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Alexander Hoehn-Saric
Chairman
Alberta E. Mills
Secretary of the Commission
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Compliance Officer
Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814-4408

Re: *Safety Standard for Gates and Enclosures*, Docket Number CPSC-2019-0014

Chairman Hoehn-Saric:

The New Civil Liberties Alliance ("NCLA") submits the following comment, which is significantly adverse, in response to the direct final rule proposed by the Consumer Product Safety Commission ("CPSC"), *Safety Standards for Gates and Enclosures*, 86 Fed. Reg. 53,535 (Sept. 28, 2021) ("Proposed Rule").

NCLA appreciates this opportunity to comment and express its concerns about the Proposed Rule. It is important to note, however, that CPSC's continued refusal to provide free and open access to its proposed safety standards (or revisions thereto) drastically undermines the public's ability to participate meaningfully in notice-and-comment rulemaking. The Constitution requires the government to provide the public with access to the law. Similarly, due process forbids the government from holding the public accountable for proscribed conduct without adequately informing the public of its legal obligations. *FCC v. Fox TV Stations, Inc.*, 567 U.S. 239, 253 (2012) ("A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."). Forcing the public to pay for access to its own law offends our constitutional structure, due process, the First Amendment, and equal protection.

The Proposed Rule continues CPSC's odious trend of incorporating private standards into the law only by reference, thereby hiding the law behind a paywall. The Proposed Rule is therefore unconstitutional as proposed. CPSC must make its own binding safety standards available to the public, as NCLA has explained in its nine previous comments objecting to CPSC's use of incorporation by reference.[1]

This comment, however, focuses on an additional set of constitutional problems with the Commission's adoption of ASTM International's revised safety standard for gates and enclosures. Following the D.C. Circuit's opinion in *Milice v. CPSC*, 2 F.4th 994 (D.C. Cir. 2021), the Commission seems to have embraced—at least half-heartedly—the position that rulemaking is unnecessary when the Commission adopts a private organization's revision to a safety standard under 15 U.S.C. § 2056a(b)(4)(B). According to the Proposed Rule, CPSC now believes that, "under the terms of the CPSIA, ASTM F1004-21 [will] take[] effect as the new CPSC standard for gates and enclosures[] even if the Commission d[id] not issue this rule[,]" and that the public comment is now irrelevant. 86 Fed. Reg. 53537. Such apparently wholesale outsourcing of standard writing to private organizations violates nondelegation principles, and the lack of public notice of and involvement in the Commission's decision-making violates due process. CPSC must include the public in its adoption of new and revised standards alike.

[1] *See* NCLA Comment Re: Revisions to Safety Standards for Infant Bath Seats, Docket No. CPSC-2009-0064 (Oct. 25, 2019); NCLA Comment Re: Revisions to Safety Standards for Non-Full-Size Baby Cribs and Play Yards, Docket No. CPSC-2019-0025 (Nov. 22, 2019); NCLA Comment Re: Revisions to Safety Standards for Toddler Beds, Docket No. CPSC-2017-0012 (Nov. 25, 2019); NCLA Comment Re: Revisions to Safety Standards for Portable Bed Rails, Docket No. CPSC-2011-0019 (March 26, 2020); NCLA Comment Re: Revisions to Safety Standards for Children's Folding Chairs & Stools, Docket No. CPSC-2015-0029 (May 1, 2020); NCLA Comment Re: Revisions to Safety Standards for Sling Carriers, Docket No. CPSC-2014-0018 (May 20, 2020); NCLA Comment Re: Revisions to Safety Standards for Crib Bumpers/Liners, Docket No. CPSC-2020-0010 (June 17, 2020); NCLA Comment Re: Revisions to Safety Standards for Hand-Held Infant Carriers, Docket No. CPSC-2012-0068 (June 19, 2020); NCLA Comment Re: Crib Mattresses, Docket No. CPSC-2020-23 (January 11, 2021).

I. STATEMENT OF INTEREST

NCLA is a nonpartisan, nonprofit civil-rights organization and public-interest law firm devoted to defending constitutional freedoms. The administrative state poses an especially serious threat to civil liberties. No other current aspect of American law denies more rights to more Americans. Although Americans still enjoy the shell of their Republic, a vastly different sort of government has developed within it—a type, in fact, that the Framers designed the Constitution to prevent.[2] This unconstitutional administrative state is the focus of NCLA's attention.

