No. 20-1373

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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LISA MILICE,
*Petitioner*

v.

CONSUMER PRODUCT SAFETY COMMISSION,
*Respondent.*

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

# PETITIONER'S OPENING BRIEF

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## JURISDICTIONAL STATEMENT

Pursuant to 15 U.S.C. § 2060(c), this Court has jurisdiction to review a consumer product safety rule when a person adversely affected by the rule files a petition under Section 2060(a) within 60 days of when the rule becomes final. Petitioner Lisa Milice, the mother of an infant, is an affected person because she is a consumer in the market for durable nursery products including infant bath seats. *See* 15 U.S.C. § 2058(b) (defining "interested persons" as "including manufacturers, consumers, and consumer organizations").

## ISSUES PRESENTED

Ms. Milice presents the following issues for this Court's review:

I. Whether depriving the public of free access to a mandatory legal standard violated the APA's notice-and-comment requirements.

II. Whether CPSC exceeded its statutory authority by failing to make a mandatory legal standard reasonably available to the public.

III. Whether CPSC acted arbitrarily and capriciously by failing to a make mandatory legal standard reasonably available to the public.

IV. Whether CPSC's Rule is contrary to constitutional right, power, or privilege because the public cannot freely access the mandatory legal standard.

## STANDARD OF REVIEW

When this Court reviews an agency action pursuant to 5 U.S.C. § 706(2), this Court "shall decide all relevant questions of law, interpret constitutional and statutory

provisions, and determine the meaning or applicability of the terms of an agency action." *Id.* This Court applies a mixed review to this inquiry. *U.S. v. Reynolds*, 710 F.3d 498, 507 (3d Cir. 2013). The agency receives no deference on pure questions of law, like constitutional and statutory interpretation, and no deference as to whether it followed procedures required by law. *Id.* As for the agency's decision-making and its underlying factual determinations, this Court applies the arbitrary-and-capricious standard. *See id; Council Tree Commc'ns, Inc. v. F.C.C.*, 619 F.3d 235, 250-51 (3d Cir. 2010).

## SUMMARY OF ARGUMENT

Some rights are visceral rights—rights so endemic to our constitution as Americans that we feel them in our gut. Free access to the law is a visceral right. The government cannot charge for access to the law because citizens are the government and the authors of the law. The law belongs to the citizenry.

Other constitutionally protected rights also depend on free access to law. The due process of law requires that people have notice of their legal obligations. And the First Amendment protects the rights to discuss public affairs, petition the government, and have a free and informed press. Hiding the law behind a paywall violates due process and the First Amendment.

Yet, the Consumer Product Safety Commission ("CPSC" or the "Commission") has devised a scheme by which some of its binding safety standards are not freely available. Any person interested in viewing one of these CPSC safety standards must pay the purchase price set by a private organization that holds a monopoly over the law in question. The public's right to access one such legal standard is at issue in this case.

Lisa Milice, an expectant mother at the time (now, a new mother), asked CPSC to let her see a copy of the Safety Standard for Infant Bath Seats, a binding rule the Commission promulgated (the "Rule"). The Commission told her that it doesn't allow people to see the Rule and directed her to buy a copy from ASTM International ("ASTM"), a private organization that specializes in creating safety standards. ASTM charges $56.00 for a copy of the law. Infant bath seats cost approximately $30.00—

about half as much as the standard. *See* Infant Bath Seat, *Amazon.com*, *available at* https://www.amazon.com/s?k=infant+bath+seat&ref=nb_sb_noss_2 [last visited May 18, 2020].

CPSC's failure to make a copy of the Rule freely accessible to the public violated the requirement in the Commission's organic statute that CPSC publish the text of its rules, as well as the Freedom of Information Act ("FOIA") and the Administrative Procedure Act's guarantees that materials incorporated by reference into agency rules be reasonably available to the public. CPSC's failure to provide the public with free access to the binding standard during the notice-and-comment period also violated the APA's mandates regarding public participation in the rulemaking process. Finally, even had CPSC's actions complied with these statutory requirements, CPSC has violated constitutional guarantees of free access to the law. Ms. Milice asks this Court to vacate the Rule, order CPSC to make any binding standard freely accessible to the public whenever CPSC proposes to promulgate a new rule, and order CPSC to make any final rule that CPSC adopts available for free permanently.

## BACKGROUND

CPSC promulgated the Rule to update the antecedent rule's reference to ASTM's voluntary safety standard for infant bath seats. App'x Vol. 1 at 3. CPSC first adopted ASTM's voluntary standard for infant bath seats as a mandatory standard in June 2010, and the Commission updated it once before now, in December 2013. On June 25,

2019, ASTM notified CPSC that ASTM "published a revised 2019 version of F1976 *Standard Consumer Safety Specification of Infant Bath Seats*." App'x Vol. 2 at 27. Although ASTM had already changed its standard since the 2013 version that CPSC incorporated into the Rule, *see* App'x Vol. 1 at 3, ASTM's June 2019 letter to CPSC included "a redlined document highlighting the specific technical changes in the 2019 version and 2018 version to help facilitate review by the CPSC Staff." App'x Vol. 2 at 27. Neither the letter, nor the attached redlined document, explained how the 2019 updated version compared to the 2013 version.

