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NCLA Asks Tenth Circuit to Scrap CPSC's Unlawful, Nonsensical Magnet Ban

MagnetSafety.org, Hobby Manufacturers Ass'n, and National Retail Hobby Stores Ass'n, Inc. v. CPSC

Washington, DC (September 29, 2023) — The Consumer Product Safety Commission (CPSC) recently adopted a "magnet safety standard" for non-toy products that broadly bans hobby magnets for adults, relying on flawed studies and failing to account for magnets' benefits or the costs of removing them from the market. NCLA has filed a reply brief in *MagnetSafety.org, et al. v. CPSC*, asking the Tenth Circuit to vacate the magnet ban for being promulgated against Consumer Product Safety Act provisions by an unconstitutionally structured agency.

A Tenth Circuit panel including then-Judge Neil Gorsuch vacated a similar 2014 magnet ban in *Zen Magnets, LLC v. CPSC*. Challenging the eerily similar new ban, NCLA now represents the nonprofit MagnetSafety.org, led by Zen Magnets founder Shihan Qu, as well as the Hobby Manufacturers Association and the National Retail Hobby Stores Association, whose members include 400 hobby stores nationwide. CPSC repeated the same errors in adopting the new rule that led the Tenth Circuit to set aside the previous ban. The Commission again failed to account for "a known and significant change or trend in the data." This time it failed to disaggregate the increase in magnet ingestion from the increased ingestion of small items overall.

To make matters worse, CPSC did not differentiate between high-powered and other kinds of magnets, leaving it impossible to say with any confidence that substantial evidence supports the cost-benefit analysis the agency conducted. CPSC acknowledges that at least four domestic voluntary standards and two international standards already govern these magnets. Despite the statutory requirement to rely on voluntary standards to the greatest possible extent, CPSC did not properly evaluate them and pushed for a mandatory rule instead. Rather than recalling or limiting importation of dangerous products, CPSC banned all products containing separable magnets, grossly overestimating the costs and underestimating the benefits of keeping these products on the market.

NCLA's brief points out that the Constitution vests the obligation "to take Care that the Laws be faithfully executed" in a single person—the President. That clause means that only executive officers answerable to the President may exercise executive power. In its 1935 *Humphrey's Executor* decision, the Supreme Court ruled that commissioners at the Federal Trade Commission may be protected from removal since that agency did not exercise executive power. However, today's CPSC does engage in executive action when it bans products. In any event, *Humphrey's* was wrongly decided to the extent it would protect executive officers from removal. Fortunately, the Tenth Circuit can follow *Humphrey's* and simply decide that CPSC's executive nature causes it to fall outside the scope of *Humphrey's* limitation on the President's ability to terminate executive officers at will.

NCLA released the following statement:

"CPSC's brief does not even bother to dispute that the Commission's analysis is little more than guesswork and merely claims that the regulation is permitted in light of 'scientific uncertainty.' Nor does CPSC seriously engage with NCLA's structural constitutional arguments. We anticipate the Court will agree with our position that these problems mean the rule must once again be vacated."

— Greg Dolin, Senior 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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