

UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION

_____)	
In the Matter of)	
)	CPSC Docket No.: 21-2
AMAZON.COM, INC.,)	
)	
Respondent)	
_____)	

DECISION AND ORDER

This matter is before the U.S. Consumer Product Safety Commission (CPSC or Commission) because American consumers purchased household products, through Respondent Amazon.com, Inc. (Amazon), that posed substantial product hazards as defined under the Consumer Product Safety Act (CPSA). Amazon does not dispute that its customers purchased over 400,000 hazardous items—children’s sleepwear that fail to meet flammability requirements, carbon monoxide detectors that fail to alarm, and hair dryers that lack electrocution protection. Further, the facts show that Amazon did not provide sufficient notification to the public and did not take adequate steps to encourage its customers to return or destroy these hazardous items, thereby leaving consumers at risk of injury.

Through the CPSA, Congress gave CPSC jurisdiction to protect the public against unreasonable risks of injury associated with many thousands of types of consumer products. The CPSA imposes reporting and compliance obligations on manufacturers, importers, retailers, and distributors. In this action, Complaint Counsel seeks a determination that Amazon acted as a distributor under the CPSA with respect to consumer products sold through its Fulfilled by Amazon program and that remedies under the CPSA are necessary to protect the public. Amazon asserts that it is not a distributor subject to the requirements of federal consumer product safety

law and that CPSC cannot order it to take action—even as it does not contest the product hazards and has taken actions on its own terms that leave consumers at risk.

After an administrative proceeding conducted in accordance with the Administrative Procedure Act (APA) and the Commission’s regulations, an administrative law judge (ALJ) determined that Amazon was a distributor and ordered Amazon to remediate the substantial product hazards that the products in this case present. Both Amazon and Complaint Counsel (the Parties) appeal different aspects of that decision.

For the reasons set forth below, the Commission adopts many of the determinations in the Initial Decision and Order of the ALJ. The Commission adopts the ALJ’s finding that Amazon operated as a distributor for purposes of the CPSA when it received, stored, and delivered the hazardous products through its Fulfilled by Amazon program. The Commission also accepts the Parties’ stipulation that the relevant products distributed by Amazon pose substantial product hazards. In addition, we determine that Amazon must provide notice of the product hazards to purchasers and the public in order to adequately protect the public under Section 15(c) of the CPSA and that it is in the public interest to require Amazon to take remedial actions under Section 15(d) of the CPSA to incentivize the removal of these hazardous products from consumers’ homes. In the absence of such remedial actions, these hazardous products can continue to be sold and resold without recourse under the law. Despite adopting many of the ALJ’s determinations, the Commission nevertheless sets aside the Order that accompanies the Initial Decision and, as detailed below, replaces it with a new Order.

Finally, the Commission concludes that Amazon’s Free Speech and Takings claims are not ripe and rejects Amazon’s remaining Constitutional challenges for the reasons discussed in Discussion Section IV, *infra*.

BACKGROUND

I. Consumer Product Safety Act

In 1972, Congress passed the CPSA, which created CPSC, an independent federal regulatory agency charged with protecting the public from unreasonable risks of injury associated with consumer products. Pub. L. No. 92-573, 86 Stat. 1207 (Oct. 27, 1972); *see also* 15 U.S.C. § 2051(b)(1). Congress amended the CPSA with the Consumer Product Safety Improvement Act of 2008 (CPSIA), Pub. L. No. 110-314, 122 Stat. 3016 (Aug. 14, 2008). CPSC has jurisdiction over many thousands of types of consumer products used in and around homes and schools, in recreation, or in other settings.¹

A. Substantial Product Hazards and Remedial Actions

Under Section 15 of the CPSA, 15 U.S.C. § 2064, if the Commission determines that a product presents a substantial product hazard, it may order a manufacturer, distributor, or retailer to provide notice of the hazard and take remedial actions. The CPSA defines “substantial product hazard” as “(1) a failure to comply with an applicable consumer product safety rule under [the CPSA] or a similar rule, regulation, standard, or ban under any other Act enforced by the Commission which creates a substantial risk of injury to the public, or (2) a product defect which (because of the pattern of defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise) creates a substantial risk of injury to the public.” 15 U.S.C. § 2064(a). Section 15(c) and (d) of the CPSA, 15 U.S.C. § 2064(c) and (d), prescribe the notice and remedies the Commission may order.

¹ U.S. Consumer Product Safety Commission, *Annual Performance Report, Fiscal Year 2023*, at i (March 11, 2024), <https://www.cpsc.gov/content/FY-2023-Annual-Performance-Report-APR>.

The imposition of remedies under Section 15 triggers additional consumer protections under the CPSA. Section 19(a)(2)(B) and (5) of the CPSA prohibit any person from (1) selling, offering for sale, manufacturing for sale, distributing in commerce, or importing into the United States any consumer product that is “subject to voluntary corrective action taken by the manufacturer, in consultation with the Commission, of which action the Commission has notified the public or if the seller, distributor, or manufacturer knew or should have known of such voluntary corrective action” or (2) failing to comply with an order issued under Section 15(c) or (d) of the CPSA. 15 U.S.C. § 2068(a)(2)(B) and (5). In the absence of a Section 15(c) or (d) order or voluntary corrective action in conjunction with CPSC, there is no legal barrier to the continued sale and resale of potentially hazardous products.

1. Notification to Protect the Public

Section 15(c)(1) of the CPSA, 15 U.S.C. § 2064(c)(1), authorizes the Commission to promote safety by, among other actions, ordering public notice if it determines that notification is required to adequately protect the public from a substantial product hazard. A Section 15(c) order may require the manufacturer, distributor, or retailer to take any one or more of the following actions:

- A. To cease distribution of the product.
- B. To notify all persons that transport, store, distribute, or otherwise handle the product, or to which the product has been transported, sold, distributed, or otherwise handled, to cease immediately distribution of the product.
- C. To notify appropriate State and local public health officials.
- D. To give public notice of the defect or failure to comply, including posting clear and conspicuous notice on its Internet website, [and] providing notice to any third party Internet website on which such manufacturer, retailer, distributor, or licensor has placed the product for sale . . .

- E. To mail notice to each person who is a manufacturer, distributor, or retailer of such product.
- F. To mail notice to every person to whom the person required to give notice knows such product was delivered or sold.

Id.

The CPSA requires the Commission to specify the form and content of any notice required under a Section 15(c) order. *Id.* The statute further requires the Commission to establish, by rule, guidelines outlining a “uniform class of information” to be included in notices required in a Section 15(c) order. 15 U.S.C. § 2064(i)(1) (Requirements for Recall Notices). Recall notices must include the items of information (such as information about the product, any injuries or deaths associated with it, and the available recall remedies) that are listed in Section 15(i) of the CPSA, 15 U.S.C. § 2064(i), and the Commission’s implementing regulations at 16 C.F.R. §§ 1115.23-1115.29, unless the Commission determines that one or more of the recall notice requirements is unnecessary or inappropriate under the circumstances. 15 U.S.C. § 2064(i).

2. *Actions in the Public Interest*

Section 15(d)(1) of the CPSA, 15 U.S.C. § 2064(d)(1), authorizes the Commission to require the manufacturer, distributor, or retailer to provide notice as required by Section 15(c) and “to take any one or more of the following actions it determines to be in the public interest:”

- A. To bring such product into conformity with the requirements of the applicable rule, regulation, standard, or ban or to repair the defect in such product.
- B. To replace such product with a like or equivalent product which complies with the applicable rule, regulation, standard, or ban or which does not contain the defect.
- C. To refund the purchase price of such product (less a reasonable allowance for use, if such product has been in the possession of a consumer for one year or more (i) at the time of public notice under subsection (c), or (ii) at the time the

consumer receives actual notice of the defect or noncompliance, whichever first occurs).

15 U.S.C. § 2064(d)(1)(A)-(C). The Section 15(d) order also must require “the person to whom it applies” to submit a plan for approval by the Commission, to implement the Commission’s order with regard to remedies. 15 U.S.C. § 2064(d)(2).

B. Section 3 Definitions: Distribution in Commerce and Distributor

Complaint Counsel alleges that under the CPSA, Amazon acted as a distributor that “distributes [the enumerated products] in commerce.” Compl. at ¶ 6, Dkt. 1. Section 3(a) of the CPSA, 15 U.S.C. § 2052(a), defines the relevant terms as follows:

(7) DISTRIBUTION IN COMMERCE.—The terms “to distribute in commerce” and “distribution in commerce” mean to sell in commerce, to introduce or deliver for introduction into commerce, or to hold for sale or distribution after introduction into commerce.

(8) DISTRIBUTOR.—The term “distributor” means a person to whom a consumer product is delivered or sold for purposes of distribution in commerce, except that such term does not include a manufacturer or retailer of such product.

Amazon maintains that it is not a distributor under the CPSA, but rather a third-party logistics provider that falls within Section 3(b). Amazon’s Appeal Brief at 13-29, Dkt. 127.

Section 3(b), 15 U.S.C. § 2052(b), provides:

COMMON CARRIERS, CONTRACT CARRIERS, AND FREIGHT FORWARDERS.—A common carrier, contract carrier, third-party logistics provider, or freight forwarder shall not, for purposes of this Act, be deemed to be a manufacturer, distributor, or retailer of a consumer product solely by reason of receiving or transporting a consumer product in the ordinary course of its business as such a carrier or forwarder.

Third-party logistics provider is defined as:

(16) THIRD-PARTY LOGISTICS PROVIDER.—The term “third-party logistics provider” means a person who solely receives, holds, or otherwise transports a consumer product in the ordinary course of business but who does not take title to the product.

15 U.S.C. § 2052(a)(16).

II. Amazon’s Activities Giving Rise to this Case

A. The Fulfilled by Amazon Program

Amazon is a \$575 billion company² that operates the e-commerce website, Amazon.com. Answer at ¶ 7, Dkt. 2; Decl. of Lauren Ann Shrem at ¶ 5, Dkt. 17. Amazon sells some consumer products on Amazon.com as a retailer. Answer at ¶ 10, Dkt. 2. Amazon also allows what it calls “third-party sellers”³ to list and sell consumer products on Amazon.com through Amazon’s Fulfilled by Amazon program.⁴ *Id.* at ¶¶ 7, 10, Dkt. 2. Fulfilled by Amazon participants pay Amazon fees for the services that Amazon provides through its Fulfilled by Amazon program. Amazon’s Resp. to Compl. Counsel’s SUMF at ¶¶ 18, 19, Dkt. 16.

Under its agreements and service terms with Fulfilled by Amazon participants, Amazon retains significant control over products sold through the Fulfilled by Amazon program and is the point of contact for the consumer. Fulfilled by Amazon participants deliver their products to

² Amazon.com, Inc.: *Annual Report, Letter to Shareholders*, (2023), https://s2.q4cdn.com/299287126/files/doc_financials/2024/ar/Amazon-com-Inc-2023-Annual-Report.pdf (“In 2023, Amazon’s total revenue grew 12% year-over-year . . . from \$514B to \$575B.”). The Commission takes official notice of this figure under 16 C.F.R. § 1025.43(d).

³ The Commission refers to Amazon’s “third-party sellers” as “Fulfilled by Amazon participants” or “program participants.” The Commission is not making any determination regarding the legal status of these entities.

⁴ In addition to Amazon’s retail sales and Fulfilled by Amazon program, Amazon’s Merchant Fulfilled Network program allows “third-party sellers” that sell products on Amazon.com to store their products and fulfill orders on their own. Answer at ¶ 10, Dkt. 2. This matter concerns products sold through the Fulfilled by Amazon program.

Amazon’s fulfillment centers,⁵ not directly to consumers. *Id.* at ¶¶ 7, 8, 11, Dkt. 16. Upon “confirm[ing] receipt of delivery” at a fulfillment center, Amazon will store the product, until sold, for “deliver[y] to customers.” Decl. of Diane Ramirez at ¶ 4, Ex. A, Fulfilled by Amazon Service Terms at F-3.1., F-4, Dkt. 18; Amazon’s Resp. to Compl. Counsel’s SUMF at ¶ 11, Dkt. 16. Because Amazon keeps the products in its fulfillment centers pending sale, Amazon charges monthly and long-term storage fees to its Fulfilled by Amazon participants. Amazon’s Resp. to Compl. Counsel’s SUMF at ¶ 19, Dkt. 16. Amazon also provides Fulfilled by Amazon participants with services that include: using technology to track, move, and ship products to customers; delivering or arranging for delivery to customers; and processing product returns. Answer at ¶¶ 11, 16, Dkt. 2. When a customer purchases the product on Amazon.com, Amazon locates the product in its fulfillment centers so that it can fulfill the order and ship the product to the customer. Amazon’s Resp. to Compl. Counsel’s SUMF at ¶ 11, Dkt. 16; Answer at ¶ 11, Dkt. 2.

Amazon may combine multiple products ordered by a customer from different Fulfilled by Amazon participants in one shipment from Amazon. Amazon’s Resp. to Compl. Counsel’s SUMF at ¶ 12, Dkt. 16. Amazon also may commingle inventory from Fulfilled by Amazon participants and move the products among its facilities. Decl. of Diane Ramirez at ¶ 4, Ex. A, Fulfilled by Amazon Service Terms at F-4, Dkt. 18. If a particular product is not being held in an Amazon distribution center, Amazon does not allow that product to be purchased on Amazon.com. Transcript of Oral Argument at 150-51, In the Matter of Amazon.com, Inc. (Dec. 14, 2023) (CPSC Dkt. No. 21-2).

⁵ During oral argument, Amazon referred to the places it holds products as “distribution centers.” Transcript of Oral Argument at 28, In the Matter of Amazon.com, Inc., (Dec. 14, 2023) (CPSC Dkt. No. 21-2). This Decision and Order uses the terms “fulfillment centers” and “distribution centers” interchangeably.

Amazon's role does not end upon product receipt, storage, and fulfillment.⁶ Amazon also directs and controls payment and pricing of Fulfilled by Amazon products. Amazon processes customer payments by charging the payment instrument designated in its customer's account and remits the agreed-upon monies to the Fulfilled by Amazon participant minus its program fees. Amazon's Resp. to Compl. Counsel's SUMF at ¶ 20, Dkt. 16. In addition, Amazon applies its so-called Fair Pricing Policy to prices charged by Fulfilled by Amazon participants using its program. *Id.* at ¶ 21, Dkt. 16. The Fair Pricing Policy allows Amazon to take action against Fulfilled by Amazon participants whose pricing practices may, in Amazon's view, harm customer trust. *Id.*, Dkt. 16. Such practices "include, but are not limited to: . . . setting a price on a product or service [on Amazon.com] that is significantly higher than recent prices offered on or off Amazon." *Id.*, Dkt. 16.

Amazon's role also extends to customer service. Amazon controls communications with its customers, mandating that Fulfilled by Amazon participants contact customers exclusively through the Amazon platform. *Id.* at ¶ 15, Dkt. 16. Amazon also requires program participants to agree that Amazon will handle all aspects of customer service. *Id.* at ¶ 14, Dkt. 16. The Fulfilled by Amazon Service Terms summarize the breadth of Amazon's control once a customer receives a product through the program:

We will be responsible for all customer service issues relating to packaging, handling and shipment, and customer returns, refunds, and adjustments related to Amazon Fulfillment Units. We will determine whether a customer will receive a refund, adjustment, or replacement for any Amazon Fulfillment Unit and we will require you to reimburse us where we determine you have responsibility in accordance with the Agreement (including these [Fulfilled by Amazon] Service Terms and the Program Policies).

⁶ According to Amazon, "fulfillment" includes such activities as "tracking goods, packaging, [and] shipping." *Id.* at 28:5-28:9.

Decl. of Diane Ramirez at ¶ 4, Ex. A, Fulfilled by Amazon Service Terms at F-8.2, Dkt. 18. The Fulfilled by Amazon Service Terms further explain that if the wrong item was delivered or the item was damaged, lost, or missing, Amazon will, “at [its] option, . . . ship a replacement Unit to the customer and reimburse [the Fulfilled by Amazon participant] . . . or . . . process a refund to the customer and reimburse [the Fulfilled by Amazon participant].” *Id.* at F-8.3, Dkt. 18.

Similarly, if the customer returns a Fulfilled by Amazon product to Amazon, Amazon, not the program participant, determines whether to dispose of the product or place it back in the participant’s inventory. *Id.* at F-8.4, Dkt. 18. At its election, Amazon may also transfer a returned product to its “Amazon Warehouse” program for later sale by Amazon. Answer at ¶ 14, Dkt. 2.⁷

In addition, Amazon requires Fulfilled by Amazon participants to coordinate with and reimburse Amazon for product recalls. The Fulfilled by Amazon Service Terms require program participants to “promptly notify” Amazon “of any recalls or potential recalls, or safety alerts of any of Your Products” and to “cooperate and assist [Amazon] in connection with” such recalls or safety alerts. Decl. of Diane Ramirez at ¶ 4, Ex. A, Fulfilled by Amazon Service Terms at F-7.4, Dkt. 18. Fulfilled by Amazon participants are “responsible for all costs and expenses” that they or Amazon “incur in connection with any recall or potential recall or safety alerts.” *Id.* at F-7.4, Dkt. 18. For example, if Amazon chooses to provide a customer with “a refund, adjustment or replacement,” it has the right to reimbursement from the Fulfilled by Amazon participant. *Id.* at F-8.2, Dkt. 18. And it may obtain that reimbursement by reversing any credits to the Fulfilled by Amazon participant’s bank account or charging their credit card. *Id.* at ¶ 2, Dkt. 18.

⁷ Through the “Amazon Warehouse” program, “Amazon sells used, pre-owned, or open box products.” Amazon’s SUMF at 2, n.6, Dkt. 75. As noted below, Amazon sold a small number of the hazardous products at issue in this case through the Amazon Warehouse program, after they were returned to Amazon. Answer at 23, ¶ 3, Dkt. 2.

