No. 23-1661

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JAKE'S FIREWORKS INC.,

Plaintiff-Appellant,

v.

U.S. CONSUMER PRODUCT SAFETY COMMISSION; and ALEXANDER HOEHN-SARIC, in his official capacity as Chairman of the CPSC,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Maryland
Honorable Theodore D. Chuang, District Judge

APPELLANT'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellant Jake's Fireworks Inc., states that it is a wholly owned subsidiary of Marivest Holdings, Inc., and no publicly held corporation owns any stock in it.

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JURISDICTIONAL STATEMENT

The district court had jurisdiction pursuant to 28 U.S.C. § 1331 because the Plaintiff brought claims arising under 5 U.S.C. §§ 701–706. This Court has jurisdiction over this action under 28 U.S.C. § 1291. Final judgment in the district court was entered on April 24, 2023, and the Notice of Appeal was timely filed on June 20, 2023. 28 U.S.C. § 2107(b).

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Does Plaintiff-Appellant Jake's Fireworks Inc. have a right under the Administrative Procedure Act to judicial review of the Consumer Product Safety Commission's Notices of Non-Compliance, which: (a) determined that the so-called Audible Effects Regulation applies to Jake's Reloadable Aerial Shells; (b) determined that the purported Reports Labeling Requirement applies to Jake's Reloadable Aerial Shells; (c) determined that Jake's products "are banned hazardous substances" and "misbranded hazardous substances" under the Federal Hazardous Substances Act; (d) declared that "it is a prohibited act" to market "banned" and "misbranded" products; and (e) warned Jake's of significant criminal and civil penalties?

INTRODUCTION

This is a case about when, and whether, regulated parties may obtain judicial review of agency decisions. According to the district court and the CPSC, the answer is "maybe never"—even when regulated parties have no further administrative options but risk criminal and civil penalties—because the agency controls when its actions are sufficiently "final" to warrant judicial review under the APA. That position clashes with decades-old Supreme Court precedent emphasizing the APA's "basic presumption of judicial review." *Abbott Labs. v. Gardner*, 387 U.S. 136, 140–41 (1967).

Here, the CPSC issued Notices of Non-Compliance reflecting the agency's determinations that certain fireworks imported by Jake's are subject to the so-called Audible Effects Regulation and a non-existent labeling regulation and, because the fireworks violated these regulations, they "are" banned and misbranded "hazardous substances" under the Federal Hazardous Substances Act (FHSA). These Notices also inform Jake's that "it is a prohibited act" under the FHSA to sell banned and misbranded hazardous substances and that violations could subject Jake's to significant civil and criminal penalties. Indeed, as the district

court recognized, the CPSC could use the Notices themselves as evidence of "knowing" violations to seek increased penalties.

Jake's maintains, among other things, that the Audible Effects Regulation does not, and was never intended to, apply to the small reloadable aerial shells that Jake's imports and sells. Jake's therefore challenged the Notices' determinations through the CPSC's administrative process, only to be told that the process will never end until the CPSC makes the *further* determination to enforce the noticed violations through a formal administrative or judicial action.

Thus, the Notices leave Jake's whipsawed between quarantining millions of dollars of "banned" and "misbranded" products or risking substantial civil and criminal liability. The district court's blessing of this procedural limbo conflicts with long-standing Supreme Court precedent. *See, e.g.*, *U.S. Army Corps of Eng'rs v. Hawkes*, 578 U.S. 590, 600 (2016) (*Hawkes II*) (unanimously holding regulated party "need not await enforcement proceedings before challenging final agency action where such proceedings carry the risk of serious criminal and civil penalties") (internal citations and quotation marks omitted).

The CPSC's Notices of Non-Compliance meet the Supreme Court's two-prong test for finality. *First*, they "mark the 'consummation' of the agency's decision-making process" because they reflect the CPSC's final determinations that various sampled lots of Jake's products are banned or misbranded hazardous substances under the FHSA; and, *second*, they are decisions "by which rights or obligations have been determined, [and] from which legal consequences [] flow" because they compel Jake's to choose between withholding its products from the market or risking criminal and civil liability. *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (internal quotation marks omitted).

The district court nevertheless reasoned that the Notices are not final agency action because they purportedly seek merely voluntary compliance and cannot be enforced except through a formal administrative or judicial enforcement action.

But the Supreme Court has repeatedly and unanimously dismissed this reasoning. In *Sackett v. EPA*, for example, the government, like the district court and CPSC here, argued that because a so-called compliance "order" could not be enforced without judicial action, it was merely an intermediate step in the deliberative process. 566 U.S. 120, 128–29

(2012). The Court rejected this argument because "the APA provides for judicial review of all final agency actions, not just those that impose a self-executing sanction." *Id*. at 129.

Critically, the Supreme Court distinguished between an agency's *final* determinations of (1) violation and (2) litigation: "[T]he EPA's 'deliberation' over whether the [challengers] are in violation of the [Clean Water] Act is at an end; the [EPA] may still have to deliberate over whether it is confident enough about this conclusion to initiate litigation, *but that is a separate subject*." 566 U.S. at 129 (emphasis added). *See also Columbia Broad. Sys. v. United States*, 316 U.S. 407, 417–18 (1942) (A final order "does not cease to be so merely because it is not certain whether the Commission will institute proceedings to enforce the penalty incurred under its regulations for non-compliance.") (citation omitted).

* * *

This Court should reverse the district court's order, hold that the CPSC's Notices of Non-Compliance are final agency action, and remand for judicial review of the Notices. Otherwise, the CPSC can indefinitely postpone judicial review and remain unaccountable for its actions.

STATEMENT OF THE CASE[1]

1. Jake's Reloadable Aerial Shells and fireworks regulation

Jake's Fireworks is a Kansas-based importer and distributor that sells consumer versions of fireworks commonly known as reloadable aerial shells[2] (Reloadable Aerial Shells), which include its best-selling Excalibur model. JA009–010, JA024 (Compl. ¶¶11, 57–58). Jake's Reloadable Aerial Shells have a diameter of 1.75 inches or less. JA228 (Mar. 7, 2016 Notice of Non-Compliance). They are designed to be launched 40-to-50 feet into the air, where a burst-charge component ignites to produce visual effects. JA011 (Compl. ¶20).

Reloadable Aerial Shells, like all fireworks, are classified into different categories based on explosive energy. Two categories are relevant here: (1) powerful "display" fireworks, classified as 1.3G explosives, which require professional handling; and (2) "consumer" fireworks, classified as 1.4G (formerly, Class C) explosive devices, which anyone may use. 49 C.F.R. § 173.50; *see* JA010–011 (Compl. ¶¶18–19).

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[1] "[W]e accept as true the allegations for which there is sufficient factual matter to render them plausible on their face." *Hutton v. Nat'l Bd. of Exam'rs in Optometry, Inc.*, 892 F.3d 613, 620 (4th Cir. 2018) (simplified).

[2] The CPSC also refers to these devices as reloadable *tube* aerial shells.

Fireworks are also subject to the Federal Hazardous Substances Act (FHSA), 15 U.S.C. §§ 1261–1278, which is administered by the CPSC, *id.* § 2079(a). Under the FHSA, a "hazardous substance" is, among other things, (A) a "flammable or combustible" "substance or mixture of substances" that "may cause substantial personal injury . . . as a proximate result of any customary or reasonably foreseeable handling or use;" or (B) any substance (or mixture) the CPSC finds, through notice-and-comment rulemaking, to be a hazardous substance. *Id.* § 1261(f)(1). The CPSC may require labeling for hazardous substances, or it may ban them (if it finds that a ban is the only way to protect public health and safety). *Id.* §§ 1262(b), 1261(q)(1). The FHSA prohibits companies from "introduc[ing] or deliver[ing] for introduction" into interstate commerce "misbranded hazardous substances" or "banned hazardous substances." *Id.* §§ 1261(p), 1263(a).

2. The Audible Effects Regulation applies to dangerously explosive devices designed for pest control.

One regulation that bans certain fireworks devices is 16 C.F.R. § 1500.17(a)(3), the so-called Audible Effects Regulation. This Regulation was adopted in 1970 to ban consumer use of hand-held Explosive Pest

Control Devices.[3] These powerful devices create no visual display but are intended to emit a loud "report," and are often used by farmers to scare birds and other pests away from crops. JA011–012 (Compl. ¶¶22–25).

