IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-1373

LISA MILICE,
Petitioner
v.
CONSUMER PRODUCT SAFETY COMMISSION,
Respondent.

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

BRIEF AMICUS CURIAE OF ADMINISTRATIVE LAW PROFESSORS CYNTHIA FARINA, MICHAEL HERZ, NINA MENDELSON, GILLIAN METZGER, ALAN MORRISON, TODD RAKOFF, PETER SHANE, SIDNEY SHAPIRO, AND DANIEL WALTERS IN SUPPORT OF NEITHER PARTY

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May 29, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Pages**

Statutes and Legislative Materials

Regulatory Materials

Books and Law Review Articles

Miscellaneous

INTEREST OF AMICI CURIAE[1]

Amici are professors of law with expertise in administrative law, including government transparency and the issue of incorporation by reference of private standards into federal regulations. Amici have a strong interest in the development of administrative law in a manner that enables simple, universal, free access to regulatory law.

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[1] All parties have consented to the filing of this brief. No party's counsel authored this brief in whole or in part, and no party or party's counsel made a monetary contribution to fund the preparation or submission of this brief. No person or entity other than counsel for amici made a monetary contribution to the preparation or submission of this brief.

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INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns the public's right to read the words of the law. Federal regulations contain thousands of standards that "incorporate by reference" (IBR) other materials, such as the American Society for Testing and Materials (ASTM) standard that the Consumer Product Safety Commission (CPSC) has incorporated by reference into the infant bath seat safety rule at issue here. The privately drafted standards encompass important health, safety, and environment protections, including child product safety rules, rules addressing food additives, and environmental safeguards for oil wells and pipelines. Although the incorporated material has the same force of law as other federal regulations, it is not published in

the Federal Register or the Code of Federal Regulations, and it is not available on the agencies' websites.

Regulated entities, of course, must be able to access IBR rules in order to comply with them. Members of the public also must be able to fully access these regulations—including the portions that are incorporated by reference—to understand rules that affect their lives, hold those who violate regulations accountable, participate in rulemaking proceedings, and, where necessary, advocate for revised rules. Yet regulated entities and members of the public alike face substantial challenge in accessing this law. In this regime in which the binding law has been left to private control, IBR standards are difficult to find and expensive to read. Pieces of binding federal regulations are now scattered across numerous private, difficult-to-navigate websites managed by the organizations that develop these standards. Many private organizations charge for access to the standards, and some have eliminated access to some standards altogether.

In critical respects, the current circumstances could pass for the "intolerable situation" described by Dean Erwin Griswold in 1934, in which thousands of pages of New Deal federal regulations were obscurely published in separate pamphlets or single sheets. Erwin Griswold, *Government in Ignorance of the Law—A Plea for Better Publication of Executive Legislation*, 48 Harv. L. Rev. 198, 294 (1934). These included regulations located "here and there in the desk drawers of [agency]

officials." Louis L. Jaffe, *Judicial Control of Administrative Action* 61 (1965). That "chaos," in Griswold's words, prompted Congress in 1935 to enact the Federal Register Act, which established the Office of the Federal Register and requires all federal regulatory text to be published in a centralized "Federal Register" and then codified in the Code of Federal Regulations. 44 U.S.C. §§ 1501, 1504, 1510. The obligation to publish was reaffirmed in the Administrative Procedure Act (APA) in 1946, as amended by the Freedom of Information Act (FOIA), 5 U.S.C. § 552. FOIA guarantees the public's right to see federal regulations by mandating that agencies publish substantive rules of general applicability in the Federal Register, *see* 5 U.S.C. § 552(a)(1)(D), and specifies that IBR materials may be "deemed published" only *if* they are "reasonably available to the class of persons affected," *id.* § 552(a)(1).

Agency IBR practices have turned the clock back on this progress. Even if a member of the public locates an IBR standard somewhere on the internet, she can access the regulatory text only on the private organization's terms. The private group may set any price for access, insist on onerous conditions, restrict usability by precluding copying, or eliminate access entirely. These barriers substantially impede regulated entities and the public at large from knowing the law, with destructive consequences for fair notice and for the public's ability to participate in core

government processes. Permitting the text to remain under private control thus threatens public access to the law.

