

**United States Court of Appeals  
for the District of Columbia Circuit**

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**No. 25-1003**

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HEROES TECHNOLOGY (US) LLC,  
d/b/a Snuggle Me Organic,

*Petitioner,*

v.

UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION,

*Respondent.*

*On Motion for Stay Pending Review of a Final Rule  
of the U.S. Consumer Product Safety Commission*

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**BRIEF FOR *AMICUS CURIAE* LOVEVERY, INC.  
IN SUPPORT OF MOTION FOR STAY PENDING REVIEW**

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PATRICK J. HAYDEN  
COOLEY LLP  
55 Hudson Yards  
New York, New York 10001  
(212) 479-6000  
phayden@cooley.com

KATHLEEN R. HARTNETT  
COOLEY LLP  
3 Embarcadero Center, 20<sup>th</sup> Floor  
San Francisco, CA 94111  
(415) 693-2000  
khartnett@cooley.com

CARLTON FORBES  
COOLEY LLP  
1299 Pennsylvania Ave., NW  
Washington, DC 20004  
(202) 842-7800  
cforbes@cooley.com

*Counsel for Amicus Curiae*

March 20, 2025

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## **CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

Pursuant to D.C. Circuit Rule 28(a)(1), *amicus curiae* Lovevery, Inc. submits this certificate as to parties, rulings, and related cases.

### **I. Parties and *Amici Curiae***

Except for the following, all parties, intervenors, and *amici* appearing in this Court are listed in Petitioner's Opposed Motion For Stay Pending Review ("Petitioner's Motion" or "Petr.'s Mot."), filed by Heroes Technology (US) LLC d/b/a Snuggle Me Organic (No. 25-1003, March 13, 2025), at page A1:

*Amicus curiae* in support of Petitioner is the Lovevery, Inc.

### **II. Rulings Under Review**

References to the rulings at issue appear in Petitioner's Motion at page A1.

### **III. Related Cases**

References to related cases appear in Petitioner's Motion at page A1.

Dated: March 20, 2025

/s/ Kathleen R. Hartnett  
Kathleen R. Hartnett  
*Counsel for Amicus Curiae*

**CORPORATE DISCLOSURE STATEMENT**

Lovevery, Inc. is a limited liability company that specializes in high-quality educational toys for children. Lovevery, Inc. has no parent corporation, and no publicly held company has 10% or greater ownership therein.

Dated: March 20, 2025

*/s/ Kathleen R. Hartnett*  
Kathleen R. Hartnett  
*Counsel for Amicus Curiae*

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
IDENTITY AND INTEREST OF <i>AMICUS CURIAE</i> .....	1
INTRODUCTION AND SUMMARY OF ARGUMENT .....	3
ARGUMENT .....	3
I.    Granting A Stay Is Necessary To Preserve The Status Quo Pending Judicial Review .....	6
II.   Lovevery Will Be Irreparably Injured Absent A Stay .....	7
A.   The CPSC’s Sovereign Immunity Bars Lovevery From Future Recovery .....	7
B.   The CPSC’s <i>Ultra Vires</i> Rule Constitutes Irreparable Injury .....	8
C.   The Financial And Reputational Harm To Lovevery Qualifies As Irreparable Loss .....	8
III.  The Balance of Equities Weighs Strongly In Favor Of Postponing The Rule’s Effective Date Pending Judicial Review .....	11
A.   The Rule’s Overbreadth Needlessly Burdens Companies Like Lovevery .....	11
B.   There Is No Indication That Consumers Will Be Harmed By Playmats Like Lovevery’s Play Gym .....	12
CONCLUSION .....	13