The preamble to the Regulation noted that "[p]roducts ostensibly intended for agricultural use ha[d] been diverted and sold to the general public (including children)," causing fatalities and serious injuries. 35 Fed. Reg. 7415, 7415 (May 13, 1970). The "primary concern" of the Audible Effects Regulation, then, was "to close the loophole through which dangerously explosive fireworks, such as cherry bombs, M-80 salutes, and similar items, reach[ed] the general public." *Id.*

To identify these "dangerously explosive" devices, the Regulation uses a device's intended "audible effects" as a "proxy" for "high explosive power, not to limit some harmful level of sound." JA013–014 (Compl. ¶29 (citing CPSC Fireworks Final Rule Briefing Package at 79 (Sept. 26,

[3] The Regulation was adopted by the Food and Drug Administration, which was originally charged with administering the FHSA. The CPSC took over responsibility for the FHSA, 15 U.S.C. § 2079(a), and adopted existing FDA regulations without change, 38 Fed. Reg. 27012 (Sept. 27, 1973).

2018) (2018 Briefing Package))).[4] Indeed, according to the CPSC, audible effects themselves do not present a risk to consumers. *Id.*; *see also* 82 Fed. Reg. 9012, 9014 (Feb. 2, 2017) (Notice of Proposed Rulemaking) (The "reference to 'audible' effects" in 16 C.F.R. § 1500.17(a)(3) "was a method of identifying" fireworks within the scope of the Audible Effects Regulation "through the type of sound the devices make and not an indication of any safety purpose relating to the loudness of the devices or hearing injuries.").

Therefore, with exceptions not relevant here, the Regulation bans "[f]ireworks devices *intended to produce* audible effects (including but not limited to cherry bombs, M-80 salutes, . . . and other fireworks *designed to produce* audible effects . . .) *if* the audible effect is produced by a charge of more than 2 grains [130 mg] of pyrotechnic composition." 16 C.F.R. § 1500.17(a)(3) (emphasis added).

Importantly, as its text confirms, the original "intention" of the Audible Effects Regulation "[wa]s not to ban so-called 'Class C' common

[4] *Available at* https://www.cpsc.gov/s3fs-public/Final%20Rule%20-%20Amendments%20to%20Fireworks%20Regulations%20-%20September%2026%202018%20%281%29.pdf?yr30bGVazalQcEbznbPy46T81o1iuIFr, last visited Oct. 16, 2023.

fireworks,[5] but only those *designed to* produce audible effects *by a charge of over 2 grains of pyrotechnic composition*." 35 Fed. Reg. at 7415 (emphasis added). Devices like reloadable shells "were not widely distributed when the Commission developed its current fireworks regulations. Thus, the existing regulations do not specifically address hazards posed by these devices." Reloadable Tube Aerial Shell Fireworks Devices, 55 Fed. Reg. 31069, 31069 (July 31, 1990) (Advance Notice of Proposed Rulemaking). Therefore, the CPSC confirmed that "[u]nder [its] existing regulations, reloadable tube aerial shells are not banned hazardous substances." *Id*. *See generally* JA011–018 (Compl. ¶¶21–41).

The CPSC later banned *large* reloadable aerial shells (diameters greater than 1.75 inches). *See* 56 Fed. Reg. 37831 (Aug. 9, 1991) (promulgating 16 C.F.R. § 1500.17(a)(11)(i)). This regulation does not apply to Jake's Reloadable Aerial Shells, which have diameters not greater than 1.75 inches. And the CPSC has not amended the Audible Effects Regulation to include products like Jake's.

[5] As noted above, "'Class C' common fireworks" here refers to 1.4G consumer fireworks, like Jake's Reloadable Aerial Shells. 49 C.F.R. § 173.50; JA010–011 (Compl. ¶18).

3. The CPSC applies the Audible Effects Regulation to Reloadable Aerial Shells through an arbitrary "poof/bang" test.

Nonetheless, the CPSC in 1990 began to apply the Audible Effects Regulation to Reloadable Aerial Shells. JA018 (Compl. ¶41). To determine whether fireworks devices are intended to create an audible effect, the CPSC created a two-part test:

1. CPSC staff—perhaps a single individual—launches a device in the air and determines if the device's visual effect is accompanied by a "pop" / "poof" (audible effect not intended) or a "boom" / "bang" (audible effect intended).

2. If CPSC staff determines a device was intended to produce audible effects—if staff hears a "boom" or a "bang"—staff then determines whether the audible effect was produced by a charge of more than 2 grains of pyrotechnic composition.

See JA018–020 (Compl. ¶¶42–45); 2018 Briefing Package at 12, 96.

When CPSC staff determines that a device's audible effect—*i.e.*, the "bang"—was produced by a charge of more than 2 grains of pyrotechnic composition, the device is deemed a banned or misbranded product under the FHSA. 16 C.F.R. § 1500.17(a)(3); *see* JA018–024 (Compl. ¶¶42–56).[6]

[6] Upon information and belief, the CPSC's determinations that the Reloadable Aerial Shells emit reports were based on the same "poof/bang" test that the CPSC used to determine they violated the Audible Effects Regulation. JA027 (Compl. ¶67).

4. The CPSC delegated its inspection and compliance authority under the FHSA to the CPSC Compliance Office, which advises firms of non-compliance and corrective actions.

The FHSA authorizes the CPSC to inspect and test imported fireworks samples at U.S. ports of entry before admission to determine if the fireworks are compliant with the law. 15 U.S.C. § 1273(a). The CPSC delegated its inspections, field-enforcement, compliance, and administrative-enforcement powers to its Office of Compliance and Field Operations (Compliance Office). 16 C.F.R. § 1000.21, 26 U.S.C. § 2076(b)(10); *see also* CPSC Mot. to Dismiss, ECF 16-1, at 9–11 (citing 16 C.F.R. § 1000.21 and Compliance Office's Regulated Products Handbook (Handbook)).

When "a product is found to violate a CPSC statute, safety standard, or banning regulation," the Compliance Office issues a notice of non-compliance (also referred to as a letter of advice) to the "responsible" firm. JA060 (Handbook). This notice "informs the firm of which statutes, rules, regulations, standards, or bans have been violated, and it specifies the prohibited acts that have occurred." *Id*. A notice of non-compliance "will state that the firm may present evidence that a violation does not exist or that a product is not covered by the applicable statue or regulation." JA067. Therefore, "if [a firm] disagree[s] with staff's determination," it

"may present evidence supporting [its] view" either orally or in writing, and it may request an informal hearing. *Id.*

But "[o]nce [a] firm is notified of a violation of a statute, rule, regulation, standard or ban" through a notice of non-compliance, the product(s) identified in the notice "should be placed on stop sale and held from distribution in commerce," "separated from other consumer products[,] and held from distribution until further notice (quarantine)." JA085 (Handbook). Finally, the firm may need to "reverse distribute" the product(s), and a firm's "reverse distribution plan must include how the firm intends to," among other things, "dispose of the product." *Id.*

5. The CPSC tests samples of Jake's products and determines that because certain samples violated the Audible Effects Regulation, they "are banned [or misbranded] hazardous substances" that "must be destroyed" subject to civil and criminal penalties for non-compliance.

Since 2006, the CPSC has determined that samples of Reloadable Aerial Shells imported by Jake's violated the Audible Effects Regulation and issued Notices of Non-Compliance. JA026–032 (Compl. ¶¶64–68, 74–76, 79–80); JA101–155, JA163–168, JA185–221, JA222–279, JA280–293, JA294–299 (examples of Notices of Non-Compliance). All Notices informed Jake's of the CPSC's determination that tested samples of the

Reloadable Aerial Shells "are banned hazardous substances" (*see, e.g.*, JA102 & JA223) or that each tested lot "is a banned hazardous substance" (*see, e.g.*, JA281 & JA295) under the FHSA.