This case implicates all these concerns because, as petitioner explains, the CPSC has failed to make its regulation "reasonably available to the class of persons affected thereby." 5 U.S.C. § 552(a)(1). The appropriate remedy for this violation, however, is not vacatur, as petitioner requests. Rather, this Court should remand this matter to the agency with an order requiring it to publish the standard, as required by FOIA.

ARGUMENT

The practice of incorporating by reference legal text into federal regulations violates FOIA's mandate that agencies publish their substantive rules. FOIA requires each agency to "separately state and currently publish in the Federal Register for the guidance of the public … the agency's substantive rules of general applicability and statements of general policy," as well as any "amendments, revisions, or repeals of" those materials. 5 U.S.C. § 552(a)(1). IBR standards are deemed to have satisfied the publication requirement only if they are "reasonably available" to affected parties. *Id*. This requirement implements the core principle that "[e]very citizen is presumed to know the law, and it needs no argument to show … that all should have free access to its contents." *Georgia v. Public.Resource.Org*, 140 S. Ct. 1498, 1507 (2020) (internal quotation marks and citation omitted). With respect to the CPSC

standard at issue here, however—as with IBR standards generally—the agency has violated this statutory requirement.

I. Incorporation by reference impedes the public's legal right of access to the law.

A. Agency use of IBR text in federal regulations is pervasive.

The CPSC's utilization of the ASTM standard in this case is part of a broader federal agency practice of incorporating text drafted by private organizations into substantive rules of general applicability that possess the full force of law. The private standards drafting organizations include standards-focused membership organizations, such as ASTM and the American National Standards Institute (ANSI), as well as industry trade associations such as the American Petroleum Institute (API) and the American Herbal Products Association. These organizations draft voluntary standards for a variety of purposes that may or may not coincide with congressional goals embodied in regulatory statutes. Conservatively, more than twenty-five private organizations have supplied text that is incorporated into the Code of Federal Regulations only by reference. *See* Emily S. Bremer, *Incorporation by Reference in Federal Regulations*, Report to the Administrative Conference of the United States, at 9 (Oct. 19, 2011), https://www.acus.gov/report/incorporation-reference-report. Seven different private standards organizations have *each* supplied incorporated-by-reference material for *hundreds* of federal regulations. *Id*. Thus, private standards define the substance of legal obligations to protect public health,

safety, and the environment in a wide variety of contexts. *E.g.*, 49 C.F.R. §§ 195.3(b)(17), 195.264(e)(3) (regulation on storage of certain hazardous liquids, requiring compliance with API Standard 620 (2008 edition, including three later addenda)); 49 C.F.R. §§ 192.7(b)(7), (c)(5), 192.112(b)(1)(ii) (regulation on pipeline fracture control, requiring compliance with API Spec 5L (2013 edition) or American Society for Mechanical Engineers (ASME) standard B31.8 (2007 edition)); 10 C.F.R. § 50.55a(a), (h)(2), (h)(3) (nuclear power reactor protection systems requirements, incorporating by reference IEEE Standard 603-1991 and "the correction sheet dated January 30, 1995"); 10 C.F.R. § 50.34(f)(3)(v)(A)(1) (incorporating portions of 1980 edition of ASME Boiler and Pressure Vessel Code Section III Divisions 1 and 2); 16 C.F.R. § 1216.2 (incorporating ASTM F977-12 standard for infant walkers).

B. CPSC's promulgation of substantive rules of general applicability while leaving the text of those rules under private control violates FOIA.

By CPSC's adoption of the ASTM infant bath seat safety standard into a federal regulation, that standard has become a government edict with the force of law. The agency's decision "converts [its] terms into the very stuff of legal obligation." Peter Strauss, *Private Standards Organizations and Public Law*, 22 Wm. & Mary Bill of Rts. J. 497, 513 (2013). As the Supreme Court recently reiterated, "no one can own the law." *Georgia v. Public.Resource.Org*, 140 S. Ct. at

1507. Based on that core principle, the Court reaffirmed that "government edicts" could not be copyrighted, *id.*, in part because the public should not be compelled to participate in a "pay-per-law" system, *id*. at 1513. *See also Banks v. Manchester*, 128 U.S. 244, 253 (1888) (stating that judicial opinions are not copyrightable because "the law, … binding every citizen, is free for publication to all"). That same principle compels the conclusion that regulatory text cannot be considered "reasonably available" when an agency incorporates the text only by reference into the Federal Register and leaves access to the text itself in private hands.[2] Thus here, where access to the federal standard is controlled by ASTM, the standard is not "reasonably available."