**TABLE OF AUTHORITIES****Page(s)****Cases**

<i>Armour &amp; Co. v. Freeman</i> , 304 F.2d 404 (D.C. Cir. 1962).....	10
<i>Atlas Air, Inc. v. Int’l Bhd of Teamsters</i> , 280 F. Supp. 3d 59 (D.D.C. 2017), <i>aff’d</i> , 928 F.3d 1102 (D.C. Cir. 2019) .....	10
<i>Cobell v. Norton</i> , No. 03-5262, 2004 WL 603456 (D.C. Cir. Mar. 24, 2004).....	6
<i>Gates v. Schlesinger</i> , 366 F. Supp. 797 (D.D.C. 1973).....	8
<i>Nken v. Holder</i> , 556 U.S. 418 (2009).....	11
<i>In re NTE Connecticut, LLC</i> , 26 F.4th 980 (D.C. Cir. 2022).....	6, 7, 11
<i>United States v. Texas</i> , --- U.S. ---, 144 S. Ct. 797 (2024) (Barrett, J., concurring) .....	6
<i>Whitman-Walker Clinic, Inc. v. U.S. Dep’t of Health &amp; Hum. Servs.</i> , 485 F. Supp. 3d 1 (D.D.C. 2020).....	8
<i>Wis. Gas Co. v. FERC</i> , 758 F.2d 669 (D.C. Cir. 1985) (per curiam).....	7

**Statutes**

15 U.S.C.	
§ 2056a.....	2, 6, 8
§ 2060(g).....	6

**TABLE OF AUTHORITIES**

(continued)

**Page(s)****Other Authorities**

16 C.F.R.	
§ 1130.....	9
§ 1130.7.....	10
§ 1130.8.....	10
§ 1250.....	12
89 Fed. Reg.	
30295.....	12
87467.....	1, 13
87468.....	9, 10, 11
87469.....	11
87470.....	13
87472.....	2
87485.....	9, 11
90 Fed. Reg.	
10447 .....	3
10583 .....	3
Federal Rule of Appellate Procedure	
29(a)(2) .....	1
29(a)(4)(E) .....	1
Letter from Lisa Trofe to Alberta Mills (Mar. 18, 2023), available at: <a href="https://www.regulations.gov/comment/CPSC-2023-0047-0018">https://www.regulations.gov/comment/CPSC-2023-0047-0018</a> .....	12
Staff’s NPR Briefing Package, available at: <a href="http://www.cpsc.gov/s3fs-public/Briefing-Package-Notice-of-Proposed-Rulemaking-Safety-Standard-for-Infant-Support-Cushions.pdf">www.cpsc.gov/s3fs-public/Briefing-Package-Notice-of-Proposed-Rulemaking-Safety-Standard-for-Infant-Support-Cushions.pdf</a> .....	4

**IDENTITY AND INTEREST OF *AMICUS CURIAE***

Lovevery, Inc. (“Lovevery”) is an American corporation that specializes in innovating high-quality educational toys for children.<sup>1</sup> Lovevery’s comprehensive support system and products for parents provide stage-based Montessori-inspired learning and play for children, as well as research-backed guidance that empowers parents with confidence. The company is best known for its award-winning subscription Play Kits program and the popular Play Gym playmat.<sup>2</sup> Lovevery is committed to making safe, high-quality developmental toys available to families across America at a reasonable price. **To date, Lovevery has sold over 1 million Play Gyms, with no playmat-related injuries or deaths.**

Lovevery has significant legal and business concerns regarding the extensive product redesign and ill-defined testing methods apparently required of its playmats by the Consumer Product Safety Commission’s (“CPSC”) rule, *Safety Standard for Infant Support Cushions*, 89 Fed. Reg. 87467 (Nov. 4, 2024) (the “Rule”). The Rule fundamentally transforms the regulation of consumer products that for decades have been considered everyday toys—such as Lovevery’s Play Gym—into “durable

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<sup>1</sup> This brief is filed pursuant to Federal Rule of Appellate Procedure 29(a)(2) and Circuit Rule 29(a)(2). Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party contributed money intended to fund the preparation or submission of this brief. All parties consent to the filing of this brief.

<sup>2</sup> Lovevery, *The Play Gym*, available at: <https://lovevery.com/products/the-play-gym> (last visited Mar. 20, 2025).

nursery products” within the meaning of the Consumer Product Safety Act (“CPSA”). 15 U.S.C. § 2056a.<sup>3</sup> Under the Rule, such products will need to be updated, retested, and covered with inapt warning labels that will harm Lovevery’s reputation and provide no aid to consumers.

