No. 22-9578

In the United States Court of Appeals for the Tenth Circuit

MAGNETSAFETY.ORG, HOBBY MANUFACTURERS ASS'N, AND NATIONAL RETAIL HOBBY STORES ASS'N, INC.,
Petitioners,

v.

CONSUMER PRODUCT SAFETY COMMISSION,
Respondent.

On Petition for Review of Final Action of the Consumer Product Safety Commission

PETITIONERS' REPLY BRIEF

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INTRODUCTION

On September 21, 2022, pursuant to 15 U.S.C. § 2056(a), the Consumer Product Safety Commission ("CPSC" or the "Commission") promulgated a final rule entitled *Safety Standard for Magnets*, 87 Fed. Reg. 57,756 (Sept. 21, 2022) (codified at 16 C.F.R. pts. 1112, 1262) ("Rule" or "Final Rule"). The Rule was enacted after this Court vacated the Commission's prior attempt to regulate magnets. *See Zen Magnets, LLC v. CPSC*, 841 F.3d 1141 (10th Cir. 2016). However, the new Rule suffers from the same *and additional* flaws as the old rule and should meet the same fate.

The 2022 Rule applies to "magnet products that are designed, marketed, or intended to be used for entertainment, (including children's jewelry), mental stimulation, stress relief, or a combination of these purposes, and that contain one or more loose or separable magnets." 87 Fed. Reg. at 57,756. Exempted from the Rule are "magnet products sold and/or distributed solely to school educators, researchers, professionals, and/or commercial or industrial users exclusively for educational,

research, professional, commercial, and/or industrial purposes," as well as "toys subject to the ASTM F963 Toy Standard." *Id.* at 57,756.

Contrary to the Commission's assertions, *see* CPSC Br. at 27--32, the Commission lacked rational basis or evidence to substantiate the rule. Simply put, there exists no logical relationship between the data the Commission considered and the rule it adopted. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983) (noting that an "agency must explain the evidence which is available, and must offer a 'rational connection between the facts found and the choice made.'") (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1968)).

Furthermore, in violation of statutory requirements, *see* 15 U.S.C. § 2058(f)(3)(D)(i), the Commission failed to properly explain why compliance with all the relevant voluntary standards is insufficient. Its peremptory statement that voluntary standards acting in combination are inadequate "[f]or the same reasons than [*sic*] no existing standard is individually adequate," 87 Fed. Reg. at 57,769, does not permit this Court to conduct meaningful review of the Commission's fact-finding and rule-

making. *See Dickinson v. Zurko*, 527 U.S. 150, 162 (1999) ("The APA requires meaningful review; and its enactment meant stricter judicial review of agency factfinding than Congress believed some courts had previously conducted."); *American Public Gas Ass'n v. Fed. Power Comm'n*, 546 F.2d 983, 986 (D.C. Cir. 1976) ("[T]he 'determining factor' in connection with the reviewability of Commission orders is … whether the record is sufficient to allow meaningful review.").

Finally, the rule was promulgated by an unconstitutionally structured *executive* agency. The Commission's arguments that the President is content with the currently serving commissioners is entirely irrelevant because the question is not whether at any given moment the President likes a particular rule promulgated by a particular agency, but whether the structure of the agency offends the Constitutional requirements which exist to permit the public to hold government officials responsible for the laws under which the public must live. *See Free Enter. Fund v. PCAOB*, 561 U.S. 477, 483 (2010) ("Since 1789, the Constitution has been understood to empower the President to keep these officers accountable—by removing them from office, if necessary."). In

PCAOB itself, the Court held removal restrictions unconstitutional even absent evidence that then-President Obama had lost confidence in any PCAOB or SEC members.

Because the Rule is not supported by substantial evidence and it was promulgated by an unlawfully constituted body, this Court should vacate it.

ARGUMENT

I. THE COMMISSION'S FINDINGS ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

As in 2014, the Commission failed to "reasonably satisfy the criteria necessary to support the ultimate statutory finding." *Aqua Slide 'N' Dive Corp. v. CPSC*, 569 F.2d 831, 838 (5th Cir. 1978). The arguments that the Commission presents in its responsive brief are unavailing.

The Commission's argument that the Rule is supported by substantial evidence is predicated on three claims, *viz.*, that: a) in response to the Court's decision in *Zen Magnets* it considered a narrower dataset and was justified in drawing inferences it drew from the increased rate of magnet ingestion; b) it properly concluded that neither voluntary standards nor robust enforcement suffices to prevent injuries;

and c) it did a proper cost-benefit analysis. However, each argument falls short.

