it was merely a "service provider" and holding instead that Amazon was "instrumental in the sale of the [defective hoverboard] by placing itself squarely between [seller] and [buyer]").[12]

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[11] *See, e.g.*, *Erie Ins. Co. v. Amazon.com, Inc.*, 925 F.3d 135, 140-41 (4th Cir. 2019) (holding that Maryland products liability law had been interpreted by courts to require a transfer of title as a prerequisite for liability); *Amazon.com, Inc. v. McMillan*, 625 S.W.3d 101, 111, 117 (Tex. 2021) (holding that the definition of distributor under Texas law coincides with that of a seller, requiring a transfer of title to be held liable under the Texas Products Liability Act); *Berkley Regional Ins. Co. v. John Doe Battery Mfr.*, 2023 WL 375934, at *4 (D. Minn. Jan. 24, 2023) (holding that Amazon was neither a commercial seller nor a distributor because it did not take title to FBA products nor was a "lessor[], bailor[], [or one] who provide[s] products to others as a means of promoting either the use or consumption of such products or some other commercial activity").

[12] In addition, a recent decision by a federal court applying New Jersey law denied summary judgment for Amazon and found that the company distributed a hoverboard that caused a

Amazon also cites to *Eberhart v. Amazon.com, Inc.*, 325 F. Supp. 3d 393 (S.D.N.Y. 2018), where a federal court interpreting New York law found that Amazon was not a distributor because other New York state cases often used the term in the context of an entity selling a product or a product having been purchased by the distributor (therefore transferring title). *Id.* at 398. Thus, the court concluded that Amazon was not liable as a distributor under New York law. However, because New York state courts had not yet addressed whether an online marketplace could be subject to strict products liability, the door was left open for a different interpretation based on New York's intent to extend liability to certain distributors and retailers for products sold in their normal course of business, provided those entities fall within the distribution chain.

Indeed, a subsequent case in New York against Amazon held that title is not dispositive for strict liability. In *State Farm Fire & Cas. Co. v. Amazon.com Servs., Inc.*, 70 Misc. 3d 697 (N.Y. Sup. Ct. 2020), the court was asked whether Amazon could fall under New York's strict products liability law when it sold a thermostat through Amazon's FBA program. In denying Amazon's motion for summary judgment, the court stated that there were genuine issues of material fact as to whether Amazon exercised sufficient control to be considered a retailer or distributor under New York law. *Id.* at 704.[13] The court recognized that e-commerce providers, and specifically Amazon,

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residential fire. In *New Jersey Manufacturers Ins. Grp. v. Amazon.com Inc.*, 2022 WL 2357430, at *4 (D.N.J. June 29, 2022), the court rejected a prior court's focus on physical control of the product and instead found that Amazon's activities, even in a case in which it did not appear to hold and ship the product in question through the FBA program, fit within the NJPLA's provisions assigning liability for "any person who, in the course of a business conducted for that purpose: sells; distributes; . . . or *otherwise is involved in placing a product in the line of commerce*." *Id.* at *4 (quoting the NJPLA) (emphasis in opinion).

[13] On January 3, 2022, the Parties filed a Stipulation with the court discontinuing the action. Therefore, no subsequent judgment to the dismissal of Amazon's motion for summary judgment was issued by the Court. Stipulation – Discontinuance (Post RJI), January 3, 2022, 008550/2019, N.Y. Sup. Ct. (2022).

have revolutionized the way Americans shop, displacing brick and mortar storefronts. Products are stored virtually on a website, as well as physically on an Amazon shelf. The court noted that "[w]hile Amazon has disclaimed title, it certainly maintains possession of the subject product." *Id.*

In sum, despite Amazon's assertions that it is not a distributor, several courts analyzing Amazon's role in the modern marketplace have found it liable in product safety cases under state and common law.

B. The ALJ Correctly Found That Amazon's Activities Through the FBA Program Preclude It from Being a Third-Party Logistics Provider Under the CPSA and Amazon's Objections to That Finding Are Unavailing

Amazon argues that it is not subject to the CPSA because it qualifies for the exception applicable to certain "third-party logistics providers" under the safe harbor provision found at 15 U.S.C. § 2052(b). This is wrong for three reasons: (1) Amazon does not meet the definition of a "third-party logistics provider" as set forth in 15 U.S.C. § 2052(a)(16), because it does more than "solely" holding, receiving, or otherwise transporting consumer products, (2) even if Amazon were a third-party logistics provider, it would not qualify for the narrow exemption under § 2052(b), and (3) Congress did not pass the 2008 Amendments to the CPSA to include Amazon and its mammoth FBA program within the definition of third-party logistics provider. Each of Amazon's arguments therefore fails as a matter of law and undisputed facts.

1. Amazon Incorrectly Interprets the Term "Solely" in the CPSA's Definition of Third-Party Logistics Provider

ALJ Grimes correctly held that Amazon is not a third-party logistics provider under the CPSA for consumer products sold through its FBA program. Dkt. No. 27 at 10-12. As with the distributor issue, ALJ Grimes rightly turned first to the applicable statutory definition. A third-party logistics provider is "a person who solely receives, holds, or otherwise transports a consumer

product in the ordinary course of business but who does not take title to the product." 15 U.S.C. § 2052(a)(16).

Amazon does far more than solely receive, hold, and transport the Subject Products through its FBA program. Among other things, Amazon also provides: A highly orchestrated sales venue, SUMF ¶¶ 1-2; payment processing, *id.* ¶¶ 20, 27; storage, sorting and shipping services, *id.* ¶¶ 8-13; 24/7 customer service, *id.* ¶¶ 14-15, 30-32; pricing restrictions, *id.* ¶ 21; and customer return services, *id.* ¶¶ 16, 32. Amazon does all of this while receiving varied fees[14] and obtaining significant rights in the process, including receiving customer returns and potentially reselling items as a seller or retailer through its Amazon Warehouse program. *Id.* ¶¶ 16-19. Amazon's policing of the prices charged by third-party sellers using its FBA program, *id.* ¶ 22, and its authority to reject products for any reason (including products that violate its FBA policies), *id.* ¶ 23, further undercut its argument that it is merely a third-party logistics provider.

Thus, Amazon does not "solely" receive, hold, or otherwise transport a consumer product in the ordinary course of business, as required to qualify as a third-party logistics provider under Section 3(a)(16) of the CPSA. Amazon does far more (and obtains more rights, including the right to sell returned products in certain circumstances) than a third-party logistics provider, and even receives a significant percentage of revenue. ALJ Grimes agreed, finding that Amazon's FBA program, viewed *in toto*, demonstrates that Amazon "does not solely—only and to the exclusion of

[14] In the *State Farm* case, Amazon acknowledged that it received a fee of $6.02 from the sale by a third-party firm of an adaptor that cost $19.99. *See* Pl.'s Mem. In Opp'n to Def.'s Mot. for Summ. J. at 8, *State Farm Fire & Cas. Co. v. Amazon.com, Inc.*, 390 F. Supp. 3d 964 (W.D. Wis. 2018). That is about a 30% cut for Amazon for the services and platform that it provided to the third-party firm. In *Bolger*, a battery sold for $12.30 incurred a $4.87 fee, about 40% of the purchase price. *See Bolger*, slip op. at *444.

all else—'receive[],' hold[], or otherwise transport[]' the consumer products alleged in the complaint. It does more." Dkt. No. 27 at 11.

Yet, contrary to the plain language of the statute and ALJ Grimes' finding, Amazon asks the Commission to find that the term "solely" in the definition of third-party logistics provider does not mean what it says. Instead, Amazon insists that "solely" means "the sole *distribution* activity in which a third-party logistics provider can engage is holding, receiving, or otherwise transporting goods." Amazon Brief at 17 (emphasis in original). But the statute does not say that.

The statute is clear: a "third-party logistics provider" is "a person who ***solely*** receives, holds, or otherwise transports a consumer product in the ordinary course of business but who does not take title to the product." 15 U.S.C. § 2052(a)(16) (emphasis added). The meaning of the word "solely" is clear-cut. As ALJ Grimes found, "solely" means "to the exclusion of all else" and "without another." Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/solely (last visited Sept. 12, 2023) (noting that synonyms include "alone, exclusively, just, only").

This plain language reading of the statute is bolstered by the Supreme Court's interpretation of the word "solely" in *Helvering v. Southwest Consol. Corp.*, 315 U.S. 194 (1942). In *Helvering*, the Supreme Court considered dueling interpretations of what qualified as a "reorganization" under the Revenue Act of 1934. Under the terms of the statute, to qualify as a "reorganization," an acquisition by a corporation had to be "in exchange solely for all or a part of its voting stock." *Id.* at 196. While interpreting the statute, the Supreme Court explained, "'Solely' leaves no leeway. Voting stock plus some other consideration does not meet the statutory requirement." *Id.* at 198. Similarly, the CPSA's statutory language leaves no leeway. A third-party logistics provider "solely receives, holds, or otherwise transports a consumer product." 15 U.S.C. § 2052(a)(16).

Because Amazon admittedly acts well beyond the scope of that definition—by, among other things, orchestrating and maintaining its mammoth online marketplace, empowering sellers to list products on its website, providing templates for product listings, holding the power to reject listings for products it deems illegal or obscene, imposing a Fair Pricing Policy for sales, providing 24/7 customer service for all consumers, processing product returns, processing consumer payments, and remitting the agreed-upon monies to the third-party seller, *see* SUMF ¶¶ 1, 2, 5, 14, 16, 20-23—Amazon does not meet the narrow statutory definition of a "third-party logistics provider" and cannot fit under what Amazon misleadingly calls the "third-party logistics provider exception" in 15 U.S.C. § 2052(b).

Even if the Commission were to interpret "solely" slightly more broadly, as ALJ Grimes posited, to allow for a third-party logistics provider to "be able to perform activities ancillary to receiving, holding, or transporting while still fitting within" the definition of a "third-party logistics provider," Dkt. No. 27 at 11, Amazon cannot fit its FBA program within this still-narrow definition. Amazon does far too much.

Indeed, as ALJ Grimes recognized, Amazon's activities in its FBA program go far beyond those that can be plausibly described as merely ancillary to receiving, holding or transporting. For example, ALJ Grimes noted that Amazon "operates a website that brings merchants who want to sell consumer goods together with consumers who want to buy those goods." Dkt. No. 27 at 11. This action—designing, operating, and maintaining an entire online marketplace for FBA products—is not merely ancillary to receiving, holding, or transporting consumer goods. Amazon does not appear to argue otherwise in its Appeal Brief. *See* Amazon Brief at 21 (listing "operation of Amazon.com, on which consumers can buy products" as a "focus[]" of ALJ Grimes' decision, but not addressing it as a factor).

Similarly, Complaint Counsel relied upon and ALJ Grimes credited the fact that Amazon "provides round-the-clock customer service" in the FBA program and "processes payments for all product purchases, charges consumers for purchases, and pays sellers minus a service fee due . . . .", *id.*, activities that again go beyond merely ancillary activities of an entity that simply receives, holds, and ships goods in the ordinary course of business. Amazon nonetheless argues that "providing customer support or processing payments for a product it did not own does not render Amazon a seller or a distributor . . . ." Amazon Brief at 22. Here, Amazon simply misses the point. It is not whether these activities "render Amazon a . . . distributor"; it is that these activities are not ancillary to receiving, holding, or transporting consumer goods, which places Amazon outside even an expansive interpretation of the third-party logistics provider definition.

Amazon's purported case support does not suggest otherwise, as it involves entirely different contexts. *See Hendrickson v. Amazon.Com, Inc.*, 298 F. Supp. 2d 914, 916-18 (C.D. Cal. 2003 (holding that Amazon did not "sell" a DVD by processing payment for it in the context of Amazon asserting a safe harbor affirmative defense as an ISP under the Digital Millennium Copyright Act); *Antone v. Greater Arizona Auto Auction*, 155 P.3d 1074, 1077-80 (Ariz. Ct. App. 2007) (analyzing an automobile auction facility through the lens of Arizona products liability law, finding that the defendant could not be held strictly liable because it did not take title to the automobile and did not sufficiently "participate[] in the chain of distribution" to support strict liability); *Joseph v. Yenkin Majestic Paint Corp.*, 661 N.Y.S.2d 728, 730-31 (N.Y. Sup Ct., Kings County 1997) (dismissing a company from a strict products liability lawsuit where the company never possessed the product and provided only "a billing or bookkeeping function"). None of these cases suggest that providing 24/7 customer support or processing customer payments constitute "ancillary" activities to receiving, holding, or transporting goods.

As noted by ALJ Grimes, Amazon also "retains some authority over the prices [FBA] Program merchants charge for products" and "enforces a Fair Pricing Policy." Dkt. No. 27 at 11. As to these activities, Amazon argues that because Congress did not expressly exclude pricing control behaviors in its definition of "third-party logistics provider," these activities cannot disqualify Amazon from being a third-party logistics provider. *Id.* at 22-23. Amazon cites to the 2013 Drug Supply Chain Security Act, which defines a "third-party logistics provider" as an "entity that provides or coordinates warehousing, or other logistics services of a product in interstate commerce on behalf of a manufacturer, wholesale distributor, or dispenser of a product," but excludes those who "have responsibility to direct the sale or disposition of the product." 21 U.S.C. § 360eee. But Amazon ignores that the CPSA's definition of third-party logistics provider contains no exceptions. Rather, by its plain terms, the CPSA is more expansive than the Drug Supply Chain Security Act in leaving out those who do anything other than receiving, holding, or transporting consumer products. And Amazon's retention of control over the prices charged by sellers for consumer products sold through the online marketplace it created and maintains cannot be credibly described as "ancillary" to receiving, holding, or transporting goods in the ordinary course of business. Even Amazon does not argue that in its Appeal Brief.

ALJ Grimes also notes that Amazon "processes all returns for [FBA] Program products" and "decides whether the [returned] product[s] can be resold." Dkt. No. 27 at 11. Amazon argues that "[p]rocessing product returns" is "exactly the type of 'ancillary' activity offered by third-party logistics providers." Amazon Brief at 23. Amazon cites an employment case that involved uncontested findings about the actions of a self-proclaimed logistics provider as proof that its own processing of returns should not be considered in the context of the CPSA. *See XPO Logistics, Inc. v. Anis*, No. 16-CVS-10677, 2016 WL 3944081, at *2 (N.C. Super. Ct. Jul. 12, 2016) (listing the

self-proclaimed activities of Plaintiff XPO Logistics, Inc.). However, regardless of whether the mere processing of returns could be deemed ancillary to receiving, holding, or transporting goods, Amazon does not even address the second aspect of its product return processing—its ability to determine whether the returned product can be resold, and then actually reselling the product itself through Amazon's Warehouse program. *See* SUMF ¶¶ 16-19. Amazon provides no citation as to how this expansive authority to inspect products to determine if they can be resold and to further resell returned FBA products could possibly be merely ancillary to receiving, holding, or transporting goods.