Absent a stay, the Rule will take effect on May 5, 2025. To the extent that compliance is even possible in that timeframe (which is doubtful), it would require Lovevery to affix unnecessary and misleading warning labels to its products, update and retest those products, and set up a registration system—all at break-neck speed. The Rule will also cause harm to Lovevery’s customers, who otherwise will have undisturbed access to Lovevery’s extraordinarily safe and high-quality toys and educational tools. Accordingly, a stay of the Rule’s effective date is warranted.

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<sup>3</sup> In response to public comment, the CPSC made clear that the Rule would apply to all playmats, which would include Lovevery’s Play Gym. *See* 89 Fed. Reg. at 87472 (“We disagree that the rule should exempt playmats.”).



## **INTRODUCTION AND SUMMARY OF ARGUMENT**

Petitioner Heroes Technology (US) LLC’s challenge to the Rule presents weighty questions for this Court’s consideration, including the improper use of an expedited regulatory process in the last two months of the prior Administration, significant questions of regulatory scope and coverage, and potential conflicts with recent executive orders requiring agencies to initiate reviews and a consultative process for burdensome regulations. *See, e.g.*, 90 Fed. Reg. 10447–49 (Feb. 24, 2025); 90 Fed. Reg. 10583–85 (Feb. 25, 2025). To ensure orderly judicial review and prevent needless and irreparable harm to the industry (including Lovevery), these important questions should be addressed by this Court before the Rule goes into effect.

## **ARGUMENT**

Petitioner’s Motion documents the CPSC’s flawed and unlawful rulemaking process in promulgating the Rule, and it correctly explains that the Rule violates the Administrative Procedure Act and its requirement of “reasoned decisionmaking.”

This brief provides additional reasons why a stay of the Rule’s effective date is warranted pending judicial review. In particular, the Rule will cause irreparable injury to Lovevery’s business and the business of similarly situated companies that sell playmats—products that have long been regulated as toys, but that now face inapt and unjustified regulation as supposedly “durable infant or toddler products.”

Quite notably, there have been *zero* reported safety incidents with Lovevery’s Play Gym related to the risks claimed by the Rule, and yet the Rule purports to sweep in Lovevery’s product as well as an estimated **2,000** other products currently on the market. *See* Petr.’s Mot. at 6. If required to comply with the Rule’s onerous design, labeling, and registration requirements by May 5, 2025, Lovevery and other companies may have to withdraw demonstrably safe products from the market entirely.

A visual is particularly telling regarding the Rule’s overbreadth. This graphic<sup>4</sup> reflects the CPSC’s initial view of the types of products—*i.e.*, “support cushions”—it would be regulating:

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<sup>4</sup> CSPC, Staff’s NPR Briefing Package at OS 109, *available at* [www.cpsc.gov/s3fs-public/Briefing-Package-Notice-of-Proposed-Rulemaking-Safety-Standard-for-Infant-Support-Cushions.pdf?VersionId=rA60lesWHddS1.wrk\\_EvV00xeX75dsFc](http://www.cpsc.gov/s3fs-public/Briefing-Package-Notice-of-Proposed-Rulemaking-Safety-Standard-for-Infant-Support-Cushions.pdf?VersionId=rA60lesWHddS1.wrk_EvV00xeX75dsFc) (last visited Mar. 20, 2025).

II. Background

Figure 1 shows the types of support cushions used for testing and analyses for this NPR.

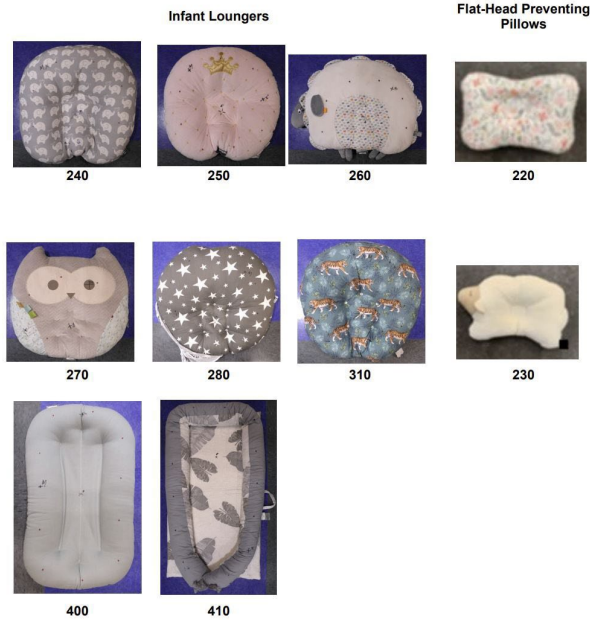


Figure 1 Test Samples

And this graphic<sup>5</sup> depicts Lovevery’s entirely different and flat product—the Lovevery Play Gym—now apparently covered by the Rule:



<sup>5</sup> Lovevery, *The Play Gym*, available at <https://lovevery.com/products/the-play-gym> (last visited Mar. 20, 2025).

