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.

OPENING BRIEF OF PETITIONER HEROES TECHNOLOGY (US) LLC D/B/A SNUGGLE ME ORGANIC

On Petition for Review of a Final Rule
of the United States Consumer Product Safety Commission

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rules 15(c)(3), 26.1, and 28(a)(1), Petitioner Heroes Technology (US) LLC d/b/a Snuggle Me Organic ("Heroes Technology" or the "Company") submits this 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. The Petitioner is Heroes Technology, and the Respondent is the United States Consumer Product Safety Commission ("CPSC" or the "Commission").

Lovevery, Inc. filed a motion for leave to file as *amicus curiae* supporting Petitioner's Motion for Stay Pending Appeal, Doc. 2106991 (Corrected Brief). The Court denied its motion, Doc. 2111781.

II. Ruling Under Review

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

III. Related Cases

As of the date of this filing, Heroes Technology is not aware of any related cases.

/s/ Kara M. Rollins
KARA M. ROLLINS

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a) and D.C. Circuit Rule 26.1, Heroes Technology (US) LLC states that it is a for-profit, limited liability company organized under the laws of Delaware. It designs, manufactures, and sells the Snuggle Me Infant Loungers and Covers. The Infant Lounger is designed for active engagement, play, and bonding with infants while they are awake. The machine-washable Infant Loungers and Covers are made with organic cotton and the Loungers are filled with polyester fiber.

Heroes Technology (US) LLC's parent company is Heroes Technology Ltd. ("HTL"), a private company limited by shares incorporated and registered in England and Wales under registered number 12620251 whose registered office is at 25 Horsell Road, The Orangery, London N5 1XL, United Kingdom.

No publicly held corporation owns 10 percent or more of Heroes Technology (US) LLC's or HTL's stock.

/s/ Kara M. Rollins
KARA M. ROLLINS

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GLOSSARY

APA	Administrative Procedure Act
ASTM	ASTM International, a private standards-setting organization
Commission	The United States Consumer Product Safety Commission
Company	Heroes Technology (US) LLC d/b/a Snuggle Me Organic
CPSA	Consumer Product Safety Act, Pub. L. No. 92-573, 86 Stat. 1207 (1972)
CPSC	The United States Consumer Product Safety Commission
CPSIA	Consumer Product Safety Improvement Act of 2008, Pub. L. 110-314, 122 Stat. 3016 (2008)
Heroes Technology	Heroes Technology (US) LLC d/b/a Snuggle Me Organic
JPMA	Juvenile Products Manufacturers Association, Inc.
Rule	*Safety Standard for Infant Support Cushions*, 89 Fed. Reg. 87,467 (Nov. 4, 2024)

INTRODUCTION

This case challenges the Consumer Product Safety Commission's ("CPSC") unlawful expansion of a statutory term's meaning to evade the usual procedural obligations it must undertake before promulgating a mandatory consumer product safety standard. The case does not contest whether a mandatory safety standard should issue, but whether Congress authorized CPSC to issue this Rule in the shortcut manner done in this case. If CPSC gets away with issuing this Rule without going through proper statutory procedures, then it will surely issue more such shortcut standards the same way.

Congress limited the use of 15 U.S.C. § 2056a's expedited rulemaking process to *durable* infant or toddler products that are intended for or reasonably expected to be used by children under the age of 5 years. While Congress did not separately define the terms "durable" and "durable product" in the statute, it provided a list of twelve durable infant or toddler products to guide CPSC. 15 U.S.C. § 2056a(f)(2). Those products, including strollers and cribs, are classic examples of durable products within the term's plain meaning. *Id.*

In comparison, the products CPSC regulates in the challenged rule, *Safety Standard for Infant Support Cushions*, 89 Fed. Reg. 87,467 (Nov. 4, 2024) (the "Rule"), are not durable products. The Rule defines "infant support cushions" as any "infant product that is filled with or comprised of resilient material such as foam,

fibrous batting, or granular material or with a gel, liquid, or gas" and marketed for certain purposes. *Id.* at 87,487. In-scope products include twelve exemplary ones, encompassing a broad and incongruent set of purposes and designs. *Id.* at 87,469. Such products include, "flat baby loungers[,]" "infant tummy time or lounging pillows," and "multi-purpose pillows marketed for both nursing and lounging[.]" *Id.* Accordingly, CPSC estimated that the Rule applies to over 2,000(!) models that require "redesign" because of the Rule. *Id.* at 87,486. The Rule's definition and list of exemplary products unmistakably describe textile products, which have traditionally been considered the epitome of nondurable products.

CPSC previously recognized that textiles are commonly understood to be nondurable products. *See Requirements for Consumer Registration of Durable Infant or Toddler Products*, 74 Fed. Reg. 30,983, 30,984 (June 29, 2009). The Rule provides no rational reason to supplant that longstanding Commission view. Nor does it provide any explanation for why the Commission abandoned its long-held interpretive method of comparing the products it seeks to regulate to those on the Congressionally prescribed list. Section 2056a's legislative history underscores the statute's plain meaning, which CPSC has ignored. "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).

By contorting its interpretation of "durable" and "durable products" to include infant support cushions—a product category that CPSC invented out of whole cloth to justify its Rule—CPSC disregarded the Congressional limits placed on its rulemaking authority. Because infant support cushions are not *durable* infant or toddler products, CPSC was required to follow the more rigorous procedures set forth in §§ 2056 and 2058 before issuing a mandatory consumer product safety standard pertaining to them. By relying on its flawed interpretation of the Consumer Product Safety Act, Pub. L. No. 92-573, 86 Stat. 1207 (1972) (codified as amended[2] at 15 U.S.C. § 2051 *et seq.*) ("CPSA"), CPSC exceeded its statutory authority and failed to adhere to legal limitations. As a result of its impermissible reading of § 2056a, CPSC arrogated unlawful power to itself and failed to observe the procedures required by law. This is a critical concern, where, as here, CPSC's statutory interpretation increases the scope of the agency's enforcement authority, which includes the ability to seek civil and criminal sanctions for violations of the Rule. 15 U.S.C. §§ 2068, 2069, 2070.

The Commission's flawed interpretation has had significant negative practical impacts on regulated entities like Heroes Technology, whose marquee products, the Snuggle Me Infant Lounger and its Cover, are subject to the Rule. As a direct result

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[2] Such amendments include the Consumer Product Safety Improvement Act of 2008, Pub. L. 110-314, 122 Stat. 3016 (2008) ("CPSIA"), which added § 2056a to the law.

of the Rule, the Company is no longer able to manufacture the Snuggle Me Infant Lounger for sale in the United States.

Heroes Technology has the best reading of the statute, and the Rule is impermissible. Even if it were otherwise permissible, the Rule is arbitrary and capricious. This Court should vacate the Infant Support Cushion Rule.

STATEMENT OF JURISDICTION

On November 4, 2024, the Commission promulgated the Rule. Heroes Technology timely petitioned for review on January 3, 2025. Doc. 2092890; 15 U.S.C. § 2060(g)(2). The Rule was promulgated pursuant to 15 U.S.C. § 2056a, and this Court has jurisdiction pursuant to 15 U.S.C. §§ 2056a(b)(3), 2060(g)(1)(C).

STATEMENT OF ISSUES

1. Whether the mandatory consumer product safety standard for Infant Support Cushions was promulgated "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right" because the products regulated by the Rule are not durable infant or toddler products. *See* 5 U.S.C. § 706(2)(C); 15 U.S.C. §§ 2056a(f), 2060(g)(3).

2. If so, whether the Rule was promulgated "without observance of procedure required by law" because the mandatory safety standard for Infant Support Cushions was promulgated pursuant to § 2056a's expedited procedures

rather than §§ 2056 and 2058's more extensive (*e.g.*, requiring cost-benefit analysis) procedures. *See* 5 U.S.C. § 706(2)(D); 15 U.S.C. §§ 2056, 2056a, 2058, 2060(g)(3).

3. Whether the Rule is "arbitrary, capricious, … or otherwise not in accordance with law[,]" 5 U.S.C. § 706(2)(A); 15 U.S.C. § 2060(g)(3), because:

a. CPSC abandoned its long-existing policy of comparing products to § 2056a's statutorily prescribed products, and in doing so failed to acknowledge it was changing its policy or provide reasons for doing so.

b. CPSC failed to consider important aspects of the problem it seeks to address, including how other product safety standards may have already reduced the harms purportedly addressed by the Rule.

c. The Rule is incompatible with reasoned decisionmaking and not supported by the record.

d. The 180-day effective date for the Rule was insufficient for compliance and did not reduce the risk of injury, despite CPSC's claims.

PERTINENT STATUTORY PROVISIONS

Pertinent statutory provisions are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

I. STATUTORY AND REGULATORY BACKGROUND

A. CPSC's General Rulemaking Power

In 1972, Congress enacted the Consumer Product Safety Act in response to concerns that "consumer products which present unreasonable risks of injury" were available to consumers and that the then-existing regulatory frameworks were either "inadequate" or potentially "burdensome to manufacturers[.]" 15 U.S.C. § 2051(a)(1), (4), (5). The CPSA created the Consumer Product Safety Commission ("CPSC") and charged it with (1) "protect[ing] the public against unreasonable risks of injury associated with consumer products;" (2) "assist[ing] consumers in evaluating the comparative safety of consumer products;" (3) "develop[ing] uniform safety standards for consumer products[;]" and (4) promot[ing] research and investigation into the causes and prevention of product-related deaths, illnesses, and injuries." 15 U.S.C. § 2051(b).

The CPSA also provides a general regulatory framework for many consumer products and authorizes the Commission to fulfill its mission in several ways, including by collecting, maintaining, and analyzing incident data; assisting with the development of voluntary product safety standards; conducting product safety research, investigations, and product testing; promulgating mandatory consumer

product safety standards; addressing imminently hazardous products; and banning hazardous products. *See generally* 15 U.S.C. §§ 2054, 2056, 2058, 2061, 2064.

Under §§ 2056 and 2060, CPSC is required to engage in a multi-step process before it promulgates a mandatory safety standard. Such standards must "be reasonably necessary to prevent or reduce an unreasonable risk of injury associated with" the regulated product. 15 U.S.C. § 2056(a). CPSC must rely upon voluntary safety standards when those standards "eliminate or adequately reduce the risk of injury addressed and it is likely that there will be substantial compliance with such voluntary standards." 15 U.S.C. § 2056(b)(1); *see also Window Covering Mfrs. Ass'n v. CPSC*, 82 F.4th 1273, 1279 (D.C. Cir. 2023) (noting that "voluntary standards" can "render regulation unnecessary"); *Finnbin, LLC v. CPSC*, 45 F.4th 127, 131 (D.C. Cir. 2022) (citing 15 U.S.C. § 2056(b)(1) (CPSC "must stay its hand if a voluntary standard … adequately reduces the relevant product risks and will likely achieve substantial compliance")). Only if CPSC determines that a voluntary safety standard will not accomplish the CPSA's goals may it promulgate a safety standard under § 2058. *See* 15 U.S.C. § 2058(f)(3)(D).

Under § 2058, CPSC must "conduct a 'final regulatory analysis'— *i.e.*, a cost-benefit analysis—before promulgating a safety standard." *Window Covering Mfrs. Ass'n*, 82 F.4th at 1279; *see also Zen Magnets, LLC v. CPSC*, 841 F.3d 1141, 1147 (10th Cir. 2016) ("[T]he Commission must 'consider' and 'make appropriate

findings' regarding the social and economic costs and benefits of the rule."). That "analysis must detail costs, benefits, and alternatives to the proposed standard, and must address any issues raised by commenters." *Window Covering Mfrs. Ass'n*, 82 F.4th at 1279 (citing 15 U.S.C. § 2058(f)(2)).

The Commission must also "make a host of findings about costs and benefits." *Finnbin, LLC*, 45 F.4th at 131 (citing 15 U.S.C. § 2058(f)). Those findings include:

> (1) "that the rule (including its effective date) is reasonably necessary to eliminate or reduce an unreasonable risk of injury associated with [the] product"; (2) that any voluntary standard is not likely to eliminate or reduce the risk of injury, or that it is "unlikely that there will be substantial compliance" with the voluntary standard; (3) that the rule's benefits "bear a reasonable relationship to its costs"; and (4) that the rule "imposes the least burdensome requirement" to prevent or reduce the risk of injury.

