No. 21-1071

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LISA MILICE,

Petitioner

v.

CONSUMER PRODUCT SAFETY COMMISSION,

Respondent

On Petitions for Review of an Order of the
Consumer Product Safety Commission

PETITION FOR PANEL REHEARING & REHEARING *EN BANC*

NEW CIVIL LIBERTIES ALLIANCE
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CERTIFICATE AS TO PARTIES, RULINGS, & RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), counsel certifies as follows:

A. Parties and Amici

Petitioner is Lisa Milice. Respondent is the United States Consumer Product Safety Commission.

The following parties participated as *amici curiae* in the case: American Society for Testing and Materials; American National Standards Institute; National Fire Protection Association, Inc.; American Society of Civil Engineers; International Association of Plumbing & Mechanical Officials; International Code Council; International Organization for Standardization; National Electrical Manufacturers Association; North American Emergency Standards Board; and Administrative Law Professors Cynthia Farina, Michael Herz, Nina Mendelson, Gillian Metzger, Alan Morrison, Todd Rakoff, Peter Shane, Sidney Shapiro, and Daniel Walters

B. Rulings Under Review

CPSC's Direct Final Rule re: Revisions to Safety Standards for Infant Bath Seats, Docket No. CPSC-2009-0064

C. Related Cases

Counsel is not aware of any other related cases within the meaning of Circuit Rule 28(a)(1)(C).

/s/ *Jared McClain*
Jared McClain

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RULE 35(B)(1) STATEMENT

This case presents an issue both of exceptional importance and first impression: Is a standard "promulgated" when an agency publishes a direct final rule proposing to incorporate the standard by reference—or does promulgation occur only once the rule is no longer conditional and the Federal Register incorporates the standard?

Without the benefit of briefing on this late-emerging issue, the panel decided the federal judiciary's first ever case about direct final rulemaking. The panel failed to appreciate that direct final rules are a novel agency action but succumbed instead to the judicial desire for a "one-size-fits-all heuristic." *Cal. Cmtys. Against Toxics v. EPA*, 934 F.3d 627, 632 (D.C. Cir. 2019). This failure resulted in a misfitting promulgation rule suited only for notice-and-comment rulemaking.

The nation's foremost scholar on direct final rulemaking quickly called the panel's decision a "time bomb" that threatens to destroy the agency-created mechanism pioneered to issue non-controversial rules more efficiently. Ronald M. Levin, *The D.C. Circuit Undermines Direct Final Rulemaking*, YALE J. REG., Notice & Comment (August 2, 2021) ["Yale N&C"], *available at* https://bit.ly/3A9tLDR; *see also* Ronald M.

Levin, Comment to Administrative Conference of the United States, 2 (July 20, 2021) ("[T]he D.C. Circuit blundered badly in its finality analysis, showing obliviousness to the way direct final rulemaking is supposed to work."), *available at* https://bit.ly/3ACbrne. "The expected constraints on direct final rulemaking break down when an agency adopts a rule without notice and comment by claiming that such procedure is 'unnecessary,' where the agency has received a serious, good-faith objection to the anticipated rule but happens to disagree with the objection." Levin, Yale N&C.

The popularity of direct final rulemaking among agencies—which have promulgated up to 336 direct final rules in a single year—magnifies the impact of the panel's mistake. Philip A. Wallach & Nicholas W. Zeppos, *Contestation of Direct Final Rules During the Trump Administration*, Brookings Institute (October 9, 2018), *available at* https://brook.gs/37BZ8el. And a recent exponential uptick in adverse comments, *id.*, makes it even more problematic that the panel's decision forces affected persons to choose between commenting and seeking judicial review.

Reconsideration is necessary.

STATEMENT OF THE CASE

Lisa Milice petitioned for review of CPSC's direct final rule ("DFR") revising the infant-bath-seat safety standard within 60 days of that standard becoming final and being published in the Federal Register.

On September 20, 2019, CPSC published its DFR, proposing 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." App'x 3. Any significant adverse comment would cause CPSC to "publish notification in the Federal Register, withdrawing this direct final rule before its effective date." *Id.* Absent adverse comments, CPSC would not publish a subsequent notice, and the standard would be "incorporated by reference" and "approved by the Director of the Federal Register as of December 22, 2019." *Id.*

In other words, the DFR was conditional. After 30 days of public comment, CPSC gave itself 60 days to determine the comments' significance and alert the public *whether* the rule would take effect as proposed—either through a subsequent publication withdrawing the rule *or* through the agency's silence allowing the rule to take effect. Only then

would the Federal Register publish the standard, informing the public of the rule's finality.

During the comment period, the New Civil Liberties Alliance, Ms. Milice's counsel, published a deliberately adverse comment on Regulations.gov, urging CPSC to withdraw its proposed standard based on significant constitutional objections. App'x 91. When CPSC did not address NCLA's comment by December 22, the Federal Register incorporated CPSC's revised infant-bath-seat standard. Not until February 6, 2020, did CPSC finally reject NCLA's objections. App'x 99.