From pricing and payment processing to packaging, delivery, and tracking on the front end to post-sale customer service, returns, refunds, and recalls on the back end, Amazon exerts extensive control over products sold through its Fulfilled by Amazon program.

B. The Hazardous Consumer Products

At issue in this matter are three categories of products purchased by consumers on Amazon's website (Amazon.com) between approximately 2018 and 2021. *See* Compl. at ¶¶ 25, 34, 43, Dkt. 1; *see also* Answer at ¶¶ 25, 34, 43, Dkt. 2; Amazon's Resp. to Compl. Counsel's SUMF at ¶¶ 1, 13, 22, 27, 44, 48, Dkt. 92. A total of approximately 418,818 units of these products were sold on Amazon.com through the Fulfilled by Amazon program to approximately 376,009 Amazon.com purchaser accounts. Amazon's Resp. to Compl. Counsel's SUMF at ¶ 4, Dkt. 16; Decl. of Lauren Ann Shrem at ¶ 8, Dkt. 17.

The first category of products is children's sleepwear garments, specifically nightgowns and bathrobes that were sold on Amazon.com through the Fulfilled by Amazon program for approximately \$15 to \$30. Compl. at ¶ 26, Dkt. 1; Answer at ¶ 26, Dkt. 2; Amazon's Resp. to Compl. Counsel's SUMF at ¶ 1, Dkt. 92.⁸ After purchasing samples on Amazon.com, CPSC staff tested the samples and found that they do not meet the flammability requirements for children's sleepwear as required under the Flammable Fabrics Act (FFA), 15 U.S.C. §§ 1191-1204, and 16 C.F.R. Parts 1615-16. Amazon's Resp. to Compl. Counsel's SUMF at ¶¶ 15, 16, Dkt. 92. Serious injuries or death can occur if the garments ignite while being worn by children. *Id.* at ¶ 20, Dkt. 92.

⁸ The children's sleepwear garments include: (1) HOYMN Little Girl's Lace Cotton Nightgowns, Kids Long-Sleeve Sleep Shirts Princess Sleepwear for Toddlers, 2-15 Years; (2) IDGIRLS Kids Animal Hooded Soft Plush Flannel Bathrobes for Girls Boys Sleepwear; (3) Home Sweet Boy's Plush Fleece Robe Shawl Skull and Hooded Spacecraft Printed Soft Kids Bathrobe for Boy; and (4) Taiycyrgan Little Girl's Coral Fleece Bathrobe Unisex Kids Robe Pajamas Sleepwear. Amazon's Resp. to Compl. Counsel's SUMF at ¶ 3, Dkt. 92.

The second category of products is carbon monoxide (CO) detectors equipped with alarms intended to alert consumers to the presence of deadly carbon monoxide gas.⁹ *Id.* at ¶ 22, Dkt. 92. The CO detectors were sold on Amazon.com through the Fulfilled by Amazon program for between \$9 and \$13. Compl. at ¶¶ 29, 35, Dkt. 1; Answer at ¶¶ 29, 35, Dkt. 2; Amazon’s Resp. to Compl. Counsel’s SUMF at ¶¶ 27, 41, Dkt. 92. CPSC staff testing of samples of the CO detectors revealed that the detectors “fail to detect carbon monoxide gas and fail to alarm in its presence.” Compl. Counsel’s SUMF at ¶ 30, Dkt. 80. When CO detectors fail to operate or alarm, consumers relying on those detectors risk exposure to dangerous levels of CO accumulation putting lives at risk. Amazon’s Resp. to Compl. Counsel’s SUMF at ¶ 40, Dkt. 92. Human exposure to CO gas may cause severe injury, including tissue damage and death. *Id.* at ¶ 41, Dkt. 92.¹⁰ Properly-functioning CO detectors are intended to alert people to the presence of CO gas because it is odorless and colorless. *Id.* at ¶¶ 38, 40, Dkt. 92.

The third category of products is hair dryers that lack integral immersion protection, which protects the user from electrocution if the hair dryer is immersed in water.¹¹ *Id.* at ¶¶ 44, 53, Dkt. 92. The hair dryers were sold on Amazon.com through the Fulfilled by Amazon program for approximately \$20 to \$70. Compl. at ¶ 44, Dkt. 1; Answer at ¶ 44, Dkt. 2; Amazon’s Resp. to Compl. Counsel’s SUMF at ¶ 48, Dkt. 92. Hand-supported hair dryers that do not

⁹ The carbon monoxide detectors include: (1) the CD01 carbon monoxide detector manufactured by WJZXTEK; (2) the ME2-CO carbon monoxide detector and ME2-CO and ss4 carbon monoxide detector manufactured by Zhenzhou Winsen Electronics Technology Company, LTD; and (3) the carbon monoxide detector manufactured by BQQZHZ. *Id.* at ¶ 23, Dkt. 92.

¹⁰ “More than 150 people in the United States die every year from accidental non-fire related CO poisoning associated with consumer products, including generators.” *Id.* at ¶ 39, Dkt. 92.

¹¹ The hair dryers include 36 samples with the following seller or manufacturer identification: OSEIDOO, Aiskki, Raxurt Store, LEMOCA, Xianming, BEAUTIKEN (2 samples), VIBOOS (2 samples), SARCCH, Bongtai, Bvser Store, TDYJWELL, Bownyo, Romancelink, BZ, Techip (2 samples), LetsFunny, SUNBA YOUTH Store/Naisen, OWEILAN, Surelang Store, GEPORAY, Miserwe, ADTZYLD, KIPOZI, KENLOR, Shaboo Prints, ELECDOLPH, LANIC, Songtai, tiamo airtrack, Ohuhu, Nisahok, Dekugaa Store, and Admitrack. *Id.* at ¶ 45, Dkt. 92.

provide integral immersion protection in compliance with the requirements of Commission rules are a “substantial product hazard” under Section 15(a) of the CPSA, 15 U.S.C. § 2064(a).¹² Amazon’s Resp. to Compl. Counsel’s SUMF at ¶ 52, Dkt. 92 (citing 15 U.S.C. § 2064(j) and 16 C.F.R. § 1120.3).¹³ CPSC staff obtained samples of the hair dryers by purchasing them on Amazon.com. *Id.* at ¶ 50, Dkt. 92. CPSC staff tested these samples and determined that the hair dryers are “hand-supported” and “lack the required immersion protection device.” Compl. Counsel’s SUMF at ¶ 51, Dkt. 80. These products present a significant electric shock and electrocution hazard to users and can ultimately lead to death. Amazon’s Resp. to Compl. Counsel’s SUMF at ¶¶ 53, 54, Dkt. 92.

C. Amazon’s Response to the Product Hazards

After testing the children’s sleepwear, CO detectors, and hair dryers, CPSC staff issued Notices of Violation (NOVs) to Amazon regarding the products’ hazards. Compl. Counsel’s SUMF at ¶¶ 5, 7, 9, 11, 24-25 and Ex. 1, Decl. of John Eustice in Support of Compl. Counsel’s Mot. for Summ. Dec. at ¶ 17, Dkt. 80. Instead of recalling the products,¹⁴ Amazon sent messages by email and through the “Message Center” of a purchaser’s Amazon.com account to each customer who purchased a relevant product. Compl. Counsel’s Resp. to Amazon’s SUMF at ¶¶ 17, 37, 50, 70, 86, 100, 110, Dkt. 87; Affidavit of Renee Morelli-Linen at ¶ 15 and Ex. F, Dkt.

¹² See 16 C.F.R. § 1120.3(a) (deeming a substantial product hazard hand-supported hair dryers that are not in compliance with Section 5 of Underwriters Laboratories (UL) Standard for Safety for Household Electric Personal Grooming Appliances, UL 859 (10th edition) or Section 6 of UL Standard for Safety for Commercial Electric Personal Grooming Appliances, UL 1727 (4th edition)).

¹³ CPSC has determined that the UL standards are “very effective in reducing deaths and electric shock injuries due to hair dryer immersion or contact with water.” Substantial Product Hazard List: Hand-Supported Hair Dryers, 76 Fed. Reg. 37636, 37640 (June 28, 2011); Amazon’s Resp. to Compl. Counsel’s SUMF at ¶ 53, Dkt. 92.

¹⁴ “The objectives of a recall include locating the recalled products, removing the recalled products from the distribution chain and from consumers, and communicating information to the public about the recalled product and the remedy offered to consumers.” Guidelines and Requirements for Mandatory Recall Notices: Notice of Proposed Rulemaking, 74 Fed. Reg. 11883, 11884 (Mar. 20, 2009).

11. The subject line of each message read either: “Attention: Important safety notice about your past Amazon order” or “Important safety notice about your past Amazon order.” Compl. Counsel’s Resp. to Amazon’s SUMF at ¶¶ 18, 51, 70, 86, 100, Dkt. 87. Each message began with “Dear Amazon Customer.” *Id.* at ¶¶ 19, 71, 87, 101, Dkt. 87.

Despite conclusive testing that the products were hazardous, Amazon’s messages advised the customer only “of a *potential safety issue* that *may impact* your Amazon purchase(s).” *Id.* at ¶¶ 19, 71, 87, 101, Dkt. 87 (emphasis added). The children’s sleepwear message further stated that the product “*may fail* to meet the federal standard for the flammability of children’s sleepwear, potentially posing a risk of burn injuries to children.” *Id.* at ¶ 71, Dkt. 87 (emphasis added). Likewise, the hair dryer message stated that the product “*may fail* to have mandatory immersion protection, posing a risk of electric shock if the hair dryer comes in contact with water,” and the CO detector message stated that the product “*may fail* to alarm on time, posing a risk of exposure to potentially dangerous levels of Carbon Monoxide.” *Id.* at ¶¶ 87, 101, Dkt. 87 (emphasis added).

Amazon’s messages provided no way for its customers to return the product or show proof of destruction but instead instructed them that “[t]here is no need for you to return the product” and that they should “dispose” of it. *Id.* at ¶¶ 19, 71, 87, 101, Dkt. 87. The messages then explained that Amazon is providing a “gift card”¹⁵ to consumers through their Amazon.com accounts. *Id.*, Dkt. 87.¹⁶

¹⁵ The Commission finds that in crediting their Amazon.com accounts, Amazon did not provide refunds within the meaning of Section 15(d) of the CPSA. *See* Discussion Section III.B.

¹⁶ Each email and Message Center message contained a “Your Account” link for the purchaser to view the available gift card balance and verify that the credit for the Subject Product purchase price plus shipping and tax had been applied to their account. Decl. of Lauren Ann Shrem at ¶¶ 13-14, Dkt. 91. Amazon represents that it provided Amazon.com credits of more than \$20 million to purchasers for the 418,818 products sold. Compl. Counsel’s Resp. to Amazon’s SUMF at ¶ 112, Dkt. 87; Decl. of Lauren Ann Shrem at ¶ 8, Dkt. 17.

Amazon’s messages did not contain an easily accessible photograph of the relevant product. Instead, purchasers who wanted to see what the product looked like had to click on the “order ID” number at the top of each message, which appeared as a clickable hyperlink. Decl. of Lauren Ann Shrem at ¶ 9, Dkt. 91. Upon clicking on this hyperlink, a purchaser would be redirected to a page under the “Your Orders” section of their account on Amazon.com, where a purchaser could view an icon photograph of the product that measured 90 x 90 pixels. *Id.* at ¶ 10, Dkt. 91; Amazon Letter Following Oral Arg. at 3, Dkt. 103.

Amazon’s messages also lacked readily-accessible information regarding the amount the customer paid for the product and the purchase date. Once again, a purchaser who needed this information to identify the product had to click on the “order ID” appearing in the message, which would redirect them to the “Your Orders” section of their account. Decl. of Lauren Ann Shrem at ¶¶ 9, 10, Dkt. 91.¹⁷

Amazon instructed customers with questions “not [to] reply to this message” because “it was sent from a notification-only address that cannot accept incoming e-mail.” Decl. of Joshua Gonzalez, at ¶ 34, Ex. 29, Dkt. 76.

Amazon issued messages only to its customers who purchased the products on Amazon.com. Compl. Counsel’s Resp. to Amazon’s SUMF at ¶¶ 17, 37, 50, 70, 86, 100, 110, Dkt. 87; Affidavit of Renee Morelli-Linen at ¶ 15 and Ex. F, Dkt. 11. Amazon told its customers who “purchased [the product] for someone else” to “notify the recipient immediately and let them know they should dispose of it.” Compl. Counsel’s Resp. to Amazon’s SUMF at ¶¶ 19, 71, 87, 101, Dkt. 87.

¹⁷ A purchaser’s order history remains available for viewing, for an indefinite period, on Amazon.com. Decl. of Lauren Ann Shrem at ¶ 12, Dkt. 91.

Amazon did not track the number of messages that were opened. Transcript of Oral Argument at 51, *In the Matter of Amazon.com, Inc.* (Dec. 14, 2023) (CPSC Dkt. No. 21-2). Nevertheless, Amazon judged its actions to be “effective” because it sent messages to purchasers and credited their Amazon.com accounts. *Id.* at 51:8-51:10.

Amazon also sought to message and credit its customers who purchased children’s sleepwear garments under 20 other Amazon Standard Identification Numbers (ASINs), which Amazon uses to identify a particular item. Compl. Counsel’s Resp. to Amazon’s SUMF at n.4, Dkt. 87. The items in the 20 ASINs appeared to vary from the products identified in the NOV’s only by size, color, or print pattern. Decl. of Nicholas Griepsma in Support of Amazon’s Suppl. Br. on Remedies, Ex. 130, at 5, Dkt. 113.

Amazon removed the items identified by CPSC staff from Amazon.com and quarantined all units in its fulfillment centers. Compl. Counsel’s Resp. to Amazon’s SUMF at ¶¶ 5, 12-13, 32-33, 44-45, 63-64, 84-85, 94, 98-99, 107, 113, Dkt. 87; Amazon’s SUMF at 11, ¶ 11, Dkt. 16. As of September 23, 2022, none of the identified items is listed or available for purchase on Amazon.com. Amazon’s SUMF at ¶¶ 6, 27, 41, 78, 95, 108, 115, Dkt. 75. Amazon also prohibited Fulfilled by Amazon participants, or any other entity, from listing any of the ASINs corresponding to the identified items for sale on Amazon.com. Compl. Counsel’s Resp. to Amazon’s SUMF at ¶¶ 7, 28, 42, 61, 79, 96, 109, 116, Dkt. 87. Amazon, however, sold approximately 28 units of the CO detectors and approximately four units of the hair dryers through the “Amazon Warehouse” program. Answer at 23, ¶ 3, Dkt. 2.

Amazon has destroyed 45,785 units of the products identified in the Complaint. Compl. Counsel’s Resp. to Amazon’s SUMF at ¶ 119, Dkt. 87; Decl. of Lauren Ann Shrem at ¶¶ 18-19, Dkt. 77. Amazon has stated that as of September 23, 2022, six units of hair dryers remained at

Amazon's fulfillment centers and awaited destruction. Decl. of Lauren Ann Shrem at ¶ 21, Dkt. 77; *see also* Compl. Counsel's Resp. to Amazon's SUMF at ¶ 120, Dkt. 87.¹⁸

III. Procedural History

A. The Staff Complaint

On July 14, 2021, the Commission authorized Complaint Counsel to file an administrative complaint against Amazon. Record of Commission Action, U.S. Consumer Product Safety Commission, *Record of Commission Action: Vote to Issue Administrative Complaint Against Amazon.com* (July 14, 2021), available at <https://www.cpsc.gov/s3fs-public/RCA-Vote-to-Issue-Administrative-Complaint-Against-Amazon-com-07142021.pdf>. The Complaint alleges that “Amazon’s unilateral actions are insufficient to remediate the hazards posed by the Subject Products” and “[a] Section 15 order requiring Amazon to take additional actions in conjunction with the CPSC as a distributor is necessary for public safety.” Compl. at ¶¶ 50-51, Dkt. 1. On that same day, Complaint Counsel served the Complaint on Amazon. The Complaint requests that the Commission determine that, through the actions described: (1) Amazon is a distributor of consumer products under the CPSA; (2) the children’s sleepwear, CO detectors, and hair dryers are substantial product hazards under Section 15(a)(1), (a)(2), and/or (j) of the CPSA, 15 U.S.C. § 2064(a)(1), (a)(2), and/or (j); (3) public notification is required to adequately protect the public from the substantial product hazards created by the products; and

¹⁸ Amazon states that on August 8, 2022, more than one year after it issued the messages for the hair dryers, CO detectors, and children’s sleepwear, Amazon made a general change to Amazon.com by launching a new page called “Your Recalls and Product Safety Alerts.” Amazon’s Letter to Judge Patil at 2, n.2, Dkt. 103; *see also* Compl. Counsel’s Resp. to Amazon’s SUMF at ¶¶ 17, 37, 50, 86, 100, Dkt. 87. This page displays certain information, including the names of products purchased with the particular customer account that have been the subject of a recall or product safety alert; an icon showing a photograph of the product; the consumer’s purchase date; the date that the recall or safety alert was issued; and instructions to stop using the product. Amazon’s Letter to Judge Patil at 2-3, Dkt. 103. Information about the products identified in the Complaint is available to purchasers on their “Your Recalls and Product Safety Alerts” page on Amazon.com. *Id.* at 2, n.2, Dkt. 103.

(4) it is in the public interest to facilitate the return and destruction of the consumer products under Section 15(d)(1) of the CPSA, 15 U.S.C. § 2064(d)(1). *Id.* at 18-19, Dkt. 1.

