

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Lisa Milice, :
 : No. 20-1373
 :
 Petitioner, :
 :
 v. :
 :
 Consumer Product Safety Commission, :
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 :
 Respondent. :

**PETITIONER’S BRIEF IN RESPONSE TO THIS COURT’S
OCTOBER 2 ORDER**

The Consumer Product Safety Commission (“CPSC” or the “Commission”) promulgated the *revisions* to its safety standard for infant bath seats pursuant to 15 U.S.C. § 2058. CPSC has already recognized as much in its direct final rule: “[T]he revised voluntary standard shall be considered to be a consumer product safety standard issued under section 9 of the Consumer Product Safety Act (15 U.S.C. 2058)[.]” 84 Fed. Reg. 49435. Whenever the Commission revises a safety standard pursuant to the procedures set out in § 2058, this Court has jurisdiction to review CPSC’s rule upon the petition of an adversely affected person, consumer, or organization residing within this circuit. 15 U.S.C. § 2060(a), (c).

But in direct contradiction to its stated position during the rulemaking process, the Commission now seeks to avoid the plain language of its governing statute. It asks

this Court to misapply a special expedited procedure that Congress set up for the judicial review of a wave of new safety standards that CPSC promulgated back beginning in 2008. The statutory language, structure, context, and history of the Consumer Product Safety Act (“CPSA”) and the subsequent Consumer Product Safety Improvement Act (“CPSIA”) make clear that the Commission’s suggestion that this Court lacks jurisdiction is wrong. Section 2060(c) vests this Court with jurisdiction over Ms. Milice’s case.

A. THE TEXT & STRUCTURE OF THE CPSA & CPSIA SHOW THAT JURISDICTION IS PROPER IN THIS COURT

Since 1972, the CPSA has authorized CPSC to promulgate consumer product safety rules and has allowed persons affected by those rules to petition for judicial review thereof in the United States Court of Appeals for the District of Columbia “*or* for the circuit in which such person, consumer, or organization resides or has his [or her] principal place of business.” Consumer Product Safety Act, Pub. L. 92-573, § 11, 86 Stat. 1218 (Oct. 27, 1972) (codified at 15 U.S.C. § 2060(a)) (emphasis added). The CPSA also set the procedures by which the Commission typically promulgates consumer product safety rules. *Id.* § 7, 86 Stat. 1212 (codified at 15 U.S.C. § 2051 *et seq.*).

Then, in 2008, Congress passed the CPSIA, Pub. L. 110-314, 122 Stat. 3016 (Aug. 14, 2008), which included the Danny Keysar Child Safety Notification Act, *id.* § 104, 122 Stat. 3028 (codified at 15 U.S.C. § 2056a). Part of what the Danny Keysar Act

accomplished was to require the Commission to promulgate new safety standards for durable infant or toddler products, including full-size and non-full-size cribs, toddler beds, high chairs, booster chairs, hook-on chairs, bath seats, gates and other enclosures for confining a child under five years old, play yards, stationary activity centers, infant carriers, strollers, walkers, swings, bassinets, and cradles. 15 U.S.C. § 2056a(f).

Congress set a tight timeline for CPSC to promulgate all these new rules for durable nursery products. Within a year of August 14, 2008, the Commission had to commence rulemaking for at least two categories of durable nursery products every six months until CPSC promulgated a rule for every such product. *Id.* § 2056a(b)(2). In addition to the new rulemaking for durable nursery products, the CPSIA also required CPSC to begin promulgating new safety standards for children’s toys within 180 days, *id.* § 2056b(a); begin publishing notice of third-party accreditation requirements for various children’s products within 10 months, *id.* § 2063(a)(3)(B); and promulgate a new safety standard for all-terrain vehicles within 90 days, *id.* § 2089(a)(1).

Presumably recognizing that the Commission’s promulgating so many new rules in such a short span could create an influx of litigation, Congress enacted a special procedure for “expedited review” of these new rules the Commission had to promulgate in response to the CPSIA. *See* 15 U.S.C. § 2060(g). This temporary, expedited review applied exclusively to challenges to four new types of standards that the CPSIA required or allowed the Commission to promulgate, including durable nursery product safety standards. *Id.* § 2060(g)(1). Similarly, the CPSIA included

temporary procedures for all the new third-party accreditation requirements that were due on a short deadline. *Id.* § 2063(a)(3)(G) (exempting these accreditation requirements from APA rulemaking for a period of three years).

But all these special procedures were only temporary to account for the sudden influx of rulemaking that the CPSIA thrust on CPSC. Once the Commission had promulgated its new durable nursery product safety standards beginning in 2008, “[i]f an organization revises a standard that has been adopted, in whole or in part, as a consumer product safety standard ... [t]he revised voluntary standard shall be considered to be a consumer product safety standard issued by the Commission under section 2058[.]” *Id.* § 2056a(b)(4). In other words, once CPSC had adopted the initial nursery product safety standards subject to the limited and temporary jurisdiction of § 2060(g), the ordinary jurisdictional standard kicked back in for all future changes.