CPSC's governing statute provides that "any person adversely affected … or any consumer or consumer organization" may petition for review "[n]ot later than 60 days after a consumer product safety standard is promulgated by the Commission." 15 U.S.C. § 2060(a).[1] Ms. Milice filed her petition on February 20, 2020, within 60 days of CPSC's final

[1] The panel treated the petition as filed under 15 U.S.C. § 2060(g), but, according to § 2056a(b)(4)(B), *revisions* to durable-nursery safety standards—like the one here—"shall be considered to be a consumer product safety standard issued by the Commission under section 2058," and thus subject to review under § 2060(a). *See* ECF No. 1886694. Regardless, both subsections provide for review within 60 days of promulgation.

decision not to withdraw the rule, and well within 60 days of CPSC's rejection of adverse comment.

Fourteen months later, on April 14, 2021, after this Court set the case for argument before the panel, *amicus curiae* ASTM International (the company claiming a copyright on CPSC's binding standards) filed an ostensible 28(j) letter raising case-law from 1978 to suggest that Ms. Milice's case was untimely because CPSC had actually "promulgated" its standard on September 20, the day it published the DFR seeking public comment. ECF No. 1894812. Limited to a 350-word reply under Rule 28(j),[2] Ms. Milice assured the Court of its jurisdiction, distinguishing direct final rules from notice-and-comment rulemaking, invoking the incurable-prematurity doctrine, and highlighting how ASTM's theory would require a petition to review CPSC's DFR *before* CPSC even considered adverse public comments and before the public knows whether the DFR will take effect.

The panel ultimately agreed with ASTM, ruling that "the 60-day period began on September 20, 2019, when the Commission published

[2] At oral argument, Petitioner sought and was denied supplemental briefing on the issue.

the 2019 Rule in the Federal Register." Op. 8. According to the panel, it gave the term "'promulgation' … its 'ordinary meaning'—i.e., publication in the Federal Register." *Id.* (quoting *Horsehead Res. Dev. Co., Inc. v. EPA*, 130 F.3d 1090, 1093 (D.C. Cir. 1997) (adopting the "default rule" from *National Grain & Feed Assoc. v. OSHA*, 845 F.2d 345 (D.C. Cir. 1988)).

Under the panel's ruling, all petitions to review direct final rules must be filed in federal court before the agency reviews public comments. This wasteful order of operations substantially raises the costs of objecting to supposedly noncontroversial rules. Worse, it creates a perverse incentive for agencies: An agency can now just wait until the judicial-review period has passed before rejecting adverse comments, knowing that it will no longer be subject to a review petition.

ARGUMENT

I. DIRECT FINAL RULES ARE NOT "PROMULGATED" UPON PUBLICATION

The panel erred by applying "*National Grain*'s default rule" to a direct final rule. Although, in the ordinary rulemaking context, a final rule is promulgated on its publication date because it consummates the

agency action, "direct final rulemaking is entirely different." Levin, Yale N&C.

As Judge Wilkins has warned, "it is a mistake to assume" that even "facially similar" types of agency action "can lend each other definition through comparison[.]" *Cmtys. Against Toxics*, 934 F.3d at 631. Consequently, "courts should resist the temptation to define the action by comparing it to superficially similar actions in the case law. … Rather, to ascertain the nature of agency action, courts should ground the analysis of the idiosyncratic regime" at issue. *Id.* at 631-32.

A direct final rule works differently than a typical rulemaking. The process consolidates the notice-and-comment steps: "In direct final rulemaking, an agency publishes the rule it intends to adopt and invites members of the public to object to it. If no one objects, the rule can become law without further action on the agency's part[.]" Ronald M. Levin, *More on Direct Final Rulemaking*, 51 ADMIN. L. REV. 757, 766 (1999). If, however, the public files a significantly adverse comment—as NCLA did here—the agency must withdraw the proposed rule and decide whether to propose the rule "in normal notice-and-comment procedures." ACUS Recommendation 95-4, 60 Fed. Reg. 43110, 43110 (Aug. 18, 1995). Direct

final rulemaking "allows the agency to issue the rule without having to go through the review process twice … while at the same time offering the public the opportunity to challenge the agency's view that the rule is noncontroversial." *Id.* "The agency's commitment to withdraw the rule if it receives an adverse comment … is a safety valve protecting the interest of members of the public to present their views to the agency if they desire to do so." Ronald M. Levin, *Direct Final Rulemaking*, 64 GEO. WASH. L. REV. 1, 12 (1995).[3] CPSC disregarded that safety valve here, and the panel mistakenly blessed that development.

Given the rule's contingence upon a condition subsequent—the agency's not receiving adverse public comment—the term "direct *final* rulemaking" is a misnomer. A direct final rule remains tentative—"in substance a *proposal*—until the comment period ends and the agency concludes that it has received no adverse comments[.]" *Id.* at 20.