Several Notices of Non-Compliance also state that the sampled lots lacked labels indicating the presence of loud "reports" (the purported Reports Labeling Requirement). *See, e.g.*, JA163–168 (Aug. 19, 2014 Notice of Non-Compliance). The CPSC has not identified a "reports" labeling requirement—and none exists. Instead, the Notices cite the general fireworks labeling regulation, 16 C.F.R. § 1500.14(b)(7)(xv), which requires Reloadable Aerial Shells to have a label "indicating to the user where and how the item is to be used and necessary safety precautions to be observed." *See* JA027 (Compl. ¶67).[7]

Most of the Notices demand—in bold—the destruction of the samples determined to be banned (or misbranded) hazardous substances: "**The sampled lots must be destroyed within 90 days from the date of this letter unless an extension of time is requested and approved by the Office of Compliance and Field Operations.**" *See,*

[7] No "Reports Labeling Requirement" exists for another reason: the CPSC has never established that a "report" is itself a hazard requiring safety precautions.

e.g., JA103, JA283, JA287, JA292. While some Notices of Non-Compliance purport to merely "request" destruction, *see* JA225 & JA297, the full Notices show that compliance is expected. Among other things, the Notices explain precisely how Jake's must destroy the banned products. *Id.*

Further, all Notices, having stated the CPSC's determination that Jake's products "*are* banned [misbranded] hazardous substances," inform Jake's that "it is a prohibited act" to introduce or deliver for introduction into interstate commerce any banned (misbranded) hazardous substance. JA030 (Compl. ¶75); *see, e.g.*, JA102, JA103–104 (Sept. 18, 2018 Notice of Non-Compliance); JA164, JA166 (Aug. 19, 2014 Notice of Non-Compliance); JA281–282, JA283 (Dec. 20, 2018 Notice of Non-Compliance), JA295–296, JA298 (Apr. 9, 2019 Notice of Non-Compliance).

And all Notices warn of significant civil penalties and criminal penalties for engaging in the acts prohibited by the FHSA. *See, e.g.*, JA104 (Sept. 18, 2018 Notice of Non-Compliance) (warning "violations could subject you and your firm [1] to civil penalties of up to $110,000 per violation limited to a maximum of $16.025 million for any related series of violations [and] [2] to criminal penalties including imprisonment for not

more than five years, a fine, and forfeiture of assets associated with the violation(s)"); *see also* JA061 (Handbook); JA026 (Compl. ¶65).

The Notices also inform Jake's that, "[u]ntil this matter is resolved, there will remain a possibility of further enforcement action, including reasonably anticipated litigation." *See, e.g.*, JA284, JA288, JA292; *see also* JA104 (warning of ". . . further action, including reasonably anticipated litigation").

Finally, the Notices advise Jake's that if it disagrees with the CPSC's "position that the products violate the Commission's regulations," it may, under the CPSC Regulated Products Handbook, present its views and supporting evidence. JA104, JA283, JA287, JA292, JA298. Each Notice demanded a response within five days. JA105, JA284, JA288, JA293, JA299.

6. Jake's follows the CPSC's administrative process.

In responses to the CPSC's Notices of Non-Compliance, Jake's explained in detail why neither the Audible Effects Regulation nor the purported Reports Labeling Requirement applies to Jake's Reloadable Aerial Shells and why the CPSC's "poof/bang" test is arbitrary, capricious, subjective, and unscientific. *See* JA028–029, JA030–031 (Compl. ¶¶70–73,

77–78); *see also* JA169–175 (Mullin May 26, 2016 Ltr.) & JA181–184 (Mullin Oct. 14, 2014 Ltr.) (examples of responses). Jake's counsel also talked to and met with CPSC staff, including Robert Kaye, Director of the Compliance Office. JA029, JA031 (Compl. ¶¶73, 78); JA315 (Mullin Nov. 13, 2020) (discussing Dec. 14, 2017 meeting). But the CPSC maintained that the Audible Effects Regulation does apply to Reloadable Aerial Shells and that the CPSC intended to enforce it. JA029 (Compl. ¶¶72–73); JA176–180 (CPSC Oct. 3, 2014 Ltr.). Four of the Notices of Non-Compliance discussed above were issued after this correspondence and meeting between Jake's and the CPSC. JA031–032 (Compl. ¶¶79–80); JA280–293 (Dec. 20, 2018 Notices of Non-Compliance); JA294–299 (Apr. 9, 2019 Notice of Non-Compliance).

As a result of the CPSC's Notices—which deemed various samples of Jake's Reloadable Aerial Shells to be banned or misbranded hazardous substances, instructed Jake's to destroy those samples, and threatened significant civil and criminal penalties for marketing its products—Jake's has quarantined at least 23,676 cases of its Reloadable Aerial Shells, worth approximately $2,651,712. JA032 (Compl. ¶81).

7. Jake's first try for judicial review is thwarted—*Jake's I*.

Unable to obtain relief from the CPSC, Jake's sought judicial review in 2019. *Jake's Fireworks Inc. v. Consumer Prod. Safety Comm'n*, No. 8:19-cv-011161-PWG (D. Md. 2019). The court dismissed the action without prejudice for lack of subject matter jurisdiction, holding that the CPSC had not yet taken the "final agency action" required for judicial review under the APA. *Jake's Fireworks Inc. v. Consumer Prod. Safety Comm'n*, 498 F. Supp. 3d 792, 807 (D. Md. 2020) (*Jake's I*) (JA300–312). Applying the Supreme Court's two-part finality test articulated in *Bennett v. Spear*, *supra*, the court found that the May 20, 2015 Notice did not satisfy the first prong—consummation of CPSC's decision-making process. According to the court, that Notice "appear[ed] to be" an intermediate ruling of a subordinate official since the Compliance Office lacks independent authority to initiate a formal enforcement action. *Jake's I*, 498 F. Supp. 3d at 803. The court also said that Jake's could do more to complete the administrative process: "While the process [was] nearing its end, there are still steps that Jake's Fireworks may take, such as request a hearing or reconsideration." *Id.* at 806.

8. Jake's follows the District Court's instructions and completes the CPSC's administrative process.

Two weeks after the court's ruling, Jake's counsel wrote to Director Kaye, again detailing its objections to the Regulation's applicability, noting that Jake's believed it had exhausted the informal-hearing process set forth in the Handbook, and asking Director Kaye to either identify additional administrative steps Jake's could take to contest the CPSC's determinations or confirm that Jake's administrative opportunities had closed. JA313–316 (Mullin Nov. 13, 2020 Ltr.).

Director Kaye replied over a month later and stated that Jake's could present certain test results and data to show Jake's *compliance* with the Audible Effects Regulation—despite Jake's clear position that the Audible Effects Regulation *did not apply* to the Reloadable Aerial Shells in the first place. JA317–319 (CPSC Dec. 16, 2020 Ltr.).[8] Director Kaye claimed that a notice of non-compliance is not a final determination by the Commission, seeming to rely on the grounds that the Compliance

[8] The CPSC also discussed the irrelevant point that the CPSC had never asked U.S. Customs and Border Protection take any action against Jake's products. JA318–319 (CPSC Dec. 16, 2020 Ltr.). While it's true that CPB may be involved in this inspection process, *see Jake's II*, 2023 WL 3058845, at *4–5, its actions in this case have no bearing on the finality questions here.

Office would provide written notice if it decided to seek a formal enforcement action. *Id.*

Jake's responded and again sought confirmation that it had no further avenues for administrative appeal and that the CPSC still understood Jake's to be subject to civil and criminal penalties for marketing banned or misbranded hazardous substances. JA320–326 (Mullin Jan. 11, 2021 Ltr.). Jake's referred to its previous letters disputing the application of the Audible Effects Regulation and summarized its arguments. JA322–324. It then specifically asked the CPSC to confirm that (1) the CPSC determined that the Audible Effects Regulation applies to Jake's fireworks, (2) Jake's requested and received an in-person hearing, and (3) Jake's exhausted its administrative appeals and was entitled to nothing further at the administrative level. JA326. Jake's also welcomed confirmation that it was free to sell the products identified in the Notices of Non-Compliance. *Id.*

Director Kaye sent a cursory response about a month later. JA327–329 (CPSC Feb. 8, 2021 Ltr.). Repeating that the CPSC had made no final determination, Director Kaye ignored the bulk of Jake's letter and claimed that Jake's request for an informal hearing was "premature

because we have not notified you that the Commission intends to take further action against Jake's or the products." JA329.

9. The present lawsuit—*Jake's II*.

Having followed the district court's advice to reengage with the CPSC but having run out of options within the CPSC despite Director Kaye's unsupported (and unactionable by Jake's) assertions to the contrary, and with no further options but to sell the fireworks and risk CPSC enforcement—including criminal penalties and civil penalties for "knowing" violations based on the Notices—Jake's again seeks review of the CPSC's decisions in federal court. Jake's brings three causes of action under the APA, alleging that the CPSC's following actions are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law: (1) applying the Audible Effects Regulation to Jake's Reloadable Aerial Shells, (2) applying the purported Reports Labeling Requirement to Jake's Reloadable Aerial Shells, and (3) using the unreasonable, subjective, and unreliable "poof/bang" or "ear" test to apply the Aerial Effects Regulation and Reports Labeling Requirement. JA039–042.