Amazon also makes references to the purported similar activities of other entities such as FedEx and UPS. Amazon Brief at 23. But neither FedEx nor UPS is before the Commission. Suffice it to say that as those and other companies expand the breadth and nature of their services, it may bring into question their responsibilities under the CPSA. But the responsibilities of others in the marketplace based upon their particular activities simply is not determinative of Amazon's status under the statute for its vast FBA program-related activities.

Finally, Amazon attempts to shoehorn itself into the "solely" requirement of the third-party logistics provider by once again attempting to amend the statute. Here, Amazon argues: "the word 'solely' must be interpreted in that . . . the sole *distribution* activity in which a third-party logistics provider can engage in is holding, receiving, or otherwise transporting goods." Amazon Brief at 17 (emphasis in original). By this reading, Amazon claims it may engage in activities other than holding, receiving, or otherwise transporting goods and still be a third-party logistics provider so long as those activities, on their own, do not constitute distribution. *Id.* at 17-18. But the third-party logistics definition does not include the word "distribution" and Amazon fails to cite to any

legislative history or case law[15] to suggest Congress even considered such an expansive role for third-party logistics providers.[16]

[15] Further, the two cases cited by Amazon as purported support for this proposition have nothing to do with the CPSA, the term "solely," or the differences between distributors and third-party logistics providers. The first, *Thrasher-Lyon v. CCS Commercial*, LLC, No. 11-cv-4473, 2012 WL 3835089, at *2 (N.D. Ill. Sept. 4, 2012), addresses the breadth of an exclusion from a statutory prohibition concerning telemarketing robocalls and not the scope of separately defined entities subject to a regulatory regime at issue here. The second, *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 101 (2012), stands for the proposition that the words of a statute must be read in context, a maxim with which Complaint Counsel agrees and is entirely consistent with finding that Amazon's extensive FBA activities go well beyond "solely" holding, receiving, or otherwise transporting goods as required to be a third-party logistics provider.

[16] Amazon also uses this section of its brief to advance the idea that it qualifies as a "third-party logistics provider" based on self-serving descriptions of such entities in cases, trade journals, and other outlets. *See* Amazon Brief at 15-16, n. 13-17. The court in *Schramm* analyzed whether a principal and agent relationship existed between a tractor-trailer driver and a broker under state negligence law, with the carrier describing its activities only in that context. *Schramm v. Foster*, 341 F. Supp. 2d 536, 550 (D. Md. 2004). And in *JSW Steel (USA), Inc.* the self-proclaimed third-party logistics provider described its services in a contract dispute that did not involve any scrutiny of its designation. *JSW Steel (USA), Inc. v. Pittsburgh Logistics Systems, Inc.*, No. 3:20-CV-00127, 2020 WL 13239017, at *1 (S.D. Tex. Jul. 16, 2020). Amazon's industry sources likewise have no bearing on this matter. None of these materials analyze the statute at issue, and ALJ Grimes rightly recognized that the full gamut of Amazon's activities in the FBA program is what matters. Dkt No. 27 at 13-14. Moreover, Amazon overstates how many of the articles describe its activities, as some do not address the FBA program and others merely muse about Amazon's general role in the marketplace. For example, in the 2014 survey of twenty-five CEOs, only six of the twenty-five CEOs identified Amazon as a third-party logistics provider—none with reference to the CPSA. *See* Robert C. Lieb & Kristin J. Lieb, *Is Amazon a 3PL?*, CSCMP'S SUPPLY CHAIN Q., Oct. 27, 2014, at 5-6. The bulk of the CEOs described Amazon as doing more, calling it a "fourth-party logistics company" and an "industry disruptor." *Id.* at 6. The Postal Service document merely discusses Amazon's entry into the "logistics market," citing information provided by Amazon without reference to the FBA program. *See* Rpt. No. RARC-WP-16-015, The Evolving Logistics Landscape and the U.S. Postal Service, Office of the Inspector Gen., U.S. Postal Srv. (Aug. 15, 2016). The citations from 2007 about Amazon's entry into the third-party logistics space again fail to reference the CPSA and simply outline the beginnings of Amazon's FBA program. *See* William Hoffman, *Pushing the Shopping Cart*, Shipping Digest (May 21, 2007); Sam Kandel, *To Expand, Make Use of Outsourcing*, Poughkeepsie J. (July 22, 2007). And Amazon's final reference does not even mention Amazon's FBA program. *See* Laura Stevens, Amazon Expands into Ocean Freight, WALL ST. J. (Jan. 25, 2017). In short, none of these journals or articles aids the court's analysis of the statutory language of the CPSA or its legislative history.

2. *Amazon Wrongly Argues That a CPSA Provision Addressing Third-Party Logistics Providers Along with Carriers and Forwarders Shows It Is Exempt from the CPSA for FBA Program Products*

Even if Amazon, in spite of its considerable involvement in the sale and servicing of FBA products, were a "third-party logistics provider" under Section 3(a)(16) of the statute—which it is not—it would still be subject to the CPSA as a distributor because it fails to qualify for the narrow safe harbor set forth in Section 3(b). That provision states that a "common carrier, contract carrier, third-party logistics provider, or freight forwarder shall not . . . be deemed to be a manufacturer, distributor, or retailer of a consumer product solely by reason of receiving or transporting a consumer product in the ordinary course of its business as such a carrier or forwarder." 15 U.S.C. § 2052(b). Amazon claims that because the only distribution activity in which it engages is holding, receiving, or otherwise transporting goods, it should fall within this safe harbor. Amazon Brief at 17. Amazon is wrong.

First, Amazon misreads the statute as creating a blanket exception for all entities that meet the definition of third-party logistics providers under Section 2052(a)(16). Amazon Brief at 14-29. Instead, Section 2052(b)[17] creates only a limited exception for the activities of *certain* "common carrier[s], contract carrier[s], third-party logistics provider[s], or freight forwarder[s]" in the narrow circumstance where they might meet the definition of "a manufacturer, distributor, or retailer" under the statute solely because of receiving or transporting consumer goods. Notably, contrary to Amazon's characterizations, the CPSA does not set forth "third-party logistics provider" and

[17] Amazon wrongly claims that "[t]he 'third-party logistics provider' definition is an *exception* to the term 'distributor.'" Amazon Brief at 17 (emphasis in original). Section 2052(a)(16), however, does nothing more than define the term and says nothing about the treatment of such entities under the CPSA. The safe harbor for specified carrier entities (including third-party logistics providers) under certain limited circumstances appears in the separate provision Section 2052(b).

"distributor" as mutually exclusive categories, but rather assumes that a third-party logistics provider may also be a distributor whenever it acts outside of the scope of the narrow role described in Section 2052(b). Indeed, it is clear from the Commission's statements relating to a 2013 proposed rule,[18] which Amazon itself cites, that a carrier—including a third-party logistics provider—can be *both* a carrier *and* a "manufacturer, importer, distributor, or retailer," depending on its activities in a given case. There, the Commission explained that, in a situation where a third-party logistics provider acts as an importer of record for a product, "[t]reating a carrier who also serves as an importer of record as an 'importer' . . . is consistent with Section [2052](b) of the CPSA" and "imposing importer-related certification requirements on [that] carrier . . . is based on the carrier's status as an importer of record . . . rather than on the carrier's transportation-related functions." *Id.* Amazon's suggestion that third-party logistics providers are automatically exempt from the CPSA is therefore plainly wrong.

Relatedly, Amazon repeatedly mischaracterizes the plain language of Section 2052(b). The provision states that a third-party logistics provider shall not be deemed a manufacturer, retailer, or distributor solely by reason of "receiving or transporting" a consumer product. 15 U.S.C. § 2052(b). Significantly, in a clear distinction from the definition of "third-party logistics provider" in Section 2052(a)(13), the language of 2052(b) expressly excludes any reference to "holding" a consumer product. And as explained in detail above, Amazon plainly holds FBA program consumer products for sale or distribution. Therefore, just as a third-party logistics provider that is an importer of record would be an "importer" under the CPSA, a third-party logistics provider that holds products for sale and distribution—as Amazon does—is a "distributor" under the statute.

[18] 78 Fed. Reg. 28,080, 28,084 (May 13, 2013).

Second, Amazon does not qualify for the exception set forth in the statute above because it is further limited to the identified entities' actions in the ordinary course of business as ***carriers or forwarders***. As ALJ Grimes expressly noted, "no one argues that Amazon is a common carrier, contract carrier, or freight forwarder." Dkt. No. 27 at 4. And Amazon's role for FBA products in "the ordinary course of its business" goes well beyond "receiving and transporting" and is far more expansive and transactionally comprehensive than such entities. Again, Amazon has admitted that it engages in extensive activities for FBA products well beyond those limited carrier functions, such as orchestrating the huge online marketplace where FBA products are sold, imposing a Fair Pricing Policy for sales of FBA products, and holding FBA products listed on Amazon.com until consumers purchase the products. SUMF ¶¶ 1, 2, 5, 14, 16, 20-23. Amazon simply does far more than "receiving or transporting" FBA products as a "carrier or forwarder" under Section 2052(b).

3. Amazon Wrongly Claims That the 2008 Amendments to the CPSA Were Intended to Include Amazon in the Definition of a Third-Party Logistics Provider

Finally, Amazon claims that when it enacted the 2008 amendment adding the third-party logistics provider definition to the CPSA, Congress intended to include Amazon in the Section 2052(b) exception. Amazon Brief at 15. Amazon notes that until 2008, the exception at Section 2052(b) only applied to "common carriers, contract carriers, and freight forwarders." *Id.* at 18. Thus, according to Amazon, the edits to Section 2052(b) and the addition of Section 2052(a)(16) constitute Congressional intent to expand the exception beyond these entities and to include Amazon's e-commerce activities through the FBA program. *Id.* Amazon is mistaken.[19]

[19] ALJ Grimes rejected this argument for three reasons. First, he recognized that "redundancies are common in statutory drafting." Dkt. No. 27 at 12 (citing *Barton v. Barr*, 140 S. Ct. 1442, 1453 (2020)). The change identified by Amazon need not constitute a change in overall meaning or effect. *Id.* Second, ALJ Grimes viewed the context of the change, noting that one would expect a

As an initial matter, Amazon fails to provide any legislative history relating to the 2008 amendments to support its argument or counter the explicitly stated goals of the amendments.[20] The record is clear that the 2008 amendments to the CPSA were passed to expand the agency's authority and to enhance consumer safety, not to create a giant loophole for entities that play a substantial role in the distribution of vast swaths of potentially hazardous products to American consumers.

In 2007, CPSC recalled an exceptionally large number of hazardous toys that had been manufactured in foreign countries, and Congress sought to strengthen CPSC's ability to respond and protect consumers. *See* 154 Cong. Rec. S7867, 7876 (statement of Sen. Pryor) (explaining that in 2007 "there were 45 million toys that were recalled" and "[e]very single toy was made in China that was recalled"); 154 Cong. Rec. H7577, 7585 (statement of Rep. Eshoo) ("It's become glaringly obvious that we can't rely on manufacturers to police themselves, we need to give the chief consumer regulatory agency the authority and the resources necessary to get unsafe products

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third-party logistics provider to be "similar in kind" to carriers and freight forwarders, and not provide "all the other services . . . that Amazon provides." *Id.* Third, the provision in question provides that an entity falling into "any one of four categories—a common carrier, contract carrier, third-party logistics provider, or freight forwarder—would not become a manufacturer, distributor, or retailer 'by reason of receiving or transporting a consumer product in the ordinary course of its business as such a carrier or forwarder.'" *Id.* at 13 (citing 15 U.S.C. § 2052(b) (emphasis added)). "Congress thus made clear that all four categories are made up of carriers or forwarders." *Id.* ALJ Grimes thus concluded that Amazon and its actions in the FBA program fall outside of the safe harbor.

[20] The "inquiry into the Congress's intent proceeds, as it must, from 'the fundamental canon that statutory interpretation begins with the language of the statute itself.'" *Goldring v. Dist. of Columbia*, 416 F.3d 70, 77 (D.C. Cir. 2005) (citation omitted). Accordingly, "job one is to read the statute, read the statute, read the statute." *Id.* (citation omitted). "[W]hen the statute's language 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." *Dodd v. United States*, 545 U.S. 353, 359 (2005). Here, the plain language of the statute sets out a broad definition of distributor (where Amazon fits) and a narrow definition for third-party logistics provider (where Amazon does not).

off the shelves and stop them from coming into the country."). Indeed, the Consumer Product Safety Improvement Act of 2008 ("CPSIA"), Public Law 110-314 (Aug. 14, 2008), was acknowledged as one of "the most significant pieces of pro-consumer legislation in many years." Statement of the Honorable Thomas Hill Moore on the Historic Passage of the Consumer Product Safety Improvement Act of 2008 (July 31, 2008), https://web.archive.org/web/20080917195602/https:/www.cpsc.gov/pr/Moore073108cpsia.pdf. As Senator Levin summarized on the floor of the Senate:

> This bill will: increase overall funding for the CPSC; increase CPSC staffing; prohibit the use of dangerous phthalates in children's toys and child care articles; streamline product safety rulemaking procedures; ban lead beyond a minute amount in products intended for children under the age of 12 and require certification and labeling; increase inspection of imported products so we are not allowing recalled or banned products to cross our borders; increase penalties for violating our product safety laws; strengthen and improve recall procedures and ban the sale of recalled products; require CPSC to provide consumers with a user-friendly database on deaths and serious injuries caused by consumer products; and ban 3-wheel all-terrain vehicles, ATVs, and strengthens regulation of other ATVs, especially those intended for use by youth.

154 Cong. Rec. S7867, 7870 (statement of Sen. Levin).

In sum, the legislation "increased funding and expanded authorities for the CPSC to accomplish their mission." 154 Cong. Rec. S7867, 7869 (statement of Sen. Sununu); *see* 154 Cong. Rec. S7867, 7870 (statement of Sen. Levin) (explaining that the legislation will "reassure consumers that there will be more oversight of the marketplace in the future"); *see also* 154 Cong. Rec. E1709-01 (statement of Rep. Holt) (stating that the passage of the CPSIA "would help empower the CPSC to become a more effective force for regulating the consumer marketplace by increasing its budget and regulatory authority"). The legislative history confirms that the 2008 amendments expanded the agency's authority to regulate the marketplace and protect consumers from risks of injury posed by hazardous consumer products, including those manufactured abroad

like many FBA products. Nothing in this CPSA-strengthening legislation supports Amazon's self-serving claim that Congress created the third-party logistics provider definition to exempt its wide-ranging FBA activities from public safety regulatory enforcement.[21]

Amazon further argues that its interpretation of the 2008 amendments is the only one that effects meaningful legislative change and that neither ALJ Grimes nor Complaint Counsel cites to evidence that Congress was adding mere "surplusage" in crafting the third-party logistics provider definition. Amazon Brief at 19. However, just because Amazon and its mammoth, wide-ranging FBA program do not fall within the narrow definition of third-party logistics provider does not mean that no other entities do either.