1. In practice, when an agency regulation includes IBR text, the public must surmount substantial obstacles to read this binding regulatory text. First, the standards are strewn over the numerous differently organized websites of various private entities, *see, e.g.*, *infra*, notes3–10—a sharp contrast to the centralized access to federal regulations Congress sought when it created the Federal Register and mandated that all regulations be published therein. *See* Jonathan Manes, *Secret Law*,

[2] Although 5 U.S.C. § 552 specifies that an incorporation by reference is subject to Office of the Federal Register approval, that Office exercises no oversight over the material's availability. *See* 1 C.F.R. § 51.5(a), (b) (requiring that agency "discuss" how it made or will make IBR material reasonably available). Moreover, the Office has offered no interpretation of the term "reasonably available." *Cf. Judulang v. Holder*, 565 U.S. 42, 53 & n.7 (2011) (refusing to apply *Chevron* because agency policy was "not an interpretation").

106 Geo. L.J. 803, 845 (2018) (describing the Federal Register Act as a "landmark piece of legislation" to centralize publication that "was specifically meant to address a problem of secret law").

Second, even once a reader locates the desired legal text, the private entity controls the price charged for access and the extent to which the text will be made available. The infant bath seat safety standard at issue in this case is one example; ASTM offers the incorporated standard, ASTM F1967-19, for $56.[3] Another example is the CPSC's toy safety regulation, 16 C.F.R. § 1250.2, which incorporates by reference ASTM F963-17. That standard includes multiple policy judgments aimed at safety, including a 65-decibel limit on sound-producing toys used close to the ear and requirements regarding toy flammability, toxic ingredients, and sharpness. The text of the standard, which, like the infant bath seat safety standard, now has the full force of law, can be accessed only by searching through ASTM's website, where it is for sale at a price of $92.[4] Both the search and the price are daunting obstacles for a parent or small toy maker subject to multiple federal rules. ASTM F963-17, incorporated by reference into 16 C.F.R. § 1250.2, in turn incorporates more than fifteen additional ASTM standards, one of which is noted as withdrawn, and several others that would require further purchase. For example, the

[3] *See* ASTM, F1967-19, https://www.astm.org/Standards/F1967.htm.
[4] *See* ASTM, F963-17, https://www.astm.org/Standards/F963.htm.

standard includes the 2011 version of ASTM F1313, "Specification for Volatile N-Nitrosamine Levels in Rubber Nipples on Pacifiers," which sets tolerance levels for this known animal carcinogen and costs $60.[5]

IBR standards of agencies other than the CPSC are likewise not "reasonably available." Pipeline and Hazardous Materials Safety Administration (PHMSA) safety regulations aimed at controlling pipeline fractures, 49 C.F.R. § 192.112(b)(1)(ii), require compliance with ASME standard B31.8 (2007 edition), which costs $220.[6] PHMSA regulations also require pipeline operators to have public safety notification programs, including for first responders and the local community in case of a pipeline spill or explosion. *See* 49 C.F.R. § 192.616 (natural gas pipelines); 49 C.F.R. § 195.440 (hazardous liquids pipelines). Both regulations incorporate by reference the 2003 edition of API Recommended Practice (RP) 1162, "Public Awareness Programs for Pipeline Operators." *See* 49 C.F.R. §§ 192.7(b)(5), 195.3(b)(8) (specifying edition). A neighbor or nearby local government emergency response authority might need or wish to know the pipeline operator's legal obligations. The incorporated API standard (now superseded by a second edition)

[5] *See* ASTM, F1313-90, https://www.astm.org/Standards/F1313.htm. As of January, 2020, ASTM has declared this standard withdrawn, without replacement. *Id.*

[6] ASME, Gas Transmission and Piping Systems, B31.8-2007, https://www.asme.org/codes-standards/find-codes-standards/b31-8-gas-transmission-distribution-piping-systems.

presently costs $140.[7] At times, API's list price for the incorporated-by-reference version of RP 1162 has exceeded $1,000. Strauss, *Private Standards Organizations*, *supra*, at 508, 535 n.255.

