

No. 20-1373

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

LISA MILICE,

Petitioner,

v.

CONSUMER PRODUCT SAFETY COMMISSION,

Respondent.

**BRIEF AMICUS CURIAE OF
AMERICAN SOCIETY FOR TESTING AND MATERIALS
IN SUPPORT OF RESPONDENT**

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CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rule of Appellate Procedure 26.1 and Local Appellate Rule 26.1.1, American Society for Testing and Materials makes the following disclosure:

1) For non-governmental corporate parties, please list all parent corporations:

None

2) For non-governmental corporate parties, please list all publicly held companies that hold 10% or more of the party's stock:

None

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

None

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Not Applicable

Dated: July 24, 2020

s/ J. Kevin Fee

J. Kevin Fee

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INTERESTS OF AMICUS CURIAE

American Society for Testing and Materials d/b/a ASTM International (“ASTM”) is a self-funded non-profit organization established in 1898 and headquartered in West Conshohocken, Pennsylvania. ASTM is dedicated to the development and publication of international voluntary consensus standards for materials, products, systems, and services. Through its standards, ASTM positively impacts public health and safety, consumer confidence, and overall quality of life.

ASTM has developed more than 12,500 standards and has more than 30,000 members worldwide. Among these standards, ASTM is the author and copyright owner of the voluntary standard at issue in this case, ASTM F1967-19, Standard Consumer Safety Specification for Infant Bath Seats.¹

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner claims that a Consumer Product Safety Commission (“CPSC”) regulation incorporating one of ASTM’s standards by reference is hidden “behind a paywall” so that interested individuals “must pay the purchase price set by a private organization” to consult it. *Milice Br. 1*. These claims are false, and the

¹ All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2). No party’s counsel authored this brief in whole or in part and no party or party’s counsel, or person or entity other than ASTM, its counsel, and/or its members, contributed money to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E).

arguments Petitioner builds on top of this faulty factual foundation lack legal support as well.

First, the plain language of the Administrative Procedure Act refutes Petitioner’s contention that a standard is not “reasonably available” unless it is available online and for free. Even if there were some ambiguity on that point, the Office of the Federal Register’s resolution of this question against Petitioner’s position would merit deference.

Second, by any plausible measure, the standard here is reasonably available. ASTM makes all of its standards that are incorporated by reference into federal law, including ASTM F1967-19, available online, for free, in its reading room—in addition to many other sources of access. Petitioner’s contrary portrayal is simply untrue.

Third, Petitioner’s requested relief conflicts with copyright law. The text and structure of the Copyright Act and relevant precedent all confirm that private authors of copyrightable works do not lose their intellectual property rights merely because a government actor decides to incorporate their work by reference.

For these reasons and others discussed below, the petition for review should be denied.

BACKGROUND

I. ASTM’s Non-Profit Mission to Advance the Public Good Through Developing Voluntary Consensus Standards

As Petitioner’s counsel explains elsewhere, “manufacturing and markets are greatly aided, and consumers offered protection, by the application of uniform industrial standards created independent of law, as means of assuring quality, compatibility, and other highly desired market characteristics.” Peter L. Strauss, *Private Standards Organizations and Public Law*, 22 WM. & MARY BILL RTS. J. 497, 499 (2013). ASTM’s mission as a non-profit organization centers on this project of developing voluntary consensus standards—technical documents designed to be used by industry professionals—in fields like public safety, building and construction, and product testing.

Although ASTM’s standards are sometimes incorporated into law by government actors, ASTM does not create standards for that purpose. Nor does it lobby governmental authorities to incorporate its standards by reference. In fact, the vast majority of ASTM standards are never incorporated into law. Even the original version of the standard at issue here, ASTM F1967, was first published in 1999, almost a decade before CPSC proposed incorporating it by reference into 16 C.F.R. § 1215. *See* 74 Fed. Reg. 45,719, 45,719 (Sept. 3, 2009) (noting that ASTM F1967 had already been “revised several times”).

ASTM's standards development is driven by over 140 committees comprising over 30,000 members representing producers, users, consumers, government, and academia from over 140 countries. *See* <https://www.astm.org/ABOUT/faqs.html>. For example, the committee responsible for developing ASTM F1967-19 includes a number of individual consumer advocates and parents who participate in the development of these standards.

Open participation and consensus are core ASTM principles. *Id.* ASTM allows the public to attend and participate in committee meetings. The committee voting process is publicly available through ASTM's website. *See* https://www.astm.org/SOCIETY_REVIEW/. The public can request to receive and comment on any ballot items, and ASTM's committees address all comments. ASTM even offers a free Standards Tracker Service, allowing the public to track the progress of proposed or revised standards during the development process. *See* https://www.astm.org/tracker_services/index.html.

