No. 20-1373

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

LISA MILICE,
Petitioner,
v.

CONSUMER PRODUCT SAFETY COMMISSION,
Respondent.

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

PETITIONER'S REPLY BRIEF

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SUMMARY OF ARGUMENT

Congress passed the Consumer Product Safety Act to protect the public from dangerous consumer products and to help consumers "safeguard themselves adequately" from unreasonable risk of injuries caused by unsafe products. 15 U.S.C. § 2051(a). Consistent with this purpose, Congress charged the Consumer Product Safety Commission ("CPSC" or the "Commission") with promulgating consumer product safety standards for a variety of products, *id.* § 2056, including durable nursery products. *Id.* § 2056a. Both CPSC's organic statute, *id.* § 2058, and the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(a), require the Commission to make its safety standards available to the consumers whose health and economic choices are impacted by those standards.

A consumer's inability to access CPSC's safety standards necessarily constrains her ability to safeguard herself adequately. Secret law does more than undermine consumer choice and violate FOIA; it also violates the Constitution. Our constitutional structure both requires and depends upon free access to the law. Without free access, persons affected by the law do not have adequate notice of the law's contents and cannot participate fully in self-governance. Despite this fact, the Commission has declared that a $56 fee is a "negligible regulatory burden" to charge for a safety standard that Congress required CPSC to promulgate for the benefit of consumers. *See* Respondent's Brief at 39 [hereinafter "CPSC Br."].

The Commission dismisses Ms. Milice's statutory and constitutional arguments with little analysis, focusing almost exclusively on ASTM's copyright in the voluntary standards it develops. But this is not a copyright case, and Ms. Milice does not have an interest in how CPSC and ASTM resolve their copyright dispute. Ms. Milice's interest is in her free access to the laws that affect her and her infant. CPSC cannot comply with its statutory and constitutional obligations unless it provides consumers with free access to its *consumer* product safety standards—both during the rulemaking process and once a standard becomes a final rule. Ms. Milice asks this Court to require the Commission to meet its legal obligation to provide consumers free access to the law.

DISCUSSION

I. THIS COURT HAS JURISDICTION OVER MS. MILICE'S PETITION FOR REVIEW

Ms. Milice filed her Petition to Review pursuant to 15 U.S.C. § 2060(a), which provides that within 60 days of CPSC's promulgating a consumer product safety rule "any person adversely affected by such rule, or any consumer or consumer organization may file a petition with the United States court of appeals … for the circuit in which such person, consumer, or organization resides … for judicial review of such rule." As a consumer of infant bath seats and a resident of Pennsylvania, section 2060(a) authorizes Ms. Milice to file her petition for judicial review with this Court, and subsection (c) provides this Court with jurisdiction to consider her petition. *See id.* § 2060.

The Commission does not dispute that Ms. Milice satisfies the requirements of § 2060(a). Instead, the Commission suggests half-heartedly that it "appear[s]" that Ms. Milice's petition is "subject to the special judicial review procedures of 15 U.S.C. § 2060(g), which apply 'in lieu of' the general judicial review provisions in § 2060." CPSC Br. at 1-2. The Commission has not argued outright that this Court lacks jurisdiction; it merely tossed in a jurisdictional red herring to mislead the Court.

The structure of CPSC's organic statute and the context in which Congress added § 2060(g) reveal that Congress vested this Court with subject-matter jurisdiction to consider petitions for review like the one in this case. *See Monzon v. De La Roca*, 910 F.3d 92, 102 (3d Cir. 2018) (interpreting a statute based on "the broader context of the statute as a whole"). Subsections (a) through (f) of § 2060 govern the lifecycle of a petition to review the Commission's safety standards. The first three subsections outline the initiation of review procedures—who can petition, when and where they can file, what arguments and data are before the court, and which court has subject-matter jurisdiction. *See* 15 U.S.C. §§ 2060(a)–(c). And the next three subsections apply at the disposition of the case—determining finality, filing a petition for certiorari, what relief is available, and how to calculate attorneys' fees. *See id.* §§ 2060(d)–(f). These are the review procedures that apply to Ms. Milice's petition.

Subsection (g) is an appendage that Congress added to § 2060 in 2008 to apply exclusively to the "[e]xpedited judicial review" of new rules when promulgated for the first time under the special strictures of the Consumer Product Safety Improvement

Act of 2008 (the "2008 Amendment"). *See* 15 U.S.C. § 2060(g). The 2008 Amendment added several safety standards to CPSC's purview and required the Commission to promulgate new rules for all these new standards on an expedited basis. *See, e.g.*, *id.* § 2089 (instructing CPSC to promulgate safety standards for all-terrain vehicles within 90 days of August 14, 2008).