Direct final rulemaking's distinct features dictate when promulgation occurs. The term "promulgate" means not just "to publish"

[3] Unlike interim final rules, which are final immediately and remain in effect unless the public persuades the agency to amend or repeal the rule, in direct final rulemaking, the agency must "withdraw its rule if *anyone* objects." *Direct Final Rulemaking*, 64 GEO. WASH. L. REV. at 3.

but also "to make public as important or *obligatory*." *Kennecott Utah Copper Corp. v. DOI*, 88 F.3d 1191, 1211 (D.C. Cir. 1996) (quoting BLACK'S LAW DICTIONARY 1093 (5th ed. 1979)) (emphasis added). Without announcing an obligatory standard, publication is not promulgation. *Cf. Am. Portland Cement Alliance v. EPA*, 101 F.3d 772, 777 (D.C. Cir. 1996) ("A proposed regulation is still in flux, so review is premature.") (cleaned up). Indeed, the Consumer Product Safety Improvement Act confirms that "promulgate" is not a synonym for "publish" and must, therefore, mean something more. *See, e.g.*, 15 U.S.C. § 2058(c) (requiring that CPSC "*publishes*" a standard it "*proposes* to promulgate") (emphasis added); *id.* § 2089(b)(2) (requiring CPSC to *promulgate* a standard within 180 days of *publishing* the *proposed* standard).

Promulgation is what ripens agency rulemaking for review. *Cf. Assoc. of Irritated Residents v. EPA*, 494 F.3d 1027, 1030 (D.C. Cir. 2007) ("[T]his court may review final agency actions, including an agency's promulgation of a rule."). Agency action is "final" when it "mark[s] the 'consummation' of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined,' or

from which 'legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (internal citations omitted). To be final, agency action must satisfy both *Bennett* prongs. *Sierra Club v. EPA*, 955 F.3d 56, 61 (D.C. Cir. 2020).

A. Publishing a Direct Final Rule Does Not Consummate Agency Action

The first *Bennett* consideration looks to "whether the agency treats the document as its final view on the matter." *Fish & Wildlife Servs. v. Sierra Club*, 141 S. Ct. 777, 786 (2021). An action is non-final if it "leaves agency decisionmakers free to change their minds," *id.*, or is "subject to further consideration by the agency." *NRDC v. Wheeler*, 955 F.3d 68, 78 (D.C. Cir. 2020).

CPSC's DFR announced that the standard would take effect *only* if CPSC did not receive significantly adverse comments. App'x 3; *see Ctr. For Auto Safety v. NHTSA*, 452 F.3d 798, 806-07 (D.C. Cir. 2006) (agency's "expressed intentions" are relevant to finality). The rule, then, was "necessarily 'tentative, provisional, or contingent,'" subject to CPSC's further consideration until December 22. *See DRG Funding Corp. v. HUD*, 76 F.3d 1212, 1214-15 (D.C. Cir. 1996). Publication of the DFR

"did not complete the administrative proceedings, nor was it meant to do so." *Id.*

It does not matter that CPSC's final "approval took the form of inaction … rather than affirmative issuance of an order." *See Bd. of Locomotive Eng'rs & Trainmen v. Fed. R.R. Admin.*, 972 F.3d 83, 99 (D.C. Cir. 2020). Agency action "can take full and final legal effect if not rejected within a predetermined period of time[.]" *Id.*; 5 U.S.C. § 551(13) (defining agency "action" to include a "failure to act"). By virtue of the DFR's "passive-approval scheme," CPSC's decision to not withdraw its standard "naturally had the same legal effect" as if CPSC had issued a confirmatory notice of finality in the Federal Register[4] or had simply issued a final rule following notice-and-comment rulemaking. *See Locomotive Eng'rs*, 972 F.3d at 99.

CPSC's decision to allow the DFR to take effect as proposed "marked the consummation of the agency's decisionmaking process." *Id.*

[4] Because predicating a DFR's finality on agency inaction can cause "uncertainty and confusion," *Direct Final Rulemaking*, 64 GEO. WASH. L. REV. at 28, agencies can "publish a separate 'confirmation notice' after the close of the comment period stating that no adverse comments were received and setting forth an effective date at least 30 days in the future." Recommendation 95-4, 60 Fed. Reg. at 43111.

at 100; *see also* Levin, ACUS Comment, 2 ("[A] commenter could infer … by the 'specified date' that the agency means to stick with the rule, and that date could be regarded as the date on which the rule has become final and ready for judicial review."). Until CPSC confirmed its position on NCLA's comment, it remained uncertain whether the rule's effective date would stand. And without a definite effective date, a rule is a nullity. *See Kennecott Copper*, 88 F.3d at 1207.

CPSC's subsequent treatment of "the challenged action" also reveals the DFR's interlocutory and tentative nature. *See Southwest Airlines Co. v. DOT*, 832 F.3d 270, 275 (D.C. Cir. 2016). Over 14 months of litigation, CPSC never questioned the timeliness of Ms. Milice's petition—strongly suggesting that it agreed that the DFR became final on December 22. Not until oral argument did CPSC's counsel belatedly adopt ASTM's reading of "promulgation" and claim that Ms. Milice's petition was untimely. *Cf. MediNatura, Inc. v. FDA*, 998 F.3d 931, 939-41 (D.C. Cir. 2021) (appellate counsel's "*post hoc* rationalization" is not a foundation for finality).