Under this regime of private control, standards with the force of law have also disappeared, although agencies have not acted to repeal them. For example, current Nuclear Regulatory Commission safety requirements for nuclear power plant steel and concrete containment systems incorporate by reference portions of the 1980 edition of ASME Boiler and Pressure Vessel Code Section III Division 2. *See* 10 C.F.R. § 50.34(f)(3)(v)(A)(1). But ASME does not list the 1980 edition for sale,[8] and it appears to be out of print.[9] The 2019 edition of that section of standards is for sale at $585.[10] Likewise, the Food and Drug Administration standard for bottled water that can permissibly be called "purified water" incorporates by reference the

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[7] *See* API, Recommended Practice 1162 (1st ed. 2003), https://www.techstreet.com/api/standards/api-rp-1162?product_id=1143305. At $120, API's current edition of the standard costs less than the superseded version that has been incorporated by reference. *See* API, API Recommended Practice 1162 (2d ed. 2010), https://www.api.org/~/media/files/oil-and-natural-gas/pipeline/1162_e2_pa.pdf.

[8] ASME, BPVC Section III–Rules for Construction of Nuclear Facility Components, https://www.asme.org/codes-standards/find-codes-standards/bpvc-iii-nca-bpvc-section-iii-rules-constructions-nuclear-facility-components-subsection-nca-general-requirements-division-1-division-2?productKey=70003R:70003R.

[9] *See* Amazon, Rules for Construction of Pressure Vessels/1980, https://www.amazon.com/Construction-Pressure-American-National-Standard/dp/9994291556 (listing for sale one used copy of another section of the 1980 Boiler and Pressure Vessel Code for $399.99, described as "rare find").

[10] ASME, BPVC Section III–Rules for Construction of Nuclear Facility Components, *supra* note 7.

United States Pharmacopeia, 1995 edition. 21 C.F.R. § 165.110(a)(2)(iv). While the current edition is for sale at $700 and some former editions are available for $125 each, the edition incorporated by reference into the agency's regulation appears to be unavailable from the drafting organization.[11]

Some federal agencies—though apparently not the CPSC, as petitioner's brief explains—keep a paper copy of the standard for inspection (but not copying), generally in a Washington, D.C.-area headquarters. As a practical matter, however, that copy is useless for providing access to individuals residing elsewhere. *See* David Hilzenrath, *Big Oil Rules: One Reporter's Runaround to Access 'Public' Documents* (POGO Dec. 6, 2018).[12] And although rulemaking agencies sometimes report that IBR rule copies are on file with the Office of the Federal Register, that agency has conceded that "it is hard to access [IBR rule] copies" in its files. *See* Office of the Federal Register, Incorporation by Reference, 79 Fed. Reg. 66267, 66271 (Nov. 7, 2014).

2. Some private standards organizations, including ASTM, have asserted that they have online "reading rooms" to provide adequate access without charge to standards that have been incorporated by reference into federal regulations. Even if

[11] *See* U.S. Pharmacopeial Convention, https://store.usp.org/OA_HTML/usp2_ibeCCtpSctDspRte.jsp?section=10071&minisite=10020.

[12] https://www.pogo.org/investigation/2018/12/big-oil-rules-one-reporters-runaround-to-access-public-documents/.

the CPSC infant bath seat safety standard were placed in ASTM's reading room, however, onerous conditions would impede any potential reader.

To start, access through the ASTM reading room is "read-only." The webpage both bars downloading the standard and blocks the text of the often-lengthy standards from being printed, saved, or cut and pasted in whole or in part. The ASTM website thus uses technological means to impede all the ordinary ways in which a reader might engage legal text, including quoting it in comments that can be shared with attorneys, regulating agencies, members of Congress, or other concerned individuals.[13] These restrictions are typical of private organization "reading rooms."[14]

Moreover, a person who wishes to see the legally binding text on ASTM's website is required to agree to oppressive terms. Before reading any ASTM-drafted text, one must first provide personal information and then click "AGREE" to a license. Under the terms of the license, the licensee must concede that ASTM owns a copyright in the material and promise not to "transmit the content … in any form … or in any way exploit any of the material … without the express authorization of

[13] *Cf.* Dep't of Transp., Proposed Rule: Pipeline Safety, 85 Fed. Reg. 21140, 21141–42 (Apr. 16, 2020) (explaining hindrance to agency operations presented by regulated entities submitting documents in "read-only" format and discussing need for full technological functionality, including downloadability and searchability).

[14] *E.g.*, API, Acceptance of Terms, https://publications.api.org/GocCited_Disclaimer.aspx.