Requiring Lovevery to affix a warning sign that its Play Gym “can kill” a baby—as the Rule would require in just a matter of weeks—is as unprecedented as it is unwarranted. In addition to confusing consumers, compliance with the Rule will cause irreparable damage to Lovevery’s business and reputation.

In light of the Rule’s broad and novel sweep, the longstanding status quo, this Court’s expedited review by statute (15 U.S.C. §§ 2056a(b)(2), 2060(g)), and the relative burdens on the parties, a stay of the Rule’s effective date pending judicial review is warranted. *See In re NTE Connecticut, LLC*, 26 F.4th 980, 991–92 (D.C. Cir. 2022).

**I. Granting A Stay Is Necessary To Preserve The Status Quo Pending Judicial Review**

“Administrative stays do not typically reflect the court’s consideration of the merits of the stay application.” *United States v. Texas*, --- U.S. ----, 144 S. Ct. 797, 798 (2024) (Barrett, J., concurring). Instead, an administrative stay “minimize[s] harm while an appellate court deliberates.” *Id.* As this Court has recognized, a stay pending appeal may be necessary “to give the court sufficient opportunity to consider the merits.” *Cobell v. Norton*, No. 03-5262, 2004 WL 603456, at \*1 (D.C. Cir. Mar. 24, 2004).

A stay of the Rule’s effective date pending this Court’s review is justified because the Rule will upend the status quo and cause companies like Lovevery to redesign, retest, and re-evaluate popular and safe products needlessly. For decades,

playmats like those produced by Lovevery have been treated as toys, not toddler or infant durable goods, and have been regulated as such. And even if the Rule is later set aside, Lovevery and other similarly situated companies will have faced significant reputational and compliance costs without a stay. Given the Rule's broad and novel sweep, and the harm that would be caused by allowing the Rule to take effect while this Court reviews, the status quo should be preserved by a stay.

## **II. Lovevery Will Be Irreparably Injured Absent A Stay**

“Ordinarily, economic loss does not, in and of itself, constitute irreparable harm.” *In re NTE Connecticut*, 26 F. 4th at 990 (quoting *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam) (internal citations omitted)). Nonetheless, “financial injury can be irreparable where no adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation.” *Id.* (internal citations omitted). In this case, corrective relief will be unavailable at a later date for several reasons, thus warranting a stay.

### **A. The CPSC's Sovereign Immunity Bars Lovevery From Future Recovery**

As Petitioner has explained, companies like Lovevery will face irreparable harm because the CPSC enjoys sovereign immunity for its actions—thus barring any attempt to seek damages from the agency after-the-fact. *See* Petr.'s Mot. at 21–22. “[W]here economic loss will be unrecoverable, such as in a case against a Government defendant where sovereign immunity will bar recovery, economic loss

can be irreparable even if it would not wipe the business out.” *Whitman-Walker Clinic, Inc. v. U.S. Dep’t of Health & Hum. Servs.*, 485 F. Supp. 3d 1, 58 (D.D.C. 2020) (quotation marks omitted).

**B. The CPSC’s *Ultra Vires* Rule Constitutes Irreparable Injury**

“[I]t is well-established that acts by Government agencies in derogation of statutory rights of the public or certain individual members of the public can constitute irreparable injury.” *Gates v. Schlesinger*, 366 F. Supp. 797, 800 (D.D.C. 1973). Here, the CPSC failed to observe the procedures required by law when it promulgated the Rule under 15 U.S.C. § 2056a, rather than the more rigorous processes required by §§ 2056 and 2058. *See* Petr.’s Mot. at 8–14. The resulting 180-day deadline—compliance with which will be difficult and costly, if even possible—will directly and irreparably harm companies like Lovevery.