The standards for durable nursery products like infant bath seats were among the new consumer product safety standards that the 2008 Amendment required CPSC to promulgate expeditiously. *See id.* § 2056a. Subsection 2056a(b)(2) set the timetable in which the Commission had to begin promulgating such standards, and subsection 2056a(b)(3) subjected those new standards to expedited judicial review pursuant to § 2060(g). Thus, it is true that § 2060(g) required all challenges to the initial rules promulgated beginning August 15, 2008 to proceed through the expedited review procedures in the D.C. Circuit—a streamlined process to accommodate the inordinate number of new rules slated to be issued. But the statute clearly contemplates a different procedure for the initial expedited review than for the review of subsequent revisions (under the normal procedure).

Section 2056a(b)(4) governs revisions to any standards under § 2056a. The first three subsections of § 2056a(b) set out the expedited procedures for promulgation and review, but subsection (4) states explicitly, "The revised voluntary safety standard shall be considered to be a consumer product safety standard issued by the Commission under section 2058 of this title[.]" *Id.* § 2056(b)(4)(B). Because subsequent revisions

under § 2056a(b)(4) are treated as standards issued pursuant to § 2058, they are subject to ordinary judicial review under the procedures of §§ 2060(a)–(f) rather than the expedited procedures in § 2060(g).

Much of the Commission's confusion in this case seems to stem from its failure to recognize that its governing statutes treat differently new standards for durable nursery products that the Commission had to promulgate in response to the 2008 Amendment and subsequent revisions to those standards, like the one at issue in this case. *See* CPSC Br. at 16 (dismissing the statutory requirement that CPSC publish the text of its rules by asserting incorrectly that "15 U.S.C. § 2058 does not apply here"). But Ms. Milice's challenge is not to an *expedited* standard—it is a challenge to a revised standard enacted in the ordinary course of the Commission's rulemaking. As such, section 2060(a) governs, and this Court has jurisdiction over Ms. Milice's petition.

II. CPSC MUST MAKE ITS SAFETY STANDARD REASONABLY AVAILABLE

The parties partially agree that the determination of what level of availability is reasonable, as required by 5 U.S.C. § 552(a), depends on the relevant circumstances. *Compare* Petitioner's Opening Br. at 22 ["Milice Br."] (explaining that "reasonable" is "necessarily circumstance dependent") *with* CPSC Br. at 15 (describing § 552(a)'s reasonable-availability requirement as "a flexible standard that allows agencies to take account of surrounding circumstances, including relevant legal constraints such as copyright law"); *see also* Amicus Br. of Am. Nat'l Standards Inst., *et al.* at 28 ["SDO Br."]

("[T]here [i]s not 'one solution for how to make standards accessible."). Yet, CPSC and its *amici* insist incorrectly that the status quo—CPSC's making its binding safety standard available only in hard copy in Bethesda, Maryland, and Washington, D.C.—is the only viable option because ASTM had a copyright on the standard that CPSC incorporated into the Rule.

CPSC frames Ms. Milice's petition as an attack on incorporation by reference generally and presents this Court with a false choice between the status quo and a court order forcing CPSC to publish all its incorporated standards in the Federal Register in violation of the Copyright Act and the Fifth Amendment. Despite the Commission's best efforts at obfuscation, the issue remains whether CPSC has ensured that its standard at issue is reasonably available to the public. *See* 5 U.S.C. § 552(a). The standard is not reasonably available, and ASTM's newfound willingness to voluntarily make a read-only version more accessible on ASTM's own website does not change that fact. CPSC cannot rely on an unaccountable private company to make the Commission's binding standards publicly available. Because the relevant safety standard is—at most—available through CPSC only in hard copy in two D.C.-area

reading rooms,[1] the Commission's incorporation by reference was unlawful and, consequently, so is the Rule.