ASTM." The licensee must also agree to indemnify ASTM for certain disputes, and even agree that all disputes will be litigated in Pennsylvania.[15] These requirements to see the text of the law are unacceptable in a democracy that prides itself on the rule of law and on the value of citizens' access to that law.

Other private standards organizations condition unpaid access to text on similar requirements. API requires any individual who wishes to read its standards that have been incorporated by reference into federal regulations—including its standard on pipeline operation public awareness, RP 1162—to click on a license that warns that use of the standard is subject to limitations similar to ASTM's and provides that "API may pursue any remedy legally available to it if you fail to comply." API also requires the individual to agree to a District of Columbia forum selection clause.[16] Further, the individual must agree that API may "suspend or discontinue providing" access to IBR standards "with or without cause and without notice." The American National Standards Institute, whose website hosts a reading room for eleven standards organizations, similarly requires the reader to agree not to "copy, use, … condense, or abbreviate" the text, and that ANSI "may terminate

[15] *See* ASTM, License Agreement, *accessible after registering at* https://www.astm.org/READINGLIBRARY/VIEW/license.html.

[16] *See* API, Acceptance of Terms, https://publications.api.org/GocCited_Disclaimer.aspx.

… access … at any time and for any reason."[17] *See also* Nina A. Mendelson, *Private Control over Access to Public Law: The Perplexing Federal Regulatory Use of Private Standards*, 112 Mich. L. Rev. 737, 743 n.30, 753 nn.83–84 (2014) (discussing variety of licensing restrictions).

An individual, business entity, or journalist seeking to learn the content of regulatory law in order to comply with it, write about it, discuss it with others, or participate in federal agency proceedings to amend a regulation would understandably be chilled from doing so by such license agreements. Indeed, any such activity could arguably violate agreements not to "use" text, "transmit the content," or "in any way exploit" the material. But if the reader does not agree to the license, the only other option is to purchase the standard at whatever price the private organization chooses to set.

3. These obstructions are inconsistent with a centuries-long, constitutive American tradition of meaningful free access to our laws. In 1795, Congress provided for public printing of the laws. *See* H.R. Journal, 3d Cong., 2d Sess. 328–39 (1795) (describing Act of Mar. 3, 1795). In the early 1800s, Congress provided free public access to federal statutes through a network of state and territorial libraries, followed by the creation of the Federal Depository Library System. Act of

[17] *See* ANSI, End User License Agreement, https://ibr.ansi.org/Checkout/EULA.aspx. To view the click-through license, register and then click "Next."

Dec. 23, 1817, res. 2, 3 Stat. 473; Act of Feb. 5, 1859, ch. 22, § 10, 11 Stat. 379, 381. In the 1930s, Congress extended that access to federal regulations through the Federal Register Act. *See* 44 U.S.C. § 1501, *et seq*. Congress has further deepened the tradition by requiring the Government Printing Office (GPO) to provide universal online access to statutes and regulations. *See* 44 U.S.C. § 4102(b).[18] Federal law also requires online public access to a wide variety of government documents and materials, including nonbinding agency guidance materials. *See* 5 U.S.C. § 552(a)(2) (reflecting a 1996 amendment to FOIA); E-Government Act of 2002, Pub. L. No. 107-347, §§ 206, 207(f), 116 Stat. 2899, 2915–16, 2918–19, *codified at* 44 U.S.C. § 3501 note.

With the sole exception of legal obligations that are incorporated by reference, all federal statutes and regulations are now freely available without restrictions online and in the approximately 1,200 governmental depository libraries. Mendelson, *Private Control*, *supra*, at 764–66. FOIA's "reasonably available" standard requires nothing less for all regulatory text with the force of law, even regulatory text that is incorporated by reference.

[18] Section 4102(b) caps recoverable costs at "incremental costs of dissemination" and requires no-charge online access in government depository libraries. The GPO does not charge a fee for online access.

C. Unfettered access to the text of the law is critical for both regulated entities and the public.

The public must be able to see regulatory text in order to participate in governance, challenge illegal rules, advocate for change, comply with the law, and hold those who violate their rights accountable. Of course, people regulated by the relevant regulation need to understand the governing law to be able to comply with it. *See Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156 (2012) (discussing "the principle that agencies should provide regulated parties fair warning of the conduct a regulation prohibits or requires" (internal quotation marks, citation, and alteration omitted)). *Cf. Cheek v. United States,* 498 U.S. 192, 205 (1991) (stating that "in 'our complex tax system, uncertainty often arises even among taxpayers who earnestly wish to follow the law'") (quoting *United States v. Bishop*, 412 U.S. 346, 360–61 (1973)). Also affected, however, are the people whom a regulation is intended to benefit. They too need meaningful access to determine whether the people and entities affecting them are complying with the law, to hold those people and entities accountable when they are not, and to assess whether to advocate for improved standards.