Window Covering Mfrs. Ass'n v. CPSC, 82 F.4th at 1280 (citing 15 U.S.C. § 2058(f)(3)(A), (D), (E), (F)). The CPSA also requires a finding that "the rule is in the public interest[.]" 15 U.S.C. § 2058(f)(3)(B). CPSC's "determination 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 (cleaned up). The Commission must also comply with the Administrative Procedure Act's ("APA") requirements when it promulgates product safety standards. *Window Covering Mfrs. Ass'n v. CPSC*, 82 F.4th at 1280. Section 2058 requires that the effective date of any product safety standard "not

exceed[] 180 days" from promulgation "unless the Commission finds … good cause … that a later effective date is in the public interest." 15 U.S.C. § 2058(g)(1) (CPSC must publish its findings).

Under the CPSA, it is "unlawful" to manufacture, import, distribute, or sell products that are regulated under the Act, but are "not in conformity with an applicable consumer product safety rule." 15 U.S.C. § 2068(a)(1). Such violations may be punished by civil penalties, criminal fines, and/or imprisonment. 15 U.S.C. §§ 2069, 2070.

B. CPSC's Specific Rulemaking Power for Durable Infant or Toddler Products

The CPSA also provides an expedited rulemaking process for promulgating safety standards for certain types of children's products.[3] Section 2056a was adopted to address perceived deficiencies in product safety requirements for durable infant and toddler products and create new registration notification requirements for such products, in case of later recalls. H.R. Rep. No. 110-787, at 67 (2008) (Conf. Rep.).

The statute defines "durable infant or toddler product" as "a durable product intended for use, or that may be reasonably expected to be used, by children under the age of 5 years[.]" 15 U.S.C. § 2056a(f)(1). While "durable" or "durable product"

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[3] Section 2056a was adopted in 2008 as part of the Consumer Product Safety Improvement Act ("CPSIA"), Pub. L. 110-314, 122 Stat. 3016.

are not separately defined by the statute, § 2056a(f)(2) includes a list of twelve infant or toddler products: "full-size cribs and nonfull-size cribs; … toddler beds; … high chairs, booster chairs, and hook-on chairs; … bath seats; … gates and other enclosures for confining a child; … play yards; … stationary activity centers; … infant carriers; … strollers; … walkers; … swings; and … bassinets and cradles." Since the CPSIA's adoption, CPSC has expanded or modified the list of durable infant or toddler products. *See* 16 C.F.R. § 1130.2(a)(8), (12)–(20).

However, the legislative history suggests that Congress meant § 2056a(f)(2) to encompass a limited set of products. The provision's sponsor, Representative Jan Schakowsky, stated that her bill's (H.R. 1699, 110th Cong. (2007)) language—which was incorporated into the CPSIA— "specifically" listed the products it applied to and that they were "very specific products." *Legislation to Improve Consumer Product Safety for Children: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy & Commerce on H.R. 2474, H.R. 1699, H.R. 814, H.R. 1721*, 110th Cong. 61 (June 6, 2007) (statement of Rep. Jan Schakowsky); *see also id.* at 5 (the bill "would require that each durable infant and toddler product—*and we name them*—high chairs, cribs and strollers, et cetera—come with a postage-paid recall registration card" (emphasis added)). At a separate hearing, Representative Bobby Rush, who was the Subcommittee Chairman at the time, noted that "title 1 [of H.R. 4040, 110th Cong.

(2007)] incorporates the provisions of H.R. 1699 … and further requires a directed rulemaking for mandatory safety standards for 12 specified durable nursery products[.]" *Comprehensive Children's Product Safety Commission Reform Legislation: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy & Commerce*, 110th Cong. 2 (Nov. 6, 2007). Likewise, the House Report for H.R. 4040 describes Section 104 of the bill, now codified at 15 U.S.C. § 2056a, as "establish[ing] safety standards and registration requirements for 12 defined 'durable infant or toddler products," such as cribs, high chairs, and strollers[.]" H.R. Rep. No. 110-501, at 32–33 (Dec. 19, 2007); *see also id.* at 34 ("The definition specifically applies to 12 enumerated products[.]"). The House Report thereafter refers only to "these products," in what appears to be a reference back to the twelve defined types of products. *See id.* at 34.

Throughout the provision's initial development, subsequent amendments, and ultimate adoption, its sponsors, cosponsors, and conferees consistently described the provision as relating to products prescribed in the statutory list. *See*, *e.g.*, 154 Cong. Rec. S1682 (daily ed. Mar. 6, 2008) (statement of Sen. Amy Klobuchar) ("To clarify, when you hear the words 'durable goods,' what does than [*sic*] mean in a mom's or parent's or kid's life? Well durable goods are nursery products that are those products that no new parent can go without: cribs, car seats and strollers and high

chairs, the most basic of all children's products.");[4] *id.* at S1688 (statement of Sen. Bill Nelson) (noting that "infant and durable products subject to this requirement include such a wide array of products such as cribs, toddler beds, high chairs, booster chairs, hook-on chairs, bath seats, gates, play yards, stationary activity centers, child carriers, strollers, walkers, swings, bassinets, cradles"); 154 Cong. Rec. H7583 (daily ed. July 30, 2008) (statement of Rep. Jan Schakowsky) (noting that "infant and toddler durable products" are "the things that are in every nursery: cribs, high chairs, playpens, strollers, bassinets").

Before the Commission promulgates a safety standard under § 2056a, it must consult with public stakeholders and "examine and assess the effectiveness of any voluntary consumer product safety standards for durable infant or toddler products[.]" 15 U.S.C. § 2056a(b)(1)(A). After participating in that consultative process, CPSC, following 5 U.S.C. § 553's notice-and-comment rulemaking procedures, may promulgate a safety standard that is either "substantially the same as such voluntary standards" or, in certain circumstances, "more stringent than such voluntary standards" if "more stringent standards would further reduce the risk of injury associated with such products." 15 U.S.C. § 2056a(b)(1)(B).

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[4] Car seats were specified in the list of products in an earlier bill, which was substantively similar to Section 104 of the CPSIA. *Compare* H.R. 2911, 108th Cong. (2003) *with* H.R. 4040, 110th Cong. (2008).

Hence, under § 2056a, the initial threshold for regulating "durable infant or toddler products" is lower than it would be for products generally regulated under the CPSA, as § 2056a turns, in certain circumstances, on a mere determination of risk reduction rather than a determination that the rule will "prevent or reduce an unreasonable risk of injury[.]" *Compare* 15 U.S.C. § 2056a(b)(1)(B)(ii) (CPSC "shall" promulgate product safety standards that "are more stringent than such voluntary standards, if the Commission determines that more stringent standards would further reduce the risk of injury associated with such products") *with* 15 U.S.C. § 2056(a) ("Any requirement of such a standard shall be reasonably necessary to prevent or reduce an unreasonable risk of injury associated with such product.").[5]

Moreover, in regulating durable infant or toddler products, the Commission is not required to defer to voluntary standards or make the findings set out in § 2058, *e.g.*, conducting a cost-benefit analysis. Unlike § 2058, Congress did not specifically prescribe the time in which a durable infant or toddler product safety standard must come into effect, 15 U.S.C. § 2056a, so the APA's general requirement that a substantive rule's effective date must be at least 30 days after publication of the final rule controls. 5 U.S.C. § 533(d).

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[5] Later revisions to safety standards promulgated pursuant to § 2056a must follow the process set out in § 2058. *See* 15 U.S.C. § 2056a(b)(4)(B).

Products regulated under the durable infant or toddler product provision must follow product registration, recordkeeping, and notification requirements. 15 U.S.C. § 2056a(d).

II. THE SNUGGLE ME INFANT LOUNGER

Heroes Technology is like many other small companies in the infant product space; it started with a mom who had an idea that she thought could help other parents. Doc. 2105663 at A4. That idea? Providing a safe place for infants to find comfort when a parent's or caregiver's hands were full. *Id.* Since those original 12 handmade infant loungers were produced in 2007, the Company has sold more than one million of its Snuggle Me Infant Loungers. *Id.* The Snuggle Me Infant Lounger and Cover are pictured below:

Doc. 2105663 at A5.

Id. at A6. The Infant Lounger is the Company's marquee product, and sales of the Infant Lounger and its Cover account for a significant majority of its revenue. *Id.* at A10.

The Company has consistently prioritized product quality and safety. *Id.* at A6–8. Among other safety efforts, Heroes Technology implemented its own voluntary registration process and included registration cards with its products, including the Snuggle Me Infant Lounger. *Id.* at A7.

III. THE VOLUNTARY STANDARDS PROCESS

Despite the CPSA's marked preference for voluntary safety standards, CPSC circumvented that process and promulgated the Rule before the voluntary infant lounger safety standard could be completed through the ASTM process. *Id.* at A8–9. That standard would have specifically addressed design and use concerns that are unique to infant loungers. *Id.* Heroes Technology, by and through its employees,

participated in the development of a draft voluntary product safety standard for infant loungers through ASTM's Infant Loungers Subcommittee. *Id.* The process was tense at times, and parties represented conflicting viewpoints. *Id.*at A9. Instead of allowing that process to run its course—and create a workable voluntary safety standard specific to infant loungers—CPSC attempted to force the Rule's broader scope and one-size-fits-all approach to numerous unrelated product categories into the voluntary standard. *See* CPSC, Meeting Log at 2 (Oct. 29, 2024), https://www.cpsc.gov/s3fs-public/10-29-2024-ASTM-F15-21-Infant-Loungers-Subcommittee-Meeting-Log.pdf ("Staff also recommended that the subcommittee align the performance and warnings requirements in the draft voluntary standard to conform to the requirements of the final rule."); *see also* Doc. 2105663 at A9. At the October 29, 2024 ASTM subcommittee meeting, Heroes Technology, as well as others, voiced their concerns with CPSC's position and the standard included in the Infant Support Cushion Rule. Doc. 2105663 at A9. As a result of the Rule, the ASTM Infant Loungers Subcommittee discontinued its work. *See Id.*

IV. THE INFANT SUPPORT CUSHION RULE

The Infant Support Cushion Rule combines thousands of discrete products, covering some twelve exemplary products, all rolled into a brand-new CPSC-invented product category: infant support cushions. Infant support cushions are defined as any

> infant product that is filled with or comprised of resilient material such as foam, fibrous batting, or granular material or with a gel, liquid, or gas, and which is marketed, designed, or intended to support an infant's weight or any portion of an infant while reclining or in a supine, prone, or recumbent position.

89 Fed. Reg. at 87,487. The Rule also "includes any removable covers, or slipcovers, sold on or together with an infant support cushion." *Id.* In-scope products include twelve exemplary products, encompassing a broad and incongruent set of purposes and designs. *Id.* at 87,469. Those products include:

> • head positioner pillows;
> • flat baby loungers;
> • crib pillows;
> • wedge pillows for infants;
> • infant sleep positioners, unless regulated as medical devices by the Food and Drug Administration (FDA);
> • stuffed toys marketed for use as an infant support cushion;
> • infant tummy time or lounging pillows, whether flat or inclined;
> • multi-purpose pillows marketed for both nursing and lounging;
> • anti-rollover pillows with or without straps that fasten the pillow to the infant;
> • infant self-feeding pillows that hold a bottle in front of the face of a reclining or lying infant;
> • pads and mats; and
> • accessory pillows and other padded accessories, often marketed for use with an infant car seat, stroller, or bouncer, but not sold with that product and therefore not included in the mandatory safety standard for those products.

Id. at 87,469. Examples of infant support cushions are provided below:

JA83. The Rule also carves out eight categories of products which are not included in the scope of the Rule including "adult bed and throw pillows[,]" "nursing pillows" that are subject to CPSC's nursing pillow rule, "purely decorative nursery pillows, such as those personalized with a baby's name and birthdate, that are not marketed, designed, or intended for infant use[,]" "stuffed toys (unless they meet the definition of an infant support cushion in this rule)[,]" and "sleeping accommodations … regulated under the Commission's infant sleep product rule." *Id.* CPSC estimated that the Rule applies to over 2,000 product models. *Id.* at 87,486.

The Rule sets out performance standards and testing methods for all in-scope products. *Id.* at 87,488–95. It also establishes marketing, labeling, and instructional requirements. *Id.* at 87,495–498. Finally, because in-scope products are (falsely) deemed "durable infant or toddler products," they are now subject to the registration and recordkeeping requirements set out in 15 U.S.C. § 2056a(d) and its implementing regulations, 16 C.F.R. § 1130.1 *et seq.*

The Rule "addresses positional asphyxiation hazards by requiring that all surfaces be sufficiently firm that they are unlikely to conform to an infant's face and occlude the airways, and by setting a maximum incline angle that would prevent hazardous positioning of an infant's head and neck along the surfaces of the product." *Id.* at 87,468; *see also id.* at 87,488, 87,489–92 (describing performance standard and testing methods for maximum incline angle); *id.* at 87,488, 87,492–93 (describing performance standard and testing methods for firmness). The Rule "addresses the risk of entrapment between the sidewall and the occupant support surface" by setting a side angle requirement[.]" *Id.* at 87,468; *see also id.* at 87,488, 87,494 (describing performance standard and testing methods for setting side angle determination). According to the Commission, the Rule "addresses fall hazards by effectively limiting sidewall height to discourage caregivers from mistakenly believing these products to be safe for unsupervised infants." *Id.* at 87,468; *see also id.* at 87,476 (explaining that "the maximum incline angle performance requirement … is expected to geometrically result in the height of the product being no more than 1.9 inches in order to comply with the incline angle requirement"). The Rule also provides specific requirements and language for on-product warning labels. *Id.* at 87,468; *see also id.* at 87,497 (providing the form of warning labels for in-scope products based on whether the product is a "tummy time" product).

