No. 24-693

In the Supreme Court of the United States

JAKE'S FIREWORKS, INC.,
Petitioner,
v.
CONSUMER PRODUCT SAFETY COMMISSION, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

AMICUS CURIAE BRIEF OF THE BUCKEYE INSTITUTE, MANHATTAN INSTITUTE, AMERICANS FOR PROSPERITY FOUNDATION, AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC., IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether judicial review under the Administrative Procedure Act for such notices of violation is unavailable until the agency further acts through formal enforcement.

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INTEREST OF *AMICI CURIAE*[1]

The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market policy in the states. The Buckeye Institute accomplishes its mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute works to restrain governmental overreach at all levels of government. The Buckeye Institute files lawsuits and submits amicus briefs to fulfill that purpose. The Buckeye Institute is a nonpartisan, nonprofit, tax-exempt organization, as defined by I.R.C. section 501(c)(3).

The Manhattan Institute for Policy Research ("MI") is a nonpartisan public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility. To that end, MI has historically sponsored scholarship and filed briefs opposing government overreach.

Amicus curiae Americans for Prosperity Foundation (AFPF) is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. Some

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae* made any monetary contribution toward the preparation or submission of this brief. Counsel timely provided the notice required by Rule 37.2.

of those key ideas include the separation of powers and constitutionally limited government. As part of this mission, it appears as *amicus curiae* before federal and state courts. AFPF believes due process and basic fairness require that businesses like Jake's Fireworks have a safe pathway to obtain meaningful pre-enforcement judicial review of the government's enforcement decisions without being forced to risk severe civil and criminal penalties.

The National Federation of Independent Business Small Business Legal Center, Inc. (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. It is an affiliate of the National Federation of Independent Business, Inc. (NFIB), which is the nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents, in Washington, D.C., and all 50 state capitals, the interests of its members.

SUMMARY OF ARGUMENT

This case presents the Court with another opportunity to balance the scales of justice by giving regulated parties timely access to judicial review of agency threats of enforcement. The Consumer Product Safety Commission ("CPSC") demanded that Jake's Fireworks must destroy certain of its fireworks inventory because they allegedly violate the CPSC's spurious "poof-bang" or "ear" test, a test that is incapable of scientific application. The Fourth Circuit,

though, has left Jake's Fireworks with a Hobson's choice: It can follow the CPSC's instructions and destroy its product or risk the imposition of severe civil and criminal sanctions. The CSPC is effectively regulating through enforcement—indeed through bullying. That is an evasion of the Administrative Procedure Act's directive to regulate via notice and comment. Indeed, in this case, the CPSC utilized this enforcement tactic even after numerous commentators and industry objectors challenged the highly subjective "poof-bang" test. When the government threatens civil and criminal penalties, the regulated party is entitled to its day in court when the basis for the prosecution is an invalid law or regulation. This case is ripe for pre-enforcement review consistent with this Court's jurisprudence.

ARGUMENT

I. Regulated parties are entitled to rely on governmental threats of enforcement.

Grandpa and Grandma[2] were enjoying a quiet evening at home when someone began banging on their front door and threatening to break it down and "get" them. Concerned, Grandpa called 911, where the call went like this:

[2] Jake's Fireworks was started over 75 years ago by "Grandpa Johnny and Grandma Marietta" when they "sold fireworks from the back of their house." *About Jake's Fireworks*, Jake's Fireworks, https://www.jakesfireworks.com/about (last visited Jan. 24, 2025).

911 Operator: "911, what's your emergency?"

Grandpa: "There is someone outside my door banging on it and telling me he is going to get me. Can you send the police?"

911 Operator: "Has he broken in yet?"

Grandpa: "No, but he is trying. He is pounding, and he says he is going to "take my money and give me what I deserve."

911 Operator: "Well, we don't know if he means it. Maybe he is just threatening to break in but doesn't really mean it. How can you be sure?"

Grandpa: "He is trying to smash the door down. Send someone! I'm afraid."

911 Operator: "Sir, we do not send the police just because someone is pounding on your door and threatening to break in. Call us if he follows through on his threat and breaks in."

Grandpa: "By then it will be too late."

911 Operator: "I am afraid you called us too soon. Have a nice day."

The CPSC is not threatening bodily harm, but it demanded that Jake's Fireworks forgo selling its fireworks and destroy them or face drastic fines and penalties. The CPSC argues that Grandpa and Grandma called upon the court too soon. They should have waited until the CPSC imposed those fines and

penalties before asking the courts to get involved. But by then, it will be too late. That is not the way the law should work.