### A. CPSC's Proposed Rule

Following ASTM's lead, CPSC voted unanimously "to approve publication of a *Federal Register* notice … to issue a direct final rule updating the reference to the ASTM standard cited in the Commission's rule for infant bath seats, 16 CFR part 1215." App'x Vol. 2 at 90; *see also* 15 U.S.C. § 2056a(b)(4)(B) (instructing that CPSC may determine that a "proposed revision does not improve the safety of the consumer product covered by the standard" and inform ASTM "that the Commission is retaining the existing consumer product safety standard")

Rather than set out the standard in full, CPSC merely incorporated the standard by reference to ASTM's updated voluntary standard. App'x Vol. 1 at 5. Over about a page of the Federal Register, CPSC summarized the changes that ASTM made in both its 2018 and 2019 revisions to the standard. *Id.* at 4. According to CPSC, ASTM made "several changes that improve safety by clarifying testing." *Id.* The 2018 changes that

CPSC considered to materially improve the safety of infant bath seats included the following:

- Defining the term "'double action release system,'" which "clarifies the actions and the sequence necessary for a release mechanism to be considered a double release mechanism";
- Moving "wording from an explanatory note into the enforceable performance requirement[,]" which clarified that "certain types of contact to the tub fixture test platform are clearly identified as failures";
- Re-formatting and personalizing the label to read "'Stay in arms' reach of your baby,' as opposed to: 'ALWAYS keep baby within adult's reach'";
- Expanding "[t]he requirements for *Instructional Literature* in section 9 of ASTM F1967-18 … to include infant bath seat labeling requirements similar to the marking and labeling section of the standard"; and
- Making several changes to test methods:
  - Defining "Test Surface #3,"[1] a new test surface for latching and locking test procedures, which would allow "new products that are restrained by the sides of the tub [to] be installed and tested according to the manufacturer's instructions by using Test Surface #3";
  - Correcting "dimensioning errors" to the new tub fixture test platform figures, as well as adding new cross-section drawings, defining more clearly the location of the cross-sections, and adding new dimensions to specify accurately the physical tub detail;
  - Adding "a requirement for a new test surface" and modifying "the two existing test surfaces," which would "reduce potential sources of test-to-test and laboratory-to-laboratory variation";
  - Requiring that test force be applied perpendicularly rather than horizontally to account for the rotation of the test bar as force is applied;
  - Changing the static-load test to reflect the addition of Test Surface #3;
  - Requiring that a product be tested "…in all other manufacturer's recommended use positions";

[1] The *Proposed Rule* noted that "'Test Surface #3' is defined as: '(a)ny area on the side(s) of the test platform (for example, inside surface, outside surface, and top ledge), where safety tread strips are not applied.'" App'x Vol. 1 at 4.

- Including Test Surface #3 to the suction-cup test and requiring that test to be conducted "…in all other manufacturer's recommended use positions."

*Id.* at 4-5. CPSC found other 2018 changes by ASTM to be immaterial or neutral, and CPSC concluded that the two revisions ASTM made in 2019 were "neutral to the safety of bath seats." *Id.* at 5.

Instead of informing the public of the precise requirements (or changes) set by law, CPSC insisted that the law "is reasonably available to interested parties" for purchase "from ASTM International" or for "inspect[ion]" in person at CPSC's office in Bethesda, MD. *Id.* In other words, the public's access to the law rested entirely on the price ASTM sets. A copy of ASTM F1967-19 costs $56.00 to purchase; for a redline version that denotes the changes to the standard, ASTM charges $67.00 to purchase.[2] *See* ASTM International, ASTM F1967-19, Standard Consumer Safety Specification for Infant Bath Seats, *available at* https://www.astm.org/standards/F1967.htm [last visited May 16, 2020].

### B. CPSC Rejected Adverse Comments Without Considering the Constitutional Arguments Raised

On October 21, 2019, the New Civil Liberties Alliance ("NCLA"), counsel to Ms. Milice, filed an adverse comment with CPSC. App'x Vol. 2 at 91. The comment

[2] It is unclear without purchasing the redline version of the standard whether ASTM has compared the 2019 version of the standard to the 2018, which CPSC never adopted into a rule, or to the 2013 version that was incorporated into binding law.

argued that CPSC's practice of incorporating by reference ASTM's standards without making those standards publicly available was not only bad policy but unlawful as well. *See id.* at 91-97. The comment articulated how CPSC was failing to make the underlying standard reasonably available and that the failure to provide free access to the law violated due process. *Id.*

Despite NCLA's comments, the Rule became final on December 22, 2019. CPSC would later inform NCLA, by letter dated February 6, 2020, that the Commission did not consider NCLA's comments to be adverse. App'x Vol. 2 at 99. In response to NCLA's due-process argument, CPSC protested that "the Commission's options [with regard to incorporation by reference] are … limited … both by [CPSC's] organic statute and by the Office of the Federal Register." *Id.* CPSC responded to NCLA's request that the Commission publish its standards in full by reciting the process for incorporation by reference set out in 15 U.S.C. § 2056a(b). *Id.* at 99-100. CPSC implied that its limited authority to re-write a voluntary standard under Section 2056a(b)(4)(B) somehow precluded it from publishing standards it proposed. *See id.* at 100. Without another word explaining either that implication or how its organic statute forbade the Commission from publishing binding safety standards, the Commission moved ahead.