Jake's requests a declaration that its Reloadable Aerial Shells are not subject to the Audible Effects Regulation; a declaration that there is

no Reports Labeling Requirement contained within the fireworks labeling regulation; an injunction prohibiting the CPSC from applying the Audible Effects Regulation and any Reports Labeling Requirement to Jake's reloadable aerial shells; a declaration that the "poof/bang" test is arbitrary, capricious, and an abuse of discretion; and an injunction prohibiting the use of the "poof/bang" test by the CPSC to determine whether a Reloadable Aerial Shell is intended to produce audible effects subject to the purportedly applicable regulations. JA042–043.

The district court again declined to reach the merits of Jake's arguments. Although the court found that Jake's had standing and assumed without deciding that the Notices were agency actions, it dismissed the case for lack of final agency action under the APA. *Jake's Fireworks Inc. v. Consumer Prod. Safety Comm'n*, No. TDC-21-2058, 2023 WL 3058845 (D. Md. Apr. 24, 2023) (*Jake's II*).

The district court held that the CPSC's Notices constitute merely intermediate rulings by a subordinate official who lacked the independent authority to initiate a formal enforcement action. *Jake's II*, 2023 WL 3058845, at *6–7. According to the court, the Notices don't actually order Jake's to take any action; they merely request destruction of Jake's prod-

ucts and warn of possible enforcement if Jake's sells its fireworks. *Id.* at *7. Therefore, the court said, "all that has occurred is that the [Compliance Office] staff has requested voluntary compliance." *Id.* (citation omitted). And "even if [the Compliance Office] has completed its assessment of whether the Aerial Shell Fireworks constitute banned hazardous substances," the court continued, the Compliance Office "does not have the final word within the CPSC on that issue." *Id.*

The court noted the processes set forth in the CPSC's Handbook but ruled that *even "the completion* of any such processes *does not end* the agency's activities" because future administrative or judicial enforcement proceedings were possible. *Jake's II*, 2023 WL 3058845, at *7 (emphasis added).

Accordingly, the district court held that the Notices did not mark the consummation of the CPSC's decision-making process, and it dismissed Jake's complaint without prejudice. *Jake's II*, 2023 WL 3058845, at *9.

* * *

Jake's is trapped in a no-man's land between the administrative state and the judiciary. The lower court told Jake's to pursue additional

administrative processes with the CPSC. But the CPSC responded to Jake's with a non sequitur: It stated that Jake's request for an informal hearing was premature because it has not yet decided whether it will engage in "further enforcement action" (*see, e.g.*, JA284, JA288, JA292 (Dec. 20, 2018 Notices of Non-Compliance)), even while it demands that Jake's destroy its fireworks or face civil and criminal penalties. As noted above, Jake's contends that the agency's regulatory interpretations and application are demonstrably wrong. But, as it stands, Jake's is quarantining over 23,676 cases of fireworks worth more than $2.6 million dollars that it cannot sell without fear of enforcement by the CPSC as a direct consequence of the CPSC's unretracted Notices of Non-Compliance. JA032 (Compl. ¶81).

SUMMARY OF THE ARGUMENT

The APA provides a right to judicial review of all "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. As the district court in *Jake's I* held—and the district court in *Jake's II* assumed without deciding—the CPSC's Notices of Non-Compliance constitute agency action. And there can be no serious dispute that Jake's lacks another adequate remedy in court. Accordingly, this is a case

about whether the Notices are sufficiently "final" to require judicial review under the APA.

The Supreme Court has identified two conditions for agency action to be considered "final." "First, the action must mark the 'consummation' of the agency's decision-making process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett*, 520 U.S. at 177–78 (internal quotation marks omitted). Both prongs are satisfied here.

The Notices reflect consummation of the agency's decision-making process: The CPSC determined that (1) Jake's products are subject to the Audible Effects Regulation and the purported Reports Labeling Requirement and (2) they violated those regulations—and thus the FHSA—by failing the "poof/bang" test. As the Supreme Court held in *Sackett*, "the text (and indeed the very name) of the [Notices of Non-Compliance] make[] clear, the [CPSC's] 'deliberation' over whether [Jake's is] in violation of the [FHSA] is at an end; the [CPSC] may still have to deliberate over whether it is confident enough about this conclusion to initiate litigation, but that is a separate subject." 566 U.S. at 129. Therefore, as in

Sackett and other Supreme Court decisions, an agency's invitation to engage in further informal discussions and the possibility of formal enforcement actions do not render its completed actions any less final. 566 U.S. at 128–29.

Sackett, like other cases, also refutes the district court's contention that the CPSC's Notices are not final because they didn't "actually order[]" Jake's to do anything. *Jake's II*, 2023 WL 3058845, at *8. But that was true in *Sackett*, where the EPA's "compliance order" sought merely "voluntary compliance" and could be enforced only through a formal enforcement action. 566 U.S. at 128–29. Importantly, that enforcement action could be initiated only by the governmental agency—not the challengers. *Id.* at 127. Therefore, what's definitive—and final—in these situations is an agency's pre-enforcement determination(s); here, the CPSC's determinations that the Audible Effects Regulation and purported Reports Labeling Requirement apply to Jake's Reloadable Aerial Shells and that the Shells are banned and/or misbranded hazardous substances.

The "definitive nature" of the Notices "also gives rise to 'direct and appreciable legal consequences,' thereby satisfying the second prong of

Bennett." *Hawkes II*, 578 U.S. at 598 (quoting *Bennett*, 520 U.S. at 178). The Notices reflect the CPSC's determination that Jake's Reloadable Aerial Shells violate the FHSA, from which legal consequences flow. Indeed, civil penalties are available for a knowing violation of the FHSA. *See, e.g.*, 15 U.S.C. §§ 1264(c)(2)(B), 2069(a)(1). And as the district court recognized, courts have found that failed tests, like those reflected in the CPSC's Notices, can constitute a "knowing" violation for purposes of civil penalties. *Jake's II*, 2023 WL 3058845, at *6 (citing *United States v. Shelton Wholesale, Inc.*, No. 96-6131-cv-SJ, 1998 WL 251273, at *3, *11 (W.D. Mo. Apr. 28, 1998)).

Further, as the Supreme Court confirmed in *Hawkes II*, an agency determination (like the Army Corps' jurisdictional determination under the Clean Water Act) that could "limit[] the potential liability" of a party, is itself a legal consequence which satisfies the second *Bennett* prong. 578 U.S. at 599. That was true, the Supreme Court explained, even though "no administrative or criminal proceeding [could] be brought for failure to conform to [the jurisdictional determination] itself." *Id.* at 600.

Finally, the *Hawkes II* decision, like *Sackett*, emphasized that a regulated party "need not await enforcement proceedings before challenging

final agency action where such proceedings carry the risk of serious criminal and civil penalties." 578 U.S. at 600 (internal citations and quotation marks omitted).

This Court should reverse the district court's decision because it effectively leaves APA finality wholly in the hands of the agency to define—contrary to the "'pragmatic' approach" required by Supreme Court precedent. *See, e.g.*, *Hawkes II*, 578 U.S. at 599 (quoting *Abbott Labs.*, 387 U.S. at 149).

ARGUMENT

I. Standard of Review

In reviewing a district court's decision to grant a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1), this Court reviews the lower court's factual findings for clear error and its legal conclusions *de novo*. *Al Shimari v. CACI Premier Tech., Inc.*, 840 F.3d 147, 154 (4th Cir. 2016). A Rule 12(b)(1) motion to dismiss should be granted when, as here, "the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." *Zeigler v. Eastman Chem. Co.*, 54 F.4th 187 (4th Cir. 2022) (internal quotation marks omitted).

II. Jake's Has Standing.

Because courts must ensure jurisdiction, Jake's briefly discusses the issue. Standing requires "an injury in fact—a concrete and imminent harm to a legally protected interest, like property or money—that is fairly traceable to the challenged conduct and likely to be redressed by the lawsuit." *Biden v. Nebraska*, 143 S. Ct. 2355, 2365 (2023).

The district court correctly held that Jake's "successfully alleged an injury in fact traceable to the Notices." *Jake's II*, 2023 WL 3058845, at *5. The district court found that, "based on the warnings provided in the Notices themselves, Jake's . . . faces potential civil and criminal penalties if it sells those fireworks," and that where Jake's "withheld its products from commerce as a direct consequence of its receipt of the Notices, this economic loss is fairly traceable to the CPSC." *Id.*, 2023 WL 3058845, at *5. Further, "[e]ven if the economic loss . . . were deemed to be the result of a purely voluntary choice," the court continued, Jake's "still faces an imminent injury because if it were to sell the fireworks in defiance of the Notices, as it has stated that it would do in the absence of the Notices, it would likely face civil penalties." *Id.* at *6 (noting that courts have found that the fact that fireworks failed a CPSC test and Notices

were issued can constitute evidence that a violation was "knowing" for purposes of civil penalty actions); *see also Abbott Labs.*, 387 U.S. at 154 (finding standing because the regulation was "directed at [petitioners] in particular" and required them to "make significant changes in their everyday business practices," and because petitioners were "quite clearly exposed to the imposition of strong sanctions") (citations omitted).