When the CPSC speaks—threatens—people listen. And people expect that the CPSC officials mean what they say. As children, we learn to expect that clarity and truthfulness. Horton explained, "I meant what I said and I said what I meant. . . . An elephant's faithful one hundred percent." Dr. Seuss, *Horton Hatches the Egg* 16 (1940). The Fourth Circuit's ruling suggests that the CPSC is not faithful "one hundred percent," rather the agency must act in order for its "blustering" to be challenged. The Fourth Circuit wants Jake's Fireworks to gamble its business on the possibility that the CPSC might be bluffing. Cf. *Free Enterprise Fund* v. *PCAOB*, 561 U.S. 477, 490 (2010) (noting that plaintiffs ordinarily do not have to "bet the farm" to challenge a law); *U.S. Army Corps of Engineers* v. *Hawkes Co.*, 578 U.S. 590, 600 (2016) (noting that plaintiffs need not wait for an agency to "drop the hammer").

The CPSC's Compliance Office has engaged in regulation by bullying, which is a subset of regulation by enforcement. The CPSC's decisionmaking has significant administrative ramifications. This Court has repeatedly held that pre-enforcement challenges to threatened agency action can proceed. This Court's recognition of pre-enforcement challenges shows how cramped the Fourth Circuit's ruling is.

II. The CPSC's Compliance Office is engaged in regulation by enforcement, through bullying.

An agency engages in regulation by enforcement when it "use[s] its enforcement powers to establish de facto rules without due process, fair notice, and consideration of public comments reflecting industry practice." Peter Chan & A. Valerie Mirko, *Recommendations to the SEC to Modify its Procedural Framework to PREVENT REGULATION BY ENFORCEMENT* 2 (Financial Services Institute, 2024).[3] By engaging in regulation by enforcement, an agency "improperly circumvents the statutory requirements for agency rulemaking, violates the rights of those the agency regulates, and frustrates productive approaches to best protect" the regulated community and the public." *Id*. In addition, an agency's pursuit of regulation by enforcement can "extend[ ] an agency's authority in ways that might otherwise be impermissible, politically costly or even illegal." Chris Brummer et al., *Regulation by Enforcement*, 96 So. Cal. L. Rev. 1297, 1300 (2024).

The threat of regulation by bullying, or as one commentator calls it, agency "arm-twisting," Lars Noah, *Administrative Arm-Twisting in the Shadow of Congressional Delegations of Authority*, 1997 Wis. L. Rev. 873 (1997), can sometimes be enough to force compliance with a directive that has not been approved or vetted via notice and comment. Noah explains that agency arm-twisting "refers to a threat by an agency to impose a sanction or withhold a

[3] https://tinyurl.com/ycx77p89.

benefit in hopes of encouraging 'voluntary' compliance with a request." *Id*. at 874.

The CPSC's Compliance Office's Notices of Non-Compliance directed to Jake's Fireworks are hardly ambiguous. As the Fourth Circuit acknowledged, those notices "though worded slightly differently," told Jake's Fireworks that some of its fireworks were banned hazardous substances. Pet. App. at 4a. The Notices stated that "the staff requests that the distribution of the sampled lots not take place and that the existing inventory be destroyed." *Id*. They went on to "set forth a procedure for documenting the destruction of the fireworks if Jake's fireworks 'chose to destroy the goods' in question, and provided a 90-day deadline by which to do so." Pet. App. at 5a; see also Pet. at 7–8 ("[T]he September 2018 Notice ordered, in bold, '**The sampled lots must be destroyed within 90 days of the date of this letter unless an extension of time is requested and approved by the [Compliance Office.]**'") (bold and brackets in original).

The consequences for non-compliance with the Compliance Office's "request" were also spelled out. The civil penalties could go as high as $110,000 per violation, or up to $16.25 million for a "related series of violations." Pet. at 7. In addition, imprisonment for up to five years is a potential criminal penalty. *Id*. If that were not enough, the CPSC warned Jake's Fireworks that "further action" might follow, "including reasonably anticipated litigation." *Id*.

The CPSC further rebuffed Jake's Fireworks' efforts to contest the Notices. Jake's Fireworks' written communication of its position was rejected.

Pet. at 8. A meeting with the Director of the Compliance Office "got nowhere" because "Jake's was informed that staff intended to enforce the regulation, as articulated in the Notices, and that there was *no further decisionmaking process* on these issues." Pet. at 9 (emphasis added).

