ORAL ARGUMENT NOT YET SCHEDULED

No. 22-1300

In the

United States Court of Appeals

for the

District of Columbia Circuit

WINDOW COVERING MANUFACTURERS ASSOCIATION,

Petitioner,

– v. –

UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION,

Respondent.

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

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BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

In addition to the parties, intervenors, and amici listed in the Brief for Petitioner, the National Association of Manufacturers, the Chamber of Commerce of the United States of America, and the New Civil Liberties Alliance have each filed notices of intent to participate as amici curiae.

B. Rule Under Review

References to the final rule at issue appears in the Brief for Petitioner.

C. Related Cases

Counsel for *amicus curiae* is unaware of any related cases within the meaning of Circuit Rules 28(a)(1)(C).

Dated: February 7, 2023 /s/ *Paul W. Hughes*

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, *amicus curiae* the National Association of Manufacturers makes the following disclosures:

The National Association of Manufacturers (NAM) is the national trade association representing manufacturers across the United States. The NAM does not have a parent company, and no publicly held company has a 10% or greater ownership interest in it. The NAM is a trade association for purposes of Circuit Rule 26.1(b).

Dated: February 7, 2023 /s/ *Paul W. Hughes*

RULE 29(d) CERTIFICATE

Pursuant to Federal Rule of Appellate Procedure 29(b), all parties have consented to the filing of this brief.

Pursuant to D.C. Circuit Rule 29(d), counsel for *amicus curiae* the National Association of Manufacturers states that filing a separate brief is necessary to represent the unique perspective of the Nation's manufacturers, a discrete group of businesses who—as the producers of consumer products—are particularly affected by the regulatory activities of the Consumer Product Safety Commission, and thus a group whose interests specially depend on the proper outcome of this case.

Dated: February 7, 2023 /s/ *Paul W. Hughes*

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GLOSSARY

APA	Administrative Procedure Act
CPSA	Consumer Product Safety Act
CPSC	Consumer Product Safety Commission
NAM	National Association of Manufacturers

INTRODUCTION AND INTEREST OF THE *AMICUS CURIAE*

The Consumer Product Safety Act (CPSA, or Act), as amended, sets up a regulatory process that is uniquely solicitous of the expertise of industry actors in creating standards that keep consumers safe. For years, that regime has generally worked well, with buy-in from both regulated businesses and the Consumer Product Safety Commission (CPSC, or Commission) working to protect consumers through consensus and collaboration.

But with the final rule promulgated below, the CPSC starkly broke with the statutory scheme, failing to satisfy the Act's high standards and falling short of bedrock principles of administrative law by handing down an unwarranted and improper mandatory rule concerning the cords of custom window coverings. But more than just window coverings are at stake. This case will determine whether the CPSA continues to work as written—or whether the CPSC may defy its organic statute whenever it wishes to substitute its own regulatory judgment for that of consumer products manufacturers.

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in all 50 states and in every industrial sector, including consumer products. Manufacturing employs over 12.9 million

men and women, contributes over $2.8 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for over half of all private-sector research and development in the Nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States. The NAM regularly files amicus briefs in appeals important to manufacturers.

This is one such case. The NAM's members include numerous companies that manufacture many of the thousands of consumer products that fall under the CPSC's regulatory purview. This petition has significant ramifications for the regulatory landscape surrounding consumer products—specifically, whether consumer products will continue to be subject to standards developed through the collaboration of industry and government, as Congress intended, or whether the CPSC will be permitted to overstep its statutory bounds to regulate unilaterally at will.

SUMMARY OF THE ARGUMENT

I. The regulatory system Congress established to address potential injuries from consumer products recognizes that the manufacturers of those products usually best understand how to achieve safety without creating unnecessary regulatory burdens. The law mandates collaboration between businesses and the government to craft voluntary safety

standards, which have historically been very effective. Departing from that proven system is inconsistent with the statute and harmful to American manufacturers of thousands of consumer products.