But this process is costly. Substantial expenses arise from committee meetings and balloting, as standards progress through development, and from editing, producing, distributing, and promoting completed standards.

Rather than requiring private or governmental entities to fund the process in advance, ASTM relies on a back-loaded funding model. It bears the initial costs associated with developing standards and recoups those costs through selling and

licensing its standards. The vast majority of ASTM's revenue comes from such sales and licenses. *See* <https://www.astm.org/ABOUT/faqs.html>.

This funding model is by design. When developing a standard depends on advance funding, groups with limited financial resources—including individuals, public interest groups, and academics—have little chance to participate in the process. A back-loaded funding model, in contrast, encourages broader participation because the standards-development organization is not tethered to large funders. Standards developed through the back-loaded model thus reflect the consensus of a broader range of interested parties. That, in turn, makes such standards—including ASTM's—more likely to gain wide voluntary acceptance.

II. The Federal Government's Support for Incorporating Privately Developed Standards by Reference into Law

For over fifty years, Congress has encouraged incorporating privately developed standards into law. In 1967 amendments to the Administrative Procedure Act, Congress determined that incorporation by reference ("IBR") of "reasonably available" material satisfies the requirement that agency rules and other materials be published in the Federal Register. *See* Act of June 5, 1967, Pub. L. No. 90-23, 81 Stat. 54, 54 (codified at 5 U.S.C. § 552(a)(1)); *Am. Soc'y for Testing & Materials v. Public.Resource.org, Inc.* ("ASTM I"), No. 13-cv-1215, 2017 WL 473822, at *3 (D.D.C. Feb. 2, 2017), *rev'd in part, vacated in part*, 896 F.3d 437 (D.C. Cir. 2018). In 1995, Congress passed the National Technology

Transfer and Advancement Act of 1995 (“NTTAA”), Pub. L. No. 104-113, § 12(d), 110 Stat. 775 (codified at 15 U.S.C. § 272 (Notes)), which, with limited exceptions, requires federal agencies to use technical standards to carry out their policy objectives and activities. Congress has even specifically IBR’d ASTM’s standards without requiring free online access. *See* 15 U.S.C. § 2056(b).

The Executive Branch also widely embraces IBR. For example, the Office of Management and Budget (“OMB”) directs federal agencies to incorporate “in whole, in part, or by reference” privately developed standards for regulatory and other activities “whenever practicable and appropriate.” OMB Circular A-119, 63 Fed. Reg. 8546, 8554-55 (Feb. 19, 1998); *see also* 81 Fed. Reg. 4673 (Jan. 27, 2016). With limited exceptions, OMB’s policy favors voluntary consensus standards “in lieu of government-unique standards in [agencies’] procurement and regulatory activities.” 63 Fed. Reg. at 8554.

The creation and IBR of privately developed standards “achieve several goals, including eliminating the cost to the federal government of developing its own standards, encouraging long-term growth for U.S. enterprises, promoting efficiency, competition, and trade, and furthering the reliance upon private sector expertise.” *ASTM I*, 2017 WL 473822, at *3 (citing OMB Revised Circular A-119 dated Jan. 27, 2016 at 14); *see also* Emily S. Bremer, *On the Cost of Private Standards in Public Law*, 63 U. KAN. L. REV. 279, 294 (2015). Because voluntary

consensus standards often establish industry norms, their IBR also decreases “the burden of complying with agency regulation.” 63 Fed. Reg. at 8554.

IBR of privately developed standards likewise allows governments to be nimbler in addressing industry needs and new technologies. For example, as private and commercial use of drones began increasing exponentially, ASTM established a committee to consider the design, performance, testing, and safety of unmanned air vehicle systems. Working with industry, safety advocates, and others, ASTM developed numerous standards increasing drone and aircraft safety. The Federal Aviation Administration considers compliance with one of these standards—ASTM F-3322-18—one of many ways for drone manufacturers to demonstrate risk-mitigation techniques sufficient for waiving certain regulations. *See* https://www.faa.gov/uas/resources/policy_library/section_352_responses/media/107_39_for_section_352.pdf.

III. The Government’s Compliance with the “Reasonably Available” Requirement

Congress subjected the IBR process to “the approval of the Director of the Federal Register.” 5 U.S.C. § 552(a)(1); 1 C.F.R. § 51.7(3). In implementing the statute’s requirement that IBR’d materials be “reasonably available,” the Director’s regulations specify that (i) a copy of the incorporated material must be on file with the Office of the Federal Register (“OFR”) and (ii) the regulations incorporating such material must describe how those incorporated materials are reasonably

available to interested parties. 1 C.F.R. §§ 51.3(4), 51.5. The regulations have never required that such materials be available to the public at no cost—*i.e.*, freely available—to qualify as “reasonably available.”