The Commission next argued that copyright law forbids free access to the text of agency rules. *Id.* Although, as the letter noted, federal case law is contrary to this position, CPSC considered itself bound by the legal interpretation of the Office of the Federal Register ("OFR"). *Id.* (quoting Office of the Federal Register, *Incorporation By*

*Reference*, 79 *Fed. Reg.* 66,267, 66,273 (Nov. 7, 2014)).[3]

CPSC concluded its letter as follows: "As required by OFR's regulations, the latest standard is reasonably available to interested parties, who may purchase a copy of the standard from ASTM. Interested parties can also inspect a copy of the standard free of charge at CPSC's offices in Bethesda." *Id.* at 101. By the time the Commission sent its February 6 letter, however, Ms. Milice and her attorneys already knew the final assertion in CPSC's letter to be patently false.

### C. CPSC's Rule Is Not Reasonably Available

In preparation for this lawsuit, undersigned counsel wished to see the standard underlying the Rule. According to the Rule, "[a] copy of the standard can [] be inspected at CPSC's Division of the Secretariat, U.S. Consumer Product Safety Commission, Room 820, 4430 East West Highway, Bethesda, MD 20814, telephone 301-504-7923." App'x Vol. 1 at 5. On January 9, 2020, undersigned counsel called CPSC at the number provided to clarify how to find CPSC's reading room and to determine what steps are necessary to arrange to view a copy of the standard. App'x Vol. 2 at 105**.** Consistent with the pronouncement in CPSC's Rule, undersigned counsel planned to travel to Bethesda, Maryland, to view a copy of the standard. *Id.* Undersigned counsel's contemporaneous notes of the January 9 phone call memorialized CPSC's response. *Id.*

[3] Contrary to OFR's legal interpretation, the Supreme Court recently reaffirmed the public's right to free access to the law, in the face of copyright claims. *See Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1504 (2020).

According to the Commission's representative with whom counsel spoke on January 9, there was no way to view the standard without paying ASTM, the organization which produced the standard, to see a copy. *Id.* CPSC's representative stated:

> "Listen, I've been here for five years and we get calls about this every single day, and the answer is that if you want to see, you have to pay for it. Because we don't come up with them; the labs who come up with them have to make money somehow. So, there's only limited information that we can provide for free. They are private organizations and we have nothing to do with the prices they set."

*Id.*

The next day, January 10, Ms. Milice contacted CPSC to request an opportunity to travel, at her own expense, to the Commission's Bethesda reading room to view the ASTM standard at issue. App'x Vol. 2 at 102. Ms. Milice also took contemporaneous notes of her call. *Id.* The CPSC representative with whom Ms. Milice spoke advised that "there [wa]s absolutely no way" Ms. Milice could view the ASTM standards for free, at the agency's reading room or otherwise. *Id.* at 102-03. According to CPSC's representative, if Ms. Milice wished to view an ASTM standard, she would have to contact ASTM and pay for any standards she wished to view. *Id.* at 103.

On February 20, 2020, Ms. Milice timely petitioned this Court, pursuant to 15 U.S.C. § 2060(a), to review the Rule. App'x Vol. 1 at 1.

## DISCUSSION

### I. CPSC'S RULE IS PROCEDURALLY INVALID AS IT VIOLATES NOTICE & COMMENT REQUIREMENTS UNDER 5 U.S.C. §§ 553 & 706(2)(D)

Section 553 of the APA "requires an agency to provide public notice and an opportunity to comment before promulgating a legislative or substantive rule." *Minard Run Oil Co. v. U.S. Forest Serv.*, 670 F.3d 236, 254 (3d Cir. 2011), *as amended* (Mar. 7, 2012). "The purpose of section 553 is to give the public an opportunity to participate in the rulemaking process, and to enable the agency promulgating the rule to educate itself before establishing rules and procedures which have a substantial impact on those regulated." *Louisiana Forestry Ass'n Inc. v. Sec'y U.S. Dep't of Labor*, 745 F3d 653, 676 (3d Cir. 2014) (cleaned up). Similarly, CPSC's organic statute provides: "Before relying upon any voluntary consumer product safety standard, the Commission shall afford interested persons (including manufacturers, consumers, and consumer organizations) a reasonable opportunity to submit written comments regarding such standard." 15 U.S.C. § 2058(b).

Pursuant to § 706(2)(D), a court must "hold unlawful and set aside agency action, findings, and conclusions" that CPSC promulgated "without observance of procedure required by law." The Court holds an agency to an "exacting standard" in determining whether an agency adhered to the APA's procedural requirements. *Nat. Res. Def. Council, Inc. v. E.P.A.*, 683 F.2d 752, 760 (3d Cir. 1982). "[J]udicial independence in carrying out the procedural aspects of the review function derives from this country's

historical reliance on the courts as the exponents of procedural fairness." *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1027 (D.C. Cir. 1978); *see also U.S. v. Reynolds*, 710 F.3d 498, 508-09 (3d Cir. 2013) (explaining that review of claims brought under § 706(2)(D) is *de novo*).

When evaluating a claim that an agency "failed to satisfy the requirements of section 553," the Court must "determine whether the notice was sufficient to fairly apprise interested parties of all significant subjects and issues involved." *Louisiana Forestry*, 745 F.3d at 676 (citations omitted). To "fairly apprise" the public of a new rule, the agency's notice must satisfy the purposes of notice-and-comment rulemaking, which include:

> (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review.