B. A Direct Final Rule's Publication Does Not Impose Legal Obligations

The second *Bennett* step—determining "whether 'legal consequences flow' from" the agency's action—is "a 'pragmatic inquiry.'" *Ipsen Biopharmaceuticals, Inc. v. Azar*, 943 F.3d 953, 956 (D.C. Cir. 2019) (citation omitted).

No legal consequences flowed from the DFR's publication, which "created only the *possibility* that there may be a change in the future," contingent upon CPSC's determining there were no significantly adverse comments, "as the result of the rulemaking process it initiated." *See California v. EPA*, 940 F.3d 1342, 1350 (D.C. Cir. 2019). The publication "made clear" that the rule would not be final until CPSC reviewed public comments. *See MediNatura*, 998 F.3d at 940 (citation omitted). There was no change in legal rights, then, until after the comment-and-review period. Without a "certain change in the legal obligations of a party, the action is non-final[.]" *Nat'l Ass'n of Home Builders v. Norton*, 415 F.3d 8, 15 (D.C. Cir. 2005). For this reason, had Ms. Milice sued prior to December 22, CPSC surely would have objected that her lawsuit was not ripe.

So long as the public "retain[ed] the opportunity to convince the agency" that it was proceeding in error, "it makes no sense" to consider agency action final and ripe for judicial review. *See Reliable Automatic Sprinkler Co., Inc. v. CPSC*, 324 F.3d 726, 733 (D.C. Cir. 2003). Otherwise, the "expected constraints" on direct final rulemaking "break down" into a regulatory trap by "read[ing] a judicial review statute to mean that an interested person's ability to file suit against a direct final rule in court may expire before the person has any way to know that the agency has rejected its objection to the rule." Levin, Yale N&C.

This Court has warned against treating agency action as final when doing so "would not allow [the agency] 'an opportunity to apply its expertise and correct its mistakes' as [the agency's] procedures prescribe." *MediNatura*, 998 F.3d at 939. CPSC provided itself 60 days to review comments, exercise its expertise, and consider withdrawing the rule. Because commenters "still enjoy[ed] an opportunity to convince the agency to change its mind" during the comment-and-review period, the DFR's publication could not be final agency action. *Id.* Should a commenter succeed, nothing would remain for an affected person to appeal; "the agency would correct its mistake." *Id.* Judicial review

during CPSC's review period would be premature and "would 'disrupt[] the agency's processes.'" *Id.*

Moreover, treating the DFR as final is "problematic under section 553(b) because the public might then be less willing to comment (believing it to be futile) and [agency] staff might not give full consideration to any comments that did arrive." *Direct Final Rulemaking*, 64 GEO. WASH. L. REV. at 16. And worse, if a direct final rule is final upon initial publication, "the agency *cannot* heed such comments except by commencing an entirely new rulemaking proceeding." Levin, Yale N&C.

Exceptions to notice-and-comment rulemaking—such as direct final rules—should be "narrowly construed and reluctantly countenanced." *Action on Smoking & Health v. CAB*, 713 F.2d 795, 800 (D.C. Cir. 1983). By equating a DFR's publication with promulgation, the panel undermined the purposes of rulemaking: (1) to expose regulations to diverse comment; (2) ensure fairness to affected parties; and (3) develop the record to enhance the quality of judicial review. *Int'l Union v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir 2005).

The panel's decision means that a consumer who objects to CPSC's failure to make its standards freely available must now pay $500 to file a petition for review that raises substantive objections in the first instance in a Court of Appeals because the judicial-review period would run before the agency could even consider adverse comments. And worse, the failure to raise issues during a still-ongoing rulemaking process could preclude judicial review of those issues. *Ohio v. EPA*, 997 F.2d 1520, 1528 (D.C. Cir. 1993) (rejecting an issue the petitioner "fail[ed] to raise during rulemaking").

"Regrettably, the Court's opinion does not even discuss these ramifications. Perhaps the Court saw only bathwater in the case and didn't realize it was throwing out a baby." Levin, Yale N&C. Because the DFR's publication did not satisfy either of *Bennett*'s criteria, there was not yet final agency action. The panel erred in holding that the bath-seat standard was promulgated and ripe for review *before* CPSC's inaction let the rule become final on December 22.

II. INCORPORATED-BY-REFERENCE STANDARDS ARE NOT PROMULGATED UNTIL THEY ARE DEEMED PUBLISHED IN THE FEDERAL REGISTER

The panel's application of *Horsehead* was also mistaken because CPSC's DFR did not include a copy of the proposed standard. *Horsehead* adopted "*National Grain*'s default rule" that an agency's "*standard* is promulgated on the date of publication in the Federal Register." *Horsehead*, 130 F.3d at 192 (quoting *National Grain*, 845 F.2d at 346) (emphasis added). Unlike the final rule in *National Grain*, however, CPSC did not actually publish its standard along with its rule. Instead, as the DFR stated, "[t]he incorporation by reference of the publication listed in this rule is approved by the Director of the Federal Register as of December 22, 2019." App'x 3. Under a proper application of *Horsehead*, CPSC "promulgated" its standard when it was incorporated into the Federal Register on December 22. App'x 91.

