ORAL ARGUMENT NOT YET SCHEDULED
No. 25-1003

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

HEROES TECHNOLOGY (US) LLC d/b/a SNUGGLE ME ORGANIC,
Petitioner,

v.

UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION,
Respondent.

REPLY IN SUPPORT OF MOTION FOR STAY PENDING REVIEW

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

I. Parties and *Amici*

This case is a petition for review of final agency action. There were no district court proceedings in this matter. Petitioner is Heroes Technology (US) LLC d/b/a Snuggle Me Organic. Respondent is the United States Consumer Product Safety Commission.

Lovevery, Inc. is *amicus curiae* supporting Petitioner.

II. Ruling Under Review

Petitioner seeks review of the Consumer Product Safety Commission's final rule entitled Safety Standard for Infant Support Cushions, 89 Fed. Reg. 87,467 (Nov. 4, 2024) (the "Rule").

III. Related Cases

The Rule has not previously been before this Court or any other court. Pursuant to Federal Rule of Appellate Procedure 15 and 15 U.S.C. §§ 2056a(b)(3), 2060(g), the deadline for filing petitions seeking review of the Rule was January 3, 2025. To Petitioner's knowledge, no other petitions for review of the Rule have been filed.

/s/ Kara M. Rollins
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INTRODUCTION

If you ask expectant parents which "infant support cushions" they are adding to their baby registry, you will be greeted by blank stares. That is because that product category did not exist. Then, last year the Respondent Consumer Product Safety Commission ("CPSC") invented it and attempted to regulate a significant part of the infant products market under a clear misinterpretation of its own statutory authority. *Safety Standard for Infant Support Cushions*, 89 Fed. Reg. 87,467 (Nov. 4, 2024) (the "Rule"). Petitioner Heroes Technology's (US) LLC d/b/a Snuggle Me Organic ("Heroes Technology" or the "Company") marquee product, the Snuggle Me Infant Lounger, is subject to the Rule. A5–6; A10. It brought this challenge to restore legality and common sense to an agency that has both exceeded the bounds of its statutory authority and evaded Executive Branch oversight.

"In the business of statutory interpretation, if it is not the best, it is not permissible." *Loper Bright Enters. v. Raimondo* and *Relentless v. Dep't of Com.*, 603 U.S. 369, 400 (2024). Heroes Technology has the best reading of the statute, and the Rule is impermissible. Even were it permissible, the Rule is neither reasonable nor reasonably explained.

This Court should grant the motion for universal stay of the Rule.

ARGUMENT

I. HEROES TECHNOLOGY IS LIKELY TO PREVAIL ON THE MERITS

A. Heroes Technology Provides the Best Reading of 15 U.S.C. § 2056a

CPSC's choice to lead with its argument that the Rule "is reasonable and reasonably explained" is as telling as it is incorrect. That formulation applies to the Administrative Procedure Act's ("APA") arbitrary and capricious review. *FCC v. Prometheus Radio Proj.*, 592 U.S. 414, 423 (2021). It does not apply to issues of statutory interpretation, which are reviewed *de novo*. *U.S. Sugar Corp. v. EPA*, 113 F.4th 984, 991 (D.C. Cir. 2024); *see also* Mot. at 8 (quoting *Loper Bright*, 603 U.S. at 412). Despite CPSC's attempt to lower the standard of review, CPSC Resp. at 11–12, the question after *Loper Bright* is not whether CPSC's interpretation of § 2056a is reasonable, but what this Court determines is the "best" interpretation. 603 U.S. at 400. While CPSC elected to ignore *Loper Bright* in its response, CPSC cannot escape its import.

1. Heroes Technology's Arguments Are Not Waived

Judicial review is available because Heroes Technology's argument turns on an issue of statutory interpretation that only courts can resolve. *See Loper Bright*, 603 U.S. at 386; *see RR Yardmasters of Am. v. Harris*, 721 F.2d 1332, 1338–39 (D.C. Cir. 1983) (no waiver of statutory interpretation challenge). That is because "agencies have no special competence in resolving statutory ambiguities[,]" *Loper*

Bright, 603 U.S. at 400–01, and statutory interpretation does not require consideration of an agency's policy objectives. *See Kaweah Delta Health Care Dist. v. Becerra*, 123 F.4th 939, 950 (9th Cir. 2024); *cf. Missouri v. Trump*, 128 F.4th 979, 994 (8th Cir. 2025).

