No. 20-1373

In the 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

BRIEF OF AMICI CURIAE AMERICAN NATIONAL STANDARDS INSTITUTE; NATIONAL FIRE PROTECTION ASSOCIATION, INC.; AMERICAN SOCIETY OF CIVIL ENGINEERS; AMERICAN SOCIETY OF HEATING, REFRIGERATING, AND AIR CONDITIONING ENGINEERS; INTERNATIONAL ASSOCIATION OF PLUMBING & MECHANICAL OFFICIALS; INTERNATIONAL CODE COUNCIL; INTERNATIONAL ELECTROTECHNICAL COMMISSION; INTERNATIONAL ORGANIZATION FOR STANDARDIZATION; NATIONAL ELECTRICAL MANUFACTURERS ASSOCIATION; AND NORTH AMERICAN ENERGY STANDARDS BOARD IN SUPPORT OF RESPONDENT AND DENIAL OF PETITION FOR REVIEW

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, each *amicus* represents that it has no parent corporations and that no publicly held corporation owns 10% or more of its stock.

Dated: July 24, 2020

/s/ *William F. Sondericker*
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INTEREST OF AMICI CURIAE[1]

American National Standards Institute, Incorporated ("ANSI") is a not-for-profit membership organization that, for more than 100 years, has administered and coordinated the voluntary standardization system in the United States. ANSI accredits the procedures of standards development organizations ("SDOs"). Accreditation by ANSI signifies that the procedures used by the standards developer in connection with the development of American National Standards meet ANSI's essential requirements for openness, balance, consensus, and due process.

The National Fire Protection Association, Inc. ("NFPA") is a self-funded non-profit devoted to reducing the risk of death, injury, and property and economic loss due to fire, electrical, and related hazards. NFPA has been developing standards since it was founded in 1896. Today, NFPA's principal activity is the development and publication of over 300 standards in the areas of fire, electrical, and building safety. NFPA's flagship work is the National Electrical Code, which is the world's leading standard for electrical safety and provides the benchmark for

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), *amici* state that no counsel for a party authored this brief in whole or in part or made a monetary contribution to the preparation and submission of this brief, and no person other than *amici* or their counsel made such a contribution. Both parties consented to the filing of this brief.

safe electrical design, installation, and inspection to protect people and property from electrical hazards.

The American Society of Civil Engineers ("ASCE") is a not-for-profit corporation organized under the laws of the State of New York, with its principal place of business in Reston, Virginia. Founded in 1852, ASCE is an educational and scientific society representing more than 150,000 members worldwide, including some 110,000 engineers and comprising hundreds of technical and geographic organizations, chapters, and committees. Its objective is to advance the science and profession of engineering to enhance the welfare of humanity. As an ANSI-accredited standard development organization, ASCE develops and promulgates technical standards promoting safety, reliability, productivity, and efficiency in civil engineering.

American Society of Heating, Refrigerating, and Air Conditioning Engineers ("ASHRAE") is a non-profit organization dedicated to advancing the science of heating, ventilation, air conditioning, and refrigeration in order to help humanity and promote sustainability. Founded in 1894, ASHRAE has more than 57,000 members in 132 nations. Its members volunteer their time to advance the ASHRAE mission, including through development of consensus based standards that represent best practices in the heating, ventilation and air conditioning (HVAC) industry.

International Association of Plumbing & Mechanical Officials ("IAPMO") coordinates the development of plumbing and mechanical codes and standards to meet the specific needs of individual jurisdictions and industry both in the United States and abroad. IAPMO is a not-for-profit membership organization that was founded in 1926.

The International Code Council, Inc. ("ICC") is a non-profit membership association dedicated to building safety. The International Codes, or I-Codes, published by ICC, provide one set of comprehensive and coordinated model codes covering all disciplines of construction including structural safety, plumbing, fire prevention and energy efficiency. All fifty states and the District of Columbia have adopted certain I-Codes at the state or other jurisdictional levels. Federal agencies including the Architect of the Capitol, General Services Administration, National Park Service, Department of State, U.S. Forest Service and the Veterans Administration also use I-Codes for the facilities that they own or manage.

Founded in 1906, the International Electrotechnical Commission ("IEC") is an independent non-profit membership organization based in Geneva, Switzerland. The IEC is the world's leading organization that develops and publishes consensus-based International Standards for all electrical, electronic and information technologies. It administers four conformity assessment systems whose members certify devices, systems, installations, services and people. The

IEC represents a global network of 173 countries. Close to 20,000 experts from industry, commerce, government, test and research labs, academia and consumer groups participate in IEC standardization work.

The International Organization for Standardization ("ISO") is a non-governmental non-profit organization with members from approximately 164 national standards bodies. Through its international consensus based processes, consistent with the World Trade Organization principles on international standards, ISO has developed and published over 21,000 voluntary International Standards on a number of subjects.

National Electrical Manufacturers Association ("NEMA") is the association of electrical equipment manufacturers, founded in 1926. NEMA sponsors the development of and publishes over 500 standards relating to electrical products and their use. NEMA's member companies manufacture a diverse set of products including power transmission and distribution equipment, lighting systems, factory automation and control systems, building controls and electrical systems components, and medical diagnostic imaging systems.