II. Because Congress set such high standards for the CPSC to meet before it may override a voluntary standard, the Administrative Procedure Act (APA) likewise operates as a strong check on the Commission. In particular, the CPSA creates an unusually robust notice and comment procedure, reflecting the statute's strong preference for collaboration between government and business by creating a forum for regulated parties to continue to play a role in the promulgation of safety rules.

III. The rule promulgated in this case does not satisfy the statute's high standards. It therefore violates the APA for failing to establish that the rule is necessary to address an unreasonable safety risk, failing to conduct an appropriate cost-benefit analysis, and failing to adhere to the statute's demanding notice and comment regime.

ARGUMENT

The Consumer Product Safety Act reflects Congress's judgement that, as much as possible, voluntary safety standards developed by consumer products manufacturers and other interested stakeholders through a collaborative, consensus-driven process are the best mechanism for keeping consumers safe without unduly burdening industry. In

accordance with this strong presumption, the law establishes a high bar for the Consumer Product Safety Commission to clear if the agency chooses to instead promulgate mandatory rules—and the Commission's obligations under the APA are likewise elevated. Because the agency has failed both to satisfy the high standard necessary to develop a mandatory rule, and to comply with the statute's uniquely elaborate notice-and-comment rulemaking procedure, the rule must be set aside.

I. THE CPSC HAS LIMITED AUTHORITY AND IS MEANT TO DEFER TO VOLUNTARY STANDARDS WHENEVER POSSIBLE.

When it enacted the CPSA, Congress set up a regulatory scheme that rightly recognizes that the businesses creating consumer products are usually in the best position to understand what is needed to keep those products safe, and how to achieve it. The law imposes uniquely potent restrictions on the CPSC, establishing a strong presumption in favor of collaboration between businesses and the government to craft voluntary standards governing the safety of consumer products. Historically, these standards have worked quite well. The CPSC's recent run of more aggressive, unilateral action disrupts that statutory plan, harming the manufacturers of consumer products without demonstrable benefits to safety.

A. The CPSA sets a high bar for the agency to override voluntary industry standards.

The CPSA places voluntary standards developed by businesses at the center of its regulatory plan. The law states plainly that in the ordinary course the "[t]he Commission *shall* rely upon voluntary consumer product safety standards rather than promulgate" its own mandatory rules, so long as the voluntary standard will "adequately reduce" injury risks and it is "likely" that businesses will substantially comply. 15 U.S.C. § 2056(b)(1) (emphasis added); *see, e.g.*, *Me. Cmty. Health Options v. United States*, 140 S. Ct 1308, 1320 (2020) (statutory term "shall" is "mandatory language" that "typically creates an obligation impervious to discretion") (quotation marks omitted) (alterations incorporated).

The statute even authorizes the CPSC to foot some of the bill for developing such voluntary standards, encouraging cooperation between the government and industry groups by permitting the Commission to reimburse the developers of safety standards for some of the costs of their participation. 15 U.S.C. § 2056(c).

On the other hand, when the CPSC wishes to override these voluntary standards, it must clear a high bar to do so. Again, the statute speaks in stark, mandatory terms: "[t]he Commission *shall not* promulgate a

consumer product safety rule *unless* it finds . . . that the rule . . . is reasonably necessary to eliminate or reduce an unreasonable risk of injury" (15 U.S.C. § 2058(f)(3)(A) (emphasis added)); that any existing voluntary standard "is not likely to result" in the same outcome or induce "substantial compliance" (*id.* § 2058(f)(3)(D)); and that "the rule imposes the least burdensome requirement" possible (*id*. § 2058(f)(3)(F)).

In other words, Congress placed mandatory rules at the very bottom of the CPSC's regulatory barrel. In order to reach the point at which a mandatory rule is appropriate, the Commission must, among other things, undertake a robust cost-benefit analysis of the proposed rule and all "reasonable alternatives" (*see* 15 U.S.C. § 2058(c)), invite businesses to develop an alternate voluntary standard (*id.* § 2058(a)(6)), actively "assist . . . , administratively and technically," in the development of that alternative voluntary standard (*id* § 2054(a)(3)), and, if that effort succeeds, "terminate" the rulemaking proceeding (*id* § 2058(b)(2)).