A. The Data Set Used by the Commission Does Not Support the Final Rule

In 2016, the Court set aside the prior version of the magnet ban, observing that the Commission's interpretation of the data is unreasonable because in determining the quantity of injuries attributable to magnets, the Commission included all injuries that could have "possibly" resulted from magnet ingestion. *Zen Magnets*, 841 F.3d at 1151–52. The Court reasoned that "the Commission's finding that 90% of the predicate injuries only 'possibly' involved magnet sets provides the Court with little guidance as to where, on the spectrum from ninety to 900 annual injuries, the real injury rate lies," and absent such "guidance" the Court is forced to set aside the challenged rule. *Id.* at 1152.

The Commission now claims that the 2022 Rule and the process of promulgating it addressed the Court's objections. *See* CPSC Br. at 28-30. That claim is hard to square with reality because the Commission's analysis introduced even *more* error into the calculation.

As the Commission describes, the first step in analyzing the injury data was to consult the National Electronic Injury Surveillance System (NEISS). *See* CPSC Br. at 13 (citing 87 Fed. Reg. at 57,759-65 and 57,780-81). At the next step, the Commission excluded ingestions that were "out of scope," *i.e.,* ones that certainly did not involve products that the Commission sought to regulate. That (appropriate) exclusion reduced the total injury count by 6%. *See* 87 Fed. Reg. at 57,761. At the third step, the Commission sought to categorize the types of magnets that were ingested, *e.g.*, "magnet set," "magnet toy," "jewelry," "science kit," "home/kitchen," "F963 magnet toy," and "unidentified." *Id.* at 57,760; *see also id.* at 57,761.

According to the Commission's own methodology, *only 20%* of the injuries from "magnet ingestions involved magnet sets, magnet toys, or jewelry." *Id.* The remaining in-scope injuries could not be attributed to these products and were instead classified as "unidentified products." *Id.* Thus, the "unidentified products" category dwarfs the category sought to be regulated by almost 4-to-1. Petitioners readily concede that *some* of the "unidentified products" in the NEISS database were likely the type

of products that the Commission sought to regulate, and therefore *some* costs associated with the ingestion of these types of products are attributable to the regulated magnets. The problem is that, as it did in 2014, the Commission attributed *all* the costs created by the ingestion of "unidentified products" to the regulated products.[1] *See, e.g.*, *id.* at 57,780 (counting both identified and unidentified sources of magnets as contributing to the medical and societal costs); *see also id.* at 57,772 (attributing *all* 25,000 ingestions to the regulated magnets).

Quantification-wise, one needs only compare the in-scope injury estimates between the Rule with the repealed 2014 rule, to see how drastically the definition of "in-scope" injuries has changed. The old method—which, as this Court recognized, was already flawed and prone to overestimation—concluded an average of 610 in-scope NEISS incidents per year. *See* 2014 Safety Standard for Magnet Sets, 79 Fed. Reg. 59,962, 59,979, Table 1 (Oct. 3, 2014). In contrast, during the current rulemaking the Commission estimated an average of *2,366*

[1] CPSC did so after already attributing "cases of uncertain product classification for which the magnets were being used as or like jewelry" to the "jewelry" category. *See* 87 Fed. Reg. at 57,761, Table 1.

incidents per year, when looking at the *same* period of overlap between the old and new rule. *See* 87 Fed. Reg. 57,763, Table 5. In other words, the net cast by the Rule is nearly *quadruple* that of the prior repealed rule, even though the subject products described are still largely the same. *Compare* 87 Fed. Reg. 57,757–58 *with* 79 Fed. Reg. 59,977.

As this Court held in *Zen Magnets*, such an analysis is inherently flawed. As the Court explained, the "Commission cannot promulgate a safety standard unless it concludes "that the rule … is reasonably necessary to eliminate or reduce an unreasonable risk of injury." 841 F.3d at 1151 (quoting 15 U.S.C. § 2058(f)(3)(A)). Because "[a]lmost anything is 'possible,'" "findings that peg the risk of injury as a mere 'possibility' provide … no assistance in assessing" whether CPSC complied with the statutory mandate. *Id.* at 1152. The new Rule ignored this clear warning. Almost "anything" can be a source of "unidentified" magnets. True enough, it is *possible* that most or even all of the unidentified magnets came from the types of magnets that the Commission sought to regulate. But it is also *possible* that very few or even none of them did. "Therefore, the Commission's finding that [over

75%] of the predicate injuries only 'possibly' involved magnet sets [jewelry or other sources sought to be regulated] provides the Court with little guidance as to where, on the spectrum from [200 to 1,000-plus] annual injuries, the real injury rate lies." *Id*.

