ORAL ARGUMENT SCHEDULED FOR NOVEMBER 7, 2025
No. 25-1003

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

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

v.

UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION,
Respondent.

REPLY 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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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)

PERTINENT STATUTORY PROVISIONS

Pertinent statutory provisions are reproduced in the addendum attached to the Opening Brief of Petitioner.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Infant safety should never have to yield to administrative convenience. But that is what happened here, when the Consumer Product Safety Commission ("CPSC") adopted an overbroad interpretation of its statutory authority so that it could regulate infant support cushions using a shortcut method reserved for durable products. But these products, including Petitioner's Snuggle Me Infant Lounger and its cover, are not "durable infant or toddler products" under 15 U.S.C. § 2056a.

Infant support cushions are not one of the products enumerated in § 2056a(f)(2). In fact, the product category did not exist until CPSC invented it as part of drafting the challenged rule, *Safety Standard for Infant Support Cushions*, 89 Fed. Reg. 87,467 (Nov. 4, 2024) (the "Rule"). The category's 2,000 disparate in-scope products bear no resemblance to any of the enumerated products. Those products, which include nursery items like cribs, bear the hallmarks of "durable products," as they are predominately made from wood, metal, or plastic (materials that typically do not significantly deteriorate over time). In contrast, infant support cushions are predominately, if not exclusively, made from textiles. Textile products are considered nondurable goods. As such, infant support cushions should have been regulated through CPSC's general, and more rigorous, rulemaking process. *See* 15 U.S.C. §§ 2056, 2058. By treating nondurable products as durable ones, CPSC expanded its power and bypassed the voluntary standards process by exploiting a

disallowed shortcut. The Rule also fails to address critical concerns like whether its mandatory performance requirements increase the risk that infants will be injured.

Heroes Technology has the best reading of the statute, and the Rule exceeds CPSC's statutory authority under 15 U.S.C. § 2056a. CPSC has waived any response to Petitioner's argument that it did not follow the correct procedures under the law, as required by § 706(2)(D). CPSC also waived any argument that it changed how it interprets § 2056a and any response to the point that it failed to acknowledge a change in interpretation. Even if the Rule is otherwise permissible, it is arbitrary and capricious. For example, CPSC failed to consider whether the risks justifying the Rule were reduced by its earlier adoption of its infant sleep products rule. For these reasons, this Court should vacate the Infant Support Cushion Rule.

ARGUMENT

I. INFANT SUPPORT CUSHIONS ARE NOT 'DURABLE INFANT OR TODDLER PRODUCTS'

A. Heroes Technology Has the Best Reading of § 2056a

CPSC's understanding of § 2056a is flawed, and Heroes Technology's reading of the text is superior. 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 good," meant, in common parlance, consumer product that lasts a long time without significant deterioration. Br. 34 (concluding same); *see also* Br. 30–33 (discussing the meaning of "durable" and "product," and

its synonymous term "goods"). Thus, durable infant or toddler products are consumer products that last a long time without significant deterioration that are "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). Heroes Technology's clear articulation of the statute's language is grounded in § 2056a's text and its ordinary public meaning at the time it was adopted. *See Bostock v. Clayton Cnty.*, 590 U.S. 644, 654 (2020); *see also* Br. 30–33 (relying on dictionaries and thesauruses from at or near the time of § 2056a's adoption.

Petitioner's interpretation also accounts for traditional principles of statutory interpretation and the statute's structure. *See, e.g.*, Br. 37–38 (discussing the *noscitur a sociis* canon); Br. 20–21 (discussing the statutory product list). And its interpretation is not inconsistent with the provision's statutory history. Br. 11–12, 43–44. CPSC maintains that Heroes Technology's interpretation "lack[s] merit." CPSC Br. 15. But it is CPSC's interpretation of § 2056a that is deficient.

First, CPSC insists that Heroes Technology is reading the term "durable good" into the statute and that "durable good" is a term of art. CPSC Br. 10, 15–23. Not so. Heroes Technology's interpretation leads to a clear decisionmaking framework for determining whether a product is a durable infant or toddler product: (1) A product that is included in the enumerated list is a durable infant or toddler product, Br. 29; (2) A product that is not included in the statutory product list may

be a durable infant or toddler product if the product shares aspects of its composition or design that effect its durability (like the materials it is made from),[2] Br. 34–35, 37–38; and, (3) A product that is not included in the statutory product list, and that does not share aspects of its composition or design that effect its durability with the enumerated products, may still be a durable infant or toddler product if the product's components or features make the product capable of lasting a long time without significant deterioration. Br. 34–35. It is only under the last part of the analysis that products that are comprised of materials that are traditionally understood to not be durable, like textiles, carry the presumption that they are not durable products. That consideration does not turn on a term of art, it only suggests that a commonly understood presumption—that textiles are usually considered nondurables—plays a role in whether a product can last a long time without significant deterioration.