In comments submitted in response to a petition to revise the federal regulations regarding incorporation by reference, for example, the Senior Citizens Law Project of Vermont Legal Aid described the situation of a tenant who needed to know whether her building complied with state fire codes. Although the woman

had been granted in forma pauperis status in court, she needed to pay a large sum to determine whether her fire extinguisher met the code's requirements.[19] Vermont Legal Aid also has reported that the high costs of accessing rules that have been incorporated by reference impairs Medicare recipients, particularly low-income seniors, from knowing their rights and filing effective appeals.[20] Moreover, the barriers to seeing legal text also frustrate the ability of citizens to make informed choices regarding issues such as where to live, whether to drink purified bottled water, or which toys or other products to buy for their children, as Consumer Reports has explained.[21] Put simply, access to the content of regulatory standards is important to the public.

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[19] Senior Citizens Law Project of Vermont Legal Aid, Comments, Incorporation by Reference at 2 (June 1, 2012) https://www.regulations.gov/document?D=NARA-12-0002-0154.

[20] *Id.* ("Many Vermont seniors cannot afford to pay for the privilege of reading documents incorporated into state and federal regulations.").

[21] *See* Consumers Union & Consumer Federation of America, Comments on Incorporation by Reference (Jan. 31, 2014), https://www.regulations.gov/document?D=OFR-2013-0001-0034 (noting importance of accessible standards to identify noncompliant products, notify agencies, and alert consumers). This organization further reported that "Consumer Reports has, on several occasions, notified the Consumer Product Safety Commission and warned consumers about products that do not comply with existing standards, thus creating a public safety hazard." Consumers Union, Comments, at 2 (June 1, 2012), https://www.regulations.gov/document?D=NARA-12-0002-0140. *See id.* (emphasizing need for "easy and free access" to content of standards).

See also Public Citizen, et al., Comments on NPRM, Incorporation by Reference, at 1 (Jan. 31, 2014) https://www.regulations.gov/document?D=OFR-2013-0001-0031 (reporting on behalf of multiple nonprofit, public interest organizations that "free access … will strengthen the capacity of organizations like

Obstacles to seeing the regulatory text also violate the statutory right of access in other ways. After a regulation is promulgated, a person adversely affected is entitled to seek judicial review and ask to have the regulation set aside as arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. §§ 702, 706(2)(A). To do so, the person needs effective access to both the regulatory text and the regulatory preamble accompanying the final rule to determine if the agency "articulate[d] a satisfactory explanation for its action including 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) (internal quotation marks and citation omitted). Likewise, an "interested person" cannot exercise "the right to petition for the issuance, amendment, or repeal of a rule" guaranteed by 5 U.S.C. § 553(e) without access to the full text of the rule.[22] For both purposes, the person needs to be able to copy and reproduce the relevant text, without cost or obtaining a third party's permission.

In short, the expense and difficulty of obtaining IBR standards hinder members of the public from fully understanding and discussing the rules that govern them, making appropriately informed choices, petitioning agencies for the

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ours to engage in rulemaking processes, analyze issues, and work for solutions to public policy challenges … and strengthen citizen participation in our democracy").

[22] IBR also impedes the public's ability to participate in the notice-and-comment rulemaking process of 5 U.S.C. § 553. *See* Pet. Br. at 9–16.

amendment of rules, lobbying Congress for increased oversight or for changes in the law, or holding their officials accountable. "Without unfettered access to these standards, our democratic system will be severely limited."[23]

D. Agencies can support private participation in standards development by means other than private control over text with the force of law.

Standards drafted by private organizations undoubtedly possess significant value in a wide range of settings, and agencies have therefore chosen to rely on them.[24] Permitting private organizations to maintain sole control over access to IBR text with the force of law, however, is not consistent with federal law requiring publication of substantive rules.