Count I of the Complaint alleges that the children's sleepwear garments that Amazon distributed to its customers through the Fulfilled by Amazon program present a substantial product hazard under Section 15(a)(1) of the CPSA, 15 U.S.C. § 2064(a)(1), because they fail to meet the flammability requirements of the FFA, creating a substantial risk of injury to children. *Id.* at 16-17, Dkt. 1. Count II alleges that the CO detectors that Amazon distributed to its customers through the Fulfilled by Amazon program present a substantial product hazard under Section 15(a)(2) of the CPSA, 15 U.S.C. § 2064(a)(2), because their failure to detect and alert consumers to the presence of elevated levels of CO constitutes a defect that creates a substantial risk of injury to the public. *Id.* at 17, Dkt. 1. Count III alleges that the hair dryers that Amazon distributed to its customers through the Fulfilled by Amazon program present a substantial product hazard under Section 15(a) and (j) of the CPSA, 15 U.S.C. § 2064(a) and (j), because they fail to provide integral immersion protection in compliance with a voluntary safety standard adopted as mandatory by the Commission, presenting a significant electric shock and electrocution hazard to users. *Id.* at 17-18, Dkt. 1.

Alleging significant deficiencies with Amazon's unilateral attempt to address the product hazards, Complaint Counsel seeks a Commission order requiring Amazon to, among other measures: (1) cease distribution of the identified products; (2) issue a CPSC-approved direct notice to all purchasers and a CPSC-approved press release, as well as any other public notice documents or postings required by CPSC staff; and (3) encourage product return or destruction. *Id.* at 11-12, 18-19, Dkt. 1. To facilitate product return and destruction, Complaint Counsel also seeks an order requiring Amazon to: (1) refund the full purchase price to all purchasers,

conditioned on returning the products or providing proof of destruction; (2) destroy any returned products; and (3) provide monthly progress reports on this remedial action to the Commission.

Id. at 19-20, Dkt. 1.

B. Order on Motion to Dismiss and Motion for Summary Decision

Amazon's status as a "distributor" under the CPSA was adjudicated by ALJ James E. Grimes in the opening phase of the case.¹⁹ On October 13, 2021, Complaint Counsel moved for a partial summary decision limited to holding that Amazon is a "distributor" of the identified products under the CPSA. Compl. Counsel's Mot. for Partial Summ. Dec., Dkt. 9. Amazon moved to dismiss the Complaint or, in the alternative, for a summary decision in its favor. Amazon's Mot. to Dismiss or, In the Alternative, Cross-Mot. for Summ. Dec., Dkt. 14 and 15. Following oral argument on these motions, ALJ Grimes issued an Order on Motion to Dismiss and Motion for Summary Decision (Jan. 2022 Order). Dkt. 27.

ALJ Grimes concluded that, with respect to the products in the Fulfilled by Amazon program, Amazon met the requirements for being a "distributor" under the CPSA and did not fall within Section 3(b) of the CPSA. *Id.* at 27, Dkt. 27; *see also* 15 U.S.C. § 2052. Specifically, the ALJ found that Amazon "hold[s] [the product] for sale . . . after introduction into commerce" because Amazon stores products provided by Fulfilled by Amazon participants until a consumer orders the product on Amazon.com. Jan. 2022 Order at 25, Dkt. 27. The ALJ also found that Amazon "hold[s] [the product] for . . . distribution after introduction into commerce" because Amazon stores products until a consumer has ordered the product on Amazon.com, at which point Amazon delivers or arranges for delivery of the product. *Id.* at 25-26, Dkt. 27.

¹⁹ CPSC does not employ an Administrative Law Judge (ALJ) and therefore participates in the Administrative Law Judge Loan Program overseen by the U.S. Office of Personnel Management. Through that program, a duly appointed ALJ may be "detailed" to another agency. *See* 5 U.S.C. § 3344 and 5 C.F.R. § 930.208. The ALJ serves as the "Presiding Officer" pursuant to CPSC's Rules of Practice for Adjudicative Proceedings. 16 C.F.R. § 1025.3(i).

ALJ Grimes rejected Amazon’s assertion that, when it operates the Fulfilled by Amazon program, it is instead a “third-party logistics provider” under the CPSA, concluding that Amazon engages in activities that place it outside the statute’s definition of that term. *Id.* at 26, Dkt. 27. In support of that conclusion, he noted that Amazon: operates a website that “brings customers and third-party sellers together;” “provides round-the-clock customer service” that includes “process[ing] refunds and adjustments” of Fulfilled by Amazon products; maintains unilateral authority to decide whether a customer will receive a refund, adjustment, or replacement; and enforces its Fair Pricing Policy. *Id.* at 26-27, Dkt. 27.²⁰

C. Order Regarding Stipulations

Following the ALJ’s determination that Amazon was a distributor, on April 26, 2022, the Parties submitted a joint stipulation (Joint Stipulation) in which they agreed that the products identified in the Complaint met the requirements for a substantial product hazard. *Stip. of Parties* at 1, Dkt. 35. Specifically, the Parties stipulated before the ALJ that,

[f]or purposes of this proceeding, Amazon does not contest that the Subject Product children’s sleepwear garments, sold by third-party sellers and identified by Amazon Standard Identification Number (“ASIN”) in paragraph 21 of the Complaint . . . , were tested by the CPSC and did not meet the current flammability requirements for children’s sleepwear . . . , and therefore meet the requirements for a substantial product hazard under Section 15(a)(1) of the CPSA (15 U.S.C. § 2064(a)(1)).

Id. at ¶ 1, Dkt. 35. Similarly, the Parties stipulated that,

[f]or purposes of this proceeding, Amazon does not contest that the Subject Product carbon monoxide (“CO”) detectors, sold by third-party sellers and identified by ASIN in paragraph 30 of the Complaint . . . , failed to alarm within 15 minutes when subjected to 400 ppm of CO according to testing conducted by the CPSC, and therefore did not meet the [applicable] standards . . . , and thus meet the requirements for a substantial product hazard under Section 15(a)(2) of the CPSA (15 U.S.C. § 2064(a)(2)).

²⁰ Despite finding Amazon to be a distributor, the ALJ stated that Amazon cannot be ordered to provide refunds because it has already given credits to the affected customers. Order on Motion to Dismiss and Motion for Summary Dec. (Jan. 2022 Order) at 21, Dkt. 27. A subsequent ALJ considered this analysis to be *dicta*. *Supra* n.22.

Id. at ¶ 2, Dkt. 35. Lastly, the Parties stipulated that,

[f]or purposes of this proceeding, Amazon does not contest that the Subject Product hair dryers, sold by third-party sellers and identified by ASIN in paragraph 39 of the Complaint, . . . were evaluated by the CPSC, . . . found not to contain an immersion protection device integral to the power cord, and therefore meet the requirements for a substantial product hazard under Sections 15(a)(2) and (j) of the CPSA (15 U.S.C. §§ 2064(a)(2) and (j)).

Id. at ¶ 3, Dkt. 35.

On May 10, 2022, ALJ Grimes issued an Order Regarding Stipulations, in which he accepted the stipulations. Order Reg. Stip., Dkt. 37.

D. Order on Summary Decision Motions

To resolve the remaining issues pertaining to the appropriate remedies, the Parties filed motions for summary decision on September 23, 2022. Dkt. 74-80. Following oral argument, ALJ Jason S. Patil²¹ issued an Order on Summary Decision Motions, denying Amazon’s motion and granting in part, but denying in part, Complaint Counsel’s motion (May 2023 Order). Dkt. 109.

ALJ Patil concluded that the products present a substantial product hazard under Section 15 of the CPSA. May 2023 Order at 13-15, Dkt. 109. He determined that a Section 15(c) order requiring Amazon to notify Fulfilled by Amazon participants to cease distribution, issue direct notice to purchasers, and post notices on Amazon.com and Amazon’s social media accounts is required to adequately protect the public from the substantial product hazards presented by the products, and that requiring Amazon to undertake certain remedies listed in CPSA Section 15(d) is in the public interest. *Id.* at 27-29, 31-47, Dkt. 109. ALJ Patil rejected Amazon’s argument that

²¹ On September 10, 2022, ALJ Grimes departed from the U.S. Securities and Exchange Commission (SEC) and, accordingly, from this adjudication. Following an interim appointment of ALJ Carol Fox Foelak, ALJ Patil became the presiding officer on December 5, 2022. All three ALJs were on loan to CPSC from SEC.

its decision to credit purchasers' Amazon.com accounts precludes a refund order. *Id.* at 39-43, Dkt. 109. According to ALJ Patil, Section 15 refunds (or replacements), conditioned upon return of a product or proof of its disposition, “represent an appropriate remedy to remove those [products] that remain in the marketplace.”²² *Id.* at 42-43, Dkt. 109. ALJ Patil also disagreed with Amazon’s argument that its prior notices to consumers make additional notices pursuant to CPSA Section 15 unnecessary, finding that Amazon’s notices did not comply with the statutory and regulatory requirements for notice under Section 15. *Id.* at 31-32, Dkt. 109. The ALJ ordered Amazon immediately to cease distribution of the products. *Id.* at 47 ¶ 1, Dkt. 109. He also ordered the Parties to brief their recommended scope of various remedies including notice, refund or replacement, and monitoring. *Id.* at 31-48, Dkt. 109.

E. Initial Decision and Order on Remedies

On July 10, 2023, ALJ Patil issued an Initial Decision and Order on Remedies “incorporat[ing] the findings and conclusions made in the January 2022 and May 2023 orders” of ALJs Grimes and Patil, respectively. Initial Dec. and Order on Remedies at 1, Dkt. 119. ALJ Patil found that the “Subject Products” present a substantial product hazard under the CPSA. *Id.* at 13, Dkt. 119. The ALJ defined the “Subject Products” as “those specifically identified by ASIN in the Complaint—as stipulated by the Parties—and in Amazon Exhibit 130,” “having only variations in size, color, and print pattern.”²³ *Id.* at 3 and 13, Dkt. 119.

²² ALJ Patil considered ALJ Grimes’s analysis on the issue of refunds, *supra* n.20, to be *dicta*. See Order on Summary Dec. Motions (May 2023 Order) at 42, n.36, Dkt. 109.

²³ Amazon’s Exhibit 130 is an excerpt from Amazon’s Supplemental Objections and Responses to Complaint Counsel’s Interrogatory Nos. 16 and 17, served on June 15, 2022. Decl. of Nicholas Griepsma in Support of Amazon’s Suppl. Br. on Remedies, Ex. 130, at 1, Dkt. 113. Amazon states in Exhibit 130 that the HOYMN products were identified by CPSC in NOV’s and the Complaint with the wrong ASIN. *Id.* at 3-4. Amazon confirmed that the correct ASIN for the HOYMN products was ASIN B0743BM1NV (not ASIN B074V558SB, as identified in the NOV and Complaint). *Id.* at 4.

As discussed above, Amazon had previously messaged each purchaser and credited their Amazon.com account. The ALJ, however, determined that these measures were deficient because the messages lacked information mandated under Section 15(i)(2) of the CPSA and 16 C.F.R. § 1115.27, Amazon did not provide any public notice of the hazards, and Amazon did not take any steps to motivate consumers to remove the hazardous products from their homes. May 2023 Order at 31-32, 40, Dkt. 109. To remedy Amazon's distribution of the products and in furtherance of the public interest, the ALJ ordered Amazon to undertake several actions pursuant to CPSA Section 15(c) and (d), including: (1) immediately ceasing distribution of the products and notifying all third parties to immediately cease such distribution; (2) sending two rounds of email notifications to original purchasers; (3) posting certain recall notices on specific Amazon.com pages, on each original purchaser's Amazon.com page, and on Amazon's primary social media accounts; (4) refunding consumers the purchase price of the products upon receipt of the product or verification of product destruction (or replacing the product, in the case of the CO detectors, upon return); (5) submitting to the Commission Monthly Progress Reports related to the recalls of each of the three categories of products; and (6) maintaining records of its actions in this matter for five years after the service of the Order so that Complaint Counsel can monitor compliance with the Order. Initial Dec. and Order on Remedies at 13-17, Dkt. 119. The ALJ prescribed the recall notices, attached to the Initial Decision and Order on Remedies at Exhibits A through D. *Id.* at 18-60, Dkt. 119.

F. Appeals to the Commission

Pursuant to 16 C.F.R. § 1025.53, both Parties filed Notices of Intent to Appeal the Initial Decision and Order on Remedies, Dkt. 120 and 121, and perfected their appeals by filing Appeal Briefs. Dkt. 125, 127. Briefing concluded on October 18, 2023, after the Commission granted a

14-day extension for Reply Briefs on Amazon’s motion. Dkt. 132-34. On December 14, 2023, the Parties participated in oral argument before the Commission.²⁴

STANDARD OF REVIEW

On appeal, the Commission “shall, to the extent necessary or desirable, exercise all the powers which it could have exercised if it had made the Initial Decision.” 16 C.F.R.

§ 1025.55(a). Thus, the Commission conducts a *de novo* review, “consider[ing] the record as a whole or such parts of the record as are cited or as may be necessary to resolve the issues

²⁴ Seven months after briefing concluded in this matter, Amazon sent a letter regarding a Freedom of Information Act (FOIA) request that it had previously submitted seeking opinions and orders issued in Commission adjudications. May 21, 2024 Letter at 1, 7, Dkt. 140. Although the CPSC Secretary added Amazon’s letter to the docket in this matter at Amazon’s request, the letter concerns a separate FOIA matter. Under 5 U.S.C. § 552(a)(6)(A)(ii) and (a)(6)(C)(i) and 16 C.F.R. § 1015.7(f), Amazon could have sought judicial relief as early as June 2023 when, it states, it did not receive a response to its May 19, 2023 appeal of its FOIA request. May 21, 2024 Letter at 4 and Ex. F, Dkt. 140. Amazon, however, failed to seek such relief.

The Commission does not rely on any adjudicative decision or order that was not publicly available. This Decision and Order cites the following three adjudications, all of which were available to Amazon: (1) the Final Decision and Order in *In the Matter of Zen Magnets, LLC*, CPSC Dkt. No. 12-2 (available on the Commission’s adjudicative proceedings webpage at <https://www.cpsc.gov/s3fs-public/pdfs/recall/lawsuits/abc/163--2017-10-26%20Final%20Decision%20and%20Order.pdf> and on Westlaw at 2017 WL 11672449); (2) the Decision and Order in *In the Matter of Relco, Inc.*, CPSC Dkt. No. 74-4 (filed on the public docket at Docket Number 80, Complaint Counsel’s Statement of Undisputed Material Facts, Exhibit 1- Declaration of John Eustice, Exhibit EE); and (3) the Opinion and Order in *In the Matter of Dye and Dye*, CPSC Dkt. No. 88-1 (available on Westlaw at 1989 WL 435534).

While unclear, to the extent that Amazon is trying to raise this FOIA issue in the instant adjudication, those arguments are waived. Amazon did not reference in its Appeal Brief the information described in the May 21, 2024 letter or assert any arguments regarding this information. 16 C.F.R. § 1025.53(b). Nor did Amazon move pursuant to 16 C.F.R. § 1025.23(b) to add to the record in this matter any information described in that letter, including previous adjudicative decisions that the agency has been uploading to its website since January 2024, *see* May 21, 2024 Letter at 4, Dkt. 140, and information provided to Amazon in response to its May 21, 2024 Letter. *See* May 24, 2024 Letter, available at <https://www.cpsc.gov/s3fs-public/2024-05-24-CPSC-FOIA-22-F-00391-23-A-00001-Supplemental-Response.pdf?VersionId=4HFdiJN5Vn71XwVAWq2rhM2Cv9VUdk.U>, and June 21, 2024 Letter, available at https://cpsc.gov/s3fs-public/CPSC_22-F-00391_Supplemental_Response_20240621.pdf?VersionId=eW6Rxlmn6Ewz4PSa6M97ojzs6KQpcRYz (FOIA Response Letters). The Commission takes official notice of the FOIA Response Letters and their contents (453 documents) under 16 C.F.R. § 1025.43(d). Amazon also has not petitioned the Commission to amend its briefs or request supplemental oral argument.

Finally, there is no evidence in the record that Amazon pursued the documents requested through FOIA during discovery. *See* June 25, 2024, Letter from Complaint Counsel at 2, Dkt. 141 (stating that Amazon “never specifically sought [prior Commission orders or opinions] in discovery in this matter” and that in its Motion to Compel, Amazon “did not specifically seek production of any prior adjudicative decisions or mention the issue”).

presented.” *Id.*; *In the Matter of Zen Magnets, LLC*, CPSC Dkt. No. 12-2, Final Decision and Order, 2017 WL 11672449, at *6 (Oct. 26, 2017); *see also Vineland Fireworks Co. v. ATF*, 544 F.3d 509, 514 (3d Cir. 2008) (“Congress permits the agency to limit its review using its regulation-promulgating powers, but if it chooses not to do so, it exercises *de novo* review over the ALJ’s decision”).

Generally, Complaint Counsel has the burden of proving that the relevant consumer products constitute a substantial product hazard. *See* 5 U.S.C. § 556(d) (“Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof”); 16 C.F.R. § 1025.43(b)(1) (“Complaint counsel shall have the burden of sustaining the allegations of any complaint”). Complaint Counsel must also establish that the firm is subject to CPSC jurisdiction. 5 U.S.C. § 556(d); 16 C.F.R. § 1025.43(b)(1).

These determinations must be “supported by and in accordance with the reliable, probative, and substantial evidence.” 5 U.S.C. § 556(d). In *Steadman v. SEC*, 450 U.S. 91, *reh’g denied*, 451 U.S. 933 (1981), the U.S. Supreme Court interpreted the phrase “reliable, probative, and substantial evidence” to mean by a preponderance of the evidence. *See also Zen Magnets*, 2017 WL 11672449, at *7, n.5 (stating preponderance of the evidence standard applies). The “preponderance of the evidence” standard “simply means that the record must be sufficient to find that a fact is more likely to be true than untrue.” *Id.* at *7 (citing *Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 736 (3d Cir. 1993), *aff’d*, 512 U.S. 267 (1994)).