C. The ALJ Correctly Found That the CPSA Authorizes the CPSC to Require the Provision of Refunds Conditioned on Tender or Proof of Destruction by Consumers and That Doing So Is in the Public Interest, and Amazon's Contrary Arguments Are Unavailing

ALJ Patil correctly found that Amazon must provide full refunds for the subject product sleepwear garments and hair dryers and must provide full refunds or replacements for the subject product carbon monoxide detectors. ALJ Patil also correctly found that the provision of such refunds or replacements must be conditioned on tender or proof of destruction by consumers. Amazon incorrectly argues that the order for it to refund consumers presents an unauthorized "double refund," that the Commission is prohibited from ordering refunds conditioned on tender or

[21] Again, Amazon's case citations do not support its view, but rather stand for unremarkable general propositions. Complaint Counsel agrees that courts should not interpret statutory provisions in a manner that would render another provision superfluous. *Bilski v. Kappos*, 561 U.S. 593, 607–08 (2010). Complaint Counsel also agrees that, when Congress amends legislation, courts must presume the change to have real and substantial effect. *Ross v. Blake*, 578 U.S. 632, 641–42 (2016). Finally, Complaint Counsel agrees that courts cannot deny a word its independent meaning consistent with, but distinct from, the functions of other words. *Babbitt v. Sweet Home Chapter of Cmties. for a Great Oregon*, 515 U.S. 687, 702 (1995). None of these general propositions support Amazon's misreading of the 2008 amendments and the Section 2052(b) safe harbor provision.

proof of destruction, and that doing so would not be in the public interest. Finally, Amazon also wrongly asserts that ordering Amazon to issue a refund here would violate the Takings Clause of the Fifth Amendment's Due Process Clause.

In making its arguments, Amazon ignores that no Section 15 refund has been issued for the Subject Products; that the CPSA, its legislative history and amendments, agency case law and agency practice authorize and support refunds conditioned on tender or proof of destruction of the Subject Products; that it is in the public interest to remove hazardous products from consumers' homes; and that the Takings Clause cannot be implicated by a "statutory obligation to pay."

1. No Section 15 Refund Has Been Issued for the Subject Products

Amazon wrongly argues that because it already issued a unilateral gift card to purchasers of the Subject Products, ALJ Patil erred in ordering Amazon to provide consumers in possession of the Subject Products with a refund. Amazon bases that argument on the assertion that CPSC does not have the authority to order multiple refunds. Amazon Brief at 29.

That argument fails, however, because *no* remedy under Section 15 of the CPSA has been provided to consumers. In other words, no refund or replacement has been provided to consumers pursuant to Section 15 for the Subject Products. As correctly recognized by ALJ Patil, "Amazon's issuance of gift cards was . . . not a Section 15 refund" and "Amazon's unilateral, voluntary action to issue gift cards did not cancel Commission authority to order refunds." Dkt. No. 109 at 39, 42. This is true for two primary reasons: First, the CPSA and corresponding regulations expressly do not recognize any voluntary action unless undertaken in conjunction with the Commission. Second, because Amazon failed to incentivize the removal of the Subject Products from commerce, its payments to original purchasers did not remedy the substantial product hazards in this case.

While both the CPSA and the Commission's regulations contemplate the possibility of voluntary corrective actions by regulated firms, the only such actions recognized as enforceable statutory actions under the CPSA are those voluntary actions taken "in consultation with the Commission." *See* 15 U.S.C. § 2068(a)(2)(B). Likewise, the Commission's regulations concerning "Voluntary remedial actions" require that such actions be undertaken pursuant to either a corrective action plan or a consent order agreement that "becomes effective only upon its final acceptance by the Commission." 16 C.F.R. § 1115.20(a)(1)(xiv), (b)(1)(vi). These regulations also make clear, as at least one federal court has confirmed, that a firm's voluntary remedial actions do not preclude either the Commission or consumers from seeking additional remedies. *See* Dkt. No. 109 at 40 (citing *In re Mattel, Inc.*, 588 F. Supp. 2d 1111, 1115–16 (C.D. Cal. 2008)).[22] Here, Amazon's unilateral actions were, by definition, not undertaken in conjunction with the agency, and therefore do not constitute a statutory remedy.

Furthermore, Amazon's unilateral business decision to provide a gift card to valid Amazon accounts of original purchasers cannot constitute a CPSA Section 15 refund remedy, as it does not remedy the ongoing hazard presented by the more than 400,000 Subject Products Amazon distributed into commerce due to the failure to incentivize or account for the return or destruction of those products.[23] Indeed, the Commission has previously described refunds that were not

[22] The regulations regarding "Voluntary remedial actions" state that CPSC reserves the right to seek broader corrective action if a regulated firm's initial "corrective action plan does not sufficiently protect the public." *See* Dkt. No. 109 at 39, citing 16 C.F.R. §1115.20(a).

[23] As ALJ Patil also correctly found: "There is no genuine issue of material fact regarding two deficiencies in [Amazon]'s refund scheme: (1) no effort was made to track what number, if any, of each Subject Product was actually disposed; and (2) the scheme did not require any purchaser to take an action to remove any Subject Product from the marketplace before receiving a refund. Instead, refunds in the form of Amazon gift cards were already issued to purchasers' Amazon accounts before they received notice of the refund and regardless of whether they ever reviewed

conditioned on product tender as "inconsistent with the statutory intent" of the CPSA, given the "obvious statutory purpose of section 15, to protect the public by encouraging removal of dangerous products from the marketplace and consumers' homes." *In The Matter of Relco, Inc*., CPSC Dkt. No. 74-4, Order, at 4, 6 (CPSC 1976) (attached as Ex. EE to the Sept. 23, 2022 Declaration of John Eustice); *see also Zen Magnets Final Decision and Order*, 2017 WL 11672449, at *41 (explaining that the Commission's mission is "to protect the public against unreasonable risks of injury associated with consumer products" and that the Commission has "statutory authority to remove hazardous products from consumers' hands").

For this reason, the record reflects the Commission's general practice of requiring recalling firms to collect and destroy returned products to prevent their redistribution in commerce. *See, e.g.,* 16 C.F.R. § 1115.20(a)(1)(vi) (providing that a corrective action plan shall include "[a] statement of the corrective action which will be or has been taken to eliminate the alleged substantial product hazard," including disposition of returned products by reworking them, destroying them, or returning them to a foreign manufacturer); Dkt. No. 80 ¶¶ 119, 125 (explaining that the Recall Handbook[24] instructs companies on the need to "develop a plan to quarantine and correct returned products"); *id.* ¶ 154 (noting that to recover and destroy hazardous products and to prevent re-entry of uncorrected products into commerce, the Corrective Action Plan template ("CAP Template")[25] [redacted]

that notice." Dkt. No. 109 at 40.

[24] Sept. 23, 2022, Declaration of John Eustice, Ex. S, Recall Handbook (CPSC_AM0011484).

[25] Sept. 23, 2022, Declaration of John Eustice, Ex. T, Corrective Action Plan Template (CPSC_AM CPSC_AM0012125-12133).

[redacted] In short, Amazon's indiscriminate issuance of a gift card did not remedy the substantial product hazards in this case or protect consumers from the unreasonable risk of injury and death. A gift card merely provides monetary relief by putting credit in a consumer's account (possibly even without their awareness), while consumers may continue to use the dangerous product or give it or sell it to someone else.[26]

2. Section 15 Authorizes the Commission to Require Tender or Proof of Destruction to Receive a Refund

Amazon incorrectly states that because the enumerated remedial actions under Section 15(d) are "repair," "return," and "refund," CPSC cannot impose a requirement that an order under Section 15 requires product tender or proof of destruction. In doing so, Amazon wrongly tries to

[26] Furthermore, even if Amazon's gift card to original purchasers could be considered a refund under the CPSA, the Commission still has the authority to order an additional Section 15 remedy in excess of the amount paid by consumers, to provide an incentive to consumers to return or destroy the Subject Products. *See generally* Complaint Counsel Letter To Judge Patil, Dkt. No. 102 (Apr. 6, 2023). First, multiple provisions of the statute reflect Congress's expectation that firms may be responsible for remedial expenses above and beyond the cost of a refund. Section 15(d) authorizes the Commission to order "any one or more" of the available remedies, and thereby to mandate corrective action that may exceed the cost of any one remedy. *See* 15 U.S.C. § 2064(d)(1). Additionally, Section 15(e) specifies that firms are responsible for reimbursing both consumers and entities in the distribution chain for foreseeable expenses incurred in effectuating the remedy. 15 U.S.C. § 2064(e). Congress also empowered the Commission to revisit corrective actions that have been ineffective and "amend, or require amendment of, the action plan," potentially seeking further remedies, which may impose further costs. 15 U.S.C. § 2064(d)(3)(B). Second, the statute also recognizes that consumers may receive value in connection with incentives to return or destroy recalled products that exceeds the price they paid for those products. Congress's intention was that the Commission correct a recalled product by providing refunds not only to "first purchasers," but also to "present owners," some of whom may have paid nothing for the product. *See* H. Rpt. 92-1153 at 43 (1972). In *In The Matter of Zen Magnets, LLC*, for example, the Commission expressly ordered that the firm provide a refund to any consumers who "did not purchase the Subject Products on Respondent's website, through third party Internet Retailers, or through retail outlets (*e.g.*, received them as a gift.)" Opinion And Order Approving Public Notification And Action Plan CPSC Dkt. No. 12-2, at 15, 2017 WL 11672451 (CPSC 2017).

cast refunds that are conditioned on return or proof of destruction as a new category of remedy, beyond the three enumerated remedies that are listed in Section 15(d). *See* Amazon Brief at 30.

While Amazon concedes that Section 15(d)(1) authorizes the Commission to order a repair, replacement, or refund of a defective product, 15 U.S.C. § 2064(d)(1), it ignores Section 15(d)(2), which states that "[t]he Commission shall specify in the order the persons to whom refunds must be made." [27] 15 U.S.C. § 2064(d)(2). Pursuant to this authority the Commission can specify that a Section 15(d)(1) refund be made to particular "persons," such as those consumers who tender the Subject Product or provide proof of its destruction.

Additional statutory authority in Section 15(d)(2) empowers the Commission to require a distributor, here Amazon, "to submit a plan for approval by the Commission," for providing the ordered refund. Such plan is subject to Commission approval and "shall include" "recall notices" to consumers that describe "any action a consumer must take to obtain a remedy." 15 U.S.C. § 2064(i)(2)(H)(ii). In conjunction, these provisions provide further statutory authority for the Commission to only approve a plan that includes recall notice to consumers requiring the "action" of tendering the product or providing proof of its destruction to obtain a refund. *See* CC's Reply, Dkt. No. 93. These provisions make clear that the Commission has the statutory authority to require product tender or proof of destruction as part of a Section 15(d) refund remedy.[28]

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[27] Moreover, it is worth noting that conditioning a refund on tender is consistent with Amazon's own definition of refund on its customer service webpage, which expressly ties "Refunds" to the processing of a consumers' product return. *See* CC Opposition, Dkt. No. 86, at 41 n. 23.

[28] Further, Congress contemplated that the Commission would have the authority and discretion to approve action plans that further the purpose of the Act. When Congress initially enacted the CPSA, Section 15 specified that an order under Section 15 "may" require the submission of an action plan satisfactory to the Commission. Congress strengthened that requirement when enacting the CPSIA to require a Commission-approved action plan for all remedial action ordered under Section 15. *See* CPSIA, Public Law 110-314 (Aug. 14, 2008) at Section 214. Similarly, the 2008

The Commission has utilized this authority to require the removal of hazardous products from consumers' homes as a condition of remedy. *See, e.g. In the Matter of Relco, Inc.,* CPSC Dkt. No. 74-4, Decision and Order, at 5 ("[g]iven the strong Congressional intent and the obvious statutory purpose of section 15, to protect the public by encouraging removal of dangerous products from the marketplace and consumers' homes, the Commission believes that tender should be required whenever practicable and where no danger is presented in the tender process."); *Zen Magnets Final Decision and Order*, 2017 WL 11672449, at *41 (stating that one of the key goals of the CPSA in furtherance of the public interest is "to remove hazardous products from consumers' hands").

3. The Legislative History of the CPSA Confirms That the Commission Has the Authority to Require Tender When Practicable

Amazon misconstrues the legislative history to argue that Congress barred CPSC from ever requiring tender. Amazon Brief at 38. To the contrary, the Commission has previously concluded that "the legislative history [of the CPSA] clearly expresses Congressional intent that the Commission possesses the authority to specify a tender requirement where the refund option is elected." *Relco* at 4-5.

In fact, Congress originally contemplated an "absolute requirement that consumers must tender products in order to be entitled to [a] refund," but ultimately omitted this mandatory tender requirement from the CPSA, in favor of a "more flexible approach." *See* H. Rpt. 92-1153 at 43 (1972). As the Commission recognized in *Relco*, this decision not to require product return as a precondition for a refund in every case was due primarily to concerns that tender would be

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Amendments made clear the Commission has the authority and discretion to order an action plan be reopened if it proved not "effective or appropriate under the circumstances." *Id.*

untenable in certain circumstances, depending on the type of product. *See* CC Opposition, Dkt. No. 86, at 28, citing *Relco*. Instead, Congress left CPSC with greater discretion to determine when tender would be appropriate. *See* H. Rpt. 92-1153 at 43 (1972):

> Accordingly, the Commission is intended to have authority to specify whether present owners or only first purchasers are entitled to refund and whether the product must be tendered or whether the sales slip or some other proof of purchase or ownership must be made. The Committee has decided against an absolute requirement that consumers must tender products in order to be entitled to the refund in favor of this more flexible approach. The Committee was concerned that, in some instances, to require the tender of the product might unduly expose consumers and persons within the distribution chain to the hazards associated with the product. Also, the offending product may no longer be in a form which would allow its tender.

This legislative history confirms that Congress certainly did not intend, as Amazon suggests, to *prohibit* the Commission from seeking tender of a recalled product. Rather, the reasoning against an "absolute requirement" for tender is premised on concerns about exposing consumers to hazard (an issue not present in this case), not the concerns Amazon raises about fraud or a lack of efficacy. *See* Amazon Brief at 38.

Indeed, Amazon's assertion—based on selective quotations from the legislative history passage cited above—that Congress was only discussing tender in the context of "fraud mitigation" is unsupported. As is evident from the full text of the passage, the legislative history states that the Commission is authorized to specify to whom refunds are issued, including whether to only include first purchasers, or also present owners. H. Rpt. 92-1153 at 52. The section further explains that the approach is flexible, depending on the hazards associated with the product in determining whether to impose a tender requirement, and not a ban. *Id.* The cited legislative history includes no reference to fraud or concerns about consumers otherwise profiting from recalls.

In sum, as the Commission recognized in *Relco,* "the legislative history [of the CPSA] clearly expresses Congressional intent that the Commission possesses the authority to specify a tender requirement where the refund option is elected," *Relco* at 4-5. This conclusion is consistent with the primary purpose of the statute to protect consumers from dangerous products that might otherwise remain in commerce.

4. Congress Provided "Recall" Authority to Section 15 as Well as Section 12

Amazon erroneously posits that when Congress referred to a "recall" as one of the remedies available in a Section 12 proceeding, while enumerating "repair," "refund," and "replace," as remedies under Section 15, Congress was confining the Commission's authority to seek product tender to actions under Section 12. Amazon Brief at 33-34.