A favorable decision here would also redress Jake's injuries. An injunction prohibiting the CPSC from applying the Audible Effects Regulation and the purported Reports Labeling Requirement to Jake's small Reloadable Aerial Shells would allow Jake's to sell the fireworks without fear of government penalty for selling a purportedly banned or misbranded hazardous substance. And declaring the poof/bang test unreasonable, arbitrary, capricious, and an abuse of discretion and prohibiting its use to determine whether a Reloadable Aerial Shell is banned or misbranded would allow Jake's to conduct its importation and distribution business out from under the current cloud of uncertainty.

III. The Notices of Non-Compliance Are Final Agency Actions Subject to Judicial Review under the APA.

The APA provides a right to judicial review of all "final agency action for which there is no other adequate remedy in a court." 5 U.S.C.

§ 704. The Supreme Court has held that, "[a]s a general matter, two conditions must be satisfied for agency action to be 'final': First, the action must mark the 'consummation' of the agency's decision-making process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett*, 520 U.S. at 177–78*; see also Sierra Club v. W. Va. Dep't of Env't Prot.*, 64 F.4th 487, 499 (4th Cir. 2023).

Here, the CPSC's Notices of Non-Compliance (A) constitute agency action, (B) satisfy the APA's finality requirements, and (C) leave Jake's with no other adequate remedy in court.

A. The Notices of Non-Compliance Are Agency Actions.

Under the APA, agency action "includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). This non-exhaustive definition "is meant to cover comprehensively every manner in which an agency may exercise its power." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 478 (2001). As such, the APA "evinces Congress' intention and understanding that judicial review should be widely available to chal-

lenge the actions of federal administrative officials." *Califano v. Sanders,* 430 U.S. 99, 104 (1977); *cf. also Abbott Labs.*, 387 U.S. at 139–41 (describing Congress's strong preference—both before and after enactment of the APA—for judicial review of agency action). The district court assumed without deciding that the Notices are agency action. This Court should confirm that they are.[9]

Given the broad sweep of the definition of agency action, it is no surprise that the CPSC's Notices of Non-Compliance fall within several categories of "agency action." 5 U.S.C. § 551(13). "Order" means "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing." *Id.* § 551(6). The CPSC's Notices reflect—in declaratory form—the agency's final dispositions that (a) the Audible Effects Regulation applies to Reloadable Aerial Shells, (b) the purported Reports Labeling Requirement applies, (c) several samples of Jake's Reloadable Aerial Shells are banned or misbranded hazardous

[9] For judicial economy, this Court may consider arguments that the district court did not reach below. *See Covey v. Assessor of Ohio County*, 777 F.3d 186, 192 (4th Cir. 2015) (addressing defendants' legal arguments that the district court did not reach in reversing motion to dismiss).

substances under the FHFA, (d) "it is a prohibited act" under the FHFA to market banned or misbranded hazardous substances, and (e) Jake's is subject to criminal and civil penalties if it engages in prohibited acts. *See, e.g.*, *Frozen Food Express v. United States*, 351 U.S. 40, 44 (1956) (holding agency's "order," which classified commodities as exempt or non-exempt agricultural products under the Interstate Commerce Act, was "in substance a 'declaratory' one").

Nonetheless, the CPSC (incorrectly) argued below that its Notices were simply investigatory communications on the ground that only adjudication establishes finality. *See* ECF No. 16-1, Mot. to Dismiss, at 15–18. But, as explained in detail below (pp. 38–43), the CPSC here (and elsewhere) ignores the well-settled distinction between (1) determinations of legal interpretation and application and (2) later determinations to enforce through formal adjudication. *See, e.g.*, *Sackett*, 566 U.S. at 129; *Abbott Labs.*, 387 U.S. at 154; *Columbia Broad.*, 316 U.S. at 417–18. Therefore, the CPSC's decision (so far) not to initiate a formal enforcement action says nothing about whether its Notices are agency action.

But the CPSC is wrong even accepting its premise that at least "informal adjudication" is required before "agency action" may be said to

have taken place. *See* Mot. to Dismiss, ECF 16-1, at 17. According to the CPSC's Handbook, the CPSC Compliance Office issues a Notice "to the responsible individual and firm when a product *is found to violate* a CPSC statute, safety standard, or banning regulation." JA060 (Handbook) (emphasis added). The Notices, accordingly, reflect the CPSC's application of (its interpretation of) the law to Jake's sampled fireworks, "closely resembl[ing] an individual adjudication, which is a well-recognized form of final agency action." *Ipsen Biopharms. v. Azar*, 943 F.3d 953, 959 (D.C. Cir. 2019). In *Ipsen*, like here, "the nature of the agency's letter went beyond simply announcing its interpretation of relevant statutory and regulatory language;" it "expressly applied [the government's] interpretation of the governing law to the specific facts of [plaintiff's] case." *Id.*

Thus, as *Abbott Laboratories* explained, the CPSC's Notices "purport to give an authoritative interpretation of a statutory provision that has a direct effect on the day-to-day business of [Jake's]; [the Notices] put[] [Jake's] in a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate." 387 U.S. at 152 (footnote omitted).

The Notices are also sanctions, since they compel Jake's to withhold from the market and (in many Notices) destroy its Reloadable Aerial

Shells. *See, e.g.*, JA283, JA287, JA292 (Dec. 20, 2018, Notices of Non-Compliance) ("**The sampled lots *must be destroyed* within 90 days from the date of this letter unless an extension of time is requested and approved by the [Compliance Office]**.") (italicized emphasis added). *See also* 5 U.S.C. § 551(10) (A "'sanction' includes the whole or part of an agency . . . (B) withholding of relief; . . . (D) destruction, taking, seizure, or withholding of property; (F) requirement, revocation, or suspension of a license; or (G) taking other compulsory or restrictive action.").

* * *

Because the CPSC Notices fall within the APA's broad definition of "agency action," through which "judicial review should be widely available to challenge the actions of federal administrative officials," *Califano*, 430 U.S. at 104, this Court should confirm that the CPSC's Notices are agency actions.

B. The Notices of Non-Compliance Are Final Agency Actions.

1. *The Notices Are Final Agency Actions Because They Mark the Consummation of the CPSC's Relevant Decision-Making Process.*

The first *Bennett* finality prong is satisfied here. The CPSC's final determinations are both reflected and articulated in the Notices, which

declare that "the sampled lots *are* banned [misbranded] hazardous substances" that cannot be sold without risking significant civil and criminal sanctions, and that (according to several Notices) "must be destroyed." *See, e.g.*, JA102–103 (Sept. 18, 2018, Notice of Non-Compliance).

The district court ignored the CPSC's (final) determinations reflected in the Notices, swallowed at face value the CPSC's assertions of non-finality, and gave dispositive weight to the irrelevant fact that the Notices purportedly seek voluntary compliance. *Jake's II*, 2023 WL 3058845, at *7. The district court's order would hollow out the Supreme Court's decisions in *Sackett*, *Hawkes II*, and elsewhere, which squarely reject what the district court found to be dispositive—the lack of a separate (final) decision to initiate a formal enforcement action.

a. The CPSC Has Determined That the Audible Effects Regulation and the Purported Reports Labeling Requirement Apply to Jake's Fireworks and that Jake's Fireworks "are" Banned or Misbranded Hazardous Substances Under the FHSA.

The CPSC's Notices advised Jake's in no uncertain terms that its fireworks "failed to comply" with the CPSC's purportedly applicable regulations, that they "*are* banned [or misbranded] hazardous substances," and that "it is a prohibited act to introduce or deliver for introduction into interstate commerce or receive in interstate commerce any banned [or

misbranded] hazardous substance." *See, e.g.*, JA102, JA103–104 (Sept. 18, 2018 Notice of Non-Compliance) (emphasis added). The CPSC also warned that these "violations could subject Jake's to criminal and civil penalties." JA104. Separately, although some Notices (purportedly) "request" destruction of the fireworks, several insist that the fireworks "must be destroyed within 90 days from the date of this letter unless an extension of time is requested *and approved by* the Compliance Office." JA103 (emphasis added). The Notices thus confirm that the Compliance Office has completed its determination as to both the applicability and violation of the regulations, the required remedial action by Jake's, and the legal consequences for its failure to comply.