Such deference to voluntary standards makes the CPSA unique among the organic statutes of administrative agencies. *See, e.g.,* Robert S. Adler*, Somebody Always Pays,* CPSC: Acting Chairman Adler's Blog (Jul. 7, 2015) https://perma.cc/RRY6-VTDU (CPSC commissioner calling the CPSA's cost-benefit analysis regime "the most burdensome and detailed set of cost-benefit procedures in the federal government"). Indeed,

even before Congress mandated deference to voluntary standards in 1981 (*see* Pub. L. No. 97-35, § 1202, 95 Stat. 703, 704 (1981)), administrative law scholars recognized that "the framers of this legislation . . . displayed rare inventiveness in a conscious effort to fashion 'a process which makes maximum use of the expertise available in the private sector and permits maximum participation by industry and consumer interests in the standard-setting process.'" Antonin Scalia & Frank Goodman, *Procedural Aspects of the Consumer Product Safety Act*, 20 UCLA L. Rev. 899, 951 (1973) (quoting H. R. Rep. No. 1154, 92d Cong. 2d Sess. 14 (1972)).

The statute's distinctive regulatory scheme thus reflects a singularly strong presumption by Congress that collaboration between regulators and businesses—and not unilateral government action—is the best approach to maintain high standards of safety for consumer products without bogging down businesses under the weight of unnecessary and unreasonable mandates.

B. Voluntary industry standards effectively balance the needs of businesses and the safety of consumers.

Under the framework set out by Congress, the CPSC and industry groups across the landscape of consumer products have collaborated productively to promulgate thousands of voluntary standards touching on every conceivable type of product. These standards have a strong track

record of success, both for ensuring safety and also for achieving high rates of compliance and industry buy-in.

The CPSA has facilitated the development of thousands of voluntary safety standards, produced by hundreds of industry actors and development organizations. U.S. Gov't Accountability Off. GAO-12-582, *Consumer Product Safety Commission: A More Active Role in Voluntary Standards Development Should Be Considered* 27 (2012). Behind every one of these voluntary standards are businesses and manufacturers working in good faith to keep their products safe. These businesses in turn rely on the regulatory stability that the statute promises. By placing regulation-sensitive parties like small businesses and manufacturers in the driver's seat of the regulatory process, the CPSA allows these parties to plan well into the future with adequate information to understand what regulatory burdens lie ahead, as well as to ensure that those burdens are possible to bear. Only equipped with that information can responsible actors make necessary investments to comply with safety standards while balancing their other obligations as businesses to make payroll, deliver on their promises, and market high-quality products at reasonable prices.

These voluntary standards have proven time and again to be effective. First off, both industry and consumer groups agree that "[c]ompliance with voluntary standards developed through the consensus process is generally considered to be high," often in excess of 90%. GAO, *More Active Rule, supra* at 7. More than that, the voluntary standards process is a model of good government, fostering "open participation" in the regulatory process, which "can help ensure compliance with the resulting standard" by increasing industry buy-in. *Id.* at 7-8. And voluntary standards develop through a "flexible process" that "facilitate[s] revisions to the standards," allowing industry to "respond in a timely manner to emerging hazards or risk." *Id*. at 7. By comparison, the blunt tool of mandatory rules leads to rigid, unyielding regulatory conditions that "stifle product development and innovation." *Id*.

C. This case exemplifies an increasingly aggressive CPSC stretching beyond its statutory authority.

1. Traditionally, the CPSC has taken its obligation to collaborate with industry seriously, generally showing the significant deference to voluntary standards contemplated by the statute. In fact, in the first thirty-four years following the enactment of the 1981 amendments, the CPSC promulgated just *ten* mandatory rules—one every three and a half years. Adler, *Somebody Always Pays, supra*. In recent years, however,

the Commission has opted for a more "audacious" approach, to use its own term. *See* Letter from CPSC Acting Chairman Robert Adler to Representative Rosa DeLauro at 12 (March 1, 2021), https://perma.cc/4G6H-ENY5 ("Adler Letter"). That new approach has included seeking to override voluntary standards with alarming frequency compared to the agency's historic pace.