The Rule either eliminates or requires significant and expensive redesigning and testing of thousands of products currently on the market, including the valued and immensely popular Snuggle Me Infant Lounger. Doc. 2105663 at A9–12.

SUMMARY OF ARGUMENT

Heroes Technology believes infant product safety is of unquestionably paramount importance. But the societal value placed on particular policies, or their outcomes, cannot override statutory text. Nor does it warrant regulatory shortcuts like the one CPSC took here. The issue before this Court is whether the Commission exceeded its statutory authority and violated the APA when it promulgated the Rule pursuant to the wrong statutory provision and adopted the Rule in an arbitrary and capricious manner. The Commission was without authority to promulgate the Rule under 15 U.S.C. § 2056a. Even if CPSC were authorized to regulate infant support cushions as durable infant or toddler products, the Rule is divorced from reason and the factual record before the agency. Thus, the Infant Support Cushion Rule should be vacated.

First, infant support cushions are not "durable infant or toddler products" within the plain meaning of the statute. Under the CPSA, the Commission may regulate infant or toddler products through either the procedures prescribed by 15 U.S.C. §§ 2056 and 2058 or, if the product being regulated is a "durable infant or toddler product[,]" those prescribed by § 2056a. Congress did not separately define

the terms "durable" or "durable product" but it did provide a list of twelve "durable infant or toddler products" to guide CPSC. 15 U.S.C. § 2056a(f)(2). Those products include the classic hallmarks of durable goods, like being made of wood, metal, and/or plastic. Durable goods are characterized by the combination of a product's useful life and its ability to withstand significant deterioration.

In contrast, the products regulated by the challenged Rule, "infant support cushions," are not durable goods. Rather, they are more akin to textiles, which are traditionally considered nondurable products. The Commission provides no reasons for overcoming this commonly understood presumption. It does not explain why it has abandoned its previously held view that textile products would not be considered durable goods under § 2056a. CPSC also fails to explain why the Rule makes no reference or comparison to the statutorily prescribed product list. The Commission's interpretation is critically flawed as it has no limits and reads "durable" and "durable product" out of the statute.

Heroes Technology provides the best reading of the statute based on the plain meaning of "durable" and "durable products," and its interpretation is underscored by the CPSIA's legislative history.

Interpreting the statute incorrectly led the Commission to also violate the APA's command that agencies comply with statutory procedural requirements. Because the Commission erroneously determined that infant support cushions,

including Snuggle Me Infant Loungers and Covers, are "durable infant or toddler products," it conducted the rulemaking through the abbreviated procedural processes outlined in § 2056a, rather than the more rigorous procedural process and under the heightened evidentiary standard required by §§ 2056 and 2058.

Second, the Rule violates the APA's command against arbitrary and capricious agency actions.

CPSC's inconsistent interpretation of § 2056a also reveals an impermissible change in position. The change-in-position doctrine protects regulated parties from regulatory whiplash by requiring agencies that change their position to display awareness when they do it and provide good reasons for doing so. The Commission previously looked to the statutory product list to guide what products it deemed as durable infant or toddler products. Here, it casually ignored its position change and provided no reasons for doing so.

The Commission's justifications for the Rule flow from its failure to consider important aspects of the problem the Rule addresses, its reliance on strained logic, and a lack of factual support in the record before it. The Rule seemingly aims to address infant support cushions being misused as sleep products, or in infant sleep environments. Despite this apparent concern, CPSC did not address whether and how its other rules aimed specifically at infant sleep products could or have reduced the risks identified in the Rule. Similarly, the Commission failed to consider how

the Rule would potentially increase the risks it seeks to prevent. For example, CPSC never studied how parents and caregivers would interact with redesigned products before determining that lower sidewall heights would reduce the incidence of infants being unsafely placed on elevated surfaces. It also failed to consider evidence suggesting that reduced sidewall heights would increase the likelihood that infants would roll out of the products. Instead of confronting these concerns, the Commission resorted to arbitrary speculation and *ipse dixit* logic.

The Rule requires manufacturers to undergo extensive product redesign, apply novel testing methods, and fulfill registration requirements. Because of the Rule, manufacturers also must deal with modifications to their supply chains and marketing practices. Members of the industry, including the industry's trade association, asserted that these changes would take at least a year to complete. Despite that, CPSC determined that it could be achieved in only 180 days. The timeframe to comply with the Rule was arbitrary and wholly insufficient.

The Rule must be vacated.

STANDING

Heroes Technology has suffered an injury in fact that is traceable to the Rule and that would be redressed by a favorable judicial decision. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560

(1992)). Heroes Technology designs, manufactures, and sells the Snuggle Me Infant Lounger and separate Covers for the product. Doc. 2105663 at A3, A5–6.

The Snuggle Me Infant Lounger is designed for active engagement, play, and bonding with infants while they are awake. *Id.* at A5; JA433. The machine-washable Infant Loungers and Covers are made with organic cotton, and the Loungers are filled with polyester fiber. Doc. 2105663 at A5–6; JA431–32; JA455. Since the Company was formed in 2007, it has sold more than one million Infant Loungers. Doc. 2105663 at A4; JA431. The Snuggle Me Infant Lounger and its Covers are both subject to the Rule. *See* Doc. 2105663 at A6; *see also* 89 Fed. Reg. at 87,469, 87,487. Heroes Technology submitted a comment opposing the Rule. *See* JA427–76. It also supported the comments made by the Juvenile Products Manufacturers Association, Inc. ("JPMA"). *See* JA427; *see also* JA477–484 (JPMA's comment).

As a direct result of the Rule, Heroes Technology was forced to cease production of its marquee product along with its Cover, which account for a significant majority of the Company's revenue. Doc. 2105663 at A9–10; JA448. The loss of revenue from the Infant Lounger may also impact the Company's ability to retain its employees or maintain operations at all. Doc. 2105663 at A10; JA448. Through mid-March of this year, the Company has spent over $97,000 in direct costs to comply with the Rule, which it would not have otherwise incurred. Doc. 2105663 at A11. Even if Heroes Technology were to bring a new Rule-compliant product to

market, there is no guarantee that consumers will want that appreciably different product because they purchase the Snuggle Me Infant Lounger due to its unique design, but it is not possible to make a complaint product that retains those features. Doc. 2105663 at A10, A11–12. It will also suffer reputational consequences and will not benefit nearly as much from the many years and thousands of positive reviews the Snuggle Me Infant Lounger earned. Doc. 2105663 at A12.

The Rule has harmed Heroes Technology economically. *Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 5 (D.C. Cir. 2017) ("Economic harm to a business clearly constitutes an injury-in-fact. And the amount is irrelevant. A dollar of economic harm is still an injury-in-fact for standing purposes."). Vacating the Rule would allow Heroes Technology to restart production of its products and continue selling them as it did before the Rule went into effect on May 5, 2025. Thus, Heroes Technology is "adversely affected by" the Rule. 15 U.S.C. §§ 2056a(b)(3), 2060(g).

STANDARD OF REVIEW

Under 15 U.S.C. § 2060(g), consumer product safety standards "relating to durable infant and toddler products" are reviewed "in accordance with" the APA. Under the APA, courts must "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations, or short of

statutory right" or "without observance of procedure required by law[.]" 5 U.S.C. § 706(2)(A), (C), (D).

The APA's familiar "arbitrary and capricious" standard requires an agency to "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). Questions of statutory interpretation are reviewed *de novo*. *U.S. Sugar Corp. v. EPA*, 113 F.4th 984, 991 (D.C. Cir. 2024) (citing *Loper Bright*, 603 U.S. at 392 & n.4). Courts must apply "the best" reading of the statute, not merely "permissible" statutory interpretations. *Loper Bright*, 603 U.S. at 400. This Court's "review of an agency's procedural compliance with statutory norms is an exacting one." *Nat. Res. Def. Council, Inc. v. SEC*, 606 F.2d 1031, 1048 (D.C. Cir. 1979).

ARGUMENT

I. CPSC Exceeded Its Statutory Authority and Conducted This Rulemaking Without the Procedures Required by Law

The APA permits review of agency actions made reviewable by statute, *see* 5 U.S.C. § 704 and 15 U.S.C. § 2060, and it requires courts to "hold unlawful and set aside agency action … found to be … in excess of statutory jurisdiction, authority, or limitations, or short of statutory right" or "without observance of procedure required by law[.]" 5 U.S.C. § 706(2)(C), (D).

CPSC is a "creature[] of statute" and it "accordingly possess[es] only the authority that Congress has provided." *NFIB v. OSHA*, 595 U.S. 109, 117 (2022). Its "powers can be decided only by considering the powers Congress specifically granted it in the light of the statutory language and background." *Nat'l Petrol. Refins. Ass'n v. FTC*, 482 F.2d 672, 674 (D.C. Cir. 1973). CPSC "literally has no power to act … unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). Thus, "[t]he question to be answered is 'not what the [Commission] thinks it should do but what Congress has said it can do.'" *Nat'l Petrol. Refins. Ass'n*, 482 F.2d at 674 (citation omitted).

In determining the scope of CPSC's authority, courts "must begin with the words of the statute creating the Commission and delineating its powers." *Id*. Unless defined, Courts interpret statutes "in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton Cnty.*, 590 U.S. 644, 654 (2020). An agency's interpretation that "was issued roughly contemporaneously with enactment of the statute and remained consistent over time" may serve as an "interpretive aid[.]" *Loper Bright*, 603 U.S. at 386. But "[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires." *Id.* at 412. Under the APA, courts "need not" and "may not defer to an agency interpretation of the law simply because a statute is ambiguous." *Id.* at 413. Courts, using traditional tools of statutory construction,

"must seek the 'single, best meaning' of a statute, not just permissible interpretations." *Pac. Gas and Elec. Co. v. FERC*, 113 F.4th 943, 949 (D.C. Cir. 2024) (quoting *Loper Bright*, 603 U.S. at 400). An agency's "policy concerns cannot override the text of a statutory provision." *Id.* at 950.

The CPSA provides two options, relevant here, for issuing product safety standards for infant and toddler products: (1) the process set out in §§ 2056 and 2058, which applies to most consumer products; or (2) the process set out in § 2056a, which only applies to "durable infant or toddler products[.]" There are significant procedural and evidentiary differences between these rulemaking processes. Products regulated under § 2056a are also subject to additional consumer registration and recordkeeping requirements. 15 U.S.C. § 2056a(d). Thus, the Commission's flawed interpretation of § 2056a(f) and its determination to proceed with rulemaking under § 2056a versus §§ 2056 and 2058 implicate both the bounds of CPSC's statutory authority and its procedural compliance with the CPSA. The CPSC's gambit to avoid §§ 2056 and 2058's strictures should fail.

A. Infant Support Cushions Are Not Durable Infant or Toddler Products

CPSC's reliance on § 2056a, as authority for promulgating the Rule, fails for two reasons. *First*, the products regulated by the Rule—including the Snuggle Me Infant Lounger and Cover—are not "durable infant or toddler products[.]" *Second*, CPSC's prior contemporaneous interpretation of "durable" or "durable product" is

inconsistent with CPSC's current interpretation, even though the statute's text has not changed. Heroes Technology's interpretation of § 2056a's text is further supported by the provision's legislative history.

"In the business of statutory interpretation, if it is not the best, it is not permissible." *Loper Bright*, 603 U.S. at 400. Heroes Technology provides the best reading of 15 U.S.C.§ 2056a and the Rule should be vacated.

1. CPSC's Interpretation Is Not Supported by § 2056a's Text

Section 2056a defines "durable infant or toddler product" as a "durable product intended for use, or that may be reasonably expected to be used, by children under the age of 5 years; and … includes … full-size cribs and nonfull-size cribs; … toddler beds; … high chairs, booster chairs, and hook-on chairs; … bath seats; … gates and other enclosures for confining a child; … play yards; … stationary activity centers; … infant carriers; … strollers; … walkers; … swings; and … bassinets and cradles" 15 U.S.C. § 2056a(f)(1)–(2). Infant support cushions are not among—nor even akin to—any of the statutorily prescribed durable infant or toddler products. As such, the Rule may only survive if infant support cushions are "durable products." But they are not. They are not furniture, like cribs, toddler beds, high chairs, or bassinets. Nor are they meant to confine a child as with strollers, stationary activity centers, or play yards. They also tend to be smaller and

movable, like the Snuggle Me Infant, which can easily be carried between rooms with a single hand. *See* Doc. 2105663 at A5.

