

ORAL ARGUMENT NOT YET SCHEDULED
Case No. 21-1180

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

FINNBIN LLC,

Petitioner,

v.

CONSUMER PRODUCT SAFETY COMMISSION,

Respondent.

On Petition for Review of a Final Rule of the
Consumer Product Safety Commission

**BRIEF OF CONSUMER REPORTS, CONSUMER
FEDERATION OF AMERICA, AND KIDS IN
DANGER AS AMICI CURIAE
IN SUPPORT OF RESPONDENT**

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**CERTIFICATE OF PARTIES, RULINGS UNDER REVIEW, AND
RELATED CASES**

A. Parties and Amici

The parties to this case are Finnbin, Petitioner, and the U.S. Consumer Product Safety Commission, Respondent.

Consumer Reports, Consumer Federation of America, and Kids In Danger submit this brief as amici curiae for Respondent.

B. Rule 26.1 Disclosure Statement

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1:

Consumer Reports, Inc. states that it is a non-profit, non-stock organization incorporated in New York. Consumer Reports has no parent corporation and, because it issues no stock, no publicly held corporation owns 10% or more of its stock.

Consumer Federation of America states that it is a non-profit, non-stock organization incorporated in New York. Consumer Federation of America has no parent corporation and, because it issues no stock, no publicly held corporation owns 10% or more of its stock.

Kids In Danger states that it is a non-profit, non-stock organization incorporated in Illinois. Kids In Danger has no parent corporation and, because it issues no stock, no publicly held corporation owns 10% or more of its stock.

C. Ruling Under Review

Petitioner seeks review of the Consumer Product Safety Commission's final rule titled *Safety Standard for Infant Sleep Products*, 86 Fed. Reg. 33022, which was promulgated on June 23, 2021 (hereinafter "Rule" or "Final Rule").

D. Related Cases

To date, Consumer Reports, Consumer Federation of America, and Kids In Danger are not aware of any other related cases as defined by D.C. Circuit Rule 28(a)(1)(C).

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STATUTES AND REGULATIONS

Except for 15 U.S.C. § 2051 and 16 C.F.R. §§ 1215-38, all applicable statutes, etc., are contained in either Petitioner's or Respondent's brief. Pertinent statutory provisions are reproduced in the addendum to this brief.

STATEMENT OF IDENTITY, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE

Per D.C. Cir. R. 29(b) and Fed. R. of App. P. 29(b), Consumer Reports, Consumer Federation of America, and Kids In Danger provide notice to the Court of their intent to participate as amici curiae in support of the Consumer Product Safety Commission (Respondent) in the matter referenced above. All parties to the case, both Petitioner and Respondent, have consented to amici's participation in this capacity.

Founded in 1936, Consumer Reports is an independent, nonprofit and nonpartisan organization that works with consumers to create a fair and just marketplace. Known for its rigorous testing and ratings of products, Consumer Reports advocates for laws and company practices that put consumers first. Consumer Reports is dedicated to amplifying the voices of consumers to promote safety, digital rights, financial fairness, and sustainability. The organization surveys millions of Americans every year, reports extensively on the challenges and opportunities for today's consumers, and provides ad-free content and tools to 6 million members across the U.S. Consumer Reports has continued to participate

during this critical time for infant sleep products, including our ongoing investigation on safe sleep, and our comments and letters in strong support of the Consumer Product Safety Commission's *Safety Standard for Infant Sleep Products*.

The Consumer Federation of America (CFA) is an association of non-profit consumer organizations that was established in 1968 to advance the consumer interest through research, advocacy, and education. Today, nearly 250 of these groups participate in the federation and govern it through their representatives on the organization's Board of Directors. As a research organization, CFA investigates consumer issues, behavior, and attitudes and publishes these findings in reports that assist consumer advocates and policymakers as well as individual consumers. As an advocacy organization, CFA works to advance pro-consumer policies on a variety of issues before Congress, the White House, federal and state regulatory agencies, state legislatures, and the courts. As an educational organization, CFA disseminates information on consumer issues to the public and news media, as well as to policymakers and other public interest advocates. CFA's consumer protection work is based upon the premise that consumers deserve a marketplace characterized by fair treatment and services and safe products.

Founded in 1998, Kids In Danger (KID) is a nonprofit organization dedicated to protecting children by fighting for product safety. KID's mission is to save lives by enhancing transparency and accountability through safer product

development, better education and stronger advocacy for children. KID fulfills its mission by reaching out to caregivers to spread safety awareness and recall information, serving as a watchdog on regulatory agencies and manufacturers, and working with designers and engineers to make safety a top priority. KID analyzes recalled and hazardous children's products and publishes reports for public education with recommendations for policy makers.

As leading advocates for strong consumer-focused product safety policies, Consumer Reports, Consumer Federation of America, and Kids In Danger will provide an *amici curiae* perspective that will aid the Court in its review of the current matter.

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

Pursuant to Federal Rule of Appellate Procedure 29(a), the ensuing brief was authored in whole by counsel for amici curiae. None of the parties to the above-captioned dispute, and none of their counsel, authored this brief in whole or in part. No person other than amici made a monetary contribution to the preparation or submission of this brief.