The Commission argues that the mere presence of "uncertainties" in the analysis does not doom the rule. *See, e.g.*, CPSC Br. at 30, 36-37 (citing *Zen Magnets*, 841 F.3d at 1152). Petitioners have no quarrel with that statement as a general matter. As this Court recognized, when it comes to regulation and cost-benefit analysis, there are often "inherent uncertainties." *Zen Magnets*, 841 F.3d at 1152. But mere presence of scientific uncertainty does not give CPSC (or any other agency) *carte blanche* to skip the statutorily required analytical steps and jump to unsupported conclusions. *See Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015, 1028 (9th Cir. 2011) ("It is not enough for the [agency] to simply invoke 'scientific uncertainty' to justify its action."). The problem is not that the Commission was facing some uncertainty. The problem is that it made *no effort* to account for that uncertainty and to adjust the calculation of the costs and benefits of the Rule. Because the Commission

failed to conduct the type of analysis Congress mandated and that is necessary for this Court to review the agency's compliance with the Consumer Product Safety Act and the Administrative Procedure Act, the rule must be vacated.

B. The Commission Fails to Account for the General Trend Showing Increase in Ingestion of Foreign Objects

As discussed in Petitioner's Opening Brief, pp. 16-21, and as the Commission does not dispute, following this Court's *vacatur* of the 2014 Rule, *all* types of ingestions (including magnets) have increased. The Commission, however, did not consider this trend in determining whether the absence of a rule limiting availability of magnets or some other factor is causing the increase in ingestions.

As already stated, the Consumer Product Safety Act authorizes only such rules as are "reasonably necessary to eliminate or reduce an unreasonable risk of injury associated with such product." 15 U.S.C. § 2058(f)(3)(A). As this Court explained, the determination of whether a rule is "reasonably necessary" "involves a balancing test like that familiar in tort law: The regulation may issue if the severity of the injury that may result from the product, factored by the likelihood of the injury,

offsets the harm the regulation imposes upon manufacturers and consumers." *Zen Magnets*, 841 F.3d at 1147 (quoting *Southland Mower Co. v. CPSC*, 619 F.2d 499, 508–09 (5th Cir. 1980)). In order to satisfy the famed Learned Hand formula, *see United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947), one must know (or at least estimate) "the likelihood of the injury" *absent* the proposed precaution. To calculate that, one must first account for various confounding variables. *See, e.g.*, *In re Zantac (Ranitidine) Prod. Liab. Litig.*, No. 20-MD-2924, ___ F.Supp.3d ___, ___ 2022 WL 17480906, at *82 (S.D. Fla. Dec. 6, 2022), *appeal dismissed*, No. 23-10090-J, 2023 WL 2849068 (11th Cir. Mar. 22, 2023) ("If a study fails to control for confounding variables, the results of the study may be skewed and produce an association where none exists or otherwise misreport the association. Thus, for an epidemiological study to generally be reliable, it must account for confounding variables.").

To illustrate, imagine a world where, as a result of some novel virus, kids infected with it are more prone to pica—a condition where the affected individual often ingests non-food items. *See Pica*, CLEVELAND

CLINIC, https://tinyurl.com/2t7pzbb7 ("Pica is a mental health condition where a person compulsively swallows non-food items. It's especially common in children and with certain conditions."). In this hypothetical world, a rule that would limit availability of magnet sets would do absolutely nothing to reduce the costs associated with treating swallowed magnets because pica-affected children would instead swallow other things, thus keeping the societal costs of ingestions constant, while also saddling the society with the burdens of the Rule.

Petitioners, of course, do not suggest the Commission was required to prove that no novel pica-inducing virus is circulating in the United States, or similarly rule out other fanciful possibilities. *See*, *e.g.*, *Mitondo v. Mukasey*, 523 F.3d 784, 789 (7th Cir. 2008) (agency need not credit "fanciful" explanations); *Brownlee v. Mut. Ben. Health & Accident Ass'n*, 29 F.2d 71, 75 (9th Cir. 1928) ("It is not necessary that evidence be of such weight as to preclude every possibility of error. It is only necessary that there be substantial evidence to support the conclusion reached."); *McKenzie Eng'g Co. v. NLRB*, 182 F.3d 622, 628 (8th Cir. 1999) (noting that an agency can reject alternative explanations). At the same time,

an agency cannot simply ignore evidence that undermines its conclusions. *See Norris v. NLRB*, 417 F.3d 1161, 1168 (10th Cir. 2005) ("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."); *Portland Cement Ass'n v. EPA*, 665 F.3d 177, 187 (D.C. Cir. 2011) ("Reasoned decisionmaking requires an agency to 'examine the relevant data and articulate a satisfactory explanation for its action[s].'") (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). What the Commission failed to do here is consider *any* explanation or confounding variable for why ingestions of *all* items have significantly increased since 2016 when this Court handed down its decision in *Zen Magnets*. The Commission's jumped-to conclusion that it was the setting aside of the prior version of the ban that led to such an increase is inherently faulty because it failed to take into account facts in the record that detracted from the Commission's conclusions. *Norris*, 417 F.3d at 1168.