**C. The Financial And Reputational Harm To Lovevery Qualifies As Irreparable Loss**

Lovevery produces subscription Play Kits for infants and toddlers. These Play Kits are developmentally-informed, and consumers trust Lovevery to send toys that fit children’s developmental characteristics.<sup>6</sup> As of 2021, Lovevery reported over 220,000 active subscribers and generated more than \$100 million in annual recurring

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<sup>6</sup> CNBC, *Lovevery Baby Toys: How Startup Brings in Millions* (July 25, 2024), <https://www.cnbc.com/2024/07/25/lovevery-baby-toys-how-startup-brings-in-millions.html>.

revenue from these subscriptions.<sup>7</sup> In 2024, Lovevery's total revenue exceeded \$200 million.<sup>8</sup> The Play Gym is an integral component of Lovevery's product line-up, complementing its subscription services and introducing parents to its child-raising support system.<sup>9</sup> The Play Gym consists of a wide, flat play surface with a breathable polyester cover over an extremely thin padding that poses no risk of suffocation. To date, Lovevery has over one million Play Gyms in circulation.

If Lovevery must comply with the Rule's May 5, 2025 effective date, it will impose substantial obstacles to Lovevery's subscription-based business model and financial wellbeing. As a result of the Rule, all Play Gyms will require additional third-party testing, new certification requirements, and warning labels that are inapplicable to any hazard that Play Gyms present. The Rule also requires that companies like Lovevery provide consumers with postage-paid consumer registration cards, *see* 89 Fed. Reg. at 87468 (requiring compliance with 16 C.F.R. pt. 1130); 89 Fed. Reg. at 87485; develop and maintain a product registration web

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<sup>7</sup> Retail Dive, *Children's Company Lovevery Raises \$100M, Launches Mobile App*, (Nov. 1, 2021), <https://www.retaildive.com/news/childrens-company-lovevery-raises-100m-launches-mobile-app/609220>.

<sup>8</sup> CNBC, *Lovevery Baby Toys: How Startup Brings in Millions*, available at: <https://www.cnbc.com/2024/07/25/lovevery-baby-toys-how-startup-brings-in-millions.html> (last visited Mar. 20, 2025).

<sup>9</sup> Canvas Business Model, *Lovevery: How It Works* (Dec. 19, 2024), <https://canvasbusinessmodel.com/blogs/how-it-works/lovevery-how-it-works?srsltid=AfmBOoqrJM8wY0Jdpqm1goa2C1U00HskbVYzbJiQehGN57m54CEfb-Kk>.

site, *see* 89 Fed. Reg. at 87468; 16 C.F.R. pt. 1130.7; maintain a toll-free phone number (Lovevery currently has no toll-free phone number); and maintain the database of consumers, *see* 16 C.F.R. pt. 1130.8 (recordkeeping and notification requirements). To comply with these provisions, Lovevery will have to contract with a third party on an ongoing basis, which will increase the already significant and unnecessary costs imposed by the Rule.

The financial harm Lovevery will likely suffer is compounded by the ways in which the Rule will undermine Lovevery's ability to retain customers through continuous engagement and trust.<sup>10</sup> Lovevery's customers expect developmentally-sound products designed with natural, Montessori-inspired materials; any impression that these products are unsafe will undermine permanently Lovevery's business model and reputation. Attaching a glaring, unnatural warning label to the Play Gym stating that it "can kill" a baby, as the Rule would require, will dissuade customers from using the Play Gym and cause severe reputational damage. It is for this reason that the impending "injury to reputation" "rise[s] to the level necessary" to constitute irreparable harm. *See Atlas Air, Inc. v. Int'l Bhd of Teamsters*, 280 F. Supp. 3d 59, 103 (D.D.C. 2017), *aff'd*, 928 F.3d 1102 (D.C. Cir. 2019); *Armour &*

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<sup>10</sup> Built In Idaho, *Lovevery: A Local Success Story*, available at: <https://www.builtinidaho.org/news/lovevery-a-local-success-story> (last visited Mar. 20, 2025).