In any event, private control over the text of federal regulations is not needed to reward private organizations for this work. To begin with, it is not clear that the work of standards development organizations would be negatively impacted by providing open access to the legal text that a federal agency has incorporated by

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[23] Consumer Federation of America, Comments, at 1 (June 1, 2012), https://www.regulations.gov/document?D=NARA-12-0002-0131; *see also* Consumers Union & Consumer Federation of America, Comments, at 2 (May 12, 2014), https://www.regulations.gov/document?D=OMB-2014-0001-0040.

[24] The National Technology Transfer Act of 1995 encourages agencies to use "technical standards" developed by "voluntary consensus standards bodies." Pub. L. 104-113, § 12(d), *codified at* 15 U.S.C. § 272 note. But nothing in that brief statute indicates either Congress's endorsement of current incorporation by reference approaches or any aim to abandon either the publication requirements of FOIA or the 185-year-old government edicts doctrine that the text of the law is not to be under private control. *Cf. Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (stating that Congress does not "hide elephants in mouseholes").

reference. *See* Peter Strauss, *Incorporating by Reference: Knowing the Law in the Electronic Age*, 39 Admin. & Reg. L. News 36 (2014) (reporting statement of head of National Fire Protection Agency that NFPA had provided online access to standards "without appreciable damage to a financial base heavily dependent on sales of its standards"). These organizations generally do not object to and even advocate for agency utilization of their standards as the binding law. For example, API suggested incorporation of one of its standards in a recent Interior Department rulemaking governing oil well blowout preventer systems in the Outer Continental Shelf.[25] Incorporation by reference can be a point of pride. *See generally* Strauss, *Private Standards Organizations*, *supra*, at 509–10 (discussing considerations that may offset any reduced market for standards that have been incorporated into federal law). ANSI advertises that membership benefits include "[i]nfluenc[ing] U.S. and ANSI Positions and Policies."[26] And federal agencies can and already do provide private drafting organizations with support, such as "direct financial support (e.g.,

[25] *See* API, et al., Comments, Blowout Preventer Systems and Well Control Revisions, at 3 (Aug. 6, 2018), https://www.regulations.gov/document?D=BSEE-2018-0002-45174 (observing that "consideration for incorporation by reference should be taken to ensure the U.S. OCS is operating to the latest API standard for well control systems" and "industry [also] requests that [the agency] align the proposed changes to the Well Control Rule with the 21-day testing interval outlined in API Standard 53").

[26] ANSI, Membership, https://www.ansi.org/membership/benefits/benefits?menuid=2#Engage.

grants, memberships, and contracts),” administrative support, and technical support, including the participation of agency personnel.[27]

Moreover, if a private organization did not anticipate sufficient reward from an agency’s adoption of text it had prepared, it could negotiate with the regulating agency to pay for the use of its text, effectively contracting for the work. *See* Strauss, *Private Standards Organizations*, *supra*, at 515; *see also* Emily S, Bremer, *On the Cost of Private Standards in Public Law*, 63 Kan. L. Rev. 279, 294 (2015) (suggesting that “affected copyright owners may have a viable takings claim”).[28]

In short, a public-private partnership in standards development could take any of several paths. But a citizen’s right to see the law cannot depend on how an agency has sourced its text.

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[27] *See* OMB, Circular A-119, Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities, at 28 (Jan. 12, 2016), https://www.nist.gov/system/files/revised_circular_a-119_as_of_1-22-2016.pdf (“What forms of support may my agency provide to standards development?”).

[28] Although private organizations have sought to copyright standards, text that a federal agency has promulgated as a federal rule with the force of law—thus converting it into a government edict—is not copyrightable. *See Georgia v. Public.Resource.Org*, 140 S. Ct. at 1508 (holding that annotations to the state code, when commissioned by the state, are government edicts and therefore not copyrightable); *ASTM v. Public.Resource.Org*, 896 F.3d 437, 458 (D.C. Cir. 2018) (Katsas, J., concurring) (stating “access to the law cannot be conditioned on the consent of a private party”).

II. The Court should remand to the CPSC without vacatur.

Although petitioner requests that the Court vacate the CPSC's standard, the appropriate remedy here is remand to the CPSC without vacatur, for prompt publication in compliance with 5 U.S.C. § 552. *See Sharon Steel Corp. v. EPA*, 597 F.2d 377, 381 (3d Cir. 1979) ("In hearing a petition for review, a court of appeals may exercise equitable powers in its choice of remedy.").