North American Energy Standards Board ("NAESB") was formed in 1994 as a not-for-profit SDO dedicated to the development of commercial business practices that support the wholesale and retail natural gas and electricity markets. NAESB maintains a membership of over 300 corporate members representing the

spectrum of gas and electric market interests and has more than 2,000 participants active in standards development. To date, NAESB, and its predecessor organization the Gas Industry Standards Board, have developed over 4,000 standards, a majority of which have been incorporated by reference in federal regulations by the Federal Energy Regulatory Commission.

Petitioner argues that a federal agency contemplating incorporating by reference a published standard must make that work available online for free download without restriction. Petitioner's argument, if accepted, would directly undermine the constitutionally authorized and congressionally conferred copyright protection that subsists in any SDO's work that is part of the incorporation by reference process. *Amici* therefore have a strong interest in the resolution of this Petition.

INTRODUCTION

Amici are non-profit SDOs and other organizations that participate in or accredit the development of specialized standards. SDOs invest substantial resources to produce high-quality standards that are vital to the functioning of and the safety issues involved in a range of industries, consumer products, and regulatory fields. Consistent with their public-service mission and non-profit status, *amici* SDOs make their standards easily accessible to the public. Professionals who use those standards as part of their business pay for access to copies of those standards—as is true of any consumer of a copyrighted work—and recoup those costs through their professional fees. These copyright revenues are critical to funding the SDOs' work, just as copyright revenues sustain the work of other copyright creators. *Amici* SDOs also make standards that have been incorporated into government regulations available for free to members of the public who are interested in reviewing those standards. *Amici* SDOs do not make their works available for wholesale internet downloading, since doing that would allow for mass piracy of their works and defeat the very incentive structure the copyright system is intended to provide.

Congress has long recognized the value of privately developed standards and has accordingly directed agencies to rely on them in regulations. Doing so allows the government to capitalize on private investment and avoid the significant costs

and redundancies of creating its own standards. Agency adoption of privately developed standards also decreases regulatory burdens and increases efficiency and uniformity for industries that rely on such standards. In light of Congress's mandate and these benefits, tens of thousands of federal regulations are now based on private standards.

In implementing Congress's directive to use private standards, the federal government has used a method of incorporation by reference ("IBR"). This approach allows an agency to reference extrinsic material in its regulations so long as the material is "reasonably available to the class of persons affected." 5 U.S.C. § 552(a)(1)(E). That practice respects the copyright that SDOs hold in their standards, meaning SDOs can continue to develop standards and the government can continue to rely on that work. And because federal statute allows this practice only where standards are reasonably available to the public, this method also ensures public access to regulatory requirements.

Petitioner would like federal agencies to adopt a different approach. In her view, every federal agency should instead make the full text of any standard it is considering for IBR available, in its entirety and for free, online. *Amici* agree with Respondent Consumer Product Safety Commission ("CPSC") that there is no legal basis for Petitioner's contentions. Instead, Petitioner's complaint is fundamentally a claim about the best way to balance competing interests. And it is a claim that

has been consistently and decidedly rejected by federal agencies charged with making this sort of policy judgment. There is no basis for this Court to disrupt that judgment.

ARGUMENT

I. CONGRESS REQUIRES FEDERAL AGENCIES TO RELY ON PRIVATELY DEVELOPED STANDARDS.

1. "Standards" are technical works that describe product specifications, provide methods for manufacturing and testing, and offer recommended safety practices. They play a "crucial role . . . in all facets of daily life," H.R. Rep. No. 104-390, pt. VII, at 23 (1995), covering fields as varied as psychological testing, *e.g.*, Standards for Educational and Psychological Testing; building design, *e.g.*, ASHRAE 90.2 (Energy-Efficient Design of Low-Rise Residential Buildings); and fire safety, *e.g.*, NFPA 92 (Standard for Smoke Control Systems).

In 1992, Congress enacted the American Technology Preeminence Act, which included a directive to the National Research Council ("NRC") to study standards development in the United States. *See* Pub. L. No. 102-245, § 508, 106 Stat. 7, 29 (1992). The resulting study contained a detailed overview of the U.S. system as well as recommendations for reform. *See* National Research Council, Standards, Conformity Assessment, and Trade: Into the 21st Century (National Academy Press 1995), https://www.nap.edu/catalog/4921/standards-conformity-assessment-and-trade-into-the-21st-century ("NRC Study").

As the NRC Study explained, while many other countries use "a central, primary national standards-developing body," the United States relies on a "highly decentralized" process for developing standards. NRC Study 32-33. Most standards in the United States are "voluntary consensus standards"—created by private SDOs with the input and expertise of a wide range of interested participants, *see id.* at 33; H.R. Rep. No. 104-390, pt. VII, at 23. Rather than creating a new set of rules for a particular industry or practice out of whole cloth, government entities often adopt these already existing standards when drafting statutes and regulations. *See* NRC Study 55.