And the promulgation date could not be any sooner. "As the Supreme Court observed almost [seven] decades ago, an agency must give some notice of "*the substance*" of its final action before that action can be deemed ripe for judicial review[.]" *Horsehead*, 130 F.3d at 1093. Surely, a rule "cannot be said to have been issued for purposes of defining

rights and the seeking of reconsideration by an aggrieved person if its substance is merely in the bosom of the Commission." *Id.*

As NCLA explained in its October 21 letter, CPSC's proposed rule was deficient precisely because the standard was not publicly available. App'x 91. The standard's inaccessibility was also the focus of Ms. Milice's petition for review. Even accepting the legal fiction that CPSC made its standard "reasonably available" upon incorporation by reference into the Federal Register, *see* 5 U.S.C. § 552, that incorporation occurred *after* the DFR's comment-and-review period. App'x 3.

Consequently, the panel's novel ruling is even further off base when a DFR proposes to incorporate a standard by reference. The clock for Ms. Milice's lawsuit cannot have begun to run until the Federal Register incorporated the standard.

III. NCLA'S ADVERSE COMMENT TOLLED THE 60-DAY CLOCK

Even if CPSC had somehow promulgated its revised bath-seat standard on September 20, NCLA's comment published on Regulations.gov tolled the time for review. The panel ruled that the incurable-prematurity doctrine tolls the limitations period only for the

party who has moved for reconsideration. Op. 9-10. But again, this Court's precedent is ill-suited for direct final rulemaking.

An adverse comment to a direct final rule is akin to a motion for reconsideration. *More on Direct Final Rulemaking*, 51 ADMIN. L. REV. at 766. "[A]n objection by a member of the public to a direct final rule can be interpreted as a request that the agency *reconsider* its decision to promulgate the rule without notice and comment." *Id.* at 765.

But the panel's decision invites concurrent judicial and administrative review proceedings, which is exactly what the incurable-prematurity doctrine tries to prevent. *See Clifton Power Corp. v. FERC*, 294 F.3d 108, 111 (D.C. Cir. 2002). The panel's decision will cause the Court to docket petitions for review, process "the initial submissions of all the parties, and entertain various preliminary motions," all while a request that the agency reconsider its rule is still pending. *See id.*

NCLA's comment satisfied the purpose of the incurable-prematurity doctrine for the public at large—not just the law firm. As Professor Levin explained in his critique of the panel's decision:

> The significance of NCLA's (constructive) reconsideration petition wasn't that it gave the agency an occasion to respond to concerns voiced by NCLA (but not Milice). Rather, the very existence of NCLA's adverse comment showed that notice and

> comment wasn't 'unnecessary' after all. If the CPSC had recognized the comment as 'significantly adverse,' it presumably would have conducted a regular rulemaking proceeding, at which it could have heard from NCLA, Milice, and other interested persons (including the nine well-known administrative law scholars who submitted an amicus brief on the incorporation by reference issue in the court of appeals).

Levin, Yale N&C.

NCLA's comment on Regulation.gov, which raised several constitutional objections and asked CPSC to withdraw its rule, put the public on notice that the rule might not take effect. The rule became final only because CPSC disregarded the text of its DFR and the limitations § 553(b) of the APA places on direct final rulemaking. No interested person—including Ms. Milice—had any reason to sue before December 22, when CPSC's inaction first made public that it did not view NCLA's comment to be significantly adverse, allowing the rule to take effect.

Reconsideration is necessary because the panel "should have held that, in a direct final rulemaking context, the adverse comments that NCLA had submitted amounted to a reconsideration petition as a matter of law." Levin, Yale N&C.

CONCLUSION

Agencies like CPSC are already cutting corners in their use of direct final rules. The panel's decision perversely incentivizes even further misuse of the practice, thereby "threaten[ing] to subvert the process of direct final rulemaking itself." Levin, Yale N&C. Ms. Milice asks the panel—or the full Court—to revisit the decision.

Dated: August 16, 2021

Respectfully,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in 14-point Century Schoolbook font, a plain, proportionally spaced font.

I further certify that this brief complies with the type-volume limitations set out in Rule 35(b)(2)(A). This brief contains 3,893 words.

Respectfully,

/s/ *Jared McClain*
Jared McClain

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed this Petition for Rehearing with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system on August 16, 2021. NCLA also filed paper copies of the brief with the Court as required by Court Rules. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Respectfully,

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United States Court of Appeals

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Argued May 10, 2021 Decided July 2, 2021

No. 21-1071

LISA MILICE,
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v.

CONSUMER PRODUCT SAFETY COMMISSION,
RESPONDENT

On Petition for Review of an Order
of the Consumer Products Safety Commission

Jared McClain argued the cause for Milice. With him on the briefs was *Peter L. Strauss.*

Courtney L. Dixon, Attorney, U.S. Department of Justice, argued the cause for respondent. With her on the brief were *Ethan P. Davis*, Acting Assistant Attorney General at the time the brief was filed, *Scott R. Mcintosh*, Attorney, and *J. Gibson Mullan*, then-General Counsel, Consumer Product Safety Commission.