Amazon's argument is unavailing. Unsurprisingly, the word "recall" appears frequently throughout the CPSA, including in contexts that make plain Congress's understanding that each of the enumerated Section 15 corrective actions themselves constitute a "recall." *See, e.g.,* 15 U.S.C. § 2076(j)(5) (requiring the Commission to include, in its annual report to the President and Congress, "the number and a summary of *recall* orders issued under section [12] or [15] of this title") (emphasis added). Indeed, Section 214 of the CPSIA, which amends Section 15, is titled "Enhanced Recall Authority and Corrective Action Plans." That title clearly demonstrates that Congress considers CPSC's Section 15 Authority a "Recall Authority."

Section 214 also added the word "recall" to Section 15 twice, *see* Section 214, Pub. L. 110-314 (110th Cong.):

- Section 15(c)(1)(D): "To give public notice of the defect or failure to comply, including posting clear and conspicuous notice on its Internet website, providing notice to any

third party Internet website on which such manufacturer, retailer, distributor, or licensor has placed the product for sale, and announcements in languages other than English and on radio and television where the Commission determines that a substantial number of consumers to whom the *recall* is directed may not be reached by other notice."(emphasis added).

- Section 15(i) – adding a new section to the statute entitled "Requirements for *Recall* Notices" (emphasis added), requiring the agency to promulgate rules on what information should be in any notice issued under (c) or (d) of Section 15.

The legislative history provides further evidence that the word "recall" is synonymous with the Commission's remedial authority under Section 15. Congress specifically referred to Section 15 as a recall vehicle when enacting the CPSA. For example, H. Rpt. 92-1153, discussing Section 12 and 15 as two distinct mechanisms, explained that "[w]hile the Committee, has determined that it is essential to include authority to recall substantially hazardous products and products which do not meet safety standards from the marketplace, it has provided for an informal hearing prior to public notification, [referring to Section 6b] and a formal hearing prior to repair, replacement or refund under these provisions [referring to Section 15]." H. Rpt. 92-1153 at 28.

Congress continued to refer to Section 15 authority as "recall authority" after passing the Act, including in 1978: "Recall authority under the CPSA is more flexible under section 15. The Commission can require a manufacturer, distributor, or retailer of a consumer product that presents a substantial product hazard to give notice of the defect and to repair or replace the product or refund the purchase price." Authorizations and other Amendments to the Consumer Protection Act: Hearing Before the House Subcomm. On Consumer Protection and Finance, 95th Cong. (1978) at 74 (Statement of Mr. Byington). In 1983, a House Report examined the agency's history and

continued to refer to Section 15 action as "recall" activities: "An example of the agency's effective use of its resources is its implementation of section 15 of CPSA. Since 1973, over 300 million potentially dangerous products have been repaired, replaced, or a refund has been given at no expense to the consumer. These recall activities have had a dramatic impact in reducing injuries and saving lives." Consumer Product Safety Amendments of 1983, H. Rpt. 98-114 (1983), at "Background."

Consistent with the clear meaning of the statute and the statements from Congress confirming that Section 15 authority is recall authority, the Commission has also defined remedial action under Section 15 as such. For example, in the Mandatory Recall Notice Rule, it defines "recall" as "any one or more of the actions required by an order under sections 12, 15(c), or 15(d) of the CPSA." *See* 16 C.F.R. § 1115.25(a). In addition, the Commission's Final Order in *Zen Magnets* cites to the Section 15(d) remedies as "recall measures." *See Zen Magnets Final Decision and Order*, 2017 WL 11672449, at *1. Clearly then, Section 15 authority is a "recall" authority, and Amazon's assertion that the word "recall" in Section 12 refers to some separate remedy authority not available under Section 15 is plainly incorrect.

5. The Recall Handbook Further Supports Tender or Proof of Destruction, and Amazon's Attacks On It Are Misguided

Amazon further attacks ALJ Patil's order of a refund conditioned on tender or proof of destruction by criticizing reliance on the Recall Handbook. Amazon Brief at 42. In doing so, Amazon misstates the relevant law related to consideration of agency materials and mischaracterizes the content of the Recall Handbook.

First, despite Amazon's assertions that "[t]he Presiding Officer invoke[d] the Recall Handbook as authority for reading a mandatory tender requirement into the CPSA," Amazon Brief

at 42, ALJ Patil merely cited the Recall Handbook as "persuasive" authority "in determining what remedial actions are in the public interest." Dkt. No 109 at 19. As ALJ Patil correctly observed—and for the reasons further described in Sections C.2-3 above— "the Commission's regulations contemplate ordering refunds conditioned on return or confirmed destruction" (citing 16 C.F.R. § 1115.27(d)). Dkt. No. 109 at 40. It is the CPSA and its regulations, therefore, that are the source of authority for requirement of tender or proof of destruction, and the Recall Handbook reflects the Commission's interpretation and practice of this remedial authority under Section 15.

Reliance on documents like the Recall Handbook as evidence of agency practice is entirely appropriate in an administrative adjudication. As explained in ALJ Patil's May 8 Order, Dkt. 109 at 16, courts recognize that agency documents may be entitled to weight and deference, even if they are not controlling. For example, in *Skidmore v. Swift*, 323 U.S. 134, 140 (1944), the Supreme Court weighed in on whether to give weight to an "Interpretative Bulletin" which served as a practical guide to employers and employees on how the Office of Administrator under the Fair Labor Standards Act would represent the public interest in its enforcement actions. The court found that policies and standards, even where not formally created, were entitled to some respect, even though not controlling upon courts. The court further explained that such documents present useful guidance both to courts and litigants. *Id.* How much weight should be given to such a document depends on "the degree of the agency's care, its consistency, formality, and relative expertness" as well as the "persuasiveness of the agency's position." *United States v. Mead Corp*., 533 U.S. 218, 228 (2001) (holding that, under *Skidmore*, a tariff classification by the United States Customs Service was entitled to deference as reflective of the agency's interpretation of its governing statute).

Those factors strongly favor giving weight to the Recall Handbook. As ALJ Patil recognized, "[G]iven that it represents decades of expertise of the agency charged with conducting such recalls, and has been consistently identified as an appropriate reference by the Commission itself in rulemaking and Congressional testimony, it is entitled to more deference than typical informal staff guidance. Based on those factors, and the fact that Recall Handbook itself is persuasive, I give it weight in determining what remedial actions are in the public interest." Dkt. No. 109 at 19. He also correctly noted that the Recall Handbook has been consistent across iterations providing further basis for giving it weight. *Id*.

Amazon misinterprets the factors articulated in *Skidmore* and *Mead* and claims that the Recall Handbook does not reflect the necessary "degree of the agency's care, . . . consistency, formality, and relative expertness," necessary to merit deference. This is wrong. Contrary to Amazon's assertion, the extent to which the Handbook is based on "an underlying or supporting factual basis"[29] is not determinative of the level of "expertness" it reflects. *See* Amazon Brief at 43. Indeed, the *Skidmore* case itself related to informal "interpretations and opinions" of the agency which "constitute[d] a body of experience and informed judgment," and courts have frequently accorded deference to agency documents that, like the Recall Handbook, reflect

[29] Amazon misleadingly cites a recommendation from the Government Accountability Office ("GAO") Report concerning the tracking of recall effectiveness data as evidence that there is little basis for the agency expertise memorialized in the Recall Handbook. *See* Amazon Brief at 43. The suggestion that the Commission does not systematically assess the effectiveness of recalls is without basis. In fact, GAO has closed all recommendations related to recall verification activities, monthly reporting, and assessing and using the data obtained from recall tracking to monitor and assess recall effectiveness. *See* https://www.gao.gov/products/gao-21-56 (showing Recommendations 3, 4 and 5 as "Closed – Implemented"). CPSC also necessarily collects recall effectiveness metrics to meet its annual reporting obligations to Congress and must include "progress reports and incident updates with respect to action plans implemented under section 2064(d)" in its annual report to the President and Congress. 15 U.S.C. § 2076(j)(6).

guidance based on years of agency practice. *See, e.g.*, *Fed. Exp. Corp. v. Holowecki,* 552 U.S. 389, 399 (2008) (finding that EEOC policy statements embodied in its "compliance manual and internal directives" are entitled to deference under *Skidmore* as to the interpretation of the Age Discrimination in Employment Act of 1967).

In addition, outside of the *Skidmore* context, courts have consistently recognized that empirical data or evidence is not always available to support agency actions, and focusing only on empirical evidence ignores non-quantifiable reasons that justify agency action. *See* CC Reply, Dkt. No. 93, at 15 ("[a] lack of empirical data does not render an otherwise reasonable conclusion based on agency experience arbitrary or capricious." *Alaska v. Bernhardt,* 500 F. Supp. 3d 889, 921 (D. Alaska 2020) (citing *Sacora v. Thomas*, 628 F.3d 1059, 1069 (9th Cir. 2010) (explaining that "it was reasonable for the [agency] to rely on its experience, even without having quantified it in the form of a study")); *see Nasdaq Stock Market LLC v. S.E.C.*, 38 F.4th 1126, 1142 (D.C. Cir. 2022) (stating that "an agency 'need not – indeed cannot – base its every action upon empirical data' and may, 'depending upon the nature of the problem, . . . be 'entitled to conduct . . . a general analysis based on informed conjecture'").[30]

6. Amazon's Assertion That CPSC Directive 9101.34 Discourages Tender or Proof of Destruction Is Misguided

In addition to its erroneous attacks on the Recall Handbook, Amazon mischaracterizes the content of a 1992 Directive, [redacted]

[30] Amazon relies on a wholly misplaced citation to *Aqua Slide 'N' Dive Corp. v. CPSC*, 569 F.2d 831 (5th Cir. 1978), for the proposition that the *Skidmore* test cannot be met when an agency document is based on agency experience. *Aqua Slide,* however, has nothing to do with *Skidmore* or the interpretation of agency guidance documents in an adjudication, but rather upheld a challenge to a CPSC regulation. In that case, a part of a CPSC regulation was struck down where the agency had relied primarily on the opinions of private consultants as the basis for the struck portion of the rulemaking, while conducting "elaborate tests" to support other parts of the regulation.

[redacted] Amazon Brief at 45-47. Contrary to Amazon's representation, the Directive 9101.34 [redacted] *See* CC's Opposition, Dkt. No. 86 at 45. [redacted] Dkt. No. 76, Amazon Ex. 65, CPSC_AM0014049 at 14091 (emphasis added). [redacted]

Amazon also incorrectly characterizes Directive 9101.34 [redacted] Dkt. No. 76, Amazon Ex. 65, CPSC_AM0014049 at 14091. Here, the Initial Decision appropriately directs Amazon to implement the recall by either sending consumers prepaid mailing packages or requesting photographic proof of destruction, actions that consumers can execute with minimal effort.

7. Ordering Amazon to Provide Refunds Conditioned on Tender or Proof of Destruction Is In the Public Interest

Amazon argues that ALJ Patil erred in finding that an order conditioning a refund on product tender or proof of destruction is "in the public interest" as required by Section 15(d)(1) of the CPSA. Amazon Brief at 47-50. Amazon's argument fails for two reasons. First, Amazon wrongly asserts that the Commission's remedial discretion under the "public interest" standard is limited to ensuring that consumers "receive information that will assist them in making decisions

about product hazards," Amazon Brief at 48, citing *Aqua Slide 'N' Dive Corp*. Second, despite clear statutory language to the contrary, Amazon wrongly insists that the "public interest" language somehow imposes an obligation on the Commission to engage in a cost-benefit analysis prior to issuing any Section 15(d) remedy.

a. Amazon's Arguments That It Is Not in The Public Interest to Take Any Remedial Action Beyond Merely Informing Consumers of the Product Hazards Are Unconvincing

Contrary to Amazon's strained interpretation of the statute, the fact that one of the purposes of the CPSA is to "assist consumers in evaluating the comparative safety of consumer products" in no way limits the Commission's discretion "in the public interest" to impose remedies beyond those actions required to inform consumers about product hazards. As ALJ Patil recognized, statutory authority to act in the public interest is a "supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy." Dkt. No. 109 at 20 (*citing FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940)). And, unless criteria defining public interest are enumerated in a statute, public interest is to be interpreted by its statutory context accounting for the purposes of the Act. *See National Ass'n for Advancement of Colored People v. Federal Power Commission,* 425 U.S. 662, 669 (1976) (explaining that "the words 'public interest' in a regulatory statute . . . . take meaning from the purposes of the regulatory legislation"). Here, the first enumerated purpose of the CPSA is "to protect the public against unreasonable risks of injury associated with consumer products. 15 U.S.C. § 2051(b); *see* Dkt No. 109, at 20. That purpose cannot be achieved if the dangerous products remain in consumers' hands, as they do in this case.

Indeed, the text and history of the Consumer Product Safety Act make clear that Congress granted CPSC broad authority to remove dangerous products from commerce in circumstances

where simply notifying the public may not be sufficient to address the hazard.[31] For example, the CPSA expressly gives the Commission the power to do the following: implement mandatory safety standards (15 U.S.C. § 2056), ban hazardous products (15 U.S.C. § 2057), file action to condemn and seize imminently hazardous products (15 U.S.C. § 2061), mandate repair, replacement and refund of a defective product (15 U.S.C. § 2064), and file action to restrain the manufacture, sale, or distribution of violative products (15 U.S.C. § 2071). As discussed above in Section C.3, the legislative history makes clear that Congress also empowered CPSC to remove dangerous products from commerce under Section 15(d), through product return or other means. *See* H. Rpt. 92-1153 at 43 (1972) ("[T]he Commission is intended to have authority to specify whether present owners or only first purchasers are entitled to refund and whether the product must be tendered or whether the sales slip or some other proof of purchase or ownership must be made."); *see also* 15 U.S.C. § 2051(a)(5) (finding that prior to the CPSA "existing Federal authority to protect consumers from exposure to consumer products presenting unreasonable risks of injury [was] inadequate").