The CPSC's action represents regulation by enforcement for two reasons. First, the CPSC demands compliance within 90 days of the date of its September 2018 Notice and other letters. Pet. at 7–8. That short time for compliance combined with the CPSC's refusal to reconsider its position leaves Jake's Fireworks "in limbo." Pet. at 11. Second, as discussed below, the CPSC's reliance on a "poof-bang" test lacks a regulatory basis and scientific rigor. In short, the CPSC put its marker down, daring Jake's Fireworks not to comply. Jake's Fireworks can either "voluntarily" comply with the CPSC's edict or risk the consequences.

III. Pre-enforcement review of the CPSC's Notices of Non-Compliance is warranted.

This case presents the Court with an opportunity to refine and reinforce its standards for awarding pre-enforcement review. This Court has granted pre-enforcement relief in cases involving both statutory and regulatory challenges. The Court has long recognized that parties threatened with enforcement of a challenged statute have standing as long as "the alleged harm [is] actual or imminent." *Whitmore* v. *Arkansas*, 495 U.S. 149, 155 (1990). In 2014, the Court held that a pre-enforcement challenge to an Ohio statute proscribing "false statement[s]" during an election was justiciable. *Susan B. Anthony List* v.

Driehaus, 573 U.S. 149 (2014). It noted that when someone is threatened with the enforcement of a law, "an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law." *Id.* at 158. The threat of enforcement need only be "sufficiently imminent." *Id.* at 159. In the same way, a speaker, facing a "credible threat" of enforcement was not "required to wait and undergo a criminal prosecution as the sole means of seeking relief." *Id.* at 161 (quoting *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 15 (2010)). See also *Nastri* v. *Dykes*, No. 23-1023, 2024 WL 1338778 (2d Cir. Mar. 29, 2024) (finding that "the credible threat of prosecution is a quite forgiving requirement that sets up only a low threshold for a plaintiff to surmount" (citation and quotation marks omitted)).

The same holds true for agency action. In 1967, Justice Harlan, writing for the Court, noted, "The cases dealing with judicial review of administrative actions have interpreted the 'finality' element in a pragmatic way." *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 149 (1967). He drew on *Columbia Broadcasting System* v. *United States*, 316 U.S. 407 (1942), in which the Court held that an FCC regulation dealing with contractual arrangements between broadcasters and local stations could be reviewed even though "no license had in fact been denied or revoked." *Abbott Laboratories*, 387 U.S. at 150. The *Columbia Broadcasting* Court declared that the regulations "have the force of law before their sanctions are invoked as well as after." 316 U.S. at 418–19. Justice Harlan also pointed to two other decisions that took "a similarly flexible view of finality." *Abbott Laboratories*, 387 U.S. at 150. Finally,

he observed that the "impact of the regulations upon the petitioners is sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage." *Id.* at 152.

More generally, *Abbott Laboratories* sets out a two-part test for determining whether a challenge to an agency action is ripe. First, the court considers "the fitness of the issues for judicial decision." *Id.* at 149. Then, it considers the "hardship to the parties of withholding court consideration." *Id.*

In *Bennett* v. *Spear*, 520 U.S. 154 (1997), the Court unanimously held that a biological opinion issued by the Fish and Wildlife Service that limited the use of water by landowners and others could be judicially reviewed. It identified "two conditions" for determining the finality of an agency action. "First, the action must mark the 'consummation' of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature." *Id.* at 177–78 (citation omitted). "[S]econd, the action must be one from which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Id* (citation omitted). The Court concluded that the biological opinion "alter[ed] the legal regime." *Id.* at 178.

Then, in *Sackett* v. *EPA*, 566 U.S. 120 (2012), the Court held that a property owner could challenge a compliance order issued by the EPA. It deemed the compliance order to be final because that order "determined" "rights or obligations" and "legal consequences . . . flow" from it. *Id.* at 126 (quoting *Bennett*, 520 U.S. at 178). The possibility of an informal discussion with the EPA did not undercut the

finality of the agency action. As the Court explained, "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." *Id*. at 127.