The CPSC's Handbook confirms that notices of non-compliance represent more than preliminary or investigatory communications; they "inform[] the firm of the specific product and *violation* that *has* occurred." JA054 (emphasis added). Moreover, the Handbook states that "the notice of noncompliance informs the firm of which statutes, rules, regulations, standards, or bans *have been violated*, and it specifies the prohibited acts that *have occurred*." JA060 (emphasis added).

According to the district court, however, the CPSC's Compliance Office does not have the final word within the CPSC to decide whether Jake's Reloadable Aerial Shells constitute banned or misbranded hazardous substances. Rather, the court said, this determination can be made only through a formal enforcement action—either an administrative action initiated by the Commissioners, or a judicial action initiated by the DOJ upon a referral from the Commissioners. *Jake's II*, 2023 WL 3058845, at *7.

But, as the Supreme Court has repeatedly held, the district court's opinion here conflates two separate *final* decisions: (1) a factual/legal determination and (2) a determination to initiate a formal enforcement action. The former decision—reflected in the Notices of Non-Compliance—is final here because the CPSC's "'deliberation' over whether [Jake's is] in violation of the [FHSA] *is at an end*; the [CPSC] may still have to deliberate over whether it is confident enough about this conclusion to initiate litigation, *but that is a separate subject*." *Sackett*, 566 U.S. at 129 (emphasis added); *see also Abbott Labs.*, 387 U.S. at 154 ("[I]f [petitioners] fail to observe the Commission's rule they are quite clearly exposed to the imposition of strong sanctions."); *Columbia Broad.*, 316 U.S. at

417–18 (A final order "does not cease to be so merely because it is not certain whether the Commission will institute proceedings to enforce the penalty incurred under its regulations for non-compliance.") (citation omitted).

And, contrary to the district court, the Compliance Office *does* have the final word on the legal determination whether the Reloadable Aerial Shells violated the FHSA. As noted above, the CPSC delegated its inspections, field-enforcement, compliance, and administrative-enforcement powers to the Compliance Office. *See* JA054–55, JA067–068 (Handbook); CPSC Mot. to Dismiss, ECF 16-1, at 9–11 (discussing 16 C.F.R. § 1000.21 and Handbook). And as the Compliance Office's own Handbook confirms, these initial legal determinations made by the Compliance Office are not reviewed elsewhere in the CPSC. Thus, while firms like Jake's are invited to present arguments and evidence to challenge the determinations identified in notices of non-compliance, those arguments and evidence are presented to the Compliance Office for its consideration. *See* JA067–068 (Handbook). If a firm "continues to disagree" and declines to take corrective action, then the Compliance Office *may* ask the Commissioners to

approve a formal enforcement action. JA068. But the firm has no ability to "administratively" appeal the Compliance Office's determinations.

The district court's approach—which is consistent with *dissenting* opinions in relevant Supreme Court precedent[10]—would eviscerate the Supreme Court's holding in *Sackett*. There, the Court held that an agency's compliance order was final agency action and found it "hard for the Government to defend its claim that the issuance of the compliance order was just 'a step in the deliberative process' when the Agency"—like the CPSC here—rejected the challengers' "attempt to obtain a hearing and when the *next* step will either be taken by the [challengers] (if they comply with the order) or will involve judicial, not administrative, deliberation (if the EPA brings an enforcement action)." 566 U.S. at 129; *see also Ipsen*, 943 F.3d at 958 (finding final agency action because the "only potential next step is an agency enforcement action").

The CPSC's attempt below to collapse these discrete decisions—determination of violation and decision to litigate—only underscores their

[10] *See, e.g.*, *Columbia Broad.*, 316 U.S. at 437 (Frankfurter, J., dissenting); *United States v. Storer Broad. Co.*, 351 U.S. 192, 208–09 (1956) (Harlan, J., dissenting) ("However these allegations are read, they assert no more than that the Commission may in the future take action pursuant to the regulations….").

distinction. As the CPSC noted, post-importation enforcement comes in one of two ways, either through an administrative action or a judicial action—"*if* [the Compliance Office] comes to believe an FHSA violation *has occurred*." ECF 16-1, Mot. to Dismiss, at 6 (emphasis added). Without the Compliance Office's (final) determinations that FHSA violations have occurred—determinations made with authority delegated by the Commission to the Compliance Office—no (further) decision concerning an enforcement action need be made. *See, e.g.*, JA284, JA288, JA292 (Dec. 20, 2018, Notices of Non-Compliance) (CPSC's informing Jake's of the "possibility of *further* enforcement action, including reasonably anticipated litigation") (emphasis added).

Accordingly, any contention that agency action cannot be final until the Commissioners or DOJ decides to litigate is wholly without merit because the decision to initiate a formal enforcement action is a separate decision that comes after a (final) determination of unlawful conduct. *See Sackett*, 566 U.S. at 129; *see also Abbott Labs.*, 387 U.S. at 154; *Columbia Broad.*, 316 U.S. at 417–18. Taken to its logical conclusion, the district court's opinion would hold that prosecutorial discretion precludes judicial

review of even final agency decisions unless and until they are separately enforced.

Nor is there any "representation that the Attorney General and the Commissioner[s] disagree" in this case; after all, "the Justice Department is defending this very suit." *Abbott Labs.*, 387 U.S. at 152. Therefore, it "would be adherence to a mere technicality to give any credence to th[e] contention" that an otherwise final agency action is non-final because the Commissioners and/or the DOJ must authorize formal enforcement actions. *Id.*

Were it otherwise, regulated parties would be forced to choose between engaging in commerce under the sword of Damocles or opting out altogether because the government might decide to (further) enforce its regulations. That is not the law. *See Free Enter. Fund v. PCAOB*, 561 U.S. 477, 490 (2010) ("We normally do not require plaintiffs to 'bet the farm . . . by taking the violative action' before 'testing the validity of the law' . . . .") (citations omitted). Jake's "need not assume such risks while waiting for [CPSC] to 'drop the hammer' in order to have [its] day in court." *Hawkes II*, 578 U.S. at 600.

Thus, the district court erred when it conflated the finality of *each and every* possible agency action concerning Jake's Reloadable Aerial Shells. The CPSC decisions that the Audible Effects Regulation and purported Reports Labeling Requirement apply to Jake's products and that those products "are banned [or misbranded] hazardous substances," articulated in the Notices, are the final agency action challenged in this case. *Cf. Hawkes Co. v. U.S. Army Corps of Eng'rs*, 782 F.3d 994, 999 (8th Cir. 2015) (*Hawkes I*) (The "Revised JD clearly meets the first *Bennett* factor—it was the consummation of the Corps' decisionmaking process on the *threshold issue* of the agency's statutory authority.") (emphasis added) (citations omitted), *aff'd*, *Hawkes II*, 578 U.S. 590.

b. The Possibility of Ongoing Discussions Does Not Render CPSC's Decisions Less Final.

That Jake's may continue to engage the CPSC in discussions does not render the Commission's determinations any less final. The Supreme Court made this clear in *Sackett*, holding that the "mere possibility that an agency might reconsider in light of 'informal discussion' and invited contentions of inaccuracy does not suffice to make an otherwise final agency action nonfinal." 566 U.S. at 127. In *Sierra Club*, this Court similarly held that the "mere possibility" that a state agency could reconsider

its Clean Water Act certification was not enough to strip the district court of jurisdiction for lack of final agency action. 64 F.4th at 500.

This rule prevents agencies from delaying judicial review indefinitely by holding out the possibility of changing their determinations or by pointing to discretionary enforcement decisions that the agencies continuously decline to employ—precisely what the CPSC has done here, and elsewhere. *See Doe v. Tenenbaum*, 127 F. Supp. 3d 426, 465 (D. Md. 2012) (CPSC's "repeated use of the words 'may' and 'could' demonstrate that it has no serious design on taking future action in connection with the report. . . . Indeed, during oral argument, the Court expressed concern that the Commission's decision 'could never be final' and the Commission conceded that '[t]hat may be.'").