On the contrary, OFR has recognized that a “freely available” requirement would inhibit the federal policy of encouraging IBR. While revising the IBR procedures in 2014, OFR expressly rejected that requirement because it could conflict with copyright law. 79 Fed. Reg. 66,267, 66,268 (Nov. 7, 2014). OFR agreed “that when the Federal government references copyrighted works, those works should not lose their copyright.” *Id.* Instead OFR requires agencies to show how each standard is reasonably available by providing “(1) [d]iscussions of how the materials are reasonably available and, if they aren’t, the actions the agency took to make the materials reasonably available to interested parties and; (2) summaries of the content of the materials the agencies wish to IBR.” *Id.* at 66,269; *see* 1 C.F.R. § 51.5.

IV. ASTM Standards’ Wide and Reasonable Availability to the Public

ASTM recognizes the importance of public access to its standards. Although not legally required, ASTM invests significant resources in making its IBR’d standards available to view for free on its website. Since 2013, ASTM has maintained a free “read-only” library in which anyone can view the ASTM standards that have been incorporated by reference into federal law. *See*

<https://www.astm.org/READINGLIBRARY/>. These standards can be viewed for free by anyone with internet access.²

Indeed, ASTM posted ASTM F1967-19 in its free online reading room after it was IBR'd into federal law. Petitioner therefore has no basis to claim that this standard is “made available only to ASTM’s customers rather than the public at large.” *See* Milice Br. 33. Petitioner is well aware of ASTM’s online reading room. *See id.* at 45.

ASTM also makes its standards available during the rulemaking process. Whenever a federal agency tells ASTM it plans to propose a rule adopting an ASTM standard and asks ASTM to make the standard freely available online during the comment period, ASTM does so. For example, ASTM has a CPSC Reading Room where it posts standards after receiving an alert from the CPSC. *See* <https://www.astm.org/cpsc.htm>. Although the CPSC has previously requested that ASTM post standards during public comment periods for proposed rule

² Contrary to the derogatory claim by Petitioner’s amici, ASTM does not require the public to “agree to oppressive terms” before reviewing such standards. *See* Farina *et al.* Br. 13. ASTM’s full Reading Room, where it hosts read-only versions of standards incorporated by reference into regulations, requires users to click through a license agreement. That agreement secures a U.S. forum for ASTM to enforce its rights against counterfeiters so that ASTM can ensure that the public is accessing genuine and accurate versions of its standards, particularly in light of growing markets for counterfeit standards. Nothing in the license agreement prevents the public from reviewing the standards for free. <https://www.astm.org/READINGLIBRARY/VIEW/license.html>.

changes, it did not do so for its proposed change to 16 C.F.R. § 1215. Since the filing of the Petition for Review, however, ASTM has worked with the CPSC to improve procedures so that standards are automatically posted during the comment period.

In addition to these free resources, ASTM standards are published and sold through books, PDFs, and electronic databases. The standards can be purchased individually or via subscription. The price for individual standards is approximately \$38 to \$89; subscription prices range from \$148 to \$640 per user, depending on the number of standards included in the subscription.³ These prices are determined, in large part, by the number of pages in the publications, and do not vary based on whether the standard has been incorporated by reference, as Petitioner vaguely implies. *See* Milice Br. 43-44.

For at least twenty years, annual membership in ASTM has cost \$75 for an individual and \$400 for an organizational member. *See* <https://www.astm.org/MEMBERSHIP/MemTypes.htm>. Each member receives one free volume of the *Annual Book of ASTM Standards*, among other benefits. ASTM provides copies of its standards at reduced or no cost when it is informed that the regular cost presents a hardship for the requester. For example, ASTM has a “10 Standards for

³ By comparison, a subscription to the Federal Register costs \$929. *See* <https://bookstore.gpo.gov/products/federal-register-complete-complete-paper-subscription-service-indexes>.

Students” program through which professors can select any 10 ASTM standards and students can purchase them for just \$10.

As discussed above, ASTM’s standards-development committees comprise a diverse group of constituents including industry representatives, government representatives, consumers, academics, people with particular expertise in the subject matter, and more. For this reason, entities subject to regulations that IBR ASTM’s standards likely have ready access to those standards and even the opportunity to participate in their development. For example, ASTM’s committee responsible for developing bath seat standards includes 60 bath seat producers.

ARGUMENT

IBR is fully consistent with the APA’s requirements where, as here, the IBR’d standard is reasonably available through multiple channels. Moreover, requiring agencies to reproduce the full text of privately authored standards rather than incorporating them by reference would raise serious problems under federal copyright law. The petition for review should be denied.