ARGUMENT

I. Introduction

Sleep-deprived parents and caregivers rely on cribs, bassinets, and other infant sleep products for a modicum of relief as they look after a baby. In recent years, with product offerings constantly changing, parents often must navigate a marketplace where it is not clear which baby products are safe for infant sleep and which are not. At the same time, sleep-related deaths among infants remains stubbornly high, with an estimated 3,600 infants younger than one year old dying in their sleep each year.¹ As described below, this lack of clarity in the marketplace—and the failure of numerous manufacturers to adhere to core safe sleep principles—has, at a minimum, contributed to preventable infant injuries and deaths.² By finalizing its safety standard for infant sleep products, the Consumer Product Safety Commission (Commission) has taken action, consistent with its statutory purpose and applicable law, to ensure that infant sleep products must align with expert recommendations based on the medical evidence, including

¹ Rachel R. Peachman, *New Evidence Shows More Infant Deaths Tied to Inclined Sleepers Than Previously Reported*, Consumer Reports (Mar. 11, 2020), www.consumerreports.org/child-safety/new-evidence-shows-more-infant-deaths-tied-to-inclined-sleepers-than-previously-reported-a3884397129.

² *Safety Standard for Infant Sleep Products*, 86 Fed. Reg 33,022, 33,033, 33,035, 33,046 (June 23, 2021).

those developed by the American Academy of Pediatrics.³ Medical studies and experts have concluded that infants should sleep on their backs, on firm and flat surfaces in their own space, with no extra padding or bedding.

Petitioner Finnbin argues that the Commission overstepped its authority in setting a mandatory safety standard for all unregulated infant sleep products, flat and inclined—but the company's arguments lack merit. Finnbin's arguments overlook and minimize several key purposes Congress charged the Commission with fulfilling. These include "to protect consumers from unreasonable risks of injury associated with consumer products," and "to develop uniform safety standards for consumer products."⁴ It is reasonable and expected for the Commission to promulgate safety standards that aim to keep our nation's children safe—especially in the case of infant sleep products, given the vulnerability of sleeping babies and the additional, specific direction from Congress for the

³ American Academy of Pediatrics Task Force on Sudden Infant Death Syndrome, *SIDS and Other Sleep-Related Infant Deaths: Updated 2016 Recommendations for a Safe Infant Sleeping Environment*. PEDIATRICS 3-8 (Nov. 1, 2016), <https://publications.aap.org/pediatrics/article/138/5/e20162938/60309/SIDS-and-Other-Sleep-Related-Infant-Deaths-Updated>; *See also* STAFF OF H.R. COMM. ON OVERSIGHT AND REFORM, 117TH CONG., REP. ON INFANT DEATHS IN INCLINED SLEEPERS: FISHER-PRICE'S ROCK 'N PLAY REVEALS DANGEROUS FLAWS IN U.S. PRODUCT SAFETY 1-2 (June 2021) (describing pediatrician and medical expert advice on safe infant sleep guidelines and its related history).

⁴ 15 U.S.C. § 2051(b)(1), (3).

Commission to, as warranted, "further reduce the risk of injury" associated with durable infant or toddler products.⁵

This expectation for the Commission is held not only by Congress and consumer advocates, but also by consumers themselves. In a July 2020 Consumer Reports nationally representative survey of 2,031 U.S. adults, 97% of Americans said they expect the manufacturer of a product they buy for their home to design and test the product to be safe before selling it to customers.⁶ In addition, the Commission has demonstrated amply that the Final Rule is well-reasoned and supported by the evidence, and in line with what consumers want to see from an agency tasked with protecting the public from hazardous consumer products. Far from being arbitrary and capricious, the Commission's promulgation of the Rule was well within its authority and kept consumers' needs foremost in mind.

For these reasons, and for the reasons included in Respondent's brief, the Court should reject Petitioner's challenge and affirm that the Commission's Final Rule for infant sleep products has been promulgated lawfully. We explore these points in further detail below.

⁵ 15 U.S.C. § 2056a(b)(1)(B)(ii).

⁶ *July 2020 American Experiences Survey: Television Privacy & Security and Product Safety*, (Consumer Reports, Yonkers, N.Y.), Aug. 2020 at 5 (on file with author).

II. Juvenile Product Manufacturers and Inadequate, Ineffective Voluntary Standards Failed Consumers and Left Infants at Greater Risk of Injury

Parents and caregivers should be able to rely on companies to do what is necessary to protect infants, one of the most vulnerable populations, from unreasonable risks of injury. Further, consumers expect that when companies fail to honor that trust, the government will step in and require them to put safety first. But juvenile product manufacturers involved in the creation and maintenance of inadequate voluntary standards for infant sleep products failed to meet these basic expectations—instead delivering a rubber stamp for their products, while thwarting the establishment of effective mandatory standards.

The Commission's safety standard for infant sleep products is steeped in the history of unsafe products targeted at sleep-deprived parents and caregivers desperately seeking solutions. In 2009, Fisher-Price, owned by Mattel, introduced its Rock 'n Play Sleeper as a bassinet that positioned babies at a 30-degree angle.⁷ The product received rave reviews, and it became an instant best-seller.⁸ Shortly after the product's introduction, the Commission issued its proposed rule for bassinets and cradles, which would no longer allow these products to be sold at an

⁷ Rachel R. Peachman, *While They Were Sleeping*, CONSUMER REPORTS (Dec. 30, 2019), www.consumerreports.org/child-safety/while-they-were-sleeping.