The district court attempted to distinguish *Sackett* on the ground that the compliance there was ordered rather than requested. *Jake's II*, 2023 WL 3058845, at *8. But that is not how either the government or the Supreme Court understood the EPA's compliance order in *Sackett*. Rather, the government argued *against* finality on the ground that compliance "orders" are an efficient means of resolving issues through *voluntary* compliance but that they are not self-executing and require (later)

enforcement. *Sackett*, 566 U.S. at 128–29. Thus, like the district court below, the government in *Sackett* argued that the EPA's compliance "order" was merely a step in the deliberative process and not a coercive sanction in itself. *Id.*

The Supreme Court rejected this argument. While it agreed that so-called "compliance orders" call for only voluntary compliance, the Court dismissed the government's argument that no "finality" therefore resulted: "It is entirely consistent with this function [*i.e.*, potential voluntary resolution] to allow judicial review when the recipient does not choose 'voluntary compliance.'" *Id.* at 128; *see also Columbia Broad.*, 316 U.S. at 418 ("Most rules of conduct having the force of law are not self-executing but require judicial or administrative action to impose their sanctions with respect to particular individuals.").

The district court offered another flawed attempt to distinguish *Sackett*. The court claimed that, unlike here, the findings and conclusions in the EPA's compliance order were not subject to any further review within EPA. *Jake's II*, 2023 WL 3058845, at *8. But, as explained above, the findings and conclusions in the Notices are not subject to further review within the CPSC. *See* above, pp. 39–40. The Compliance Office has

made its determinations, upheld them, and refused Jake's request for an informal hearing. The *next* step, as in *Sackett*, is the separate decision by the CPSC whether to initiate a formal enforcement action. 566 U.S. at 128–29.

Indeed, Director Kaye's denial of an informal hearing, though framed as an assertion about ripeness, *see* ECF 16-1, CPSC Mot. to Dismiss, at 9, provides additional evidence of consummation of decision-making for APA purposes (not to mention Jake's purposes). According to Director Kaye, Jake's "request for an informal hearing is premature because we have not notified you that the Commission intends to take *further* action against Jake's or the products." JA329 (Feb. 8, 2021 Ltr.) (emphasis added). This reference to "further" action implicitly acknowledges that the Notices of Non-Compliance were themselves the final agency actions concerning the CPSC's interpretation and application of its regulations. As Director Kaye's letter indicates, enforcement and any process that goes with it would be a separate agency action, one that has not yet occurred and one, accordingly, that Jake's is not challenging here. *Id.*

Moreover, while the CPSC asserts that Jake's could submit evidence "supporting a claim of *compliance*" with the FHSA and its regula-

tions (JA328 (Feb. 8, 2021 Ltr.) (emphasis added)), it has ignored Jake's repeated requests to confirm that there is no avenue (absent selling its products and risking penalties) for Jake's to contest *applicability* of the relevant regulations, which is what Jake's challenge on the merits is about. The Compliance Office's years-long, unwavering refusal to reconsider proves that the determinations in the Notices are anything but tentative. *See Abbott Labs.*, 387 U.S. at 151 (observing "no hint" that challenged regulation was informal, merely the ruling of a subordinate official, or tentative).

Accordingly, even if the Notices are read not to "actually order Jake's Fireworks to take any action," that is irrelevant. *Jake's II*, 2023 WL 3058845, at *7. The question is whether the Notices mark the consummation of the agency's decision-making process. Here, the Notices definitively and repeatedly reflect the CPSC's determinations that Jake's products are banned (or misbranded) hazardous substances under the FHFA, that it is a prohibited act to sell those hazardous substances, and that Jake's is subject to criminal and civil sanctions for selling its "banned" or "misbranded" products.

The district court thus erred by assuming that Jake's is in the same position before and after receiving the Notices of Non-Compliance. As discussed below, it is "common experience that men conform their conduct to regulations by governmental authority so as to avoid the unpleasant legal consequences which failure to conform entails." *Columbia Broad.*, 316 U.S. at 418.[11] Therefore, regulated parties like Jake's "are free only in the sense that all those who do not choose to conform to regulations which may be determined to be lawful are free by their choice to accept the legal consequences of their acts." *Id.* at 419.

* * *

The APA and the Supreme Court do not obligate Jake's to engage in an administrative process that only the agency has the power to end. This Court should follow the Supreme Court and hold that the CPSC's Notices of Non-Compliance reflect the consummation of the agency's decision-making process. *See Hawkes II*, 578 U.S. at 600; *Sackett*, 566 U.S.

[11] Again, the district court's reasoning finds support in the dissenting opinions of Supreme Court precedent. *See, e.g.*, *Frozen Food*, 351 U.S. at 48 (Harlan, J., dissenting) ("But the carriers subject to the Interstate Commerce Act are in no way worse off now than they were before this [agency] order issued; there is no greater liability or risk under the statute occasioned by the order, which has no more effect than would any other informal expression of views by the Commission.").

at 127–29; *Abbot Labs.*, 387 U.S. at 149–51; *Storer Broad.*, 351 U.S. at 198 (holding that FCC regulation announcing policy against issuing TV license to applicants owning five such licenses was final agency action); *Frozen Food*, 351 U.S. at 44–45.

2. The Notices Are Final Agency Actions Because They Have Legal Consequences and Determine Jake's Obligations.

The second prong of the *Bennett* test asks whether an agency action is one by which "rights or obligations have been determined," or from which "legal consequences will flow.'" *Bennett*, 520 U.S. at 177–78.[12] The Supreme Court takes a "pragmatic approach" here, *Hawkes II*, 578 U.S. at 599, informed by the APA's "basic presumption of judicial review," *Abbott Labs.*, 387 U.S. at 140–41 (explaining that the APA is meant to "cover a broad spectrum of administrative actions" and so its "generous review provisions must be given a hospitable interpretation" (citations and internal quotation marks omitted)). As noted above, the Supreme Court has expressly rejected the CPSC's argument that an agency order must be "self-executing" to warrant review, holding "the APA provides for judicial

[12] Having held that Jake's did not satisfy the first *Bennett* prong, the district court did not address the second prong. *Jake's II*, 2023 WL 3058845, at *9. For judicial economy, however, this Court may consider arguments that the district court did not reach below. *See Covey*, 777 F.3d at 192.

review of all final agency actions, not just those that impose a self-executing sanction." *Sackett*, 566 U.S. at 129; *see also Abbott Labs.*, 387 U.S. at 150; *Frozen Food*, 351 U.S. at 43–44.

That Jake's faces legal consequences as a result of the Notices is clear from the statute. The FHSA provides that "[a]ny person who knowingly violates section 1263 of this title [by introducing banned hazardous substances into interstate commerce] shall be subject to a civil penalty . . . for each such violation." 15 U.S.C. § 1264(c)(1). The FHSA defines "knowingly" as "(A) having actual knowledge, or (B) the presumed having of knowledge deemed to be possessed by a reasonable person who acts in the circumstances, including knowledge obtainable upon the exercise of due care to ascertain the truth of representations." *Id.* § 1264(c)(5). In *Shelton Wholesale*, the court found that a factfinder could consider the knowledge that fireworks had failed CPSC compliance testing as evidence of a knowing FHSA violation. 1998 WL 251273, at *11; *see also Bellion Spirits, LLC v. United States*, 7 F.4th 1201, 1209 (D.C. Cir. 2021) (holding "legal consequences . . . attach to the [advisory] letter because it has the effect of extinguishing any willfulness defense Bellion otherwise might assert in an administrative proceeding"); *Ipsen*, 943 F.3d at 955–

57 (holding agency letter that explicitly disclaimed it was "final agency action or even an initial determination" nevertheless met both *Bennett* prongs because it increased *probability* that plaintiff could be found to have acted "knowingly").

Accordingly, a separate legal effect flows from the issuance of the CPSC's Notices because—regardless of how the Commission itself characterizes them—if Jake's distributes the subject products, the Notices could be used as evidence that Jake's did so knowing the products were banned or misbranded hazardous substances and, therefore, subject Jake's to civil penalties.[13] An agency may not "avoid judicial review 'merely by choosing the form of a letter to express its definitive position on a general question of statutory interpretation.'" *Her Majesty the Queen in Right of Ontario v. EPA*, 912 F.2d 1525, 1531 (D.C. Cir. 1990) (citation omitted); *see also Columbia Broad.*, 316 U.S. at 416 ("The particular label placed upon [the order] by the Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do and

[13] Any contention by the CPSC that it might not use its Notices as evidence of Jake's (future) knowing violation doesn't change the analysis. *See Abbott Labs.*, 387 U.S. at 154 (rejecting government's representation that DOJ would proceed only civilly, not criminally, if petitioners violated agency's rule).

has done which is decisive."); *id.* at 419 (dismissing argument "addressed to the form rather than the substance" of agency's action).