I. Petitioner’s Broad Challenge to the Practice of IBR Is Legally Unsupported.

A. “Reasonably Available” Does Not Require Free Online Access.

Petitioner’s categorical rule that “reasonably available” must mean IBR’d materials are available for free online is inconsistent with the plain language of Section 552(a)(1). The ordinary meaning of the term “reasonably” is not “at zero

cost.” The term means “[f]airly or pretty well; sufficiently, suitably; moderately, fairly”—belying any notion that something must be *maximally* available to be *reasonably* available—and in the context of monetary expense means “[a]t a fair or reasonable cost” or “inexpensively,” not *free*. *Reasonably*, OXFORD ENGLISH DICTIONARY (online ed. 2020); *see also Reasonable*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2014) (“inexpensive”).

Moreover, “reasonably available” is an inherently flexible term, and information that is “readily available”—as ASTM F1967-19 is, *see infra* Section II—is sufficiently available to qualify as “reasonably available” whether or not it can be obtained online for free. *Cf. Dep’t of Justice v. FLRA*, 991 F.2d 285, 291 (5th Cir. 1993) (explaining, in a different statutory context, that documents that are “readily available” are “reasonably available” but documents that are available only through “extreme or excessive means” are not).

Petitioner does not claim that the term required free and instantaneous access when Section 552(a)(1) was enacted in 1967. She concedes that at the time, Congress envisioned interested parties going to local libraries to view IBR’d standards. *See Milice Br. 25-26*. Yet with no legal support—and citing only her counsel’s law review article—Petitioner demands that “reasonably available” be given “a more rigorous meaning” today based on the notion that the statute’s meaning should “evolve” over time. *Milice Br. 22* (citing Strauss, *supra*, at 497).

Contrary to Petitioner’s approach, “every statute’s *meaning* is fixed at the time of enactment.” *Wisc. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018). ASTM’s IBR’d standards are unquestionably far more readily available today than IBR’d standards in 1967.

Petitioner’s preference for an updated, “more rigorous meaning” also ignores Congress’s consistent refusal to change the statutory standard. Section 552 has been amended many times since 1967, but Congress has never amended the statute to define “reasonably available” as “free” or to require agencies to reproduce the full text of the standards they adopt. That is true even though Congress has altered other aspects of the statute in light of technological change. *See, e.g.*, FOIA Improvement Act of 2016, Pub. L. No. 114-185, § 2, 130 Stat. 538, 538 (requiring agency-created opinions and statements to be made available “in an electronic format” but maintaining the “reasonably available” standard for IBR’d works). If Congress intended “reasonably available” to mean free online access today, it would have said so.

B. Petitioner Cannot Overcome OFR’s Reasonable Rejection of a Free Online Access Requirement.

Beyond being inconsistent with the ordinary meaning of the statutory language, Petitioner’s view is at a minimum foreclosed by *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). Petitioner

cannot possibly show that the statute unambiguously requires that IBR'd standards be freely available or that OFR's contrary determination is unreasonable.

The Administrative Procedure Act authorizes the Director of the Federal Register to determine the conditions under which "reasonably available" IBR'd material satisfies the statute's publication requirement. 5 U.S.C. § 552(a). OFR thus bears responsibility for ensuring that privately created, IBR'd material is reasonably available, and it has promulgated regulations rejecting any requirement that IBR'd material be freely available online. *See* 1 C.F.R. pt. 51.

Petitioner cannot show that the statute's undefined phrase "reasonably available" unambiguously requires free availability. In fact, "reasonable" and related words are paradigmatic examples of the sorts of ambiguous terms that support *Chevron* deference. *See, e.g., Yusupov v. Att'y Gen.*, 518 F.3d 185, 199 (3d Cir. 2008) (finding "reasonable grounds to believe" ambiguous even where legal dictionary provided only one definition for the phrase); *All. for Cmty. Media v. FCC*, 529 F.3d 763, 777 (6th Cir. 2008) (noting that courts widely find "reasonable" and "unreasonable" to be subject to multiple constructions); *Capital Network Sys., Inc. v. FCC*, 28 F.3d 201, 204 (D.C. Cir. 1994) ("Because 'just,' 'unjust,' 'reasonable,' and 'unreasonable' are ambiguous statutory terms, this court owes substantial deference to the interpretation the Commission accords them.").

OFR has reasonably refused to rewrite “reasonably available” in the fashion Petitioner favors. On February 13, 2012, OFR received a petition to amend its IBR regulations to define “reasonably available” to require that all IBR’d standards “be available for free online.” *See* 78 Fed. Reg. 60,784, 60,785 (Oct. 2, 2013). In its notice of proposed rulemaking, OFR considered dozens of comments from industry, trade groups, standards-development organizations, and the public,⁴ and explained why this proposal is not supported by the law and not necessary. *See id.* at 60,786-87. Then, in adopting a final rule revising its IBR regulations, OFR explained why the term “reasonably available” does not require standards to be available for free. 79 Fed. Reg. at 66,268 (“If we required that all materials IBR’d into the CFR be available for free, that requirement would compromise the ability of regulators to rely on voluntary consensus standards, possibly requiring them to create their own standards, which is contrary to the NTTAA and the OMB Circular A-119.”). Given the consistency of its position with the statutory framework Congress has established, and the care and thoroughness of OFR’s consideration of this issue, its rejection of Petitioner’s position is entitled to deference.