Moreover, the Commission has consistently sought to remove hazardous products from consumers' homes to protect the public against injury in other cases where, as here, a high volume of hazardous products remained unaccounted for. *See In re Zen Magnets, LLC* Opinion and Order Approving Public Notification and Action Plan, CPSC Dkt. No. 12-2, 2017 WL 11672451, at *12-*13 (ordering the respondent, as an "incentive to encourage returns," to provide "a refund to all

[31] Amazon's reliance on the *Aqua Slide* case as somehow limiting this authority is entirely misplaced. While the court in *Aqua Slide*, which involved a rulemaking rather than a Section 15 adjudication, highlighted the importance of notifying consumers about hazards associated with swimming pool slide to provide them with sufficient information to evaluate the hazard, that case does not include any analysis whatsoever of the phrase "public interest," let alone any statement suggesting that it would not be in the public interest in removing dangerous products from commerce. *See Aqua Slide 'N' Dive Corp. v. CPSC*, 569 F.2d 831 (5th Cir. 1978).

consumers who provide a written affirmation, in any form, that they are returning the Subject Products"); *In the Matter of Relco, Inc.*, CPSC Dkt. No. 74-4, Decision and Order, at 6 ("[A] refund allowance not accompanied by a tender requirement would not advance the purposes of the legislation and might expose unwary consumers and other users to the dangers posed by the hazardous product."); *see also* 2012 and 2021 Recall Handbook (stating that one of the goals of a recall is "to remove defective products from the distribution chain and from the possession of consumers"). In addition, the Consent Agreements in prior Section 15 actions cited in ALJ Patil's May Order are indicative of the agency's position on the purpose of the CPSA and show the Commission's consistency in requiring refunds conditioned on tender and destruction. *See* Dkt. No. 109 at 41 n.35. In sum, as is evident from both the statutory authority and agency practice, there is no support for Amazon's suggestion that the "public interest" standard precludes an order requiring product tender or destruction.[32]

Additionally, the record here reflects that requiring Amazon to do no more than issue notice in this case would plainly not suffice to address the ongoing risk to consumers. Amazon has not taken any action to incentivize consumers to remove the Subject Products from commerce, and none of the 400,000 hazardous Subject Products Amazon distributed into commerce are confirmed to have been removed from consumers' hands. Therefore, it is in the public interest to uphold the

[32] Amazon's claim that it is not in the public interest to require tender or destruction because such actions make consumers less likely to participate in the recall is similarly unavailing. The incentive to return the Subject Product or provide proof of its destruction does not in any way create a disincentive for the consumer to dispose of the product on their own. The Commission has consistently found that refunds conditioned on tender or destruction are the best way to incentivize a consumer to participate in the recall and thereby advance the public interest by confirming the product has been removed from commerce. *See* CC Opposition, Dkt. No. 86 at 48; *see also Zen Magnets Opinion and Order*, 2017 WL 11672451, at *11.

Presiding Officer's ruling that Amazon must refund consumers who tender or provide photographic proof of destruction of the Subject Products.

b. Amazon Wrongly Argues That the Public Interest Standard Cannot Be Met Without a Balancing of Costs and Benefits

Amazon's attempted rewrite of the public interest requirement to include a "generalized balancing of costs and balancing" is unavailing. Amazon Brief at 49. Here, the plain language of the statute says exactly the opposite of what Amazon argues. Section 15(h) of the CPSA is unambiguously titled "Cost-Benefit Analysis of Notification or Other Action Not Required." 15 U.S.C. § 2064(h) ("Nothing in this section shall be construed to require the Commission, in determining that a product distributed in commerce presents a substantial product hazard and that notification or other action under this section should be taken, to prepare a comparison of the costs that would be incurred in providing notification or taking other action under this section with the benefits from such notification or action.").

In its effort to erase this clear statement from the statute, Amazon purports to rely on *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452. U.S. 490 (1981), for the proposition that Congress incorporated a requirement of "generalized balancing of costs and benefits" into the "public interest" standard, simply by including the phrase "unreasonable risk" elsewhere in the CPSA. But this case provides no support whatsoever for Amazon's position. *Donovan* simply does not address either the meaning of "public interest" or the Commission's authority under Section 15. As ALJ Patil explained, the analysis of the phrase "unreasonable risk" in *Donovan* pertains only to the rulemaking authority in Section 7(a) of the CPSA.[33] Dkt. No. 109 at 22. And the Commission has

[33] Section 7(a) empowers the Commission to "promulgate consumer product safety standards," provided that "[a]ny requirement of such a standard shall be reasonably necessary to prevent or reduce an *unreasonable risk* of injury associated with such product." 15 U.S.C. § 2056(a) (emphasis added).

previously held, in no uncertain terms, that "[t]he regulatory analysis concerning 'unreasonable risk' in the rulemaking context is not applicable in an adjudicatory proceeding seeking an order to address a 'substantial product hazard.'" *See In re Zen Magnets, LLC*, CPSC Dkt. No. 12-2, Opinion and Order Denying Respondent's Motion to Disqualify, 2016 WL 11778211, at *13 (Sept. 1, 2016) (reasoning that "rulemaking is primarily concerning with a balancing of the hazard and economic impact of the proposed regulations," while "adjudications under Section 15 require no such balancing"); *see also In re Dye and Dye*, CPSC Dkt. No. 88-1, Opinion and Order, 1989 WL 435534, *22 n.9 (July 17, 1991) ("The existence of a defect or substantial product hazard does not depend on a cost-benefit analysis.").

Amazon's claim that Congress intended the Commission to balance costs and benefits in the "public interest" analysis is further refuted by the legislative history of Section 15(h), which was added to the CPSA as part of the Consumer Product Safety Improvement Act of 1990, Pub. L. 101-608. Section 15(h) was added to the CPSA after several hearings where Congress considered whether to add a cost-benefit analysis requirement to Section 15. Congress ultimately took precisely the opposite approach, citing concerns that "the CPSC has used analysis of costs and benefits from corrective action to justify inaction," and amending the CPSA to "clarify[] the current law that such analysis is not required . . . . [T]he CPSC retains the discretion to utilize this analysis where it is appropriate." 135 Cong. Rec. S10049-01, 1989 WL 193553 (Aug. 3, 1989) (Statement of Sen. Bryan). The notion that Congress specifically amended the statute to renounce a proposal for mandatory cost benefit-analysis in Section 15, only to later incorporate the requirement *sub silentio* through reference to "the public interest," is not tenable and can only be viewed as an attempt by Amazon to "justify inaction" as to the Subject Products.

8. Ordering Amazon to Issue a Refund Under Section 15(d) Would Not Violate the Takings Clause

Amazon asserts that "repeat payments to persons *who already received* full purchase-price payments would run afoul of the Fifth Amendment's Takings Clause." Amazon Brief at 34-35 (emphasis in original). In effect, Amazon simply repackages its objections to ALJ Patil's finding that a refund is in the public interest as a constitutional challenge, under the theory that issuing a refund to consumers who already received a gift card would constitute an impermissible transfer of Amazon's property for the sole purpose of benefitting "a particular class of identifiable individuals" rather than for the "public use," as required by the Takings Clause. *Id.* at 35 (citing *Kelo v. City of New London*, 545 U.S. 469, 478 (2005)). As discussed in Section C.2 above, however, the public purpose of the Section 15 refund is not to compensate a limited universe of Amazon customers, but to promote the removal of hazardous Subject Products from the hands of both original purchasers and current possessors. Furthermore, Amazon's arguments are refuted by longstanding legal precedent that neither an obligation to pay money, nor a monetary loss caused by voluntary action, can constitute a taking.

First, the Takings Clause is inapplicable to an order to provide a refund under Section 15 because "regulatory actions requiring the payment of money are not takings." *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1339 (Fed. Cir. 2001) (citing *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), where five justices[34] found that the retroactive liability provisions of

[34] Although there was no majority opinion the *Apfel* case, Justice Kennedy's concurring opinion and the four dissenting justices all agreed that the Takings Clause was not implicated by an obligation to pay money. "Thus five justices of the Supreme Court in [*Apfel*] agreed that regulatory actions requiring the payment of money are not takings." *Commonwealth Edison Co.*, 271 F. 3d at 1339; *see id.* 271 F.3d at 1339 n. 10 (collecting cases reflecting "prevailing view" that, under *Apfel*, the Takings Clause does not apply to statutory obligations to pay money).

the Coal Industry Retiree Health Benefit Act of 1992 did not implicate the Takings Clause); *see also McCarthey v. City of Cleveland*, 626 F.3d 280, 85 (6th Cir. 2010) (noting that "all circuits that have addressed the issue have uniformly found that a taking does not occur when the statute in question imposes a monetary assessment that does not affect a specific interest in property."). While deprivation of a property interest in a *fund* of money—*i.e.,* the interest or principal of a "specific, separately identifiable" fund of money "into which a private individual has paid money," *see Apfel*, 524 U.S. at 555 (Breyer, J., dissenting)—can result in a Taking,[35] mere "statutory obligations to pay money" cannot. *See Adams v. United States*, 391 F.3d 1212, 1224-25 (Fed. Cir. 2004) (finding that where a law implicates an abstract sum[s] of money capable of being calculated" instead of a "an actual sum of money representing interest derived from ownership of particular deposits in an established account," there is no identifiable property interest cognizable under the Takings Clause). Here, Amazon is challenging the constitutionality of a remedial order to pay consumers a refund under Section 15(d). Such an order represents a statutory obligation to pay and does not implicate any "specific fund" in which Amazon could identify a property interest.

Furthermore, Amazon's arguments are misplaced because its voluntary action to issue gift cards to customers does not convert a Section 15 refund into a Takings Clause violation. The fact that a number of Amazon customers have already been compensated for their purchases is not relevant to the Takings Clause analysis of the proposed Section 15 refund, because any monetary loss Amazon experienced from issuing gift cards is entirely attributable to its own voluntary conduct. And courts have clearly held that voluntary payments do not implicate the Takings Clause. For example, one court rejected an argument that fees associated with collect calls

[35] *See, e.g.*, *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160-165 (1980).

received from state prison inmates constituted a taking, because the "prospective recipient of a collect call is in complete control over whether she chooses to accept the call and thereby relinquish her money to pay for it." *McGuire v. Ameritech Servs., Inc*., 253 F. Supp. 2d 988, 1004 (S.D. Ohio 2003); *see also Lafleur v. State Univ. Sys. of Fla*., No. 8:20-CV-1665-KKM-AAS, 2021 WL 3727832, at *7 (M.D. Fla. Aug. 2, 2021), report and recommendation adopted, No. 8:20-CV-1665-KKM-AAS, 2021 WL 3725243 (M.D. Fla. Aug. 23, 2021) (rejecting an argument that "voluntary tuition and fee payment to a public university constitutes a 'taking'").

Moreover, courts have consistently held that "Governmental regulation that affects a group's property interests 'does not constitute a taking of property where the regulated group is not required to participate in the regulated industry.'" *Burditt v. U.S. Dep't of Health & Hum. Servs*., 934 F.2d 1362, 1376 (5th Cir. 1991) (citation omitted); *see also Meriden Tr. & Safe Deposit Co. v. F.D.I.C.,* 62 F.3d 449, 455 (2d Cir. 1995) (rejecting an argument that the FDIC's assessment of a bank's liability was a taking where the regulated bank had, following the passage of a law changing the regulatory framework, chosen "to continue as an 'insured depository institution' and possibly become subject to [] liability in the future," thereby "voluntarily subjecting itself to a known obligation."). Accordingly, Amazon's voluntary issuance of a gift card to its customers prior to the initiation of this action does not transform a Section 15 refund into an unconstitutional taking.

D. Amazon's Challenge to the Scope of the Subject Products Included in the Order Fails because the Subject Products Should Include All Products that Are the Same, Including Those That Have Only Cosmetic Variations

Amazon argues that ALJ Patil improperly included in the scope of his remedial order 20 children's sleepwear products that Amazon voluntarily removed from its website, because the Commission did not perform "testing" or "quantitative analysis" on each of those products to

determine if they presented a substantial product hazard. *Id.* at 50-51. Specifically, Amazon challenges the inclusion of the product listings described in Amazon Exhibit 130, which were "child" listings (*i.e.,* specific products with identifiable sales) tied to certain "parent" ASIN listings of the Subject Products that Complaint Counsel identified in the Complaint. Amazon disputes the assumption that all "child" ASINs of a single "parent" necessarily pose identical product hazards. *Id.* at 53.

Amazon's argument makes clear that it would be entirely arbitrary to use ASINs (Amazon's proprietary product listing system) to define the scope of remedies ordered by the Commission and that doing so would not be in the public interest. Instead, the focus must be on the Subject Products. It is the Subject Products—identified by ASIN in the Complaint and further clarified by Amazon during discovery—that are subject to remedial order. As Complaint Counsel explained in its Appeal Brief, under the CPSA, a covered "product" under Section 15(c) not only encompasses the precise items expressly identified in a Complaint or during the course of a Section 15 proceeding, it also covers the same products, however identified, including products differing only cosmetically such as by size or color variations.

Contrary to Amazon's suggestion, there is no need to conduct tests of every possible iteration of the same product, as doing so would be redundant. Accordingly, products that happen to be sold or offered for sale through a separate "parent" or "child" ASIN or products with only cosmetic variations are the same "product" under the CPSA. *See, e.g.*, *JCW Invs., Inc. v. Novelty, Inc.*, 482 F.3d 910, 916 (7th Cir. 2007) (finding that despite minor cosmetic differences in the appearance of two dolls, including different colored shoes, chairs, one wearing a hat and one doll having their name emblazoned on their chest, an "objective observer" would believe the dolls were the same); *Beaty v. Ford Motor Co.*, 854 F. App'x 845, 848–49 (9th Cir. 2021) (reasoning that

knowledge of a defect in one model of panoramic sunroofs may be attributable to another model where the purported differences between models were "merely cosmetic and 'immaterial' to the defect at issue").

For these reasons, the Commission's order should be clear that it extends to all Subject Products, regardless of how such products distributed through the FBA program appear on Amazon's website, and regardless of the "parent" or "child" ASINs assigned to a particular listing of that product. Likewise, whether or not the 20 products listed in Amazon Exhibit 130 are specifically enumerated in the Commission's final order, Amazon should be ordered not to distribute products that are the same as the Subject Products, including products with mere cosmetic differences that pose the same substantial product hazards. Indeed, it would not serve the public interest to allow those products, and any other such products that Amazon may otherwise distribute in the future, to fall through the cracks of the remedial order in this case. If Amazon thereafter nonetheless decides to distribute products listed in Amazon Exhibit 130, it does so at its own risk and to the detriment of public safety, and potentially subject to CPSA Section 19 civil penalties if those products are the same as the Subject Products.

E. Amazon's Challenge to the Notice Ordered by the ALJ Fails Because Direct Notice and Social Media Notice Are Authorized by Statute and Required to Adequately Protect the Public

Amazon distributed 400,000 hazardous Subject Products into commerce and it is undisputed that each of those products meets the requirements for a substantial product hazard; indeed, each presents a risk of serious injury or even death. The direct notice and social media notice sought in this case are therefore both required to adequately protect the public because no consumer who purchased or possesses a Subject Product has been properly informed of the potential dangers or the remedies available to address those hazards.

Yet, Amazon wrongly disputes ALJ Patil's decision to order multiple rounds of direct notice and social media notice, arguing that the record does not support the requested notice, that it should not be required to post any social media notice to its primary accounts, and that any order requiring notice violates the First Amendment of the U.S. Constitution. These arguments are wrong for several reasons. First, the record clearly demonstrates that direct notice to consumers is required to adequately protect the public in this case. Second, CPSA Section 15 and its corresponding regulations grant the Commission the authority to order multiple rounds of direct notice. Third, ordering Amazon to make multiple rounds of social media posts to its primary accounts is required to adequately protect the public. Finally, an order requiring Amazon to provide consumers with the requested notice would not violate the First Amendment.