Heroes Technology references durable goods because the term was synonymous with durable products at the time CPSIA was adopted and CPSC had considered the term for guidance in the past. Indeed, Senator Amy Klobuchar, who helped lead CPSIA's adoption, used the term "durable goods" multiple times to describe the products that are enumerated in § 2056a(f)(2). *See* 154 Cong. Rec. S1682 (daily ed. Mar. 6, 2008) (statement of Sen. Amy Klobuchar); Br. 11. Thus,

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[2] The list includes products that are typically and predominately comprised of metal, wood, or plastic. *See* 15 U.S.C. § 2056a(f)(2); *see also* Br. 20–21, 34, 41.

CPSC's argument that the statute's plain language forecloses the term "durable good" from being considered is wrong. *See* CPSC Br. 10, 16. Senator Klobuchar's statements buttress Heroes Technology's argument that, in common parlance, "durable products" and "durable goods" are synonymous and that Congress used the terms interchangeably. Br. 34. The use of "product" rather than "goods" may merely be a matter of style. After all, it is not the Consumer *Goods* Safety Commission.

On the contrary, it is CPSC's interpretation that relies on a factor that Congress did not consider when it adopted the CPSIA—value deterioration. CPSC Br. 12. And it offers no contemporaneous support for that factor. *Compare* CPSC Br. 12–13 *with* Br. 30–31. Here, CPSC's definition of "durable" includes consideration of the deterioration of the "value" of an item. CPSC Br. 12. Whereas the dictionary definitions relied on by Petitioner, dating to at or near the time CPSIA was adopted, make no mention of value deterioration in their definitions of "durable." Br. 30. This is not a matter of semantics. CPSC justifies its interpretation of § 2056a, in part, because infant support cushions are resold on secondary markets. JA611; CPSC Br. 1, 9, 13; *see also* JA148, JA166. To the extent that the definition of "durable product" turns on whether its value deteriorates significantly over time, as evidenced by its availability in secondary markets, CPSC has offered no evidence of that factor being included in the ordinary public meaning of "durable" when

CPSIA was adopted. Besides which, baby clothes are resold on secondary markets, too, and no one considers them to be "durable products."

Other than CPSC's misplaced reliance on value deterioration, there is little daylight between CPSC's definition of "durable products" and Merriam-Webster's definition of "durable goods." *Compare* CPSC Br. 12–13 *with* Br. 32–33. As an economic term, "durable goods" is expressed in terms of the product's perceived lifespan, typically three years or more. Br. 33. But Petitioner never advocated for that specific economic term of art to be applied, even though CPSC itself considered the economic definition of "durable goods" in prior rulemakings. *See id.*; *see also* CPSC Br. 21–22 (noting that the economic term provides "some guidance").

CPSC's critical failure here is that it believes Heroes Technology's analysis starts by asking whether a product is a textile or by assuming that textile-based products are always excluded from regulation under § 2056a. CPSC Br. 15–22. But as explained above, that is not where the text, structure and history of the provision lead. *See* Br. 34–38. Infant support cushions are not enumerated in the statute. *See* 15 U.S.C. § 2056a(f)(2). They are not like the enumerated products because they are, by definition, not constructed with wood, metal, or plastic. Br. 34. As such, CPSC should have considered whether infant support cushions, which are textile-based products, have components or features that overcome the common

presumption that textiles are nondurable. Br. 35–36. CPSC's analysis does not overcome that presumption.

CPSC's reliance on its prior regulation of "sling carriers" and "soft infant carriers" plays no role in determining whether infant support cushions are durable infant or toddler products. *See* CPSC Br. 16–17. Section 2056a(f)(2) explicitly states that "infant carriers" are durable infant or toddler products. It is not a big leap then to say that a product that is designed to carry an infant—regardless of the materials it is made of—is an "infant carrier." *See* 82 Fed. Reg. 8,671, 8,676 (Jan. 30, 2017) (noting that products "contained parts that are considered durable from an engineering perspective"). And Heroes Technology's interpretation does not suggest otherwise, as the statute's text always controls. *See supra*, at 3. Again, Petitioner's argument has never been that the term "durable infant or toddler product" excludes all textile products. Rather, it has advocated only that textile-based products that are not enumerated by statute and do not share similar composition to products in the statutory list require additional consideration before they can be regulated under § 2056a as opposed to §§ 2056 and 2058. Br. 34–35. Notably here, the Rule's definition of "infant support cushions" unmistakably describes textiles. Br. 34.