In addition to suing agencies to enforce constitutional limits on the exercise of administrative power, NCLA encourages agencies to curb their own unlawful exercise of such power by establishing meaningful limitations on administrative rulemaking, adjudication, and enforcement. The courts are not the only government bodies with the duty to attend to the law. Even more immediately, agencies and agency heads have a duty to follow the law—not least by avoiding unlawful modes of governance. All agencies and agency heads must ensure that their modes of rulemaking, adjudication, and enforcement comply with the Administrative Procedure Act ("APA") and the Constitution.

II. CPSC'S UNCONSTITUTIONAL REVISION OF SAFETY STANDARDS

The Consumer Product Safety Act (15 U.S.C. § 2051 *et seq.*) requires manufacturers of products under the Commission's regulatory authority to certify that their product complies with all applicable CPSC requirements. 15 U.S.C. § 2063(a). For children's products, the manufacturer must base this certification on tests of a sufficient number of samples by a third-party conformity assessment body accredited by CPSC to test according to the applicable requirements. *Id.* § 2063(a)(2). Failure to comply with CPSC's safety standards subjects manufacturers, distributors, and retailers to civil and criminal penalties. *Id.* §§ 2068, 2069, 2070.

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[2] *See generally* Philip Hamburger, *Is Administrative Law Unlawful?* (2014).

Section 2056a(b)(1), added by the Consumer Product Safety Improvement Act of 2008, requires CPSC to set product safety standards for certain nursery products. *Id.* § 2056a(b)(1). In doing so, CPSC must "assess the effectiveness of any voluntary consumer product safety standards" "in consultation with consumer groups, juvenile product manufacturers, and independent child product engineers and experts[.]" *Id.* § 2056a(b)(1)(A). Subsection (b)(1)(B) requires CPSC, in accordance with the rulemaking requirements of 5 U.S.C. § 553, to promulgate standards that are "substantially the same as" or "more stringent than [] voluntary standards[.]"

In 2011, Congress amended these procedures to create a "[p]rocess for considering subsequent revisions to voluntary standards," which is codified at 15 U.S.C. § 2056a(b)(4). Pursuant to this revision process, an organization "shall notify the Commission" if it "revises a standard that has been adopted, in whole or in part, as a consumer product safety standard under [section 2056a]." *Id.* § 2056a(4)(B). According to the statute, the private organization's "revised voluntary standard *shall* be considered to be a consumer product safety standard issued by the Commission under section 2058 of this title," *id.* (emphasis added), which provides for a private right of review in any U.S. Court of Appeals in which a petitioner resides. *See id.* § 2060(a). The revised private standard becomes law by operation of statute, "effective 180 days after the date on which the organization notifies the Commission (or such later date specified by the Commission in the Federal Register) unless, within 90 days after receiving that notice, the Commission notifies the organization that it has determined that the proposed revision does not improve the safety of the consumer product covered by the standard[.]" *Id.* § 2056a(b)(4)(B). In other words, so long as the private standard improves the safety standard in some way, it becomes law automatically. The Commission's only authority is to reject a standard that does not improve safety, in which case all the Commission can do is retain that organization's "existing consumer product safety standard." *Id.*

This process of allowing private organizations to revise CPSC's binding safety standards

without oversight, input, or direction from the agency or the public is an unconstitutional delegation of legislative power to private entities and violates the due process of law.

A. DELEGATING CPSC'S STANDARD-WRITING AUTHORITY TO A PRIVATE ORGANIZATION IS UNLAWFUL

The principle of nondelegation "serves both to separate powers as specified in the Constitution and to retain power in the governmental Departments so that delegation does not frustrate the constitutional design." *Pittson Co. v. United States*, 368 F.3d 385, 394 (4th Cir. 2004) (citing *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001); and *Carter v. Carter Coal*, 298 U.S. 238, 311 (1936)). In *Carter Coal*, the Supreme Court rejected a scheme by which Congress "delegate[d] the power to fix maximum hours of labor" to a group of manufacturers that produced two-thirds of the annual tonnage of coal. 298 U.S. at 310. The Court characterized the law as a "legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business." *Id.* at 311. According to the Court, "a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property." *Id.* Because the law was "so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment," the Court struck down the private-delegation provision.

Similarly, outsourcing the Commission's standard-setting authority to private organizations, with no oversight or input from CPSC, violates nondelegation principles inherent in our constitutional structure and the Fifth Amendment's Due Process Clause. *See id.* This violation of due process is compounded by CPSC's failure to make its proposed and final standards freely available to non-members of ASTM. *Cf. Amici Curiae* Br. of Admin. Law Profs., *Milice v. CPSC*, No. 21-1071, at 21 (D.C. Cir. 2021) (explaining that private organizations like ASTM advertise to their members the

benefits of being in a position to influence government policies and decisions). Interested non-members cannot freely access the standard during its development *or* during the comment period of the rulemaking process—let alone participate in the private rulemaking process.

