No. 14-9610

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ZEN MAGNETS, LLC

Petitioner,

v.

CONSUMER PRODUCT SAFETY COMMISSION,

Respondent.

On Petition for Review from the Consumer Product Safety Commission

OPPOSITION TO MOTION FOR STAY AND INJUNCTION PENDING PETITION FOR REVIEW

BENJAMIN C. MIZER
Acting Assistant Attorney General
MARK R. FREEMAN
ADAM C. JED
(202) 514-8280
Attorneys, Appellate Staff
Civil Division, Room 7240
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

INTRODUCTION AND SUMMARY

This case concerns a safety rule for sets of high-powered magnets, frequently used by consumers as desk toys. These magnets are extremely dangerous if swallowed because they are powerful enough to clamp together through intestinal wall and lung tissue. Following numerous incidents in which children were hospitalized and seriously injured, the Consumer Product Safety Commission proposed a rule that would require either that these magnets be large enough to prevent swallowing or have a low enough "magnetic flux" (the strength of the magnets) to mitigate the danger. After reviewing extensive data, considering thousands of public comments, and considering views at a public hearing, the Commission promulgated the rule.

Petitioner, Zen Magnets, imports magnet sets affected by the rule. After waiting until the last possible day to file its petition, obtaining an extension to file its opening brief, and waiting until the rule had come into effect, Zen has now filed a motion to enjoin the rule pending review by this Court.

Zen cannot satisfy the stringent requirements for an injunction pending appeal. As an initial matter, Zen has not demonstrated that an injunction will prevent any irreparable injury—the *sine qua non* of interim relief. Zen describes the theoretical effects of this safety rule on businesses that sell magnet sets, but Zen does not say that an injunction is necessary to protect Zen *itself*. Nor does Zen offer any concrete evidence of the effects of the rule on Zen's business during the pendency of this case. That is not surprising. Notwithstanding Zen's use of the word "ban," Zen is

challenging a safety standard and is free to import or to manufacture magnet sets that comply with this standard. Any claim that Zen requires immediate relief would also be difficult to square with Zen's waiting six months, until the rule had come into effect, to seek an injunction. On the other hand, the public interest—reflected in the considered judgment of the federal agency charged with consumer product safety—strongly weighs against an injunction. It is undisputed that high-powered magnet sets have led to numerous hospitalizations and life-threatening injuries. Blocking the rule would leave these products unregulated, at the expense of children's safety.

Equally fundamentally, Zen also has demonstrated no probability of success on the merits. Zen is not entitled to enjoin enforcement of the magnet safety rule absent a showing that it will likely succeed on its petition for review in this Court. Yet virtually all of Zen's arguments are simply disagreements with how the agency extrapolated from the available data or weighed competing policy considerations. Those matters, however, are firmly vested with the agency. The question for this Court's review is simply whether the agency could rationally make the factual determinations that it did, and whether the agency considered the relevant issues and offered a rational explanation for its decision. On any view of the record, the agency did so, and Zen has failed to show otherwise. The motion should be denied.

STATEMENT

A. Statutory Background

Congress enacted the Consumer Product Safety Act, 15 U. S. C. § 2051 *et seq.*,

in order, *inter alia*, "to protect the public against unreasonable risks of injury associated with consumer products." 15 U. S.C. § 2051(b)(1). The Act establishes the Consumer Product Safety Commission which, as relevant here, may "promulgate consumer product safety standards" that are "reasonably necessary to prevent or reduce an unreasonable risk of injury associated with such product." 15 U.S.C. § 2056(a). The Commission creates such standards by notice and comment rulemaking in which it must consider "relevant available product data," the "risk of injury," "the approximate number" of affected products, "the need of the public for the consumer products," the "probable effect" on "utility, cost, or availability" of those products, alternative means of "achieving the objective of the order while minimizing adverse effects," and "the public interest." *Id.* § 2058(e) & (f)(1), (3).