1. Contrary to Amazon's Arguments, the Record Demonstrates That Direct Notice to Purchasers Is Required to Adequately Protect the Public

Amazon raises several challenges to ALJ Patil's findings that it must provide direct notice to consumers, in accordance with the Commission's specific form and content guidelines, in order to notify the public about and facilitate a remedy for the hazardous Subject Products. Each of these arguments fail. First, Amazon is wrong that email messages it unilaterally sent to direct purchasers limits the Commission's authority to order Section 15 notice. Second, the record fully supports a finding that notice is required to adequately protect the public. Finally, Amazon's challenge to the Commission's authority and discretion to dictate the notice contents consistent with the CPSA and its corresponding regulations fails as a matter of law.

a. Amazon Wrongly Claims That Its Unilateral Message to Customers Limits the Commission's Section 15 Remedial Authority

Amazon's argument that its unilateral email to original purchasers of the Subject Products strips the Commission of its Section 15(c) authority to order direct "notice to every person to whom the . . . product was delivered or sold" is plainly untenable. For the same reasons described in Section C.1 above that Amazon's unilateral issuance of a gift card is not a statutory refund under Section 15(d), Amazon's unilateral email does not constitute statutory notice under Section 15(c), and Amazon's attempts to characterize ALJ Patil as having ordered "additional notice" is therefore misplaced. *See* Amazon Brief at 54. As ALJ Patil recognized in the May 8 Order, Amazon's unilateral actions "by definition . . . do not constitute a statutory remedy," and therefore cannot "cancel" the Commission's authority to order notice and remedies under Section 15. Indeed, the CPSA expressly contemplates that the Commission—*not* the regulated firm— "shall specify the form and content of any notice required" under Section 15(c). Dkt. No. 109 at 26. Accordingly, as no statutory notice remedy has yet been ordered in this case, Amazon is wrong to suggest that its single email to original purchasers in any way prevents the Commission from ordering Amazon to provide direct notice to consumers or from directing the "form and content" of the required notice in its discretion.

b. Contrary to Amazon's Arguments, the Administrative Record Supports a Finding That Notice Is Required in Order to Adequately Protect the Public

Despite Amazon's repeated efforts to rephrase the statutory language,[36] the CPSA authorizes the Commission to craft notice remedies pursuant to a broad, discretionary standard:

[36] In its appeal brief, Amazon misstates the applicable standard on several occasions, wrongly

whether notification is "required in order to adequately protect the public." 15 U.S.C. § 2064(c)(1). Here, the administrative record provides substantial support for ALJ Patil's reasoned conclusion that notice is required. Dkt. No. 109 at 36-39. Specifically, it is undisputed that Amazon's unilateral email failed to meet the content requirements of the CPSA, its implementing regulations, and the Commission's guidance; Amazon's argument that its email was somehow the practical equivalent of a proper Section 15(c) notice is therefore unavailing. For example, Amazon's unilateral email failed to include substantial mandatory content Congress set forth in 15 U.S.C. § 2064(i): it did not include a photograph of the product, the number of units at issue, or an identification of the manufacturers of the Subject Products. *See*, e.g., Amazon Statement of Undisputed Material Facts, Dkt. No. 75 ¶ 71 (quoting Amazon's unilateral email with the following Item language: "B0743NKWC – Girls' Lace Nightgowns & Bowknot Sleep Shirts 100 percent Cotton Nightie for Toddler, Purple Lace, 6-7 Years/Tag 140"). Further, Amazon's unilateral email did not provide the product's dates of manufacture and sale, the number and description of any injuries or deaths associated with the product, or Amazon's contact information for consumers to reach out with any questions about the email's content. *See* Dkt. No. 75 ¶¶ 19, 52, 71, 87, 101; *see also* Complaint Counsel's Response to Amazon's Statement of Undisputed Material Facts, Dkt. No. 87 ¶ 55 (quoting CPSC's Rule 30(b)(6) deponent's testimony [redacted]

claiming that the Commission must determine: that the goals of the CPSA "*cannot be fulfilled without* the components purportedly missing from Amazon's first round of email messages" Amazon Brief at 55 (emphasis added), that the components of the requested notice are "*so necessary* to protect the public that [] emails to thousands of purchasers was required," *id.* (emphasis added), whether the language in Amazon's emails "*could be effective,*" *id.* at 57 (emphasis added), and whether "the public *cannot be adequately protected* in these circumstances without" the requested notice, *id.* at 63 (emphasis added). None of these Amazon-crafted standards have any basis in the text of the statute.

[redacted]

Amazon also failed to satisfy the content requirement floor set forth in 16 C.F.R. § 1115.27 as part of the Mandatory Recall Notice Rule. The Mandatory Recall Notice Rule requires a notification to include, among other things: the word "recall" in the heading and text of the notice, *id.* § 1115.27(a); a photograph of the product at issue, *id.* § 1115.27(c)(6); a description of the action being taken, which may include "request return and provide a replacement" or "request return and provide a refund," *id.* § 1115.27(d); "the approximate number of product units covered by the recall," *id.* § 1115.27(e); a description of the product's substantial product hazard that enables consumers to "readily identify and understand the risks and potential injuries or deaths associated with the product conditions," *id.* § 1115.27(f); identification of "each manufacturer (including importer) of the product and the country of manufacture," *id.* § 1115.27(h); the dates of manufacture and sale of the product, *id.* § 1115.27(k); the price of the product, *id.* § 1115.27(l); a description of all incidents, injuries, and deaths associated with the product, *id.* § 1115.27(m); all information a consumer needs to "obtain all information about each remedy," including "distributor contact information (such as name, address, telephone and facsimile numbers, e-mail address, and Web site address)," *id.* § 1115.27(n)(3), 15 U.S.C. § 2064(i) (2)(H); and any other information as the Commission "deems appropriate and orders," *id.* § 1115.27(o). Amazon's unilateral email did not include this content.

Although Amazon wrongly argues that these deficiencies are merely a matter of "contrary preferences," Amazon Brief at 59, both Congress and the Commission set forth these requirements to effectuate the statutory mandates to protect the public against the unreasonable risk of injury and

death associated with substantial product hazards. Here, Amazon distributed 400,000 hazardous Subject Products into commerce, each of which presents a risk of serious injury or death, and not a single consumer who purchased or possesses one of these products has been properly informed of the potential dangers and the available remedies. Hence, ALJ Patil was correct that ordering Amazon to provide direct notice to consumers is required to adequately protect the public. *See* Dkt. No. 109 at 36.

c. Amazon's Suggestion That the Commission Must Justify Individual Components of the Ordered Notice Is Incorrect as a Matter of Law

Amazon argues that its voluntary email to original purchasers somehow imposed a new evidentiary burden on the Commission to show that each element of statutorily required content "purportedly missing from Amazon's email messages were so necessary to protect the public that additional emails to thousands of purchasers was required." Amazon Brief at 55. This is wholly inconsistent with the CPSA.

In addition to granting the Commission broad discretion to determine what form of notice is required to remedy a substantial product hazard, Congress also entrusted the Commission with substantial flexibility to determine the contents of that notice. Section 15(i) of the CPSA expressly lists several categories of safety information that each recall notice "shall include" unless the Commission "determines with respect to a particular product that one or more of the following items is unnecessary or inappropriate under the circumstance," and directs the agency to further establish regulations "setting forth a uniform class of information to be included in any notice. . . . that the Commission determines would be helpful to consumers." 15 U.S.C. § 2064(i) (1) -(2). This type of remedial discretion is typical in statutes delegating power to administrative agencies. *See, e.g., Hyatt v. Off. of Mgmt. & Budget,* 908 F.3d 1165, 1174 (9th Cir. 2018) (finding that the

determination "of what appropriate remedial action should be taken, if any—is committed to [OMB's] discretion," where the applicable statute directed the agency to take "appropriate" remedial measures "if necessary").

Indeed, Congress introduced the Section 15(i) content requirements via the Consumer Product Safety Improvement Act of 2008, as part of a larger move to shift the discretion to determine the form and content of remedial actions to the Commission and away from regulated firms.[37] Section 15(i) plainly requires that the mandatory notice content should be included in every recall notice, unless the Commission concludes otherwise. 15 U.S.C. § 2064(i)(2). Nothing in the statute requires the Commission to independently justify each individual content element to be included in the notice in a given Section 15 action; such an obligation would turn the CPSA completely on its head and allow firms to thwart the Commission's discretion simply by proposing alternative language.

Accordingly, both the form and content of the direct notices that ALJ Patil ordered Amazon to provide to original purchasers of the Subject Products are fully authorized by the CPSA and supported by the administrative record.

[37] *See* S. Rep. No. 110-265 (Feb. 25, 2008) at 13 (explaining that the legislation "would provide the Commission the authority to approve the corrective action plan it determines to be in the public interest, instead of allowing the manufacturer to select the corrective action plan it believes appropriate"); *see also* 154 Cong. Rec. H7585 (July 30, 2008) (statement of Rep. Eshoo) ("It's become glaringly obvious that we can't rely on manufacturers to police themselves, we need to give the chief consumer regulatory agency the authority and the resources necessary to get unsafe products off the shelves and stop them from coming into the country."); 153 Cong. Rec. H16882 (Dec. 19, 2007) (statement of Rep. DeLauro) ("The days of industry self-policing must come to an end.").

2. Amazon's Claim That There Is No Legal Basis to Order Multiple Rounds of Direct Notice Is Incorrect

Amazon wrongly suggests that the Commission lacks authority to order it to provide multiple rounds of direct notice, misleadingly arguing that ALJ Patil did not rely on any legal authority besides the CAP Template for this aspect of the decision. In fact, the authority for multiple rounds of notice is apparent from Section 15(c) of the CPSA, which grants the Commission the power to "specify the form" of required notice and expressly provides the authority to order multiple forms of notice (*e.g.*, "notice on Internet website," "announcements in languages other than English and on radio and television," and "mail[ed] notice to every person to whom the . . . product was delivered or sold."). 15 U.S.C. § 2064(c)(1)(D)-(F). Likewise, the Commission's regulations direct that multiple forms of recall notice should be used. *See* 16 C.F.R. § 1115.26(a)(5). The notion that Congress granted the discretion to order numerous different types of notice, but intended to prohibit the Commission from utilizing any particular type of notice more than one time, if appropriate, is nonsensical.

The administrative record in this case substantiates the benefits of multiple rounds of direct notice in properly informing the public, including the requirements memorialized in the Recall Handbook and the CAP Template. These documents are not, therefore, the sources of this legal authority, but simply demonstrate the judgment of the agency, based on decades of conducting product safety recalls, that multiple rounds of direct notice are more effective than a single round. Accordingly, the Commission has full discretion under Section 15(c) and 16 C.F.R. § 1115.26(a)(5) to order multiple rounds of notice, and ALJ Patil's order requiring two rounds of direct notice is fully supported by the administrative record.

3. *Contrary to Amazon's Arguments, Multiple Rounds of Social Media Posts, Published to Its Primary Accounts, Are Required to Adequately Protect the Public*

Amazon is wrong that ALJ Patil's order for recall posts to be published on Amazon's primary social media accounts "lacks proportionality." Amazon Brief at 61. Section 15(c)(1)(D) of the CPSA authorizes an order requiring a firm to post "clear and conspicuous notice on its Internet website," and Amazon does not appear to contest the Commission's power to order social media postings. 15 U.S.C. § 2064(d)(1). Yet Amazon argues that the Commission should not require Amazon to publish multiple rounds of social media posts or to use its primary social media accounts, but rather, Amazon should be allowed to publish the notice on the social media pages for its "AmazonHelp" customer service accounts. These arguments are wrong for several reasons.

First, a goal of social media notice is to reach as many people as possible who may not have been original purchasers or who otherwise would not see Amazon's direct notice or a notice published on Amazon.com or CPSC.gov,[38] a goal that would be thwarted by limiting such notice to a single round of notice on social media pages receiving relatively low traffic. Despite Amazon's plainly incorrect assertion that its "AmazonHelp" social media pages are "suited—and designed" for the purpose of providing social media notice, Amazon Brief at 63, these pages, by their own terms, have quite a different purpose: to "answer Amazon support questions."[39] Accordingly, in

[38] *See* "'CPSC 2.0' Launches Product Safety Agency into Social Media Consumers to Be Informed of Important Safety Issues Faster and More Frequently," CPSC.gov (Apr. 22, 2009), https://www.cpsc.gov/Newsroom/News-Releases/2009/CPSC-20-Launches-Product-Safety-Agency-into-Social-MediaConsumers-to-Be-Informed-of-Important-Safety-Issues-Faster-and-More-Frequently, (explaining that "social media sites" allow CPSC to "expand its reach to millions of consumers" and noting, "Through social media, CPSC can directly reach millions of the moms, dads and others who need our safety information the most").

[39] *See* AmazonHelp, FACEBOOK, Page description, https://www.facebook.com/AmazonHelp/ (last visited 9/19/2023, 2:57PM).; @AmazonHelp, TWITTER, Account description,

contrast to Amazon's primary accounts, the AmazonHelp pages feature essentially no public posts—the AmazonHelp Facebook page, for instance, has not published any new content to its main page since November 2021[40]—and instead respond directly (and often privately) to individuals raising complaints on each social media platform. Unsurprisingly then, as noted in Complaint Counsel's Brief in Support of its Amended Proposed Order, the "AmazonHelp" pages have substantially lower engagement than Amazon's primary accounts: "AmazonHelp" on Facebook has only 31,815 followers (about 0.1% of the 29.9 million followers for Amazon's primary Facebook page),[41] and the @AmazonHelp account on X (Twitter) has 493,600 followers (about 8.65% of the 5.7 million followers for Amazon's primary X (Twitter) account).[42] *See* Dkt. No. 117 at 7. Amazon's proposal would also entirely eliminate posting notice of the recall on Instagram, where Amazon's primary account reaches 4.4 million followers.[43] In short, these customer-service accounts are poorly suited to provide broad-based public notice of the hazardous Subject Products and the remedies available to consumers.

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https://twitter.com/AmazonHelp?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauth (last visited 9/19/2023, 2:57 PM).

[40] *See* AmazonHelp, FACEBOOK, https://www.facebook.com/AmazonHelp/ (last visited 9/19/2023, 2:57 PM).

[41] *See* Amazon, FACEBOOK, https://www.facebook.com/Amazon/ (last visited 9/19/2023, 2:58 PM); AmazonHelp, FACEBOOK, https://www.facebook.com/AmazonHelp/ (last visited 9/19/2023, 2:57 PM).

[42] See @Amazon, TWITTER,https://twitter.com/amazon?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor (last visited 9/19/2023, 2:58 PM); @AmazonHelp, TWITTER, https://twitter.com/AmazonHelp?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor (last visited9/19/2023, 2:59 PM).

[43] @Amazon, INSTAGRAM, https://www.instagram.com/amazon/?hl=en (last visited 9/19/2023, 3:00 PM).

Second, Amazon's argument that recall notices on its' primary social media accounts will displace their ordinary content is unavailing. In the first place, a requirement that Amazon post three separate notices three different times to each platform is hardly a volume that would "nullify the[] utility" of those accounts for Amazon's customers. Moreover, any purported impact on "updates concerning Amazon's core services" is a pure business concern, which, in light of the ongoing substantial hazard posed by the unaddressed Subject Products, is decidedly outweighed by the interests of public safety that can be achieved through proper notice. At any rate, the fact that Amazon is a large company that offers a high volume of products for sale is not a reason to grant an exception from the ordinary practice of requiring multiple rounds of social media notice on a firm's primary social media accounts.

