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Safety Advocates and Hobby Industry Groups Challenge CPSC's Unlawful, Irrational Magnet Ban

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

Washington, DC (April 27, 2023) – The Consumer Product Safety Commission (CPSC) has approved a draconian new "magnet safety standard" for non-toy products, which broadly bans high-powered hobby magnets for adults. CPSC relied on flawed studies and failed, contrary to the Consumer Product Safety Act (CPSA), to properly account for magnets' benefits or the costs of removing them from the market. More fundamentally, CPSC is unconstitutionally structured, because it is an independent agency exercising executive power outside the President's control. Today, the New Civil Liberties Alliance filed an opening brief in *Magnetsafety.org, et al. v. CPSC*, asking the U.S. Court of Appeals for the Tenth Circuit to vacate the magnet ban for a *second* time—this time because it was promulgated in violation of CPSA provisions by an unconstitutionally structured agency.

On September 21, 2022, CPSC promulgated a final rule entitled *Safety Standard for Magnets*. Previously, in *Zen Magnets, LLC v. CPSC*, a Tenth Circuit panel including then-Judge Neil Gorsuch vacated a similar 2014 magnet ban. Shihan Qu, the founder of Zen Magnets, now leads MagnetSafety.org—an organization dedicated to "promot[ing] the safe usage of high-powered magnets among consumers and educators." NCLA represents MagnetSafety.org and two hobby industry associations in the lawsuit, the Hobby Manufacturers Association and the National Retail Hobby Stores Association, whose members include 400 hobby stores across America.

In adopting the new rule, CPSC repeated the same errors that led the Tenth Circuit to set aside the previous ban. As in 2014, the Commission 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. CPSC also failed to differentiate between high-powered and other kinds of magnets, making it impossible to say with any confidence that substantial evidence supports the cost-benefit analysis conducted by the Commission.

As CPSC acknowledges, 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. CPSC also failed to recall or limit importation of dangerous products. Instead, CPSC banned all products containing separable magnets, grossly overestimating the costs and underestimating the benefits of keeping these products on the market in the process.

NCLA's brief also points out that the Constitution vests the obligation "to take Care that the Laws be faithfully executed" in a single person—the President of the United States. The "take Care" clause means that only executive officers answerable to the President may exercise executive power. Such officers must be terminable at the President's will to ensure his control over them. The brief asks the Tenth Circuit to follow *Humphrey's Executor* by holding CPSC's exercise of executive power unconstitutional, but it also argues that the barriers to removal upheld in that case were themselves unconstitutional. In other words, for-cause removal protection for CPSC Commissioners is unconstitutional *both* because *Humphrey's* must be rejected *and* because it must be followed.

NCLA released the following statements:

"The Tenth Circuit has already told CPSC that its analysis of costs and benefits of a rule banning high-powered magnets doesn't comply with the law. The Commission is essentially ignoring the prior decision and doubling down on its own flawed reasoning. It is able to do so precisely because it is not politically accountable to the President and the American public. The Court should declare that the Commission's structure is unconstitutional and that the magnet ban is contrary to law."
— Greg Dolin, Senior Litigation Counsel, NCLA

"No one wants to see children injured by ingesting magnets, button batteries, or anything else. But banning magnets for adults is an unnecessary and irrational response to this risk. Knives, hot stoves, and many other products intended for adults are dangerous when kids get hold of them. But we find enough utility in those products that we think banning them for adults is not the answer. The same holds true for hobby magnets. Congress would never enact this broad a ban, and CPSC is behaving irrationally—and inconsistently with its statutory authority. Meanwhile, CPSC has a huge problem on its hands because its exercise of executive power violates the Supreme Court precedent of *Humphrey's Executor*."
— **Mark Chenoweth, President and General Counsel, NCLA**
(and former legal counsel to Commissioner Anne Northup at CPSC)

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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