B. Factual Background

1. This case concerns sets of small, high-powered magnets, typically comprising dozens or hundreds of tiny magnetic spheres or cubes, that are often used as desk toys. 79 Fed. Reg. 59,962, 59,963 (Oct. 3, 2014). In 2010, the Consumer Product Safety Commission began receiving reports of serious incidents caused by these magnet sets, particularly in children. *Id.* at 59,962; *see id.* at 59,964. When a person ingests more than one magnet, the magnets "interact rapidly and forcefully," damaging intestinal or lung tissue "trapped" between them. 77 Fed. Reg. 53,781, 53,784, 53,786 (Sept. 4, 2012). These injuries are difficult to diagnose because symptoms "often appear similar to those of less serious conditions." 79 Fed. Reg. at

59,964. This can result in serious injury or death. *Ibid.*

The Commission began gathering information about these products and working with companies to address the safety hazards. During 2011, the agency evaluated marketing and labeling of magnet sets and encouraged companies to ensure that these sets were not marketed to children. 77 Fed. Reg. at 53,782. In cooperation with several manufacturers, the agency also published a public service announcement concerning the hazards of this product. *Ibid.*

Nonetheless, reports of serious incidents continued to increase. *Ibid.* Based on an extrapolation from data in the National Electronic Injury Surveillance System, it was estimated that from 2009-2011, approximately 1,700, and possibly as many as 4,400, ingestions of magnets from magnet sets were treated in emergency departments. *Id.* at 53,784 & n.3. A high percentage of the injuries resulted in surgeries or other invasive procedures. *Id.* at 53,782. "[D]espite the warnings or labeling," caregivers purchased sets for children. *Id.* at 53,783. And even when caregivers "intended to keep the sets away" from them, children got their hands on the magnets anyway. *Ibid.* Experts believed that these products—which are often shiny and smooth and "move in unexpected ways" thanks to their "strong magnetic properties"—appeal to and even "seem magical" to younger children. *Ibid.* And older children are attracted to the magnets' possible uses. For example, in "incidents reported among the 8- through 12-year-old age group, one child described wanting to feel the force of the magnets through his tongue; one was trying to see if the magnets

would stick to her braces; and another wanted to see if the magnets would stick together through her teeth." *Id.* at 53,785; *see also ibid.* (examples of incidents involving 8 to 15 year olds). These incidents resulted in long hospital stays, CT scans, endoscopies, surgeries, "damaged bowel tissue," and "life-threatening intestinal injuries [that] will have lasting adverse health effects." *Ibid.*

2. In 2012, the Commission proposed a product safety standard for consumer magnet sets. *Id.* at 53,781. The proposed standard would apply to "any aggregation of separable, permanent magnetic objects that is a consumer product intended or marketed by the manufacturer primarily as a manipulative or construction desk toy for general entertainment, such as puzzle working, sculpture, mental stimulation, or stress relief." *Id.* at 53,787. It would essentially require either that magnets be large enough to mitigate the risk of swallowing, or that the magnetic flux be low enough, *i.e.*, the magnets weak enough, to minimize the danger of tissue strangulation. *Ibid.*

The agency received more than 5,000 written comments and heard testimony at a public hearing. 79 Fed. Reg. at 59,966. "Virtually all comments received from medical professionals" supported the rule. *Id.* at 59,969. They observed that "magnet ingestions often result in rapid and severe injuries with devastating and costly long-term consequences," explained that injuries caused by high-powered magnets are "difficult to diagnose," and expressed concern with "the rapidly growing number of cases." Some commenters noted that magnet sets have many good uses, such as "fun

stress-relievers" and "as an artistic medium." *Id.* at 59,967. Other commenters "cite[d] the high severity of the injuries associated with magnet sets." *Ibid.*