4. Contrary to Amazon's Contentions, Requiring It To Provide Notice Does Not Violate the First Amendment

Amazon does not dispute that the Commission's authority to mandate notice in compliance with the content requirements Congress set forth in Section 15(i) of the CPSA, and to mandate that firms post notice on their "Internet website" under Section 15(c)(1)(D) of the CPSA, is facially constitutional. Yet Amazon argues that, because it took unilateral action to email its customers and issue a gift card, and because it chooses to operate multiple social media accounts, the Commission can no longer show that the requested Section 15 notice would directly advance its substantial interest in protecting consumers, as required by *Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980). Notwithstanding the unilateral actions that Amazon has taken, however, the Commission's notice requirements are constitutional under *Central Hudson.* Further, given that Amazon's email was limited to original purchasers, did not

fully address the dangers associated with the Subject Products, and did not incentivize the removal of those products from commerce, notice is still required to promote the aims of the CPSA.

As ALJ Patil recognized in the May 8 Order, Dkt. No. 109 at 33, the appropriate analysis of whether compelled commercial speech is constitutional is an intermediate scrutiny test, embodied in the *Central Hudson* factors: (1) the regulated speech concerns lawful activity and is not misleading; (2) there is a substantial government interest; (3) the regulation directly advances the substantial government interest; and (4) the regulation is not more extensive than necessary to serve that interest. *Central Hudson,* 447 U.S. at 566.

Here, the *Central Hudson* factors are satisfied for the same reason that notice is required to adequately protect the public: there are 400,000 hazardous products that Amazon distributed to consumers, none of which are accounted for and none of which have been confirmed to be removed from commerce. The Commission has a substantial interest in notifying consumers about those hazards—in a manner that properly incentivizes the removal of the Subject Products from commerce—including second-hand purchasers and giftees who are unlikely to be aware of Amazon's unilateral and deficient email to purchasers. *See* Dkt. No. 109 at 34-35. This public safety interest is materially advanced by requiring Amazon to provide direct notice pursuant to the CPSA's mandatory content provisions and the Commission's mandatory standards, as well as to provide public notice on its primary social media accounts. *See id*. Finally, the notice is narrowly tailored to those purposes, given that the dangerous Subject Products present exactly the type of circumstance that Section 15's notice provisions were built to address, and there is no suggestion in the record that Amazon is not fully capable of administering the required notice. *See id.*

Accordingly, Amazon's assertions that its unilateral actions render these remedies "micromanagement" that no longer materially advance the Commission's public safety interest are

plainly wrong. Notice is still required to adequately protect the public here, where Amazon's single email was limited to original purchasers, failed to adequately describe the hazards associated with the Subject Products, and failed to incentivize or account for the removal of those products from the hands of consumers.

Furthermore, Amazon is incorrect to suggest that *Central Hudson* requires the Commission to show how the Section 15 notice requirements, as applied to Amazon in this individual case, will "directly advance" the Commission's interest in protecting the public. To the contrary, the Supreme Court in *United States v. Edge Broad. Co*., 509 U.S. 418, 427 (1993), held it is "readily apparent" that, in the context of an "as applied" constitutional challenge, *Central Hudson*'s direct advancement factor "cannot be answered by limiting the inquiry to whether the governmental interest is directly advanced *as applied to a single person or entity*. Even if there were no advancement as applied in that manner . . . there would remain the matter of the regulation's general application to others." In *Edge*, the Court addressed a challenge to federal legislation prohibiting the broadcast of lottery advertisements, except for promotions of state-run lotteries broadcast by stations licensed to a State which conducts a state-run lottery. *Id.* at 423. Respondents, Edge Broadcasting, challenged these laws as applied to themselves, because, although they were licensed in North Carolina (which did not sponsor a lottery), they were situated near the border with Virginia (which did) and reported that over 90% of their listening audience was based in Virginia. *Id.*

The Supreme Court reversed the lower court's finding that the statutes unconstitutionally regulated commercial speech in violation of the First Amendment, reasoning that the *Central Hudson* test does not require the government to justify "the extent to which [a regulation] furthers the Government's interest in an individual case." *See id.* at 430-31. As to the second and third

factors of the *Central Hudson* test,[44] the Court expressed "no doubt that the statutes directly advanced the governmental interest at stake," and explained that the interest was "directly served by applying the statutory restriction to all stations in North Carolina." *Id.* at 428-29. The Court reasoned that the issue of the statute's specific application to Edge was not relevant to the direct advancement prong of the *Central Hudson* test, clarifying that the analysis of this factor required consideration of "the regulation's general application to others—in this case, to all other radio and television stations in North Carolina and countrywide." *Id.* at 528. Instead, the Court explained that "the validity of the statutes' application to Edge . . . properly should be dealt with under the fourth factor of the *Central Hudson* test," rather than the third. *Id.* at 429-30.

Accordingly, contrary to Amazon's claims, in an as-applied challenge like the one here, *Central Hudson* does not require the Commission to show that the specific notice ordered *in this particular case*[45] will in fact advance its interests in informing and protecting consumers. Specifically, the *Edge* Court held that the lottery legislation would satisfy *Central Hudson*, "*even if, as applied to Edge, there were only marginal advancement of [the substantial government] interest.*" *Id.* (emphasis added). "[A]pplying the restriction to a broadcaster such as Edge directly advances the governmental interest," the Court continued, [E]ven if . . . . applying the general statutory restriction to Edge, in isolation, *would no more than marginally* insulate the North Carolinians . . . served by Edge from hearing lottery ads.") (emphasis added). *Edge* further notes

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[44] The Court assumed that the first *Central Hudson* factor (that the regulated activity concerns lawful, non-misleading speech) was met. *Id.* at 426.

[45] *See also Suburban Lodges of Am., Inc. v. Columbus Graphics Comm.,* 145 Ohio App. 3d 6, 13 (Ct. of App. Ohio 2000) (reasoning that, under *Central Hudson*, "the relevant inquiry . . . is not . . . whether the city can prove that prohibiting *this particular sign* will have a direct effect on traffic safety and aesthetics. . . as the effect of any particular sign on traffic safety and aesthetics would likely be de minimis") (emphasis added).

the Supreme Court has consistently held that, once the government has established "a 'strong interest in adopting and enforcing ruled of conduct designed to protect the public,'" it is "entitled to protect its interest by applying a prophylactic rule to those circumstances generally" and is not required to "go further and to prove that the State interests supporting the rule actually were advanced by applying the rule in [a] particular case." *Edge*, 509 U.S. at 431 (internal citations omitted).[46]

Likewise, here, an order for the requested direct notice and social media notice in these circumstances directly advances the Commission's interest in protecting consumers from product hazards and removing hazardous products from the stream of commerce. This is especially true when it comes to Internet-based firms like Amazon, whose ability to contact original purchasers and track consumer engagement with remedies, as compared with traditional brick-and-mortar firms, creates an opportunity for particularly effective notice to consumers. Of course, there is also no suggestion that Amazon is somehow incapable of issuing the requested notices in accordance with the statutory guidelines. Even if, however, the direct notice and social media notice in this particular case would in fact "no more than marginally advance" the Commission's interest in

[46] Amazon correctly notes that the Supreme Court held, in *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 188 (1999), that the third prong of *Central Hudson* "is not satisfied by mere speculation or conjecture; rather a governmental body . . . must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." (quoting *Edenfield v. Fane,* 507 U.S. 761, 770–771 (1993)). But this statement of the general obligation to justify speech regulations does not address the specific application of *Central Hudson* to an individual case. For this reason, the Court in *Edge* distinguished *Edenfield*—the precedent quoted in *Greater New Orleans*— as involving an individual's challenge to a regulation as applied to a "broad category of commercial solicitation" rather than "as applied only to himself or his own acts of solicitation." *Edge*, 509 U.S. at 431. The language Amazon quotes from *Nat'l Ass'n of Manufacturers v. S.E.C.*, 800 F.3d 518, 547 (D.C. Cir. 2015) and *Safelite Grp., Inc. v. Jepsen,* 764 F.3d 258, 265 (2d Cir. 2014), is likewise in the context of analyzing the broader benefits of challenged regulations, and not the benefits that arise from application to individual parties.

protecting consumers—and the record below amply demonstrates why the benefit of the notice would be far more than marginal—the *Edge* case makes clear that it would still pass constitutional muster under *Central Hudson*. *See Edge*, 509 U.S. at 428-29.

Moreover, to allow Amazon or any other firm to manufacture a constitutional exemption to ordinary Section 15 remedies by simply taking voluntary action in its business judgment and claiming it sufficient would "seriously erode[]" the Commission's available tools to protect the public from hazardous products. *See id.* at 435 (White, J., concurring) (reasoning that the "practical effect" of accepting the argument that "Edge had a valid claim that the statutes violated *Central Hudson* only as applied to it," would be a "piecemeal approach" that would "seriously erode[]" the government's policy of supporting states' decisions to impose bans on lotteries). Amazon's assertions that an order requiring direct notice and social media notice would somehow violate the First Amendment therefore have no merit.

F. Amazon's Claims That This Adjudication Violates the Separation of Powers Doctrine or the Due Process Clause Fail as a Matter of Law

Amazon incorrectly argues that this proceeding is unconstitutional under two separate separation-of-powers theories, as well as a due process theory. As a threshold matter, these arguments are not properly addressed in this forum, given that facial constitutional challenges are beyond the jurisdiction of administrative agency proceedings. In addition, Amazon's suggestion that the Commission should voluntarily dismiss the case is based on a misreading of the cited case law.

Moreover, Amazon is wrong on the merits of each of these claims. Its arguments challenging the for-cause removal restrictions that apply to the CPSC Commissioners and to the Presiding Officers are contrary to longstanding precedent. Meanwhile, there is no legal or factual

basis for Amazon's claim that the Commission has an unconstitutional conflict of interest in this matter.

1. Contrary to Amazon's Arguments an Administrative Adjudication Is Not the Appropriate Forum to Rule on Facial Constitutional Challenges

Amazon wrongly characterizes ALJ Patil's decision not to rule on its constitutional challenges to this proceeding as "mistaken." In fact, as ALJ Patil noted in the May 8 Order, the Supreme Court has reasoned that "agency adjudications are generally ill suited to address structural constitutional challenges," and the "consensus view" is that "administrative agencies lack jurisdiction" to address the constitutionality of congressional enactments. Dkt. No. 109 at 3 (*citing Axon Enter., Inc. v. FTC*, 143 S. Ct. 890, 905 (2023) (*quoting Carr v. Saul*, 141 S. Ct. 1352, 1360 (2021)). Indeed, even Amazon concedes that "the Commission may not be able to invalidate the challenged removal restrictions itself," arguing, instead that the Commission should voluntarily dismiss the adjudication "based on its conclusion that those restrictions are unconstitutional." Amazon Brief at 67.

But voluntary dismissal of the case would be entirely inconsistent with Congress's direction that the Commission "determine[]" the appropriate remedies for a substantial product hazard following "an opportunity for a hearing" in accordance with Section 15(f) of the CPSA. *See* 15 U.S.C. § 2064(c)(1), (d)(1), (f)(1). As ALJ Patil correctly recognized, it is Congress who created the removal protections applicable to CPSC Commissioners as well as to Administrative Law Judges. Dkt. No 109 at 3. And Congress also clearly vested the Commission with authority to conduct Section 15 adjudications pursuant to the Administrative Procedure Act. *See* 15 U.S.C. § 2064(f)(1) ("[A]n order under [Section 15] (c) or (d) may be issued only after an opportunity for a heading in accordance with Section 554 of [the Administrative Procedure Act]). It would be

wholly improper for the Commission to follow Amazon's suggestion that it unilaterally determine the structure of its own governing legislation to be somehow unconstitutional.

To support its assertions regarding voluntary dismissal, Amazon relies on *Jones Bros., Inc. v. Sec'y of Lab.*, 898 F.3d 669, 674, 677 (6th Cir. 2018). A close read of *Jones Bros.*, however, shows that it holds exactly the opposite of what Amazon suggests, and instead provides further support for the well-established tenet that facial constitutional challenges like those Amazon raises here are beyond the scope of an administrative proceeding. Specifically, *Jones Bros.* dealt with a challenge to the appointment of an Administrative Law Judge in a hearing of the Federal Mine Safety and Health Review Commission ("Mine Safety Commission"). The appointment was made by the Mine Safety Commission's Chief Administrative Law Judge, rather than "[t]he Commission," as required by the Mine Act, which the regulated firm argued violated not just the statute, but also the Constitutional requirement that inferior officers be appointed by the President, "the Courts of Law," or "the Heads of Departments." The Court held that this was the rare Constitutional challenge that should have been raised during the administrative proceeding rather than at the federal court level, explaining that the company sought "to *enforce*" the relevant provision of the Mine Act "not to *invalidate* it." *Id.* at 676-77 (emphasis added).

This distinction was key because it meant that the Mine Safety Commission could unilaterally act to cure the alleged Constitutional violation—in that case, by "having every Commissioner ratify the appointment of every administrative law judge"—without needing to invalidate its governing legislation. *Id.* at 679. The court explained that a constitutional challenge to "misused agency discretion" could also be raised at the administrative level for the same reason, *e.g.*, an equal protection challenge to an agency's exercise of "statutory authority to penalize only individuals of a certain race," which could be remedied by the agency taking voluntary action to

"stop the discriminatory enforcement." *Id.* at 675. By contrast, as to facial constitutional challenges to regulatory statutes, the *Jones Bros* court was emphatic that the Mine Safety Commission, "like all administrative agencies, has no authority to entertain a facial constitutional challenge to the validity of a law," because "only the Judiciary enjoys the power to invalidate statutes inconsistent with the Constitution." *Id.* at 674. Here, however, as to the separation-of-powers issues, Amazon makes no claims that the Commission is either misusing its statutory discretion or disregarding statutory requirements in an unconstitutional manner. Instead, Amazon's suggestion of voluntary dismissal would have the practical effect of invalidating and disregarding the remedial powers Congress vested the Commission with under the CPSA. Yet, as Amazon itself has expressly conceded, "[T]he agency does not have the authority to invalidate its own statute." Oral Arg. Tr. at 150.