When § 2056a was adopted, "durable" meant that a product was capable of lasting for a substantial amount of time without significant deterioration. *Durable*, SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES (6th ed. 2007) ("Able to withstand change, decay, or wear. … *spec.* Designating goods which remain useful over a period of time, as distinguished from those produced for immediate consumption."); *Durable*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 2002) ("[A]ble to exist for a long time without significant deterioration; *also*: designed to be durable <~ goods>[.]"); *Durable*, THE AMERICAN HERITAGE COLLEGE DICTIONARY (4th ed. 2002) ("Capable of withstanding wear and tear or decay."); *Durable*, WEBSTER'S NEW WORLD DICTIONARY & THESAURUS (2d ed. 2002) ("strong, firm, enduring"); *Durable*, RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY (2d ed. 2001) ("highly resistant to wear, decay, etc. … capable of lasting; enduring"); *Durable*, ROGET'S 21ST CENTURY THESAURUS IN DICTIONARY FORM (3d ed. 2005) ("*sturdy, long-lasting*" (emphasis in original)).

In 2008, "product" meant something that is produced. *See*, *e.g.*, *Product*, SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES (6th ed. 2007) ("A thing produced by an action, operation, or natural process; a result, a

consequence; *spec.* that which is produced commercially for sale.");[6] *Product*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 2002) ("something produced"); *Product*, THE AMERICAN HERITAGE COLLEGE DICTIONARY (4th ed. 2002) ("Something produced by human or mechanical effort or by a natural process."); *Product*, WEBSTER'S NEW WORLD DICTIONARY & THESAURUS (2d ed. 2002) ("something produced by nature, industry, or art").

"Product" was also understood to be synonymous with the term "goods." *Product*, ROGET'S 21ST CENTURY THESAURUS IN DICTIONARY FORM (3d ed. 2005) ("*result or goods created*" (emphasis in original)); *see also Product*, WEBSTER'S NEW WORLD DICTIONARY & THESAURUS (2d ed. 2002) ("[Goods produced; *often plural*] stock, commodity, merchandise" (modification in original)); *Product*, RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY (2d ed. 2001) ("[T]he totality of goods or services that a company produces.").

As a combined term, "durable product," often referred to as a "durable good," "durables," or "hard goods," are **"**[c]onsumer goods that are designed to be used repeatedly over a long period; esp., large things (such as cars, televisions, and

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[6] Oxford English Dictionary abbreviates "specifically" as "spec." *Abbreviations*, Oxford English Dictionary, *available at* https://www.oed.com/information/understanding-entries/abbreviations/ (last visited June 3, 2025).

furniture) that most people do not buy often." *Durable Goods*, BLACK'S LAW DICTIONARY (12th ed. 2024).

The definition of "durable goods," and its variations, has remained consistent over the course of several decades. *Compare id. with Durable Goods*, BLACK'S LAW DICTIONARY (8th ed. 2004) ("[c]onsumer goods that are designed to be used repeatedly over a long period, such as automobiles and personal computers"); *Durable Goods*, BLACK'S LAW DICTIONARY (6th ed. 1990) ("Goods which have a reasonably long life and which are generally not consumed in use; *e.g.* refrigerator."); *Durable Goods*, BLACK'S LAW DICTIONARY (5th ed. 1979) (same). A review of various dictionaries also shows that there is a consistent substantive understanding of the term. The Oxford English Dictionary defines "consumer durables" as "[c]onsumer goods which are expected to have a relatively long useful life after purchase[.]" *Consumer Durables*, OXFORD ENGLISH DICTIONARY (Sept. 2024), https://doi.org/10.1093/OED/6922242419 (definition was "[o]riginally published as part of the entry for *consumer, n.*" and "was revised in September 2009"). Merriam-Webster defines "durables" as "consumer goods (as vehicles and household appliances) that are typically used repeatedly over a period of years[.]" *Durables*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 2002); *see also Durable Goods*, MERRIAM-WEBSTER'S ADVANCED LEARNER'S ENGLISH DICTIONARY (2008) ("products (such as cars or stoves) that usually last a very long

time"). And the American Heritage College Dictionary defines a "durable" as "[a] durable manufactured product, such as an automobile." *Durable*, THE AMERICAN HERITAGE COLLEGE DICTIONARY (4th ed. 2002).

As CPSC previously recognized, the difference between durable goods and "nondurable goods," "soft goods," or "semidurable goods" is often expressed in terms of the product's perceived lifespan, typically longer than three years. *See* 74 Fed. Reg. 30,983, 30,984 (June 29, 2009) (*Requirements for Consumer Registration of Durable Infant or Toddler Products* NPRM) (CPSC collecting definitional sources for "durable goods" from traditional dictionaries and economic sources). Despite having a useful product life of several years or more, a product's reusability has no bearing on whether it is a "durable product." *See* In the Matter of Christina C., CBCA 7750-RELO, at *3 (July 27, 2023). Consequently, products like textiles and fabric items are not considered durable goods, even if they may be kept for longer than three years. *See* Robert Smith & Zoe Chace, *What Are Durable Goods, Anyway?*, Planet Money, NPR (Mar. 28, 2012, 9:57 AM ET), https://www.npr.org/sections/money/2012/03/28/149523535/what-are-durable-goods-anyway (noting that carpets are not durable goods even though consumers keep them for more than three years); *see also Nondurables*, MERRIAM-WEBSTER.COM (last visited June 3, 2025), https://www.merriam-webster.com/dictionary/nondurables ("consumer goods (such as textiles, food,

clothing, petroleum, and chemical products) that are only able to be used for a relatively short time before deteriorating or that are consumed in a single usage").

Thus in 2008, when Congress adopted the CPSIA, "durable," whether used as a standalone adjective, or as the term "durable product" or its synonymous term "durable goods," meant, in common parlance, consumer products that last a long time without significant deterioration. While "durable" or "durable product" were left separately undefined in § 2056a, the twelve products prescribed by Congress all bear the hallmarks of durable goods, *i.e.*, they are items generally constructed with wood, metal, or plastic. *See* 15 U.S.C. § 2056a(f).

In contrast, the Rule defines "infant support cushions" as any

> infant product that is filled with or comprised of resilient material such as foam, fibrous batting, or granular material or with a gel, liquid, or gas, and which is marketed, designed, or intended to support an infant's weight or any portion of an infant while reclining or in a supine, prone, or recumbent position.

89 Fed. Reg. at 87,487. It also "includes any removable covers, or slipcovers, sold on or together with an infant support cushion." *Id.* CPSC also recognized that "[m]ost infant support cushions currently on the market are filled with cushy foam or soft fibrous batting, covered by flexible fabric." *Id.* at 87,469. The Rule's definition of in-scope products unmistakably describes textiles.

As CPSC previously recognized, textiles are commonly understood to be nondurable products. *See* 74 Fed. Reg. at 30,984. In other words, textiles are

presumptively not "durable products," and it is incumbent upon CPSC to show that the 2,000 in-scope products are "durable" or are "durable products" before it can regulate them under § 2056a. Take, for example, the Snuggle Me Infant Lounger and Cover. Both products are covered by the Rule. Doc. 2105663 at A6. The Snuggle Me Infant Lounger is constructed with organic cotton and filled with polyester fiber, and the Infant Lounger Cover is made with organic cotton. *Id.* at A5–6. Both are machine washable. *Id.* These products are intended for use for infants up to 1 year old, *i.e.*, the expected life of the product is up to 1 year. Doc. 2105663 at A5. The Snuggle Me Infant Lounger and Cover are nondurable textile products that bear little resemblance to the statutorily prescribed products.

In promulgating the Rule, CPSC provides nothing to overcome this presumption. CPSC reasoned that infant support cushions are durable infant or toddler products because the products:

> are not disposable; have a useful life of up to several years during which they are often used by multiple children successively; are similar to other soft durable infant and children's products such as crib mattresses and sling carriers (which the Commission has issued rules for under section 104); are resold and widely available on secondary marketplaces; and are primarily intended to be used by children five years old or younger.

89 Fed. Reg. 87,468; *id.* at 87,480. CPSC concluded that it "[t]herefore" could "reasonably" treat infant support cushions as "durable infant or toddler products" even though they "are not specifically listed in

[§ 2056a(f)(2)].” *Id.* at 87,480. Notably, § 2056a makes no mention of these factors. Moreover, CPSC is wrong on each of these points and offers no rational explanation for why, after all this time and contra its uniform prior application, it now considers infant support cushions, which are textiles, to be durable infant or toddler products.

Disposable products are not durable goods, but, as noted above, the fact that a product can be reused, or used by multiple children in succession, does not make a product a “durable good.” Carpets and other textiles, like children’s clothing, cloth diapers, and blankets, are reused, and sometimes used by multiple children in succession, but are not classified as “durable goods.” Further, the useful life of a product is only one consideration in determining whether it is a durable good. Likewise, the ability of a product to be resold or made available in a secondary marketplace has little bearing on whether it is a durable product.

Products that are used repeatedly over long periods of time without degrading are durable goods. Thus, it is the combination of a product’s useful life and its ability to withstand significant deterioration that guides whether a product is durable.

If the Commission’s interpretation of § 2056a—that these two factors somehow convert textile products into durable goods—is correct, then there would be no limit to what CPSC could classify as a durable infant or toddler product. For example, infant clothing, cloth diapers, and blankets are not disposable, and they are resold and widely available on secondary marketplaces. *See*, *e.g.*, Cloth Diaper

Swap, babycenter.com (last visited June 3, 2025), https://community.babycenter.com/groups/a69805/cloth_diaper_swap; *see also* 74 Fed. Reg. at 30,984 (noting that "clothing, blankets, and such textile products would not be considered durable infant or toddler products"); JA300 (same).

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, also meant to include products like cloth diapers. Indeed, that is the critical error in CPSC's interpretation; it has no limits. CPSC ignores the role that the statutory product list plays in limiting the meaning of the terms "durable" and "durable product." But "[t]he canon of *noscitur a sociis* teaches that a word is 'given more precise content by the neighboring words with which it is associated.'" *Fischer v. United States*, 603 U.S. 480, 487 (2024); *Yates v. United States*, 574 U.S. 528, 543 (2015) ("[A] word is known by the company it keeps[.]"). The Rule's interpretation of § 2056a does not consider how the statutorily prescribed products list, which includes products predominately made of wood, plastic, and metal, "cabin[s]" CPSC's use of § 2056a's expedited process. *See Yates*, 574 U.S. at 529. Critically, Infant support cushions, like the Snuggle Me Infant Lounger, bear no resemblance to the products on the list, which includes furniture (*i.e.*, cribs, toddler beds, and bassinets) or products specifically designed to confine infants (*i.e.*, activity centers, strollers, and swings). The associated-words canon prevents precisely what CPSC

has done in the Rule: ascribing a broad meaning to a word and giving § 2056a inadvertent breadth. *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995). CPSC's interpretation should not be countenanced.

If there are no limits under CPSC's interpretation, then "durable" and "durable product" is read out of the statute. "Ephemeral" products that deteriorate over months or a few years' use are, under this theory, to be suddenly regulated by fiat. 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). That is because it is "a cardinal principle of statutory construction that [courts] must give effect, if possible, to every clause and word of a statute." *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (internal quotation marks omitted). CPSC's interpretation renders the terms "durable" or "durable product" superfluous and should be disregarded.

Finally, the fact that CPSC has determined that crib mattresses and sling carriers are "soft" durable infant or toddler products does not mean that infant support cushions are. The Commission's *ipse dixit* cannot overcome the plain and ordinary meaning of the statute. Moreover, that CPSC's classifications of those products were not challenged does not mean that CPSC's interpretation was correct then or applicable here.

While CPSC has previously indicated that the term "durable goods" is "blurry at its edges," this is not an "edge" case. *See* CPSC, *Briefing Package: CPSC Staff*

Response to the Record of Commission Action on Crib Bumpers, Tab B at II (Sept. 9, 2016), https://www.cpsc.gov/s3fs-public/StaffResponsetotheRecordofCommissionActiononCribBumper.pdf. In any event, "blurriness" does not permit the Commission to interpret the statute in such a way that it rewrites the English language, particularly when that interpretation bears on whether CPSC has acted within its statutory authority and implicates CPSC's ability to seek civil and criminal sanctions for violations of the Rule. 15 U.S.C. §§ 2068, 2069, 2070.