Pursuant to the CPSA, in order to require notice under Section 15(c) and remedies under Section 15(d), the Commission must determine and explain why a Section 15(c) notice is necessary to “adequately protect the public” and why any Section 15(d) actions are “in the public interest.” 15 U.S.C. § 2064(c)(1) and (d)(1). With regard to remedies, the Supreme Court has

held that, “where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy[,] ‘the relation of remedy to policy is peculiarly a matter for administrative competence.’” *American Power & Light Co. v. SEC*, 329 U.S. 90, 112 (1946) (quoting *Phelps Dodge Corp. v. Nat’l Labor Relations Bd.*, 313 U.S. 177, 194 (1941)). Therefore, “an agency’s choice of remedies generally is not to be overturned unless the reviewing court finds that it is unwarranted in law or without justification in fact.” *Svalberg v. SEC*, 876 F.2d 181, 184 (D.C. Cir. 1989) (citing *Butz v. Glover Livestock Comm’n*, 411 U.S. 182, 185-86 (1973)).

DISCUSSION

I. Amazon Acted as a Distributor of the Children’s Sleepwear Garments, Carbon Monoxide Detectors, and Hair Dryers Sold Through the Fulfilled by Amazon Program

ALJ Grimes concluded that the “facts show that Amazon meets the statutory definition of the term *distributor* and does not fall within the terms of the safe harbor for *third-party logistics providers*.” Jan. 2022 Order at 27, Dkt. 27 (emphasis in original). ALJ Patil subsequently incorporated ALJ Grimes’s conclusion in the Initial Decision and Order on Remedies. *Id.* at 1, Dkt. 119. The Commission adopts ALJ Grimes’s conclusion that Fulfilled by Amazon participants “delivered” the children’s sleepwear, CO detectors, and hair dryers at issue to Amazon for “purposes of distribution in commerce,” thereby making Amazon a distributor as defined by the CPSA. *See* Jan. 2022 Order at 7-8, 25-26, Dkt. 27.

Amazon fit squarely within the definition of distributor in the CPSA when it operated its Fulfilled by Amazon program for the children’s sleepwear garments, CO detectors, and hair dryers at issue in this case. The substantial record before us establishes Amazon’s extensive control over these products, beginning with receipt of a Fulfilled by Amazon participant’s

products at an Amazon distribution center, and storage of this inventory until it is purchased by and shipped to a consumer.

Amazon’s argument that it is merely a “third-party logistics provider” misrepresents the far-reaching control Amazon exercises in its Fulfilled by Amazon program. Amazon cannot sidestep its obligations under the CPSA simply because some portion of its extensive services involves logistics. Such a reading is contrary to the plain language of the CPSA and undermines CPSC’s purpose: to protect the public against unreasonable risks of injury associated with consumer products. Instead, the facts here place Amazon comfortably within the role of distributor of the products at issue and within the CPSA’s purpose to protect consumers from hazardous products. Amazon must therefore comply with the CPSA to protect consumers from injury.

A. Amazon Acted as a Distributor

The CPSA defines “distributor” as “a person to whom a consumer product is delivered or sold for purposes of distribution in commerce, except that such term does not include a manufacturer or retailer of such product.” 15 U.S.C. § 2052(a)(8).²⁵ Amazon was a distributor of the hazardous products at issue in this matter because Fulfilled by Amazon participants delivered their products to Amazon for the purposes of distribution to customers who ordered through Amazon.com.

1. The Products Were Delivered to Amazon

Undisputed facts demonstrate the products were “delivered” to Amazon. Jan. 2022 Order at 7, n.7, 25, Dkt. 27. Under the Fulfilled by Amazon program, program participants send their

²⁵ For Amazon to qualify as a distributor under the CPSA, products must have been “delivered or sold” to Amazon “for purposes of distribution in commerce.” Complaint Counsel does not allege that the Fulfilled by Amazon participants “sold” the products to Amazon.

products to Amazon’s fulfillment centers. Amazon’s Resp. to Compl. Counsel’s SUMF at ¶¶ 7, 8, Dkt. 16. Amazon’s “confirm[ation of] receipt of delivery” for storage and subsequent delivery to a customer indicates that the product has been successfully delivered to Amazon. Decl. of Diane Ramirez at ¶ 4, Ex. A, Fulfilled by Amazon Service Terms at F-3.1, F-4, Dkt. 18.

2. *The Products Were Delivered for Purposes of Distribution in Commerce*

We conclude also that the products were delivered to Amazon “for purposes of distribution in commerce.” The CPSA defines “distribution in commerce” as “to sell in commerce, to introduce or deliver for introduction into commerce, or to hold for sale or distribution after introduction into commerce.” 15 U.S.C. § 2052(a)(7). In accordance with the ALJ’s findings, the Commission determines that Amazon’s activities fit squarely within the parameters of this definition, which specifically encompasses “hold[ing] for sale ... after introduction into commerce.” *See* Jan. 2022 Order at 25, Dkt. 27 (“Amazon holds the product while it waits for a consumer to purchase it.”).

Fulfilled by Amazon participants send their products to Amazon, not directly to customers who order through Amazon.com, with the intention and expectation that they will be sold to end customers. Amazon’s Resp. to Compl. Counsel’s SUMF at ¶ 7, Dkt. 16; Decl. of Diane Ramirez at ¶ 4, Ex. A, Fulfilled by Amazon Services Terms at F-3.1, Dkt. 18. Amazon stores the Fulfilled by Amazon products in its fulfillment centers until a customer purchases the product on Amazon.com, at which point Amazon fulfills the order and ships the product to the customer. Amazon’s Resp. to Compl. Counsel’s SUMF at ¶ 11, Dkt. 16; Answer at ¶ 11, Dkt. 2. Fulfilled by Amazon participants pay Amazon monthly and long-term storage fees for Amazon to store their products in its fulfillment centers. Amazon’s Resp. to Compl. Counsel’s SUMF at ¶ 19, Dkt. 16. If Amazon does not hold the product (*e.g.*, it is out of stock), customers cannot

complete the transaction, indicating that Amazon must have the product in its warehouse—to hold for sale—before the sales transaction can occur. Transcript of Oral Argument at 150-51, In the Matter of Amazon.com, Inc. (Dec. 14, 2023) (CPSC Dkt. No. 21-2).

The ALJ also found, as an alternative basis for determining that Amazon acted as a distributor, that Amazon “hold[s]” Fulfilled by Amazon products for “distribution after introduction into commerce” because it holds the products “in anticipation of delivery.” Jan. 2022 Order at 25-26, Dkt. 27. Under the Fulfilled by Amazon program, Amazon stores participants’ products in its fulfillment centers; uses technology to track, move, and ship products to customers; and delivers or arranges for delivery to customers. Answer at ¶ 11, Dkt. 2; *see also* Decl. of Diane Ramirez ¶ 4, Ex. A, Fulfilled by Amazon Service Terms at F-4, F-5, Dkt. 18 (explaining that Amazon “will provide storage services . . . once [it] confirm[s] receipt of delivery,” “track inventory of [u]nits,” and “move [u]nits among facilities” and “[a]s part of [Amazon’s] fulfillment services, [Amazon] will ship [Fulfilled by Amazon products] from [its] inventory” to customers). Because Amazon held the Fulfilled by Amazon products at issue in this matter in anticipation of delivery, the Commission finds that it acted as a “distributor” under the CPSA for this reason as well.

Amazon makes several arguments, discussed below, as to why the plain language of the CPSA’s definition of “distributor” does not determine its status. None is persuasive.

3. *The Statute’s Plain Meaning Defeats Amazon’s Effort to Avoid Responsibility as a Distributor*

a. *Title to Products Is Not Required for Distributor Status*

Amazon asserts that it does not hold products “for distribution,” as the CPSA’s “distributor” definition requires, because it does not take title to the products. Amazon’s Appeal Br. at 26, Dkt. 127. There is no statutory basis to support this argument, and Amazon concedes as

much. Transcript of Oral Argument at 56, In the Matter of Amazon.com, Inc (Dec. 14, 2023) (CPSC Dkt. No. 21-2) (Counsel for Amazon: “The distributor definition and the distribution in commerce definition don’t mention having title...”). The CPSA defines “distributor,” but it does not define the terms “delivered” and “sold” that are used in the definition. 15 U.S.C.

§ 2052(a)(8). In the absence of such definitions, the Commission construes these statutory terms in accordance with their ordinary or natural meaning. *Asgrow Seed v. Winterboer*, 513 U.S. 179, 187 (1995); *see also Star Athletica, LLC v. Varsity Brands, Inc.*, 580 U.S. 405, 412, 421 (2017) (relying on dictionaries to define terms). Dictionaries published circa 1972, when Congress passed the CPSA, defined “delivered” as “to carry and turn over (letters, goods, etc.) to the intended recipient or recipients” and “make or hand over.” Random House Dictionary of the English Language 382 (Jess Stein & Laurence Urdang, eds.,1971); The Meriam-Webster Editorial Staff, Webster’s Third New International Dictionary of the English Language, Unabridged 597 (Philip Babcock Gove eds.,1971). Thus, under its ordinary meaning, the word “delivered” does not require a transfer of title or ownership.

The CPSA’s use of the disjunctive phrase “delivered *or* sold” (emphasis added) confirms that taking delivery of a product for distribution, without a sale, is sufficient for distributor status. A sale with transfer of title to the distributor is not required. To read the statute as Amazon does would be to read “delivered” entirely out of the statute. Fulfilled by Amazon participants plainly *deliver* their products to Amazon for storage and fulfillment.

Because, as Amazon concedes, the statutory definitions of “distributor,” “distribute in commerce,” and “distribution in commerce,” all lack any reference to a title requirement, Amazon would have the Commission look beyond the statutory language of the CPSA and instead interpret the term “distributor” under what it calls the “understanding at common law . . .

that distributors take ownership of products before selling them to the next recipient in the supply chain.” Amazon’s Appeal Br. at 27, Dkt. 127. Amazon argues that title to a product generally is required for a firm to be strictly liable in tort claims for product defects as a distributor. *Id.* at 27-29, Dkt. 127.²⁶ Amazon invokes the canon of statutory construction that “*absent other indication*, ‘Congress intends to incorporate the well-settled meaning of the common-law terms it uses.’” *Id.* at 26, Dkt. 127 (citing *Sekhar v. United States*, 570 U.S. 729, 732 (2013)) (emphasis added).

Amazon’s argument for filling a statutory gap with common law principles fails because there is no gap to fill. Section 3 of the CPSA specifically states what Congress intended the terms “distributor,” “to distribute in commerce,” and “distribution in commerce” to mean. 15 U.S.C. § 2052(a)(7), (8). A “definition which declares what a term means excludes any meaning”—including Amazon’s common law gloss—“that is not stated.” *Burgess v. United States*, 553 U.S. 124, 130 (2008) (ellipses and internal quotation marks omitted); *see also Biskupski v. Attorney Gen.*, 503 F.3d 274, 280 (3d Cir. 2007) (“By placing the term . . . in quotations followed by ‘means’ Congress made absolutely clear that [the term] is a term of art defined by” what “follow[s]”). Amazon cannot use the common law to supplant what Congress wrote.

b. The Holder of Products Does Not Have to Sell Them

Amazon further argues that Fulfilled by Amazon products are not delivered to it “for purposes of distribution in commerce” because it does not “hold [them] for sale.” Amazon’s

²⁶ In fact, some courts have found Amazon liable under state and common law strict product liability principles because of its Fulfilled by Amazon program activities. *See, e.g., Bolger v. Amazon.com, LLC*, 53 Cal. App. 5th 431, 438 (Cal. Ct. App. 2020) (“Amazon is a direct link in the chain of distribution, acting as a powerful intermediary between the third-party seller and the consumer”); *State Farm Fire & Cas. Co. v. Amazon.com, Inc.*, 390 F. Supp. 3d 964, 972 (W.D. Wis. 2019) (finding Amazon liable, even though it did not take ownership of the seller’s products, because it was “the only conduit” between the seller and the American marketplace).

Appeal Br. at 25, Dkt. 127. According to Amazon, the phrase “hold for sale” means “the entity doing the ‘hold[ing]’ must also do the selling.” *Id.*, Dkt. 127. Therefore, in Amazon’s view, it cannot be a distributor for purposes of the CPSA because its Fulfilled by Amazon participants—not Amazon—sell their products to consumers.

As discussed in Discussion Section I.A.2, under the Fulfilled by Amazon program, Amazon holds products in its distribution centers so that they can be sold by program participants. Amazon holds Fulfilled by Amazon products for sale. Nowhere in the relevant statutory language is there a requirement that the same entity both hold and sell products. Amazon’s argument once again would require that a distributor possess title to the products it distributes, even though the statute contains no such requirement.

None of the cases on which Amazon relies for this proposition addresses the question of whether a distributor as defined in the CPSA can “hold” a product that is “for sale” by another entity. Nor do these cases support Amazon’s contention that use of the word “for” requires the same person to perform both activities. The cases merely instruct that the ordinary meaning of the term “for” is “with the object or purpose of.” Random House Dictionary of the English Language 553 (Jess Stein & Laurence Urdang, eds., 1971); see *Jackson v. Vtech Telecomms. Ltd.*, No. 01-C-8001, 2003 WL 25815373, at *6 (N.D. Ill. Oct. 23, 2003); *Applera Corp. v. MJ Rsch. Inc.*, 292 F. Supp. 2d. 348, 363 (D. Conn. 2003). Plain statutory meaning prevails against Amazon’s argument: holding Fulfilled by Amazon products in its distribution centers for program participants is holding Fulfilled by Amazon products for sale.²⁷

²⁷ During oral argument, Amazon stated that it “receives from third-party sellers [and] holds in distribution centers those products for sale.” Transcript of Oral Argument at 28, In the Matter of Amazon.com, Inc. (Dec. 14, 2023) (CPSC Dkt. No. 21-2).

B. Amazon Is Not a Third-Party Logistics Provider Within CPSA Section 3(b)

Having rejected Amazon’s attempt to import a title requirement into the statutory definition of “distributor,” we now turn to Amazon’s attempt to fit the Fulfilled by Amazon program within CPSA Section 3(b) and within the scope of the term “third-party logistics provider.” Amazon’s Appeal Br. at 13-23, Dkt. 127. Section 3(b) of the CPSA provides that common carriers, contract carriers, third party logistics providers, or freight forwarders shall not be deemed to be a manufacturer, distributor, or retailer “solely by reason of receiving or transporting a consumer product in the ordinary course of its business as such a carrier or forwarder.” 15 U.S.C. § 2052(b). For purposes of the CPSA, a “third-party logistics provider” is “a person who solely receives, holds, or otherwise transports a consumer product in the ordinary course of business but who does not take title to the product.” 15 U.S.C. § 2052(a)(16). Amazon’s argument that it is merely a “third-party logistics provider” under CPSA Section 3(b) is at odds with the record before us, which sets forth the comprehensive package of services—certainly not just logistics—that Amazon requires its Fulfilled by Amazon participants to accept.

1. Amazon Is Not a Third-Party Logistics Provider under the CPSA

Amazon’s role in moving Fulfilled by Amazon products through the stream of commerce extends well beyond that of a “third-party logistics provider” that “solely receives, holds or otherwise transports a consumer product” and certainly beyond the scope of the Section 3(b) provision that such entities are not distributors “solely by reason of receiving or transporting a consumer product.”²⁸ Among other Fulfilled by Amazon activities that go beyond receiving and transporting, Amazon screens products for program eligibility. Decl. of Diane Ramirez ¶ 4, Ex.

²⁸ Even if it is true, as Amazon contends, that Amazon is considered by other firms to be a provider of third-party logistics services, *see* Amazon’s Appeal Brief at 15, Dkt. 127, industry parlance says little or nothing about Amazon’s status under the particular language of the CPSA.

A, Fulfilled by Amazon Service Terms at F-1, Dkt. 18. It communicates directly with its customers regarding their Fulfilled by Amazon purchases, including sending a “Dear Amazon Customer” message when Amazon learns of a “potential safety issue” involving a product, and it provides live customer support. Amazon’s Resp. to Compl. Counsel’s SUMF at ¶ 14, Dkt. 16; Compl. Counsel’s Resp. to Amazon’s SUMF at ¶¶ 19, 52, 71, Dkt. 87.

Amazon also controls communications between participants and customers, requiring the sellers to use Amazon’s online platform. Amazon’s Resp. to Compl. Counsel’s SUMF at ¶ 15, Dkt. 16. Customers return Fulfilled by Amazon products to Amazon rather than to the program participant. Decl. of Diane Ramirez ¶ 4, Ex. A, Fulfilled by Amazon Service Terms at F-8.2, Dkt. 18. And it is Amazon, not the Fulfilled by Amazon participant, under the program’s service terms, that determines whether a customer will receive a credit or a replacement unit and, for units that are returned, whether to dispose of the product, place the product back into the program participants’ inventory for another sale, or transfer the product to Amazon for sale by Amazon itself through the Amazon Warehouse program. *Id.* at F-8.3, 8.4, Dkt. 18; Answer at ¶ 14, Dkt. 2. Amazon profits from this business model by charging Fulfilled by Amazon participants fees for the various services Amazon offers through the program. Amazon’s Resp. to Compl. Counsel’s SUMF at ¶¶ 18, 19, Dkt. 16 (citing Amazon.com’s Seller Central webpage, *available at* <https://sellercentral.amazon.com/gp/help/external/201074400>)).