*Prometheus Radio Project v. F.C.C.*, 652 F.3d 431, 449-50 (3d Cir. 2011) (quoting *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005)). An agency cannot achieve these purposes without "an exchange of views, information, and criticism between interested persons and the agency." *Id.* In other words, the notice-and-comment must actually provide "a *meaningful* opportunity" to comment. *Id.* at 450 (emphasis added) (quoting *Rural Cellular Ass'n v. F.C.C.*, 588 F.3d 1095, 1101 (D.C. Cir. 2009)).

Nearly 50 years ago, the U.S. Court of Appeals for the D.C. Circuit announced that it was inconsonant "with the purpose of a rule-making proceeding" for an agency "to promulgate rules on the basis of … data that, [to a] critical degree, is known only to the agency." *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. 1973). The information that an agency must "reveal[] for public evaluation" during the rulemaking process includes "the technical studies and data upon which the agency relies in its rulemaking." *Banner Health v. Price*, 867 F.3d 1323, 1336 (D.C. Cir. 2017) (cleaned up). Most other circuits have since followed suit, adopting the standard set out in *Portland Cement*. *See, e.g.*, *Citizens Awareness Network, Inc. v. U.S.*, 391 F.3d 338, 353 (1st Cir. 2004); *Nat'l Black Media Coal. v. F.C.C.*, 791 F.2d 1016, 1023 (2d Cir. 1986); *Lloyd Noland Hosp. & Clinic v. Heckler*, 762 F.2d 1561, 1565 (11th Cir. 1985); *Springfield Tele. of Utah, Inc. v. F.C.C.*, 710 F.2d 620, 629 (10th Cir. 1983); *Air Prod. & Chemicals, Inc. v. Fed. Energy Reg. Comm'n*, 650 F.2d 687, 700 n.17 (5th Cir. 1981); *Wash. Trollers Ass'n v. Kreps*, 645 F.2d 684, 686 (9th Cir. 1981). This Court has recognized the weight of that authority, noting that "a number of other courts of appeal have … h[eld] that failing to place important data on the record constitutes prejudicial error," but decided the case at hand on other grounds. *Hanover Potato Prod., Inc. v. Shalala*, 989 F.2d 123, 131 (3d Cir. 1993).

In an analogous circumstance to this case, the Ninth Circuit ruled that a "summary" that incorporated by reference pertinent information did not satisfy an agency's duty to provide notice of the law. *Kreps*, 645 F.2d at 685-86. The statute at issue, the Fishery Conservation Act of 1976, required the Secretary of Commerce to

provide a "summary" of a proposed fishery plan and allowed the Secretary to incorporate by reference documents containing necessary information. *Id.* As the court explained, the summary could satisfy Congress' goal of public comment "only if the public is able to make intelligent, informed, meaningful comments." *Id.* at 686. The summary "must therefore provide information sufficient to enable an interested or affected party to comment intelligently[.]" *Id.* The court concluded that, "although the 'summary' that the Plan is required to include may incorporate by reference documents containing the necessary information, those documents *must* be reasonably available to the interested public." *Id.* & n.2 (emphasis added) (noting that the information central to the agency's decision must be "accessible" to the public).

Similar to the Secretary's notice in *Kreps*, CPSC's notice in this case did not fairly apprise the public of the standard it proposed to incorporate by reference into the Federal Register. The notice failed to achieve any of the three purposes set out in *Prometheus Radio*: (1) it did not expose the agency's proposed regulation to diverse public comment; (2) it did not ensure fairness to affected parties; and (3) it deprived affected parties of any opportunity to develop record evidence, which would have enhanced the quality of this Court's review. *See* 652 F.3d at 450. Without ready access to the proposed standard, affected persons were left with a choice between purchasing the standard from ASTM or limiting comments to CPSC's opaque practices. Neither choice amounted to a *meaningful* opportunity to be heard. *Id.*

That CPSC offered a summary of its proposal does not change this calculus. *See Portland Cement*, 486 F.2d at 393. As outlined in the Background section above, CPSC's staff identified several ways that ASTM had changed the standard to materially affect the safety of infant bath seats. But knowing what types of changes ASTM made and what CPSC's staff thought about those changes does not give the interested public a complete picture those changes. For instance, informing the public that ASTM found that "dimensioning" errors existed in the 2013 standard—without identifying those errors or the new dimensions—does not help the public appreciate the magnitude of those errors. App'x Vol. 1 at 4. CPSC's summary indication that errors existed previously does little to notify the interested public in a way that might prevent similar errors from persisting in the current standard. Indeed, perhaps if CPSC's rulemaking process had not been so opaque in 2013, public comment might have identified those errors at the time.

Consider another example. The Rule altered "wording from an explanatory note into the enforceable performance requirement" and clarified that "certain types of contact to the tub fixture test platform are clearly identified as failures" but never explained what those "types of contact are." *Id.* Any consumer who wants to know what type of failures CPSC will tolerate in its safety standard of infant bath seats has no hope of finding out free of charge.

Indeed, nearly every change that CPSC briefly summarized implicates just how much failure in infant bath seats the Commission will tolerate and how it will measure

the consequences of such failures. *See* App'x Vol. 1 at 4-5. Consumers like Ms. Milice must be able to access that information to make informed choices about the safety of infant products. Yet, the Rule's summary is completely inscrutable.