The NRC study cataloged the benefits that flow from reliance on private standards. First, governments are spared the cost and administrative burden of assembling the expertise and conducting the processes necessary to produce and update standards. *See* NRC Study 157; Emily S. Bremer, *On the Cost of Private Standards in Public Law*, 63 U. Kan. L. Rev. 279, 294 (2015). This process results in substantial savings to taxpayers. *See infra* pp. 12-14.

Second, private SDOs can respond to emerging needs more quickly than government agencies. *See* NRC Study 56. The development and use of privately developed standards thus allows the government to be more nimble "in meeting new market and societal needs." *Id.* at 157.

Third, because standards often inform industry practice, government reliance on private standards "reduces unjustifiable burdens on private firms to meet duplicative standards for both government and private-sector processes." *Id.* at 157; *see also* OMB Circular A-119, 2016 WL 7664625, at *13 (Jan. 27, 2016). In turn, the prospect of government adoption encourages private organizations to develop "standards that serve national needs" and promotes "efficiency, economic competition, and trade." *Id.*

Given these benefits, the NRC Study found that the U.S. "system serves the national interest well." NRC Study 3. It concluded that "[g]overment should . . . rely on private activities in all but the most vital cases" and do more "to leverage the strengths of the U.S. standards establishment and its services." *Id.* at 157. To that end, the study recommended that Congress enact legislation that would promote federal agencies' use of privately developed, voluntary consensus standards in their regulations. *See id.* at 158.

2. Congress responded by enacting the National Technology Transfer and Advancement Act of 1995 ("NTTAA"). Congress agreed with the study's conclusion that the United States' "unique consensus-based voluntary system has served us well for over a century and has contributed significantly to United States competitiveness, health, public welfare, and safety." H.R. Rep. No. 104-390, pt. VII, at 24. The NTTAA accordingly mandated that "all Federal agencies and

departments shall use technical standards that are developed or adopted by voluntary consensus bodies, using such technical standards as a means to carry out policy objectives or activities." Pub. L. No. 104-113, § 12(d)(3), 110 Stat. 775, 783 (1996).

Consistent with that directive, federal agencies' reliance on SDO-developed standards is widespread. The Code of Federal Regulations contains over 23,000 sections incorporating private standards. Emily S. Bremer, *Technical Standards Meet Administrative Law: A Teaching Guide on Incorporation by Reference*, 71 Admin. L. Rev. 315, 316-17 (2019). And the standards that have been federally adopted now play a critical role in promoting public health and safety. For example, federal agencies have relied on NFPA 72: National Fire Alarm and Signaling Code, NFPA 99: Health Care Facilities Code, and NFPA 101: Life Safety Code to dictate safety requirements for government-operated facilities, as well as minimum safety requirements for facilities suitable for veterans and Medicare patients. *See*, *e.g.*, 38 C.F.R. § 17.74; 42 C.F.R. § 483.90; 46 C.F.R. § 161.002-10(b); 38 C.F.R. § 51.200.

Federal agencies are not alone in utilizing the substantial benefits of the private SDO process. All 50 States and numerous local jurisdictions IBR standards as well. NFPA standards alone have been incorporated, either directly or indirectly, in over 16,000 state and local statutes and regulations.

II. THE PRIVATE STANDARDS DEVELOPMENT SYSTEM FUNCTIONS BECAUSE OF COPYRIGHT.

Private authors must have incentives to make the investments required to realize the NTTAA's policy benefits. Copyright provides this incentive, just as it does for the creation and dissemination of a wide range of creative works. Without copyright protection, the benefits that Congress intended when it enacted the NTTAA would be gravely threatened. IBR provides a way for the federal government to continue to rely on private standards without disturbing their copyright protection.

A. Standards developers rely on copyright protection to support their creative efforts.

The process of creating and updating standards requires massive investments of time and effort. While particular development processes vary across SDOs, most follow the requirements of ANSI, which accredits and coordinates standards development. *See* NRC Study 35 (describing ANSI's role). To receive ANSI accreditation, SDOs must comply with ANSI's "Essential Requirements," which aim to allow "any person . . . with a direct and material interest" to participate in standards development by "expressing a position and its basis," "having that position considered," and "having the right to appeal." *See* ANSI Essential Requirements § 1.0 (Jan. 2020), www.ansi.org/essentialrequirements. An SDO seeking approval for a standard must show that it did not impose any "undue

financial barriers to participation," condition voting on membership status, or allow "any single interest" to exert disproportionate influence on the process. *See id*. § 1.1-.2.

NFPA's development process is illustrative. The process begins with the posting of a public notice online soliciting input from interested persons. After receiving public input, one of NFPA's over 250 Technical Committees—consisting of thousands of volunteers from the public, government, academia, and industry—holds a public meeting to consider and respond to all public comments. The Committee creates a draft standard that is posted to the NFPA website for another round of public review and comment. After the second comment period, the Technical Committee creates a revised draft that it submits to the NFPA Standards Council, together with any appeals. The Council decides appeals and, if appropriate, issues the standard as an official NFPA standard. All told, the process for NFPA to create a single private standard spans roughly two years, and NFPA undertakes this process for each of its over-300 standards every three to five years.