⁴ Counsel for Petitioner even submitted a comment to OFR arguing many of the same positions that he now advances on Petitioner’s behalf. *See* Peter Strauss, Comment (Jan. 29, 2013), Comment ID: OFR-2013-0001-0024, *available at* <https://www.regulations.gov/document?D=OFR-2013-0001-0024>.

OFR's approach appropriately balances the public's interest in available standards, the public benefits of voluntary consensus standards, and the copyright interests of standards-development organizations. *See* CPSC Br. 21-25. Petitioner cannot explain why the Court should hold OFR's approach unreasonable and unworthy of deference.

II. ASTM's Standard Is Reasonably Available.

The OFR has repeatedly and consistently concluded that ASTM's standards, including ASTM F1967-19, meet the test for reasonable availability. That is unsurprising, because ASTM is dedicated to ensuring that the public has ready access to its standards. Among hundreds of other standards, ASTM F1967-19 is already available for free online in ASTM's reading room.

In addition, ASTM F1967-19 and ASTM's other IBR'd standards are readily available in many other ways. CPSC and OFR make physical copies of the standard available in their reading rooms at no cost. CPSC Br. 22. Moreover, when an ASTM standard is included in a proposed agency rule, the rule provides ASTM's contact information. Interested parties can contact ASTM or visit its website to purchase a copy of the standard at reasonable cost, assuming they do not already have access to it through an ASTM membership and do not avail themselves of the free alternatives. CPSC's rule incorporating ASTM F1967-19 likewise included contact information for ASTM, including its website. Pet. 7; 84

Fed. Reg. at 49,439. And CPSC's summary provided extensive discussion of the changes to ASTM's standard from prior versions. Pet. 4-5; 84 Fed. Reg. at 49,436-37.

OFR properly approved ASTM F1967-19 for IBR on August 26, 2019, which required OFR to find that it was reasonably available to interested persons. App'x 43-44; CPSC Br. 20-23. Courts must uphold an agency's factual findings unless they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706. The Director's determination that ASTM F1967-19 is reasonably available is far from arbitrary or capricious. ASTM F1967-19 is available to the public in numerous formats, including hardcopy, electronic versions, and read-only access through ASTM's reading room. ASTM even makes supplemental materials, including redlines to see the changes from prior versions, available on its website.

In addition to challenging the standard's post-rulemaking availability, Petitioner also contends that she lacked access to the development process, claiming ASTM "developed the standard in private, sheltered from public input and scrutiny." Milice Br. 14. That contention is false. The public is free to participate in the development of ASTM's standards, even if Petitioner chose not to. *See supra* pp. 4-5. Petitioner also accuses CPSC of "withholding the final standard from public review in addition to any data relating to ASTM's processes,"

supposedly a “gaping loophole [in the] notice requirements.” Milice Br. 14-15. But she offers no factual support for this mischaracterization of ASTM’s standards-development process.

The truth is, ASTM F1967-19 is widely available, and ASTM’s process is highly transparent. And to the extent Petitioner’s critique is not about ASTM but about IBR of privately developed standards more broadly, her sole recourse is to ask Congress to enact different legislation.

III. IBR Does Not Destroy Private Authors’ Copyright Ownership.

Apart from the flaws in Petitioner’s administrative law argument, her brief also misconstrues copyright law. In her view, vested copyrights are extinguished if the works later “are incorporated by law.” Milice Br. 36. That view conflicts with the Copyright Act and an abundance of precedent.

True, Petitioner encourages the Court to sidestep this copyright question and “simply [decide] whether CPSC must provide reasonable access [and leave] the Commission and ASTM [to] handle the standard’s copyright.” Milice Br. 42 n.11. But it is hard to see how the Court can duck the issue while agreeing with Petitioner’s position that CPSC must publish ASTM’s standard. *See id.* at 40, 44. Petitioner’s amici likewise urge the Court to remand the regulation to CPSC “with instructions to publish the standard.” Farina *et al.* Br. 23-25. Because CPSC does not have ASTM’s consent to publish the standard, publication would infringe

ASTM's copyright and subject CPSC to liability.⁵ *See* 28 U.S.C. § 1498(b). In light of Petitioner's requested relief, it is important for the Court to consider the flaws in Petitioner's conception of copyright law.