The regulated industry also cannot comment meaningfully during the rulemaking process without paying for the privilege. Manufacturers are legally bound by the standards, which can have profound impacts on product testing and a product's market viability. CPSC's failure to publish the standard it planned to adopt deprived the comment process of valuable insights that manufacturers could offer with respect to these details and the potential impact the changes might have on child safety.

The Commission's summary simply does not satisfy its obligation to make publicly accessible any data, records, and information that are central to its decision-making. *See Kreps*, 645 F.2d at 685-86. Promulgating binding regulations based on data and information known only to the agency subverts the purpose of a public comment period. *See Portland Cement*, 486 F.2d at 393.

Public access to the proposed standard during CPSC's rulemaking is particularly critical when considering the purpose of the rulemaking at issue. If CPSC had developed the safety standard for infant bath seats, rather than merely adopting ASTM's standard, the agency would be required to disclose critical data and information on which it relied. *See id.* But because ASTM developed the standard in private, sheltered from public input and scrutiny, CPSC suggests that it can withhold the final standard from public review in addition to any data relating to ASTM's processes. This Court

should not countenance the Commission's attempt to insert such a gaping loophole into notice requirements. "Having to purchase access to the proposal and the likely unavailability of its supporting materials has conflicted sharply with both the contemporary law of rulemaking and the developments that have made access to data costless for all, once material is placed online." Peter L. Strauss, *Private Standards Organizations & Public Law*, 22 WM. & MARY BILL RTS. J. 497, 520 (2013).

Even if CPSC did make a copy of the standard available for "inspection" in its Bethesda reading room—which it does not—that would not save this fatally flawed scheme. As Ms. Milice and undersigned counsel have attested, CPSC flatly refused to make the relevant standards available for review in its reading room during the comment period. App'x Vol. 2 at 102-03, 105. Indeed, CPSC indicated that it had nothing to do with setting a cost for access to the law. *Id.* at 106. But even if CPSC's reading room were more than a figment of the Commission's imagination, the public cannot be expected to drive, fly, or otherwise travel to Bethesda to see a copy of the law. CPSC's blatant refusal to provide access to the binding law can hardly be said to comply with the APA's notice-and-comment requirements.

CPSC's failure to make publicly accessible the regulations it proposed to incorporate by reference was not harmless. *See Reynolds*, 710 F.3d at 514 (reviewing for harmless error an agency's failure to comply with requisite processes). Without access to the standard, as well as the underlying data and records, the public was deprived of its opportunity to comment meaningfully. Depriving manufacturers and consumers

alike from commenting on the rulemaking injures product safety and leaves consumers unable to make a fully informed choice about the products they wish to purchase. Accordingly, the proper remedy for CPSC's violation of 5 U.S.C. §§ 553 & 706(2)(d) is to vacate the Rule and order CPSC to provide free public access to any relevant proposed standard *before* the agency re-promulgates the rule.

## II. THE RULE IS SUBSTANTIVELY INVALID AS IT IS IN EXCESS OF STATUTORY AUTHORITY UNDER 5 U.S.C. § 706(2)(C)

The APA also charges courts "with reviewing whether an agency action is 'in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.'" *N.J. Bd. of Pub. Utilities v. F.E.R.C.*, 744 F.3d 74, 95 (3d Cir. 2014) (quoting 5 U.S.C. § 706(2)(C)). A rule that exceeds an agency's statutory grant of authority is without legal basis and, therefore, is unlawful. *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 307 (2013) (admonishing courts to "tak[e] seriously, and apply[] rigorously, in all cases, statutory limits on agencies' authority"); *cf.* Peter L. Strauss, *In Search of Skidmore*, 84 FORDHAM L. REV. 789, 795 (2014).

An inquiry under § 706(2)(C) "necessarily entails a firsthand judicial comparison of the claimed excessive action with the pertinent statutory authority." *La. Forestry*, 745 F.3d at 679. This Court "rel[ies] on the rules of statutory interpretation articulated by the Supreme Court and this Court," examining the statutory scheme as a whole to resolve whether the agency has exceeded its grant of authority. *Phila. v. Att'y Gen. of U.S.*, 916 F.3d 276, 284 (3d Cir. 2019), *reh'g denied* (June 24, 2019).

### A. Tools of Statutory Interpretation Elucidate that Congress Meant for Agency Rules to Be Freely Accessible

The cardinal rule of statutory interpretation instructs that a court "begin with the statutory language" and "'presume that a legislature says in a statute what it means and means in a statute what it says there.'" *In re Phila. Newspapers, LLC*, 599 F.3d 298, 304 (3d Cir. 2010), *as amended* (May 7, 2010) (quoting *Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)). If a statute's meaning is clear from its text, the inquiry ends there. *Id.*

The next interpretive tools that courts employ are the descriptive canons of interpretation. *U.S. v. EMF Homer City Generation, L.P.*, 727 F.3d 274, 294-95 (3d Cir. 2013). These well-known tools include the understanding that Congress gave words their ordinary, contemporary meaning; used words consistently throughout the statute; and did not intend an absurd result. *BedRoc, Ltd., LLC v. U.S.*, 541 U.S. 176, 184 (2004); *Si Min Cen v. Att'y Gen.*, 825 F.3d 177, 194 (3d Cir. 2016); *EMF*, 727 F.3d at 294. Additionally, courts consider "the specific context in which the language is used, and the broader context of the statute as a whole." *Monzon v. De La Roca*, 910 F.3d 92, 102 (3d Cir. 2018) (citations omitted). And "the regulatory and statutory backdrop," as well as "'the title of a statute and the heading of a section,'" can also aid in this analysis and may illuminate a statute's meaning. *Si Min Cen*, 825 F.3d at 194-95 (quoting *Almendarez-Torres v. U.S.*, 523 U.S. 224, 234 (1998)).