Kelly M. Klaus, Rose Leda Ehler, Rachel G. Miller-Ziegler, and *J. Blake Cunningham* were on the brief for *amici curiae* American National Standards Institute, et al. in support of respondent. *Gary D. Sesser* entered an appearance.

J. Kevin Fee and *Michael E. Kenneally* were on the brief for *amicus curiae* American Society for Testing and Materials in support of respondent.

Nina A. Mendelson, *Allison M. Zieve,* and *Adina H. Rosenbaum* were on the brief for *amici curiae* Administrative Law Professors in support of neither party.

Before: ROGERS, MILLETT and WILKINS, *Circuit Judges*.

Opinion for the Court by *Circuit Judge* ROGERS.

ROGERS, *Circuit Judge*: This case comes to the court as a broadside attack on the practice of federal agencies incorporating privately drafted technical standards into their regulations by reference. In September 2019, the Consumer Product Safety Commission revised its safety standard for infant bath seats, stating: "Each infant bath seat shall comply with all applicable provisions of ASTM F1967–19, Standard Consumer Safety Specification for Infant Bath Seats." *Revisions to Safety Standard for Infant Bath Seats*, 84 Fed. Reg. 49,435, 49,439 (Sept. 20, 2019) (the "2019 Rule"). When Lisa Milice, a then-expectant mother, and her counsel contacted Commission staff about inspecting the ASTM standard, they were told they would have to purchase the standard from its developer. Milice eventually challenged the 2019 Rule on the grounds that it violated the Administrative Procedure Act and the First and Fifth Amendments to the U.S. Constitution because its content is not freely available to the public. The court is unable to address Milice's arguments, however, because her petition for review is untimely.

I.

The Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, 122 Stat. 3016, was enacted to, among other things, "establish consumer product safety standards and other safety requirements for children's products," H.R. Rep. No. 110-787, at 1 (2008) (Conf. Rep.). The Act requires the Commission to "consult[] with representatives of consumer groups, juvenile product manufacturers, and independent child product engineers and experts" regarding "the effectiveness of any voluntary consumer product safety standards for durable infant or toddler products." 15 U.S.C. § 2056a(b)(1)(A). After consultation, the Commission is to "promulgate consumer product safety standards" for such products on an expedited basis that were either "substantially the same as" the voluntary standards or "more stringent" if "more stringent standards would further reduce the risk of injury associated with such products." *Id.* § 2056a(b)(1)(B), (b)(2).

The Act includes a procedure for revising the Commission's durable infant and toddler product standards. If the Commission's standard "is based, in whole or in part, on a voluntary standard," the Commission must alert the developer and that organization must inform the Commission of any revisions. *Id.* § 2056a(b)(4)(A)-(B). The revised voluntary standard "shall be considered to be a consumer product safety standard issued by the Commission" effective 180 days after the Commission is notified, "unless . . . 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). Thus, the revised voluntary standard replaces the Commission's standard by operation of law unless the Commission affirmatively rejects it.

In 2009, the Commission proposed a safety standard for infant bath seats that was "substantially the same as a voluntary standard developed by ASTM International." Safety Standard for Infant Bath Seats, 74 Fed. Reg. 45,719, 45,719 (Sept. 3, 2009). Following an opportunity for comment, the Commission published a rule that was "almost the same as the proposed standard." *Safety Standard for Infant Bath Seats: Final Rule*, 75 Fed. Reg. 31,691, 31,691 (June 4, 2010). ASTM's standard was incorporated by reference: "[E]ach infant bath seat shall comply with all applicable provisions of ASTM F 1967–08a, Standard Consumer Safety Specification for Infant Bath Seats, approved November 1, 2008." *Id.* at 31,698. Interested persons could purchase a copy of the standard from ASTM or inspect a copy on a read-only basis at the Commission's Office in Bethesda, Maryland or at the National Archives in Washington, D.C. *Id.*

ASTM revised its standard for infant bath seats in 2012 and 2013, and each time the Commission published notices in the Federal Register incorporating the revised standards by reference. *See* 77 Fed. Reg. 45,242 (July 31, 2012); 78 Fed. Reg. 73,692 (Dec. 9, 2013). When ASTM notified the Commission in June 2019 that it had again updated its infant bath seat standard, the Commission published a notice in the Federal Register on September 20, 2019, summarizing ASTM's changes. 84 Fed. Reg. at 49,436–37. Finding ASTM's changes had either a positive or neutral impact on product safety, *id.* at 49,436, the Commission announced that the revision would take effect December 22, 2019, unless "significant" adverse comments were received within thirty days, *id.* at 49,439. In that event, the Commission would withdraw the 2019 Rule before its effective date and publish notice in the Federal Register. *Id.* at 49,435. As before, the Commission incorporated ASTM's standard by reference: "Each infant bath seat shall comply with all applicable

provisions of ASTM F1967–19, Standard Consumer Safety Specification for Infant Bath Seats, approved May 1, 2019." *Id.* at 49,439. And as before, the Director of the Federal Register had approved the incorporation by reference as conforming to the requirements of Section 552(a)(1) of the Administrative Procedure Act ("APA"). *Id.* Again, the standard could be purchased from ASTM or viewed on a read-only basis at the Commission's Bethesda headquarters or the National Archives. *Id.*