3. On September 26, 2014, the agency issued a final rule, which was published in the Federal Register on October 3, 2014, establishing a safety standard. 79 Fed. Reg. at 59,962 (codified at 16 C.F.R. pt. 1240). The rule applies to "magnet sets" and individual magnets "marketed or intended for use with or as magnet sets." 16 C.F.R. § 1240.1. It defines magnet sets as "[a]ny aggregation of separable magnetic objects that is a consumer product intended, marketed or commonly used as a manipulative or construction item for entertainment, such as puzzle working, sculpture building, mental stimulation, or stress relief." *Id.* § 1240.2. The rule establishes a safety standard based on size and strength: "Each magnet in a magnet set, and any individual magnet" that "fits completely within" a standard toy testing cylinder, used to estimate whether children can swallow an item, must have a certain maximum magnetic strength or "flux." *Id.* § 1240.3. The agency described and addressed the thousands of comments that it received, 79 Fed. Reg. at 59,966-59,972, described and explained changes between the proposed rule and final rule, *id.* at 59,972-59,974, discussed alternatives that were considered but rejected, *id.* at 59,974-59,976, and explained its final regulatory analysis, *id.* at 59,976-59,984.

The agency evaluated benefits of the rule in light of data from the National Electronic Injury Surveillance System and other sources. *Id.* at 59,978-59,980. Using the available data, the agency estimated that from 2009 to 2012, there were

approximately 2,138 injuries treated in emergency departments, eleven percent of which required hospitalization, and the agency used an injury cost model to estimate medical costs, work losses, and intangible costs associated with such incidents. *Id.* at 59,978-59,980. The agency recognized that, given the limits of available data, "there is uncertainty concerning these estimates," and explained that the estimates may incidentally take into account incidents that did not involve the types of magnet sets at issue, and/or may incidentally exclude incidents where, for example, medical narratives "mentioned that a magnet was involved but presented insufficient information to classify the magnet type." *Id.* at 59,980.

The agency also carefully considered the potential costs of the rule. It reviewed "[t]he lost use value experienced by consumers who would no longer be able to purchase magnets that do not meet the standard" and "the lost income and profits to firms that could not produce and sell non-complying products." *Ibid.* The agency also considered various alternatives, such as requiring warnings or different packaging or limiting sales to certain locations. *Id.* at 59,983-59,984. But the Commission concluded, on balance, that these alternatives would not adequately protect consumers and that the safety risks to the public from high-powered consumer magnet sets warranted adoption of the safety standard.

C. Procedural History

Two months later, on December 2, 2014, Zen Magnets filed a petition for review. On January 15, 2015, Zen asked the agency to stay the rule, and on

February 5 supplemented its request. On February 20, the Commission denied that request. On March 10, Zen moved to extend the time to file its opening brief, but also stated that it would seek an interim order staying the rule. On April 1, after the rule had come into effect, Zen asked this Court to enjoin the rule pending review.

ARGUMENT

Zen asks the Court to enjoin the Consumer Product Safety Commission's safety standard for consumer magnet sets pending resolution of Zen's petition for review.[1] To demonstrate that this extraordinary remedy is warranted, Zen must at a minimum show a strong likelihood of success on the merits, that it is likely to suffer irreparable harm without the requested order, and that enjoining the rule would not impair the public interest. *See Nken* v. *Holder*, 556 U.S. 418, 434-435 (2009); *Winter* v. *Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).[2] Because Zen has failed to demonstrate either a likelihood of success or irreparable injury, and because the public interest plainly weighs in favor of the safety rule, the motion should be denied.

I. Zen Has Shown No Likelihood of Success on the Merits

A. Safety rules issued by the Consumer Product Safety Commission are

[1] Although Zen asks for a "stay," because Zen waited until after the rule came into effect, the motion is better characterized as seeking an injunction. But because the standards are substantially the same, that does not affect the analysis.