If, after utilizing its descriptive tools, the court is still not satisfied that it has discerned a statute's true meaning—or simply wishes to confirm its evaluation—the

court next turns to so-called "hybrid" canons of interpretation, such as the constitutional-avoidance doctrine and the "saving canon."[4] *EMF*, 727 F.3d at 294. Like descriptive canons, hybrid canons also help the court to infer a statute's meaning, but they also serve a normative goal of "achiev[ing] certain policy goals that courts have identified." *Id.* In other words, doctrines like constitutional avoidance permit the court to infer that Congress meant for its statutory scheme to function constitutionally, without infringing the rights of those the scheme may affect. *See id.*

Applying those interpretive tools to this case shows that Congress meant, unambiguously, for the public to have free access to the law. Stated differently, Congress did not authorize agencies to hide binding rules behind a private organization's paywall.

### 1. CPSC's Organic Statute Unambiguously Requires the Commission to Publish the Full Text of Its Rules

The Commission's organic statute unambiguously prohibits CPSC from promulgating a consumer product safety rule "unless the Commission publishes in the Federal Register the text of the proposed rule[.]" 15 U.S.C. § 2058(c). CPSC may, in certain circumstances, promulgate voluntary safety standards as the Commission's

[4] It is important to note that the canon of avoidance is a "'traditional tool[] of statutory construction'" that this Court must apply "at the Step One stage" of an analysis under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), while "defining the scope of a congressional delegation" and determining "whether an agency's interpretation falls within a gap Congress has authorized an agency to fill." *Am. Farm Bureau Fed'n v. E.P.A.*, 792 F.3d 281, 301 (3d Cir. 2015).

binding consumer safety standard. *Id.* at 2058(a)(5) (permitting the agency to invite the submission of voluntary safety standards); *id.* at (b)(1) (permitting the agency to promulgate a voluntary safety standard); *id.* at 2056a(b)(1)(B) (requiring CPSC to promulgate durable nursery safety standards that are "substantially the same" or "more stringent" than voluntary standards); *id.* at 2056a(b)(4) (outlining the process to update voluntary standards the Commission has adopted).

But the plain language of the provisions allowing the Commission to adopt voluntary safety standards makes clear that those standards become "a consumer product safety standard issued by the Commission." *Id.* at 2056a(b)(4)(B); *see also id.* at 2058(b)(1) (explaining that a voluntary standard adopted by CPSC is "promulgated … *as* a consumer product safety standard") (emphasis added). And, again, CPSC must publish the full text of any safety standard it adopts. *Id.* at 2058. There is no ambiguity in this long-standing, straightforward statutory mandate. *See Phila. Newspapers*, 599 F.3d at 304 (if the statute's text is clear, that is the end of the court's inquiry).

### 2. FOIA Allows for Incorporation by Reference Only if the Agency Provides for Freely Accessible Rules

Like CPSC's organic statute, the FOIA provisions of the APA also require agencies to publish the text of their substantive rules. Specifically, an agency must "make available to the public" all "substantive rules of general applicability adopted as authorized by law." 5 U.S.C. § 552(a)(1)(D). Consistent with this requirement, an agency must "separately state and currently publish in the Federal Register for the

guidance of the public." *Id.* This publication requirement implicates the right of affected persons to have notice of the law: "a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published." *Id.* at 552(a).

There is, however, an exception to FOIA's general requirement that agencies must publish the full text of substantive rules. Section 552(a) creates a presumption that "a person has actual and timely notice" of a rule if the agency incorporates a provision by reference and makes that provision "reasonably available to the class of persons affected thereby … with the approval of the Director of the Federal Register." *Id.* According to the Rule, CPSC believed that this FOIA exception allowed the Commission to evade the plain mandate of 15 U.S.C. § 2058(c). *See* App'x Vol. 1 at 6 (citing 1 C.F.R. § 51.5(b), which governs the process for incorporation by reference under 5 U.S.C. § 552(a)).

Before turning to a textual analysis of FOIA's incorporation-by-reference exception, it is important to bear in mind that Congress enacted CPSC's organic statute after FOIA's amendments to the APA, so any conflict between the two publication requirements should be resolved in favor of CPSC's later-enacted, more-absolute mandate. *See Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 241 (2007). CPSC cannot simply rely on an older, more-general provision to save it from the precise directive in Section 2058(c). After all, CPSC *did not exist* when Congress enacted FOIA to increase free access to the law following high-profile fiascos during the New Deal.

*See infra* Section II.A.3. Years later, in 1981, when Congress enacted Section 2058(c)'s publication requirement, *see* Pub. L. 97-35, Sec. 1203(a) (1981), Congress was familiar with FOIA's requirements and still chose deliberately to mandate that CPSC "publish[] in the Federal Register the text of the proposed rule." 15 U.S.C. § 2058(c). This more-specific, later-enacted requirement demonstrates a clear congressional imperative for CPSC to follow the text of the law. The Commission must, therefore, "*publish* … the *text* of the proposed rule," *id.*, not direct the public to buy it from someone else.