⁸ *Id.*

angle greater than five degrees.⁹ Mattel wrote to the Commission in the summer of 2010 and argued that its inclined sleepers should not be included within the scope of the standard, writing that "[p]arents deprived of any appropriate product for calming their tired, colicky infants, will look elsewhere—and substitute products dangerous for that purpose," and added "there certainly have been no deaths or injuries."¹⁰ Once its exemption was granted, Fisher-Price went on to lead the development of a weak voluntary standard that failed to protect babies, or their parents, from tragedies tied to unsafe infant sleep environments.¹¹

After ten years of sales, 4.7 million units sold in the U.S., tens of millions of dollars in revenue, and what was ultimately revealed to be close to 100 deaths, the Fisher-Price Rock 'n Play Sleeper was recalled in April 2019.¹² The fact that

⁹ *Safety Standard for Bassinets and Cradles: Notice of Proposed Rulemaking*, 75 Fed. Reg. 22,303, 22,306 (Apr. 28, 2010) (codified at 16 C.F.R. § 1218).

¹⁰ Fisher-Price, Comment Letter on Proposed Safety Standard for Bassinets and Cradles 5-6 (July 12, 2010).

¹¹ *Safety Standard for Bassinets and Cradles*, 78 Fed. Reg. 63,019, 63,021 (Oct. 23, 2013) (codified at 16 C.F.R. § 1218) ("An inclined product intended for sleeping would fall under the inclined sleep product standard currently under development by ASTM."); STAFF OF H.R. COMM. ON OVERSIGHT AND REFORM, *supra* note 3 at 3; Peachman, *supra* note 7.

¹² CONSUMER PRODUCT SAFETY COMM'N, *Fisher-Price Recalls Rock 'n Play Sleepers Due to Reports of Deaths*, (Apr. 12, 2019), www.cpsc.gov/Recalls/2019/Fisher-Price-Recalls-Rock-n-Play-Sleepers-Due-to-Reports-of-Deaths; *Sleeping Danger: The Rock 'n Play and Failures in Infant Product Safety Hearing before H.R. Comm. on Oversight and Reform*, 117th Cong. (June 7, 2021) (Fisher-Price testified that the company is aware of 97 infant deaths associated with the Rock 'n Play); *See generally Infant Inclined Sleepers: The Rise and Fall of a Dangerous Baby Product*, CONSUMER REPORTS,

numerous fatalities were linked to the product came to light only after Consumer Reports confronted Mattel with data on dozens of deaths and then published an in-depth story.¹³ In addition to the recall of the Rock 'n Play, these revelations ultimately led to the recalls of hundreds of thousands of infant inclined sleep products made by other manufacturers.¹⁴ Several months later, a biomechanics study evaluating the design of infant inclined sleep products concluded that the design of these products put infants at increased risk.¹⁵ Articles based on this research have since been peer-reviewed and one article has been published in the *Journal of Biomechanics*.¹⁶

The Commission also comprehensively examined all products marketed for infant sleep that were not currently covered by an existing safety standard, including in-bed sleepers and baby boxes. The Commission reviewed incident

www.consumerreports.org/product-safety/inclined-sleeper-safety (last visited Dec. 23, 2021) (landing page for Consumer Reports' infant sleep reporting).

¹³ Rachel R. Peachman, *Fisher-Price Rock 'n Play Sleeper Should Be Recalled, Consumer Reports Says*, CONSUMER REPORTS (Apr. 8, 2019), www.consumerreports.org/recalls/fisher-price-rock-n-play-sleeper-should-be-recalled-consumer-reports-says; *see also* Peachman, *supra* note 7.

¹⁴ CONSUMER PRODUCT SAFETY COMM'N, Kids II Recalls All Rocking Sleepers Due to Reports of Deaths (Apr. 12, 2019), www.cpsc.gov/Recalls/2019/Kids-II-Recalls-All-Rocking-Sleepers-Due-to-Reports-of-Deaths.

¹⁵ *Safety Standard for Infant Sleep Products*, 86 Fed. Reg. at 33,036.

¹⁶ CONSUMER PRODUCT SAFETY COMM'N, STAFF MEMORANDUM, DRAFT FINAL RULE FOR INFANT SLEEP PRODUCTS: STAFF'S RESPONSE TO COMMISSIONER'S HEARING QUESTIONS 1 (May 26, 2021), www.cpsc.gov/s3fs-public/DraftFinalRuleforInfantSleepProductsStaffsResponsetoCommissionersHearingQuestions.pdf.

reports, identified hazard patterns, and evaluated voluntary standards for infant sleep products that are both published and under development. After its review, the Commission sensibly and lawfully concluded that all "currently unregulated inclined sleep products" and "currently unregulated non-inclined, flat infant sleep products" should be required to comply with the requirements of the bassinets and cradles standard and "further reduce the risk of injury associated with infant sleep products."¹⁷

A. The voluntary standard for infant inclined sleep products protected company interests, not consumer safety

The voluntary standard for infant inclined sleep products, ASTM F3118,¹⁸ showcases how far a company might go to protect a highly lucrative product. In 2011, Fisher-Price "generated roughly \$10 million in Rock 'n Play Sales."¹⁹ In its 2021 Federal Register notice issuing the Final Rule, the Commission estimated that sales of infant sleep products not subject to a mandatory safety standard now totaled more than \$125 million a year.²⁰ A decade ago, Fisher-Price pushed for an

¹⁷ *Safety Standard for Infant Sleep Products*, 86 Fed. Reg., at 33,025, 33,033, and 33,053.