[2] Even if a sliding scale applies, when addressing "governmental action taken in the public interest pursuant to a statutory or regulatory scheme," the moving party must show at least a "substantial likelihood" of success, regardless of the other factors. *Heideman* v. *S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003).

reviewed pursuant to the Administrative Procedure Act, with factual findings reviewed for "substantial evidence on the record taken as a whole." 15 U.S.C. § 2060(c). Under this highly deferential standard of review, the agency's factual conclusions "are conclusive unless the record demonstrates that any reasonable adjudicator would be compelled to conclude to the contrary." *Sidabutar* v. *Gonzales*, 503 F.3d 1116, 1122 (10th Cir. 2007) (internal quotation marks omitted). And the "court is not to substitute its judgment for that of the agency" but instead must decide whether it "may reasonably be discerned" that the agency "examine[d] the relevant" information and identified "a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

The Commission plainly did so here. It explained the need for the rule, 79 Fed. Reg. at 59,976-59,977, described the product and market, *id.* at 59,977-59,978, analyzed the risks and societal benefits, *id.* at 59,978-59,980, evaluated the costs of the rule to producers and consumers, *id.* at 59,980-59,983, and considered various alternatives, *id.* at 59,983-59,986, before determining that the risks to consumers posed by high-powered magnet sets warranted adoption of the safety standard.

B. Zen's only legal objection to the Commission's rule is its claim (Mot. 14-16) that the agency failed to provide the required opportunity for notice and comment because the final rule's definition of consumer magnet sets varied slightly from that of the proposed rule. To give meaning to the notice and comment requirement, courts generally require that the final rule be a "logical outgrowth" of the proposed rule.

Long Island Care at Home, Ltd. v. *Coke*, 551 U.S. 158, 174 (2007). "The object, in short, is one of fair notice." *Ibid.* "A final rule is a logical outgrowth if affected parties should have anticipated that the relevant modification was possible." *Allina Health Servs.* v. *Sebelius*, 746 F.3d 1102, 1107 (D.C. Cir. 2014). By contrast, a final rule is not a logical outgrowth where "interested parties would have had to divine [the agency's] unspoken thoughts, because the final rule was surprisingly distant from the proposed rule." *CSX Transp., Inc.* v. *Surface Transp. Bd.*, 584 F.3d 1076, 1080 (D.C. Cir. 2009).

Not only was the final rule here a logical outgrowth of the proposed rule, but the rules are virtually identical. The proposed and final rules establish safety standards for consumer magnet sets—indeed, the *same* standards. The only difference that Zen points to (Mot. 15) is a slight modification in the definition of a consumer magnet set: The proposed definition was "any aggregation of separable, permanent magnetic objects that is a consumer product *intended or marketed* by the manufacturer primarily as a manipulative or construction desk toy for general entertainment," and gave examples. 77 Fed. Reg. at 53,787 (emphasis added). The final definition is "[a]ny aggregation of separable magnetic objects that is a consumer product *intended, marketed or commonly used* as a manipulative or construction item for entertainment" and gave the same examples. 16 C.F.R. § 1240.2 (emphasis added).

Zen cannot plausibly maintain that this kind of modification could not have been anticipated and thus vitiated the notice and comment process. Indeed, the Notice of Proposed Rulemaking (NPRM) expressly sought "comment on the scope

of the products proposed to be covered by this proposed rule." 77 Fed. Reg. at 53,787. Zen thus had every reason to expect that the definition of covered magnet sets might change during the rulemaking. *See CSX*, 584 F.3d at 1081 (logical outgrowth where "NPRM expressly asked for" comments on the issue). And in any event, small definitional changes are common in rulemaking. Thus, the agency explained that "[t]his change clarifies that the common usage of a firm's magnet products could be a consideration in determining whether the magnets are intended for use as manipulatives for entertainment, irrespective of the firm's stated intentions." 79 Fed. Reg. at 59,973. And it addressed the possibility of companies' "avoiding the rule by simply stating in marketing and other materials that the magnets are intended for uses other than those specified in the definition." *Ibid.* That refinement was well within the Commission's discretion to adopt in moving from a proposed rule to a final one.