CPSC's reliance on its prior regulation of crib mattresses is likewise flawed. CPSC Br. 17–19. Nothing in Petitioner's interpretation would restrict CPSC from regulating crib mattresses under § 2056a. A crib without a crib mattress is unusable.

It does not take a logical leap to understand that "cribs" would include a necessary component for use or that a crib mattress is similar enough to a crib that it falls within § 2056's ambit. *See supra*, at 3–4; c*f.* Br. 37–38 (discussing canon of *noscitur a sociis*). CPSC's argument that Heroes Technology's interpretation leads to "structural anomalies," *see* CPSC Br. 17–19, hinges on CPSC's incorrect assumption that Petitioner's statutory interpretation excludes all textile-based products. But Heroes Technology has never argued that. It has only argued that if a product is not enumerated or is not like an enumerated product, then CPSC must consider whether aspects of a product's composition, like being entirely comprised of textiles (as infant support cushions are) places it outside § 2056a's ambit.

The cases CPSC cites to suggest that textiles are "durable" are irrelevant to the question before this Court. *See* CPSC Br. 20. In *Ex parte Newman*, 18 F. Cas. 94 (C.C.D.D.C. 1859), the court considered whether a hoop-skirt maker was entitled to a patent for the "mode of constructing" his hoop-skirt. *Id.* at 95. The court determined that the mechanical manufacturing process rendered the hoop-skirt "more durable" relative to one made by a different construction method. *Id.* Thus, despite CPSC's argument to the contrary, CPSC Br. 20, that case does not stand for the proposition that textiles are "durable," only that hoop-skirts made by machines are more durable than those made by other means. Likewise, in *Standard Terry Mills, Inc. v. Shen Manufacturing Co.*, 803 F.2d 778 (3d Cir. 1986), the court's

determination that a fabric was durable went to the question of whether the fabric's weave was functional for purposes of a trade dress claim, not whether, as here, textiles are durable products.

Second, CPSC suggests that its interpretation of § 2056a is not impermissible because it has not "treated the Act as a blank check to regulate the entire universe of infant or toddler products." CPSC Br. 21. But an agency's exercise of administrative self-restraint has no bearing on what a statute means. Nor should it. In any event, CPSC's assertion is wrong. The four non-statutory factors CPSC invented to justify whether a product is "durable" have no limit. As Heroes Technology has argued, all kinds of traditionally nondurable products would now meet CPSC's broadened definition of durable infant or toddler products. *See* Br. 36–37 (discussing how clothing, cloth diapers, and blankets meet CPSC's definition of durable products).

Third, CPSC's four-factor test for determining whether a product is a "durable infant or toddler product" is atextual and finds no support in the definitions of "durable." *See* CPSC Br. 22–23 (quoting JA609); *see also* Br. 30 (providing definitions of "durable"). There is nothing in § 2056a that suggests that a product is durable merely because it is "used by multiple children successively" or is "resold and widely available on secondary marketplaces." JA609; *see also* Br. 35–37. Indeed, such considerations may be just as easily credited to the fact that a product was seldom or never used, or that raising children is expensive and reducing or

recouping the cost of doing so financially benefits families. *See, e.g.*, Caroline Picard, *Baby-related Expenses Now Cost Parents $20,384 in the First Year Alone*, BabyCenter (Feb. 19, 2025), https://www.babycenter.com/family/money/first-year-baby-related-expenses_41002904. Stated differently, the reuse of or secondary market for infant support cushions does not establish that such products are "durable."

Fourth, CPSC argues that Heroes Technology's discussion of § 2056a's legislative history is meant to suggest that the statutory product list is exclusive. *See* CPSC Br. 23–24. But that grossly misstates Petitioner's argument, which simply explained that Congress placed specific emphasis on the statutory product list and Petitioner's statutory interpretation does not conflict with that consideration. *See* Br. 43–44. Petitioner's brief nowhere argues that the list is exclusive; in fact, it argues the opposite, that the statutorily prescribed list provides CPSC guidance in future rulemakings. Br. 1, 20–21; *see also id.* at 37–38, 41–42, 47–48. Indeed, CPSC's cases suggest as much by noting that enumerated examples, like those in § 2056a(f)(2), are illustrative. *See* CPSC Br. 24–25 (citing cases). Rather than reading "includes" out of the statute, as CPSC alleges, *see* CPSC Br. 24–25, Heroes Technology's interpretation follows the text's command by recognizing that the enumerated product list provides insight into the statute's meaning.