¹⁸ *Standard Consumer Safety Specification for Infant Inclined Sleep Products*, (Oct. 18, 2021), www.astm.org/f3118-17a.html (ASTM International, formerly known as the American Society for Testing and Materials, is an organization that facilitates the creation of voluntary standards for a wide variety of products).

¹⁹ STAFF OF H.R. COMM. ON OVERSIGHT AND REFORM, *supra* note 3 at 14.

²⁰ *Safety Standard for Infant Sleep Products*, 86 Fed. Reg., at 33,026.

exception from stringent safety rules for the Rock 'n Play.²¹ In a similar position, Finnbin is now pushing for its baby boxes to be exempted from the Commission's thoroughly substantiated Rule. In effect, Finnbin is urging the Court to ignore expert safety guidelines for infant sleep, and the painful lessons of recent history, to allow unregulated infant flat sleep products, including its baby boxes, to continue being marketed for sleep.

As described above, infant inclined sleep product manufacturers successfully attained an exception when the Commission issued its proposed rule for bassinets and cradles.²² This occurred even as Fisher-Price was receiving alarming reports about injuries and deaths from the public. One consumer reported in October 2012 to Fisher-Price "that a year earlier, in October 2011, her two-month-old son 'had stopped breathing' while in the Rock 'n Play."²³ Most disturbing, a June 2021 House Committee on Oversight and Reform staff report notes that Fisher-Price made little effort to follow up on reports from consumers, and ignored its own internal safety committee's recommendation that the company needed to "research the positioning of infants in the Rock 'n Play."²⁴ Instead, the

²¹ Fisher-Price, *supra* note 10.

²² *Safety Standard for Bassinets and Cradles*, 78 Fed. Reg., at 63,021.

²³ STAFF OF H.R. COMM. ON OVERSIGHT AND REFORM, *supra* note 3, at 16.

²⁴ STAFF OF H.R. COMM. ON OVERSIGHT AND REFORM, *supra* note 3, at 6 and 16 ("Ms. Pilarz said Fisher-Price was not concerned by the lack of affirmative research that a 30-degree angle was safe.").

company continued to sell this product, and to plan to expand the market for it. In 2013, Fisher-Price projected that in 2016 its "annual sales revenue [for the Rock 'n Play] would more than double to \$26.3 million."²⁵

After juvenile product manufacturers successfully carved out a narrow category for infant inclined sleep products, they worked for years to publish the first version of ASTM F3118. Consumer Reports, Consumer Federation of America, Kids In Danger, and our partners expressed strong objections and concerns over the voluntary standard. Writing in reference to the second, 2017 version of the standard, we stated that infant inclined sleep products "do not align with the trusted safe sleep recommendations advised by both medical practitioners and other safety experts."²⁶ The voluntary standard ran counter to existing medical evidence of how babies should sleep—namely, on a firm, flat surface, which none of these products provided.

The history of the voluntary standard for infant inclined sleep products makes clear: without the Commission holding them accountable, companies may all too readily protect their own interests before the safety of consumers. Finnbin

²⁵ STAFF OF H.R. COMM. ON OVERSIGHT AND REFORM, *supra* note 3, at 14.

²⁶ Kids in Danger, Consumer Federation of America, Consumers Union, U.S. PIRG, and Public Citizen, Comment Letter on Proposed Safety Standard for Infant Inclined Sleep Products 6 (June 27, 2017) (Consumers Union is the former name of the advocacy division of Consumer Reports).

clearly takes this approach now in its own brief. It states that because no infant deaths have been connected to baby boxes, this rule will force "baby box purveyors to either incur hundreds of thousands of dollars to redesign their products . . . or else shut down."²⁷ Eerily, Fisher-Price made the same argument that "there has been no incident" and "certainly have been no deaths or injuries," associated with the Rock 'n Play when pushing for a new product category in 2010 that resulted in unimaginable tragedy for so many families.²⁸ The Commission's mandatory standard would help reform the status quo that allows for manufacturer interests to come before consumer safety, and in its place establish a regulatory structure that ensures all infant sleep products must provide evidence-based safe environments for babies.

B. Inadequate voluntary standards endangered infants by conflicting with expert medical guidelines

Finnbin is currently reiterating Mattel's arguments from 2010—that parents will resort to dangerous alternatives,²⁹ that its products are not connected to any fatality or injury,³⁰ and that the Rule would leave children's needs unmet.³¹ The Commission rightly rejects these arguments. It is critical for the Commission to

²⁷ Pet'r Br. 47.

²⁸ Fisher-Price, *supra* note 10, at 5.

²⁹ Pet'r Br. 24; Fisher-Price, *supra* note 10, at 3-4.