A. The Copyright Act Precludes Stripping Authors of Their Copyrights Because of IBR.

Milice's view of IBR's copyright-law implications is inconsistent with the text, structure, and history of the Copyright Act. Section 201 of the Copyright Act provides that "[c]opyright in a work . . . vests initially in the author or authors of the work," and Section 106 provides the owner of the copyright the exclusive right to "reproduce the copyrighted work." 17 U.S.C. §§ 106(1), 201. "Unlike other forms of intellectual property, copyright protection is both instant and automatic." *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1513 (2020). "It vests as soon as a work is captured in a tangible form." *Id.* Hence there is no dispute that ASTM, as the author of ASTM F1967-19, had a vested, exclusive right to reproduce that standard upon its creation. CPSC Br. 21; *cf.* Peter L. Strauss, *Incorporating by Reference: Knowing the Law in the Electronic Age*, ADMIN. &

⁵ Even CPSC acknowledges that fair use is unlikely to extend "to publish[ing] the standard in a format that would allow unrestricted copying and distribution by all comers" in light of the inevitable effect on the market for the standard. *See* CPSC Br. 33.

REG. L. NEWS, Winter 2014, at 36, 37 (Standards are “[u]nquestionably the private property of the SDOs before their incorporation”).⁶

Nothing changed when the standard was IBR’d into the CPSC’s regulation. When Congress passed the Copyright Act in 1976, it was aware that copyrighted works were regularly incorporated into law. *See, e.g., Hall v. United States*, 566 U.S. 506, 516 (2012) (courts should “assume that Congress is aware of existing law when it passes legislation” (internal quotations omitted)). A decade earlier, Congress had authorized federal agencies to incorporate standards into federal regulations—and agencies did so. *See* 5 U.S.C. § 552(a)(1). Yet the Act in no way suggests that Congress intended to terminate copyright protection for standards incorporated into statutes or regulations.⁷

⁶ Congress expressly distinguished a category of government-authored works—namely, works “prepared by an officer or employee of the United States Government as part of that person’s official duties.” 17 U.S.C. § 101. For these works, Congress decided, copyright protection “is not available.” *Id.* § 105. Congress gave no indication that any category of *privately* authored works would be ineligible for copyright merely because of the works’ or authors’ connections to government. On the contrary, the legislative history attests that “publication or other use by the Government of a private work *would not affect its copyright protection in any way.*” H.R. Rep. No. 1476, 94th Cong., 2d Sess. 60 (1976) (emphasis added).

⁷ Had Congress intended IBR to destroy copyright ownership, serious questions would arise about whether such a regime required “just compensation” for the destroyed copyright under the U.S. Constitution’s Takings Clause. *See CCC Info. Sers., Inc. v. Maclean Hunter Market Reports, Inc.*, 44 F.3d 61, 74 (2d Cir. 1994) (“[A] rule that the adoption of such a reference by a state legislature or administrative body deprived the copyright owner of its property would raise very substantial problems under the Takings Clause of the Constitution.”); *Practice*

B. *Georgia v. Public.Resource.Org* Does Not Support Petitioner.

Without the slightest support from the Copyright Act, Petitioner argues that privately authored works, such as ASTM F1967-19, lose their copyright protection upon IBR as a matter of judge-made doctrine. Milice Br. 36. This argument purports to draw support from the Supreme Court’s recent decision in the *Georgia* case, 140 S. Ct. at 1498.

Petitioner grossly distorts that decision. *Georgia* did not endorse any sweeping principle that might extinguish copyrights in privately authored, IBR’d works. On the contrary, it clarified the scope of the “government edicts doctrine,” a judicially created doctrine that imposes “a limitation on copyright protection for certain *government work product*, rooted in the Copyright Act’s ‘authorship’ requirement.” *Id.* at 1504 (emphasis added). As *Georgia* shows, that doctrine is inapplicable to works authored by private parties⁸ and thus cannot be used to displace the text and structure of the Copyright Act.

Mgmt. Info. Corp. v. Am. Med. Ass’n, 121 F.3d 516, 520 (9th Cir. 1997) (citing *CCC* for same concern); see also CPSC Br. 29-30. Principles of constitutional avoidance, which Petitioner stresses for other statutes, give further reason not to adopt Petitioner’s reading of copyright law.

⁸ In *Georgia*, the annotations were written pursuant to a work-for-hire agreement in favor of the Georgia Code Review Commission, 140 S. Ct. at 1505, and “[t]he Copyright Act therefore deems the Commission the ‘sole’ author of the work,” *id.* at 1508 (citing 17 U.S.C. § 201(b)).

The Supreme Court stressed that the government edicts doctrine is “a straightforward rule based on the identity of the author,” *id.* at 1506, and not on “whether given material carries ‘the force of law,’” *id.* at 1513. Thus, the doctrine requires asking “whether the author of the work is a judge or legislator” acting “in the course of his judicial or legislative duties” and not (as Petitioner would have it) “whether given material carries ‘the force of law,’” *id.* at 1513.