In any event, the text of FOIA only confirms that CPSC cannot promulgate substantive rules without making the full text of the safety standard freely accessible to the public.

FOIA does not define "reasonably available," so this Court must give that term its ordinary meaning, taking into account the purpose of the statute as set out in its provisions as a whole. *See BedRoc, Ltd.*, 541 U.S. at 184; *Si Min Cen*, 825 F.3d at 194; *EMF*, 727 F.3d at 294. As defined at the time of FOIA's passage, the adverb "reasonably," conjugated from "reasonable" meant, "Just; proper. Ordinary or usual. Fit and appropriate to the end in view." Reasonable, BLACK'S LAW DICTIONARY 1431 (4th ed. rev. 1968). And the term "available" was understood to mean "usable" or "effectual." Available, BLACK'S LAW DICTIONARY 171; *see also* "Available," Merriam-Webster, *Merriam-Webster.com Dictionary*, *available at* merriam-webster.com/dictionary/available [last visited May 14, 2020] ("available" means something is "present or ready for immediate use"; "accessible, obtainable"). Given

that the "end in view" is for affected persons to access the incorporated material, a standard is "reasonably available" if the Commission uses proper and ordinary means to make the standard usable by affected persons.

What is just, proper, ordinary, or usual is necessarily circumstance dependent. As circumstances evolve—particularly through technological advances—what "reasonable" steps an agency must take to make law available must evolve as well.[5] Reasonable availability has taken on a more rigorous meaning since the original enactment of 5 U.S.C. § 552(a), when "the Federal Register and the Code of Federal Regulations (CFR), like statutes, were available only as print documents." Strauss, 22

[5] Technological developments over time have improved the government's ability to make laws freely accessible. In 1795, for instance, publication in three local newspapers might have been reasonable access—particularly considering that Congress subsidized the cost of shipping newspapers through the U.S. Postal Service for "the diffusion of knowledge." Mendelson, 112 MICH. L. REV. at 764 & n.159. By 1859, Congress "provided for the permanent retention of governmental publications by libraries and other designated depositories." *Id.* at 765 & n.164.

Jumping forward to 1993, after the arrival of the Internet, Congress began requiring the Government Printing Office "to make universal online access to statutes and regulations available, defining recoverable costs as the 'incremental cost of dissemination,'" but barred that charge at depository libraries. *Id.* at 766 & n.170-72 (noting that the GPO has not imposed any cost). Three years later, "Congress required agencies to make available, by 'electronic means,'" indices of records created from late-1996 and onward. *Id.* at 766. The stated purpose was to "enhance public access to agency records and information" and to "foster democracy by ensuring public access to agency records and information." *Id.* at n.174 (citation omitted). And in 2002, with the e-Government Act, Congress began to require agencies to post electronically their rulemaking and rulemaking dockets, "and to post on their websites a wide range of materials, with the express purposes of 'increasing access, accountability, and transparency' and enhancing 'public participation in Government[.]'" *Id.* at 766 & n.175 (cleaned up).

WM. & MARY BILL RTS. J. at 518. Now, citizens use "websites as their primary point of contact with their government, [so] even seemingly small and subtle barriers that inhibit fair public access to government information take on significance." Comments of Cary Coglianese, Edward B. Shils Prof. of Law, Univ. of Penn. L. Sch. to Michael White, Acting Dir., Office of the Fed. Register, Nat'l Archives & Records Admin. 1 (May 30, 2012). Access to the Rule, like other CPSC rules, "contrasts sharply with the accessibility of the U.S. Code and the CFR, both freely available to anyone online and in the over 1,200 depository libraries nationwide." Nina A. Mendelson, *Private Control Over Access to the Law: The Perplexing Regulatory Use of Private Standards*, 112 U. MICH. L. REV. 737, 768 (2014). Given the widespread access to other laws and rules available online, the current circumstances in 2020 dictate that CPSC, at the very least, make the Rule freely available online. This would save physical space in the Code of Federal Regulations while ensuring that any provisions incorporated by reference are reasonably available as Congress has instructed.

**3. Congress Has Required the Public to Have Free Access to Law**

Congress created the Federal Register and the CFR to ensure that regulatory requirements would be publicly and freely available. The New Deal created massive amounts of new administrative regulations that were mostly available only in "separate paper pamphlets," which created "chaos" because the regulated public lacked easy access to legal obligations. Erwin Griswold, *Government in Ignorance of the Law—A Plea*

*for Better Publication of Executive Legislation*, 48 Harv. L. Rev. 198, 199, 204-05 (1934). The situation was so bad that even the *government* lacked notice of regulatory requirements, and "was seriously embarrassed" when it brought major prosecutions to enforce regulations that had been repealed or altered. *The Federal Register & the Code of Federal Regulations—A Reappraisal*, 80 Harv. L. Rev. 439, 440-41 (1966). In one such instance, the Supreme Court observed, "Whatever the cause of the failure to give appropriate public notice of the change in the section, with the result that the persons affected, the prosecuting authorities, and the courts, were alike ignorant of the alteration, the fact is that the attack in this respect was upon a provision which did not exist." *Panama Refining Co. v. Ryan*, 293 U.S. 388, 412 (1935). Publication in a single, freely available source was meant to solve this problem. *A Reappraisal*, 80 Harv. L. Rev. at 440-41.