³⁰ Pet'r Br. 41; Fisher-Price, *supra* note 10, at 5.

³¹ Pet'r Br. 48-52; Fisher-Price, *supra* note, 10 at 3-6.

ensure that history does not repeat itself. It must not permit infant product safety to again be governed by a weak voluntary standard developed in large part by the very companies that stand to gain the most from its creation. The evidence is clear that products intended and marketed for infant sleep should conform to a strong mandatory safety standard aligned with expert safe sleep recommendations, such as those of the American Academy of Pediatrics.

It would be counterproductive—and dangerous for consumers—to ignore the evidence, and the lessons of the past, associated with the handling of infant inclined sleep products. However, this is exactly what Finnbin argues the Consumer Product Safety Improvement Act of 2008 requires of the Commission. Petitioner claims that 15 U.S.C. §2056a "provides the Commission with a streamlined power to enact safety standards for products that are already the subject of a voluntary standard . . ." and cannot include in the Final Rule unregulated products, including baby boxes, unless a voluntary standard already exists.³² In addition to misstating the extent of the Commission's regulatory authority, Petitioner's argument dismisses the role that the evidence of past actions and tragedies should play in informing action for the future. In particular, the evidence outlined above demonstrates the inadequacy of voluntary standards for various infant sleep products and the necessity for a strong mandatory standard.

³² Pet'r Br. 8.

By carving out infant inclined sleep products from the standard for bassinets and cradles, and by driving the creation of the voluntary standard for these products, manufacturers avoided having them subjected to a strong rule aligned with expert safe sleep guidelines, and they continued to sell these products to the public. In fact, manufacturers worked hard to publish the voluntary standard for infant inclined sleep products in order to avoid the *same* safety requirements found in the *Safety Standard for Bassinets and Cradles*, which the Commission now will be requiring all unregulated infant sleep products to comply with under its mandatory safety standard for infant sleep products.³³ In pushing for publication of the voluntary standard, manufacturers sowed confusion and blurred the line between which products were in fact safe for infant sleep and which were not. Reasonable consumers—carrying with them a false sense of security—could only assume, erroneously, that the products they saw for sale online and in stores, marketed for sleep, were indeed safe for sleeping infants.³⁴

³³ *Safety Standard for Infant Sleep Products*, 86 Fed. Reg., at 33,024; *Safety Standard for Bassinets and Cradles*, 16 C.F.R. § 1218.2 (2021).

³⁴ *See also* Fisher-Price, Media Statement on the U.S. Consumer Product Safety Commission-Fisher-Price Joint Security Alert (Apr. 5, 2019), <https://corporate.mattel.com/news/media-statement-on-the-u-s-consumer-product-safety-commission-fisher-priceR-joint-security-alert-released-on-april-5-2019> (stating that the Rock 'n Play Sleeper met all applicable safety standards, including ASTM International, and was certified by the Juvenile Products Manufacturers Association (JPMA)).

The Court should not allow Petitioner's arguments to prevail, as doing so would dramatically weaken the Commission's ability to fulfill its mission to protect infants from unreasonable risks of injury. Companies should not be allowed to once again carve themselves out from aligning their products with safe sleep principles. If Petitioner's arguments were to prevail, it would permit manufacturers to continue marketing products for infant sleep despite failing to comply with appropriately stringent safety standards, leading to confusion among parents and potential risks to infants similar to those linked to infant inclined sleep products. It would empower juvenile product manufacturers to develop inadequate, narrow voluntary standards that fail to align with the medical evidence around safe infant sleep—something manufacturers of in-bed sleepers have been trying to do—and would frustrate the Commission's goal to "provide the highest level of safety for such products that is feasible" and to "further reduce the risk of injury."³⁵ It is critical that the Commission be able to not only strengthen weak voluntary standards, but also promulgate a strong mandatory standard, even in the absence of a voluntary standard, to protect the public from unreasonable risks of injury.

³⁵ *Safety Standard for Infant Sleep Products*, 86 Fed. Reg., at 33,035 (discussing current development of a separate in-bed sleeper voluntary standard); 15 U.S.C. § 2056a(b)(1)(B)(ii) and (b)(2).

III. The Commission Acted Appropriately to Protect Infants from Unsafe Sleep Environments and Provide Parents Clear Information

Contrary to Finbinn's arguments, the Commission acted consistently with its statutory purpose to protect consumers against unreasonable risks of injury, to assist consumers in evaluating the safety of products, to promulgate uniform safety standards, and to research and investigate potential safety issues.³⁶ The Commission acted fully in accordance with applicable law and with Congress' intent. The Commission's strong mandatory standard will help consumers navigate the marketplace by ensuring that only infant products that are intended or marketed for sleep will be those that comply with mandatory safety standards aligning with expert safe sleep guidelines. This Rule will prevent companies from muddling safe sleep messaging to parents and caregivers, by ensuring that all products marketed for infant sleep but not already subject to another mandatory standard must comply with the Rule's provisions. In fact, the Commission states that one goal of the Final Rule "is to make it clear to consumers which products are certified as compliant with a [Commission] sleep standard."³⁷ As described below, the Commission took appropriate action in promulgating this Rule as directed by Congress, to prioritize the safety of one of society's most vulnerable populations.