C. Zen's remaining arguments simply urge that the agency should have differently interpreted the available data or weighed competing policy considerations. But these fail to apprehend the applicable principles of administrative law. And to the extent that Zen relies on evidence outside of the administrative record, Zen also disregards the well-established rule that review is "confined to consideration of the decision of the agency" and "the evidence on which it was based." *Federal Power Comm'n* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976).

1. Zen alleges (Mot. 5-9) that the agency erred in estimating how many people

have been injured by magnet sets. As an initial matter, Zen's factual claims rest heavily on a December 2014 transcript of a *different* administrative proceeding that is not in the record and, indeed, occurred months after the Commission issued this rule. *See* Mot. 7-8. Zen cannot invalidate a rule on the ground that the agency did not consider materials that were not (and could not have been) part of the rulemaking.[3]

More fundamentally, the Commission had ample basis for its factual analyses. The agency acknowledged the sorts of methodological concerns that Zen now raises and explained that it had no choice but to work with necessarily imperfect data, such as emergency room reports, and estimate and extrapolate from there. The agency explained that it reviewed databases containing reports of injuries; identified reports referencing ingested magnets; counted injuries clearly attributable to the magnet sets at issue (such as by reference to a brand name); and discarded incidents connected to other identifiable magnet-types, such as "kitchen magnets." *See* 77 Fed. Reg. at 53,784, 53,791; 79 Fed. Reg. 59,964-59,965, 59,969, 59,978-59,980. The agency further explained that, because reports "include[] incidents involving all types of magnets, not just magnet sets," it had to rely on narratives, such as notes in emergency room reports, to estimate which ones "involve" or "possibly involve" the

[3] Moreover, Zen's extra-record statements merely observe what the agency itself explained: Incident reports that do not clearly state the type of magnet are classified by making a "judgment call." Thus, it cannot be said to a "statistical certainty" that the agency's estimates include no injuries caused by other magnet types. Mot. 8. That observation does not undermine the agency's reasoned extrapolation from available data.

magnet sets at issue here. 77 Fed. Reg. 53,784.

Thus, the agency made clear that its injury counts were "estimates," and, in response to comments like those urged by Zen, the agency explained that its analyses "acknowledge that there is some uncertainty concerning the estimated annual average of medically attended injuries." 79 Fed. Reg. at 59,968; *accord id.* at 59,980. The agency candidly recognized that it may have incidentally included incidents involving magnets that would not be covered by the rule. *Ibid.* On the other hand, the agency also noted that by excluding magnets "classified as 'unknown or other,'" it may also have *excluded* incidents attributable to covered magnet sets. *Ibid.* (Indeed, "medical experts reported that the available research most likely reflects an *undercount* of the true incidence of injuries associated with magnet sets." *Id.* at 59,966 (emphasis added).)

It was well within the Commission's discretion to proceed on this basis. As the Supreme Court has explained, "[i]t is not infrequent that the available data does not settle a regulatory issue." *State Farm*, 463 U.S. at 52. An agency merely must "explain the evidence which is available" and "offer a rational connection between the facts found and the choice made." *Ibid.*; *see Forester* v. *Consumer Prod. Safety Comm'n*, 559 F.2d 774, 788-789 (D.C. Cir. 1977) (agency need not "develop a precise 'body count' of actual injuries that will be reduced by each regulatory provision" and "no precise statistical showing is required"). The Commission has done so here.

Zen's remaining criticisms of the Commission's methodology merely second-guess the specific judgment calls that agency experts had to make when interpreting

this imperfect data. For example, Zen faults the agency for counting injuries caused by magnets described as "small" or described as "round," rather than only counting reports with both terms. *See* Mot. 6-7. But that kind of judgment call is for the agency to make.[4] Given the imperfect data and the need to balance over- and underestimates, the agency's methodology was hardly irrational.