As in 2014, "the Commission's analysis neglected to address critical ambiguities and complexities in the data underpinning the Commission's findings as to [] the degree of the risk of injury caused by magnet sets …."

Zen Magnets, 841 F.3d at 1148. In 2014, the error was ascribing to magnets all "unknown" ingestions. In 2022, the error is ascribing to regulated magnets all "undefined" ingestions (*and* ascribing the increase in ingestions to the setting aside of the prior regulation), despite the fact that ingestions went up for all sorts of products, not just magnets. These "ambiguities and complexities in the data" make it impossible "to ascertain whether the Commission's findings meet the substantial evidence standard," *id.*, and CPSC's "fail[ure] to consider an important aspect of the problem" renders the rule "arbitrary and capricious," *State Farm*, 463 U.S. at 43. Hence, the Rule cannot survive judicial review.

C. The Commission Does Not Dispute that Its Analysis Failed to Focus on Multiple Magnet Ingestion

No one disputes that ingestion of small non-edible items poses risks to children. These items may obstruct breathing passageways, damage intestinal tract or other internal organs, and the like. But these risks are common to *all* small items. The question is not whether magnets pose the same risk as small coins, loose buttons, paperclips, thumbtacks, and

the like. Rather, the obvious question is whether magnets pose some sort of unique risk.[2]

Petitioners do not disagree that "threats posed by hazardous magnet ingestion include pressure necrosis, volvulus, bowel obstruction, bleeding, fistulae, ischemia, inflammation, perforation, peritonitis, sepsis, ileus, ulceration, aspiration, and death, among others." 87 Fed. Reg. at 57,790. *See also* CPSC Br. at 4-5. These risks stem from the magnets' ability to attract to each other or other ferromagnetic objects through internal body tissue. 87 Fed. Reg. at 57,790; CPSC Br. at 4-5. As Petitioners explained in their opening brief, "the risk from magnets *qua* magnets exists as a result not of their size, but of their attractive forces and materializes only when those attractive forces actually attract another magnet or 'ferromagnetic object.'" Pet. Op. Br. at 21. The Commission does not dispute that it did not focus on such cases.

[2] The Commission contends this argument is waived because it wasn't raised during the rule-making process. CPSC Br. at 38. Whether or not the argument was raised, this consideration is obvious because the Commission sought to regulate not just small objects, but specifically magnets. So, it had to explain what makes magnets unique and focus its analysis on that unique aspect.

See CPSC Br. at 38-39. Nor could it, since CPSC's own data suggests that at least a third of ingestions were of a single magnet variety. *See, e.g.*, Leah K. Middelberg *et al.*, *High-Powered Magnet Exposures in Children: A Multi-Center Cohort Study*, 149 Pediatrics 26, 28 (2022), *cited in* 87 Fed. Reg. at 57,759. Instead, the Commission simply intones that it "noted the limitations of" its data set, and "explained that [its cost] estimate was 'uncertain,'" as if these were magic phrases that released the Commission from its obligation to conduct a proper analysis. But "[i]t is not enough for the [agency] to simply invoke 'scientific uncertainty' to justify its action." *Greater Yellowstone Coal.*, 665 F.3d at 1028.

The Commission concedes that in determining the benefits of the rule, it relied on the *total* number of magnet ingestions (of which at least one-third were single-magnet ingestions, *see supra*) rather than ones that cause injuries specific to magnets. CPSC Br. at 38-39. In its attempt to justify this approach, the Commission argues that "it is utterly implausible that trivial injuries from single magnets were driving [CPSC's] analysis," because "[t]he Commission was not merely counting the number of incidents, but counted the costs of those incidents." *Id.* at

39 (internal citations omitted). The Commission points out that "$41.7 million of the $51.8 million estimate involved cases where children were admitted to the hospital rather than treated in emergency rooms or other settings." *Id.* But these arguments are largely beside the point.

First, a difference of $10 million in costs, which accounts for almost 20% of total costs is rather significant. Second, and more importantly, admissions to hospitals in and of themselves are not indicative of whether the admission was occasioned by the child falling victim to particular dangers posed by magnets. A hospital admission may have occurred because a *single* magnet was stuck in the child's trachea thus requiring endoscopic surgery to remove it. Or an admission may have been prompted by lack of knowledge whether a child swallowed a single magnet or a single button cell battery, which may also necessitate surgical intervention given the unique dangers such batteries pose. *See* NAT'L CAPITAL POISON CTR., BUTTON BATTERY INGESTION STATISTICS, https://bit.ly/40JW3lf. In short, mere hospital admissions numbers or their associated costs do not reveal any information as to whether these admissions were caused or even exacerbated by the unique dangers posed

by high-powered magnets. Therefore, it is impossible to reliably estimate how many injuries would be reduced by the application of the Rule. As the Fifth Circuit explained, "[w]ithout reliable evidence of the likely number of injuries that would be addressed by application of the [rule], [courts] are unable to [evaluate whether the proposed] provision is reasonably necessary to reduce or prevent an unreasonable risk of injury." *Southland Mower Co. v. CPSC*, 619 F.2d 499, 510 (5th Cir. 1980).