In considering whether a remand should be with or without vacatur, the Court should consider the "seriousness of [procedural] deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed." *Mozilla v. FCC*, 940 F.3d 1, 86 (D.C. Cir. 2019) (quoting *Allied-Signal, Inc., v. U.S. Nuclear Regulatory Comm'n,* 988 F.2d 146, 150–51 (D.C. Cir. 1993)). Similarly, the Administrative Conference of the United States has recommended that courts consider whether "(a) correction is reasonably achievable … ; (b) the consequences of vacatur would be disruptive; and (c) the interests of the parties who prevailed against the agency in the litigation would be served by allowing the agency action to remain in place." Recommendation 2013-6, 78 Fed. Reg. 76272, 76273 (Dec. 17, 2013). In addition, this Court should take into account protection of the overall congressional scheme. *See Mobay Chem. v. Gorsuch*, 682 F.2d 419, 427 (3d Cir. 1982); *Sharon Steel Corp.*, 597 F.2d at 381.

Here, each of these factors weighs in favor of remanding to the agency without immediate vacatur of the infant bath seat safety rule. To start, petitioner does not make a substantive objection to this rule: She objects only to the CSPC's failure to publish it. That failure that can be overcome while leaving the rule in place. Although the agency's violation of section 552 is serious—undermining compliance and the public's right to know, discuss, and seek change in the law—there is no reason to think that the CPSC will revise the rule because of this error. *E.g.*, *City of Oberlin, Ohio v. FERC*, 937 F.3d 599, 611 (D.C. Cir. 2019) (considering likelihood that agency can address "deficiencies" while still reaching the same result); *Black Oak Energy, LCC v. FERC*, 725 F.3d 230, 244 (D.C. Cir. 2013) (remanding without vacatur where it was "plausible that FERC can redress its failure of explanation on remand while reaching the same result").

Meanwhile, vacatur would be unnecessarily disruptive. Vacatur would result in reinstatement of the 2013 standard on infant bath seats (also an IBR standard) that has different labeling and other requirements than the 2020 rule at issue here. Manufacturers would thus have to revert to the 2013 requirements, only months later to switch again to the 2020 standard after the current rule was reissued.

This back and forth would also undermine Congress's objective in the Danny Keysar Child Product Safety Notification Act, enacted in 2008 to ensure strong safety standards for "durable infant or toddler products," expressly including "bath

seats." *See* 15 U.S.C. § 2056a(a), (b)(2), (f)(2) (requiring CPSC to ensure that standards, including for "bath seats," "provide the highest level of safety for such products that is feasible"). Here, where the agency's violation—and the problem on which the parent-petitioner's challenge is based—can be remedied by the publication of the challenged rule, remanding without vacatur would avoid the risk that the statute's objectives would be "set back." *Am. Bankers Ass'n v. NCUA*, 934 F.3d 649, 674 (D.C. Cir. 2019) (remanding without vacatur).

For these reasons, amici urge the court to remand to the agency with directions that it promptly comply with section 552's publication requirement. The Court should also retain jurisdiction to ensure responsive agency action. *See, e.g.*, *Mobay Chem.*, 682 F.2d at 427 (remanding rule to agency with six month delay of mandate); *Nat'l Ass'n of Regulatory Util. Comm'rs v. DOE,* 680 F.3d 819, 820 (D.C. Cir. 2012) (directing compliance within six months and retaining jurisdiction "so that any further review would be expedited").

CONCLUSION

This Court should grant the petition in part, by remanding the standard to CPSC with instructions to publish the standard as required by 5 U.S.C. § 552(a)(1)(D).

May 29, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 29, 2020, a true and correct copy of the foregoing brief was served on all parties to this appeal, via CM/ECF, pursuant to Third Circuit Rule 25.1(b), because counsel for all parties are Filings Users who will be served electronically by the Notice of Docket Activity.

/s/
Allison M. Zieve

CERTIFICATE OF BAR MEMBERSHIP

I certify that Allison M. Zieve, counsel for amici curiae, is a member of the Bar of this Court.

/s/
Allison M. Zieve

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the typeface and volume limitations set forth in Federal Rules of Appellate Procedure 29(a)(5), 32(a)(5), 32(a)(6), and 32(a)(7)(B) as follows: The typeface is fourteen-point Times New Roman font, and the word count is 5,867.

/s/
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LOCAL RULE 31.1(C) CERTIFICATIONS

I certify that the electronic file of this brief was scanned with VIPRE anti-virus software and that no virus was detected.

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