2. CPSC's Inconsistent Interpretation of § 2056a Cannot Change the Statute's Meaning

While the plain meaning of the statute controls, the Rule also cannot be saved by CPSC's recent authority-arrogating interpretation of § 2056a(f), as it is neither contemporaneous with the CPSIA's enactment nor consistent over time. A year after the CPSIA was adopted, CPSC informed its understanding of "durable" and "durable product" by looking to dictionary definitions of "durable goods" and how the term was understood "[i]n the economic or financial context[.]" 74 Fed. Reg. at 30,984; *see also* JA300. It recognized that "clothing, blankets, and such textile products would not be considered durable infant or toddler products" under the definitions they considered. *Id.* CPSC suggested that "[a]dditional guidance" on the term's meaning could be drawn from the twelve statutory product categories. *Id.*; 74 Fed. Reg. 68,668 (Dec. 29, 2009). CPSC also recognized that the statutory definition left

"uncertainty," and while "[m]any products may last three or more years … that does not necessarily mean that Congress intended them to be considered durable infant or toddler products under this section." 74 Fed. Reg. at 30,985; *see also* JA300.

As recently as 2021, at least some members of the Commission or its staff still held the view that "textile products" are not durable goods. For example, now-Acting Chair Peter A. Feldman questioned the viability of regulating crib bumpers under § 2056a because they are "textiles." JA284; JA295–96. As Commission Staff articulated in 2016:

> [C]rib bumpers probably would not be considered "durable products" by existing economic and commercial definitions. Bumpers, along with apparel and other textile consumer goods, generally are classified in government statistics as non-durable goods with a useful life of less than 3 years. Although bumpers might be passed down among infants and could last more than 3 years with light use or repair, the expected life of bumpers in regular use is likely to be less than 3 years. If crib bumpers are not "durable infant or toddler products," rulemaking under [§ 2056a] is not a viable option.

Briefing Package: CPSC Staff Response to the Record of Commission Action on Crib Bumpers, at 27; *see also id.* at 26–30 (discussing regulatory approaches to crib bumpers under various statutory provisions); *but see id.* at 29 (noting without explanation that "the Commission is not limited to the economic definition of 'durable' when determining whether crib bumpers are a 'durable infant or toddler product'").

Critically, CPSC did not reference § 2056a(f)(2)'s statutory product list for guidance, as it had previously done. The products in that list—adopted by Congress—tend to be made from hard and rigid materials like plastic, wood, and metal and/or fit into traditional categories of durable goods like furniture, *e.g.*, cribs, toddler beds, and high chairs. *See id.*at Tab B at II ("CPSC staff has considered consumer product durability based, in part, on a product's metal, wood, or plastic content."). In comparison, the Rule's in-scope products, like Snuggle Me Loungers, are textiles and have no analogous statutory product category. *See*, *e.g.*, JA83 (providing examples of infant support cushions). Nor does CPSC suggest that such exists. Instead, CPSC relies on its determinations that infant sling carriers and crib mattresses are "soft" durable infant and children's products—a category that is not prescribed by statute. 89 Fed. Reg. at 87,480. As to "infant slings[,]" the Commission determined that they are durable infant or toddler products because the products "are similar to infant or child carriers which are explicitly covered" by § 2056a(f)(2). 74 Fed. Reg. at 68,673.

In 2022, nearly twelve years after § 2056a(f) was adopted, CPSC issued its Safety Standard for Crib Mattresses final rule. 87 Fed. Reg. 8,640 (Feb. 15, 2022). In that rule, CPSC also noted how crib mattresses are "similar to" and used "in conjunction with" the products listed in § 2056a(f)(2). *Id.* at 8,641. But CPSC provides no such analysis here and provides no reason for disregarding its long-held

interpretive methods. Such interpretative methods, if contemporaneous with § 2056a's adoption and remaining consistent over time, would at best provide an "interpretative aid." *See Loper Bright*, 603 U.S. at 386. But CPSC appears to have, without explanation, abandoned such interpretive rationales.

Despite this contemporaneous and consistent interpretation of § 2056a, CPSC now claims it may regulate textile products that "are filled with cushy foam or soft fibrous batting, covered by flexible fabric" as durable goods. 89 Fed. Reg. at 87,469. It has done so without consulting the statutory product list for guidance and relying instead on factors that have no bearing on whether a product is "durable" within the term's ordinary meaning. *See id.* at 87,480–81; *but see* Doc. 2105663 at A28–29.

CPSC's classification of infant support cushions as durable infant or toddler products cannot overcome the plain meaning of "durable" or "durable product," or CPSC's prior contemporaneous interpretation of § 2056a(f). "[T]he basic nature and meaning of a statute does not change when an agency … has happened to offer its interpretation[.]" *Loper Bright*, 603 U.S. at 408. And, if an "agency's consistently wrong interpretation cannot rewrite the statute's text to change its meaning[,]" *Missouri v. Trump*, 128 F.4th 979, 994 (8th Cir. 2025), then its inconsistent interpretation cannot either. Infant support cushions, including Snuggle Me Infant Loungers and Covers, are textiles. They are not "durable" or "durable products"

within the meaning of those terms as understood in 2008, nor now. CPSC is without power to regulate them under § 2056a, so this Court should vacate the Rule.

3. Legislative History Underscores § 2056a's Plain Meaning

Legislative history plays no role in interpreting an unambiguous statute. *See Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 808–09 n.3 (1989) (citing *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 199 (1977)). However, legislative history may "underscore[]" a statute's plain meaning. *Loper Bright*, 603 U.S. at 393. Section 2056a's legislative history underscores how far afield CPSC's determination that infant support cushions are durable infant or toddler products is from the statute's original meaning.

The legislative history suggests that Congress may have intended § 2056a(f)(2)'s list to be a finite set of products. As the provision's primary sponsor, Rep. Jan Scakowsky, consistently noted, Congress "specifically" listed the products the provision applied to and indicated that they were "very specific products." *Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy & Commerce on H.R. 2474, H.R. 1699, H.R. 814, H.R. 1721*, 110th Cong. 61 (June 6, 2007) (statement of Rep. Jan Schakowsky). Likewise, she stated that "we," meaning Congress, "name them—high chairs, cribs and strollers, et cetera[.]" *Id.* at 5. The House Report for H.R. 4040 also highlights how the durable infant or toddler products provision "specifically applies to 12

enumerated products[.]" H.R. Rep. No. 110-501, at 34. Indeed, most of the statements in support of the provision mention some or all the products that are included in the statute. *See*, *e.g.*, 154 Cong. Rec. S1682 (daily ed. Mar. 6, 2008) (statement of Sen. Amy Klobuchar); *id.* at S1688 (statement of Sen. Bill Nelson); 154 Cong. Rec. H7583 (daily ed. July 30, 2008) (statement of Rep. Jan Schakowsky).

Section 2056a's legislative history by no means supplants its text or reliance on the traditional tools of statutory construction. *Cf. Finnbin*, 45 F.4th at 133–34 (considering § 2056a's structure). In adopting § 2056a, Congress placed significant emphasis on the statutorily prescribed product list. Despite that emphasis, and the CPSC's own prior consideration of the same, CPSC has now abandoned any reliance on comparisons to those products. In doing so, CPSC has also abandoned a key limitation on its authority. If CPSC is free to ignore the statutory product list in identifying new durable infant or toddler products, then its power to regulate under § 2056a is limitless. Such an authority-arrogating interpretation is inconsistent with the statute's plain meaning, as underscored by § 2056a's legislative history.

B. CPSC Failed to Observe the Procedures Required by Law When It Promulgated the Rule Under § 2056a

Because CPSC erroneously determined that infant support cushions, including Snuggle Me Infant Loungers and Covers, are "durable infant or toddler products," it conducted the rulemaking through the procedural processes outlined in § 2056a,

rather than the more rigorous procedural process and under the heightened evidentiary standard required by §§ 2056 and 2058. *See supra* pp. 7–9, 12–13. CPSC's authority to proceed under the usual path, §§ 2056 and 2058, versus the exceptional path, § 2056a, turns on whether the products being regulated are "durable infant or toddler products." CPSC can only exercise the exception if the products are "durable infant or toddler products." Otherwise, it must regulate, if at all, under the usual path. If CPSC chose the wrong process—and it did—then the Rule is unlawful because it failed to follow the correct "statutorily prescribed procedures[.]" *See Nat. Res. Def. Council*, 606 F.2d at 1045; *Cf. Am. Hosp. Ass'n*, 596 U.S. at 736 ("Because HHS did not conduct a [statutorily required] survey of hospitals' acquisition costs, HHS acted unlawfully by reducing the reimbursement rates for [certain] hospitals").

The CPSA "protects" regulated entities, like Heroes Technology, "by imposing an important procedural prerequisite" before CPSC can promulgate mandatory product safety standards and, under § 2056a, impose consumer registration and recordkeeping requirements. The text, structure, and legislative history of the CPSA, and its amendments, support the Company's argument that infant support cushions were incorrectly classified as durable infant or toddler products. *See supra* pp. 29–45. As a result of CPSC's error, these products, including the Snuggle Me Infant Lounger and its Cover, were regulated pursuant to the wrong

statutory provision. For example, as both Heroes Technology and JPMA commented, CPSC "failed to provide a risk/benefit analysis, risk/hazard analysis, and a consumer choice analysis[.]" JA428 n.3, JA434, JA438, JA442 (Heroes Technology); JA480 (JPMA noting same); JA282 (Boppy Company noting that "[b]y attempting to implement this rule under Section 104, CPSC is avoiding the more stringent risk-benefit and impact-analysis review required by 15 U.S.C. § 2058"). But CPSC stated that "[t]he types of analysis described by the commenter that would quantify the hazard reduction benefits versus the costs of compliance are not required by section 104 of the CPSIA." 89 Fed. Reg. at 87,480.[7] Had the Rule been promulgated under §§ 2056 and 2058, CPSC would have been required to conduct cost-benefit analyses like these. *See also* JA287–88 (commenter explaining how the Rule fails under § 2058(f)(3)(A), (D), (E), (F)).

The question is not whether Heroes Technology's products can be regulated, but whether Congress authorized CPSC to regulate them by the abbreviated process chosen. Here, CPSC self-servingly chose the wrong option and, by doing so, "acted unlawfully" by denying the Company, and other infant support cushion manufacturers, the benefit of §§ 2056 and 2058's more thorough procedural protections. *Cf. Am. Hosp. Ass'n*, 596 U.S. at 736.

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[7] CPSC stated that only JPMA raised this concern, neglecting to notice that Heroes Technology and Boppy Company raised it as well.

II. THE RULE IS ARBITRARY, CAPRICIOUS, AND NOT IN ACCORDANCE WITH LAW

The Rule also violates the APA's command against agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" 5 U.S.C. § 706(2)(A). Under the APA, an agency's actions must "be reasonable and reasonably explained." *FCC v. Prometheus Radio Proj.*, 592 U.S. 414, 423 (2021). Agency actions may be reversed or vacated "if the agency has 'entirely failed to consider an important aspect of the problem' or has 'offered an explanation for its decision that runs counter to the evidence before the agency.'" *Saad v. SEC*, 718 F.3d 904, 910–11 (D.C. Cir. 2013) (quoting *State Farm*, 463 U.S. at 43). At bottom, "the agency's explanation must 'enable us to conclude that the [agency's action] was the product of reasoned decisionmaking.'" *Window Covering Mfrs. Ass'n*, 82 F.4th at 1286 (quoting *State Farm*, 463 U.S. at 52).

A. CPSC Casually Ignored Its Changed Interpretation of § 2056a

CPSC's inconsistent interpretation of the statute is also subject to arbitrary and capricious review under 5 U.S.C. § 706(2)(A). *See FDA v. Wages & White Lion Invs., L.L.C.*, 145 S. Ct. 898, 916–17 (2025). The "change-in-position doctrine" is the "answer" to the "problem" that occurs when an agency articulates a policy or promulgates a regulation doing one thing and then turns around and does something different later. *Id.* at 917 (citation omitted). Here, the Commission previously interpreted "durable infant or toddler products" by comparing the products it was

seeking to regulate to the statutorily prescribed products. *See* 74 Fed. Reg. at 30,984 (noting that "[a]dditional guidance" for the definition of durable infant or toddler products "comes from considering the product examples in the statute"); *see also* 74 Fed. Reg. at 68,670 (rejecting certain categories of products as being durable infant or toddler products "[b]ased on … the original 12 product categories identified in the CPSIA"). But CPSC did not compare infant support cushions with statutorily prescribed products despite that issue being raised to the Commission. *See* 89 Fed. Reg. at 87,480; *see also* JA283–84. In response, CPSC stated that infant support cushions "are similar to other soft durable infant and children's products such as crib mattresses and sling carriers (which CPSC has issued rules for under section 104)" but it made no mention of the statutorily prescribed list or why it stopped comparing products to that list. 89 Fed. Reg. at 87,480.