In reaching that conclusion, the Court explained how “[t]he government edicts doctrine traces back to a trio of cases decided in the 19th century”—namely, *Wheaton v. Peters*, 8 Pet. 591 (1834); *Banks v. Manchester*, 1238 U.S. 244 (1888); and *Callaghan v. Meyers*, 128 U.S. 617 (1888):

These cases establish a straightforward rule: Because judges are vested with the authority to make and interpret the law, they cannot be the “author” of the works they prepare “in the discharge of their judicial duties.” This rule applies both to binding works (such as opinions) and to non-binding works (such as headnotes and syllabi). *It does not apply, however, to works created by government officials (or private parties) who lack the authority to make or interpret the law*

Georgia, 140 S. Ct. at 1506 (emphasis added).

Petitioner takes out of context the Court’s statement that “[t]he animating principle behind this rule is that no one can own the law.” *Id.* The Court never suggested that principle is itself the governing legal rule. On the contrary, the Court stressed that the way the case law “give[s] effect to that principle in the

copyright context [is] through construction of the statutory term ‘author.’” *Id.* “Rather than attempting to catalog the materials that constitute ‘the law,’ the doctrine bars the officials responsible for creating the law from being considered the ‘author[s]’ of ‘whatever work they perform in their capacity’ as lawmakers.” *Id.* Hence, when an official empowered to make law creates material within the scope of that official authority, it is true that “no one can own the law.” *Id.* But a similar rule “does not apply . . . to works created by private parties.” *Id.* at 1506. So, according to the Court’s own summary, the government edicts doctrine means that “copyright does not vest in works that are (1) created by judges or legislators (2) in the course of the judicial and legislative duties.” *Id.* at 1508.

In clarifying the government edicts doctrine, the Court rejected Public Resource’s much broader position, now echoed by Petitioner, that would eliminate already-vested copyrights when privately authored works are incorporated into law. Public Resource *asked* the Supreme Court to hold that all “[l]egal materials adopted by or published under the authority of the State are not the proper subject of private copyright.” Brief of Respondent at 35, *Georgia*, 140 S. Ct. 1498 (No. 18-1150) (emphasis added). The Court did not do so. Instead, it confirmed that the government edicts doctrine “does not apply” to works created by “private parties[] who lack the authority to make or interpret the law.” *Georgia*, 140 S. Ct. at 1507. Accordingly, “[i]nstead of examining whether given material carries ‘the

force of law,’ [courts] ask only whether the author of the work is a judge or a legislator.” *Id.* at 1513.

Since ASTM F1967-19 was authored by neither judge nor legislator,⁹ it does not matter whether the CPSC incorporated it by reference. ASTM retains its enforceable copyright in the standard regardless.

C. Other Circuits Recognize That IBR Does Not Destroy Copyrights in Privately Authored Works.

Even before *Georgia*, courts had rejected arguments that government incorporation of privately authored works terminates copyright protection.

For example, in *CCC Information Services, Inc. v. Maclean Hunter Market Reports, Inc.*, 44 F.3d 61 (2d Cir. 1994), the Second Circuit considered whether state regulations’ incorporation of the privately authored valuations of used cars (the *Automobile Red Book*) destroyed the private author’s copyright in that work. Reversing the district court’s decision in favor of the accused infringer, the Second Circuit rejected the arguments Petitioner advances—*i.e.*, “that the public must have free access to the content of the laws that govern it” and that “if a copyrighted

⁹ CPSC’s decision to IBR ASTM F1967-19 does not transform CPSC into the author of that standard. The term “author” “presuppose[s] a degree of originality,” *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991), and “[o]riginal, as the term is used in copyright, means ... that the work was independently created by the author (as opposed to copied from other works),” *id.* at 345. CPSC did not independently create any expression, and ASTM remains the author of the standard.

work is incorporated into the laws, the public need for access to the content of the laws requires the elimination of the copyright protection.” *Id.* at 73. After explaining how the infringer cited “[n]o authority” to directly support that view, the Court declined “to hold that a state’s reference to a copyrighted work as a legal standard for valuation results in loss of the copyright.” *Id.* at 73-74. Regardless of “policy considerations” that supposedly favored that position, “countervailing considerations” opposed it. *Id.* at 74. “For example, a rule that the adoption of such a reference by a state legislature or administrative body deprived the copyright owner of its property would raise very substantial problems under the Takings Clause of the Constitution.” *Id.* As a result, the Second Circuit held that the private author had “demonstrated a valid copyright and infringement thereof” and directed entry of judgment accordingly. *Id.*

The Ninth Circuit has likewise rejected the argument that privately authored works lose their copyright once they are incorporated into law. *Practice Mgmt.*, 121 F.3d at 517. In *Practice Management*, the court considered a copyrighted coding system developed by the American Medical Association to help healthcare workers identify medical procedures. The federal Health Care Financing Administration had “adopted regulations requiring applicants for Medicaid reimbursement to use” those privately authored codes. *Id.* at 518. A competitor sought to publish the codes, arguing that they “became uncopyrightable law when

[the agency] adopted the regulation mandating [their] use.” *Id.* The court disagreed, holding that the codes continued to be protected by copyright. *Id.* at 520.