³⁶ 15 U.S.C. §§ 2051(b)(1)-(4).

³⁷ *Safety Standard for Infant Sleep Products*, 86 Fed. Reg., at 33,026.

A. The Commission's actions aligned with its purpose and mission to protect the public from unreasonable risks of injury

The Commission has a core interest in ensuring that infants are protected against unreasonable risks of injury associated with a product, especially products purporting, without evidence, to be safe. Since coming into existence nearly five decades ago, the Commission has been tasked with four key purposes:

- "(1) to protect the public against unreasonable risks of injury associated with consumer products;
- (2) to assist consumers in evaluating the comparative safety of consumer products;
- (3) to develop uniform safety standards for consumer products and to minimize conflicting State and local regulations; and
- (4) to promote research and investigation into the causes and prevention of product-related deaths, illnesses, and injuries."³⁸

For durable infant and toddler products, the Commission's mission is even clearer. With the passage of the Consumer Product Safety Improvement Act of 2008, Congress strengthened the Commission's directive to ensure that "the standards set forth under [15 U.S.C. § 2056a] . . . provide the highest level of safety for such products that is feasible." In light of its mission as set forth in both the original 1972 Consumer Product Safety Act and the 2008 Act, the Commission

³⁸ 15 U.S.C. § 2051(b).

appropriately took action to ensure that all infant sleep products must comply with life-saving standards informed by evidence-based safe sleep guidelines.³⁹

In the Final Rule, the Commission's staff summarized its incident data that shows an alarming 522 incidents, fatal and non-fatal, linked to unregulated infant inclined sleep products, reported since just 2016.⁴⁰ Staff also cites 183 reported incidents, fatal and non-fatal, connected to unregulated flat infant sleep products that occurred between January 1, 2019 and December 31, 2020.⁴¹ The incident data made clear that unregulated infant sleep products, both inclined and flat, have distinct hazard patterns that can be addressed to more effectively ensure that all must meet expert safe sleep guidelines.

The Commission's approach to addressing the potential hazards associated with unregulated infant sleep products includes careful consideration of these incidents. The Commission has appropriately determined a solution that would help protect infants from possible harm. Armed with the data provided in the Commission staff's briefing package and the lessons learned from the inadequate

³⁹ Consumer Product Safety Act, Pub. L. No. 92-573, 86 Stat. 1207 (1972); Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, 122 Stat. 3016.

⁴⁰ *Safety Standard for Infant Sleep Products*, 86 Fed. Reg., at 33,028

⁴¹ *Id.* at 33,030.

voluntary standard for infant inclined sleep products, the Commission's actions were wholly proper and in line with its mission and purpose.⁴²

B. The Commission promulgated the safety standard for infant sleep products in accordance with the law and direction from Congress

Nearly 40 years ago, Congress created the Commission in the midst of a public health crisis in which an estimated "twenty million Americans were injured," over one hundred thousand were permanently disabled, and thirty thousand were killed each year in incidents connected with consumer products.⁴³ Congress charged the agency with "protecting the public from unreasonable risks of injury or death associated with the use of the thousands of types of consumer products under the agency's jurisdiction."⁴⁴ Once considered the "model agency," changes curtailing its authorities only ten years after its creation resulted in a limited agency unable to promulgate strong mandatory safety standards.⁴⁵

⁴² Commission Briefing Package: Final Rule Regarding Safety Standard for Infant Sleep Products, CONSUMER PRODUCT SAFETY COMM'N (May 12, 2021), www.cpsc.gov/s3fs-public/FinalRuleSafetyStandardforInfantSleepProducts.pdf; *see also Safety Standard for Infant Sleep Products*, 86 Fed. Reg., at 33,022-72.

⁴³ Arnold B. Elkind, *Forward* to NATIONAL COMMISSION ON PRODUCT SAFETY, FINAL REPORT 1 (June 1970).

⁴⁴ *About Us*, CONSUMER PRODUCT SAFETY COMM'N, www.cpsc.gov/About-CPSC (last visited Dec. 23, 2021).

⁴⁵ Robert S. Adler, *From "Model Agency" to Basket Case—Can the Consumer Product Safety Commission be Redeemed?*, 41 Admin. L. Rev. 61, 68-70, 74-76 (1989).

In the early 2000s, Congress once again found itself in the midst of another public health crisis—this time, with various product hazards that posed particular risks to children.⁴⁶ In response, Congress passed the Consumer Product Safety Improvement Act of 2008, a bipartisan bill empowering the Commission to take stronger action on many fronts, including through new authority to more easily promulgate mandatory safety standards for durable infant or toddler products.⁴⁷

As noted in Respondent's brief, Congress sought to address concerns it had with the Consumer Product Safety Act's "effect on the safety of infant and toddler products."⁴⁸ Both Congresswoman Jan Schakowsky and Senator Amy Klobuchar expressed particular concern that voluntary standards alone were inadequate to address safety issues associated with infant and toddler products.⁴⁹ Section 2056a—enacted as Section 104 of the Consumer Product Safety Improvement Act—addresses this concern and streamlines the rulemaking process. Section

⁴⁶ *2007: The Year of the Recall*, CONSUMER REPORTS (Oct. 30, 2007), https://advocacy.consumerreports.org/press_release/2007-the-year-of-the-recall/; see also Louise Story and David Barbosa, *Mattel Recalls 19 Million Toys Sent From China*, N.Y. TIMES (Aug. 15, 2007), www.nytimes.com/2007/08/15/business/worldbusiness/15imports.html; see generally *2007: The Year of the Recall*, KIDS IN DANGER (Feb. 2008), www.kidsindanger.org/docs/reports/2008_year_of_the_recall.pdf.