While thousands of expert and lay volunteers provide input, the SDOs themselves must cover the cost of salary and benefits paid to their administrative and editorial staff who oversee the process and assist in drafting the actual text of standards. Some SDOs, like NFPA and NEMA, also employ their own expert staff to give technical guidance to volunteer members of technical committees during

the standards process. SDOs also pay for office and meeting space for multi-day meetings that may involve hundreds of participants. And they incur significant expenses in publishing various committee reports, collecting public input and comments, coordinating outreach and education efforts, and managing information technology. In 2018 alone, for instance, NFPA spent over $11 million on technical committee operations. SDOs incur still more costs in publishing the standards.

As the NRC study recognized, SDOs are able to fund this considerable investment because they can generate revenue from selling, licensing, and otherwise distributing their copyrighted standards to the professionals who use them in their work. *See* NRC Study 32. NFPA, for example, generates about 65% of its revenue from the sale of copyrighted materials. For its part, NEMA allocates half of the royalties earned from the sale of standards developed by a given technical committee to the committee's next annual budget. Without copyright protection, others would be free to expropriate and sell or give away the works created or licensed by SDOs, and SDOs' revenues would drop precipitously.

B. The private standards development system would be gravely threatened without copyright protection.

1. *Amici* SDOs are non-profits. Like most businesses, however, they have to make difficult choices about where to invest their limited resources. Losing the revenue they have historically earned from the sale and licensing of works they create would force them to alter their business practices (to the extent they could

survive at all) in ways that would gravely undermine their mission. First, SDOs could well be forced to reduce the rigor of their development process. That might mean less public participation, fewer technical experts, and less comprehensive discussion and review.

Second, SDOs might be forced to charge fees or to increase existing fees to those who wish to participate in the development process. Currently, SDOs receive and respond to input from a broad range of interested parties, including individuals and entities who are unlikely to pay hefty fees to participate in the development process. If SDOs had to cover their costs through fees, it would likely reduce participation from public interest groups, academics, and interested members of the public. That decreased participation would likely lead to a commensurate increase in the power of regulated industries to influence standard setting. *See* Bremer, 71 Admin. L. Rev. at 329.

Third, the absence of copyright protection would threaten the breadth of standard-setting work that SDOs now engage in. Like many creative industries that rely on a few copyright "hits" to generate the revenue needed to support the full range of their expressive works, SDOs often rely on a few flagship standards to generate most of their revenues; the sales of these standards effectively subsidize the production of standards that serve narrower markets and, accordingly, cannot generate enough revenue to cover the cost of their creation. *See* Bremer, 71

Admin. L. Rev. at 329-30. For example, only roughly a dozen of NFPA's 300 standards generate any meaningful revenue. But the fact that a standard is not profitable does not mean that it is unimportant: to take one example, NFPA 1971: Standard on Protective Ensembles for Structural Fire Fighting and Proximity Fire Fighting generates very little revenue but provides lifesaving specifications for firefighter protective gear.

Currently, *amici* SDOs do not consider whether a standard will be profitable in deciding whether to develop or update it. If SDOs' revenues decreased substantially, this approach might no longer be sustainable. Standards that are less in demand, like NFPA 1971 (the guidelines for firefighter protective gear), might not be updated on a regular basis, and jurisdictions that have incorporated the standard would no longer be able to rely on NFPA as the go-to for industry-leading safety guidelines.

Further, SDOs would be unlikely to engage in the kind of innovation needed to develop new standards that respond to emerging issues. For example, responding to the string of mass shootings in this country, NFPA set out to develop a standard for active shooter incidents in 2017. To create that standard, NFPA solicited input from first responders, emergency personnel, medical professionals, and hospital staff, and put together a Technical Committee of about 80 members. The result was the 2018 release of NFPA 3000: Standard for an Active

Shooter/Hostile Event Response (ASHER) Program—the first and only standard in the world addressing active shooter responses. From the outset, NFPA recognized that it would be unlikely to ever recoup its investment—the standard will primarily be used to develop protocols and train staff, rather than as a day-to-day guidebook. NFPA was able to complete this critically important project because of sales and licensing of its more profitable standards. Without those revenues—and the copyright that allows for them—NFPA 3000 might never have been created.

2. Government agencies might try to fill the void left by the elimination of private standards development. Assuming that responsibility, however, would impose significant burdens on the limited resources of those agencies. Moreover, a system in which every governmental body at every level (federal, state, and local) assumed for itself the responsibility to develop standards would create massive dis-uniformity and inefficiency across a wide range of commercial activity. Multiple jurisdictions would likely set out to develop their own rules for a particular field. The process would be hugely inefficient, duplicating efforts on the front end, and requiring industries to meet multiple jurisdictions' requirements on the back end. And, while national SDOs solicit broad input from leading experts and participants with a wide variety of interests, an individual jurisdiction would be unlikely to attract the same intensity or diversity of views, worsening the resulting regulation it crafted.