The only case holding that governmental incorporation of privately authored standards has any impact on copyright protection is the sharply divided decision by the Fifth Circuit in *Veeck v. Southern Building Code Congress International, Inc.* 293 F.3d 791 (5th Cir. 2002) (en banc).¹⁰ But contrary to Petitioner’s suggestions, not even *Veeck* supports her view. For one thing, the majority in that case expressly distinguished government “incorporation of extrinsic standards,” including those written by the “standards-writing organizations” that participated as amici in *Veeck*, from the fact-pattern in *Veeck* itself, which concerned the wholesale adoption of a model code that “serves no other purpose than to become law” and is “promoted by its author . . . precisely for use as legislation.” *Id.* at 803-05. On this basis, *Veeck* found the *CCC* and *Practice Management* cases

¹⁰ Petitioner also invokes D.C. Circuit and First Circuit decisions, but they declined to definitely decide the issues Petitioner raises. *See Am. Soc’y for Testing & Materials v. Public.Resource.Org, Inc.* (“*ASTM IP*”), 896 F.3d 437, 458 (D.C. Cir. 2018) (indicating that the court was “leaving for another day the far thornier question of whether standards retain their copyright after they are incorporated by reference into law”); *Bldg. Officials & Code Adm. v. Code Tech., Inc.*, 628 F.2d 730, 731 (1st Cir. 1980) (“Normally . . . we would expect to rule finally on such a ‘legal’ issue. We think it is inadvisable to do so here, however.”).

“distinguishable in reasoning and result.” *Id.* at 804. This case, of course, aligns with *CCC* and *Practice Management*, not *Veeck*.

In any event, *Veeck*’s reasoning does not survive *Georgia*. In *Veeck*, the court analyzed the same trio of 19th Century government-edicts cases—*Banks*, *Wheaton*, and *Callahan*—and determined that the “public are the final ‘authors’ of the law” within a “metaphorical concept of citizen authorship.” *Id.* at 799 (citation omitted). The Eleventh Circuit later adopted the same reasoning in the *Georgia* dispute. *Code Revision Comm’n for Gen. Assembly of Ga. v. Public.Resource.Org, Inc.*, 906 F.3d 1229, 1242 (11th Cir. 2018), *aff’d sub nom. Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498. But the Supreme Court rejected the Eleventh Circuit’s approach. *Georgia*, 140 S. Ct. at 1506 (“We hold that the annotations in Georgia’s Official Code are ineligible for copyright protection, though for reasons distinct from those relied on by the Court of Appeals.”). Instead of adopting a “metaphorical” notion that private citizens constructively author all laws, the Court emphasized that the identity of the actual author is paramount: “The textual basis for the [government edicts] doctrine is the Act’s ‘authorship’ requirement, which unsurprisingly focuses on—the author.” *Id.* at 1512. The Court refused “to dig deeper to ‘the root’ of [the] government edicts precedents” because, in its view, “the text *is* the root.” *Id.* Under this approach, the actual author is determined when the copyright attaches, “instant[ly] and

automatic[ally],” upon the work’s fixation in a tangible medium. *Id.* at 1513. And works that are authored by “private parties[] who lack the authority to make or interpret the law” are protected by copyright. *Id.* at 1507. Because Petitioner’s proposed approach would violate that rule and threaten ASTM’s copyright, that approach must be rejected.

CONCLUSION

For these reasons, the petition for review should be denied.

Dated: July 24, 2020

Respectfully submitted,

s/ J. Kevin Fee

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COMBINED CERTIFICATES OF COMPLIANCE

In accordance with Local Appellate Rules 28.3(d) and 46.1(e), I certify that at least one of the attorneys whose names appear on the brief is a member of the bar of this court.

In accordance with Local Appellate Rule 31.1(c), I certify that McAfee Endpoint Security 10.7 was run on the file and did not detect a virus and that any paper copies that Amicus submits will be identical to the text of the electronic brief.

In accordance with Federal Rule of Appellate Procedure 32(g)(1), I certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 6,265 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), according to the word count of Microsoft Word 2016. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in Times New Roman 14-point font, a proportionally spaced typeface.

Dated: July 24, 2020

s/ J. Kevin Fee

J. Kevin Fee

CERTIFICATE OF SERVICE

I hereby certify that counsel for all parties are registered as Filing Users of the Court's CM/ECF system and will be served electronically on this date by operation of the Court's CM/ECF system.

Dated: July 24, 2020

s/J. Kevin Fee

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