Manufacturers are legally bound by CPSC's standards, which can have profound impacts on product testing and a product's market viability; and consumers depend on effective standards. CPSC's process shields those standards from manufacturers and consumers, violates due process, deprives the process of valuable insights that manufacturers and consumers could offer, and disproportionately infringes the constitutional rights of those who are not ASTM members. The Proposed Rule does nothing to alleviate the unconstitutional effects of the unequal treatment it propounds.

If CPSC had developed the safety standard for baby gates, rather than merely adopting ASTM's revised standard, the agency would be required to follow APA's rulemaking requirements, *see* 5 U.S.C. § 2058, and to disclose critical data and information on which it relied. *See Portland Cement v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973). But because ASTM developed the standard in private, sheltered from public input and scrutiny, CPSC claims that it can withhold from public view the standard the Commission plans to adopt in addition to any data relating to ASTM's processes.

Federal agencies are required to interpret their own statutes consistently with the Constitution. *See Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 731 (6th Cir. 2013) (Sutton, J., concurring). Because the provision for revising already-adopted private standards is patently unconstitutional, CPSC should instead follow the other rulemaking processes set out in the CPSIA.

B. CPSC's Non-Public Decision to Adopt ASTM F1004-21 as a Binding Safety Standard Violates Due Process

In the Proposed Rule, the Commission makes clear that it has already declined to reject ASTM's 2021 revision to its voluntary standard for gates and enclosures. The Proposed Rule states

that ASTM notified CPSC of the revision on July 6, 2021, meaning the statutory time in which the Commission could have rejected the revision elapsed on October 4, about a week after CPSC published the Proposed Rule on September 28. *See* 86 Fed. Reg. 53538.

The Proposed Rule, then, was a *fait accompli*. CPSC seems to acknowledge as much at least twice in the Proposed Rule, stating that (1) "ASTM F1004-21 automatically will take effect as the new mandatory standard for gates and enclosures on January 2, 2022, 180 days after the Commission received notice of the revision on July 6, 2021"; and (2) "under the terms of the CPSIA, ASTM F1004-21 takes effect as the new CPSC standard for gates and enclosures, even if the Commission does not issue this rule." Confusingly—perhaps because CPSC recognizes how perverse and unconstitutional it is to remove itself and the public from rulemaking—the Commission still seeks public comment on the Proposed Rule, while assuring the public that its "comments would not alter substantive changes to the standard or the effect of the revised standard as a consumer product safety rule under section 104(b) of the CPSC." 86 Fed. Reg. at 53,537. Given this position, it's unclear why the Commission is bothering with the charade of filing this Proposed Rule as a direct final rule. Neither the Commission's request for public comment nor its suggestion that it may revise or withdraw the Proposed Rule in response to significant adverse comments, *see id.* at 53,538, is in good faith because the Commission has already made up its mind. *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1101 (D.C. Cir. 2009) ("The opportunity for comment must be a meaningful opportunity, … in order to satisfy this requirement, an agency must also remain sufficiently open-minded[.]") (citations omitted).

Seeking public comment that the Commission admits up front will have *no effect* on the proposed standard cannot paper over the constitutional infirmities at the core of this rulemaking process. Excluding the public from the rulemaking process violates due process and the congressional mandate in the CPSIA that CPSC consult with "representatives of consumer groups, juvenile product manufacturers, and independent product engineers and experts" in promulgating the Commission's

binding safety standards. *See* 15 U.S.C. § 2056a(b)(1)(A).

In order to bring its rulemaking process in line with the Constitution, CPSC must withdraw the Proposed Rule and commence a notice-and-comment rulemaking process instead.

III. CONCLUSION

CPSC should not continue to promulgate safety standards that were revised without any agency input or oversight. Should CPSC insist on continuing to incorporate ASTM's revised standards without affording due-process rights to the interested public, NCLA will not hesitate to bring further legal action to challenge these improperly promulgated rules in other federal courts of appeals.

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Thank you again for this opportunity to provide NCLA's views on this important issue. Should you have any questions, please contact Jared McClain at jared.mcclain@ncla.legal

Sincerely,

NEW CIVIL LIBERTIES ALLIANCE

/s/

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