A. Two Copies Near the Capital Do Not Satisfy Reasonable Availability

The congressional purpose in allowing incorporation by reference was to reduce the size of the bound version of the Code of Federal Regulation and Federal Register. Milice Br. at 22-23. And Congress's purpose in amending the Administrative Procedure Act ("APA") through FOIA was to ensure the public's accessibility to law and other governmental records. *See Air Force v. Rose*, 425 U.S. 352, 365-66 (1976) (FOIA "assur[es] public access to all governmental records whose disclosure would not significantly harm specific governmental interests"). Robust access to law is not at odds with incorporation by reference; the agency need only ensure that its incorporated standards are available in a form other than the bounded Federal Register. In fact, agencies making incorporated standards "widely available" was just what Congress anticipated when it allowed for incorporation by reference. Peter L. Strauss, *Private Standards Organizations & Public Law*, 22 Wm. & Mary Bill Rts. J. 497, 519 (2013). Such

[1] The Commission, relying on the declaration of Secretary Alberta Mills, suggests that Ms. Milice and undersigned counsel were "misinformed" by CPSC representatives who stated that incorporated standards are not available in a Bethesda reading room. *See* CPSC Br. at 34 (quoting Mills Decl. ¶¶ 5-6). Everyone makes mistakes, but repeated mistakes indicate systemic issues. Perhaps correcting this mistake was among the "improved procedures" that CPSC implemented in response to Ms. Milice's Petition for Review. *See* ASTM Br. at 10. Either way, the fact that CPSC's own representatives were unaware of the Commission's reading room tends to show that a D.C.-area reading room is not accessible for most consumers.

wide availability outside the bounded Federal Register achieves both the purpose behind incorporation by reference and FOIA's policy of broad public disclosure. *See Rose*, 425 U.S. at 365-66 (interpreting FOIA's disclosure requirements in favor of disclosure).

Instead of engaging with the statutory text or legislative purpose, CPSC and its *amici* insist that this case begins and ends with the Commission's obligation to protect ASTM's copyright. Although CPSC recognizes that protecting ASTM's copyright is but one of many factors to consider in determining whether a standard is reasonably available, *see* CPSC Br. at 25, CPSC has not identified any other factors it has accounted for, nor why ASTM's copyright outweighs all else.

Worse yet, the authority on which CPSC and its *amici* rely comes from an Office of Management and Budget ("OMB") bulletin rather than binding law. *See, e.g.*, SDO Br. at 28 (quoting OMB Circular A-119 for the proposition that agencies must "observe and protect" the copyright of standards incorporated by reference). Closer inspection of OMB's bulletin, however, undermines their position. OMB instructed agencies to "observe and protect" copyrights only *if* the agency "published [a voluntary standard] in an agency document." Office of Mgmt. & Budget, Circular No. A-119 (1998), *available at* https://www.whitehouse.gov/wp-content/uploads/2017/11/Circular-119-1.pdf. This instruction assumed rather than prohibited the publication of copyrighted standards; OMB merely recognized the need to account for copyrights—whether

through negotiating licensing or otherwise.[2] CPSC has simply not explained why it cannot simultaneously protect ASTM's copyright and make the binding standard available to the public.

CPSC also equivocates on how much copyright law constrains its ability to disseminate the standard more widely than it has here. For instance, CPSC acknowledges that "particular uses of ASTM's standard might qualify as fair uses now." CPSC Br. 32-33. It qualifies this point, however, by opining that "it is a separate question whether fair use would likewise permit the Commission to publish the standard in a format that would allow unrestricted copying and distribution by all comers." CPSC Br. at 33; *see also CCC Info. Servs., Inc. v. Maclean Hunter Market Reports,*

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[2] CPSC's *amici* note that the Office of the Federal Register ("OFR") has opined on the application of the Copyright Act to incorporation by reference. *See* ASTM Br. at 13-15; SDO Br. at 24-25. Both *amici* invoke *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 836 (1984), and ask this Court to defer to OFR's interpretation of the Copyright Act. To do so would be a preposterous extension of *Chevron* deference for several reasons in addition to those set out in Ms. Milice's opening brief. Milice Br. at 30 n.7.

For one, OFR has no special knowledge or expertise about how to apply the Copyright Act. *Ardestani v. I.N.S.*, 502 U.S. 129, 148 (1991). Secondly, OFR is not before this Court and CPSC has (correctly) not asked this Court for deference, thereby forfeiting any deference in this case. *See E. Bay Sanctuary Covenant v. Barr*, 964 F.3d 832, 845 (9th Cir. 2020) (holding that *Chevron* deference is not a standard of review and is thus subject to forfeiture or waiver); *Albanil v. Coast 2 Coast, Inc.*, 444 F. App'x 788, 796 (5th Cir. 2011) (unpublished) (same); *C.F.T.C. v. Erskine*, 512 F.3d 309, 314 (6th Cir. 2008) (same). Further, reasonable availability under § 552(a) is a question of statutory interpretation, which this Court reviews *de novo* without regard to OFR's "policy judgment." *Compare* SDO Br. at 25 (asking this Court not to disrupt OFR's "policy judgment") *with United States v. Reynolds*, 710 F.3d 498, 506-08 (3d Cir. 2013) (announcing that a court's statutory review under the APA is *de novo*).