It bears repeating that Petitioners do not dispute that some level of uncertainty in the data is inherent and do not begrudge the Commission for its reliance on best-available (though uncertain) data. *See FCC v. Prometheus Radio Project*, 141 S.Ct. 1150, 1160 (2021) (noting that it is "not unusual in day-to-day agency decisionmaking" to lack access to "perfect empirical or statistical data."); *Zen Magnets*, 841 F.3d at 1152 (noting that some degree of uncertainty is tolerable given the "inherent factual uncertainties in a given context."). Still, "mere possibility" that a particular event has a particular cause "falls short of the appropriate standard." 841 F.3d at 1152. Here, the Commission did not even attempt to account for the fact that some appreciable number of magnet

ingestions resulted in injuries that have no linkage to the *magnetic properties* of the ingested items. Consequently, the Commission's estimate of the costs associated with these injuries is not supported by the substantial evidence.

Under the Consumer Product Safety Act (CPSA), the Commission may only issue regulations when "the benefits expected from [a] rule bear a reasonable relationship to its costs," 15 U.S.C. § 2058(f)(3)(E). Any rule that is based on an obviously improper calculation of costs and benefits must be set aside since it cannot be determined whether a relationship between the proposed rule and claimed benefits is "reasonable." Such is the case here.

D. The Commission's Own Evidence Contradicts Its Claims Regarding the Insufficiency of Enforcement Efforts

As this Court recognized in *Zen Magnets*, enforcement of applicable and pre-existing toy safety standards resulted in a significant decrease in injuries. 841 F.3d at 1148–49. The Commission argues that its robust enforcement efforts have failed to stem the flood of magnet-related injuries. *See* CPSC Br. at 44 (referencing "Commission's aggressive use of existing tools over many years."). Notably, the Commission does not

detail what those efforts were. This is not surprising because the Commission's own website reveals that while the agency issued a number of recalls between 2011 and 2014, each accompanied with a press release, enforcement activity ground to a halt until 2021 when the next recall occurred. This lack of recalls is particularly noteworthy since sales of magnet sets on various e-commerce platforms increased after 2014 while the Commission did nothing. All recalls the Commission mentions in its submission to the Court occurred *prior* to this Court's decision in *Zen Magnets*. Thus, there is no evidence that recalls in the absence of the Rule would not work. To the contrary, evidence shows that recalls worked pre-2014, 841 F.3d at 1148–49, and there is no reason to believe they wouldn't work, were they re-instituted, in 2023.

Furthermore, the Commission not only failed to engage in robust enforcement, but actually contributed to the problem. In 2021, the agency warned parents not to buy high-powered magnets as holiday gifts for children *under three years old*. CPSC, *Top Safety Tips for Early Holiday Shoppers Amid Reports of Expected Toy Shortage* (Sept. 28, 2021), https://tinyurl.com/2r3p6jsh ("Keep small balls, high-powered

magnets, and toys with small parts or button batteries away from children younger than age 3."). The mixed message the parents received is that these magnet sets are safe for children as young as *three years old*, even though the industry itself adopted a standard that these items are not meant for anyone under the age of *fourteen*. ASTM F3458–21.

The Commission's argument is thus little more than a self-fulfilling prophecy. It refused to adequately enforce standards and encouraged parents to buy toys inappropriate for young children and now feigns shock and surprise when the number of injuries associated with such toys increased. Instead of addressing its own shortcomings, the Commission issued a rule that may not have been necessary had the Commission scrupulously attended to its responsibilities.

Because the Commission failed to show that enforcement activities are inadequate, it necessarily failed to establish that the Rule is "reasonably *necessary* to eliminate or reduce an unreasonable risk of injury associated with such product." 15 U.S.C. § 2058(f)(3)(A) (emphasis added). The statute is clear—where there exist "means of achieving the objective of the [rule] while minimizing adverse effects on competition or

disruption or dislocation of manufacturing and other commercial practices," *id.* § 2058(f)(1)(D), a new rule is, by definition, not "necessary" and must be vacated.