Amazon argues that processing product returns is the type of “ancillary” activity that third-party logistics providers such as FedEx and UPS commonly offer. Amazon’s Appeal Br. at 23, Dkt. 127. However, Amazon does far more.²⁹ It enforces pricing rules for its Fulfilled by Amazon participants. Through its Fair Pricing Policy, Amazon may penalize sellers who set

²⁹ Amazon appeared to acknowledge as much during Oral Argument. Transcript of Oral Argument at 49, In the Matter of Amazon.com, Inc. (Dec. 14, 2023) (CPSC Dkt. No. 21-2).

prices that are “significantly higher than recent prices offered on or off Amazon.” Amazon’s Resp. to Compl. Counsel’s SUMF at ¶ 21, Dkt. 16. Amazon charges customers, processes their payments, and then pays program participants after deducting its own Fulfilled by Amazon program fees. *Id.* at ¶ 20, Dkt. 16. Amazon controls the entire sale process, from the initial listing on Amazon.com, through ordering and delivery, to product returns, disposition of returned products, and the processing of refunds or Amazon credits. Therefore, Amazon’s attempt to characterize its Fulfilled by Amazon program as a third-party logistics provider fails.

Complaint Counsel maintains that Section 3(a)(16)’s definition of “third-party logistics provider” as a person who “solely receives, holds, or otherwise transports a consumer product” means that a third-party logistics provider within the meaning of the CPSA cannot perform *any* activities with respect to a consumer product beyond purely receiving, holding, or transporting. Compl. Counsel’s Answering Br. at 27-28, Dkt. 129 (“[T]he CPSA’s statutory language leaves no leeway.”). ALJ Grimes, however, rejected Complaint Counsel’s position that “*solely* means what it says” and that an entity that qualifies as a “*third-party logistics provider*” is strictly limited to receiving, holding, or transporting.” Jan. 2022 Order at 10-11, Dkt. 27 (emphasis in original). The ALJ stated instead that “[a] third-party logistics provider must be able [to] perform activities ancillary to receiving, holding, or transporting.” *Id.* at 11, Dkt. 27 (offering product inspection as one example). We agree with the ALJ that a third-party logistics provider should be able to perform activities that are strictly ancillary to receiving, holding, or transporting products, such as taking inventory or checking on the contents of a damaged box. *See id.* at 10-11, n.13, Dkt. 27. We need not, however, quibble over the permissible scope of such ancillary services: this is not a close case. Under any plausible view of the facts and the statutory language, Amazon does

considerably more than is allowed by the definition of “third-party logistics provider” and Section 3(b).

Amazon nevertheless insists that the word “solely” has still another role. According to Amazon’s reading, “the sole *distribution* activity in which a third-party logistics provider can engage is holding, receiving, or otherwise transporting goods.” Amazon’s Appeal Br. at 17, Dkt. 127 (emphasis in original). Amazon thus suggests that it can engage in whatever activities it likes with respect to Fulfilled by Amazon products without becoming subject to the CPSA as a distributor, as long as its distribution activities are limited to holding, receiving, and transporting the products. However, the CPSA contains no such sweeping limitation; in defining “third-party logistics provider,” Congress did not mention distributors or distribution. The CPSA simply does not use the term “solely” in the way Amazon proposes.

2. Amazon’s Activities Fall Outside the Terms of Section 3(b)

Because Amazon is not a “third-party logistics provider,” it does not fall within Section 3(b), which provides a narrow statutory exclusion for such entities. We nevertheless address Amazon’s argument based on Section 3(b), which fails for numerous additional reasons.

Section 3(b)’s application is narrow: as relevant here, it states that a third-party logistics provider will not be treated as a distributor solely on the basis that it receives or transports consumer products *when acting as a carrier or forwarder*. As the ALJ explained, Section 3(b) is a particularly bad fit for Amazon. In this proceeding, “no one argues that Amazon is a common carrier, contract carrier, or freight forwarder.” Jan. 2022 Order at 4, Dkt. 27. Further, the “ordinary course of [Amazon’s] business” is much more than merely shipping Fulfilled by Amazon products. In fact, Amazon’s shipment of such products from its distribution centers to

consumers stems from an even greater activity—its online marketplace that allows Fulfilled by Amazon participants to sell products and consumers to purchase them.

In addition, Amazon’s argument ignores that while CPSA Section 3(a)(16) defines a “third-party logistics provider” as “a person who solely *receives, holds, or otherwise transports*” (emphasis added), Section 3(b) states that third-party logistics providers and other entities that “solely . . . *receiv[e] or transport[]*” products do not qualify as “distributors” (emphasis added). “[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal citations omitted). Therefore, even if Amazon were a third-party logistics provider (which it is not), Amazon could not claim protection against distributor status under Section 3(b) because its distributor status arises at least in part from the activity of holding Fulfilled by Amazon participants’ products in its distribution centers for purposes beyond simply transporting them. Among other activities, Amazon (1) warehouses products until a consumer purchases the products on Amazon.com; (2) commingles inventory from Fulfilled by Amazon participants and moves them among distribution centers; and (3) retains stock for managing returns and replacements. *See, e.g.*, Amazon’s Resp. to Compl. Counsel’s SUMF at ¶ 11, Dkt. 16; Decl. of Diane Ramirez at ¶ 4, Ex. A, Fulfilled by Amazon Service Terms at F-4, F-8.2, F-8.3, Dkt. 18. Such activities fall outside the definition of a third-party logistics provider.

In its attempt to overcome this problem, Amazon asserts that if holding products disqualified logistics providers from taking advantage of Section 3(b), then to qualify under this provision, the entity could “only receive and instantaneously ship products without keeping them in storage for any period of time.” Amazon’s Reply Br. at 12-13, Dkt. 134. In that regard,

Amazon points to the changes that Congress made in the CPSIA, by adding third-party logistics providers to the CPSA. Amazon’s Appeal Br. at 18, Dkt. 127. Before 2008, Section 3(b) applied only to common carriers, contract carriers, and freight forwarders. *Id.*, Dkt. 127. Amazon posits (without reference to any evidence in the record or supporting legislative history) that by adding third-party logistics providers as a defined term in Section 3(a)(16) and in Section 3(b) in 2008, “Congress necessarily meant to reach entities providing services *beyond* those of common carriers, contract carriers, or freight forwarders.” *Id.*, Dkt. 127 (emphasis in original).

In Amazon’s view, disqualifying logistics providers that “hold” products from the protection of Section 3(b) would conflate third-party logistics providers with the common carriers and contract carriers that already were protected, and therefore it would fail to give effect to Congress’s addition of third-party logistics providers in 2008. *Id.* at 18, Dkt. 127 (citing *Bilski v. Kappos*, 561 U.S. 593, 607-08 (2010)); *see also Loughrin v. United States*, 573 U.S. 351, 358 (2014) (citing *Williams v. Taylor*, 529 U.S. 362 (2000)) (stating that surplusage canon requires courts to give each word and clause of a statute operative effect, if possible). As the ALJ observed, however, “redundancies are common in statutory drafting.” Jan. 2022 Order at 12, Dkt. 27 (citing *Barton v. Barr*, 140 S. Ct. 1442, 1453 (2020)). “[S]ometimes they result from ‘a congressional effort to be doubly sure’” and “[s]ometimes the better overall reading of the statute contains some redundancy.” *Id.*, Dkt. 27 (citing *Barton*, 140 S. Ct. at 1453 (internal citation omitted)). Here, the most plausible reading is that Congress simply wanted to clarify that Section 3(b) reaches firms known as “third-party logistics providers” if they perform only the same role in commerce as traditional carriers and freight forwarders.

The ALJ also highlighted a final point that, under the canon known as *noscitur a sociis*, “statutory words are known by the company they keep.” *Id.*, Dkt. 27 (citing *Yates v. United*

States, 574 U.S. 528, 543 (2015)). Courts invoke this canon “when a string of statutory terms raises the implication that the ‘words grouped in a list should be given related meaning.’” *S.D. Warren Co. v. Maine Bd. of Env’t Prot.*, 547 U.S. 370, 378 (2006) (citing *Dole v. Steelworkers*, 494 U.S. 26, 36 (1990)). Applying the canon *noscitur a sociis* to the list of entities in Section 3(b) of the CPSA—common carriers, contract carriers, and freight forwarders—the term “third-party logistics provider” should be interpreted as a similar entity that transports goods as opposed to one that provides other services that extend beyond shipping. In contrast to such entities, Amazon controls the distribution of Fulfilled by Amazon products from the initial transactions on Amazon.com through product returns, and thereby puts itself outside Section 3(b).³⁰

C. The Commission Can Resolve this Issue Through Adjudication

Amazon argued before the ALJ, but not in its Appeal Brief, that Complaint Counsel’s decision to use adjudication as opposed to rulemaking to determine whether Amazon meets the statutory definitions of “distributor” and “third-party logistics provider” violates the APA and the Constitution’s Due Process Clause. Amazon’s Opposition to Compl. Counsel’s Mot. for Partial Summ. Dec. and Memo. in Support of Mot. to Dismiss or, in the Alternative, Cross-Mot. for

³⁰ Both Parties claim support from a 2013 proposed rulemaking in which the Commission addressed whether a carrier that also “chooses to become a licensed customs broker” and “agrees to serve as the importer of record” should be treated as an “importer” under the CPSA, notwithstanding Section 3(b). Certificates of Compliance, Notice of Proposed Rulemaking, 78 Fed. Reg. 28080, 28083 (May 13, 2013); *see* Compl. Counsel’s Answering Br. at 34, Dkt. 129; Amazon’s Appeal Br. at 20, Dkt. 127. In that proceeding, the Commission explained:

[Section 3(b)] protects carriers from being ‘deemed’ a manufacturer, importer, distributor, or retailer, based ‘solely’ on ‘receiving or transporting a consumer product’ in the ordinary course of business as a carrier. Under the proposed rule, imposing importer-related certification requirements on a carrier that chooses to become a licensed customs broker and that agrees to serve as the importer of record *is based on the carrier’s status as importer of record and related customs functions rather than on the carrier’s transportation-related functions.*

Certificates of Compliance, Notice of Proposed Rulemaking, 78 Fed. Reg. at 28083 (emphasis added). This language is consistent with the view that Section 3(b) protects only entities engaged in transportation, and thus also is consistent with our holding here.

Summ. Dec. at 25-38, Dkt. 15. The ALJ determined that Amazon’s rulemaking argument was premature. Jan. 2022 Order at 15, Dkt. 27.

To raise an issue on appeal, the Commission’s regulations require an appeal brief to contain “[t]he argument, presenting clearly the points of fact and law relied upon to support each reason why the Initial Decision is incorrect, with specific page references to the record and the legal or other material relied upon.” 16 C.F.R. § 1025.53(b)(4). The only mention of rulemaking in Amazon’s appeal is a scant reference that appears in the Introduction to Amazon’s Appeal Brief: “This adjudication is the wrong vehicle to harmonize the Commission’s recall practices with marketplace facilitators such as Amazon. The proper course for the Commission would be to pursue amendment to the CPSA or engage in rulemaking . . .” Amazon’s Appeal Brief at 4, Dkt. 127. By not raising this issue in its Appeal Brief with specific references to facts and the law, the Commission finds that Amazon has waived this argument.³¹ 16 C.F.R. § 1025.53(b)(4); *cf. Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 553-54 (1978) (“[A]dministrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure reference to matters that ‘ought to be’ considered and then, after failing to do more to bring the matter to the agency’s attention, seeking to have

³¹ The Commission also finds that Amazon waived the following arguments because they are not discussed in any manner in Amazon’s Appeal Brief: (1) the Commission “cannot impose its brand-new policy retroactively on Amazon’s past conduct, relating to products that are not currently listed on Amazon.com” and (2) Amazon’s actions regarding the products at issue render the Complaint moot. Amazon’s Opposition to Compl. Counsel’s Mot. for Partial Summ. Dec. and Memo. in Support of Mot. to Dismiss or, in the Alternative, Cross-Mot. for Summ. Dec. at 28-38, Dkt. 15. Even if Amazon had properly preserved its retroactivity argument for appeal, it is well-settled that agencies may conduct adjudications that have retroactive effects. *See SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) (“[e]very case of first impression has a retroactive effect, whether the new principle is announced by a court or by an administrative agency”). Likewise, Amazon’s assertion that the Complaint is moot is belied by the Commission’s findings in this case. As discussed in Discussion Section III, additional remedies under Section 15(c) and (d) are necessary because Amazon’s messages were insufficient to protect the public and Amazon did not take any steps to remove the products from consumers’ possession.

that agency determination vacated on the ground that the agency failed to consider matters ‘forcefully presented.’”).

Even if Amazon had properly preserved this issue for appeal, the Commission finds that Amazon’s argument is unpersuasive. The Supreme Court has recognized that agencies have the discretion to choose between rulemaking and adjudication. *See SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) (“[T]he choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.”); *see also* 5 U.S.C. §§ 553-554. Agencies also may announce new principles in adjudicative proceedings. *See NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 765 (1969) (“Adjudicated cases may and do, of course, serve as vehicles for the formulation of agency policies, which are applied and announced therein.”) (citation omitted).

II. The Subject Products Present a Substantial Product Hazard

A. The Parties’ Joint Stipulation

Before ALJ Grimes, the Parties jointly stipulated that the children’s sleepwear garments, CO detectors, and hair dryers identified in the Complaint “meet the requirements for a substantial product hazard under” Section 15(a)(1), (a)(2), and/or (j) of the CPSA. Stip. of Parties at 1-2, Dkt. 35. Specifically, the Parties jointly stipulated that, for “the purposes of this proceeding,” Amazon “does not contest” that: (1) the children’s sleepwear garments, sold through Amazon’s Fulfilled by Amazon program and identified by ASIN in paragraph 21 of the Complaint, “meet the requirements for a substantial product hazard under Section 15(a)(1) of the CPSA;” (2) the CO detectors, sold through Amazon’s Fulfilled by Amazon program and identified by ASIN in paragraph 30 of the Complaint, “meet the requirements for a substantial product hazard under Section 15(a)(2) of the CPSA;” and (3) and the hair dryers, sold through

Amazon's Fulfilled by Amazon program and identified by ASIN in paragraph 39 of the Complaint, "meet the requirements for a substantial product hazard under Section 15(a)(2) and (j) of the CPSA." *Id.* at 1-2, Dkt. 35.

ALJ Grimes responded to the Joint Stipulation by issuing an order accepting that "the three products identified in the complaint meet the requirements for a substantial product hazard under 15 U.S.C. § 2064(a)(1), (a)(2), or (j)." Order Reg. Stip., at 1, Dkt. 37.

Long-established Supreme Court precedent states that a stipulation obviates the need for further fact-finding: "The power of the court to act in the disposition of a trial upon facts conceded by counsel is as plain as its power to act upon the evidence produced." *Oscanyan v. Arms Co.*, 103 U.S. 261, 263 (1880). Complaint Counsel has alleged, and Amazon has conceded, that the products identified in the Joint Stipulation meet the requirements for a substantial product hazard as defined in Section 15. Consistent with ALJ Grimes's order, the Commission adopts the ALJ's determination that the products identified in the Complaint and Joint Stipulation present substantial product hazards.³²

B. No Other Products Have Been Shown to Present Substantial Product Hazards

ALJ Patil subsequently determined that, in addition to the stipulated products specified by ALJ Grimes, 20 similar children's sleepwear products "listed by ASIN on pages 4 to 5 of [Amazon's] Exhibit 130 pose a substantial product hazard." Initial Dec. and Order on Remedies at 3, Dkt. 119. ALJ Patil stated that these additional products "were purchased by consumers,

³² As noted in footnote 23, *supra*, Complaint Counsel misidentified the ASIN for the HOYMN products. In Amazon Exhibit 130, Amazon identified the correct ASIN for the HOYMN products that were violative. Decl. of Nicholas Griepsma in Support of Amazon's Suppl. Br. on Remedies, Ex. 130, at 4, Dkt. 113. For purposes of this litigation, the Commission understands the Subject Products to include those products listed by ASIN B0743BM1NV (not ASIN B074V558SB).

tested by the CPSC, and are a substantial product hazard.” *Id.* at 2, Dkt. 119. The ALJ further concluded that the “analytic process” Amazon used to identify these products for removal from Amazon.com was “sufficient to support ameliorative action.” *Id.* at 2, Dkt. 119. Both Amazon and Complaint Counsel appeal the ALJ’s determination of which products comprised the scope of the products in this matter.

The Commission finds that the ALJ’s inclusion of the children’s sleepwear products in Amazon Exhibit 130 was unwarranted. Amazon points out, and Complaint Counsel does not dispute, that CPSC staff did not conduct conclusive safety testing on the products listed by ASINs in Exhibit 130. Amazon’s Appeal Br. at 50-54, Dkt. 127; Amazon’s Response Br. at 10-13, Dkt. 128. Rather, based on its own analytic process, Amazon withdrew the children’s sleepwear products listed in its Exhibit 130 from sale on Amazon.com and messaged and credited the relevant purchasers’ Amazon.com accounts. *See* Initial Dec. and Order on Remedies at 2, Dkt. 119 (citing Amazon Exhibit 130). The Commission finds this action by Amazon on its own does not sufficiently establish that the removed products present a substantial product hazard and, therefore, sets aside the ALJ’s determination regarding the products listed by ASINs in Amazon Exhibit 130 that are not also identified in the Complaint and Joint Stipulation.

Complaint Counsel claims that ALJ Patil erred by limiting the scope of products covered by the ALJ’s remedial order. *See, e.g.,* Compl. Counsel’s Appeal Br. at 6-9, Dkt. 125; Compl. Counsel’s Reply Br. at 5-11, Dkt. 133. On the particular record presented here, the Commission agrees with the ALJ’s determination that there is not adequate evidence to expand the scope of products in this matter.

For the remainder of this Decision and Order, the products identified in the Complaint and Joint Stipulation, which the Commission has determined pose substantial product hazards under Section 15 of the CPSA, will be referred to collectively as the “Subject Products.”

III. Remedies Under Section 15(c) and (d) of the CPSA

We turn now to the topic of remedies under Section 15(c) and (d) of the CPSA. Under Section 15(c), the Commission has the authority to determine that notice of a substantial product hazard “is required in order to adequately protect the public.” 15 U.S.C. § 2064(c). Likewise, under Section 15(d), the Commission has the authority to require additional remedial actions that it “determines to be in the public interest.” 15 U.S.C. § 2064(d). Although Amazon took certain measures to communicate with its customers about the Subject Products, the Commission finds that these limited communications, together with the crediting of its customers’ Amazon.com accounts, did not suffice to meet the requirements of the CPSA or protect the public.