The mandatory rule at issue in this case is just one of a flurry of such rules recently issued by the agency. For instance, in September of 2022, the Commission issued a broad mandatory rule designed to address the risk of injury associated with swallowing small magnets found in a wide variety of products. *See Safety Standard for Magnets*, 87 Fed. Reg. 57,756 (Sept. 21, 2022). Notably, the Tenth Circuit struck down a very similar mandatory rule just a few years ago, in *Zen Magnets, LLC v. Consumer Prod. Safety Comm'n*, 841 F.3d 1141 (10th Cir. 2016). Not to be deterred, the CPSC has revived the rule, only this time setting its sights on an even broader swath of consumer products. Another mandatory rule promulgated in late 2022 concerned injuries caused by clothing storage units tipping over. *See Safety Standard for Clothing Storage Units*, 87 Fed. Reg. 72,598 (Nov. 25, 2022).

This recent pattern of aggressive agency enforcement fits into a broader effort by the CPSC to expand its purview far beyond the modest

parameters Congress set for it when it enacted the CPSA. Indeed, the agency has recently proclaimed a "reinvent[ion]" of itself, requesting a nearly three-fold budget increase to beef up enforcement and dramatically restructure the agency, creating several new divisions and hiring scores more employees. *See* Adler Letter, *supra*. But the Commission may only lawfully pursue such a fundamental shift in the scope of its activity insofar as it does not step outside the parameters of its organic statute. With respect to the issuance of mandatory rules at least, that power is strictly limited.

2. Furthermore, allowing the CPSC to push past its statutory limits, as it now seeks to do, would deal a devasting blow to manufacturers across the consumer products landscape, especially small businesses. In this case, the agency disregarded the harsh consequences of its mandatory rule for the small businesses that design and manufacture custom window coverings—and many other small businesses directly impacted—despite clear warnings. For instance, the Small Business Administration—a fellow federal agency—warned the CPSC that its methodology for calculating the number of impacted businesses was flawed and that the proposed rule would require significant new investments in space, while wasting substantial inventory. Comment from Office of Advocacy, U.S. Small Business Administration (March 23, 2022), perma.cc/X3GC-

9KDW. The Commission itself admitted that it "anticipate[d] a significant impact on small businesses," (*Safety Standard for Operating Cords on Custom Window Coverings*, 87 Fed. Reg. 73,144, 73,173 (Nov. 28, 2022)), which it calculated accounted for 60% of all revenue in the window covering industry and 97% of the industry's firms. *Id*. at 73,149.

As the petitioner pointed out during the notice and comment period, these figures—concerning enough on their face—actually significantly undercounted the number of small businesses potentially impacted, as they excluded home furnishing wholesalers, interior designers, custom product workrooms, and numerous other categories of businesses whose window treatment sales would be directly impacted. A748-749. Another commenter estimated that the Commission had improperly excluded 25,000 businesses with fewer than 100 employees from its analysis—more than double the number of potentially impacted small businesses the CPSC had accounted for. *See* A779. Ultimately, the agency pressed forward with promulgating its mandatory rule anyway, despite knowing the consequences it would have for small businesses.

These same concerns will apply whenever the CPSC disregards its governing statute to implement unnecessary, unexpected, and unrealistic requirements. Businesses suffer when they are forced to comply with sudden, unforeseen rule changes—especially when those rule changes

lack adequate input from the regulated businesses and are not calibrated to what is feasible given resource and time constraints. That is all the more so for small businesses, for whom the new investments necessary to comply with regulations will be especially burdensome.

II. APA LIMITATIONS ARE PARTICULARLY STRINGENT ON THE CPSC BECAUSE ITS ORGANIC STATUTE SETS SUCH A HIGH BAR.

As a general principle, the greater the statutory hurdles an agency must clear in order to act, the more stringently the APA serves as a check against arbitrary and capricious or unlawful agency action. Therefore, because Congress set forth such strict requirements that must be met before the CPSC can override a voluntary standard, the requirements of the APA likewise apply with special force.