E. CPSC Failed to Adequately Consider the Efficacy of Voluntary Standards

The CPSA restricts the Commission's ability to promulgate rules to those situations where compliance with voluntary standards fails to "eliminate or adequately reduce the risk of injury" identified in the Notice of Proposed Rulemaking. 15 U.S.C. § 2058(b)(1). Conversely, where "compliance with any standard … is likely to result in the elimination or adequate reduction of the risk of injury identified in the notice, and [where] it is likely that there will be substantial compliance with such standard, the Commission" may not supplant a voluntary standard with its own regulation. *Id.* § 2058(b)(2). Voluntary standards must be considered not just in isolation, but also "in combination with any other standard submitted to the Commission." *Id.* § 2058(b)(1). As a prerequisite to promulgating any rule, the Commission must explicitly conclude that "compliance with [a] voluntary consumer product safety standard is not likely to result in the elimination or adequate reduction

of such risk of injury; or it is unlikely that there will be substantial compliance with" such a standard. *Id.* § 2058(f)(3)(D). These conclusions must be adequately explained, and if they are not, the Rule must be vacated. *See Zen Magnets*, 814 F.3d at 1144.

The Commission argues that it met that standard. *See* CPSC Br. at 47-48. But the factual record belies that claim.

First, in addressing Standard ASTM F3458-21, the Commission simply employs circular logic and argues that because the standard doesn't ban the products in question, it is inadequate. *See* 87 Fed. Reg. at 57,767 (faulting the voluntary standard for lacking "performance requirements preventing small, powerful magnets from being used in magnet sets."). However, *elimination* of the risk posed by the product is not the proper standard. The statute requires CPSC to stay its hand whenever compliance with voluntary standards "adequately reduce[s] the risk of injury" identified in the Notice of Proposed Rulemaking. 15 U.S.C. § 2058(b)(1). The Commission also ignored and mischaracterized various features of the standard. For example, the Commission asserts that "safety messaging … and packaging requirements without

performance requirements for the magnets themselves, are not likely to adequately address the hazard." 87 Fed. Reg. at 57,768. CPSC adds that the various elements of the standard, standing alone, do not adequately address the risk. But it ignores that each element of the standard addresses an aspect of the risk and that the standard may thereby adequately address the overall risk.

For example, the agency argues that consumers misunderstand the hazard posed by magnets and that the child-resistant packaging requirements are inadequate because they only address accessibility by small children, leaving intact teens' ability to access the product. *Id.* at 57,768–69. But that conclusion ignores that the requirements of ASTM F3458–21 work in *combination* with one another. One requirement of the standard is the use of a pictogram plainly illustrating the hazard and a straightforward warning that ingestion can result in injury or death in a size and type face hard to ignore. Yet another requirement is that consumers be provided with information about how to determine if magnets are missing from the set. The voluntary standard also requires

that the magnet sets not be sold or marketed to children under 14 and that on-line sales include appropriate warnings on the website.

The agency rejects these requirements one by one, because it concludes that none of them addresses the whole issue. Of course, the very reason that multiple requirements exist is that no one requirement is *meant* to address the totality of the issue; rather the requirements are meant to combine with one another to "adequately reduce the risk of injury." 15 U.S.C. § 2058(b)(1). The Commission failed to properly evaluate whether these requirements acting *together* would do so.

Similarly, the Commission perfunctorily rejected the argument that various other voluntary standards beyond ASTM F3458–21, acting *together* with that standard, would "adequately reduce the risk of injury," 15 U.S.C. § 2058(b)(1), forestalling the need for the Rule. The Commission simply asserted that "the standards collectively fail to adequately reduce the magnet ingestion hazard" "[f]or the same reasons than no existing standard is individually adequate." 87 Fed. Reg. at 57,769–70. That explanation fails for two separate reasons. First, even assuming that such a perfunctory statement is adequate, it is insufficient

where the Commission's evaluation of each voluntary standard standing alone was erroneous. Second, even assuming that "each [individual] standard 'contains critical inadequacies' and 'considerable limitations,'" CPSC Br. at 47 (quoting 87 Fed. Reg. at 57,769), the Commission itself admits that only "*some* of [these inadequacies] repeat across standards," *id.* In other words, the Commission itself admits that some "inadequacies"[3] do *not* repeat across various standards, meaning that in some areas standards do reinforce one another. Yet, the Commission entirely failed to explain why such reinforcement is inadequate.

It is well settled that "[m]ere conclusory statements … are simply inadequate to support a finding of significant risk" of injury. *Am. Fed'n of Lab. & Cong. of Indus. Orgs. v. OSHA*, 965 F.2d 962, 976 (11th Cir. 1992). Because the Commission provided little beyond such statements, it failed to meet the statutory prerequisites to regulating the products in

[3] Of course, in CPSC's view, any standard that lacks "performance requirements preventing small, powerful magnets from being used in magnet sets," *i.e.*, one that outright bans such magnets, is by definition "inadequate." 87 Fed. Reg. at 57,767. As explained, *ante*, this approach is erroneous.

question and therefore the rule must be vacated. *See Zen Magnets*, 814 F.3d at 1144.