The rule at issue here clearly falls into the category of “revised ... standards” subject to jurisdiction under §§ 2058 and 2060(a). Indeed, as the title suggests, the rule sets out “Revisions to Safety Standard for Infant Bath Seats,” and revises a rule first promulgated on June 4, 2010. 84 Fed. Reg. 49435. The original 2010 rule was part of the flurry of new rules issued in compliance with the CPSIA, subject to the limited jurisdiction of § 2060(g). As a *revision*, however, the rule here falls within this Court’s jurisdiction. *See* 15 U.S.C. §§ 2056a(b)(4), 2058, 2060(a), (c).

The text and structure of § 2056a further establishes that the original promulgation of durable nursery product safety standards followed different

procedures for judicial review than subsequent revisions to those rules. *See Monzon v. De La Roca*, 910 F.3d 92, 102 (3d Cir. 2018) (interpreting a statute based on “the broader context of the statute as a whole”). Subsection 2056a(b)(2) set the timetable in which the Commission had to begin promulgating the new safety standards, which were then subject to expedited judicial review in the D.C. Circuit pursuant to § 2060(g). *See* 15 U.S.C. § 2056a(b)(3). And notably, the expedited review provision is mentioned *only* following the discussion of the new standards required by the law—before any discussion of revisions to those standards. *See id.*

Subsection 2056a(b)(4) then shifts gears and limits the effect of the new expedited review provision. The statute says plainly that any subsequent revisions to the rules “shall be considered to be a consumer product safety standard issued by the Commission under section 2058,” *id.* § 2056(b)(4), which governs normal “[p]rocedure for consumer product safety rules.” *Id.* § 2058. One important consequence of treating revisions as if they were issued under § 2058 is that they then become subject to ordinary judicial review pursuant to §§ 2060(a)–(f) rather than the expedited procedure of § 2060(g). *Cf. Zen Magnets, LLC v. CPSC*, 841 F.3d 1141, 1145-48 (10th Cir. 2016) (considering a petition to review under § 2060(a) of a safety standard originally adopted for children’s magnets under § 2056b and later promulgated for all magnets pursuant to §§ 2056, 2058). Thus, the statutory text makes plain that only the *original* durable nursery product safety rules were subject to the limited jurisdictional provision set out

in § 2060(g). The subsequent revision to the rules—like the one at issue here—are not so limited.

B. CPSC OPENLY ACKNOWLEDGED THAT IT PROMULGATED THE REVISED INFANT BATH SEAT RULE PURSUANT TO SECTION 2058

CPSC understood all this when it promulgated the recent revision to the infant bath seats rule. During the rulemaking process, the Commission recognized that § 2058 governed its revision of the bath-seat rule at issue. In the section of the direct final rule outlining the source of its statutory authority, CPSC stated explicitly that “the revised voluntary standard shall be considered to be a consumer product safety standard issued under section 9 of the Consumer Product Safety Act (15 U.S.C. 2058)[.]” 84 Fed. Reg. 49435. Without ever walking back that representation, the Commission has now halfheartedly suggested that it “[a]ppears” that the “judicial review procedures of 15 U.S.C. § 2060(g)” apply. CPSC Resp. Br. at 1-2. But this suggestion contradicts CPSC’s statement during rulemaking that it was promulgating the rule under § 2058 rather than § 2056a(b). Of course, rules promulgated under the procedures of § 2058 are subject to this Court’s jurisdiction under 2060(c), unlike those promulgated a decade ago under the expedited procedures of § 2056a(b). Hence, based on CPSC’s own statement during rulemaking, this Court has jurisdiction.

CPSC’s current suggestion to the contrary is little more than a convenient litigating position. This Court should also be wary of CPSC’s tactics. The Commission invited litigation in this forum when it proclaimed during rulemaking that it considered

the rule to be one subject to § 2058, and thus subject to jurisdiction in the circuit where Ms. Milice resides. Now, faced with a serious challenge to its authority, CPSC is looking for a convenient way to avoid the consequences of its actions.

CONCLUSION

It is more than a little ironic that CPSC—in a case about the lawlessness of the Commission’s failure to make its safety standards available outside of the Washington D.C.-area—would try to suggest that consumers challenging the agency’s withholding of those standards must travel to Washington D.C. to challenge its misconduct. This Court should not let CPSC’s red herring throw off course Ms. Milice’s pursuit of the Commission’s unlawful rulemaking. Section 2060(c) vests the Third Circuit with jurisdiction over Ms. Milice’s petition for review.

October 13, 2020

Respectfully Submitted,

/s/ Jared McClain

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed this letter brief with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the CM/ECF system on October 13, 2020. I also certify that the foregoing document is being served on all counsel of record in this appeal via CM/ECF pursuant to Local Rule 25.1.

October 13, 2020

Respectfully,

/s/ Jared McClain
JARED MCCLAIN