Fifth, CPSC did not refer to the statutory product list for guidance when it determined that infant support cushions are "durable infant or toddler products." Instead, it referred to its prior rulemakings and compared infant support cushions to *those* determinations, a recipe for regulatory creep. CPSC Br. 26–27. As explained above, CPSC's reference to sling carriers is irrelevant, as "infant carriers" are an enumerated category, so it does not matter if they are textile-based products. *See supra*, at 7. In any event, this one-step removed analysis is impermissible, as it does not consider the general qualities of the enumerated products that make them "durable." *See* Br. 34. CPSC's argument that it determined that infant support cushions are durable infant or toddler products because some of the enumerated products are "used for infant sleep" makes no sense (it would treat pajamas and crib sheets as durable) and defies any basic definition of "durable." *See* CPSC Br. 26–27.[3] A product's durability is the result of what it is made of, not what it is used for. That a product is or may be used for sleep does not indicate if the product will last a long time without significant deterioration. *See* CPSC Br. 26–27. Therefore, product use has no bearing on whether a product may be regulated under § 2056a. CPSC's interpretation gives § 2056a expansive breadth beyond the scope of the limited statutory shortcut and is impermissible. *See* Br. 37–38.

[3] CPSC's argument also cuts against itself. *See infra* 18–23.

Finally, because CPSC adopted an erroneous interpretation of § 2056a, and conducted this rulemaking under that provision, it also violated 5 U.S.C. § 706(2)(D) because this rulemaking was conducted without observing the correct procedural requirements under 15 U.S.C. §§ 2056 and 2058. *See* Br. 4–5, 7–9, 12–13, 44–46. CPSC ignores this argument altogether. Any challenge to Heroes Technology's § 706(2)(D) claim is waived. *Cf. United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 497 (D.C. Cir. 2004) ("Ordinarily, arguments that parties do not make on appeal are deemed to have been waived."). Heroes Technology, by contrast, has not waived any of its arguments despite meritless assertions from CPSC.

B. Heroes Technology's Arguments Are Not Waived

This Court can review Heroes Technology's challenge to the Infant Support Cushion Rule because its claim, under 5 U.S.C. § 706(2)(C), asks whether CPSC exceeded its statutory authority when it promulgated the Rule. *See* Br. 4, 26–46. This "substantive issue … is solely one of statutory interpretation." *R.R. Yardmasters of Am. v. Harris*, 721 F.2d 1332, 1338 (D.C. Cir. 1983); *see also Loper Bright Enters. v. Raimondo* and *Relentless v. Dep't of Com.*, 603 U.S. 369, 400 (2024) (it is a court's independent duty to interpret statutes). That is because "agencies have no special competence in resolving statutory ambiguities," *Loper Bright/Relentless*, 603 U.S. at 400–01, and statutory interpretation does not require consideration of an agency's policy objectives. *See Kaweah Delta Health Care Dist. v. Becerra*, 123 F.4th 939,

950 (9th Cir. 2024); *see also Yardmasters*, 721 F.2d at 1338–39 (statutory interpretation "does not require the development of a factual record, the application of agency expertise, or the exercise of administrative discretion." (footnote omitted)). Thus, courts may set aside agency action that is "patently in excess of the agency's authority." *Wash. Ass'n for Television & Child. v. FCC*, 712 F.2d 677, 682 (D.C. Cir. 1983) (cleaned up). Heroes Technology's statutory challenge questions CPSC's "power or jurisdiction" to act under § 2056a, and this Court can address this challenge.

Review would not prejudice CPSC. It had a fair opportunity to consider the statutory interpretation question and did so. *See* JA621; *see also Wash. Ass'n for Television*, 712 F.2d at 682 ("[I]t is not always necessary for a party to raise an issue, so long as the Commission in fact considered the issue."). Moreover, Heroes Technology raised the same statutory interpretation argument it raises here in its February 2025 request to CPSC to postpone the effective date of the Rule. *See* Doc. 2105663 at A19–21, A24–29. CPSC thus had a meaningful opportunity to respond and consider Heroes Technology's statutory argument prior to this Court's consideration of the matter. *See USAir, Inc. v. Dep't of Transp.*, 969 F.2d 1256, 1260 (D.C. Cir. 1992). Instead, the Commission denied Heroes Technology's request without comment. Doc. 2105663 at A15, A17.