In particular, the CSPA's strong preference for collaboration between government and business in the usual course means that when the agency opts for the disfavored process of mandatory rulemaking, it must provide through the intricate notice and comment process established by the statute a truly meaningful forum for regulated parties to understand what is coming and have a say.

A. Because the CPSA imposes such high standards for agency action, the APA applies with significant force to the CPSC.

A "reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). And "the question whether a particular action is arbitrary or capricious must turn on the extent to which the relevant statute, or other source of law, constrains agency action." *Kreis v. Sec'y of Air Force*, 866 F.2d 1508, 1514 (D.C. Cir. 1989).

That is, Congress is free to calibrate both the substantive powers of particular agencies and the procedural latitude those agencies are provided in pursuit of their policy objectives, adjusting the agency's discretion either upwards or downwards from the default. *See, e.g.*, *Merck & Co., Inc. v. HHS*, 962 F.3d 531, 536 (D.C. Cir. 2020) ("[A]gencies are bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes.") (quotation marks omitted); *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) ("Agencies have only those powers given to them by Congress, and enabling legislation is generally not an open book to which the agency may add pages and change the plot line.") (quotation marks omitted, alteration incorporated). And where, as here, Congress

has chosen to place unusually strict restraints on an agency's power to act, a court's APA review is correspondingly more searching than in a normal case. *Kreis*, 866 F.2d at 1514; *cf. Am. Legion v. Derwinski*, 54 F.3d 789, 799 (D.C. Cir. 1995) ("Given th[e] broad discretion found within the statute, the scope of our review . . . is particularly limited.").

This principle makes good sense. As this Court has well noted, the APA does not provide "a fixed template to be imposed mechanically on every case," but rather "commit[s] to the courts a 'multifaceted review function'" that accounts for the "'intent of Congress in drafting the particular statute at issue'" *Nat. Res. Def. Council, Inc. v. Sec. & Exch. Comm'n*, 606 F.2d 1031, 1049 (D.C. Cir. 1979) (quoting *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1024 (D.C. Cir. 1978)). Because courts must pay "close attention to the nature of the particular problem faced by the agency . . . [t]he stringency of [the court's] review . . . depends upon analysis of a number of factors . . . particularly the agency's enabling statute." *Id*. at 1050. "Only through such a flexible approach can [the court] review the multifarious types of agency actions as responsible participants in an enterprise of practical governance." *Id*. Thus, it will naturally be more apparent when an agency "relied on factors which Congress has not intended it to consider [or] entirely failed to consider an important aspect of the problem" (*Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut.*

Auto. Ins. Co., 463 U.S. 29, 43 (1983)), when Congress went to extra pains to lay out in the organic statute, in meticulous detail, what factors the agency must rely on, what aspects it must consider, and how.

The CPSA does exactly that. At every turn, the law insists upon adhering to voluntary standards. *See* pages 5-7, *supra*. It orders the Commission to rely upon them whenever practicable (15 U.S.C. § 2056(b)(1)); it commands the agency to facilitate the process of developing them (*id.* § 2054(a)(3)); and it imposes abnormally strict requirements when the CPSC wishes to override them (*id.* § 2058(f)). The appropriate review under the APA is thus especially exacting, as the statute supplies numerous criteria to identify where the Commission's analysis was improper or unlawful, from a faulty cost-benefit analysis to an unsubstantiated determination that a voluntary standard was not up to the job.

B. Proper notice and comment rulemaking is of particular importance in the context of CPSC mandatory rules.

1. The APA requires all agencies to publish in the Federal Register "[g]eneral notice of proposed rulemaking" and provide "interested persons an opportunity to participate . . . through submission of written data, views, or arguments." 5 U.S.C. § 553(b)-(c). And when the agency issues a final rule, it must "consider and respond to their arguments, and explain its final decision in a statement of the rule's basis and purpose."

Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 109 (2015) (Scalia, J., concurring); *see also* 5 U.S.C. § 553(c). Notice and comment rulemaking is not a mere formality or "empty charade." *Connecticut Light & Power Co. v. Nuclear Regul. Comm'n*, 673 F.2d 525, 528 (D.C. Cir. 1982). Rather, "[i]t is to be a process of reasoned decision-making," providing an "opportunity for interested parties to participate in a meaningful way in the discussion and final formulation of rules." *Id*. In this way, the procedure "guards against excesses in rulemaking." *Perez*, 575 U.S. at 109 (Scalia, J., concurring).

2. As with the other requirements of the APA, the standards of proper notice and comment rulemaking are elevated when an agency's organic statute demands as much. *See Allina Health Servs. v. Price,* 863 F.3d 937, 944 (D.C. Cir. 2017)*, aff'd sub nom. Azar v. Allina Health Servs.,* 139 S. Ct. 1804 (2019) (holding that the Medicare Act incorporated more stringent notice and comment requirements than the APA). The CPSA is one such statute, "requir[ing] the CPSC to take certain procedural steps when issuing rules that go beyond the typical APA notice-and-comment procedures." David H. Carpenter, Cong. Research Serv., R45174, *The Consumer Product Safety Act: A Legal Analysis* 10 (2018).

The CPSA's supercharged notice and comment regime accords with the statute's unique goals. The watchword of the CPSA is collaboration.

The Act reflects Congress's expectation that, in the ordinary course, the agency will work alongside businesses to formulate voluntary rules that protect consumer safety without unduly burdening industry. *See* Teresa M. Schwartz, *The Consumer Product Safety Commission: A Flawed Product of the Consumer Decade,* 51 Geo. Wash. L. Rev. 32, 71 (1982) ("The [post-1981 CPSA] require[s] the Commission to consider voluntary standards throughout the process."). When the CPSC chooses to promulgate mandatory rules instead, the notice and comment rulemaking process becomes the primary avenue available for the parties directly impacted by the rule to recreate—at least to a degree—the tradition of productive exchange between government and industry that is meant to be the agency's hallmark. This context helps explain why the statute's requirements are so unusually "elaborate" and "well designed to discourage the Commission from developing mandatory standards." *Id*. at 72.

3. These considerations are especially important for manufacturers, who need adequate information and time to adjust to new standards without disruptions to jobs, supply chains, prices, and quality. *Cf. Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005) ("Notice requirements are designed . . . to ensure fairness to affected parties"); *Avail Vapor, LLC v. United States Food & Drug Admin.*, 55 F.4th 409, 422 (4th Cir. 2022) ("It is a bedrock

principle of administrative law that agencies should provide regulated parties fair warning of the conduct [a regulation] prohibits or requires." (quotation marks omitted); *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.* 140 S. Ct. 1891, 1913 (2020) ("When an agency changes course . . . it must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account. It would be arbitrary and capricious to ignore such matters.") (quotation marks and citation omitted). These important interests are undermined where, as here, the agency oversteps the procedural constraints that Congress took great care to impose upon it.

III. THE CPSC'S MANDATORY RULE FAILS TO MEET THESE HIGH STANDARDS.

The mandatory rule the CPSC promulgated in this case cannot measure up to the high standards Congress set in the CPSA, nor the commensurately heavy burden the agency must carry under the APA. In particular, the CPSC's notice and comment procedures were inadequate to stand in for the statute's preferred pathway of collaboration between industry and regulators, and its substantive analysis does not meet the fundamental requirement of reasoned decsionmaking.

This case thus provides the Court with an important opportunity to ensure that the CPSC's "reinvent[ion]" of itself (Adler Letter, *supra*) does

not transgress the rules that Congress enacted, ensuring that manufacturers throughout the consumer products industry may continue to rely on an agency relationship premised on productive engagement to produce safe, feasible, and stable voluntary standards.

A. The CPSC failed to satisfy the CPSA's requirements for overriding a voluntary standard.

When the CPSC wishes to override industry and promulgate a mandatory rule, its organic statute requires it to show its work. The agency must establish, across numerous metrics, that its rule is necessary and justifiable. As the petitioner explains, the CPSC's mandatory rule regarding custom window coverings fails on multiple fronts; we focus on two such failings with particular significance to consumer products manufacturers more generally.