2. Zen next argues (Mot. 9-12) that the agency did not strike the right balance between the dangers of small, high-flux magnet sets, and the utility of such sets. Zen asserts—based, in part, on December 2014 transcripts not in the rulemaking record (*e.g.,* Mot. 10, 11)—that magnet sets may be useful for art, education, and research and the safety rule would impede such uses. But the agency acknowledged these uses and considered the costs and benefits, and Zen cannot seek to invalidate the rule merely because the agency could have struck a different balance.

The agency acknowledged that a cost of the safety standard would include "lost use value experienced by consumers who would no longer be able to purchase magnets that do not meet the standard," and the agency even sought to model that loss. *See* 79 Fed. Reg. at 59,980-59,882. In response to comments that "high-powered magnets have many laudable uses, including for education and research," and "value

[4] Zen's argument also rests on a misunderstanding of the final rule. Zen asserts that there was overcounting because the final rule covers only magnets that are "both strong *and* round." Mot. 7. But the rule does not require that magnets be round at all. *See* 16 C.F.R. § 1240.2. The covered high-powered magnets may, for example, be "cube-shaped." 79 Fed. Reg. at 59,963.

as an artistic medium," the agency explained that the rule does not cover "high-powered magnets that serve industrial and commercial needs," that "less powerful" or larger magnets could be used, and that in addition to compliant magnet sets, entirely different products may also be useful for the same purposes. *Id.* at 59,967, 59,977. The agency also acknowledged, however, that not all alternatives are good substitutes for all purposes. *Ibid.*

Zen is on no firmer ground in declaring that the magnetic flux requirement would make magnets "useless for nearly any type of manipulation." Mot. 10. Zen's only support for that claim is a single extra-record statement that lower-flux magnets are difficult to use for constructing certain three-dimensional shapes and therefore "are ineffective as educational tools to teach lattice structures." Mot. Ex. C. at 13-14. Moreover, Zen's assertion ignores the possibility of using larger or connected high-flux magnets not covered by the rule. 79 Fed. Reg. at 59,967. More fundamentally, the agency fully acknowledged that lower-flux magnets "may be too weak for building sculptures or . . . other construction activities" (*id.* at 59,977), and that larger magnets may be "more limited" in their uses (*id.* at 59,967), but concluded that the safety rule was nonetheless warranted. The fact that the agency fully considered Zen's objection but did not treat it as dispositive is not a basis for invalidating the rule.

3. Zen next asserts (Mot. 12-13) that the agency lacked a rational basis for concluding that the magnet safety rule is "reasonably necessary to prevent or reduce an unreasonable risk of injury." 15 U.S.C. § 2056(a). Zen's argument repeats its

assertions that the agency did not accurately gauge the "risk of the magnets" or "the rule's effects on product utility." Mot. 12. Zen's only additional argument is its observation (Mot. 12-13) that these magnets only injure people if swallowed. That does not address whether the safety standard is "reasonably necessary to prevent or reduce an unreasonable risk of injury." 15 U.S.C. § 2056(a). As the agency explained, "[a] product may present an unreasonable risk of injury, even if the product does not contain a fault, flaw, or irregularity," based on "how consumers may actually use a product." 79 Fed. Reg. at 59,966-59,967 (citing *Southland Mower* v. *Consumer Prod. Safety Comm'n*, 619 F.2d 499, 513 (5th Cir. 1980) ("Congress intended for injuries resulting from foreseeable misuse of a product to be counted in assessing risk")); *see ibid.* (examples of rules for cigarette lighters and lawnmowers).[5]

4. Finally, Zen posits (Mot. 13-14) that, because a number of manufacturers have voluntarily stopped selling dangerous magnet sets after the agency proposed its rule in 2012, the agency's use of pre-2012 data rendered the cost-benefit analysis unsupportable. Neither Zen nor anyone else submitted comments on this issue, and Zen therefore cannot now challenge the final rule on that basis. *See, e.g., Universal*