In this section, the Commission determines that Amazon’s actions were insufficient to adequately protect the public and that remedial actions are in the public interest. We then outline the process for Amazon, pursuant to Section 15(i) and 16 C.F.R. § 1115.29(c), to submit proposed notices for Commission approval (Proposed Notification Plan) and to “submit a plan, for approval by the Commission, for taking action” to implement the prescribed remedies (Proposed Action Plan), as required by Section 15(d)(2). 15 U.S.C. § 2064(d)(2).

A. Amazon is Required under CPSA Section 15(c) to Provide Notice to Protect the Public

Under Section 15(c)(1) of the CPSA, if the Commission determines that notification is required in order to adequately protect the public from a substantial product hazard, the Commission may order the responsible firm to take “any one or more” of the following actions: cease distribution; notify all third parties to cease immediately distribution of the product; notify State and local public health officials; give public notice, including posting clear and conspicuous notice on its Internet website; mail notice to each manufacturer, distributor, or retailer of the product; and mail notice to every person to whom the firm knows such product was delivered or sold. 15 U.S.C. § 2064(c)(1).

Section 15(c)(1) also directs the Commission to specify the form and content of the notice to consumers. Further, Section 15(i), 15 U.S.C. § 2064(i), details requirements for the notice and directs CPSC to promulgate an implementing rule, which the Commission did through its Guidelines and Requirements for Mandatory Recall Notices, 16 C.F.R. Part 1115 Subpart C (Mandatory Recall Notices Rule). According to Section 15(i)(2) of the CPSA and the Mandatory Recall Notices Rule (at 16 C.F.R. §§ 1115.27, 1115.29(b)), unless the Commission determines that “one or more” of the listed items is “unnecessary or inappropriate” with respect to the particular product, the notice shall include: (1) a description of the product (including a photograph), hazard, injuries, deaths, action being taken, and remedy; (2) identification of the manufacturers and significant retailers; (3) identification of relevant dates and number of units; and (4) the word “recall” in the heading and text. The Commission staff’s publication, “Product Safety Planning, Reporting, and Recall Handbook” (Recall Handbook), also provides guidance to companies based on decades of Commission and staff experience with recalls and recall effectiveness. Compl. Counsel’s SUMF at ¶ 116, Ex. 1 (Ex. S at CPSC_AM0011464), Dkt. 80.

The CPSA and the Mandatory Recall Notices Rule contemplate that the Commission may require multiple types of notice to reach affected members of the public. *See* 15 U.S.C. § 2064(c)(1) (authorizing the Commission to order a firm “to take any one or more” of the enumerated notification actions); 16 C.F.R. § 1115.26(a)(5) (“At least two of the recall notice forms listed in [16 C.F.R. § 1115.26(b)] should be used.”). Commission decisions in previous Section 15 cases accordingly have mandated a wide variety of direct and public notifications to protect the public. *See, e.g., Zen Magnets*, 2017 WL 11672449, at *43 (ordering multiple types of notice, including news release, video news release, website notices, social media posts, direct notice to third party Internet websites, recall posters, and direct notice to each person to whom the firm knew such product was delivered or sold); *In the Matter of Relco, Inc.*, CPSC Dkt. No. 74-4, Order, at 1-3 (Oct. 27, 1976) (available at Compl. Counsel’s SUMF, Ex. 1, Decl. of John Eustice in Support of Compl. Counsel’s SUMF, Exhibit EE, Dkt. 80) (ordering recall press release, advertisements, and direct notices to all known purchasers).

1. Amazon’s Messages Were Insufficient to Protect the Public

In his May 2023 Order, ALJ Patil concluded that Amazon’s messages to direct purchasers were “insufficient” because they did not include information mandated under Section 15(i)(2) of the CPSA and 16 C.F.R. § 1115.27, such as the word “recall” within the notice heading and text, the number of units being recalled, sale dates, contact details for information regarding the remedy, and a high-resolution photograph of the relevant product. May 2023 Order at 31-32, 42-43, Dkt. 109. The ALJ also determined that notice incentivizing consumers who still have a Subject Product to return it, or to confirm its destruction, is necessary to remove as many of the products as possible from homes and the marketplace. *Id.* at 44-45, Dkt. 109. In addition, the ALJ concluded that additional notice is necessary to protect those consumers who did not receive

Amazon’s direct notice. *Id.* at 31, 38-39, Dkt. 109. For the reasons explained below, the Commission adopts these conclusions of the ALJ.

a. Amazon Only Sent Its Messages to Initial Purchasers

The Commission agrees with the ALJ’s conclusion that notice is necessary to reach beyond Amazon’s initial purchasers. In prior decisions, the Commission has emphasized that “notice to as many members of the public that may be exposed to the [substantial product] hazards ... as is feasible is required so that members of the public may take appropriate actions to protect themselves.” *In the Matter of Dye and Dye*, CPSC Docket No. 88-1, Opinion and Order, 1989 WL 435534, at *21 (July 17, 1991); *see also Zen Magnets*, 2017 WL 11672449, at *42 (“[W]idespread public notice that the Subject Products present a substantial product hazard is necessary to adequately protect the public.”).

Here, however, Amazon has made no direct attempt to reach consumers who obtained the hazardous products as gifts, hand-me-downs, donations, or on the secondary market. Instead, Amazon placed the burden of such notice on its customers—requesting that they inform others who received the products from them about the hazard. In other words, Amazon provided no notice to alert the general public to the substantial product hazards caused by the faulty hair dryers, flammable children’s sleepwear, and defective CO detectors sold on Amazon.com. Anyone who obtained the products indirectly was, and still may be, uninformed about the hazardous products in their possession. Given the lack of evidence that any of the approximately 418,818 Subject Products identified in the Complaint that were purchased by consumers were destroyed,³³ many of the Subject Products may still be in consumers’ hands. And, as the ALJ

³³ Though it is unclear from the record, the Commission understands the 45,785 products destroyed by Amazon to be those that were in its distribution centers awaiting sale, not products that had already been distributed to consumers. Compl. Counsel’s Resp. to Amazon’s SUMF at ¶ 119, Dkt. 87; Decl. of Lauren Ann Shrem at ¶¶ 18, 19, Dkt. 77.

observed, “Amazon’s acknowledgment that it resold at least a small number of the Subject Products is evidence that a resale market for such products exists.” May 2023 Order at 28, Dkt. 109 (citations omitted).

As the Commission explained in issuing its final rule on mandatory recall notices, “[s]ole reliance on direct recall notices ignores the fact that other persons may benefit from receiving recall notices . . . [such that] at least two of the recall notice forms listed in [16 C.F.R. § 1115.26(b)] should be used.” Guidelines and Requirements for Mandatory Recall Notices, Final Rule, 75 Fed. Reg. 3355, 3360 (Jan. 21, 2010); *see also* May 2023 Order at 11-12, Dkt. 109 (“[D]irect notice is less effective with respect to Subject Products that are not in the hands of the original purchasers, who would not receive direct notice unless an initial purchaser passed it along.”) (internal citation omitted). Accordingly, the reach of Amazon’s messages to purchasers was insufficient to effectuate the purposes of the CPSA.

b. Amazon’s Messages Failed to Use the Term “Recall” and Describe the Product Hazards

Instead of alerting its customers to a “recall” in its messages, as 16 C.F.R. § 1115.27(a) requires, the subject line of Amazon’s messages more obscurely stated either “Attention: Important safety notice about your past Amazon order” or “Important safety notice about your past Amazon order.” Compl. Counsel’s Resp. to Amazon’s SUMF at ¶¶ 18, 51, 70, 86, 100, Dkt. 87. In Section 15(i), Congress authorized the Commission to determine the information that should appear in Section 15(c) notices that would be helpful to consumers, both in its rule and in particular circumstances. 15 U.S.C. §§ 2064(i)(1) and (2). The title of Section 15(i), “Requirements for Recall Notices,” confirms that Congress intended that notices required under Section 15(c) be clearly labeled “recall notices.” In requiring that the word “recall” appear in the notice heading and text of recall notices, 16 C.F.R. § 1115.27(a), the Commission explained:

A recall notice should motivate firms and media to widely publicize the recall information, and it should motivate consumers to act on the recall for the sake of safety. To those ends, the word “recall” draws media and consumer attention to the notice and to the information contained in the notice, and it does so more effectively than omitting the term or using an alternative term. A recall notice must be read to be effective, and drawing attention to the notice through the use of the word “recall” increases the likelihood that it will be read and, therefore, effectuates the purposes of the CPSA and CPSIA.

Guidelines and Requirements for Mandatory Recall Notices: Notice of Proposed Rulemaking, 74 Fed. Reg. 11883, 11884 (Mar. 20, 2009). The Commission therefore adopts the ALJ’s conclusion that Amazon’s proposed notices must include the term “recall” within the heading and text.

The Commission also finds, as did the ALJ, that Amazon’s messages to its customers lacked other content necessary for consumers to understand the significant risks of injury associated with the products, including personal injury or death, and the need for immediate action. Although the children’s sleepwear garments failed applicable flammability requirements, the CO detectors failed to detect carbon monoxide, and the hair dryers lacked integral immersion protection, Amazon’s messages advised purchasers merely of a “*potential* safety issue that *may impact* your Amazon purchase(s),” in that the garments and CO detectors “*may fail*” to meet the requirements, and the hair dryers “*may fail*” to have mandatory immersion protection. Compl. Counsel’s SUMF at ¶¶ 30, 51,168, Dkt. 80; Comp. Counsel’s Resp. to Amazon’s SUMF at ¶¶ 19, 71, 87, 101 Dkt. 87; Amazon’s Resp. to Compl. Counsel’s SUMF at ¶ 16, Dkt. 92 (emphasis added). The Commission’s regulations require “a clear and concise description of the product’s *actual* or potential hazards that result from the product condition or circumstances giving rise to the recall” for consumers “to readily identify and understand the risks and potential injuries or deaths.” 16 C.F.R. § 1115.27(f) (emphasis added). Amazon took the opposite approach, failing to state clearly that the products had indeed failed their respective tests, such that consumers may

have continued to use the hazardous products because they were not adequately informed of the substantial risk of injury.³⁴

c. Amazon's Messages Lacked Information Needed to Identify the Product and Understand the Recall

As the ALJ recognized, Section 15(i)(2)(A) requires a recall notice to include a description of the product, including a photograph, 15 U.S.C. § 2064(i)(2)(A)(iii), in order to enable consumers “to readily and accurately identify the specific product and distinguish it from similar products” in their homes. May 2023 Order at 31-32, Dkt. 109; 16 C.F.R. § 1115.27(c). Amazon’s messages did not contain readily-accessible photographs of the relevant products. Decl. of Lauren Ann Shrem at ¶ 9, Dkt. 91. While recipients could click a hyperlink embedded behind order ID numbers, clicking that link merely directed consumers to another webpage where further web navigation was required to view an icon-sized photograph of the product. *Id.* at ¶ 10, Dkt. 91. In contrast to including a high-quality photograph of the product directly in its messages, as the Commission’s rule requires, Amazon’s cumbersome multistep process did not allow consumers to easily identify the relevant products in their homes, increasing the likelihood that they would fail to take action to avoid the hazard.

In addition, as the ALJ found, Amazon’s messages lacked other information, described in Section 15(i)(2) of the CPSA and 16 C.F.R. § 1115.27, that would have enabled consumers to understand the scope of products affected, including the number of units being recalled and the

³⁴ After reviewing the contents of public recall notices that CPSC staff has released jointly with firms over many years, Amazon makes arguments about the wording the Commission may and may not require in mandatory notifications. Amazon’s Appeal Br. at 57-58, Dkt. 127; Amazon’s Reply Brief at 31, Dkt. 134 (citing Dkt. 74 at 17-18). We reject Amazon’s suggestion that press releases developed through voluntary give-and-take between CPSC staff and individual firms, without litigation, defines what notice language the Commission may mandate under Section 15(c) through adjudication. The CPSA, Commission regulations, and the record in this particular matter guide the Commission’s decision here.

contact information regarding the remedy.³⁵ Thus, for yet more reasons, Amazon’s messages were inadequate.

d. Amazon’s Messages Did Not Sufficiently Incentivize Consumers to Remove the Hazardous Products

Amazon’s messages notified purchasers that they should dispose of the product and that their Amazon.com account had been credited. Compl. Counsel’s Resp. to Amazon’s SUMF at ¶¶ 19, 71, Dkt. 87. Whatever commercial arguments Amazon may have had for providing automatic credits, CPSC’s concern is consumer safety, which includes incentivizing removal of hazardous products from consumers’ possession. The Commission therefore agrees with the ALJ’s conclusion that by crediting purchasers’ accounts without any requirement that they return or destroy the Subject Products to receive the credit, Amazon failed to incentivize its customers or other consumers to stop using the hazardous products and, importantly, to remove them—and the continuing hazard they pose—from their homes. May 2023 Order at 39-40, Dkt. 109.

Instead, Amazon’s messages downplayed the severity of the hazard by stating only that the product “may” cause harm and advising purchasers that “[t]here is no need for [them] to return the product.” *Id.* at 8, Dkt. 109, citing Dkt. 87, ¶ 19. For these reasons as well, Amazon’s messages were insufficient to effectuate the purposes of CPSA Section 15.

2. Additional Remedies Under Section 15(c) Are Necessary to Protect the Public

Having found Amazon’s actions to be insufficient to protect the public, ALJ Patil ordered Amazon to implement several remedies under Section 15(c), including: (1) immediately ceasing

³⁵ Amazon asserts that CPSA Section 15(i)(2) requires Complaint Counsel “to show that each component purportedly missing from Amazon’s email messages were so necessary to protect the public that additional emails to thousands of purchasers was required.” Amazon’s Appeal Br. at 58-59, Dkt. 127. This assertion finds no support in the CPSA, which makes clear that any notice required by an order under Section 15(c) or (d) “shall include” the specified information unless “the Commission determines . . . that one or more of the . . . items is unnecessary or inappropriate under the circumstances.” 15 U.S.C. § 2064(i)(2) (emphasis added).

distribution of the Subject Products and notifying all third parties to immediately cease such distribution; (2) sending two rounds of email notifications to original purchasers using the notice attached to the Initial Decision and Order on Remedies at Exhibit C; (3) posting specified recall notices and links to such notices on designated Amazon.com web pages, each original purchaser's Amazon.com page, and designated Amazon social media platforms; and (4) providing instructions to consumers about how to return or destroy the Subject Products in order to obtain refunds. Initial Dec. and Order on Remedies at 13-14, Exs. A-D, Dkt. 119.

In light of the insufficiency of Amazon's actions, the Commission agrees with the ALJ that Amazon should provide notice to direct purchasers to inform them of the hazards pursuant to Section 15(c)(1)(F), 15 U.S.C. § 2064(c)(1)(F), and public notice in accordance with section 15(c)(1)(D), 15 U.S.C. § 2064(c)(1)(D). The Commission also agrees that Amazon's notices should include the word "recall," as well as information prompting and enabling consumers to return or destroy the hazardous products. 15 U.S.C. § 2064(i)(2); 16 C.F.R. § 1115.27.

However, in other respects, the Commission finds that the ALJ failed to consider facts that are relevant to the remedies needed in this case. Notably, the ALJ's order does not account for the fact that Amazon has already ceased distribution of the Subject Products and sent messages about the products (albeit with deficiencies) to direct purchasers. The ALJ's order also requires Amazon to post notices to its primary social media accounts without assessing the usefulness of using these particular accounts to promote the recall. Therefore, the Commission is setting aside the ALJ's order.

Instead, the Commission orders Amazon to develop, in consultation with Complaint Counsel, a Proposed Notification Plan that includes direct and public recall notices for Commission review and approval, as well as recommendations for dissemination of the public

notice. *See* 16 C.F.R. § 1115.29(c). The Proposed Notification Plan shall reflect the findings in this Decision and Order.

The process we are setting forth here will enable the Commission to consider all of the relevant facts and circumstances before approving a notice remedy in this case. Section 15(c) gives the Commission the discretion to order “any one or more” notice remedies, depending on the circumstances. 15 U.S.C. § 2064(c). Further, Section 15(i)(2) of the CPSA and the Commission’s Mandatory Recall Notices Rule “give the Commission and/or a court the flexibility to add or remove requirements from a particular recall notice as necessary and appropriate, keeping in mind the goal of increasing recall effectiveness, and to help consumers identify products, understand the product hazard, and understand any available remedy.” Guidelines and Requirements for Mandatory Recall Notices, Final Rule, 75 Fed. Reg. at 3359.

In addition, the notification remedies laid out in Section 15(c) of the CPSA are closely related to the recall remedies required under Section 15(d), discussed below. For example, any notification under Section 15(c) should properly describe the remedies being provided under Section 15(d) so that consumers understand the safety issues at stake and the actions they should take.

In developing its Proposed Notification Plan, Amazon should follow the timeline for the Proposed Action Plan outlined below. Until the Commission issues an order approving the Proposed Notification Plan, under 16 C.F.R. § 1115.29(c), Amazon should not undertake any action under Section 15(c).

B. Remedies Required Under Section 15(d)

Section 15(d) of the CPSA authorizes the Commission to require a manufacturer, distributor, or retailer not only to provide notice of a substantial product hazard pursuant to

Section 15(c), but also to take any or all of the remedial actions outlined in Section 15(d)(1): repairing the defect, replacing the product with a like or equivalent product, and/or refunding the purchase price of the product if the Commission determines that one or more of the actions is in the public interest. 15 U.S.C. § 2064(d)(1). As noted above, Section 15(d)(2) requires the manufacturer, distributor, or retailer to submit to the Commission a plan for implementing the remedial actions ordered, which the Commission must approve and monitor for compliance and effectiveness. 15 U.S.C. § 2064(d)(3)(A)-(C).