First, the CPSC failed to show that its mandatory rule addresses an unreasonable safety risk and that the existing mandatory standard was not up to the task. *See* 15 U.S.C. § 2058(f)(3). The Commission all but admitted that the safety risk it sought to address was not significant. It was able to point to only 36 injuries over thirteen years—a rate of roughly three per year, despite the hundreds of millions of custom window coverings present in homes and businesses across the country. 87 Fed. Reg. at 73,152. And it improperly accounted for injury risks arising

from stock products and those that were already mitigated by voluntary standards the industry developed in 2018. 87 Fed. Reg. at 73,152.

The baseline showing that a regulation is necessary to address an actual safety concern is of utmost importance to consumer products manufacturers of all stripes. Of course, businesses are concerned about safety risks and wish to act in good faith to address them—as the voluntary standard system well acknowledges. But it is unreasonable to insist that businesses make enormous new investments in equipment and manufacturing processes, and dispose of costly, suddenly noncompliant inventory, in order to grapple with phantom injury risks. *Cf. City of Chicago v. Fed. Power Comm'n,* 458 F.2d 731, 742 (D.C. Cir. 1971) ("A regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist.").

Second, the agency failed to conduct its cost-benefit analysis with the rigor mandated by the statute. *See* 15 U.S.C. § 2058(f)(3)(E). As petitioners, other commentators, and even the Small Business Administration all pointed out, the CPSC's cost-benefit analysis was fatally flawed from its inception, failing to account for many of the small businesses that would suffer adverse consequences under the proposed rule. *See, supra*, pages 11-12.

Moreover, the agency's accounting of probable costs was equally lacking. For instance, though the Commission consciously sought to regulate custom window coverings used in commercial settings (87 Fed. Reg. at 73,173), it based its assessment of costs only on the residential market for custom window coverings (*id.* at 73,149). And even taking the Commission's calculations on their face, the CPSC found that while the likely benefit of the proposed rule was $23,000,000, the possible cost was as much as $129,000,000—over five times greater than the benefit. A609. When the costs of an agency's regulation so heavily outweigh the benefits, it is hard for the agency to justify taking such an action. *See*, *e.g.*, *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 732 (D.C. Cir. 2016) (Kavanaugh, J., dissenting) ("[R]easoned decisionmaking requires assessing whether a proposed action would do more good than harm."); *Michigan v. EPA*, 576 U.S. 743, 752 (2015) ("No regulation is 'appropriate' if it does significantly more harm than good.").

By falling far short of the many requirements set out in the CPSA to override a voluntary standard, the Commission's custom window covering rule thus violated the Administrative Procedure Act. *See United Parcel Serv., Inc. v. Postal Regul. Comm'n*, 955 F.3d 1038, 1050 (D.C. Cir. 2020) ("An agency Order that is at odds with the requirements of the applicable statute cannot survive judicial review."). *Cf. Mozilla Corp. v.*

FCC, 940 F.3d 1, 60 (D.C. Cir. 2019) (A "statutorily mandated factor, by definition, is an important aspect of any issue before an administrative agency, as it is for Congress in the first instance to define the appropriate scope of an agency's mission.") (quotation marks omitted) (cleaned up)).

Manufacturers must be able to trust that the CPSC has taken care to attentively assess the economic costs that businesses will bear as a consequence of a new regulation. But the CPSC failed to do so here. If not corrected, this case would set a dangerous precedent, allowing the Commission to expand beyond its statutory authority by promulgating aggressive new rules without demonstrating that they produce a significant public benefit, and while acknowledging that they place an immense burden on the manufacturers of consumer products.

B. The CPSC failed to undertake proper notice and comment procedures.

The agency's mandatory rule must also be set aside because the notice and comment procedure under which the CPSC promulgated the regulation was woefully inadequate to fairly apprise interested parties of what to expect, much less give them a meaningful opportunity to participate in the regulatory process.