[5] If Zen means to argue that some alternate requirement could prevent people from ingesting dangerous magnets, the agency explained that despite "warnings or labeling," caregivers still purchased sets for children, and that even when caregivers "intended to keep the sets away," children nonetheless got hold of them, resulting in injuries. 77 Fed. Reg. at 53,783. The final rule thus addressed alternatives and explained why, notwithstanding such options, the size and flux requirements were reasonably necessary. *See* 79 Fed. Reg. at 59,974-59,976 (discussing, *inter alia,* use of warnings, packaging restrictions, and rules on where sets can be sold).

Health Servs., Inc. v. *Thompson*, 363 F.3d 1013, 1019-20 (9th Cir. 2004) (collecting cases).

There are, moreover, persuasive reasons that no one made such a suggestion. First, as the agency explained, it used a pre-2012 baseline because "[t]he expected benefits of a product safety regulation must be measured against a baseline representing the best assessment of how the market would operate and how products would be used in the absence of the intervention." 79 Fed. Reg. at 59,978. Second, this argument would render almost impossible any regulation of products in a changing market. The agency must propose rules based on the data available at the time and cannot indefinitely delay rules as the market changes and as new data is then collected about the prior year's market changes. Third, and in any event, decreasing sales will decrease *both* the costs and the benefits of the rule. If fewer dangerous magnet sets are sold, then a safety rule may not prevent as many injuries, but it also will not affect as many manufacturers, importers, or consumers. The agency accordingly was well within its discretion to look to pre-2012 data.

II. Zen Has Failed to Show That the Balance of Harms and the Public Interest Favor the Extraordinary Relief Sought Here

Having failed to establish a likelihood of success on the merits, Zen cannot obtain an injunction. *See Warner* v. *Gross*, 776 F.3d 721, 736 (10th Cir. 2015). But in any event, Zen also has not established that its requested order is necessary to prevent irreparable injury or that any such interest is not outweighed by the injury to the public interest and the Commission, which is charged with protecting consumers.

Most fundamentally, Zen has not established that an injunction is necessary to prevent any irreparable injury to its own interests. Zen quotes statements by the Commission about the potential effects of the rule on businesses generally. Mot. 16-17. Yet Zen notably does not claim an order is necessary to protect *itself*. Nor does Zen include any kind of detailed declarations about the effect of this rule on Zen's importing volume or sales figures; exactly what business steps Zen can take only if it gets the extraordinary relief it seeks; and why those steps are critical to Zen's business.

That may be because, as Zen's CEO has suggested, Zen has already stopped importing non-compliant magnet sets and, in light of the lead time to import from China, will not resume doing so until this case is finally resolved.[6] Further, Zen can still import magnet sets that comply with the rule: Zen could import lower-flux sets to sell for other purposes, or Zen could import high-flux sets with larger or interconnected pieces that prevent swallowing. *See* 79 Fed. Reg. at 59,967, 59,968. Other companies already make and sell such products. *See id.* at 59,967, 59,977.[7]

---

[6] Melanie Asmar, *Denver's Zen Magnets Wins Motion to Temporarily Lift Feds' Magnets-Ball Ban* (Apr. 6, 2015), http://www.westword.com/news/denvers-zen-magnets-wins-motion-to-temporarily-lift-feds-magnet-ball-ban-6630520; *see also* http://zenmagnets.com/cpscs-magnet-sphere-ban-lasted-17-hours/

[7] Zen's motion also contains an unexplained assertion (Mot. 17-18) that an injunction will "help protect Zen's due process rights." Zen does not, however, make any due process argument. Zen merely quotes a statement by a Commissioner who abstained from voting on the rule, because she did not want her vote to suggest that she had prejudged related issues in an ongoing adjudication. Zen has not explained why enjoining the rule, which has been voted on, would erase any such inference, let alone concern any due process rights.