Further, CPSC misconstrues the only authority upon which it relies. CPSC Resp. at 13 (quoting *Del. Dep't of Nat. Res. & Env't Control v. EPA*, 895 F.3d 90, 96 (D.C. Cir. 2018)). A close reading of that case shows that the matter arose under the Clean Air Act's ("CAA") narrow judicial review provision, which differs from APA review. *See* 42 U.S.C. § 7607(d)(7)(B). Even under the CAA's provision, this Court explained that although "some" of the petitioner's comments suggested they supported certain parts of the proposed rule, their other comments suggested opposition to the rule, and thus their challenge was not entirely inconsistent with their comment period position. *Del. Dep't of Nat. Res.*, 895 F.3d at 96. Heroes Technology has opposed the promulgation of the Rule since its proposal. *See* A79–128, A19–22, A23–36. Heroes Technology's position in this matter is consistent with its position before the agency below, and it is not waived.

2. CPSC's Interpretation of 15 U.S.C. § 2056a Is Impermissible

The parties agree that under § 2056a Congress intended to regulate infant or toddler products that combine a useful product life and an ability to withstand significant deterioration over time. *Compare* Mot. at 10 *with* CPSC Resp. at 11.

Beyond that, CPSC's interpretation makes little sense. It also misstates and misunderstands Heroes Technology's arguments.

CPSC states that the Company "does not dispute that infant support cushions are 'durable infant or toddler products' as that term is ordinarily understood, CPSC Resp. at 12. But the Company absolutely does contest that precise point. Mot. at 8–9. CPSC also argues that Heroes Technology is attempting to apply "terms of art" not included in the statute. CPSC Resp. at 12. Not so. Rather, Heroes Technology takes the position that "durable," whether used as a stand alone adjective, or as the term "durable product" or its synonymous term "durable goods," means, in common parlance, consumer products that last a long time without significant deterioration. All these terms were commonly understood to mean the same thing at the time that § 2056a was adopted. Mot. at 10. For example, CPSC takes issue with the Company's use of "durable good" as a synonym for "durable product" but, in 2008, Merriam-Webster defined "durable goods" as "products (such as cars and stoves) that usually last a very long time[.]" *Id.*

CPSC also misunderstands Heroes Technology's argument regarding textiles. Heroes Technology's argument is *not* that there is categorical exception for textiles; rather, Heroes asserts textiles are the sort of products that are commonly understood to be nondurable products. Mot. at 9–10 (citing dictionaries). In other words, textiles are presumptively not durable products. CPSC's reasons for finding that infant

support cushions are durable products under § 2056 do not overcome that presumption. For example, CPSC relies on the facts that infant support cushions "are not disposable" and "are resold and widely available on secondary marketplaces" as reasons for why they are durable products. 89 Fed. Reg. at 87,468. But if that interpretation were correct, then there would be no limit to what CPSC could classify as a durable infant product. *See* A28–29. For example, infant clothing, cloth diapers, and blankets are not disposable, and are resold and widely available on secondary marketplaces. *See*, *e.g.*, Cloth Diaper Swap, babycenter.com (last visited Mar. 28, 2025).[1]

But it is not credible that Congress, in regulating durable infant products and expressly identifying furniture and other products made of wood, plastic, and metal, Mot. at 10, also meant to include products like cloth diapers. Indeed, that is the critical error in CPSC's interpretation; it has no limits. And if there are no limits under CPSC's interpretation, then "durable" is read out of the statute. But interpreting a statute in a way that excludes some of the language is impermissible. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001).

CPSC also never explains why it has stopped comparing products to the statutory product list. Mot. at 13. Instead, it relies on its one-step removed

[1] https://community.babycenter.com/groups/a69805/cloth_diaper_swap.

interpretations regarding "infant carriers" and "crib mattresses," which were promulgated over a decade after § 2056a. CPSC Resp. at 15–17; *see also* Mot. at 13–14; A29. Besides, CPSC's "consistently wrong interpretation cannot rewrite the statute's text to change its meaning." *Missouri v. Trump*, 128 F.4th at 994.