⁴⁷ Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, 122 Stat. 3016.

⁴⁸ Resp't Br. 4.

⁴⁹ Resp't Br. 4-5 (citing 153 Cong. Rec. 7,701, 36,237 (2007); 154 Cong. Rec. 3,461-63 (2008)).

2056a makes it easier for the Commission to promulgate rules using the Administrative Procedure Act's general rulemaking process, which is much less onerous than the process outlined for the Commission under 15 U.S.C. §§ 2056 and 2058.⁵⁰ Since the enactment of 15 U.S.C. § 2056a, the Commission went from promulgating virtually zero mandatory standards for durable infant and toddler products to completing more than twenty standards.⁵¹

Finnbin argues that 15 U.S.C. § 2056a is a "much more limited tool" that "authorizes action only where the Commission is reviewing an *existing* voluntary consumer product safety standard."⁵² If allowed to prevail, Petitioner's argument would hamstring the Commission's ability to protect consumers, contradicting congressional intent. As Respondent stated, § 2056a is a tool "to give the Commission *greater* powers," not a "limited tool," as Petitioner posits.⁵³ Indeed, Congress intended for the Commission to have greater authority under the Consumer Product Safety Improvement Act of 2008, to take stronger and quicker action on durable infant and toddler products. As pointed out in Respondent's brief, sponsors of the 2008 Act confirm this interpretation and place "heavy emphasis on the inadequacy of voluntary standards for durable infant or toddler

⁵⁰ See DAVID H. CARPENTER, CONG. RSCH. SERV., R45174, THE CONSUMER PRODUCT SAFETY ACT: A LEGAL ANALYSIS 9 (updated Apr. 24, 2018).

⁵¹ See *generally* 16 C.F.R. 1215-38.

⁵² Pet'r Br 33. (emphasis added) (quotations omitted).

⁵³ Resp't Br. 30; Pet'r Br 33.

products."⁵⁴ As such, "[t]here is nothing improper about the Commission's exercising the full measure of authority Congress gave it under § 2056a."⁵⁵ In promulgating the *Safety Standard for Infant Sleep Products*, the Commission did exactly what it was created and directed to do when faced with yet another public health crisis—this time, tied to stubbornly high rates of sudden unexpected infant deaths.⁵⁶

IV. The Commission's Actions Were Well-Reasoned, Supported by the Evidence, and in Line with Consumer Expectations

The Commission's *Safety Standard for Infant Sleep Products* correctly addresses known issues with unregulated infant sleep products, and based on the current state of the evidence, it would provide infants the "highest level of safety for such products that is feasible."⁵⁷ A growing body of evidence, including medical studies, in-depth investigations from media outlets and Congress, and the Commission's own incident reports, makes clear that the agency's standard is necessary to ensure that infant sleep products on the market meet strong safety requirements. The Commission was right to push for a strong rule that would do just this.

⁵⁴ Resp't Br. 25.

⁵⁵ Resp't Br. 32 (quotations omitted).

⁵⁶ See Peachman, *supra* note 1.

⁵⁷ *Safety Standard for Infant Sleep Products*, 86 Fed. Reg., at 33,022-72; 15 U.S.C. § 2056a(b)(2).

According to an examination of the Commission's incident data and Consumer Reports' independent reporting, more than 100 infant deaths are associated with inclined sleepers, and at least 23 infant deaths are associated with unregulated flat sleep products, including in-bed sleepers.⁵⁸ In sum, more than 120 reported deaths are known to be connected to unregulated infant sleep products, when even one preventable death is too many. As the Commission's Acting Chairman Bob Adler stated at the time of the vote on the Final Rule, "as more data accumulated . . . [the Commission] obtained a clearer picture of infant sleep product hazards – and fully shared this data as the agency acquired it."⁵⁹

The Commission's actions to ensure that all infant sleep products must align with safe sleep principles are also strongly supported by consumers. Overwhelmingly, consumers expect the consumer products that they buy for their homes to meet minimum safety standards that protect them from unreasonable

⁵⁸ Consumer Reports, Letter on Draft Final Rule for Infant Sleep Products (May 27, 2021); *Sleeping Danger: The Rock 'n Play and Failures in Infant Product Safety Hearing before H.R. Comm. on Oversight and Reform*, 117th Cong. (June 7, 2021) (testifying that Fisher-Price is aware of 97 infant deaths associated with the Rock 'n Play); CONSUMER PRODUCT SAFETY COMM'N, Kids II Recalls All Rocking Sleepers Due to Reports of Deaths, (Apr. 12, 2019), www.cpsc.gov/Recalls/2019/Kids-II-Recalls-All-Rocking-Sleepers-Due-to-Reports-of-Deaths (issuing a recall because of five deaths associated with this brand's infant inclined sleep products).