3. In short, copyright protection for privately developed standards is working exactly as the Constitution intended—as an efficient economic incentive "To promote the Progress of Science." U.S. Const. art. 1, § 8, cl. 8; *see also Mazer v. Stein*, 347 U.S. 201, 219 (1954) ("Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered."). Without this incentive, the current standards development system would be distorted through some combination of a less robust process, more capture by industry, and fewer and less frequently updated standards. Government entities would be forced to choose between continuing to rely on the resulting inferior standards, or attempting to craft and update their own rules through a process that would impose significant public expense and would introduce substantial inefficiencies for industry that would have to conform to multiple jurisdictions' requirements.

That system is not one that "serves the national interest well," NRC Study 3, and it is not the system that Congress envisioned when enacting the NTTAA. Effectively implementing NTTAA's policy thus requires federal agencies to not only rely on private standards, but to do so in a way that protects and preserves the copyright in those standards.

C. Incorporation by reference provides a means for federal agencies to use private standards without affecting their copyright.

1. The Copyright Act "govern[s] the existence and scope of copyright protection." *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 157 (2010) (citation

and alteration omitted). IBR was a commonly accepted practice before the current Copyright Act was enacted and it has been common since. At no time has Congress said that standards are ineligible for or lose their copyright protection upon being IBR'd (or upon being considered for IBR). And, with respect to federal agencies' practice of IBR'ing, Congress has specifically sanctioned the practice without indicating that it disrupts the copyrights that subsist in those works.

When enacting the 1976 Copyright Act, Congress was well aware that federal, state, and local jurisdictions were frequently IBR'ing privately developed standards. Ten years earlier, Congress enacted the Freedom of Information Act ("FOIA"), which included a provision specifically allowing agencies to IBR material, such as privately developed standards, that is reasonably available. *See* Act of June 5, 1967, Pub. L. No. 90-23, § 552, 81 Stat. 54, 54 (codified at 5 U.S.C. § 552(a)(1)(E)) ("matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register"). The 1976 Act specifies various ways that copyright could be divested. *See, e.g.*, 17 U.S.C. §§ 204, 302. If Congress had thought incorporation by reference affected copyright status, Congress presumably would have listed that as a basis for losing copyright. That it did not indicates that Congress did not believe this well-

established practice did anything to divest copyright protection in incorporated standards. In fact, the legislative history of the 1976 Act shows quite the opposite: "[P]ublication or other use by the Government of a private work would not affect its copyright protection in any way." *See* H.R. Rep. No. 94-1476, at 60 (1976).

Twenty years after it enacted the Copyright Act, Congress enacted NTTAA, which affirmatively requires agencies to use privately developed standards. *See supra* pp. 10-11. Congress did so knowing not only of its prior endorsement of IBR in FOIA, but also of the importance of copyright to private standards development as it passed the NTTAA following its receipt of the NRC Study, which specifically discussed the fact that SDOs "offset expenses and generate income through sales of standards documents, to which they hold the copyright." NRC Study 32. Against this background, there is no basis to conclude that Congress was directing federal agencies to engage in a practice that would divest the standard creators of the underlying copyrights that made their work possible in the first place. As noted, the legislative history of the Copyright Act of 1976 runs directly contrary to this view. And such a result would have been self-defeating, as it would have undermined the very system Congress intended to support.

If Congress had "intended to revoke the copyrights of . . . standards when it passed the NTTAA, or any time before or since, it surely would have done so expressly." *Am. Soc'y for Testing & Materials v. Public.Resource.org, Inc.*, No.

13-cv-1215 (TSC), 2017 WL 473822, at *11 (D.D.C. Feb. 2, 2017) ("*ASTM I*"), *rev'd on other grounds*, 896 F.3d 437 (D.C. Cir. 2018) ("*ASTM II*") (citing *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) (Congress "does not . . . hide elephants in mouseholes.")).[2] That Congress instead decided to encourage IBR shows that Congress did not intend to divest copyright protection.

2. Petitioner is wrong that *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498 (2020), held that Congress intended a contrary result. *See* Petr. Br. 36-37. There, the Supreme Court held that under the "government edicts doctrine," the State of Georgia could not obtain copyright protection for annotations to its official code created by a state legislative body. The Court explained that the government edicts doctrine is "a straightforward rule based on the identity of the author," 140 S. Ct. at 1506—in that case, the State. The Court made it clear that the doctrine does not apply to "works created by . . . private parties[] who lack the authority to make or interpret the law." *Id.* at 1507.

[2] Two *amici* SDOs here are plaintiffs in the *ASTM* litigation, an infringement lawsuit challenging Public.Resource.Org's verbatim copying and distribution of their copyrighted standards. After over a year of discovery, the district court granted summary judgment to plaintiff SDOs, concluding the plaintiffs' standards did not lose copyright protection upon being IBR'ed and rejecting the defendant's fair use defense. *See ASTM I*, 2017 WL 473822, at *5-18. On appeal, the D.C. Circuit declined to decide the copyrightability question, instead remanding for additional factual development regarding fair use. *See ASTM II*, 896 F.3d at 440-41.