Instead, the Rule relies on CPSC's one-step-removed interpretations regarding "sling carriers" and "crib mattresses," which were promulgated over a decade after § 2056a. *Id.* But when those rules were adopted, CPSC interpreted § 2056a as extending to those products because they were "similar to" the statutory product list. *See* 74 Fed. Reg. at 68,673 ("Infant slings are similar to infant or child carriers which are explicitly covered."); 87 Fed. Reg. at 8,641 (finding that crib mattresses are durable infant or toddler products, in part, because "they are products

similar to the products listed in [2056a(f)(2)]"). Ignoring the statutory products list—as CPSC now does—constitutes a change in position.

When, as here, the agency has changed its position, "the doctrine poses a second question: Did the agency 'display awareness that it is changing position' and offer 'good reasons for the new policy'?" *Wages & White Lion Invs.*, 145 S. Ct. at 918 (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)). And "core principles of administrative law dictate that 'an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored[.]'" *Physicians for Soc. Resp. v. Wheeler*, 956 F.3d 634, 647 (D.C. Cir. 2020) (quoting *Lone Mountain Processing, Inc. v. Secretary of Labor*, 709 F.3d 1161, 1164 (D.C. Cir. 2013)). While the Commission responded to a comment that infant support cushions are more akin to pillows and unlike the twelve Congressionally defined categories, *see* JA283–84, CPSC did not acknowledge that it was changing its position, let alone provide any reasons for its new policy. *See* 89 Fed. Reg. at 87,480. Such an "about-face" without any explanation is "arbitrary and capricious." *Nat'l Ass'n of Mfrs. v. SEC*, 105 F.4th 802, 812 (5th Cir. 2024).

B. CPSC Failed to Consider Important Aspects of the Problem That the Rule Seeks to Address

The Rule covers a non-exhaustive list of twelve exemplary product categories (and an estimated 2,000 products currently on the market), each of which serves

different consumer needs and is designed for different uses. 89 Fed. Reg. at 87,469, 87,486. Despite this, CPSC lumped all these products together in its newly created umbrella category of infant support cushions. The Rule aims to reduce three types of risk that CPSC believes are associated with infant support cushions: suffocation, entrapment, and fall hazards. *Id.* at 87,468. As JPMA noted, the Rule seemingly aims to address infant support cushions being misused as sleep products or in infant sleep environments. JA479, JA481–82; *see also* JA245–46 (Best Practice Quality LLC noting that "99.999% of the current products on the market are being used properly and safely without a voluntary or mandatory standard"). The Commission suggests the same, as the incidents it relies on to support the Rule seem to be overwhelmingly associated with product misuse in unsafe sleep environments.[8] *See* 89 Fed. Reg. at 87,467 (noting that "incidents typically 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"); *see also* JA115–16 (concluding that use of infant support cushions in unsafe sleep environments was a primary or contributing factor to adverse incidents).

Despite its primary concern that infant support cushions have or will be misused in infant sleep environments, CPSC did not consider whether and how its

[8] Heroes Technology explicitly warns its customers that the Snuggle Me Infant Lounger is not a sleeping device. JA433–34.

other rule aimed specifically at infant sleep products could or have reduced the risks identified in the Rule. In June 2021, CPSC promulgated a mandatory safety standard for infant sleep products, which went into effect on June 23, 2022. *See* 86 Fed. Reg. 33,022 (June 23, 2021). Like the challenged Rule, the infant sleep products rule was justified based on concerns that certain products increased the risk of falls and asphyxiation or suffocation, among other risks. *Id.* at 33,031. Both rules rely on "a maximum incline angle of 10 degrees" to address those perceived risks. JA96 89; *see also* 89 Fed. Reg. at 87,488. It also appears that both rules may rely on overlapping data. For example, both rules relied on data extracted for 2019 and 2020 and pulled information related to overlapping data codes including cribs, playpens, and bassinets. *Compare* JA102–103 *with* CPSC, *Briefing Package: Draft Final Rule for Infant Sleep Products under the Danny Keysar Child Product Safety Notification Act*, Tab B at 68–69 & n.6 (May 12, 2021), https://www.cpsc.gov/s3fs-public/Final-Rule-Safety-Standard-for-Infant-Sleep-Products.pdf.

In response to concerns that the Rule is unnecessary considering the infant sleep products rule, the Commission responded only that the Rule does not include products that "meet the definition of infant sleep products because they are not marketed or intended to provide sleeping accommodations." *See* 89 Fed. Reg. at 87,471. As such, CPSC stated—without further basis—that the Rule "is necessary to addresses [*sic*] the hazards posed by infant support cushions because the infant

sleep products rule does not apply to infant support cushions." *Id.* But that answer does not explain away the apparent reliance on overlapping data for formulating the two rules. Nor does it address why CPSC did not bother to consider if the infant sleep products rule reduced incidents before it acted here.

Further, the infant sleep products rule is not as categorical as CPSC suggests. Per the Commission, "soft-sided products" may fall under the infant sleep products rule "if the product is clearly intended for infant sleep, and is not large enough for an older child[.]" 86 Fed. Reg. at 33,066. This suggests that what product falls under that rule can be driven by the product's shape or design. *See* 89 Fed. Reg. at 87,475 (noting that "staff is aware of infant support cushions that are or have previously been marketed and promoted as sleep products").

CPSC arbitrarily failed to consider that an important aspect of addressing risks related to infant support cushions being misused as sleep products, or in infant sleep environments, would be to ask whether those risks were reduced through the infant sleep products rule. But CPSC never asked itself that question nor analyzed any post-infant sleep products rule data.[9] Its failure to do so was arbitrary and capricious.

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[9] The infant sleep products rule went into effect on June 23, 2022. 86 Fed. Reg. at 33,022. The challenged Rule relies on data from January 1, 2010 through December 31, 2022. 89 Fed. Reg. at 87,467.

C. The Rule Is Incompatible with Reasoned Decisionmaking and Is Not Supported by the Record

The Commission did not bother to consider what would occur if products, including the Snuggle Me Infant Lounger, are removed from the market or redesigned in such a way that parents and caregivers adopt regrettable substitutions in their absence. Stated another way, CPSC did not consider whether the Rule would potentially increase the very risks and hazards to infants that the Rule was designed to reduce. Its justifications for limiting sidewall height, through the maximum incline angle performance standard, for example, are dubious. *See* 89 Fed. Reg. at 87,468; *see also id.* at 87,476 (explaining that "the maximum incline angle performance requirement … is expected to geometrically result in the height of the product being no more than 1.9 inches in order to comply with the incline angle requirement").

As Heroes Technology pointed out, CPSC merely "speculate[d] that lower sidewalls would cause parents and caregivers to not leave products on elevated surfaces[.]" JA443. But not only is there no evidence supporting CPSC's statement, Heroes Technology's evidence suggested that lowered sidewalls would lead to increased fall hazards, as it would be easier for infants to roll out of the redesigned products. *Id.* As Heroes Technology explained in its comment, it designed and tested a non-commercial prototype based on the proposed rule's description and performance requirements. *Id.*; *see also* JA452–476. The preliminary observations

of the prototype in use with actual infants showed that the infants were able to roll out of the prototype and that reduced sidewall height "provides less of a barrier to roll out of the product." JA443; *see also* JA460–2, JA469–70, JA475–76.

In response, CPSC stated—without any data or evidence to support its claim—that "[h]igher sidewall heights give the false perception to the caregiver that the product will safely contain their infant" and "encourage unsafe placement of infants on elevated surfaces[.]" 89 Fed. Reg. at 87,477. But CPSC never studied how parents and caregivers would interact with these products before making that assessment. In contrast, had the Rule been promulgated under §§ 2056 and 2058, as it should have been, CPSC would have had to consider and weigh costs, benefits, and hazards of the Rule before promulgating a mandatory safety standard.

CPSC also asserted that "the incident data show that higher sidewall heights do not adequately contain infants or prevent falls and that infants roll out from and fall out of products with a side height of 4 inches or higher." 89 Fed. Reg. 87,477; *see also* JA91 ("CPSC staff is concerned that this side height [of 4 inches] might give consumers the impression that the infant support cushion is intended to safely contain the infant occupant.").[10] Despite the Commission's statement, there is nothing in the administrative record establishing that CPSC or its staff ever measured

[10] The 4-in sidewall height reference appears to be drawn from the draft ASTM Infant Lounger standard. *See* JA91, JA150.

the sidewalls of any of the products regulated by the Rule or that were involved in any of the incidents it relied on to justify the Rule. *See* JA429–30 (noting similar).

CPSC's justification for the Rule cannot be said to be the product of reasoned decisionmaking. The Rule's *ipse dixit* logic cannot bear the weight of its maximum incline angle performance requirement, which controls sidewall height. To the extent CPSC justifies the Rule based on measurements it never took, the Rule is arbitrary and capricious.

D. The 180-day Effective Date Was Insufficient for Compliance and Did Not Reduce the Risk of Injury

CPSC's 180-day effective date does not reflect "the 'reasoned decisionmaking' required by the APA." *Window Covering Mfrs. Ass'n*, 82 F.4th at 1290 (citation omitted). Three industry members, including the industry's trade association, JPMA, indicated that the 180-day effective date was "woefully insufficient" and sought an effective date of a year or longer. JA430; JA483–4; JA293–4.[11] Their comments raised substantial concerns about manufacturers' ability to adjust in time to the redesign of their products and successfully apply novel and ill-defined testing methods. 89 Fed. Reg. at 87,480; JA430; JA446–48; JA449; JA483–4. As JPMA noted, the Rule "necessitate[s] extensive product redesign and

[11] Only 18 comments were submitted, one of which appears to be a duplicate. 89 Fed. Reg. at 87,468; *Compare* JA258–68 *with* JA269–279.

registration card requirements" and noted that in the past CPSC determined that such concerns justified longer effective dates when new products were first required to comply with registration card requirements. JA483–4. Heroes Technology raised similar concerns, specifically noting that the Rule would necessitate substantial changes to its products—not just in terms of redesign and testing, but also in its supply chain and marketing practices. JA430; JA446–48; JA449. Heroes Technology indicated that it also required additional time to conduct "the appropriate human factor testing to ensure [it is] producing the safest product possible."[12] JA447.

In response to those concerns, CPSC only stated that commenters did not "provide any specific data or information showing the level of effort to redesign and distribute" compliant in-scope products and concluded that "the rule provides a reasonable effective date that takes into consideration manufacturers[']burdens and the risk of continued infant injuries and deaths." 89 Fed. Reg. at 87,480. CPSC's standard is absurd. It appears to require regulated entities to provide "specific data" regarding redesign to defeat its assessment that the 180-day effective date is

[12] CPSC has suggested that applying human factors principles in product design "can help lower the number of product-related adverse incidents." CPSC & Health Canada, *Guidance on the Application of Human Factors to Consumer Products* 5 (Feb. 2020), https://www.cpsc.gov/s3fs-public/Human-Factors-Standard-Practice-Document-Final-ENGLISH-Feb03-2020_0.pdf; *see also id.* at 18.

adequate before a rule is finalized. This Court does "not credit an agency explanation that requires regulated entities to tailor their operations to adhere to an agency's proposed rules." *Window Covering Mfrs. Ass'n*, 82 F.4th at 1292.

There is also no data supporting CPSC's perceived sense of "urgency of addressing the hazards associated with infant support cushions" beyond the fact that incidents have occurred in the past, with the most recent data being from 2022. 89 Fed. Reg. at 87,480. Nor is there data establishing that the Rule will reduce risks in the future. Nor does it account for risk reduction resulting from CPSC's infant sleep products rule, 86 Fed. Reg. at 33,052. At best, CPSC's staff suggested that the effective date "would delay the safety benefits of the rule" but provided no basis for its conclusory statement. *See* JA100, JA174; *see also Window Covering Mfrs. Ass'n*, 82 F.4th at 1292.

CONCLUSION

For these reasons, this Court should vacate the Infant Support Cushion Rule.

Dated: June 3, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because it contains 12,987 words, as counted by the word-processing system used to prepare the document and excluding those parts exempted by Federal Rule of Appellate Procedure 32(f).

I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 in 14-point Times New Roman font.