2. Amazon's Arguments That the Proceeding Is Unconstitutional Due to the Removal Provisions Applicable to the CPSC Commissioners and the Presiding Officers Are Squarely Refuted by Longstanding Precedent

Amazon asserts two meritless arguments in support of its contention that this proceeding represents an unconstitutional violation of separation of powers principles. Both arguments fail. First, Amazon's allegation that the statutory limitation on the removal of CPSC Commissioners is unconstitutional is squarely foreclosed by binding precedent in analogous challenges to removal restrictions for other multi-member federal agencies that exercise authority comparable to that of the CPSC. Second, Amazon challenges the longstanding removal protections for ALJs, but fails to demonstrate that the removal of subordinate adjudicators "for good cause," 5 U.S.C. § 7521, unconstitutionally encroaches on Executive authority.

a. Amazon's Separation of Powers Challenge to the Commission's Structure Is Refuted by Precedent

Amazon's arguments that the for-cause removal provisions applicable to CPSC Commissioners renders this proceeding unconstitutional contradict longstanding precedent in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), and other cases. Since the creation of the Interstate Commerce Commission in 1887, Congress has repeatedly accorded for-cause tenure protections to officers of multi-member federal agencies. *See* Act of Feb. 4, 1887, ch. 104, § 11, 24 Stat. 379, 383. Half a century later, in *Humphrey's Executor*, the Supreme Court upheld the constitutionality of such restrictions in a case involving a commissioner of the multi-member Federal Trade Commission, who could be removed only for "inefficiency, neglect of duty, or malfeasance in office." *Id.* at 619-20 (quoting 15 U.S.C. § 41). The Court "found it 'plain' that the Constitution did not give the President 'illimitable power of removal' over the officers of independent agencies," and held that the "'coercive influence' of the removal power would 'threate[n] the independence of [the] commission.'" *Morrison v. Olson*, 487 U.S. 654, 687-88 (1988) (alterations in original) (quoting *Humphrey's Executor*, 295 U.S. at 630).

Accordingly, since the *Humprey's Executor* decision, "various federal agencies" are led by multi-member boards "covered by 'good cause' removal restrictions," and those agencies may "exercise civil enforcement powers." *Morrison*, 487 U.S. at 692 n.31. That includes the "Consumer Product Safety Commission," which the Supreme Court explained may "obtain injunctions and apply for seizure of hazardous products." *Id.* (citing 15 U.S.C. §§ 2061, 2071, 2076(b)(7)(A)). Furthermore, the Supreme Court's modern removal cases continue to treat *Humphrey's Executor* as good law. In *Free Enterprise Fund*, for example, where the Court invalidated "novel" and "rigorous" removal restrictions for certain inferior officers who could only

be removed by the SEC Commissioners, *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd*., 561 U.S. 477, 496 (2010), the Court reached its holding on the explicit understanding that the SEC Commissioners cannot "be removed by the President *except under the Humphrey's Executor standard*," *id.* at 487 (emphasis added).

Indeed, even the case Amazon relies on for its arguments, *Selia Law LLC v. Consumer Financial Protection Bureau*, 140 S.Ct. 2183 (2020), highlights the problems with Amazon's position. In that case, the Supreme Court continued to recognize that *Humphrey's Executor* permits removal restrictions for multi-member regulatory agencies, but held that because the CFPB was "led by a single Director" rather than "a board with multiple members," the President must have the ability to remove the director at will. *Selia Law*, 140 S.Ct. at 2191. The Court explained that in contrast to "a traditional independent agency"—once again citing as an example "*the multimember Consumer Product Safety Commission,*" *id.* at 2192 (emphasis added)—agencies headed by a "single Director . . . cannot be described as a 'body of experts' and cannot be considered 'non-partisan' in the same sense as a group of officials drawn from both sides of the aisle," *id.* at 2200. The Court thus severed the Director's removal restrictions as unconstitutional, *id.* at 2210-11, and explained that Congress may "pursu[e] alternative responses to the problem—for example, converting the CFPB into a multimember agency," *id.* at 2211. Under Amazon's theory, however, that "for-cause removal provisions are generally impermissible" even for multi-member regulatory agencies,[47] the "alternative response[]" offered by the Supreme Court would itself be unconstitutional.

[47] Amazon Brief at 68.

Ultimately, the CPSC's structure is constitutional because it parallels that of the Federal Trade Commission and numerous other multimember commissions that federal courts have found meet the *Humphrey's Executor* standard.[48] The agency is headed by five Commissioners, nominated by the President and confirmed by the Senate, who serve staggered seven-year terms. 15 U.S.C. § 2053(a)-(b). "Not more than three of the Commissioners shall be affiliated with the same political party." *Id.* § 2053(c). As relevant here, the Commissioners may be removed by the President during their seven-year terms for "neglect of duty or malfeasance in office but for no other cause." *Id.* § 2053(a).

Relying on a single district court decision from the Eastern District of Texas, *see Consumers' Rsch. v. CPSC*, 592 F. Supp. 3d 568, 2022 WL 1577222, at *12 (E.D. Tex. Mar. 18, 2022), appeal pending, No. 22-40328 (5th Cir.), Amazon nevertheless suggests that *Humphrey's Executor* does not control because it does not apply to agencies that exercise "a wide range of executive powers," including: authority to promulgate safety standards, authority to initiate civil and criminal actions in district court, authority to conduct administrative adjudications, and authority to issue subpoenas. Amazon Brief at 68-69. That contention is irreconcilable with the existing Supreme Court precedent on for-cause removal. Indeed, Amazon's theory is incompatible

[48] In addition to the aforementioned Federal Trade Commission and the Securities and Exchange Commission, other such agencies include the Federal Communications Commission, *see Freytag v. Comm'r,* 501 U.S. 868, 916, 920 (1991) (Scalia, J., concurring), the Nuclear Regulatory Commission, National Labor Relations Board, *In re Aiken Cnty*., 645 F.3d 428, 442 (D.C. Cir. 2011) (Kavanaugh, J., concurring), and the U.S. Sentencing Commission, *Mistretta v. United States*, 488 U.S. 361, 410-11 (1989). Substantive removal restrictions have also been understood to be constitutional under *Humphrey's Executor* for multi-member Executive tribunals such as the Tax Court, *Freytag*, 501 U.S. at 920 (Scalia, J., concurring), the Court of Appeals for the Armed Forces, *Morrison,* 487 U.S. at 725 (Scalia, J., dissenting), and the War Claims Commission, *Wiener v. United States*, 357 U.S. 349 (1958). *See also* Antonin Scalia & Frank Goodman, Procedural Aspects of the Consumer Product Safety Act, 20 UCLA L. Rev. 899, 904 (1973).

with *Humphrey's Executor* itself because the FTC in 1935 also had what Amazon would call "a wide range of executive powers." *See* Pub. L. No. 63-203, §§ 5, 6(g), 38 Stat. 717, 719-20, 722 (1914) (authorizing the FTC to issue cease-and-desist orders, to bring enforcement actions, and to issue regulations). In sum, Amazon's challenge to the structure of the Commission is refuted by decades of precedent upholding the constitutionality of multi-member regulatory agencies, and their arguments fail as a matter of law.

b. Amazon's Separation of Powers Challenge to the Presiding Officers Also Fails

Amazon's challenge to the removal restrictions for administrative law judges similarly fails because "the President has sufficient control" over ALJs "to satisfy the Constitution." *Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1133 (9th Cir. 2021) (rejecting similar challenge for Department of Labor ALJs). Congress created ALJs (then called hearing examiners) when it enacted the Administrative Procedure Act ("APA") in 1946. *See* Pub. L. No. 79-404, § 11, 60 Stat. 237, 244 (1946). The APA provided that ALJs would be "[s]ubject to the civil-service" and "removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission." *Id.* That provision is now codified in 5 U.S.C. § 7521(a), which provides that ALJs may be removed by their appointing agency "only for good cause established and determined by the Merit Systems Protection Board." This longstanding scheme gives ALJs a "qualified right of decisional independence," *Nash v. Califano*, 613 F.2d 10, 15 (2d Cir. 1980), and was designed to rebut allegations that ALJs might be "mere tools of the agency," *Ramspeck v. Federal Trial Examiners Conf.*, 345 U.S. 128, 131 (1953).

The presiding ALJs in this administrative proceeding were inferior officers, subordinate officials whose work was "directed and supervised at some level by others who were appointed by

Presidential nomination with the advice and consent of the Senate." *Edmond v. United States*, 520 U.S. 651, 663 (1997). Specifically, the ALJ was required to apply the applicable law and regulations, and the ALJ's decision is now subject to Commission review. Nothing in the precedent of the Supreme Court precludes Congress from affording a measure of decisional independence to subordinate officials of this kind, who perform adjudicative, rather than policymaking, functions. On the contrary, the Supreme Court has consistently made clear that Congress may vest removal authority for an inferior officer in a Department Head[49] rather than the President personally, and subject to limited restrictions, so long as they do not place such officers beyond adequate presidential control.[50]

Amazon erroneously argues, based on *Free Enterprise Fund*, that all removal restrictions on ALJs are unconstitutional, since ALJs have a "good cause" standard for removal that is adjudicated by the Merit Systems Protection Board (MSPB), whose members themselves have for-cause removal restrictions. This is a misreading of *Free Enterprise Fund*. *See* 561 U.S. 477 (2010). In that case, the Court invalidated a statutory provision that imposed stringent limitations on the removal of inferior officers who could be removed only by principal officers also subject to

[49] The Supreme Court has held that, in the context of a multimember regulatory agency, the multimember body itself constitutes a "Head[] of Department[]" under the constitution. *See, e.g., Free Enterprise Fund*, 561 U.S. at 512 ("As a constitutional matter, we so no reason why a multimember body may not be the 'Hea[d]' of a Departmen[t]' that it governs."); *Lucia v. S.E.C.*, 138 S. Ct. 2044, 2050 (2018) (noting that the Securities and Exchange "Commission itself counts as a 'Head[ ] of Department[ ]'").

[50] For example, in *United States v. Perkins*, 116 U.S. 483 (1886), the Court upheld a removal restriction that required the Secretary of the Navy to make a misconduct finding or convene a court-martial before removing a naval officer during peacetime. *Id.* at 484-85. Second, in *Morrison,* 487 U.S. 654, the Court upheld a "good cause" removal restriction for an independent counsel appointed to investigate and prosecute serious crimes committed by certain high-ranking executive officers. *Id*. at 685-93.

good cause removal. There, the members of the Public Company Accounting Oversight Board ("Board") could be removed only for "willful violations of the [Sarbanes-Oxley] Act, Board rules, or the securities laws; willful abuse of authority; or unreasonable failure to enforce compliance," and any removal decision would be made by the SEC Commissioners (themselves thought to be removable only for cause). *Id.* at 503.

The Court in *Free Enterprise Fund* took pains, however, to explain that it was not making "general pronouncements on matters neither briefed nor argued here," 561 U.S. at 506, and that the invalidation of the Board's "highly unusual" and "sharply circumscribed" removal standard, *id.* at 505, should not "cast doubt on the use of what is colloquially known as the civil service system within independent agencies," *id.* at 507. And the Court also made explicit that its holding did "not address that subset of independent agency employees who serve as administrative law judges," who "perform adjudicative rather than enforcement or policymaking functions." *Id.* at 507 n.10. Nothing about the Court's subsequent holding in *Lucia v. SEC*, 138 S. Ct. 2044 (2018), which found that SEC ALJs were inferior officers for purposes of the Appointments Clause, changes this analysis, since, as Amazon concedes, "*Lucia* also did not expressly answer 'whether the statutory restrictions on removing [SEC] ALJ's are constitutional.'" Amazon Brief at 70 (citing *Lucia* at 2051 n.1). The precedents Amazon relies on in its motion therefore do not support a finding that the Presiding Officers in this case were unconstitutionally insulated from oversight by the President.

Even if the *Free Enterprise Fund* analysis were fully applicable here, the unusually stringent removal protections addressed in that case are starkly different from those presented in this proceeding. There, members were removable only if they "willfully violated" certain laws, "willfully abused [their] authority," or "without reasonable justification or excuse . . . failed to

enforce compliance with" specified rules or standards. 15 U.S.C. § 7217(d)(3); see *Free Enterprise Fund*, 561 U.S. at 486-87, 502-03. Those strict limitations on removal were further exacerbated by the Board's widespread regulatory authority and limited oversight by the SEC. The Court concluded that this "novel" and "rigorous" structure meant that "the President [was] no longer the judge of the Board's conduct" because he lacked "the ability to oversee the Board, or to attribute the Board's failings to those whom he can oversee." *Id.* at 492, 496. Accordingly, the Court invalidated and severed the Board's removal restrictions. *Id.* at 509.

None of those concerns are implicated here: the ALJ has narrowly circumscribed adjudicative duties, and the "good cause" standard in 5 U.S.C. § 7521 is understood to permit removal on reasonable grounds. Moreover, given that the ALJs in this administrative proceeding were serving on detail from another agency, the Commission retained ultimate control over whether to use the ALJs temporarily assigned to Amazon's case: there were no statutory restrictions on the Commission's authority to terminate the ALJs' details at will. *See* 5 U.S.C. § 3344 (details for ALJs); 5 C.F.R. § 930.208 (regulations for the detail program). Thus, the Commissioners—each of whom is removable for cause by the President, and therefore constitutionally accountable to the President—retained full discretion over whether to continue to employ ALJ Grimes and ALJ Patil on detail, and there is no "undu[e] interfer[ence] with the role of the Executive Branch." *Morrison*, 487 U.S. at 693.

3. Amazon's Suggestion That the Structure of The Commission Proceeding Violates the Due Process Clause Is Incorrect

The final, unpersuasive challenge Amazon makes comes in the form of strained citations to the "ancient maxim" that "no one should be a judge in his own cause." Amazon Brief at 71. Amazon appears to argue that the typical structure of administrative agency proceedings—by

which a Commission votes to initiate a case and then later makes the final decision regarding the action—is itself a conflict of interest. *Id.* at 71-72. Yet the Administrative Procedure Act clearly exempts the "members of the body comprising the agency" from the general rule that "[a]n employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review." 5 U.S.C. § 554(d)(2).

Amazon cites no case law supporting the proposition that the structure set forth by the APA violates the Due Process clause, and in fact, there is significant precedent holding just the opposite. *See Withrow v. Larkin*, 421 U.S. 35, 52-54 (1975) (rejecting an argument that "the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication"); *Air Prod. & Chemicals, Inc. v. FERC*, 650 F.2d 687, 709 (5th Cir. 1981) ("The practice of reviewing the recommendations of investigatory staff . . . and then ordering a formal investigation is clearly within the exception to the APA. The courts have also uniformly held that this feature does not make out an infringement of the due process clause of the Fifth Amendment.") (internal citations omitted); *see also Zen Magnets, LLC v. Consumer Prod. Safety Comm'n,* 986 F.3d 1156, 1167-68 (10th Cir. 2020) ("Agency officials can undertake multiple roles when carrying out their statutory duties, and the occupation of different roles is not necessarily problematic. For example, administrative officials could participate in an administrative adjudication even after investigating and testifying about their opinions on the underlying conduct.") (citations omitted). Furthermore, the Commission has instituted specific regulations prohibiting Complaint Counsel from engaging in "[a]ny oral or written *ex parte* communication relative to the merits of any proceedings" with the Commissioners and their staff "during the period

commencing with the date of issuance of a complaint and ending upon final Commission action in the matter. 16 C.F.R. § 1025.68.

V. CONCLUSION

For the reasons stated above, the Commission should deny the relief requested in Amazon's Appeal Brief.

Respectfully submitted,

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September 20, 2023

CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2023, a copy of the foregoing was served upon all parties and participants of record in these proceedings as follows:

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