The case thus has no application to the ASTM standard on which the CPSC relied—or any standard created by a private SDO. Unlike the official code at issue in *Georgia*, at the time of a standard's creation, it is just a privately developed, expressive work—and it unquestionably can be copyrighted. *See Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881, 887 (2019) ("An author gains 'exclusive rights' in her work immediately upon the work's creation" (quoting 17 U.S.C. § 106)). It is only once a jurisdiction subsequently incorporates a privately authored standard that government makes any decisions vis-à-vis the already created and copyrighted expressive work. At that point, though, the question is not whether the standard *can* be copyrighted, but instead whether the standard *loses* its copyright. And, as explained above, nothing strips standards of their copyright once incorporated. Just as nobody suggests that song lyrics quoted in a judicial opinion or a book designated as required reading in a school district suddenly become "government edicts," standards that have been incorporated do not lose their private authorship once the government decides to reference them.

Petitioner's reliance on *Veeck v. Southern Building Code Congress International, Inc.*, 293 F.3d 791 (5th Cir. 2002) (en banc), is likewise misplaced. That nonbinding, deeply divided, and criticized[3] decision is particularly

[3] *See, e.g.*, 2 William F. Patry, *Patry on Copyright* § 4.84 (West 2015) (arguing that the *Veeck* is "deeply flawed" and "should be disapproved of").

unpersuasive following *Georgia*. *Georgia* made clear that the critical question for the application of the government edicts doctrine is, who authored the work? *See* 140 S. Ct. at 1506. *Veeck* gave short shrift to the authorship question. It acknowledged that the works before it were privately authored but deemed the relevant question to be whether the work had the force of law. *Veeck*, 293 F.3d at 793-94, 796. *Contra Georgia*, 140 S. Ct. at 1512-13 (rejecting argument that government edicts doctrine turned on whether works had force of law). The decision's failure to conduct a "straightforward" analysis "based on the identity of the author," *id.* at 1506, is incompatible with *Georgia*.

In any event, the decision is inapposite. The majority there emphasized it was not deciding whether "copyrights may be vitiated simply by the common practice of governmental entities' incorporating their standards in laws and regulations," *Veeck*, 293 F.3d at 803-04; *see also* 1 Nimmer on Copyright § 5.12 (2019) ("the Fifth Circuit took pains to emphasize the limits of its holding").[4] Far

[4] Other courts of appeals have rejected the argument that incorporation of a copyrighted standard divests the standard of copyright protection. *See Practice Mgmt. Info. Corp. v. Am. Med. Ass'n*, 121 F.3d 516, 521 (9th Cir. 1997), *amended*, 133 F.3d 1140 (9th Cir. 1998) (copyright holder did not lose copyright "when use of [its work] was required by government regulations"); *CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Reports, Inc.*, 44 F.3d 61, 74 (2d Cir. 1994) (rejecting argument "that a state's reference to a copyrighted work as a legal standard for valuation results in loss of the copyright"); *see also Bldg. Officials & Code Adm. v. Code Tech., Inc.*, 628 F.2d 730, 736 (1st Cir. 1980) (declining to resolve copyrightability issue and noting that "the rule denying copyright protection to judicial opinions and statutes grew out of a much different set of circumstances

from being "[i]ncredibl[e]," Petr. Br. 35, the CPSC's acknowledgment that *Veeck* did not "'eliminate[] the availability of copyright protection for privately developed codes and standards that are referenced in or incorporated into federal regulations,'" App'x Vol. 2 at 100 (citing 79 Fed. Reg. 66,267, 66,273 (Nov. 7, 2014)), simply reiterates the Fifth Circuit's explanation of its own opinion.

III. FEDERAL AGENCIES HAVE CONSISTENTLY ENDORSED INCORPORATION BY REFERENCE AS THE APPROPRIATE WAY TO BALANCE THE RIGHTS OF COPYRIGHT HOLDERS WITH PUBLIC ACCESS.

In the past decade, three different federal agencies have considered issues relating to how the government should use private standards. In each of those proceedings, the agency considered the same sorts of arguments that Petitioner presses here (including ones made by Petitioner's counsel). And, in each proceeding, the agency rejected the argument that posting the full text of standards online is the best—much less the only—way for agencies to rely on private standards while ensuring public access. Instead, these agencies endorsed incorporation by reference—the practice CPSC used here—concluding it strikes an appropriate balance between the rights of copyright holders and the public's need for access to incorporated material. Although framed as a challenge to a single rule, the petition in this case is really a request for this Court to strike a different

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than do . . . technical regulatory codes" developed by groups that "serve an important public function").

balance—to replace incorporation by reference with incorporation in full any time an agency is even considering relying on a privately developed standard.[5] The agencies that already considered this question were well suited to hear from a diverse group of interested parties and balance the complex interests at stake. This Court should not undo their policy judgment.