Inc., 44 F.3d 61, 74 n.30 (2d Cir. 1994) (suggesting a middle-ground approach that would treat as fair use the public's use of private work incorporated into law while still protecting the copyright against competitive commercial publication) (citing Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* (1994)). Absent from CPSC's equivocation is any explanation of why the Commission did not take advantage of those fair uses to make the standard available beyond the D.C. area. The Commission's decision to shield its binding standard from public view based on a half-baked copyright analysis is arbitrary and capricious at best. *See NVE, Inc. v. Dep't of Health & Human Servs.*, 436 F.3d 182, 189-90 (3d Cir. 2006).

Moreover, CPSC's misplaced, singular focus on copyright law needlessly complicates the issue by suggesting that an agency must either forgo incorporation by reference or violate copyright laws. But CPSC's own brief betrays this false choice. For instance, CPSC cites the Government Publishing Office's choice not to charge for online access to the Federal Register even though federal law might permit charging fees that cover overhead costs associated with posting and archiving materials online. CPSC Br. at 26. And CPSC also points to Ms. Milice's observation that 225 years ago the government disseminated laws by subsidizing the shipping costs of newspapers

before eventually providing free access to law depository libraries.[3] CPSC Br. at 40. These examples show two things: (1) the variety of ways that CPSC could have made its standard more-reasonably available; and (2) CPSC's current practice of printing only two physical copies of the law would have been unreasonable even by the standards of 1795.

Whether other means of availability—like nominal user fees for online viewing or the use of depository libraries—would satisfy § 552(a) is, at the very least, a closer

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[3] ASTM turned up yet another example of how CPSC's current practice is unreasonable by any standard. *See* ASTM Br. at 12. In *Department of Justice v. Federal Labor Relations Authority*, the Fifth Circuit interpreted a law that required agencies to produce documents to unions whenever the documents were necessary to the union and "reasonably available" to the agency. 991 F.2d 285, 289 (5th Cir. 1993). The court rejected (and refused to defer to) FLRA's statutory reading that deemed documents to be "reasonably available" for government disclosure so long as disclosure was not "excessively burdensome" on the agency. *Id.* at 289, 291. According to the Fifth Circuit, reasonable availability under the statute at issue existed near the middle of a continuum between turning over nearly all documents and turning over hardly any. *Id.* Because the agency's "excessively burdensome" approach was too near the end of the spectrum, the Court remanded with instructions that the agency "keep in mind Congress's stated goal of maintaining effective and efficient governmental operations[.]" *Id.* at 291-92.

Like FLRA's approach, CPSC's two-hard-copies policy is too extreme to satisfy *FLRA*'s middle-ground standard of reasonableness. And given that FOIA favors public access over efficiency, availability in this case must hew more closely to the disclosure side of the continuum. *See Rose*, 425 U.S. at 366 (requiring courts "to choose that interpretation most favoring disclosure.").

That is not to say, however, that reasonable availability means "maximally available." *See* ASTM Br. at 12. Even though producing standards on the Internet would be more accessible and less expensive than printing copies for depository libraries, CPSC can always demonstrate the reasonableness of an alternative approach once it comes up with one. Suffice it to say, there is a broad range of options between "maximally available" and forcing everyone across the United States to travel to CPSC's Bethesda reading room.

question than the one this case poses. *Cf. Nat'l Veterans Legal Servs. Program v. United States*, --- F.3d ---, 2020 WL 4516079, at *12 (Fed. Cir. Aug. 6, 2020) (holding that principles of constitutional avoidance support limiting the government's use of fees for PACER access "to the amount needed to cover expenses incurred in services providing public access to federal court electronic docketing services" because "the First Amendment stakes [] are high" and excessive fees would "diminish the public's ability to 'participate in and serve as a check upon the judicial process'") (citation omitted).

But the reasonableness of alternative means does not change the fact that CPSC's current practice does not meet the reasonable-availability threshold. Perhaps in recognition of how unreasonable and costly it is for interested persons to travel to Bethesda or the National Archives to learn what the law says, neither CPSC nor its *amici* spent any of their briefing defending the reasonableness of the Commission's two-hard-copies policy. CPSC's refusal to make the standard more readily available is contrary to law, 5 U.S.C. § 706(2)(C), and its unwillingness to provide more-reasonable alternatives is arbitrary and capricious. *Id.* § 706(2)(A).

