



FOR IMMEDIATE RELEASE

Media Inquiries: [Judy Pino](mailto:Judy.Pino@ncla.org), 202-869-5218

CPSC Shuts Public Out of Its Consideration and Adoption of Safety Standards for Baby Gates

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

Washington, DC (November 1, 2021) – By repeatedly refusing to provide free and open access to its safety standards, the Consumer Product Safety Commission (CPSC) has violated the U.S. Constitution, which requires the government to provide the public with access to the law. In response, the New Civil Liberties Alliance, a nonpartisan, nonprofit civil rights group, has filed a [comment](#) objecting to CPSC’s proposed rule, [Safety Standard for Gates and Enclosures](#).

NCLA has filed nine separate comments and the lawsuit, [Milice v. CPSC](#), challenging CPSC’s rulemaking processes. In this most recent substantive comment, NCLA argues that the proposed rule violates the private nondelegation doctrine and due process by outsourcing standard writing to ASTM International, a private organization that specializes in creating safety standards. In doing so, CPSC circumvents public notice of and involvement in the agency’s decision-making. For example, if CPSC had developed the safety standard for gates and enclosures internally, rather than merely adopting ASTM’s externally developed standard, the agency would be required to disclose critical testing data and to consider public input and scrutiny.

CPSC’s process for adopting safety standards has gotten worse following the D.C. Circuit’s July 2021 [opinion](#) in *Milice v. CPSC*. The Commission has embraced the position that rulemaking—and public involvement in the adoption of safety standards—is unnecessary when CPSC adopts a private organization’s revision to a safety standard CPSC has previously adopted. The private standard becomes law even if CPSC does nothing. According to the Commission, it has only the authority to reject a private standard that does not improve safety; and even then, the private organization’s prior standard remains the law. This process of allowing private organizations to revise CPSC’s binding safety standards without oversight, input, or discretion from the agency or the public is an unconstitutional delegation of legislative power to private entities and violates the due process of law.

CPSC’s violation of due process is made worse by its failure to make its binding standards free to non-members of ASTM, aside from two physical copies available, respectively, at CPSC’s headquarters in Bethesda, Maryland, and at the National Archives in Washington, DC. Alternatively, CPSC directs the public to purchase a copy from ASTM—often at a cost higher than the cost of the product itself.

CPSC cannot ignore the congressional mandate that it must consult with consumers and manufacturers in setting safety standards. 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.

NCLA released the following statement:

“Even though CPSC has brazenly said that public comments will not change anything, we believe it’s important to shine some light on this opaque and unlawful process. ASTM may claim to own the law, but it is not a public entity and cannot have wholesale control over the writing of binding standards that carry criminal penalties. Unless CPSC corrects this irretrievably flawed process, the courts will.”

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

For more information about this issue visit [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.

###