*Co. v. Freeman*, 304 F.2d 404, 406 (D.C. Cir. 1962) (reversing denial of preliminary injunction of Secretary of Agriculture’s amendatory regulation that required meat packer company to include the label “IMITIATION HAM” on meat products).

### **III. The Balance of Equities Weighs Strongly In Favor Of Postponing The Rule’s Effective Date Pending Judicial Review**

Postponing the Rule’s effective date will not “substantially injure the other parties interested in the proceeding,” *Nken*, 556 U.S. at 426, 434; instead, granting a stay is necessary to balance the equities, *see in re NTE Conn., LLC*, 26 F.4th at 991.

#### **A. The Rule’s Overbreadth Needlessly Burdens Companies Like Lovevery**

The Rule purports to cover as “infant support cushions” a non-exhaustive and overbroad list of products, ranging from “head positioner pillows,” to “wedge pillows for infants,” to “infant sleep positioners,” to “pads and mats.” 89 Fed. Reg. 87469. The purpose, use, construction, size, shape and firmness vary widely across these categories, yet the CPSC adopted a one-size-fits-all testing protocol for each. *See, e.g., id.* 87468, 87485–86.

The CPSC offers no explanation of why the Rule’s protocol should govern Lovevery’s products, and in particular, Lovevery’s Play Gyms. Indeed, every product category listed in the Rule—with the exception of “pads and mats”—is by definition and design largely three-dimensional. Lovevery’s Play Gyms, by contrast, are flat, have no bumpers, and have no child containment function. And, as was made

clear during the CPSC's rulemaking, many playmats are already subject to 16 C.F.R. § 1250, which provides safety standards for toys by reference to ASTM F-963-23, an international safety standard. *See* 16 C.F.R. § 1250, ASTM F963-23.<sup>11</sup> To date, the CPSC has provided *no* information about how playmats increase the risk of infant suffocation.<sup>12</sup>

In short, requiring industry to implement the Rule by May 5, 2025 will substantially injure other parties, including Lovevery, who must comply with the Rule's overbroad and flawed requirements. *See NTE Conn.*, 26 F.4th at 49.

**B. There Is No Indication That Consumers Will Be Harmed By Playmats Like Lovevery's Play Gym**

"It is the agency's duty to identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules." *Window Covering Mfrs. Ass'n v. CPSC*, 82 F.4th 1273, 1283 (D.C. Cir. 2023) (cleaned up). In this case, however, the data cited by the CPSC wholly fails to justify its overbroad regulation.

Notably, the incident data relied upon by the CPSC is not disaggregated by product: the CPSC refers to 79 fatal incidents and 124 nonfatal incidents between

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<sup>11</sup> Letter from Lisa Trofe to Alberta Mills at 2 (Mar. 18, 2023), available at <https://www.regulations.gov/comment/CPSC-2023-0047-0018>.

<sup>12</sup> *See Notice of Availability and Request for Comment: Data Regarding Incidents Associated With Infant Support Cushions*, 89 Fed. Reg. 30295 (Apr. 23, 2024), available at: [www.federalregister.gov/d/2024-08605](http://www.federalregister.gov/d/2024-08605).

2010-2022 from injuries associated with “infant support cushions” broadly. *See* 89 Fed. Reg. at 87470. However, the CPSA does not specify the characteristics of infant support cushions that led to these injuries. And, on the face of the Rule, it appears that none of these incidents correspond to a product like a playmat. This is unsurprising, given that, to date Lovevery has sold over 1 million Play Gyms, with no playmat-related injuries or deaths.

Instead, the Rule states that “[i]n more than 60 percent of the fatalities, the official cause of death was asphyxia or probable asphyxia.” 89 Fed. Reg. at 87467. These incidents involved the use of “an infant support cushion placed in or on a sleep-related consumer product such as an adult bed, futon, crib, bassinet, play yard, or couch.” *Id.* For the nonfatal incidents, “the most common circumstances involved an infant falling from an infant support cushion placed on a raised surface[.]” *See* 89 Fed. Reg. at 87467. Notably, the CPSC attributes these dangerous incidents to an external unsafe environment—not to the products themselves. The data cited by the CPSC thus plainly does not support its overbroad Rule.

### **CONCLUSION**

This Court should grant a stay pending review.