Further, CPSC misconstrues the authority upon which it relies. CPSC Br. 15. Despite CPSC's reliance on *Delaware Department of Natural Resources & Environmental Control v. EPA*, 895 F.3d 90, 96 (D.C. Cir. 2018), that case is inapplicable here as it arose under the Clean Air Act's ("CAA") narrow judicial review provision, which differs from APA review. *See* 42 U.S.C. § 7607(d)(7)(B). Even under the CAA's provision, this Court explained that although "some" of the petitioner's comments suggested they supported certain parts of the proposed rule, their other comments suggested opposition to the rule, and thus their challenge was not entirely inconsistent with their comment period position. *Del. Dep't of Nat. Res.*, 895 F.3d at 96. So too here.

Heroes Technology has opposed the promulgation of the Rule since its proposal. *See* JA427–476; *see also* Doc. 2105663 at A19–21, A23–36. Its position before the agency was not "diametrically opposed" to the one taken here, as CPSC has tried to argue. *See* CPSC Br. 14. For example, Heroes Technology challenged the proposed rule in part because CPSC "failed to provide a risk/benefit analysis, risk/hazard analysis, and a consumer choice analysis." JA428 n.3, JA434, JA438, JA442; *see* Br. 45–46. CPSC responded that those analyses are not required under § 2056a. *See* JA621. But they would have been required if the Rule were correctly promulgated under §§ 2056 and 2058. *See, e.g.*, JA287–88 (commenting how Rule fails under § 2058(f)(3)(A), (D), (E), (F)). Petitioner also challenged CPSC's

authority to promulgate the Rule under 15 U.S.C. § 2056a because there was no voluntary standard for these products. [4] *See* JA621. So, Heroes Technology's position in this matter is consistent with its position before CPSC, and it is not waived.

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

It is telling that CPSC retreats to the familiar waters of the pre-*Loper Bright* era by inviting this Court to "accord due respect" to the CPSC's decision. CPSC Br. 27 (quoting *Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306, 1311 (D.C. Cir. 2010)). But that standard relates to statutory gap-filling under the now-overturned *Chevron* framework. *See Nat'l Cable & Telecomms. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 339 (2002); *see also Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1002–03 (2005) (quoting same); *cf. Loper Bright/Relentless*, 603 U.S. at 408 ("Once more, the basic nature and meaning of a statute does not change when an agency happens to be involved.").

The standard of review under 5 U.S.C. § 706(2)(A) is whether the agency's decision is "reasonable and reasonably explained." *FCC v. Prometheus Radio Proj.*, 592 U.S. 414, 423 (2021); *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 51–52 (1983). CPSC's "explanation must 'enable us to

[4] Petitioner does not maintain this claim on review.

conclude that the [agency's action] was the product of reasoned decisionmaking.'" *Window Covering Mfrs. Ass'n v. CPSC*, 82 F.4th 1273, 1286 (D.C. Cir. 2023) (quoting *State Farm*, 463 U.S. at 52). The Infant Support Cushion Rule is neither reasonable nor reasonably explained.

A. CPSC Waived Any Argument to the Challenge that It Casually Ignored Its Changed Interpretation of § 2056a

In promulgating the Infant Support Cushion Rule, CPSC eschewed any analysis comparing infant support cushions to products included on the statutory products list. *See* Br. 47–49. That failure to compare constituted a change in position that CPSC should have acknowledged. *See FDA v. Wages & White Lion Invs., LLC*, 145 S. Ct. 898, 916–17 (2025); *see also* Br. 47–49. A change in agency policy occurs when the agency takes an action that is "inconsistent" with a "longstanding earlier position," *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 224 (2016), or reverses its "former views[,]" *State Farm*, 463 U.S. at 41. CPSC was required to provide reasons for changing its position but provided none. *Wages & White Lion*, 145 S. Ct. at 918 (citation omitted); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (agencies "may not, for example, depart from a prior policy *sub silentio*"); *see also* Br. 49.

Just as CPSC casually ignored that it changed its position, it also ignored Heroes Technology's arguments that CPSC had done so. At best, CPSC takes a passing glance at Petitioner's arguments. *See* CPSC Br. 26 (citing Br. 41–42, 47–

49). But a single sentence noting that CPSC did not "impose" a "requirement upon itself in prior rulemakings" to interpret § 2056a by referencing the statutory product list, *see id.*, is not sufficient to preserve its argument. *Gov't of Manitoba v. Bernhardt*, 923 F.3d 173, 179 (D.C. Cir. 2019) (arguments are forfeited when raised "only in the most skeletal way" (internal quotation marks omitted)).