Ironically, in seeking to demonstrate reasonable availability, CPSC and its *amici* rely almost exclusively on the fact that ASTM has, for the time being, made the standard at issue available for free online. *See, e.g.*, ASTM Br. at 16 (asserting that the standard is "readily available in many other ways" and then identifying the two D.C.-area reading rooms plus the various ways in which CPSC has directed interested persons to contact ASTM if they want to see a copy of the standard). While Ms. Milice agrees that free

online access would satisfy CPSC's statutory and constitutional obligation to make its binding rules available to the public, CPSC cannot rely on ASTM's voluntary accommodation to fulfill its obligation.

B. ASTM's Voluntary Actions Do Not Satisfy CPSC's Burden of Making Its Safety Standard Reasonably Available

Section 552(a) imposes on *the Commission* a requirement to make its substantive rules "available to the public." CPSC cannot satisfy this requirement by relying on the voluntary action of a third party.[4] Even if "ASTM's standard *is* available online for free … on ASTM's website[,]" that does not relieve CPSC of its legal duty. *See* CPSC Br. at 15. ASTM's voluntary publication of its standards is irrelevant to this Court's review because no legal mechanism compels ASTM to provide access to its standards freely—or at all. ASTM recognizes as much in its brief, asserting that it is "not legally required"

[4] CPSC's misplaced reliance on the voluntary actions of ASTM also explains its misunderstanding of *Washington Trollers Association v. Kreps*, 645 F.2d 684, 685 (9th Cir. 1981). *See* CPSC Br. at 45. The Commission seems to suggest that the proposed standard and redline in this case were available to the interested public during the rulemaking process as required by 5 U.S.C. § 553. But again, this assumes wrongly that CPSC can rely on ASTM to make proposed standards available to the interested public. Moreover, ASTM has admitted in its brief that CPSC never even asked ASTM to make the proposed standard and redline available during the rulemaking at issue in this case. ASTM Br. at 9-10 (acknowledging that CPSC did not request that ASTM post the proposed standard in its reading room during the comment period). Given that the proposed standard was known only to CPSC (and ASTM) during the rulemaking process, the Ninth Circuit's rationale in *Kreps* remains persuasive for the reasons explained in Ms. Milice's opening brief. Milice Br. at 11-12.

to "mak[e] its [incorporated-by-reference] standards available to view for free on its website." ASTM Br. at 8.

Without any legal obligation to make CPSC's standards available on the government's behalf, ASTM's voluntary decision to do so currently cannot relieve CPSC of its own legal duty. The government cannot deprive the public of constitutional rights by outsourcing the functions of government—even if the outsourcing "promot[es] efficiency" and "eliminat[es] [] cost[s]." ASTM Br. at 6-7. Just as an organization of defense attorneys' willingness to represent some defendants *pro bono* would not absolve the government of its constitutional duty to provide counsel to some indigent defendants, *Gideon v. Wainwright*, 372 U.S. 335 (1963), the purported willingness of a third-party to publish CPSC's safety standards does not absolve the Commission of its own legal duty to make those standards available.

It's not just ASTM's reading room that's irrelevant to this case; none of ASTM's rulemaking processes satisfy CPSC's burdens here. Although ASTM claims that "[o]pen participation and consensus are core ASTM principles" and that "[t]he public is free to participate in the development of ASTM standards," ASTM Br. at 4, 17, the private organization remains free to change its mind at any time. There is no legal check on or judicial review of ASTM's processes. *See* ASTM Br. at 8 (noting that ASTM is under no legal obligation to make its standards available).

Ms. Milice does not dispute that ASTM's standards might add value to the marketplace and help keep consumers safe. It's admirable that ASTM created an online

reading room and claims to see the importance of democratizing its standard-setting processes.[5] But the point remains that ASTM is not legally bound to follow any process it touts in its brief. ASTM can change its mind tomorrow (or as soon as the decision in this case is handed down), ignore or exclude participants, obscure all transparency, remove its standards from its website, or increase its prices exponentially—all without legal liability.

This possibility is not merely theoretical. In 2012, Congress prohibited the Pipeline and Hazardous Materials Safety Administration ("PHMSA") from issuing rules or non-binding guidance unless the incorporated material was "made available to the public, free of charge, on an Internet Web site." Pub. L. No. 112-90, 125 Stat. 1904, 1919 (2012). This became an issue because PHMSA relied on Standard Developing Organizations ("SDOs") to publish their own standards on the Internet without compensation, and one SDO refused to do so. 159 Cong. Rec. H4499 (daily ed. July 16, 2013) ("Unfortunately, to date ASME has been unwilling to move forward to provide transparency to their standards like all the other organizations have been willing to do so."). With the agency and SDO in a deadlock, Congress expedited consideration