The Commission’s Mandatory Recall Notices Rule contemplates remedies that “include, but are not limited to, refunds, product repairs, product replacements, rebates, coupons, gifts, premiums, and other incentives.” 16 C.F.R. § 1115.27(n)(1). A recall notice may specify that a consumer must take certain actions to obtain the remedy, including but not limited to “contacting a firm, removing the product from use, discarding the product, returning part or all of the product, or removing or disabling part of the product.” 16 C.F.R. § 1115.27(n)(2).

1. Removal of the Subject Products from Consumers’ Homes Is in the Public Interest

ALJ Patil ordered Amazon to issue refunds for the full purchase price of the Subject Product children’s sleepwear, CO detectors, and hair dryers upon product return or confirmation of destruction, with the option to replace CO detectors upon return. Initial Dec. and Order on Remedies at 10-11, 15-16, Dkt. 119. The ALJ also stated that consumers should incur no expenses for returning or replacing the products. *Id.* at 15, Dkt. 119. In addition, the ALJ ordered Amazon to quarantine and destroy Subject Products that are returned by consumers, submit monthly progress reports, and maintain records of its actions. *Id.* at 16-17, Dkt. 119. The ALJ’s order also includes many additional details governing implementation of these Section 15(d) remedies. *Id.* at 13-17, Dkt. 119.

In determining that remedies in this case are “in the public interest,” a term that is not defined in the CPSA, the ALJ stated that “[w]hen Congress uses *public interest* in a regulatory statute, it ‘take[s] meaning from the purposes of the regulatory legislation.’” May 2023 Order at 20, Dkt. 109 (quoting *NAACP v. Fed. Power Comm’n*, 425 U.S. 662, 669 (1976)).³⁶ The ALJ also rejected Amazon’s assertion that a cost-benefit analysis is required for a public interest determination under Section 15; indeed, the CPSA specifically says otherwise. May 2023 Order at 21-22, Dkt. 109; *see* 15 U.S.C. § 2064(h) (“Nothing in this section shall be construed to require the Commission . . . to prepare a comparison of the costs that would be incurred in providing notification or taking other action under this section with the benefits from such notification or action.”). Applying these standards, the ALJ determined that “a remedial scheme which motivates consumers to remove the dangerous products is appropriate.” May 2023 Order at 42, Dkt. 109. He further determined that Amazon’s measures were deficient because Amazon made “no effort . . . to track what number, if any, of each Subject Product was actually disposed” and consumers were not required “to take an action to remove any Subject Product from the marketplace before receiving a refund.” *Id.* at 40, Dkt. 109.

The Commission agrees. Removal of hazardous products from commerce and from consumers’ possession is in the public interest because it serves the CPSA’s purposes of protecting the public against unreasonable risks of injury associated with consumer products, reducing the number of hazardous products in commerce, and helping consumers safeguard themselves. *See* 15 U.S.C. § 2051(a) and (b). In addition, such an approach is consistent with the Commission’s Mandatory Recall Notices Rule, which specifically contemplates product removal

³⁶ The ALJ noted that both Parties had agreed that *NAACP* is “the most relevant Supreme Court case for interpreting the ‘public interest’ under Section 15(d).” May 2023 Order at n.21, Dkt. 109 (citing Transcript of Oral Argument at 20, 85-86, In the Matter of Amazon.com, Inc. (Mar. 28, 2023) (CPSC Dkt. No. 21-2)).

as a mechanism for implementing a Section 15(d) remedy. *See* 16 C.F.R. § 1115.27(n)(2). If the Subject Products remain in consumers' possession, children will continue to wear sleepwear garments that could ignite and result in injury or death; consumers will unwittingly rely on defective CO detectors that will never alert them to the presence of deadly carbon monoxide in their homes; and consumers will use the hair dryers they purchased, which lack immersion protection, in the bathroom near water, leaving them vulnerable to electrocution. In addition, remedies under Section 15(d) are necessary to ensure that the hazardous products cannot legally be sold or resold on secondary markets, further protecting consumers from harm. *See* 15 U.S.C. § 2068(a)(5).

Accordingly, the Commission adopts the ALJ's determination that Amazon must issue full refunds for the children's sleepwear garments, CO detectors, and hair dryers, conditioned upon return or proof of destruction or, for the CO detectors, Amazon may issue replacement products upon return.³⁷ The Commission further adopts the ALJ's determination that the consumer should incur no cost to return or destroy the Subject Products.

2. The CPSA Authorizes the Commission to Order a Conditioned Refund or Replacement

Amazon argues on appeal that the Commission cannot add a condition to a refund or replacement remedy because, it claims, Congress identified only three remedies that can be taken by the Commission: repair, replacement, and refund. Amazon's Appeal Br. at 31-34, Dkt. 127. Amazon relies on the dictionary definitions of "replace" and "refund" and the absence of the word "recall" in the language of Section 15(d) for its assertion that requiring return or proof of

³⁷ Section 15(d)(1)(C) of the CPSA authorizes the Commission to order refunds "less a reasonable allowance for use, if such product has been in the possession of a consumer for one year or more" at the time of public notice or actual notice to the consumer. 15 U.S.C. § 2064(d)(1)(C). Amazon was invited to argue on the record the appropriateness of a refund less a reasonable use allowance as opposed to a full refund. Initial Dec. and Order on Remedies at 10-11, Dkt. 119. It declined to do so. *Id.* at 11, Dkt. 119.

destruction is beyond the Commission’s authority. *Id.* at 32-34, 36-39, Dkt. 127. It also highlights Congress’s use of the word “recall” in Section 12 of the CPSA, though not Section 15, to buttress its argument, *id.*, and notes that Congress specified product destruction in other provisions of the CPSA and thus could have done so in Section 15(d). *Id.* at 34, Dkt. 127; *see, e.g.*, 15 U.S.C. §§ 2066(e), 2088(a).

The Commission finds Amazon’s arguments unpersuasive. In fact, Section 15(d)(2) authorizes the Commission to “specify in the [remedial] order the persons to whom refunds must be made,” 15 U.S.C. § 2064(d)(2), and Section 15(i)(2)(H)(ii) requires that notices inform consumers of “any action a consumer must take to obtain a remedy.” 15 U.S.C. § 2064(i)(2)(H)(ii). These provisions allow the Commission to place conditions on a Section 15(d) remedy by specifying the universe of recipients and what recipients must do to receive the remedy. Section 15(i) also details the requirements for any “recall notices” required under Section 15(c) and (d).

In addition, Section 15(d) directs the Commission to fashion remedies that, as here, are in the public interest. Indeed, the Commission has previously required remedies that rely on a return requirement in other mandatory recalls. In *Relco*, the Commission explained that “a refund allowance not accompanied by a tender [return] requirement . . . might expose unwary consumers and other users to the dangers posed by the hazardous product.” CPSC Dkt. No. 74-4 at 6. In *Zen Magnets*, the Commission stated that its “interest is in removing as many of the Subject Products as possible from consumers’ hands.” 2017 WL 11672449 at *45.

The Commission’s well-established practice of conditioned refunds is also memorialized in the Commission’s Mandatory Recall Notices Rule, which requires firms to specify “[a]ll specific actions that a consumer must take to obtain each remedy, including, but not limited to,

instructions on how to participate in the recall. These actions may include . . . removing the product from use, discarding the product, returning part or all of the product, or removing or disabling part of the product.” 16 C.F.R. § 1115.27(n)(2).

Here, leaving the Subject Products in consumers’ possession and possibly in the secondary marketplace would be contrary to the CPSA’s purpose of protecting the public against unreasonable risks of injury from consumer products. The Commission finds that conditioning refunds or replacements of the Subject Products upon return or proof of destruction is authorized by the CPSA, consistent with Commission policy and practice, and in the public interest because it prevents continuing consumer harm.

C. Amazon, in Consultation with Complaint Counsel, Shall Submit a Proposed Action Plan Under Section 15(d)(2)

The Commission orders Amazon, in consultation with Complaint Counsel, to develop a Proposed Action Plan for approval by the Commission pursuant to Section 15(d)(2). The Proposed Action Plan should detail how Amazon intends to implement the Section 15(d) remedies that the Commission is requiring. The Proposed Action Plan should include the following elements:

1. The Process for Effecting Refunds and Replacements Conditioned on Return or Proof of Destruction

The Commission sets aside the ALJ’s directions to Amazon to implement the refunds and replacements, Initial Dec. and Order on Remedies at 13-15, Dkt. 119, and instead requires Amazon to propose a process for implementing refunds and replacements in the Proposed Action Plan.

2. *Quarantine and Destruction of the Subject Products*

The Commission sets aside the ALJ's detailed requirements directing Amazon to quarantine, segregate, and destroy Subject Products, *id.* at 16, Dkt. 119, and instead directs Amazon to propose a quarantine and destruction process in the Proposed Action Plan.

3. *Monthly Progress Reports and Records Retention*

The Commission sets aside the ALJ's requirements for Amazon to submit monthly progress reports for up to five years and to maintain records of compliance for a period of five years, *id.* at 16-17, Dkt. 119, and instead directs Amazon to propose a schedule of monthly progress reports and a plan for records retention in the Proposed Action Plan.

D. Process for Developing the Proposed Notification Plan and Proposed Action Plan

Within 15 days³⁸ following the service of this Decision and Order, Amazon shall deliver to Complaint Counsel proposed plans for (1) notification under Section 15(c); and (2) implementing the 15(d) remedies discussed above.

Within 15 days of Amazon's delivery to Complaint Counsel of its Proposed Notification Plan and Proposed Action Plan, Amazon and Complaint Counsel shall meet and confer to seek to ensure that the proposed plans are mutually acceptable.

Within ten days of the meet and confer, Amazon shall file its Proposed Notification Plan and Proposed Action Plan with the Commission, through the Office of the Secretary. Within three days thereafter, Complaint Counsel shall file a statement regarding any disputed issues with Amazon's proposed plans. Amazon may file a reply to Complaint Counsel's statement within two days.

³⁸ See 16 C.F.R. § 1025.15(a).

The Commission must approve the Proposed Notification Plan pursuant to 16 C.F.R. § 1115.29(c) and the Proposed Action Plan pursuant to Section 15(d)(3) before Amazon provides any notice under Section 15(c) or takes any action under Section 15(d).

IV. Amazon’s Constitutional Challenges to this Adjudicative Proceeding

In addition to its statutory challenges, Amazon asserts five constitutional challenges to this adjudication and certain remedies under the CPSA. Amazon argues that: (1) requiring Amazon to post notices with CPSC-approved language and mandating posting of those notices on Amazon’s social media platforms constitute unlawful compelled speech in violation of the First Amendment; (2) requiring Amazon to issue refunds is impermissible under the Fifth Amendment’s Takings Clause of the U.S. Constitution; (3) the CPSA’s for-cause removal protection for Commissioners violates the separation of powers doctrine in Article II of the U.S. Constitution; (4) the ALJs’ supposedly “dual” for-cause removal protection similarly violates the separation of powers doctrine; and (5) the combined investigatory, prosecutorial, and judicial roles of the Commissioners in administrative adjudications violate the Fifth Amendment’s due process protections. Amazon’s Appeal Br. at 66-73, Dkt. 127. We address these claims below.

A. Amazon’s Free Speech and Takings Arguments Are Not Ripe

Amazon argued before the ALJ, and now on appeal, that requiring Amazon to both issue notices with agency-mandated language and post such notices to its primary social media accounts would unlawfully compel speech in violation of the First Amendment. *Id.* at 63-66, Dkt. 127. Amazon also maintains that because it provided all purchasers of the Subject Products a credit in the amount of the purchase price,³⁹ requiring a “repeat” payment would be an

³⁹ Amazon’s credits were “in the form of a gift card to [each consumer’s] Account.” Compl. Counsel’s Resp. to Amazon’s SUMF at ¶¶ 19, 71, 87, 101, Dkt. 87.

“impermissible, one-sided transfer of property from Amazon for the ‘benefit’ of a ‘particular class of identifiable individuals’” that is prohibited under the Takings Clause of the U.S. Constitution.⁴⁰ *Id.* at 34-35, Dkt. 127 (quoting *Kelo v. City of New London*, 545 U.S. 469, 478 (2005)); *see also* Amazon’s Reply Br. at 24-25, Dkt. 134. These claims are not ripe.

“A claim is not ripe where the ‘possibility that further consideration will actually occur before [implementation] is not theoretical, but real.’” *Full Value Advisors, LLC v. SEC*, 633 F.3d 1101, 1107 (D.C. Cir. 2011) (citations omitted). This Decision and Order requires Amazon to develop, in consultation with Complaint Counsel, a Proposed Notification Plan and a Proposed Action Plan for submission to the Commission. It is not until the Commission, after reviewing the components of these proposals, issues its final Order on the Proposed Notification Plan and Proposed Action Plan that Amazon’s claims will be ripe. *See Full Value Advisors*, 633 F.3d at 1106 (holding that First Amendment compelled speech claim was unripe because, even though it “presents a purely legal question and might be otherwise ‘fit for review,’” prudence “restrains courts from hastily intervening into matters that may best be reviewed at another time or in another setting, especially when the uncertain nature of an issue might affect a court’s ‘ability to decide intelligently,’” and “when the issue is one of constitutional import”) (citations omitted)); *New York Civil Liberties Union v. Grandeau*, 528 F.3d 122, 133 (2d Cir. 2008) (Sotomayor, J.) (“[J]udicial review of the NYCLU’s First Amendment challenge would certainly benefit from additional factual development and is in many ways contingent on future events, such as an inquiry by the Commission into activity that the NYCLU deems non-lobbying advocacy.”).

⁴⁰ “Nor shall private property be taken for public use, without just compensation.” U.S. Const. amend. V.

B. The CPSA’s For-Cause Removal Protection for CPSC Commissioners Is Constitutional

ALJ Patil declined to rule on Amazon’s challenges to the removal protections for Commissioners and ALJs, explaining that, “[a]lthough the Supreme Court has not ruled on whether the ‘oft-stated principle’ that administrative agencies lack jurisdiction is correct, . . . I decline to challenge that consensus view here and thus will not rule on these claims.” May 2023 Order at 3, Dkt. 109. In addition, Complaint Counsel contends on appeal that under *Axon Enterprise, Inc. v. FTC*, 598 U.S. 175 (2023), the Commission cannot rule on Amazon’s removal protection claims. Compl. Counsel’s Answering Br. at 78-80, Dkt. 129.

We disagree with Complaint Counsel’s interpretation of *Axon*. While the Court there held that district courts have jurisdiction to hear constitutional challenges to an agency’s structure even before the agency renders a decision in an adjudication, it did not conclude that agencies themselves are barred from considering those same constitutional issues. *See Axon*, 598 U.S. at 180. Therefore, absent definitive authority that agencies lack jurisdiction to address structural constitutional challenges, the Commission will address Amazon’s claims.

Under the CPSA, Commissioners may be removed by the President during their seven-year terms for “neglect of duty or malfeasance in office but for no other cause.” 15 U.S.C. § 2053(a). Amazon contends that this for-cause removal provision is unconstitutional. Amazon’s Appeal Br. at 68-69, Dkt. 127. According to Amazon, because the Commission “exercises a wide range of executive powers,” it cannot fall within the narrow exception that the Supreme Court recognized in *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935), for “a multimember body of experts . . . that perform[s] legislative and judicial functions.” *Id.* at 68, Dkt. 127 (citing *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2192 (2020)).

Congress has accorded for-cause tenure protections to officers of numerous multi-member federal agencies since it created the Interstate Commerce Commission in 1887, Pub. L. No. 49-104, ch 104 § 11, 24 Stat. 379, 383 (1887). Half a century later, in *Humphrey's Executor*, the Supreme Court upheld the constitutionality of such restrictions in a case involving a commissioner of the multi-member Federal Trade Commission (FTC), who could be removed only for “inefficiency, neglect of duty, or malfeasance in office.” 295 U.S. at 619-20 (quoting 15 U.S.C. § 41). The Court “found it ‘plain’ that the Constitution did not give the President ‘illimitable power of removal’ over the officers of independent agencies,” and held that the “‘coercive influence’ of the removal power would ‘threate[n] the independence of [the] commission.’” *Morrison v. Olson*, 487 U.S. 654, 687-88 (1988) (alterations in original) (quoting *Humphrey's Executor*, 295 U.S. at 629-30). “Since [the Court’s] 1935 decision in *Humphrey's Executor* . . . , removal restrictions have been generally regarded as lawful for so-called ‘independent regulatory agencies,’ such as the Federal Trade Commission, the Interstate Commerce Commission, and the Consumer Product Safety Commission.” *Morrison*, 487 U.S. at 724-25 (Scalia, J., dissenting) (citations omitted).

The Supreme Court’s more recent separation of powers rulings have similarly recognized that Congress has significant latitude in establishing multi-member agencies whose members have some restrictions on their removal. For instance, in *Free Enter. Fund v. Public Co. Acct. Oversight Bd.*, 561 U.S. 477, 496 (2010), the Court invalidated “novel” and “rigorous” removal restrictions for certain inferior officers who could only be removed by the U.S. Securities and Exchange Commission (SEC) Commissioners. The Court reached that holding on the explicit understanding that the SEC Commissioners cannot “be removed by the President except under the *Humphrey's Executor* standard,” *id.* at 487, and that understanding was essential to the

Court’s analysis that the inferior officers had “two levels of protection from removal,” *id.* at 514. To cure the constitutional violation identified in *Free Enterprise Fund*, the Court severed the inferior officers’ removal restrictions. *Id.* at 508-10. That severance cured the constitutional infirmity because the SEC was now “fully responsible” for the actions of the inferior officers, who are “no less subject than the Commission’s own functions to Presidential oversight,” and thus constitutional. *Id.* at 509.