⁵⁹ Consumer Product Safety Comm'n, Statement of Acting Chairman Robert S. Adler re: Vote on Final Rule to Establish a Safety Standard for Infant Sleep Products 2 (June 15, 2021).

risks of injury. According to a July 2020 Consumer Reports nationally representative survey of 2,031 U.S. adults, 96% of Americans said they believe products costing \$75 or more that they buy for their home adhere to a required safety standard, and 97% said they expect the manufacturer of a product they buy for their home to design and test the product to be safe before selling it to customers.⁶⁰ Moreover, in September 2021, a majority (56%) of Americans surveyed in another Consumer Reports nationally representative survey of 2,341 U.S. adults say that "[t]he government should ensure the safety of [products intended or marketed for infant sleep] by setting minimum federal standards that the manufacturers must meet before being sold." In contrast, just 32% of Americans think that "[t]he manufacturers should be responsible for ensuring the safety of [products intended or marketed for sleep] they make prior to their sale without having to adhere to federal standards imposed by the government."⁶¹

The Commission's actions are not only supported by the evidence provided by its own staff, but also by consumers who want to see their families protected from unreasonable risks of injury and death tied to infant sleep products. In February 2020, more than 22,000 consumers signed a Consumer Reports petition

⁶⁰ Consumer Reports, *supra* note 6.

⁶¹ *September 2021 American Experiences Survey: Television Privacy & Security and Product Safety*, (Consumer Reports, Yonkers, N.Y.), Oct. 2021, at 20 (on file with author) (citing also that 11% of Americans said they were "unsure.").

in support of the Commission's supplemental notice of proposed rulemaking.⁶²

Almost a year and a half later, in June 2021, more than 30,000 consumers urged the agency's commissioners to vote to approve the final safety standard.⁶³

CONCLUSION

For the reasons provided above and the reasons provided by Respondent, the Court should reject Finnbin's challenge to the Rule. The Commission rightfully prioritizes infant safety and identifies it as paramount when evaluating the potential benefits and risks of infant sleep products. Allowing infant sleep products to be marketed without requiring those products to align with expert safe sleep guidelines would continue to leave infants at unreasonable risk, and would directly conflict with the Commission's core mission and statutory authorities. The Consumer Product Safety Commission exists to ensure that consumers are protected from unreasonable risks of injury, that the marketplace can be easily evaluated for the comparative safety of products, and that companies are held accountable for safety of their products.⁶⁴ Consumers—in this case, *infants*—should not need to be injured, or even killed, before the government can take action. Manufacturers should not be able to thwart the Commission from

⁶² Consumer Reports, Comment Letter on Proposed Safety Standard for Infant Sleep Products 1-2 (Feb. 26, 2020).

⁶³ Consumer Reports, Letter Petition of Consumers in Support of Proposed Safety Standard for Infant Sleep Products (June 1, 2021).

⁶⁴ 15 U.S.C. § 2051(b)(1)-(3).

exercising its rulemaking authority under § 2056a simply by manipulating product categorization in the voluntary standards development process. If allowed to prevail, Finnbin's interpretation of the law would severely and erroneously curtail the Commission's role and authorities, allow tragic history to repeat itself, and render the agency unable to follow Congress' clear directive.

Respectfully submitted,

DATE: December 27, 2021

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CERTIFICATION OF SERVICE

I certify that on December 27, 2021, I electronically filed the foregoing Brief on behalf of Consumer Reports, Consumer Federation of America, and Kids In Danger as amici curiae in support of Respondent with the Clerk of the United States Court of Appeals for the District of Columbia via the Court's CM/ECF system. All parties will be served by the CM/ECF system.

DATE: December 27, 2021

/s/ Oriene H. Shin

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 29(a)(5) and Circuit Rule 32-1 because it contains 5,400 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief was prepared in Microsoft Word for Mac version 16.56, using Times New Roman typeface and a 14.0 font size.

DATE: December 27, 2021

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ADDENDUM

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§2051. Congressional findings and declaration of purpose

(a) The Congress finds that—

- (1) an unacceptable number of consumer products which present unreasonable risks of injury are distributed in commerce;
- (2) complexities of consumer products and the diverse nature and abilities of consumers using them frequently result in an inability of users to anticipate risks and to safeguard themselves adequately;
- (3) the public should be protected against unreasonable risks of injury associated with consumer products;
- (4) control by State and local governments of unreasonable risks of injury associated with consumer products is inadequate and may be burdensome to manufacturers;
- (5) existing Federal authority to protect consumers from exposure to consumer products presenting unreasonable risks of injury is inadequate; and
- (6) regulation of consumer products the distribution or use of which affects interstate or foreign commerce is necessary to carry out this chapter.

(b) The purposes of this chapter are—

- (1) to protect the public against unreasonable risks of injury associated with consumer products;
- (2) to assist consumers in evaluating the comparative safety of consumer products;
- (3) to develop uniform safety standards for consumer products and to minimize conflicting State and local regulations; and
- (4) to promote research and investigation into the causes and prevention of product-related deaths, illnesses, and injuries.

(Pub. L. 92–573, §2, Oct. 27, 1972, 86 Stat. 1207.)