Similarly, the Court held that the U.S. Army Corps of Engineers' jurisdictional determination was a judicially reviewable final agency action. *Hawkes Co*., 578 U.S. 590. It said that the issuance of the judicial determination meant that "the Corps for all practical purposes 'has ruled definitively' that respondents' property contains jurisdictional waters." *Id*. at 598 (citation omitted). The determination also led to "direct and appreciable legal consequences." *Id*. (quoting *Bennett,* 520 U.S. at 178). Finally, the Court observed that its "conclusion tracks the 'pragmatic' approach we have long taken to finality." *Id*. at 599 (quoting *Abbott*, 387 U.S. at 149).

Jake's Fireworks is entitled to pre-enforcement review of the CPSC's claims of non-compliance. The CPSC's Notices declare that certain fireworks are hazardous and must be destroyed or legal consequences will follow. Any coyness on the part of the CPSC in its phrasing reflects the fact that it, like other agencies, has "learned what language to use to avoid satisfying the two prongs of the *Bennett* test." Stephen Hylas, *Final Agency Action in the Administrative Procedure Act*, 92 N.Y.U. L. Rev. 1644, 1666 (2017). That coyness pales in the light of the CPSC's refusals to consider Jake's Fireworks' views. The CPSC's intent to enforce its Notices is credible.

This Court has "long held [that] parties need not await enforcement proceedings before challenging

final agency action where such proceedings carry the risk of 'serious criminal and civil penalties.'" *Hawkes Co.*, 578 U.S. at 600 (quoting *Abbott* 387 U.S. at 153). Jake's Fireworks cannot proceed without incurring "the risk of serious criminal and civil penalties." The Fourth Circuit's inflexible and unpragmatic reading of the finality requirement leaves Jake's Fireworks adrift.

IV. The Court should allow pre-enforcement review of the CPSC's subjective, unreliable "poof-bang"/"ear" test.

The CPSC's reliance on a "poof-bang" test for evaluating whether Jake's Fireworks are too loud is the epitome of arbitrary and capricious. It is inconsistent with the regulation the CPSC invokes to support its Notices. Furthermore, it is incapable of consistent and reliable application.

The CPSC's expert first described the "poof-bang" test, also called the "ear" or "audible effects" test, by noting that "the CPSC determines whether a device is intended to produce an audible effect by firing the device and determining"—according to an anonymous bureaucrat's personal observation—"whether it goes 'pop' or 'poof' when the visual effect (generally stars) is seen or 'boom' or 'bang' when the visual effect occurs." *United States* v. *Shelton Wholesale, Inc.*, 34 F. Supp. 2d 1147, 1158 (W.D. Mo. 1999), *aff'd sub nom. Shelton* v. *Consumer Prods. Safety Comm'n*, 277 F.3d 998 (8th Cir. 2002). The CPSC's staff later explained:

> To determine "intent to produce an audible effect," CPSC staff listens to the device during field testing, and based on

> the sound, determines whether the applicable "loud report" was detected. If staff hears a "loud report," staff considers the fireworks device "intended to produce an audible effect," in which case, the burst charge (which causes the audible effect) is limited to 2 grains (130 mg). To be clear, staff does not listen for sound level produced by a device but for a certain type of sound. Specifically, staff listens for a crisp, sharp sound profile that is related to the pressure pulse associated with the ignition of a pyrotechnic material.

Briefing Memorandum from George A. Borlase, Assistant Executive Director, Office of Hazard Identification and Reduction et al, to U.S. Consumer Prod. Safety Comm'n (Sept. 26, 2018) at 12.[4]

In the preamble of the Audible Effects Regulation, 35 Fed. Reg. 7415 (May 13, 1970), the CPSC's predecessor agency[5] noted that the "intention [of the regulation was] not to ban so-called 'Class C' common fireworks, but only those designed to produce audible effects caused by a charge of more than 2 grains of pyrotechnic composition." To the extent that caveat was designed to reassure sellers of Class C fireworks, it might well have convinced interested sellers that they did not need to submit a comment. In any event, there is no regulatory basis for the CPSC to use the

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[4] https://tinyurl.com/cz2s7upw.

[5] The CPSC adopted the existing regulations without change. Pet. at 5, n.2.