Nor does that passing statement answer Heroes Technology's arguments, which allege that CPSC changed how it determines whether a product is a durable infant or toddler product without recognition or explanation. *See* Br. 47–49. Besides which, CPSC's assertion is easily disproven. Since 2009, CPSC has considered which products should be designated as durable infant or toddler products by comparing them to the statutory product list. *See* 87 Fed. Reg. 8,640, 8,641 (Feb. 15, 2022) (recognizing that that crib mattresses "are not included in the statutory list of durable infant or toddler products" but finding that they can be regulated as such "because … they are products similar to the products listed in section 104(f)(2) of the CPSIA"); 79 Fed. Reg. 17,422 (Mar. 28, 2014) (in adopting standard for "Soft Infant and Toddler Carriers" CPSC noted that "the CPSIA specifically identifies 'infant carriers' as durable infant or toddler products"); *see also* Br. 47–48. But CPSC did not compare infant support cushions to the products listed in the statute, as it had done for nearly 15 years. *See* JA621; *see also* JA283–84.

At best, CPSC compared infant support cushions to other products it had determined were durable infant or toddler products (years after § 2056a was adopted). *See*, *e.g.*, CPSC Br. 25–27. But CPSC's self-serving analysis referencing its prior regulatory actions does not change the fact that it did not compare Infant Support Cushions to the statutory product list. Nor could it, because infant support cushions are unlike any of the enumerated products. CPSC's failure to make that comparison shows a change in agency policy that requires both acknowledgement and an explanation. The Rule did neither. Critically, CPSC made no attempt to contest this point, so any arguments regarding its change-in-position are waived.

B. CPSC Failed to Consider Important Aspects of the Problem of Addressing Risks Associated with Infant Support Cushions

CPSC should have considered risk reductions achieved through the infant sleep products rule, but it did not because of the shortcut it took. Failing "to consider an important aspect of the problem is one of the hallmarks of arbitrary and capricious reasoning." *Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 430 (D.C. Cir. 2018); *see also State Farm*, 463 U.S. at 43. Agencies run afoul of this command when they do not consider how interrelated rules impact each other. *See Nat'l Ass'n of Priv. Fund Managers v. SEC*, No. 23-60626, 2025 WL 2434051, at *11 (5th Cir. Aug. 25, 2025) (finding that agency ignoring the "significant interplay" between rules was a failure "to consider an important aspect of the problem").

Here, the "problem" addressed by the Rule is addressing the risks associated with the misuse of infant support cushions in infant sleep environments. *See*, *e.g.*, JA598–99. Yet, CPSC argues that it was not required to consider risk reductions achieved through the infant sleep products rule because the definition of "'infant support cushion' excludes 'sleeping accommodations that are regulated under'" the earlier rule. CPSC Br. 28 (citing JA610). But that argument is contradicted both by the evidence before CPSC and its reasons for promulgating the Rule.

CPSC did not respond to Petitioner's argument that both rules relied on at least some of the same data to justify promulgation. *See* Br. 51–52. So, that response is waived. *See U.S. ex rel. Totten*, 380 F.3d at 497. CPSC also did not directly respond to Heroes Technology's argument that the infant sleep products rule is not as categorical as the CPSC claims. *See* Br. 52. Stated another way, there is overlap and interplay between the rules. For example, a product falls under the infant sleep products rule if it is "marketed or intended to provide a sleeping accommodation" and is not subject to another mandatory standard. 86 Fed. Reg. 33,022 (June 23, 2021); CPSC Br. 28. A product is "marketed for sleep" if the "product's packaging, marketing materials, inserts, or instructions indicate that the product is for sleep, or includes pictures of sleeping infants[.]" 86 Fed. Reg. at 33,025; *see also id.* at 33,066 (explaining how soft-sided products may fall under the infant sleep products rule). Far from a clear-cut standard, it is, at best, a know-a-sleep-accommodation-when-

we-see-it definition, which seems to have confused even the CPSC in differentiating products between the two rules.

As CPSC is aware, the incident data[5] it relied on to justify the Rule includes at least one product that CPSC determined violated the infant sleep products rule *before* the Rule was finalized. *See*, *e.g.*, CPSC, *CPSC Warns Consumers to Immediately Stop Using Mamibaby, Yoocaa, DHZJM, Cosy Nation & Hyhuudth Loungers Manufactured by Ningbo Tree Nest Children Products Due to Suffocation, Fall & Entrapment Hazards; Violations of Regulations; 5 Infant Deaths Reported* (Aug. 15, 2024), https://www.cpsc.gov/Warnings/2024/CPSC-Warns-Consumers-to-Immediately-Stop-Using-Mamibaby-Yoocaa-DHZJM-Cosy-Nation-Hyhuudth-Loungers-Manufactured-by-Ningbo-Tree-Nest-Children-Products-Due-to-Suffocation-Fall-Entrapment-Hazards-Violations-of-Regulations-5-Infant-Deaths (describing incidents with Mamibaby loungers). Thus, CPSC's statement that the definition of "infant support cushion" excludes products regulated under the infant sleep products rule is incorrect. *See* CPSC Br. 28. In the alternative, CPSC relied on data it should have excluded when it was promulgating the Infant Support Cushion Rule. Either way, CPSC's reliance on overlapping incident data suggests that the rules are not as distinct as CPSC claims. *See* CPSC Br. 28–29. Understanding what