Further, the Supreme Court has clarified that even agency decisions that do not result in *direct* legal consequences satisfy the second *Bennett* prong. In *Hawkes II*, the Supreme Court noted that even though no formal enforcement action could be brought "for failure to conform to the approved [jurisdictional determination] itself," the agency's determination "not only deprive[d] respondents of a . . . safe harbor from liability . . . but warn[ed] that if they discharge pollutants onto their property without obtaining a permit from the Corps, they d[id] so at the risk of significant criminal and civil penalties." 578 U.S. at 599–600; *see also Abbott Labs.*, 387 U.S. at 152 (noting that the regulation's promulgation "put[] petitioners in a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate") (footnote omitted).

The D.C. Circuit's analysis in *Rhea Lana, Inc. v. Dep't of Labor* is consistent with this analysis. 824 F.3d 1023 (D.C. Cir. 2016). There, a district director of the Department's Wage and Hour Division advised Rhea Lana, via two letters, that it considered its volunteer workers to be employees under the Fair Labor Standards Act and entitled to wages. *Id.*

at 1025–26. The second letter—which became the subject of Rhea Lana's lawsuit—stated that no penalty was being imposed but that Rhea Lana "will be subject to . . . penalties" "[i]f at any time in the future your firm is found to have violated the monetary provisions of the FLSA." *Id.* at 1026. Rhea Lana sued under the APA to challenge the DOL's determination that its volunteers were employees. The district court granted DOL's motion to dismiss on the basis that the DOL letters were not final. *Id.*

The D.C. Circuit reversed. While it found that the second DOL letter created no new legal obligations beyond those already imposed under the Fair Labor Standards Act, it nevertheless concluded "that legal consequences flow[ed] from the [l]etter because it ma[de] Rhea Lana eligible for civil penalties in any future enforcement action." *Rhea Lana*, 824 F.3d at 1028; *see also Abbott Labs.*, 378 U.S. at 152–53 (holding regulations final agency action because they "purport to give an authoritative interpretation of a statutory provision" forcing companies to decide between incurring massive compliance costs or risking criminal and civil penalties for selling "misbranded" drugs); *Hawkes I*, 782 F.3d at 1000 (reversing district court's ruling on second *Bennett* factor because it "seriously understates the impact of the regulatory action at issue by exaggerating the

distinction between an agency order that compels affirmative action, and an order that prohibits a party from taking otherwise lawful action"), *aff'd*, 578 U.S. 590. As demonstrated above, such is the case here.

The Fifth Circuit's recent analysis in *Clarke v. CFTC* is also helpful. In *Clarke*, participants in an online futures trading market challenged the Commodity Future Trading Commission's recission of a no-action letter. 74 F.4th 627 (5th Cir. 2023). Similar to the CPSC here, the CFTC asserted that the online marketplace was "'free to continue unabated with or without any staff no-action relief' and that the CFTC can commence enforcement 'with or without a staff no-action letter.'" *Id.* at 638. Also, like here, the CFTC claimed that its no-action letter "'represents the position only of the Division that issued it' and binds only the issuing Division . . . and not the Commission or other Commission staff.'" *Id.* n.6. But the Fifth Circuit observed, importantly, that this did not change the finality analysis because a beneficiary could rely on the discretion in a no-action letter. *Id.*

This case is even easier than *Clarke*: as described above, Jake's would be in legal jeopardy if it did *not* "rely" on the assertions about the status of its products made in the CPSC's Notice of Non-Compliance. *See*

Hawkes I, 782 F.3d at 1001 (noting that adverse effect at issue was "caused by agency action, not simply by the existence" of the Clean Water Act), *aff'd*, *Hawkes II*, 578 U.S. 590. The Handbook and Notices are clear about the legal consequences of a knowing violation of a Notice. Thus, the Handbook advises, under 15 U.S.C. § 1264, "any person who knowingly violates [15 U.S.C. § 2069] shall be subject to a civil penalty not to exceed $100,000 per violation. . . . The Commission may seek a civil penalty of up to $100,000 per noncompliant (violative) product, up to a maximum of $15.15 million for any related series of violations." JA061 (Handbook). Similarly, the Notices warn of "civil penalties of up to $110,000 per violation limited to a maximum of $16.025 million for any related series of violations." *See, e.g.*, JA283, JA287, JA292 (Dec. 20, 2018 Notices of Non-Compliance). The Handbook and the Notices also warn of criminal penalties, "including imprisonment for not more than five years, a fine, and forfeiture of assets associated with the violation(s)." *See, e.g.*, JA061 (Handbook); JA283, JA287, JA292 (Dec. 20, 2018 Notices of Non-Compliance). And "the APA provides for judicial review of all final agency actions, not just those that impose a self-executing sanction." *Sackett*, 566 U.S. at 129.

Finally, in *Spirit Airlines, Inc. v. Dep't of Transp.*, the D.C. Circuit acknowledged a blurry line between "practical" consequences and "legal" consequences, but stated that "[w]e can see . . . that an agency's action need not flatly prohibit a party from acting in order to affect its legal rights; it is enough that the agency action presently and directly limits or defeats a party's ability to enter into an advantageous business arrangement." 997 F.3d 1247, 1252 (D.C. Cir. 2021). The court explained that "[t]o emphasize the purportedly voluntary nature of the overall scheduling regime at Newark, the [Federal Aviation Administration] also ignores the value to an airline of having the agency's approval." *Id.* at 1253–54.

The same is true here: even if the CPSC's demands that Jake's destroy its fireworks seek voluntary action in some technical sense (and the law should not be read to require every potentially regulated entity to parse dense statutory and regulatory text to determine if an agency has the authority it purports to have on the face of a Notice), they nevertheless cast a cloud of uncertainty over the safety and legal status of Jake's products, in addition to the liability resulting from a "knowing" violation. *See also Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir.

2000) (holding that EPA "guidance" document was final agency action notwithstanding agency disclaimers because "the entire Guidance, from beginning to end—except the last paragraph—reads like a ukase. It commands, it requires, it orders, it dictates.").

As the Supreme Court has repeatedly explained, the relevant legal consequences are those that could result from engaging in the conduct that the agency has already determined to be unlawful. *See, e.g.*, *Sackett*, 566 U.S. at 129; *Bennett*, 520 U.S. at 173, 178; *Abbott Labs.*, 387 U.S. at 152–53.

The CPSC's Notices of Non-Compliance have "direct and appreciable legal consequences," *Bennett*, 520 U.S. at 178, and they therefore satisfy the second prong of the *Bennett* test.

C. Jake's Has No Other Adequate Remedy in Court.

The APA allows judicial review of final agency action for which there is "no other adequate remedy in a court." 5 U.S.C. § 704. The Supreme Court has repeatedly held that regulated entities do not need to precipitate an enforcement action to seek review. In *Sackett*, the Court held that waiting for the agency to bring a civil enforcement action, which the plaintiffs could not initiate, did not provide an adequate alternative

remedy. 566 U.S. at 127. The Court reaffirmed this "long held" position in *Hawkes II*, confirming that "parties need not await enforcement proceedings before challenging final agency action where such proceedings carry the risk of "serious criminal and civil penalties." 578 U.S. at 600. Accordingly, Jake's "need not assume such risks while waiting for [CPSC] to 'drop the hammer' in order to have their day in court." *Id.*

STATEMENT REGARDING ORAL ARGUMENT

Appellants respectfully request oral argument. This case raises significant questions regarding the application of the Administrative Procedure Act. Oral argument will give these issues the attention they warrant, allow the advocates to assist the Court by answering any questions, and aid the Court in careful consideration of this case.

CONCLUSION

The CPSC should not be allowed—and under the APA, it is not allowed—to avoid accountability by indefinitely prolonging its administrative process to prevent juridical review. Here, the CPSC purports to enforce regulations that either do not apply to Jake's products (the Audible Effects Regulation) or that do not exist (the purported Reports Labeling Requirement). It enforces these regulations through its arbitrary "poof/bang" test. And it threatens Jake's with substantial criminal and civil

sanctions for violating the final determinations of violation reflected in the Notices of Non-Compliance. But, it claims, Jake's can challenge none of this until the CPSC alone decides to initiate a formal enforcement action. The district court erred by approving this procedural gamesmanship.

Therefore, this Court should reverse the district court's motion to dismiss, hold that the CPSC's Notices of Non-Compliance are final agency action under the APA, and remand this matter to the district court for review of the determinations made in the Notices.

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Respectfully submitted,

s/ Oliver J. Dunford

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B)(i) and Local Rule 32(b), I certify that the attached brief is proportionally spaced, has a typeface of 14 points and contains 11,672 words.

DATED: October 18, 2023.

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