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STATUTORY ADDENDUM

15 U.S.C. § 2056. Consumer product safety standards 1a

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15 U.S.C. § 2056. Consumer product safety standards

(a) Types of requirements

The Commission may promulgate consumer product safety standards in accordance with the provisions of section 2058 of this title. A consumer product safety standard shall consist of one or more of any of the following types of requirements:

(1) Requirements expressed in terms of performance requirements.

(2) Requirements that a consumer product be marked with or accompanied by clear and adequate warnings or instructions, or requirements respecting the form of warnings or instructions.

Any requirement of such a standard shall be reasonably necessary to prevent or reduce an unreasonable risk of injury associated with such product.

(b) Reliance of Commission upon voluntary standards

(1) The Commission shall rely upon voluntary consumer product safety standards rather than promulgate a consumer product safety standard prescribing requirements described in subsection (a) of this section whenever compliance with such voluntary standards would eliminate or adequately reduce the risk of injury addressed and it is likely that there will be substantial compliance with such voluntary standards.

(2) The Commission shall devise procedures to monitor compliance with any voluntary standards—

(A) upon which the Commission has relied under paragraph (1);

(B) which were developed with the participation of the Commission; or

(C) whose development the Commission has monitored.

(c) Contribution of Commission to development cost

If any person participates with the Commission in the development of a consumer product safety standard, the Commission may agree to contribute to the person's cost with respect to such participation, in any case in which the Commission determines that such contribution is likely to result in a more satisfactory standard than would be developed without such contribution, and that the person is financially responsible. Regulations of the Commission shall set forth the items of cost in which it may participate, and shall exclude any contribution to the acquisition of land or buildings. Payments under agreements entered into under this subsection may be made without regard to section 3324(a) and (b) of title 31.

15 U.S.C. § 2056a. Standards and consumer registration of durable nursery products

(a) Short title

This section may be cited as the "Danny Keysar Child Product Safety Notification Act".

(b) Safety standards

(1) In general

The Commission shall—

(A) in consultation with representatives of consumer groups, juvenile product manufacturers, and independent child product engineers and experts, examine and assess the effectiveness of any voluntary consumer product safety standards for durable infant or toddler products; and

(B) in accordance with section 553 of title 5, promulgate consumer product safety standards that—

(i) are substantially the same as such voluntary standards; or

(ii) are more stringent than such voluntary standards, if the Commission determines that more stringent standards would further reduce the risk of injury associated with such products.

(2) Timetable for rulemaking

Not later than 1 year after August 14, 2008, the Commission shall commence the rulemaking required under paragraph (1) and shall promulgate standards for no fewer than 2 categories of durable infant or toddler products every 6 months thereafter, beginning with the product categories that the Commission determines to be of highest priority, until the Commission has promulgated standards for all such product categories. Thereafter, the Commission shall periodically review and revise the standards set forth under this subsection to ensure that such standards provide the highest level of safety for such products that is feasible.

(3) Judicial review

Any person adversely affected by such standards may file a petition for review under the procedures set forth in section 2060(g) of this title, as added by section 236 of this Act.

(4) Process for considering subsequent revisions to voluntary standard

(A) Notice of adoption of voluntary standard

When the Commission promulgates a consumer product safety standard under this subsection that is based, in whole or in part, on a voluntary standard, the Commission shall notify the organization that issued the voluntary standard of the Commission's action and shall provide a copy of the consumer product safety standard to the organization.

(B) Commission action on revised voluntary standard

If an organization revises a standard that has been adopted, in whole or in part, as a consumer product safety standard under this subsection, it shall notify the Commission. The revised voluntary standard shall be considered to be a consumer product safety standard issued by the Commission under section 2058 of this title, effective 180 days after the date on which the organization notifies the Commission (or such later date specified by the Commission in the Federal Register) unless, within 90 days after receiving that notice, the Commission notifies the organization that it has determined that the proposed revision does not improve the safety of the consumer product covered by the standard and that the Commission is retaining the existing consumer product safety standard.

(c) Cribs

(1) In general

It shall be a violation of section 2068(a)(1) of this title for any person to which this subsection applies to manufacture, sell, contract to sell or resell, lease, sublet, offer, provide for use, or otherwise place in the stream of commerce a crib that is not in compliance with a standard promulgated under subsection (b).

(2) Persons to which subsection applies

This subsection applies to any person that—

(A) manufactures, distributes in commerce, or contracts to sell cribs;

(B) based on the person's occupation, holds itself out as having knowledge or skill peculiar to cribs, including child care facilities and family child care homes;

(C) is in the business of contracting to sell or resell, lease, sublet, or otherwise place cribs in the stream of commerce; or

(D) owns or operates a place of public accommodation affecting commerce (as defined in section 2203 of this title applied without regard to the phrase "not owned by the Federal Government").

(3) Crib defined

In this subsection, the term "crib" includes—

(A) new and used cribs;

(B) full-sized or nonfull-sized cribs; and

(C) portable cribs and crib-pens.

(d) Consumer registration requirement

(1) Rulemaking

Notwithstanding any provision of chapter 6 of title 5 or the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.), not later than 1 year after August 14, 2008, the Commission shall, pursuant to its authority under section 2065(b)

of this title, promulgate a final consumer product safety rule to require each manufacturer of a durable infant or toddler product—

(A) to provide consumers with a postage-paid consumer registration form with each such product;

(B) to maintain a record of the names, addresses, e-mail addresses, and other contact information of consumers who register their ownership of such products with the manufacturer in order to improve the effectiveness of manufacturer campaigns to recall such products; and

(C) to permanently place the manufacturer name and contact information, model name and number, and the date of manufacture on each durable infant or toddler product.

(2) Requirements for registration form

The registration form required to be provided to consumers under paragraph (1) shall—

(A) include spaces for a consumer to provide the consumer's name, address, telephone number, and e-mail address;

(B) include space sufficiently large to permit easy, legible recording of all desired information;

(C) be attached to the surface of each durable infant or toddler product so that, as a practical matter, the consumer must notice and handle the form after purchasing the product;

(D) include the manufacturer's name, model name and number for the product, and the date of manufacture;

(E) include a message explaining the purpose of the registration and designed to encourage consumers to complete the registration;

(F) include an option for consumers to register through the Internet; and

(G) include a statement that information provided by the consumer shall not be used for any purpose other than to facilitate a recall of or safety alert regarding that product.

In issuing regulations under this section, the Commission may prescribe the exact text and format of the required registration form.

(3) Record keeping and notification requirements

The rules required under this section shall require each manufacturer of a durable infant or toddler product to maintain a record of registrants for each product manufactured that includes all of the information provided by each consumer registered, and to use such information to notify such consumers in the event of a voluntary or involuntary recall of or safety alert regarding such product. Each manufacturer shall maintain such a record for a period of not less than 6 years after the date of manufacture of the product. Consumer information collected by a manufacturer under this Act may not be used by the manufacturer,

nor disseminated by such manufacturer to any other party, for any purpose other than notification to such consumer in the event of a product recall or safety alert.

(4) Study

The Commission shall conduct a study at such time as it considers appropriate on the effectiveness of the consumer registration forms required by this section in facilitating product recalls and whether such registration forms should be required for other children's products. Not later than 4 years after August 14, 2008, the Commission shall report its findings to the appropriate Congressional committees.

(e) Use of alternative recall notification technology

(1) Technology assessment and report

The Commission shall—

(A) beginning 2 years after a rule is promulgated under subsection (d), regularly review recall notification technology and assess the effectiveness of such technology in facilitating recalls of durable infant or toddler products; and

(B) not later than 3 years after August 14, 2008, and periodically thereafter as the Commission considers appropriate, transmit a report on such assessments to the appropriate Congressional committees.

(2) Determination

If, based on the assessment required by paragraph (1), the Commission determines by rule that a recall notification technology is likely to be as effective or more effective in facilitating recalls of durable infant or toddler products as the registration forms required by subsection (d), the Commission—

(A) shall submit to the appropriate Congressional committees a report on such determination; and

(B) shall permit a manufacturer of durable infant or toddler products to use such technology in lieu of such registration forms to facilitate recalls of durable infant or toddler products.

(f) Definition of durable infant or toddler product

As used in this section, the term "durable infant or toddler product"—

(1) means a durable product intended for use, or that may be reasonably expected to be used, by children under the age of 5 years; and

(2) includes—

(A) full-size cribs and nonfull-size cribs;

(B) toddler beds;

(C) high chairs, booster chairs, and hook-on chairs;

(D) bath seats;

(E) gates and other enclosures for confining a child;

(F) play yards;

(G) stationary activity centers;
(H) infant carriers;
(I) strollers;
(J) walkers;
(K) swings; and
(L) bassinets and cradles.

15 U.S.C. § 2058. Procedure for consumer product safety rules

(a) Commencement of proceeding; publication of prescribed notice of proposed rulemaking; transmittal of notice

A proceeding for the development of a consumer product safety rule may be commenced by the publication in the Federal Register of an advance notice of proposed rulemaking which shall--

(1) identify the product and the nature of the risk of injury associated with the product;

(2) include a summary of each of the regulatory alternatives under consideration by the Commission (including voluntary consumer product safety standards);

(3) include information with respect to any existing standard known to the Commission which may be relevant to the proceedings, together with a summary of the reasons why the Commission believes preliminarily that such standard does not eliminate or adequately reduce the risk of injury identified in paragraph (1);

(4) invite interested persons to submit to the Commission, within such period as the Commission shall specify in the notice (which period shall not be less than 30 days or more than 60 days after the date of publication of the notice), comments with respect to the risk of injury identified by the Commission, the regulatory alternatives being considered, and other possible alternatives for addressing the risk;

(5) invite any person (other than the Commission) to submit to the Commission, within such period as the Commission shall specify in the notice (which period shall not be less than 30 days after the date of publication of the notice), an existing standard or a portion of a standard as a proposed consumer product safety standard; and

(6) invite any person (other than the Commission) to submit to the Commission, within such period as the Commission shall specify in the notice (which period shall not be less than 30 days after the date of publication of the notice), a statement of intention to modify or develop a voluntary consumer product safety standard to address the risk of injury identified in paragraph (1) together with a description of a plan to modify or develop the standard.

The Commission shall transmit such notice within 10 calendar days to the appropriate Congressional committees.

(b) Voluntary standard; publication as proposed rule; notice of reliance of Commission on standard

(1) If the Commission determines that any standard submitted to it in response to an invitation in a notice published under subsection (a)(5) if promulgated (in whole,

in part, or in combination with any other standard submitted to the Commission or any part of such a standard) as a consumer product safety standard, would eliminate or adequately reduce the risk of injury identified in a notice under subsection (a)(1), the Commission may publish such standard, in whole, in part, or in such combination and with nonmaterial modifications, as a proposed consumer product safety rule.

(2) If the Commission determines that--

(A) compliance with any standard submitted to it in response to an invitation in a notice published under subsection (a)(6) is likely to result in the elimination or adequate reduction of the risk of injury identified in the notice, and

(B) it is likely that there will be substantial compliance with such standard,

the Commission shall terminate any proceeding to promulgate a consumer product safety rule respecting such risk of injury and shall publish in the Federal Register a notice which includes the determination of the Commission and which notifies the public that the Commission will rely on the voluntary standard to eliminate or reduce the risk of injury, except that the Commission shall terminate any such proceeding and rely on a voluntary standard only if such voluntary standard is in existence. For purposes of this section, a voluntary standard shall be considered to be in existence when it is finally approved by the organization or other person which developed such standard, irrespective of the effective date of the standard. Before relying upon any voluntary consumer product safety standard, the Commission shall afford interested persons (including manufacturers, consumers, and consumer organizations) a reasonable opportunity to submit written comments regarding such standard. The Commission shall consider such comments in making any determination regarding reliance on the involved voluntary standard under this subsection.

(c) Publication of proposed rule; preliminary regulatory analysis; contents; transmittal of notice

No consumer product safety rule may be proposed by the Commission unless the Commission publishes in the Federal Register the text of the proposed rule, including any alternatives, which the Commission proposes to promulgate, together with a preliminary regulatory analysis containing--

(1) a preliminary description of the potential benefits and potential costs of the proposed rule, including any benefits or costs that cannot be quantified in monetary terms, and an identification of those likely to receive the benefits and bear the costs;

(2) a discussion of the reasons any standard or portion of a standard submitted to the Commission under subsection (a)(5) was not published by the Commission as the proposed rule or part of the proposed rule;

(3) a discussion of the reasons for the Commission's preliminary determination that efforts proposed under subsection (a)(6) and assisted by the Commission as required by section 2054(a)(3) of this title would not, within a

reasonable period of time, be likely to result in the development of a voluntary consumer product safety standard that would eliminate or adequately reduce the risk of injury addressed by the proposed rule; and

(4) a description of any reasonable alternatives to the proposed rule, together with a summary description of their potential costs and benefits, and a brief explanation of why such alternatives should not be published as a proposed rule.