II. UNDER ANY VIEW OF *HUMPHREY'S EXECUTOR* CPSC'S STRUCTURE IS UNCONSTITUTIONAL

Respondent makes two interconnected arguments—first, that *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), remains good law and second, that it governs this case. But, if this court faithfully applies *Humphrey's*, then it will hold CPSC's structure unconstitutional. Moreover, Respondent's unconvincing argument that CPSC is lawfully structured fatally fails to grapple with the Supreme Court's recent pronouncements on the limits of executive agencies' "independence." They demand that *Humphrey's Executor* be revisited.

A. CPSC Does Not Fit in Humphrey's Executor*'s "Exception"*

The Commission does not dispute that it wields "executive power" in the constitutional sense. *See* CPSC Br. at 57-60; *see also Consumers' Rsch. v. CPSC*, 592 F. Supp. 3d 568, 584 (E.D. Tex. 2022), *appeal docketed*, No. 22-40328 (5th Cir., argued Mar. 6, 2023). For this reason, *Humphrey's* offers CPSC no help, because it approved restrictions on removal only for a "quasi-legislative" and "quasi-judicial" body, not one

with executive functions. When *Humphrey's* approved the Federal Trade Commission, that agency lacked executive powers, which were added decades later. Because CPSC, unlike the 1930s-era FTC, does have executive powers, *Humphrey's* does not govern this case.

Nor is *Morrison v. Olson*, 487 U.S. 654 (1988) helpful to the Commission's position, both because that case asked whether an Independent Counsel is an *inferior officer* (which the Commissioners are not), and because that case is now uniformly viewed as having been wrongly decided—or even reversed *sub silentio*. *See* Pet. Op. Br. at 57, n.11. All other cases the Commission cites confirm the proposition that when it comes to executive officials, the President's power to remove them must be "exclusive and illimitable." *Humphrey's Executor*, 295 U.S. at 627.

B. Humphrey's Executor *Is Fatally Undermined by the Subsequent Developments in Constitutional Law*

The Commission points out that over the years, the courts have upheld the structure of various agencies whose members cannot be removed at will by the President. *See* CPSC Br. at 51-56. However, the cases cited by the Commission both precede the Supreme Court's more

recent understanding of the Appointments Clause and are inapposite to the situation at hand.

For example, the Commission relies on *Freytag v. Comm'r*, 501 U.S. 868 (1991), to show that the Court has recently approved, as constitutional, agencies over which the President has little control. But *Freytag* does not stand for that proposition at all. *Freytag* was an appointments clause challenge to the *method of appointment* of "special trial judges" of the Tax Court. *See Freytag v. Comm'r*, Pet. for Cert., 1990 WL 10022763, *i (Nov. 13, 1990) ("Does the Appointments Clause of Art. II, § 2, which allows Congress to confer power to appoint inferior officers on the 'Courts of Law' and the 'Heads of Departments,' permit Congress to grant the chief judge of the Tax Court power to appoint special trial judges?"). Nothing in the briefing, or the Court's decision addressed the *removal* of Tax Court judges or "special trial judges." Petitioners, of course, concede that the members of the Commission were lawfully appointed because they were all nominated by the President and confirmed by the Senate. The problem with the Commission is not the

appointment of its members, but their protection from removal at will. *See* Pet. Op. Br. at 36-58.

The Commission's reliance on *Wiener v. United States*, 357 U.S. 349 (1958), is also misplaced. *Wiener* concerned the War Claims Commission, which possessed no executive powers, instead being "established as an adjudicating body with all the paraphernalia by which legal claims are put to the test of proof." 357 U.S. at 345–55. Furthermore, as the War Claims Commission was processing claims that were to be paid by the United States and out of the federal treasury, *see* 50 U.S.C. § 4143, the Commission was essentially an Article I tribunal similar to the long-established and long-accepted Court of Claims. *Cf. Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 283 (1855) ("United States may consent to be sued, and may yield this consent upon such terms and under such restrictions as it may think just.").