[5] Although ASTM frames its "click-through [] license agreement" as a mere formality, *see* ASTM Br. at 9 n.2, the agreement requires the standard-seeking public to share their identities and give up rights in order to see the law. Admin. Law Profs. Br. at 11-12 (describing the "oppressive terms" of ASTM's licensing agreement). Of course, private organizations often require that users agree to terms of service. It becomes a problem in this case only because the government is forcing the public to rely on ASTM for access to the law.

of an amendment that struck the language "on an Internet web site" from the law. *Id.* at H4495-96. The amendment, however, still required PHMSA to make its standards (but not its guidance) available for free offline, which satisfied the congressional purpose "of a transparent government with free access to standards for noncommercial purposes." *Id.* at H4496 (noting that requiring people to drive to Washington, D.C., to see a standard would not satisfy this standard); Pub. L. No. 113-30, 127 Stat. 510, 510 (2013).

ASTM now insists that Ms. Milice's "sole recourse" is to lobby Congress to change the law.[6] ASTM Br. at 18. But the concurrent amendments to the Pipeline Safety Act demonstrate only that persons affected by incorporated standards cannot

[6] CPSC and ASTM also insist that Congress's amendments to the Pipeline Safety Act demonstrate that FOIA did not already require PHMSA to make its standards freely accessible to the public. *But see Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 839-40 (1988) ("[T]he opinion of this later Congress as to the meaning of a law enacted 10 years earlier does not control the issue. The views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.") (cleaned up). CPSC even goes so far as to suggest, without authority, that an amendment to another law makes language in an entirely different law "superfluous." CPSC Br. at 28. This approach to statutory interpretation is dangerously wrong. *See Bostock v. Clayton Cty.*, 140 S. Ct. 1731,1747 (2020) (describing reliance on subsequent legislative history as a "particularly dangerous" approach that "should not be taken seriously") (citations omitted).

In practice, CPSC's attempted misuse of a subsequent legislative amendment to a different statute would set a dangerous precedent when the subsequent legislative history corrected an agency's failure to follow the law. FOIA requires agencies to make available any standards incorporated by reference. When PHMSA failed to do so, Congress amended PHMSA's statute to impose the requirement more explicitly. Interpreting the subsequent amendment as indicative of the prior Congress's purpose would allow agencies effectively to rewrite (or at least undermine the meaning of) statutes by refusing to comply with them.

rely on SDOs for access to the law—not that legislation was the only option to resolve the impasse between PHMSA and the SDO. Although Ms. Milice has no legal recourse against ASTM if it diverges from its rulemaking processes or if ASTM deletes its online reading room, her recourse against a recalcitrant federal agency is not so limited. Congress has required CPSC to make its standards available to the public. *See* 5 U.S.C. § 552(a); 15 U.S.C. §§ 2058. And when CPSC fails to meet its legal obligations, Congress has already provided Ms. Milice an additional recourse: Article III courts like this one vindicate the rights of consumers. *See* 5 U.S.C. § 706(2)(C); 15 U.S.C. § 2060.

The means by which the Commission satisfies its legal duties cannot depend on the whims of a third party. This litigation demonstrates how responsive Respondent and ASTM can be to active litigation. ASTM admits that it was Ms. Milice's "filing of the Petition for Review" that prompted CPSC to work with ASTM "to improve procedures so that standards are automatically posted during the comment period." ASTM Br. at 10. But once this litigation concludes, nothing prevents CPSC's reversion to past practices absent a court order requiring the Commission to make its rules reasonably available without reliance on the voluntary compliance of ASTM. This Court must announce that providing two physical copies near the capital, coupled with CPSC's apparent reliance on ASTM's reading room, does not satisfy CPSC's obligation to make its standard "reasonably available."

III. CPSC'S FAILURE TO MAKE ITS STANDARD AVAILABLE VIOLATES MS. MILICE'S CONSTITUTIONAL RIGHTS

CPSC has not come out and said that the public has no constitutional right to access the law, but it might as well have. *See* CPSC Br. 38-40. Just as it did with its statutory arguments, the Commission once again wields ASTM's copyright as a sword to hack away at Ms. Milice's rights. A third party's copyright interests, however, do not justify the Commission's violation of the constitutional rights of the consumers whom it is charged to protect. Ms. Milice, like all Americans, has a right to see what the law says—especially those laws that affect her. The structure of the Constitution, the Due Process Clause of the Fifth Amendment, and the First Amendment all work to ensure that a person with a concrete interest in a law has the right to notice of what the law says, to participate in the lawmaking process, to petition the government about the law's contents, and to be heard through judicial review when the government violates any of those rights.