On October 21, 2019, the New Civil Liberties Alliance ("NCLA") wrote to the Commission what it "intended to serve as [] significant adverse commentary." Letter of Caleb Kruckenberg, Litigation Counsel, NCLA, to Robert S. Adler, Act'g Chairm'n, CPSC, at 2 (Oct. 21, 2019). NCLA stated that the 2019 Rule was unconstitutional and needed to be withdrawn because the incorporation of ASTM's standards by reference "hid[] the binding law behind a paywall" in violation of the Fifth and Fourteenth Amendments. *Id.* at 1, 4–7. NCLA suggested that the Commission "could avoid these problems by simply publishing the legal standard instead of incorporating it by reference," noting that, in its view, the Commission "has no obligation to adopt . . . ASTM standards," and "has the option of reproducing those standards in full in the Code of Federal Regulations." *Id.* at 7.

The Commission responded by letter of February 6, 2020, stating that it did not consider NCLA's letter a significant adverse comment because NCLA's constitutional concerns did not implicate product safety, and that the 2019 Rule had taken effect on December 22, 2019. Letter from J. Gibson Mullan, Gen'l Counsel, CPSC, to Caleb Kruckenberg, Litigation Counsel, NCLA (Feb. 6, 2020). The Commission advised that because the decision whether to publish the text of ASTM's standards in the Federal Register is "limited both by [its] own

organic statute and by the Office of the Federal Register," *id.* at 1, it "does not have the option of publishing the revised mandatory standard instead of incorporating it by reference," *id.* at 3. First, its authority to veto a change to a voluntary standard that it had previously adopted is "limit[ed]" by Congress to "reject[ing] the revision only if it determines that the change does not improve safety." *Id.* at 2. Second, "nearly all voluntary standards [are] protected by copyright," which the Commission can neither ignore nor publish without permission of the copyright holder. *Id.* at 2–3.

On February 20, 2020, Milice, an expectant mother, filed a petition for review of the 2019 Rule in the United States Court of Appeals for the Third Circuit, invoking 15 U.S.C. § 2060(a). Section 2060(g)(1)(c), however, provides an expedited procedure for "any standard promulgated by the Commission under section 20656a of this title (relating to durable infant and toddler products)":

> Not later than 60 days after the promulgation, by the Commission, of a rule or standard to which this subsection applies, any person adversely affected . . . may file a petition with the United States Court of Appeals for the District of Columbia Circuit for judicial review of such rule.

15 U.S.C. § 2060(g)(2). By Order of February 18, 2021, the Third Circuit transferred the case to this court.

The parties' briefs focus on the lawfulness of the 2019 Rule. In response to Milice's objections relating to the availability of ASTM's standard in view of its incorporation by reference, the Commission maintains that the Rule complies with the APA's incorporation by reference requirements and presents no constitutional concerns, noting that there are three

ways to access ASTM's infant bath seat standard: (1) inspect it in-person at the Commission's reading room in Bethesda, or at the Office of the Federal Register in Washington D.C.; (2) purchase the standard for $56 from ASTM; or (3) view the standard on ASTM's website in read-only format (*i.e.*, the text on the webpage cannot be copied or printed). Resp't's Br. 13–14. Milice responds that her only interest is to ensure that the Commission provides public access to its binding standards. The frustrated efforts experienced by Milice and NCLA to view ASTM's standard in the Commission's Bethesda reading room, *see* Lisa Milice Decl. ¶¶ 6–7 (May 11, 2020); Jared McClain, Esq., Decl. ¶¶ 4–9 (May 11, 2020), illustrate one limitation to the incorporation by reference format, and she maintains that the Commission and ASTM "remain free to contemplate a licensing arrangement, litigate ASTM's copyright claim, or negotiate compensation for ASTM's copyright," Reply Br. 19.

A month before the scheduled oral argument, amicus ASTM notified the court that it may lack jurisdiction over the petition for review because it was filed more than 60 days after the 2019 Rule was published in the Federal Register. Milice responded through NCLA counsel that her petition is properly before the court because it was filed within 60 days of the Commission's rejection of NCLA's comment or, alternatively, the effective date of the 2019 Rule. The court directed the parties to be prepared at oral argument to address the petition's timeliness. *Per Curiam* Order (May 3, 2021).

II.

Notwithstanding the parties' legal dispute over the availability of ASTM's standard to the public, the court must first determine whether it has subject matter jurisdiction to consider Milice's petition for review. *See Arbaugh v. Y&H*

Corp., 546 U.S. 500, 514 (2006); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998).