1. Federal agencies have focused extensively on how to implement NTTAA's directive, including with respect to the access issues Petitioner raises. In 2011, the Administrative Conference of the United States ("ACUS") developed recommendations regarding the use of incorporation by reference "through a consensus process in which a broad array of stakeholders participated." OMB Circular A-119, 2016 WL 7664625, at *6; *see* 77 Fed. Reg. 2257 (Jan. 17, 2012). The following year, the Office of Federal Register ("OFR") received a petition authored by, among others, Petitioner's counsel, requesting that the agency revise its regulations regarding incorporation by reference. *See* 77 Fed. Reg. 11,414, 11414-16 (Feb. 27, 2012) (reproducing petition coordinated by Peter Strauss). OFR responded by conducting a rulemaking to address, among other issues, whether "reasonably available" under FOIA meant available "[f]or free . . . [t]o

[5] Far from avoiding any constitutional issue, *see* Petr. Br. 27, any holding that agencies must make the full text of standards available online would *create* constitutional issues. *See CCC Info. Servs., Inc.*, 44 F.3d at 74 (treating IBR as "depriv[ing] the copyright owner of its property would raise very substantial problems under the Takings Clause of the Constitution").

anyone online." *Id.* at 11,414. Separately, shortly after OFR initiated that rulemaking, the Office of Management and Budget ("OMB") invited comments as to "whether and how to supplement" its policies in its Circular A-119: Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities. 77 Fed. Reg. 19,357, 19,357 (Mar. 30, 2012).

In each of those proceedings, the agency heard from a diverse array of stakeholders. Some of those comments repeated the arguments that Petitioner makes here—indeed, Petitioner's counsel submitted numerous comments in each proceeding, many of which echoed arguments presented here.[6] But, unlike the

[6] OFR Comments: Comment (Jan. 30, 2014), https://www.regulations.gov/document?D=OFR-2013-0001-0024; Comment (June 1, 2012), https://www.regulations.gov/document?D=NARA-12-0002-0149; Comment (Apr. 9, 2012), https://www.regulations.gov/document?D=NARA-12-0002-0105; Comment (Mar. 29, 2012), https://www.regulations.gov/document?D=NARA-12-0002-0094; Comment (Mar. 26, 2012), https://www.regulations.gov/document?D=NARA-12-0002-0078; Comment (Mar. 26, 2012), https://www.regulations.gov/document?D=NARA-12-0002-0077; Comment (Mar. 12, 2012), https://www.regulations.gov/document?D=NARA-12-0002-0009; Comment (Mar. 1, 2012), https://www.regulations.gov/document?D=NARA-12-0002-0004.

OMB Comments: Comment (July 2, 2013), https://www.regulations.gov/document?D=OMB-2012-0003-0078; Comment (May 31, 2012), https://www.regulations.gov/document?D=OMB-2012-0003-0055; Comment (May 31, 2012), https://www.regulations.gov/document?D=OMB-2012-0003-0052; Comment (Apr. 30, 2012), https://www.regulations.gov/document?D=OMB-2012-0003-0011; Comment (Apr. 26, 2012), https://www.regulations.gov/document?D=OMB-2012-0003-0003.

record before the CPSC or this Court, those comments were not limited to ones with Petitioner's views. Instead, participants included "standards developing bodies, academics, public interest groups, regulators, and industry," OMB Circular A-119, 2016 WL 7664625, at *6 (discussing ACUS process), with a range of perspectives and opinions.

2. After hearing from all sides, each agency rejected the argument—repeated by Petitioner here—that the federal government should abandon IBR. Most significantly, OFR adopted a final rule implementing the "reasonable availability" requirement in FOIA. The final regulations required that agencies summarize incorporated materials, discuss the ways in which those materials are reasonably available, and explain how interested parties can access the materials. *See* 1 C.F.R. § 51.5(b). But, critically, OFR did not require that agencies post the full text of standards on which they relied online.

Instead, the agency specifically concluded that "Federal law [does not] require[] that all IBR'd standards . . . be available for free online." 78 Fed. Reg. 60,784, 60,787 (Oct. 2, 2013) (notice of proposed rulemaking); 79 Fed. Reg. at

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ACUS Comments: Revised Strauss Amendment (Dec. 2, 2011), https://www.acus.gov/comment/revised-strauss-amendment; Revised Strauss Comments (Dec. 2, 2011), https://www.acus.gov/comment/revised-strauss-comments; Follow-Up Comments Received from Peter Strauss (Nov. 28, 2011), https://www.acus.gov/comment/follow-comments-received-peter-strauss; Comments Received from Peter Strauss (Nov. 16, 2011), https://www.acus.gov/comment/comments-received-peter-strauss.

66,268 (final rule). The agency noted that Congress had made clear those circumstances where it intended to require free online access for incorporated materials. 78 Fed. Reg. at 60,786-87 (citing statute requiring Pipeline and Hazardous Materials Safety Administration to incorporate only standards that "have been made available free of charge to the public on the Internet"). And it explained there was not "one solution" for how to make standards accessible. *Id.* at 60,786. Moreover, OFR explained that incorporated standards retained their copyright protection. *Id.* at 60,792. If federal agencies reproduced copyrighted text online or in the Federal Register, it would infringe that copyright—creating expansive liability for the federal government and violating the requirement of "both the NTTAA and OMB Circular A-119 . . . that federal agencies 'observe and protect' the rights of copyright holders when IBRing." *Id.* Thus, if the agency "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." 79 Fed. Reg. at 66,268.