CPSC's interpretation of § 2056a is impermissible, so the Rule should be stayed.

B. The Rule Is Neither Reasonable Nor Reasonably Explained

CPSC invites this Court to ignore *Loper Bright* by invoking deference to its so-called expert policy judgments. CPSC Resp. at 19. But that standard relates to statutory gap-filling under the now-overturned *Chevron* framework. *See Nat'l Cable & Telecomms. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 339 (2002). The standard of review under 5 U.S.C. § 706(2)(A) is whether the agency's decision is "reasonable and reasonably explained." Mot. at 15 (quoting *Prometheus Radio Proj.*, 592 U.S. at 423). The Rule is neither.

First, the 180-day effective date is unreasonable. Mot. at 16–17. There is ample evidence—as Heroes Technology's own experience highlights—that the compliance timeframe was inadequate. *Id.* CPSC also incorrectly states that Heroes Technology sought a one-year extension, but the Company stated that it needed *at least a year* to comply, A100.

Second, CPSC misunderstands the overbreadth argument. CPSC Resp. at 19–20. "Infant support cushions" did not exist as a product category until CPSC invented it when it proposed the Rule. Heroes Technology's point is not there are no carve-outs for subcategories; its argument is that the "infant support cushions" category is entirely invented by CPSC for the express purpose of regulating any product with fiber or similar filling. Mot. at 17. The twelve exemplary product categories provided are product types, not subcategories. Each of the products in those distinct categories is designed for a specific use and has a specific risk profile relative to that use. CPSC's one-size-fits-all approach does not account for design and use differences.

Third, CPSC attempts to say that it did not have to consider the impacts in risk reduction achieved through its infant sleep product rule because "that is not 'an important aspect' of the problem addressed by this rule." CPSC Resp. at 21–22 (citation ommitted). CPSC's argument is incorrect. The Rule is aimed at reducing infant deaths and injuries, many of which occur in sleep environments, CPSC Resp. at 7, and it was justified in part because some infant support cushions "display images of infants sleeping or resting[.]" 89 Fed. Reg. at 87,474. Those risks and such products are addressed and regulated under the *Safety Standard for Infant Sleep Products*, 86 Fed. Reg. 33,052, 33,026 (June 23, 2021) (products advertised with

images of sleeping infants are in-scope). But CPSC never bothered to consider whether the existing regulation achieved risk reduction.

CPSC's remaining arguments are unpersuasive and rely on *ipse dixit* logic. *Compare* CPSC Resp. at 20–21 *with* Mot. at 18. The Rule should be stayed.

II. A STAY IS NECESSARY AND SUPPORTED BY THE REMAINING EQUITABLE FACTORS

CPSC's equitable analysis also amounts to little more than *ipse dixit*. It provides no information or data establishing how the Rule will reduce any risk of harm and provides only the conclusory statement that the "mandatory standard resolves" the perceived product hazards. CPSC Resp. at 24. CPSC tries to argue that a stay will permit more "noncompliant products" to be sold. *Id.* However, it provides no evidence of that. Nor does the Rule have the immediate effect CPSC claims, as it permits manufacturers and retailers to sell through pre-Rule product stock even after the effective date. *See* Mot. at 23. CPSC also ignores the fact that this Petition is subject to expedited review under 15 U.S.C. §§ 2056a(b)(3), 2060(g)(1)(C).[2] This Court has stayed other safety standards despite CPSC raising comparable equitable concerns. *See* Order, *Window Covering Manufacturers Association v. CPSC*, No. 22-1300 (Jan. 10, 2023), Doc. 1980865 (per curiam).

[2] *Finnbin, LLC v. CPSC*, No. 21-1180 (D.C. Cir. 2022), was resolved in less than a year from when the petition was filed.

CPSC tries to downplay the harm its Rule has caused Heroes Technology. CPSC Resp. at 24–25. To be clear, the Rule poses an existential threat to the Company, jeopardizing its ability to stay in operation. Mot. at 20–21; A9–10. That is because the Rule forces the Company to stop the sale of its marquee product, which accounts for most of the company's revenue. A4–6; A9–10. The destruction of a lawful business is not "slight" economic harm, *see* CPSC Resp. at 24, it is cognizable irreparable harm, *see* Mot. at 21–22.