Any actual claim of irreparable injury would also be difficult to square with Zen's own litigation conduct. Although Zen was actively involved in the rulemaking, submitted a comment, and immediately made press statements about the final rule,[8] Zen waited until the last possible day to file this action. *See* 15 U. S. C. § 2060(a). With the rule then set to take effect four months later, Zen did not take immediate action or move to expedite. Instead, Zen obtained an extension of the time to file its opening brief and then further waited until the rule came into effect—six months after the rule issued—to file this motion. Zen's delay "tends to blunt [its] claim of urgency and counsels against the grant of a stay." *Ruckelshaus* v. *Monsanto Co.*, 463 U.S. 1315, 1318 (1983) (Blackmun, J., in chambers) (stay application filed seven weeks after decision, and applicant sought 30-day extension to file jurisdictional statement).

At the same time, enjoining this safety standard, which was promulgated by the expert agency charged with regulating consumer product safety, would endanger children and harm the agency. There are a number of small firms that manufacture consumer magnet sets. An injunction would invite these companies to make or import unsafe sets. Although Zen quibbles about the *number* of children who have been injured by these products, even Zen does not seriously dispute the expert medical consensus that they are dangerous and have been responsible for serious

[8] *See, e.g.,* Melanie Asmar, *Denver's Zen Magnet Is Fighting the Federal Givernment Over Its Ban of Tiny Magnet Balls* (Oct. 8, 2014), http://www.westword.com/news/denvers-zen-magnets-is-fighting-the-federal-government-over-its-ban-of-tiny-magnet-balls-6051787.

injury and death.[9] It is no answer to say (Mot. 18-19) that the public would "benefit from a stay" because non-compliant magnet sets are useful or fun. That just asks this Court to reweigh the judgment made by the expert agency charged with evaluating precisely those issues, and to do so with far less data. It is also no answer to declare (Mot. 18, 19) that the agency could take steps to designate noncompliant magnet sets as "imminent hazards" and then seek judicial relief, such as a court-ordered recall, under 15 U.S.C. § 2061. Enjoining a consumer safety rule harms the agency charged with promulgating that rule and—more importantly—the public that the rule protects. And although Section 2061 can be used to address an "imminent and unreasonable risk of death, serious illness, or severe personal injury" (*id.* § 2061), it is not in the public's or agency's interest to leave entirely unregulated goods that do not rise to this level but do pose "an unreasonable risk of injury," the standard for the rule at issue here (*id.* § 2056(a)).

CONCLUSION

For the foregoing reasons, petitioner's motion should be denied.

[9] Although Zen asserts (Mot. 19) that it does not sell its magnet sets to children, Zen can make no similar assertion about others who import magnet sets. And in any event, the record shows that magnet sets sold to adults, including adults who took precautions to keep them away from children, have nonetheless caused serious injuries and death. *See, e.g.,* 77 Fed. Reg. at 53,783; 79 Fed. Reg. at 59,964-59,965.

Respectfully submitted,

BENJAMIN C. MIZER
Acting Assistant Attorney General

MARK R. FREEMAN
ADAM C. JED
(202) 514-8280
Attorneys, Appellate Staff
Civil Division, Room 7240
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

APRIL 2015

CERTIFICATIONS OF COMPLIANCE

I hereby certify that this response complies with the requirements of Fed. R. App. P. 27(d)(1)(E) because it has been prepared in 14-point Garamond, a proportionally spaced font, and that this response complies with the page limitation of Fed. R. App. P. 27(d)(2) because it is 20 pages long.

I further certify that (1) all required privacy redactions have been made; (2) any required paper copies are exact versions of the document filed electronically; and (3) the electronic submission was scanned for viruses and found to be virus-free.

/s/ Adam Jed
Adam C. Jed

CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2015, I electronically filed the foregoing document with the Clerk of this Court by using the appellate CM/ECF system. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Adam Jed
Adam C. Jed