[5] Incident data is "associational data" meaning that there is a product "associated" with an incident, not that a product is the cause of that incident.

separate or additional risks infant support cushions pose, if any, cannot be done without considering the reductions resulting from the infant sleep products rule. But CPSC failed to do so.

CPSC also argues that "infant support cushions present hazards independent of those presented by infant sleep products." CPSC Br. 28–29. That argument makes little sense in light of a record replete with CPSC's concerns that the risks it identified—suffocation, entrapment, and falls—are *overwhelmingly* associated with product misuse in unsafe sleep environments. JA608 (noting that the majority of fatal "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"); JA598–99 ("Nearly all reported fatalities (75 of 79) involved placement of the infant support cushion on another sleep-related consumer product."); *see also* JA115–16; JA157. Indeed, CPSC concluded that the only way to discourage infant support cushions from being used in sleep environments was to require "physical changes to the product[s.]" JA158. Which the Rule does for some 2,000 product models. Br. 20, 23, 25; *see also* JA627.

As Heroes Technology argued in its opening brief, Br. 51, both rules were justified based on concerns that the covered products increased the risk of suffocation or asphyxiation, entrapment, and falls. *Compare* 86 Fed. Reg. at 33,031 (describing hazard patterns for "flat sleep products" and describing entrapment

incidents associated with such products) *with* JA609 (describing hazards "associated with infant support cushions"). Both rules also adopted similar requirements to address the perceived risks, including "a maximum incline angle of 10 degrees" to address those perceived risks. JA96 ("Staff recommends that infant support cushions should have a maximum incline angle that shall not exceed 10 degrees, as in the CPSC infant sleep product rule[.]"); *see also* JA629. CPSC's generic cite to the data, *see* CPSC Br. 28–29, does not save its argument because, as discussed above, that incident data that informs the hazard patterns included overlapping incidents between the two rules, and both rules identified similar hazard patterns.

CPSC misunderstands Petitioner's discussion of the Rule's scope. *Compare* Br. 49–50 *with* CPSC Br. 27–28. As Heroes Technology noted, and CPSC does not dispute, "infant support cushions" did not exist as a product category until CPSC invented the catch-all category for this Rule. Br. 50. As such, this is not a case like *Finnbin LLC v. CPSC*, 45 F.4th 127 (D.C. Cir. 2022), about carve-outs and exceptions, where the petitioner challenged the infant sleep products rule for failing to "explain" why the rule covered its products, which they asserted had "distinct risks and benefits." *Id.* at 135; *see also* CPSC Br. 27. Instead, this is a case where CPSC is treating different products, designed to serve different needs, that have different risk profiles, as though they are identical because infants "tend to fall asleep" in them. JA612; *see also* JA353 (Boppy); JA435 (Heroes Technology);

JA479, JA482 (JPMA). But infants also fall asleep in infant sleep products, and yet CPSC saw no need to consider how that prior regulation interacted with this Rule.

There is little doubt that the infant sleep products rule and the Infant Support Cushion Rule are interrelated. CPSC should have, but did not, consider whether the risks it identified in the Rule were already addressed by the infant sleep products rule. Its failure to do so was arbitrary and capricious.

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

CPSC misunderstands Petitioner's arguments regarding the justifications for the Rule. Heroes Technology is not arguing that CPSC should have done more, *see* CPSC Br. 29, its argument is that even under 15 U.S.C. § 2056a's relaxed requirements it did not do enough to justify the Rule.[6] *See* Br. 53–55. Because CPSC did not do the bare minimum to justify the Rule, and often relied on its own unsupported conclusory statements, it cannot be said that the Infant Support Cushion Rule is the product of reasoned decisionmaking as supported by the record. This Court "may not uphold agency action based on speculation[.]" *Nat'l Shooting Sports Found., Inc. v. Jones*, 716 F.3d 200, 214 (D.C. Cir. 2013) (citation omitted). Nor does it "defer to an agency's 'conclusory or unsupported suppositions.'" *Id.* (quoting

[6] CPSC was also not precluded from doing more than the bare minimum, but even in the interests of infant safety, declined to do so. *See*, *e.g.*, JA621.

