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## **NCLA Asks D.C. Circ. to Rehear Rules Behind Paywalls Case on Timing of Direct Final Rule Challenges**

*Lisa Milice v. U.S. Consumer Product Safety Commission*

**Washington, DC (August 16, 2021)** – One mother remains steadfast in her resolve to ensure that all Americans have free access to the product safety standards set forth by the Consumer Product Safety Commission (CPSC). A D.C. Circuit panel dismissed the case *Lisa Milice v. U.S. Consumer Product Safety Commission* in early July on the ground that it was filed too late, but today the New Civil Liberties Alliance, a nonpartisan, nonprofit civil rights group, filed a [petition](#) for rehearing in the U.S. Court of Appeals for the D.C. Circuit. NCLA represents Lisa Milice, a mother of two, in her challenge to CPSC’s practice of keeping consumer product safety standards hidden behind a private paywall.

The possibly unintended upshot of the D.C. Circuit’s ruling is that consumers and manufacturers will now have to file costly lawsuits against CPSC *before* the agency has had a chance to address their concerns during the rulemaking period, or else they will lose their right to sue. Manufacturers would also now have to buy ASTM International’s safety standards *before* CPSC even confirms that those standards will become binding law.

The D.C. Circuit panel [dismissed](#) the case on purely procedural grounds. According to the Court, the 60-day clock on filing a lawsuit began to run the day the agency published notice of its direct final rule and asked for public comment. On September 20, 2019, CPSC published its direct final rule in the Federal Register, announcing proposed revisions to its bath-seat standard that would become effective on December 22, 2019, “unless [CPSC] receive[d] significant adverse comment by October 21, 2019.” During the comment period, on October 21, NCLA published a significantly adverse comment on Regulations.gov, publicly raising several constitutional objections to CPSC’s proposed rule and urging CPSC to reconsider its proposed standard. But the D.C. Circuit panel held that the rulemaking process was already final on September 20, when CPSC first published its direct final rule in the Federal Register. The “default rule” the panel applied is one courts created to apply to rules published after notice-and-comment rulemaking. But as NCLA explained to the Court, direct final rulemaking is entirely different—direct final rules are tentative and take effect only if there are no adverse comments.

Without the benefit of briefing, the panel decided an issue of first impression that will impact the time to challenge all direct final rules going forward. The panel failed to recognize that direct final rulemaking is a unique form of agency action that allows agencies to propose non-controversial rules with fewer procedural steps than notice-and-comment rulemaking. Instead, the panel succumbed to the judicial desire for a one-size-fits-all heuristic and applied a promulgation rule that is only suitable for ordinary rulemaking. The nation’s foremost scholar on direct final rulemaking, Ronald M. Levin, has already [called](#) the panel’s decision a “time bomb” that threatens to destroy the agency-created process altogether.

Without further review, CPSC will continue using its unlawful practice of incorporating by reference private standards that are not freely available to the public. The panel even acknowledged that Ms. Milice’s “frustrated efforts” to see what the law says “illustrate one limitation” of CPSC’s use of incorporation by reference. NCLA

urges the Court to grant the motion for reconsideration, fix the timing problem it has created for challenging direct final rules, and order CPSC to make any binding safety standards permanently accessible to the public for free.

**NCLA released the following statement:**

“The D.C. Circuit’s decision frustrates concerned parents like Lisa, whom CPSC continues to deny access to the law. The Court has made it much more difficult for consumers to hold CPSC accountable for its failure to serve consumer interests as Congress instructed. As a result of the Court’s ruling, interested consumers will now have to file costly lawsuits against CPSC before they’ve had the chance to hear back from the agency in the public-comment portion of the rulemaking process.”

— **Jared McClain, Litigation Counsel, NCLA**

For more information visit the case page [here](#).

**ABOUT NCLA**

[NCLA](#) is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar [Philip Hamburger](#) to protect constitutional freedoms from violations by the Administrative State. NCLA’s public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans’ fundamental rights.

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