Section 2060(g)(2) of Title 15 of the U. S. Code provides that a petition for review of a consumer product safety standard for infant and toddler products must be filed "[n]ot later than 60 days after [its] promulgation, by the Commission." In *Laminators Safety Glass Association v. Consumer Product Safety Commission*, 578 F.2d 406 (D.C. Cir. 1978), the court held that the petitioner's failure to comply with an identically worded filing deadline under the Consumer Product Safety Act "depriv[ed] this Court of jurisdiction," *id.* at 408. It follows that meeting Section 2060(g)(2)'s filing deadline is a jurisdictional prerequisite to suit. Notably, Milice has never argued to the contrary, thereby forfeiting any claim that Section 2060(g)(2) is not a jurisdictional bar. *See Int'l Longshore & Warehouse Union v. NLRB*, 971 F.3d 356, 363 (D.C. Cir. 2020). Here, the 60-day period began on September 20, 2019, when the Commission published the 2019 Rule in the Federal Register. Where "the agency does not define the term by regulation and if the statute supports (or at least does not foreclose) the interpretation, 'promulgation' is accorded its 'ordinary meaning' — i.e., publication in the Federal Register." *Horsehead Resource Dev. Co., Inc. v. EPA*, 130 F.3d 1090, 1093 (D.C. Cir. 1997). Milice, however, did not file her petition until February 20, 2020 — 153 days after the 2019 Rule's promulgation. Her petition is therefore time barred and must be dismissed.

Milice's efforts to render her tardy petition timely are unpersuasive. Relying on *Bennett v. Spear*, 520 U.S. 154 (1997), she maintains that the 2019 Rule was not final agency action subject to challenge until December 22, 2019, because the Commission stated in the preamble that it would withdraw the 2019 Rule before its effective date if it received significant

adverse comment. Oral Arg. Rec. 1:30–3:00, 9:00–9:51. Milice's reliance on *Bennett* is misplaced. "Agency actions are final if two independent conditions are met: (1) the action 'marks the consummation of the agency's decisionmaking process' and is not 'of a merely tentative or interlocutory nature;' and (2) it is an action 'by which rights or obligations have been determined, or from which legal consequences will flow.'" *Soundboard Ass'n v. FTC*, 888 F.3d 1261, 1267 (D.C. Cir. 2018) (alteration adopted) (quoting *Bennett*, 520 U.S. at 177–78). The 2019 Rule satisfies both conditions.

Far from speaking tentatively, the Commission stated in the preamble of the 2019 Rule that "the changes made in ASTM F1967–19 will either improve the safety of infant bath seats or are neutral with respect to safety," and "[t]herefore, the Commission will allow the revised voluntary standard to become effective as a mandatory consumer product safety standard under the statute." 84 Fed. Reg. at 49,436. Indeed, the Commission designated the revised infant bath seat standard as a "direct final rule." *Id*. at 49,435. Nor is there any question of the 2019 Rule's legal effect: a person who knowingly makes, distributes, or sells a product that does not conform to the Commission's standards faces potential civil and criminal penalties under 15 U.S.C. §§ 2068–70. The 2019 Rule was final agency action in September 2019, notwithstanding the possibility that the Commission might reconsider and change its standard in the future. *See Nat'l Envtl. Dev. Assoc.'s Clean Air Project v. EPA*, 752 F.3d 999, 1006–07 (D.C. Cir. 2014).

Alternatively, Milice maintains that the 2019 Rule was not final agency action under the incurable-prematurity doctrine until the Commission rejected NCLA's comment on February 6, 2020. Because "finality with respect to agency action is a party-based concept," *Bellsouth Corp. v. FCC*, 17 F.3d 1487,

1489 (D.C. Cir. 1994) (quoting *United Transp. Union v. ICC*, 871 F.2d 1114, 1118 (D.C. Cir. 1989)), the "reviewability of an agency action turns in part on the conduct of the petitioning parties," *ICG Concerned Workers Ass'n v. United States*, 888 F.2d 1455, 1457 (D.C. Cir. 1989). If a party asks an agency to reconsider its decision, the request "renders [the] agency's otherwise final action non-final with respect to the requesting party." *Clifton Power Corp. v. FERC*, 294 F.3d 108, 110–11 (D.C. Cir. 2002). As a result, a petition filed by that party while its request remains pending is "incurably premature." *Id.* By contrast, "[i]f a party has sought only judicial review, the agency action can be deemed final and hence reviewable as to that party, regardless of whether other parties have moved for administrative reconsideration." *ICG Concerned Workers Ass'n*, 888 F.2d at 1457–58; *see, e.g.*, *Petrol. Commc'ns, Inc. v. FCC*, 22 F.3d 1164, 1171 n.6 (D.C. Cir. 1994). Even assuming the incurable prematurity doctrine applies in this context as Milice supposes, it is of no help to her because she never asked the Commission to reconsider the 2019 Rule, nor did NCLA purport to write its October 21, 2019, comment letter on her behalf. Oral Arg. Rec. 4:25–5:08.

Accordingly, because Milice's petition for review of the 2019 Rule is untimely, the court lacks jurisdiction and must dismiss her petition.