McDonnell Douglas Corp. v. U.S. Dep't of the Air Force, 375 F.3d 1182, 1187 (D.C. Cir. 2004)). Here, CPSC's arguments invite the Court to ignore these limitations.

CPSC argues that it was not required to consider or study what would happen if infant support cushions were removed from the market. CPSC Br. 29. But Petitioner's arguments point to a fundamental deficiency in CPSC's decisionmaking—that CPSC cannot determine that the Rule reduces risks without considering whether it also increases those same risks. Again, take for example CPSC's justification for limiting sidewall height. *See* Br. 53–55. CPSC's justification boils down to CPSC's assumption that parents will see the lower sidewalls and will know that their infants would not be secure, therefore they will not leave them unattended or in a place where they can roll out into a hazardous situation. JA615. But CPSC did not study how parents would interact with these products, so it could not know whether parents would make that judgment—it only speculated what would happen. *See* JA150 (CPSC staff thought that higher sidewalls "provide[] a visual cue to consumers that the infant is safely contained in the product" but did not study whether that was true).

Similarly, CPSC only looked at data that falls had occurred to decide that lower sidewalls were necessary. CPSC's cite to the record, *see* CPSC Br. 30, does not respond to Petitioner's argument, because there is nothing in the record suggesting that CPSC measured any of the sidewall heights of any of the products

involved in fall incidents. *See* JA429–30); *see also* JA120, JA133–34 (discussing study of "sample" products but nowhere indicating which, if any, were involved in fall incidents); *see also* JA615 ("incident data shows that parents *may* mistakenly believe" higher sidewalls "will safely contain their infant" (emphasis added)). To be sure, CPSC studied sidewalls, *see* JA122–36, but those studies had nothing to do with supporting CPSC's statement that lower sidewalls mean that parents will know that a product will not contain their infant.

The only entity that bothered to study whether lowered sidewalls increased risks to infants was Heroes Technology, which produced a non-commercial protype based on the proposed rule's requirements and tested it with infants. *See* JA443; JA452–476; *see also* Br. 53–54. Preliminary observations from that study showed that lower sidewall heights "provides less of a barrier to roll out of the product." JA443; *see also* JA460–2, JA469–70, JA475–76. Despite this, CPSC never bothered to consider whether products with lower sidewalls, like Petitioner's Rule-compliant prototype, would lead to more infants rolling out of products into hazardous situations, *i.e.*, increasing the risk of falls. CPSC's justification is pure *ipse dixit* and incompatible with reasoned decisionmaking.

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

The Infant Support Cushion Rule's effective date did not give manufacturers, like Heroes Technology, sufficient time to redesign, manufacture, test, and bring

Rule-compliant products to market. *See* Br. 55–57. CPSC counters here, as it did in the Rule, that six months is the typical timeframe that JPMA "allows … for products … to implement a new voluntary standard" and that "juvenile product manufacturers are accustomed to adjusting to new standards" in 180 days. *See* CPSC Br. 31 (quoting JA621).

But CPSC ignores Petitioner's principal argument, that the Rule requires wholesale redesign of its products, and potentially thousands of other products on the market, as well as the application of novel testing methods. Br. 55–56 (explaining that it takes significant time to redesign, manufacture, test, and market a compliant product). It is unclear to Petitioner what CPSC would deem specific enough to satisfy manufacturers' requests for more time, and CPSC offers no indication of such. Either way, CPSC's bald assertion that manufacturers were accustomed to compliance with voluntary standards in a certain timeframe is insufficient because the evidence before CPSC was that it was infeasible to redesign compliant products within the time allotted. *See Window Covering Manufacturers Ass'n*, 82 F.4th at 1291.

CPSC also misunderstands Petitioner's argument regarding the incident data. *Compare* CPSC Br. 32 *with* Br. 57. Heroes Technology's point is not that the data is "stale"; the point is that the data is inaccurate and does not account for risk reduction already achieved through the infant sleep products rule. *See* Br. 57.

According to CPSC, its perceived sense of "urgency" to address the risks identified in the Rule and the number of incidents that had occurred justified the 180-day effective date. *See* CPSC Br. 31. But there is nothing in "the Final Rule nor the administrative record examin[ing] how the timing of the effective date would affect the risk of injury" other than CPSC's conclusory statements that it will because incidents had occurred in the past. *Window Covering Manufacturers Ass'n*, 82 F.4th at 1292. The Infant Support Cushion Rule's 180-day effective date was arbitrary and capricious.

CONCLUSION

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

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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 6,486 of 6,500 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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CERTIFICATE OF SERVICE

I hereby certify that on September 23, 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.

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