Dated: March 20, 2025

Respectfully submitted,

Patrick J. Hayden  
Hannah D. Duncan  
Cooley LLP  
55 Hudson Yards  
New York, NY 10001-2157  
Phone: (212) 479-6000  
phayden@cooley.com  
hduncan@cooley.com

Matthew R. Howsare  
Carlton Forbes  
Cooley LLP  
1299 Pennsylvania Ave., NW, Ste. 700  
Washington, DC 20004-2400  
Phone: (202) 842-7800  
mhowsare@cooley.com  
cforbes@cooley.com

*/s/ Kathleen R. Hartnett*

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Kathleen R. Hartnett  
Jinyoung Lee  
Cooley LLP  
3 Embarcadero Center, 20th Fl.  
San Francisco, CA 94111-4004  
Phone: (415) 693-2000  
khartnett@cooley.com  
jinyoung.lee@cooley.com

*Counsel for Amicus Curiae*

**CERTIFICATE OF COMPLIANCE**

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 27(d)(2) because it contains 2,584 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and D.C. Cir. R. 32(e)(1).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. R. 32(a)(6) because it was prepared in a proportionately spaced typeface using Microsoft Word in Times New Roman 14-point type for text and footnotes.

*/s/ Kathleen R. Hartnett*

Kathleen R. Hartnett

*Counsel for Amicus Curiae*

**CERTIFICATE OF SERVICE**

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, I hereby certify that, on March 20, 2025, I electronically filed the foregoing Brief of *Amicus Curiae* Lovevery in Support of Motion for Stay with the Clerk of the Court for the U.S. Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system, and served copies of the foregoing via the Court's CM/ECF system on all ECF-registered counsel.

*/s/ Kathleen R. Hartnett* \_\_\_\_\_

Kathleen R. Hartnett

*Counsel for Amicus Curiae*

**UNITED STATES COURT OF APPEALS  
DISTRICT OF COLUMBIA CIRCUIT**

333 Constitution Avenue, NW  
Washington, DC 20001-2866  
Phone: 202-216-7000 | Facsimile: 202-219-8530

**Case Caption:** Heroes Technology (US) LLC

\_\_\_\_\_  
**v.**  
United States Consumer Product Safety  
\_\_\_\_\_

**Case No:** 25-1003  
\_\_\_\_\_

**ENTRY OF APPEARANCE**

The Clerk shall enter my appearance as  Retained  Pro Bono  Appointed (CJA/FPD)  Gov't counsel  
for the  Appellant(s)/Petitioner(s)  Appellee(s)/Respondent(s)  Intervenor(s)  Amicus Curiae below:

**Party Information**

(List each represented party individually - Use an additional blank sheet as necessary)

Lovevery, Inc.  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**Counsel Information**

Lead Counsel: Kathleen R. Hartnett  
\_\_\_\_\_

Direct Phone: ( 415 ) 693-2071 Fax: ( \_\_\_\_ ) \_\_\_\_ - \_\_\_\_ Email: khartnett@cooley.com  
\_\_\_\_\_

2nd Counsel: Patrick J. Hayden  
\_\_\_\_\_

Direct Phone: ( 212 ) 479-6529 Fax: ( \_\_\_\_ ) \_\_\_\_ - \_\_\_\_ Email: phayden@cooley.com  
\_\_\_\_\_

3rd Counsel: Carlton Forbes  
\_\_\_\_\_

Direct Phone: ( 202 ) 776-2117 Fax: ( \_\_\_\_ ) \_\_\_\_ - \_\_\_\_ Email: cforbes@cooley.com  
\_\_\_\_\_

Firm Name: Cooley LLP  
\_\_\_\_\_

Firm Address: 3 Embarcadero Center, 20th Floor  
\_\_\_\_\_

Firm Phone: ( 415 ) 693-2000 Fax: ( \_\_\_\_ ) \_\_\_\_ - \_\_\_\_ Email: \_\_\_\_\_  
\_\_\_\_\_

Notes: This form must be submitted by a member of the Bar of the U.S. Court of Appeals for the D.C. Circuit.  
**Names of non-member attorneys listed above will not be entered on the court's docket.** Applications for  
admission are available on the court's web site at <http://www.cadc.uscourts.gov/>.