The Commission shall transmit such notice within 10 calendar days to the appropriate Congressional committees. Any proposed consumer product safety rule shall be issued within twelve months after the date of publication of the notice, unless the Commission determines that such proposed rule is not reasonably necessary to eliminate or reduce the risk of injury associated with the product or is not in the public interest. The Commission may extend the twelve-month period for good cause. If the Commission extends such period, it shall immediately transmit notice of such extension to the appropriate Congressional committees. Such notice shall include an explanation of the reasons for such extension, together with an estimate of the date by which the Commission anticipates such rulemaking will be completed. The Commission shall publish notice of such extension and the information submitted to the Congress in the Federal Register. Nothing in this subsection shall preclude any person from submitting an existing standard or portion of a standard as a proposed consumer product safety standard.

(d) Promulgation of rule; time

(1) Within 60 days after the publication under subsection (c) of a proposed consumer product safety rule respecting a risk of injury associated with a consumer product, the Commission shall--

(A) promulgate a consumer product safety rule respecting the risk of injury associated with such product, if it makes the findings required under subsection (f), or

(B) withdraw the applicable notice of proposed rulemaking if it determines that such rule is not (i) reasonably necessary to eliminate or reduce an unreasonable risk of injury associated with the product, or (ii) in the public interest;

except that the Commission may extend such 60-day period for good cause shown (if it publishes its reasons therefor in the Federal Register).

(2) Consumer product safety rules shall be promulgated in accordance with section 553 of Title 5, except that the Commission shall give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions. A transcript shall be kept of any oral presentation.

(e) Expression of risk of injury; consideration of available product data; needs of elderly and handicapped

A consumer product safety rule shall express in the rule itself the risk of injury which the standard is designed to eliminate or reduce. In promulgating such a rule the Commission shall consider relevant available product data including the results of research, development, testing, and investigation activities conducted generally and pursuant to this chapter. In the promulgation of such a rule the Commission shall also consider and take into account the special needs of elderly and handicapped persons to determine the extent to which such persons may be adversely affected by such rule.

(f) Findings; final regulatory analysis; judicial review of rule

(1) Prior to promulgating a consumer product safety rule, the Commission shall consider, and shall make appropriate findings for inclusion in such rule with respect to--

(A) the degree and nature of the risk of injury the rule is designed to eliminate or reduce;

(B) the approximate number of consumer products, or types or classes thereof, subject to such rule;

(C) the need of the public for the consumer products subject to such rule, and the probable effect of such rule upon the utility, cost, or availability of such products to meet such need; and

(D) any means of achieving the objective of the order while minimizing adverse effects on competition or disruption or dislocation of manufacturing and other commercial practices consistent with the public health and safety.

(2) The Commission shall not promulgate a consumer product safety rule unless it has prepared, on the basis of the findings of the Commission under paragraph (1) and on other information before the Commission, a final regulatory analysis of the rule containing the following information:

(A) A description of the potential benefits and potential costs of the rule, including costs and benefits that cannot be quantified in monetary terms, and the identification of those likely to receive the benefits and bear the costs.

(B) A description of any alternatives to the final rule which were considered by the Commission, together with a summary description of their potential benefits and costs and a brief explanation of the reasons why these alternatives were not chosen.

(C) A summary of any significant issues raised by the comments submitted during the public comment period in response to the preliminary regulatory analysis, and a summary of the assessment by the Commission of such issues.

The Commission shall publish its final regulatory analysis with the rule.

(3) The Commission shall not promulgate a consumer product safety rule unless it finds (and includes such finding in the rule)--

(A) that the rule (including its effective date) is reasonably necessary to eliminate or reduce an unreasonable risk of injury associated with such product;

(B) that the promulgation of the rule is in the public interest;

(C) in the case of a rule declaring the product a banned hazardous product, that no feasible consumer product safety standard under this chapter would adequately protect the public from the unreasonable risk of injury associated with such product;

(D) in the case of a rule which relates to a risk of injury with respect to which persons who would be subject to such rule have adopted and implemented a voluntary consumer product safety standard, that--

(i) compliance with such voluntary consumer product safety standard is not likely to result in the elimination or adequate reduction of such risk of injury; or

(ii) it is unlikely that there will be substantial compliance with such voluntary consumer product safety standard;

(E) that the benefits expected from the rule bear a reasonable relationship to its costs; and

(F) that the rule imposes the least burdensome requirement which prevents or adequately reduces the risk of injury for which the rule is being promulgated.

(4)(A) Any preliminary or final regulatory analysis prepared under subsection (c) or (f)(2) shall not be subject to independent judicial review, except that when an action for judicial review of a rule is instituted, the contents of any such regulatory analysis shall constitute part of the whole rulemaking record of agency action in connection with such review.

(B) The provisions of subparagraph (A) shall not be construed to alter the substantive or procedural standards otherwise applicable to judicial review of any action by the Commission.

(g) Effective date of rule or standard; stockpiling of product

(1) Each consumer product safety rule shall specify the date such rule is to take effect not exceeding 180 days from the date promulgated, unless the Commission finds, for good cause shown, that a later effective date is in the public interest and publishes its reasons for such finding. The effective date of a consumer product safety standard under this chapter shall be set at a date at least 30 days after the date of promulgation unless the Commission for good cause shown determines that an earlier effective date is in the public interest. In no case may the effective date be set at a date which is earlier than the date of promulgation. A consumer product safety standard shall be applicable only to consumer products manufactured after the effective date.

(2) The Commission may by rule prohibit a manufacturer of a consumer product from stockpiling any product to which a consumer product safety rule applies, or to which a rule under this chapter or similar rule, regulation, standard, or ban under any other Act enforced by the Commission applies, so as to prevent such manufacturer from circumventing the purpose of such rule, regulation, standard, or ban. For purposes of this paragraph, the term "stockpiling" means manufacturing or importing a product between the date of promulgation of such rule, regulation, standard, or ban and its effective date at a rate which is significantly greater (as determined under the rule under this paragraph) than the rate at which such product was produced or imported during a base period (prescribed in the rule under this paragraph) ending before the date of promulgation of the rule, regulation, standard, or ban.

(h) Amendment or revocation of rule

The Commission may by rule amend or revoke any consumer product safety rule. Such amendment or revocation shall specify the date on which it is to take effect which shall not exceed 180 days from the date the amendment or revocation is published unless the Commission finds for good cause shown that a later effective date is in the public interest and publishes its reasons for such finding. Where an amendment involves a material change in a consumer product safety rule, sections 2056 and 2057 of this title, and subsections (a) through (g) of this section shall apply. In order to revoke a consumer product safety rule, the Commission shall publish a proposal to revoke such rule in the Federal Register, and allow oral and written presentations in accordance with subsection (d)(2) of this section. It may revoke such rule only if it determines that the rule is not reasonably necessary to eliminate or reduce an unreasonable risk of injury associated with the product. Section 2060 of this title shall apply to any amendment of a consumer product safety rule which involves a material change and to any revocation of a consumer product safety rule, in the same manner and to the same extent as such section applies to the Commission's action in promulgating such a rule.

(i) Petition to initiate rulemaking

The Commission shall grant, in whole or in part, or deny any petition under section 553(e) of Title 5 requesting the Commission to initiate a rulemaking, within a reasonable time after the date on which such petition is filed. The Commission shall state the reasons for granting or denying such petition. The Commission may not deny any such petition on the basis of a voluntary standard unless the voluntary standard is in existence at the time of the denial of the petition, the Commission has determined that the voluntary standard is likely to result in the elimination or adequate reduction of the risk of injury identified in the petition, and it is likely that there will be substantial compliance with the standard.

15 U.S.C. § 2060. Judicial review of consumer product safety rules

(a) Petition by persons adversely affected, consumers, or consumer organizations

Not later than 60 days after a consumer product safety rule is promulgated by the Commission, any person adversely affected by such rule, or any consumer or consumer organization, may file a petition with the United States court of appeals for the District of Columbia, or for the circuit in which such person, consumer, or organization resides or has his principal place of business for judicial review of such rule. Copies of the petition shall be forthwith transmitted by the clerk of the court to the Commission or other officer designated by it for that purpose and to the Attorney General. The record of the proceedings on which the Commission based its rule shall be filed in the court as provided for in section 2112 of Title 28. For purposes of this section, the term "record" means such consumer product safety rule; any notice or proposal published pursuant to section 2056, 2057, or 2058 of this title; the transcript required by section 2058(d)(2) of this title of any oral presentation; any written submission of interested parties; and any other information which the Commission considers relevant to such rule.

(b) Additional data, views, or arguments

If the petitioner applies to the court for leave to adduce additional data, views, or arguments and shows to the satisfaction of the court that such additional data, views, or arguments are material and that there were reasonable grounds for the petitioner's failure to adduce such data, views, or arguments in the proceeding before the Commission, the court may order the Commission to provide additional opportunity for the oral presentation of data, views, or arguments and for written submissions. The Commission may modify its findings, or make new findings by reason of the additional data, views, or arguments so taken and shall file such modified or new findings, and its recommendation, if any, for the modification or setting aside of its original rule, with the return of such additional data, views, or arguments.

(c) Jurisdiction; costs and attorneys' fees; substantial evidence to support administrative findings

Upon the filing of the petition under subsection (a) of this section the court shall have jurisdiction to review the consumer product safety rule in accordance with chapter 7 of Title 5, and to grant appropriate relief, including interim relief, as provided in such chapter. A court may in the interest of justice include in such relief an award of the costs of suit, including reasonable attorneys' fees (determined in accordance with subsection (f)1 and reasonable expert witnesses' fees. Attorneys' fees may be awarded against the United States (or any agency or official of the United States) without regard to section 2412 of Title 28 or any other provision of law. The consumer product safety rule shall not be affirmed unless the Commission's

findings under sections 2058(f)(1) and 2058(f)(3) of this title are supported by substantial evidence on the record taken as a whole.

(d) Supreme Court review

The judgment of the court affirming or setting aside, in whole or in part, any consumer product safety rule shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification, as provided in section 1254 of Title 28.

(e) Other remedies

The remedies provided for in this section shall be in addition to and not in lieu of any other remedies provided by law.

(f) Computation of reasonable fee for attorney

For purposes of this section and sections 2072(a) and 2073 of this title, a reasonable attorney's fee is a fee (1) which is based upon (A) the actual time expended by an attorney in providing advice and other legal services in connection with representing a person in an action brought under this section, and (B) such reasonable expenses as may be incurred by the attorney in the provision of such services, and (2) which is computed at the rate prevailing for the provision of similar services with respect to actions brought in the court which is awarding such fee.

(g) Expedited judicial review

(1) Application

This subsection applies, in lieu of the preceding subsections of this section, to judicial review of--

(A) any consumer product safety rule promulgated by the Commission pursuant to section 2064(j) of this title (relating to identification of substantial hazards);

(B) any consumer product safety standard promulgated by the Commission pursuant to section 2089 of this title (relating to all-terrain vehicles);

(C) any standard promulgated by the Commission under section 2056a of this title (relating to durable infant and toddler products); and

(D) any consumer product safety standard promulgated by the Commission under section 2056b of this title (relating to mandatory toy safety standards).

(2) In general

Not later than 60 days after the promulgation, by the Commission, of a rule or standard to which this subsection applies, any person adversely affected by such rule or standard may file a petition with the United States Court of Appeals for the District of Columbia Circuit for judicial review of such rule. Copies of the petition shall be forthwith transmitted by the clerk of the court to the Commission or other officer designated by it for that purpose and to the Attorney General. The

record of the proceedings on which the Commission based its rule shall be filed in the court as provided for in section 2112 of Title 28.

(3) Review

Upon the filing of the petition under paragraph (2) of this subsection, the court shall have jurisdiction to review the rule in accordance with chapter 7 of Title 5 and to grant appropriate relief, including interim relief, as provided in such chapter.

(4) Conclusiveness of judgment

The judgment of the court affirming or setting aside, in whole or in part, any final rule under this section shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification, as provided in section 1254 of Title 28.

(5) Further review

A rule or standard with respect to which this subsection applies shall not be subject to judicial review in proceedings under section 2066 of this title (relating to imported products) or in civil or criminal proceedings for enforcement.

CERTIFICATE OF SERVICE

I hereby certify that on June 3, 2025, I filed the foregoing Opening Brief of Petitioner in the United States Court of Appeals for the District of Columbia Circuit using the Appellate CM/ECF system. Service will be accomplished by the Appellate CM/ECF System. As required by Circuit Rule 31(b), I will also cause to be filed eight paper copies of the brief with the Court.

/s/ Kara M. Rollins
KARA M. ROLLINS