Petitioner argues that (contrary to OFR's determination) "reasonable availability" means "freely available online." Petr. Br. 23. Remarkably, however, Petitioner's statutory analysis does not acknowledge the fact that OFR *has* interpreted the statutory language in question—and that it rejected Petitioner's

arguments.[7] The absence of any engagement with OFR's reasoning is particularly glaring given that (as Petitioner's counsel has previously recognized) the statute "unmistakably places the responsibility to determine reasonable availability" and "to issue regulations on that subject" with the OFR. Comments of Peter L. Strauss ¶ 8 (Mar. 9, 2012), https://www.regulations.gov/document?D=NARA-12-0002-0009; *see also* 79 Fed. Reg. at 66,269 (explaining authority); 78 Fed. Reg. at 60,785-86. Accordingly, this Court must defer to OFR's interpretation—not ignore it, as Petitioner does.

ACUS and OMB reached similar conclusions in the proceedings they held. Both agencies recognized that it was OFR's job, not theirs, to interpret reasonable availability. *See* 77 Fed. Reg. at 2258; OMB Circular A-119, 2016 WL 7664625, at *6. But both also concluded that, contrary to what Petitioner argues here, the government could ensure reasonable access through means other than posting the full text of an incorporated standard online. Specifically, ACUS offered—and OMB adopted in its final circular—recommendations for how agencies could

[7] Petitioner says only that OFR has shown a "complete disinterest . . . toward the public's right to access law." Petr. Br. 32 n.8. But, as noted, OFR conducted an entire rulemaking proceeding (as urged by Petitioner's counsel) to grapple with this issue. The agency did not—as Petitioner incorrectly asserts—issue a "direct final rule," *id.*, but instead collected comments at the petition and NPRM stage, including *eight* comments from Petitioner's counsel alone. OFR's conclusion is contrary to Petitioner's view of the best way to ensure that the public has access to incorporated materials. But the claim that OFR has shown "disinterest" in the issue is meritless.

"Ensur[e] Incorporated Materials Are Reasonably Available." 77 Fed. Reg. at 2258-59; OMB Circular A-119, 2016 WL 7664625, at *6-7, *19. Both agencies thus recognized, consistent with OFR's conclusion, that there is not "one solution" for how to make standards reasonably available to the public. 78 Fed. Reg. at 60,786; *see also* OMB Circular A-119, 2016 WL 7664625, at *19 (noting availability options including "technological solutions, low-cost publication, or other appropriate means"). Instead, "reasonable availability is context-specific." *Id.*

Moreover, ACUS and OMB found that copyright holders would often be valuable partners in ensuring reasonable availability. *Cf. Schnapper v. Foley*, 667 F.2d 102, 109 (D.C. Cir. 1981) (legislative history of Copyright Act "indicates a desire to vest the government with some flexibility" in "arrang[ing] ownership and publication rights with private contractors"). As ACUS explained, its "research reveal[ed] that some agencies have successfully worked with copyright owners to further the goals of both transparency and public-private collaboration." 77 Fed. Reg. at 2258; *see also* OMB Circular, 2016 WL 7664625, at *19.

That finding is unsurprising. Despite the parade of horribles that Petitioner and her *amici* present, SDOs like *amici* are nonprofits dedicated to public health and safety. Ensuring widespread and ready access to standards is core to *amici* SDOs' organizational missions and non-profit status. For this reason, like other

copyright creators who control access to their creations, many *amici* SDOs choose to make their standards accessible in a range of ways. Most notably, many of the *amici* SDOs make any standard they are aware has been incorporated by reference available on their websites for reading free of charge. And some SDOs go even further: NFPA, for example, makes every standard available online.[8]

In short, a requirement that agencies post online with unrestricted access all IBR'd standards is not the only way to ensure reasonable availability. This Court should reject Petitioner's request to replace the considered judgment of the OFR, ACUS, and OMB with hers.

[8] By default, NFPA puts the current and prior version of every standard online, as well as any version that it is aware has been incorporated by reference. NFPA occasionally receives requests to put other versions of its standards online, and it puts those standards online as well.

CONCLUSION

For the foregoing reasons and those stated in the brief of Respondent CPSC, the Court should deny the petition for review.

Dated: July 24, 2020

Respectfully submitted,

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Dated: July 24, 2020

/s/ *William F. Sondericker*
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CERTIFICATE OF BAR MEMBERSHIP

In accordance with Third Circuit Rule 28.3(d), I hereby certify that I, William F. Sondericker, counsel for *amici curiae* American National Standards Institute; American Society of Civil Engineers; International Association of Plumbing & Mechanical Officials; International Code Council; International Electrotechnical Commission; International Organization for Standardization; National Electrical Manufacturers Association; and North American Energy Standards Board, am a member of the Bar of this Court.

Dated: July 24, 2020

/s/ *William F. Sondericker*
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In accordance with Third Circuit Rule 31.1(c), I certify that the electronic file of this brief has been scanned for viruses with the most recent version of a commercial virus scanning program, Netskope v.76.0.0.470 and Forcepoint One Endpoint v.19.10.4281, and according to the program is free of viruses.

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Dated: July 24, 2020

/s/ *William F. Sondericker*
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CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2020, the foregoing document was filed with the Clerk of the Court, using the CM/ECF system, causing it to be served on all counsel of record.

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/s/ *William F. Sondericker*
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