"poof-bang" test. The CPSC created the test—poof—out of thin air. But the CPSC's Consumer Fireworks Testing Manual does not authorize, explain, or even mention the "poof-bang" test, the "ear" test, or the "audible effects" test. See U.S. Consumer Prod. Safety Comm'n, *Consumer Fireworks Testing Manual* (4th ed. 2006).[6] It is nearly as difficult to find the test on any government website as the plans Arthur sought in *The Hitchhiker's Guide to the Galaxy*.[7]

As then-Professor Kagan wrote, "Bureaucracy is the ultimate black box of government—the place where exercises of coercive power are most unfathomable and most threatening." Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2332 (2001). She explained, "To a great extent, this will always be so: the bureaucratic form—in its proportions, its reach, and its distance—is impervious to full public understanding, much less control." *Id.*

The "black box of government" hides the identity and qualifications of the governmental "experts" who make the regulatory decisions. Not only their identity, but also their training, qualifications, knowledge, biases, and even methodologies remain hidden. Even if the existence of the "poof-bang" theory is disclosed, those responsible for applying it remain hidden in the bowels of the "black box of government."

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[6] https://www.cpsc.gov/s3fs-public/pdfs/blk_pdf_testfireworks.pdf.

[7] Arthur eventually found the plans which were "on display in the bottom of a locked filing cabinet stuck in a disused lavatory with a sign on the door saying 'Beware of the Leopard.'" Douglas Adams, *The Hitchhikers Guide to the Galaxy* 9–10 (1979).

The "poof-bang" test is a "black box" test that is incapable of principled and consistent application. This Court has addressed the issue of scientific methodology. Following these directives, the "poof-bang" test should be subject to the need to show that its results are not just "relevant, but reliable." *Daubert* v. *Merrell Dow Pharmaceuticals*, 509 U.S. 579, 590 (1993). The Court explained, "The adjective 'scientific' [in Federal Rule of Evidence 702] implies a grounding in the methods and procedures of science." *Id.* "Proposed testimony must be supported by appropriate validation—i.e., 'good grounds,' based on what is known. *Id.* "[A] key question" regarding a theory or technique is "whether it can be (and has been tested)." *Id.* at 593. "Another pertinent consideration is whether the theory or techniques has been subjected to peer review and publication." *Id.* A court considering the proffer of scientific evidence should also consider "the known or potential rate of error." *Id.* at 594. A final consideration is "widespread" or "general" acceptance such that "a known technique that has been able to attract only minimal support within the community may properly be regarded with skepticism." *Id.* (citation omitted).

The "poof-bang" theory would not pass the *Daubert* test. The CPSC does not use any scientific instruments to conduct this test. Scientific instruments provide an objective and reproducible methodology. For example, a properly calibrated measuring device that measures the decibel level at a specific distance from the explosive device and under controlled circumstances, e.g. indoors or outdoors, windy or calm atmospherics, and specific humidity levels. The subjective determination of a faceless bureaucrat that Jake's

Fireworks is violating federal law and is subject to huge fines and criminal prosecution is not scientific. The National Fireworks Association pointed out that the CPSC "has on numerous occasions made conflicting determinations about the exact same device" in using the "poof-bang" test. National Fireworks Association, Comment Letter on Proposed Rule on Production of Audible Effects Within the Meaning of the Commission's Fireworks Regulations Under the Federal Hazardous Substances Act (Oct. 4, 2016).[8] Acting Chairman Buerkle recognized this problem, stating that although "the staff [of the commission] has worked for years to replace [the ear test] with a more objective standard," "the effect of today's vote is to leave the oft-criticized ear test in place for now." Ann Marie Buerkle, *Statement from Acting Chairman Buerkle on the Commission Vote on Fireworks Amendments*, U.S. Consumer Prod. Safety Comm'n (Sept. 24, 2019).[9] *Amici* are unaware of any testing that would support the "poof—bang" or "ear" test's validity or any supporting peer review or publication. It is applied nowhere outside the confines of CPSC's lair. Cf. *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944) (The weight to be given to the judgment of an agency "will depend on the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors that give it power to persuade"). Here the CPSC's testing is not entitled to any weight. The CPSC has ignored public comments and has "leveraged enforcement

[8] https://www.regulations.gov/document/CPSC-2016-0020-0001.

[9] https://tinyurl.com/3ftjdpns.

proceedings to make policy after abandoning a failed notice-and-comment process." Brummer et al., *supra*, at 1313. This case epitomizes the need for pre-enforcement review of regulations when an agency threatens enforcement.

CONCLUSION

The CSPC's threats are akin to "your money or your life," differing only in degree. The sale of fireworks is Grandpa's and Grandma's life. People are entitled to intervention and protection when threatened, whether by an intruder banging on their door or the CPSC demanding destruction of their business' inventory or sending them to jail.

The Court should grant the petition and, on review, reverse the decision of the Fourth Circuit Court of Appeals.

Respectfully submitted,

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