To begin, the agency's final action deviated meaningfully from the initial proposed rule, exceeding the traditional standards governing how

much an agency may change a proposed regulation before it must provide additional notice and solicit additional feedback. A final rule must be a "logical outgrowth" of the proposed rule, such that interested parties could have fairly anticipated what was coming. *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1079-1080 (D.C. Cir. 2009). Here, to take just one example, the CPSC made unwarranted assumptions in its final rule about the costs necessary to develop compliant products, which did not appear in the initial proposed rule. *See* 87 Fed. Reg. at 73,182. Thus, interested parties had no way of anticipating how the agency would estimate a crucial figure bearing on whether the rule was warranted and the "least burdensome" option available. *See* 15 U.S.C. § 2058(f)(3)(F).

As noted above, the bedrock requirement of proper notice and comment has heightened importance here, considering the elaborate process set out in the statute to reflect the close collaboration between the government and businesses that Congress sought to promote. *See* pages 16-18, *supra*. When the CPSC chooses to impose a mandatory rule, its governing statute seeks to reproduce the normal course of collaboration between industry and government by requiring the Commission to invite the development of a voluntary standard and defer to that standard if possible. *See* 15 U.S.C. §§ 2058(a)(6), 2058(b)(2)(B). Thus, even when the CPSC moves forward with developing a mandatory rule, the goal is for

the Commission to take the off-ramp to a voluntary rule at any of multiple possible junctures. But here, though the petitioner was actively attempting to update its voluntary standard, the CPSC not only plowed ahead with its proposed mandatory rule anyway, but also moved forward to prevent the updated 2022 voluntary standard from coming into effect.

Such activity is flatly at odds with the goals of the CPSA. The statute reflects Congress's intent that, as best as possible, industry and government will work together to keep consumers safe while keeping the regulatory environment fair and flexible. But the CPSC treated the petitioner not as a partner in the regulatory process, but as a direct adversary. This case thus has extraordinary significance for the many manufactures of consumer products who have long relied on the CPSA's spirit of collaboration between government and business to arrive at commonsense, practical safety standards that are stable and predictable. The Court should not permit the CPSC to exceed its traditional—and statutorily mandated—limited regulatory role.

* * *

In sum, as this Court and the Supreme Court have repeatedly explained, "[f]ederal agencies are creatures of statute. They possess only those powers that Congress confers upon them," and "[i]f no statute confers authority to a federal agency, it has none." *Judge Rotenberg Educ.*

Ctr., Inc. v. FDA, 3 F.4th 390, 399 (D.C. Cir. 2021); *accord, e.g.*, *West Virginia*, 142 S. Ct. at 2609. Here, Congress made a considered choice to place only limited powers in the hands of the CPSC, preferring instead that voluntary standards should be the default—and that that default should not easily be overcome. *See Merck & Co.*, 962 F.3d at 536 ("[A]gencies are bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes.") (quotation marks omitted).

Thus, despite the CPSC's recent effort to "reinvent[]" itself (Adler Letter, *supra*), the procedural strictures Congress chose to impose on the agency set an extremely high bar for the promulgation of mandatory standards, and the agency cannot "rewrite" those "clear statutory terms to suit its own sense of how the statute should operate" (*Util. Air. Reg. Grp. v. EPA*, 573 U.S. 302, 328 (2014)). The Court should reject the agency's attempt to evade those standards here.

CONCLUSION

The Court should set aside the final rule.

Dated: February 7, 2023

Respectfully submitted,

/s/ *Paul W. Hughes*

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel for intervenor certifies that this brief:

(i) complies with the type-volume limitation of Rule 29(a)(5) because it contains 5,511 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f) and Circuit Rule 32(e)(1); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2016 and is set in New Century Schoolbook font in a size equivalent to 14 points or larger.

Dated: February 7, 2023 /s/ *Paul W. Hughes*

CERTIFICATE OF SERVICE

I hereby certify that that on February 7, 2023, I filed the foregoing brief via the Court's CM/ECF system, which effected service on all registered parties to this case.

Dated: February 7, 2023 /s/ *Paul W. Hughes*