CPSC does not contest that Ms. Milice, a consumer of durable infant products, is within the class of persons implicated by the Commission's safety standards; nor does CPSC contest that she has standing to challenge the constitutionality of its safety standards for durable nursery products. Again, the Commission's only defense is obfuscation. By waving the copyright flag, CPSC attempts to deflect attention from the constitutional harm its secret standards cause to consumers. But this is not a copyright case and—regardless of ASTM's copyright interests—Ms. Milice has a

constitutionally protected right to access the law freely.

A. This Is Not a Copyright Case

Ms. Milice asserted that "CPSC's failure to make its standards freely accessible to the public is unconstitutional." Milice Br. at 39. CPSC's response was entirely beside the point: "Nothing in the Constitution provides that a privately authored copyrighted standard loses its copyright protections upon being incorporated by reference into law." CPSC Br. at 40-41. This case is not about ASTM's copyright—no matter how much CPSC would rather defend ASTM's copyright than its own unlawful actions.

Whether ASTM would retain its copyright if CPSC published the standard on its website and whether such publication would require compensation (or would be fair use) are important questions beyond the scope of this case. Ms. Milice has no greater legal interest in challenging ASTM's copyright than CPSC has in defending the issue. *But see* CPSC Br. at 29 (criticizing Ms. Milice for not identifying specific "provision[s] of the Copyright Act that would terminate [ASTM's] copyright protection"). Given that neither party has standing to contest the issues that CPSC raises, those questions are best left for another case. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (explaining that the standing doctrine limits the federal courts' authority to redressing a legal wrong in cases between parties with an actual controversy). CPSC and ASTM remain free to contemplate a licensing arrangement, litigate ASTM's copyright claim, or negotiate compensation for ASTM's copyright. Ms. Milice's interest in the outcome

extends only to ensuring that CPSC provides public access to its binding standards.

B. *Public.Resource* Did Not Exempt CPSC from Publishing Its Standards

The Commission's conflation of Ms. Milice's constitutional claims with copyright questions also confuses the applicability of *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498 (2020). The baseline holding of *Public.Resource* was that a member of the public could, without offending copyright laws, publish legal documents that a private company drafted for a legislature. *Id.* at 1509. Thus, even if this *were* a copyright case, *Public.Resource* would undermine the Commission's attempt to use ASTM's copyright as an absolute defense.

Indeed, to defend its constitutional violations, CPSC relies on an irrelevant distinction to distort the holding in *Public.Resource*. The difference between ASTM's arrangement with CPSC and that between LexisNexis and the Georgia legislature is that Georgia paid LexisNexis a pre-negotiated price through the public coffers whereas the access-seeking public must pay whatever price ASTM sets directly to ASTM. The price ASTM may set is, of course, always subject to change after the standard becomes law. Yet, the arguments of CPSC's *amici* depend on this distinction in the payment structure. ASTM BR. at 21 n.8; SDO Br. at 21 (describing LexisNexis's work as "created by a state legislative body"); *see also* CPSC Br. at 30 (claiming the *Public.Resource* "did not address any question regarding a copyright in a work authored by a party other than a government entity or official"). Under their reading, the government could presumably

deny access to all laws if the government outsourced legislative drafting to lobbyists or other private organizations so long as the government didn't pay for the drafting as Georgia did in *Public.Resource*. *See* SDO Br. at 21 ("The Court made clear that the [government-edicts] doctrine does not apply to 'works created by … private parties[] who lack the authority to make or interpret the law.'").

Maybe this distinction matters as a matter of copyright law, but the public's right to access the law cannot turn on whether the government paid its drafter up front. Nor, as CPSC seems to suggest, can the public's right to access hinge on whether the private drafter intended its standard to become law or whether the SDO "claim[s] an ownership interest in 'the law.'" *See* CPSC Br. at 31 (attempting to distinguish *Veeck v. S. Building Code Congress Int'l, Inc.*, 293 F.3d 791 (5th Cir. 2002), because the case "involve[d] an organization that had written a 'model building code []' with 'the sole motive and purpose of' becoming law").