In *Seila Law*, the Court likewise recognized that *Humphrey’s Executor* permits removal restrictions for multi-member regulatory agencies. The Court held that because the Consumer Financial Protection Bureau was “led by a single Director” rather than “a board with multiple members,” the President must have the ability to remove the Director at will. 591 U.S. 197, 203-05 (2020). The Court explained that in contrast to “a traditional independent agency,” *such as “the multimember Consumer Product Safety Commission,” id.* at 205, 207 (emphasis added), agencies headed by a “single Director . . . cannot be described as a ‘body of experts’ and cannot be considered ‘non-partisan’ in the same sense as a group of officials drawn from both sides of the aisle.” *Id.* at 218. The Court thus severed the Director’s removal restrictions as unconstitutional, *id.* at 237-238, and explained that Congress may “pursu[e] alternative responses to the problem—for example, converting the CFPB into a multimember agency.” *Id.* at 237.

Amazon attempts to rely on a district court decision where the court held that “*Humphrey’s Executor* exception does not apply . . . because the Commission exercises substantial executive power, unlike [the FTC].” *Consumers’ Rsch. v. CPSC*, 592 F.Supp.3d 568, 581 (E.D. Tex. 2022); *see also* Amazon’s Appeal Br. at 68-69, Dkt. 127. But the Fifth Circuit recently reversed and remanded this decision, holding that because “[t]he Supreme Court expressly ‘d[id] not revisit *Humphrey’s Executor* or any other precedent’ in *Seila Law*, . . .

Humphrey's controls.” *Consumers’ Rsch. v. CPSC*, 91 F.4th 342, 346 (5th Cir. 2024) (internal footnote omitted), *reh’g en banc, reh’g denied*, 98 F.4th 646 (5th Cir. 2024), *petition for cert. filed*, No. 23-1323 (U.S. June 14, 2024); *see also Leachco, Inc. v. CPSC*, 103 F.4th 748, 765 (10th Cir. 2024) (“[C]urrent Supreme Court and Tenth Circuit precedent, as well as recent case law from other federal courts, casts doubt on the merit of Leachco’s constitutional challenges to CPSC’s structure, which are necessary predicates of its only preserved irreparable harm argument”); *Illumina, Inc. v. FTC*, 88 F.4th 1036, 1047 (5th Cir. 2023) (citation omitted) (“[A]lthough the FTC’s powers may have changed since *Humphrey’s Executor* was decided, the question of whether the FTC’s authority has changed so fundamentally as to render *Humphrey’s Executor* no longer binding is for the Supreme Court, not us, to answer.”); *United States v. Sunsetter Products LP*, 2024 WL 1116062, at *4 (D. Mass. 2024) (finding the CPSC’s for-cause removal provisions constitutional). Thus, the holding of *Humphrey’s Executor* continues to apply to statutory removal restrictions for multi-member agencies, including CPSC.

Finally, Amazon has not demonstrated any harm related to the removal provision. Amazon has not provided any indication that “the President had expressed that he wanted to remove [a Commissioner] but chose not to because of the limitations under the removal provision.” *Leachco*, 103 F.4th 756 (citing *Collins v. Yellen*, 141 S. Ct. 1761, 1789 (2021)); *see also Cmty. Fin. Servs. Ass’n of Am., Ltd. v. CFPB*, 51 F.4th 616, 632 (5th Cir. 2022) (“[T]o demonstrate harm, the Plaintiffs must show *a connection* between the President’s frustrated desire to remove the actor and the agency action complained of”) (emphasis in original), *cert. granted, opinion rev’d on other grounds, CFPB v. Cmty. Fin. Servs. Ass’n of Am., Ltd.*, 601 U.S. 416 (2024).

C. Dual For-Cause Removal Protection for ALJs Is Constitutional but Inapplicable in this Matter

ALJs can be removed by the agency that appointed them for “good cause established and determined by the Merit Systems Protection Board” (MSPB). 5 U.S.C. § 7521(a). The President may not remove MSPB members except for “inefficiency, neglect of duty, or malfeasance in office.” 5 U.S.C. § 1202(d). Amazon argues that this dual-layer removal protection for the ALJs, who were assigned to this adjudication from SEC, violates the separation-of-powers doctrine by insulating the ALJs from removal by both the President and their agency heads. Amazon’s Appeal Br. at 69-71, Dkt. 127.

Amazon’s focus on the status of ALJs is misguided in the present context, where the decisionmaker is CPSC, rather than the ALJs who provided initial decisions for *de novo* review by the Commission. *See generally* 16 C.F.R. part 1025, subpart F. On appeal, the Commission “shall, to the extent necessary or desirable, exercise all the powers which it could have exercised if it had made the Initial Decision.” 16 C.F.R. § 1025.55(a); *see also* 5 U.S.C. § 557(b). As noted, the Commission may modify or set aside the ALJ’s findings, conclusions, and order. 16 C.F.R. § 1025.55(b).

Even if applied to proceedings that are pending before an ALJ of the Commission (which is not the posture of this matter), Amazon’s “dual-layer removal” theory would fail. The presiding ALJs in Amazon’s administrative proceeding are inferior officers, meaning subordinate officials whose work “is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.” *Edmond v. United States*, 520 U.S. 651, 663 (1997). The Supreme Court has consistently recognized that Congress may vest removal authority for an inferior officer in a department head rather than the President personally, and subject to limited restrictions that do not place such officers beyond adequate

Presidential control. For example, in *Free Enterprise Fund*, 561 U.S. 477, the Court invalidated a statutory provision that imposed stringent limitations on the removal of inferior officers who could be removed only by principal officers also subject to good cause removal. The members of the Public Company Accounting Oversight Board (Board) could be removed only for “willful violations of the [Sarbanes-Oxley] Act, Board rules, or the securities laws; willful abuse of authority; or unreasonable failure to enforce compliance,” and any removal decision would be made by the SEC Commissioners (themselves thought to be removable only for cause). *Id.* at 503. The Court concluded that this “novel” and “rigorous” structure meant that “the President [was] no longer the judge of the Board’s conduct” because he lacked “the ability to oversee the Board, or to attribute the Board’s failings to those whom he *can* oversee.” *Id.* at 496.

Accordingly, the Court invalidated and severed the Board’s removal restrictions. *Id.* at 509; *see also United States v. Perkins*, 116 U.S. 483, 484-85 (1886) (upholding restriction that required the Secretary of the Navy to make a misconduct finding or convene a court-martial before removing a naval officer during peacetime); *Morrison*, 487 U.S. at 685-89 (upholding “good cause” removal restriction for independent counsel).

Amazon relies on *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022), *aff’d on other grounds*, 144 S. Ct. 2117 (2024),⁴¹ a Fifth Circuit decision in which the court of appeals held that Section 7521, as applied to the SEC’s ALJs, violates Article II. Amazon’s Appeal Br. at 70-71, Dkt. 127. But the Fifth Circuit in *Jarkesy* appears to have misconstrued the Supreme Court’s holding in *Free Enterprise Fund* as establishing a categorical rule that multiple layers of tenure protection *always* violate Article II. 34 F. 4th at 464 (concluding that “SEC ALJs are insulated from the

⁴¹ Because the Supreme Court affirmed the ruling of the Fifth Circuit on separate grounds, it “[did] not reach the . . . removal issues.” *SEC v. Jarkesy*, 144 S. Ct. 2117, 2127-28 (2024).

President by at least two layers of for-cause protection” because “SEC Commissioners and MSPB members can only be removed by the President for cause”).

The “only issue” before the Court in *Free Enterprise Fund* was whether Congress could grant such protection to “the Board,” 561 U.S. at 508, and the Court viewed the “size and variety” of the Federal Government as discouraging “general pronouncements” about other officials, *id.* at 506. The Court explained in particular that its holding did not address those federal workers who are “employees” rather than “Officers of the United States.” *Id.* The *Free Enterprise Fund* Court also specifically noted that its holding did “not address that subset of independent agency employees who serve as administrative law judges.” *Id.* at 507 n.10.

The constitutional problems the Court identified in *Free Enterprise* do not exist here. First, the ALJs perform only adjudicative functions. In contrast, the Court in *Free Enterprise Fund* considered the removability of an “inferior officer ‘who’ determines the policy and enforces the laws of the United States,” 561 U.S. at 484, and it distinguished ALJs on the ground that they “perform adjudicative rather than enforcement or policymaking functions,” *id.* at 507 n.10; *see also Leachco*, 103 F.4th at 764 (“[W]hile the Fifth Circuit found double-layered removal protections for ALJs unconstitutional in [*Jarkesy*], that court seemed to disregard the distinction between the [Board] members in *Free Enterprise Fund*, who exercised executive functions, and ALJs, who perform adjudicatory functions”—a distinction that “matters” under “Supreme Court precedent”) (citations omitted)). As the Court previously explained, “an adjudicatory body” in the Executive Branch has “a unique need” for decisional independence. *Collins*, 141 S. Ct. at 1783 n.18.

Second, the Commission retains other means of controlling an ALJ’s exercise of executive power. There are no statutory restrictions on the Commission’s authority to terminate

the ALJs' detail from the SEC to CPSC at will. *See* 5 U.S.C. § 3344 (details for ALJs); 5 C.F.R. § 930.208 (regulations for the detail program). And the Commission is unaware of any reason to believe that the President is dissatisfied with the performance of the ALJs here. Accordingly, there is no "possible harm resulting from the allegedly unconstitutional limitations on the President's ability to remove [the] ALJ[]." *K & R Contractors, LLC v. Keene*, 86 F.4th 135, 149 (4th Cir. 2023).

Finally, 5 U.S.C. § 7521(a)'s good-cause standard sets a lower bar for removal of ALJs than the "unusually high" bar set by the statute at issue in *Free Enterprise Fund*, which permitted removal only for "willful violations" of some (but not all) laws or regulations, "willful abuse" of power, or "unreasonable failure to enforce compliance." 561 U.S. at 503.

D. Combined Investigatory, Prosecutorial, and Judicial Roles of Commissioners Would Not Deny Amazon Due Process

Amazon lastly asserts that the Commission's structure and authority, where the Commission "direct[s] agency staff to initiate investigations," "vot[es] to approve the issuance of" a Section 15 complaint, and then itself decides the case, "preclude a fair and impartial adjudication" in violation of the Fifth Amendment's Due Process Clause. Amazon's Appeal Br. at 71-73, Dkt. 127.

Amazon relies primarily on *Williams v. Pennsylvania*, 579 U.S. 1 (2016), for the proposition that "'an unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case.'" Amazon's Reply Br. at 41, Dkt. 134. In that case, a justice of the Pennsylvania Supreme Court participated in a postconviction proceeding involving a case in which he had previously, in his supervisory role as district attorney, approved the decision to seek the death penalty. *Williams*, 579 U.S. at 3-9. The U.S. Supreme Court held that "under the Due Process Clause there is an impermissible risk of actual bias when a judge earlier

had *significant, personal involvement* as a prosecutor in a critical decision regarding the defendant’s case.” *Id.* at 8 (emphasis added). Applying that standard, the Court held that the justice’s failure to recuse himself from the case violated the Due Process Clause. *Id.* at 10-12.

Williams stands for the proposition that particular facts may suggest impermissible bias where the decisionmaker has had prior involvement in the case—not for the proposition that prior involvement necessarily presents a Constitutional problem. “Courts have long recognized ‘a presumption of honesty and integrity in those serving as adjudicators.’” *Professional Air Traffic Controllers Org. v. Fed. Labor Rels. Auth.*, 685 F.2d 547, 573 (D.C. Cir. 1982) (internal citations omitted). Given this presumption, “the combination of investigative and adjudicative functions does not, without more, constitute a due process violation.” *Withrow v. Larkin*, 421 U.S. 35, 58 (1975); *see also In re Zdravkovich*, 634 F.3d 574, 579 (D.C. Cir. 2011) (recognizing that the Supreme Court found no due process violation in *Withrow* where the same agency made probable cause determination and final adjudication).

Indeed, the APA, under which this administrative proceeding is being conducted, specifically exempts “members of the body comprising the agency” from the requirement that “[a]n employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review.” 5 U.S.C. § 554(d); *see also Air Prod. & Chemicals, Inc. v. FERC*, 650 F.2d 687, 709 (5th Cir. 1981) (“The practice of reviewing the recommendations of the investigatory staff . . . and then ordering a formal investigation is clearly within the exception to the APA.”) (internal citations omitted). The Commission’s rules implement the APA’s general separation-of-functions requirement by prohibiting Complaint Counsel from engaging in “[a]ny oral or written *ex parte* communication relative to the merits of

any proceedings” with the ALJ, the Commissioners and their staff, and others involved in the decisional process, “during the period commencing with the date of issuance of a complaint and ending upon final Commission action in the matter.” 16 C.F.R. § 1025.68. Amazon has not alleged any violation of the separation of functions provisions under the APA or the Commission’s rules.

Amazon points to a statement that then-Acting Chairman Robert S. Adler made in connection with his vote to approve the Complaint as evidence that the Commission as a whole has pre-judged Amazon’s liability. Amazon’s Appeal Br. at 72-73 & n.62, Dkt. 127. The statement at issue—“Today the Commission voted to file an administrative complaint against [Amazon] . . . to require them to take responsibility for recalling products sold under their ‘Fulfilled by Amazon’ channel”—is merely a summary by a former Commissioner of the Commission’s vote to issue the Complaint. Consumer Product Safety Commission: *Statement of Acting Chairman Robert S. Adler on the Vote to Approve Filing of an Administrative Complaint Against Amazon.com* (July 14, 2021), https://www.cpsc.gov/s3fs-public/Statement%20on%20Amazon%20RSA%207.14_0.pdf. It does not indicate that the minds of the current Commissioners deciding this matter are “irrevocably closed.” *FTC v. Cement Inst.*, 333 U.S. 683, 701 (1948) (“[T]he fact that the Commission had entertained such views as the result of its prior *ex parte* investigations did not necessarily mean that the minds of its members were irrevocably closed”). In *Cement Institute*, the Court refused to disqualify the FTC from hearing an adjudication after Commissioners issued statements questioning the legality of the practices at issue in the case, noting that, during the adjudication, respondents produced “volumes” of evidence, presented testimony, and cross-examined witnesses as support that their practices were legal. *Id.* at 700-01.

Amazon has been offered a fair and thorough process to decide various questions of law and fact in this matter. It had the opportunity to present its case before the ALJs and now before the Commission. In light of the presumption that adjudicators act with honesty and good faith, the APA's specific allowance of prior Commissioner involvement in the adjudications they decide, and Amazon's failure to identify any particular facts indicating bias by current Commissioners, Amazon's due process argument fails.

ORDER

Having considered the Order on Motion to Dismiss and Motion for Summary Decision (Dkt. 27), Order on Summary Decision Motions (Dkt. 109), and Initial Decision and Order on Remedies (Dkt. 119), the arguments, and evidence of record in this proceeding, the Commission (by a unanimous, 5-0 vote) finds:

1. That Respondent Amazon.com, Inc. (Amazon) acted as a distributor under the CPSA, 15 U.S.C. § 2052(a)(8), when it received, stored, and delivered the Subject Products through its Fulfilled by Amazon program;
2. That the Subject Product children's sleepwear garments identified in the Complaint and the Stipulation of the Parties present a substantial product hazard under Section 15(a)(1) of the CPSA, 15 U.S.C. § 2064(a)(1);
3. That the Subject Product carbon monoxide detectors identified in the Complaint and the Stipulation of the Parties present a substantial product hazard under Section 15(a)(2) of the CPSA, 15 U.S.C. § 2064(a)(2);
4. That the Subject Product hair dryers identified in the Complaint and the Stipulation of the Parties present a substantial product hazard under Section 15(a)(2) and (j) of the CPSA, 15 U.S.C. § 2064(a)(2) and (j);
5. That because Amazon's messages were insufficient to protect the public, under Section 15(c)(1) of the CPSA, 15 U.S.C. § 2064(c)(1), direct notice to purchasers, pursuant to 15 U.S.C. § 2064(c)(1)(F), and public notice, pursuant to 15 U.S.C. § 2064(c)(1)(D), are required in order to adequately protect the public from the substantial product hazards presented by the Subject Products; and
6. That because Amazon did not seek to remove the Subject Products from commerce and from consumers' possession, under Section 15(d)(1) of the CPSA,

15 U.S.C. § 2064(d)(1), it is in the public interest that Amazon issue full refunds for the children's sleepwear garments, carbon monoxide detectors, and hair dryers, conditioned upon return or proof of destruction or, for the carbon monoxide detectors, replacement products upon return.

It is therefore ORDERED:

1. That the ALJ's Order is set aside in full;
2. That, within 15 days following the service of this Decision and Order, Amazon shall deliver to Complaint Counsel its Proposed Notification Plan and Proposed Action Plan, defined above;
3. That, within 15 days of Amazon's delivery to Complaint Counsel of its Proposed Notification Plan and Proposed Action Plan, Amazon and Complaint Counsel shall meet and confer to seek to ensure that the proposed plans are mutually acceptable;
4. That, within ten days of the meet and confer, Amazon shall file with the Commission, through the Office of the Secretary, the Proposed Notification Plan and Proposed Action Plan for review and approval by the Commission, as required by 16 C.F.R. § 1115.29(c) and Section 15(d)(2) of the CPSA, 15 U.S.C. § 2064(d)(2);
5. That, within three days thereafter, Complaint Counsel shall file a statement regarding any disputed issues with the Proposed Notification Plan and the Proposed Action Plan; and

6. That, within two days thereafter, Amazon may file a reply to Complaint Counsel's statement.

SO ORDERED this 29th day of July, 2024.

BY THE COMMISSION,

ALBERTA MILLS

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MILLS

Date: 2024.07.29 15:53:16 -04'00'

ALBERTA E. MILLS, Secretary
Consumer Product Safety Commission