CPSC's other arguments concerning economic injury, CPSC Resp. at 24–25, show its complete lack of knowledge regarding how products are developed, designed, manufactured, tested, and brought to market. *First*, CPSC ignores that its costs estimates are exponentially wrong. Mot. at 20–21 Heroes Technology has already expended over 5,770 hours of professional time to comply with the Rule, A11, nearly 30 times the number of hours CPSC estimated. Mot. at 21; 89 Fed. Reg. at 87,486. Adopting CPSC's dubious labor cost estimate of $68.24/hour the Company's professional time costs are over $393,700. *See* 89 Fed. Reg. at 87,486.

Second, the costs highlighted do not include the costs related to the prototype developed during the NPRM-stage. A11. That non-commercial prototype was only meant to address CPSC's "lack of analysis … on comparative risks and hazards[.]". A95. And that prototype is not the compliant product that the Company is bringing to the market, A11.

Third, CPSC argues that there is "ample evidence" that consumers are willing to purchase products with lower sidewalls, CPSC Resp. at 25, but that is based only on the mere existence of products on the market across different categories, not actual sales of the same type of products configured with lower sidewalls. Parents and caregivers buy a Snuggle Me Infant Lounger because they want its unique features, just as they buy *amicus*'s Play Gym because they desire its distinct features. Despite CPSC's assertion, the 2,000 in-scope products are not interchangeable. A playmat is not a lounger, a lounger is not a playmat, and consumers want access to both. *See* A4 (over one million Snuggle Me Loungers have been sold); Amicus Br., Doc. 2106991, at 1 (over one million Play Gyms sold).

Fourth, CPSC's unexplained determination that Executive Orders 14,215 and 14,219 do not apply to the Rule, CPSC Resp. at 23, highlights why a stay is necessary, as this Court is the only branch of government that can hold the agency to account.

Finally, CPSC's argument against issuing a universal stay, CPSC Resp. at 26–27, is legally wrong, as it ignores the fact that a § 705 stay is the only way to preserve the remedy the Company is seeking here: vacatur of the Rule itself. CPSC's position also makes little sense considering the APA's remedy of striking down rules altogether. Under § 706, courts are empowered to "hold unlawful and set aside" certain agency actions. 5 U.S.C. § 706(2); *see also Corner Post, Inc. v. Bd. of*

Governors of Fed. Rsrv. Sys., 603 U.S. 799, 830 (2024) (Kavanaugh, J., concurring) ("[t]o 'set aside' a rule is to vacate it."). Nothing in the cases cited by CPSC suggests otherwise, as they did not involve the APA's review and remedies provisions. *See Gill v. Whitford*, 585 U.S. 48 (2018) (arising under 42 U.S.C. § 1983); *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) (upholding nationwide class relief in a non-APA review case).

Contrary to CPSC's argument, CPSC Resp. at 26–27, the APA's text shows that Congress "depart[ed] from [the] baseline" rule "that equitable relief is ordinarily limited to the parties in a specific case." *Corner Post*, 603 U.S. at 838 (Kavanaugh, J., concurring). In effect, the APA provides reviewing courts "veto-like power that enables the judiciary to formally revoke an agency's rules, orders, findings, or conclusions[.]" Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 1012 (2018). That veto-like power cannot be preserved unless the stay is universal.

Moreover, a stay limited only to Heroes Technology would not alleviate the harm it has alleged, nor address the equities it has raised, and would create needless uncertainty. *See* Mot. at 20–22, 22–23; *see also* A11–13. CPSC ignored the Company's arguments that the Rule harms consumers and businesses across the industry, Mot. at 22–23. *Amicus* Lovevery, Inc. confirmed the same. *See* Amicus Br. at 8–11.

A complete stay of the Rule is proper under the APA, and this Court has issued such stays in challenges to safety standards in the past.

CONCLUSION

This Court should stay the Rule, *in toto*, pending review.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This filing complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 2,600 words excluding the parts of the brief exempted by Fed. R. App. P. 27(a)(2)(B).

This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirement of Rule 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/ Kara M. Rollins
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CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2025, I filed the foregoing with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system which will serve all counsel of record.

/s/ Kara M. Rollins
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