C. Our Constitutional System Does Not Allow for Privately Held Law

Lost in CPSC and its *amici*'s discussion of the government-edicts doctrine is the principle underlying the doctrine. The government-edicts doctrine exists as an

exception to copyright protection because "no one can own the law."[7] *Public.Resource*, 140 S. Ct. at 1507. No one can own the law because the public must be able to access the law freely. *Id.* ("'[I]t needs no argument to show … that all should have free access' to [the law's] contents.") (quoting *Nash v. Lathrop*, 6 N.E. 559, 560 (Mass. 1886)). This concept is not abstract. *But see* CPSC Br. at 40 (claiming the right to see the text of binding law requires a "level of abstraction" that "cannot be ascribed to the founders") (citation omitted). Without free access to the law, the public cannot have fair notice of what the law requires, cannot engage in meaningful discourse on the law, and cannot meaningfully petition the government. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980) (plurality) ("[I]t is difficult for [the People] to accept what they are prohibited from observing."). In addition to depriving the public of the ability to make informed political choices, secret law in the consumer-product context injures consumers' economic liberty to make informed purchasing decisions. *Cf.* 15 U.S.C. § 2051(a) (describing the CPSC's purpose as helping consumers to "safeguard

[7] ASTM attempts to construe the Court's decision to resolve *Public.Resource* on statutory grounds as an implied rejection of the Respondent's and the Eleventh Circuit's more-broad constitutional basis. ASTM Br. at 23. But a court exercising judicial restraint by resolving a case on the narrowest grounds in no way resolves the broader arguments—especially when leaving questions unresolved avoids answering constitutional questions unnecessarily. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 205 (2009) (explaining that constitutional avoidance dictates deciding a case on more narrow grounds when possible); *Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not considered as having been so decided as to constitute precedents.").

themselves adequately").

CPSC's argument on the merits of Ms. Milice's constitutional claims comes down to this: "ASTM has not claimed ownership of the 'law.'" CPSC Br. at 40. The Commission misconstrues its own role as a rulemaking agency tasked with promulgating binding safety standards. Since CPSC incorporated ASTM's voluntary standard into the Rule, that standard is now binding law. As such, the public has a right to access that once-voluntary standard, and consumers are among the "the class of persons whom Congress has authorized to sue" when the Commission's consumer product safety standards are unlawful. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 (2014); *see also* 15 U.S.C. § 2060(a) (including consumers in the class of persons with standing to petition for review of CPSC's safety standards); *id.* § 2056a (instructing CPSC to consult with consumers in setting its safety standards).[8]

Charging for access to the law also disproportionately injures persons without the financial means to pay for access. *Cf. M.L.B. v. S.L.J.*, 519 U.S. 102, 124 (1996) (holding that due-process principles forbid the government from allowing the "basic right to participate in political processes" or to "access [] judicial processes" to "turn

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[8] The legal consequences of a once-voluntary standard's becoming binding law affect the rights of all interested persons, not merely the regulated industry. *But see* CPSC Br. at 39 ("Petitioner does not have standing to raise any constitutional claims on behalf of regulated parties, none of whom are before the Court."). Ms. Milice has emphasized the binding nature of CPSC's safety standards because standards that bind manufacturers impact consumer safety and consumers' purchasing decisions. The deprivation of due process that Ms. Milice seeks to challenge is her own, not that of any manufacturer.

on ability to pay"). Even if $56 were a "negligible regulatory burden" for manufacturers, *see* CPSC Br. at 39, the cost is not negligible for consumers like Ms. Milice who wish only to ensure the safety of a $30 product. Nina A. Mendelson, *Private Control Over Access to Law: The Perplexing Regulatory Use of Private Standards*, 112 Mich. L. Rev. 737, 791 (2014) (demonstrating how charging for standards "distinctively and systematically disadvantage[s] consumer interests"). Moreover, the $56 fee is not merely the cost of accessing the law but also the cost of participating fully in the political process, the cost of being able to give the informed consent necessary for self-governance, and the cost of making an informed purchase as a consumer. Although CPSC's brief minimizes the interest of consumers in its rulemaking process, Congress mandated that the Commission consult with consumer representatives, *see* 15 U.S.C. § 2056a(b)(1)(A), and the Constitution compels CPSC to make its binding safety standards accessible to the public beyond two reading rooms in the D.C. area, where consumers would have to travel.

CONCLUSION

This Court should order CPSC to provide the public free access to its binding safety standard.

August 7, 2020

Respectfully,

/s/ Jared McClain

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CERTIFICATE OF COMPLIANCE

I 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, plain, roman-style font. This brief also complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7). This brief contains 6,495 words.

I further certify that the electronic version of this brief was scanned with Trend Micro Antivirus. It contains no known viruses. Any paper copies of this brief that this Court orders Petitioner to file will be identical to the electronic version.

Respectfully,

/s/ Jared McClain
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New Civil Liberties Alliance

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed Petitioner's Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system on August 7, 2020. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Respectfully,

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