The Commission attempts to bolster its arguments by pointing to newer cases in which the Court "accepted" that "Congress can, under certain circumstances, create independent agencies run by principal officers appointed by the President, whom the President may not remove

at will but only for good cause." CPSC Br. at 54 (quoting *PCAOB*, 561 U.S. at 483). But as the Commission recognizes *in the very same sentence of its own brief*, *see id.*, the Court did not endorse this state of affairs, because the parties to that case did "not ask [the Court] to reexamine any of [its] precedents." *PCAOB*, 561 U.S. at 483. The *PCAOB* Court merely concluded that *even accepting Humphrey's Executor* and *Morrison*, the Accounting Oversight Board's structure violated the Constitution. However, that opinion did not endorse those questionable precedents. Similarly, in *Seila Law v. CFPB*, the Court did not address the continued vitality of *Humphrey's Executor*, 140 S.Ct. 2183, 2206 (2020) ("we do not revisit *Humphrey's Executor* or any other precedent today"); instead, it invalidated the Consumer Financial Protection Bureau's structure as transgressing even what *Humphrey's* permitted. *See id.* At 2200–01 (noting that CFPB is far afield from what *Humphrey's* approved and therefore the logic of that case doesn't apply).

The Commission fails to grapple with the Court's recent pronouncements that "the President's power to remove—and thus supervise—those who wield *executive power* on his behalf follows from

the text of Article II," *id.* at 2191-92 (emphasis added), and that this "power is the rule, not the exception," *id.* at 2206.

As explained in Petitioners' opening brief, *Humphrey's Executor* does not stand for the proposition that individuals exercising *executive* power can be insulated from removal. *Humphrey's* only approved these limits because it concluded that "the commission acts in part quasi legislatively and in part quasi judicially … [and] [t]o the extent that it exercises any executive function, as distinguished from executive power in the constitutional sense, it does so … as an agency of the legislative or judicial departments of the government." 295 U.S. at 628. Indeed, "*Humphrey's Executor* reaffirmed the core holding of *Myers* [*v. United States*, 272 U.S. 52 (1926)] that the President has 'unrestrictable power … to remove purely executive officers.'" *Seila Law*, 140 S.Ct. at 2199 (quoting *Humphrey's Executor*, 295 U.S. at 632). Courts, including this one, have extended the logic of *Humphrey's* to cover agencies wielding executive power. *See, e.g.*, *SEC v. Blinder, Robinson & Co.*, 855 F.2d at 677, 681–82 (10th Cir. 1988). However, if such an extension were

ever appropriate, it cannot be maintained in light of the binding decisions in *PCAOB*, *Seila Law*, and *Collins v. Yellen*, 141 S.Ct. 1761 (2021).

C. Petitioners Suffered "Compensable Harm" Because a Politically-Accountable Commission May Not Have Promulgated This Rule

The Commission argues that because the current President appointed a number of Commissioners and has not attempted to fire any of them, vacating the underlying rule is not a remedy available to Petitioners, even if the Commission is unconstitutionally structured. CPSC Br. at 60-63. The Commission erroneously claims there are only two ways of showing that an unconstitutional restriction on removal works a "compensable harm" on Petitioners—the President actually attempted to fire an official but was blocked from doing so, or the President made a public statement expressing a wish to fire an official. *Id.* at 61 (citing *Collins*, 141 S.Ct. at 1789). But the *Collins* Court permitted petitioners there to present their argument that had there been no restrictions on removing the Federal Housing Finance Agency Director, "the President might have replaced one of the confirmed Directors … or a confirmed Director might have altered his behavior in a

way that would have benefited the shareholders." 141 S.Ct. at 1789. (Whether this showing has been made is being litigated on remand).

Just as in *Collins*, so too here had the President remained politically accountable for the actions of the Commissioners, he might have directed them to tread more carefully when attempting to destroy an entire market for a popular product. *See, e.g.*, Maegan Vazquez, CNN, *Biden Not in Favor of Ban on Gas Stoves, White House Says* (Jan. 11, 2023), https://tinyurl.com/9eueu6bz ("The White House on Wednesday asserted that President Joe Biden does not support a ban on gas stoves after a [CPSC Commissioner, Richard Trumka, Jr.] suggested that such a proposal was on the table."). Likewise, Commissioners themselves may have stepped more gingerly had they feared political repercussions for their decisions. Accountability is why the Constitution enables the President to fire officials who exercise executive power, which Article II vests entirely in him alone. *See PCAOB*, 561 U.S. at 483.

Petitioners are not required to prove that the rulemaking's outcome would have been different had the Commission been properly structured.

Rather, it suffices to show that the Commission possibly would have made different choices but for the absence of political accountability.

CONCLUSION

For the foregoing reasons, and those in Petitioners' Opening Brief, this Court should vacate the challenged Rule.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of the Federal Rules of Appellate Procedure 32(a)(7)(B)(ii) because it contains 6,498 words. This brief also complies with the typeface and type-style requirements of the Federal Rule of Appellate Procedure because it was prepared using Microsoft Word 2016 in Century Schoolbook 14-point font, a proportionally spaced typeface.

/s/ Gregory Dolin
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CERTIFICATE OF SERVICE

I hereby certify that on September 29, 2023, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which sent notification of such filing to all counsel of record.

/s/ Gregory Dolin
Gregory Dolin