As this Court confirmed previously, "the fundamental purpose of the Federal Register Act" was "to eliminate the problem of secret law" and "provid[e] public access to what has been published in the Federal Register." *Cervase v. Office of the Fed. Register*, 580 F.2d 1166, 1169, 1171 (3d Cir. 1978). An agency's failure to provide interested persons with the means to retrieve documents codified in the Federal Register undermines Congress' purpose of eliminating secret law. *Id.*

Similarly, Congress enacted FOIA, 5 U.S.C. § 552, because it believed that governmental disclosure of information to the public was inadequate. *OSHA Data/CIH, Inc. v. Dep't of Labor*, 220 F.3d 153, 160 (3d Cir. 2000). "[T]he clear legislative intent" of FOIA was "to assure public access to all governmental records whose

disclosure would not significantly harm specific governmental interests." *Dep't of Air Force v. Rose*, 425 U.S. 352, 365-66 (1976). "Congress therefore structured FOIA to reflect 'a general philosophy of full agency disclosure unless information exempted under clearly delineated statutory language." *OSHA Data*, 220 F.3d at 160 (quoting S. REP. NO. 89-813, at 3 (1965), as quoted in *Rose*, 425 U.S. at 360-61). To further FOIA's purpose, the Supreme Court has dictated that courts construe broadly FOIA's disclosure requirements and construe narrowly its exemptions. *Rose*, 425 U.S. at 366. FOIA's "recognized principal purpose" requires courts "to choose that interpretation most favoring disclosure." *Id.*

The title of FOIA and the heading of Section 552 serve only to reinforce Congress' purpose of granting the freedom of information and public access to agency rules. *See* 5 U.S.C. § 552 ("Public information; agency rules, opinions, orders, records, and other proceedings"); *see also Si Min Cen*, 825 F.3d at 194 (confirming legislative meaning through titles and headers). And the statute's legislative history confirms that Congress expected that standards that agencies incorporated by reference "would be widely available in law libraries open to public use." Strauss, 22 WM. & MARY BILL RTS. J. at 519. In his article *Private Standards Organizations & Public Law*, Professor Peter L. Strauss outlined how the primary purpose of allowing incorporation by reference was "to protect the utility of the Federal Register and the Code of Federal Regulations, reducing their otherwise necessary size by thousands of printed pages[.]" *Id.* at 502. Congress assumed, however, that "standards made law by incorporation would be

published by commercial law publishers operating in the competitive market for their services[,]" which would be carried in public libraries. *Id.* & n.150 (citing S. REP. NO. 88-1219, at 5 (1964)).

Both "the specific context in which the language is used, and the broader context of the statute as a whole" demonstrate that Congress meant for public access to law to be free. *See Monzon*, 910 F.3d at 102. Nothing in the statutory language suggests that Congress meant for interpretation by reference to be an exception to FOIA's broader policy of public disclosure. Congress sought only to relieve the Federal Register of printing bulky physical documents. Congress in no way meant that interested persons would need to pay for access law—nor did Congress subject law to monopoly pricing.[6] *Id.*

To the extent that incorporation by reference could be considered an exception to FOIA's public-access requirements, that exception must be construed narrowly, in

[6] Despite this congressional purpose, as of 2015, over 9,500 incorporated-by-reference standards were not publicly available. For each, "[a]n individual who seeks access to this binding law generally cannot freely read it online or in a governmental depository library, as she can the U.S. Code or the Code of Federal Regulations. Instead, she generally must pay a significant fee to the drafting organization, or else she must travel to Washington, D.C., to the Office of the Federal Register's reading room." Mendelson, 112 MICH. L. REV. at 737 & n.14 (explaining the instructions for making an appointment to view incorporated-by-reference standards, as set out at http://www.archives.gov/federal-register/cfr/ibr-locations.html [last visited April 27, 2020]).

Of course, as seen in this case, CPSC has failed to even allow the interested public, like Ms. Milice, to utilize the Commission's reading room at their own expense. App'x Vol. 2 at 102-03.

favor of disclosure. *Rose*, 425 U.S. at 366. Congress enacted FOIA to increase public access to the law. *Id.* By its terms, Section 552(a) prohibits CPSC from hiding its binding rules behind a private paywall.

### 4. The Constitutional-Avoidance Doctrine Militates Against CPSC's Interpretation of 5 U.S.C. § 552

When a provision may be susceptible to more than one reading, "a court may shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems." *Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018). As mentioned above, the constitutional-avoidance doctrine is a "hybrid" interpretive tool with both descriptive and normative ends. *EMF*, 727 F.3d at 294. The primary goal is to discern statutory meaning. *Clark v. Martinez*, 543 U.S. 371, 382 (2005). Courts "assume that Congress does not intend to pass unconstitutional laws[.]" *Guerrero-Sanchez v. Warden, York Cty. Prison*, 905 F.3d 208, 223 (3d Cir. 2018). Consistent with this approach, when "an administrative interpretation of a statute invokes the outer limits of Congress' power," courts require "a clear indication that Congress intended such a result." *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001).

In a recent copyright dispute, the Court of Appeals for the D.C. Circuit specifically acknowledged the "serious constitutional concerns" raised by the unavailability of ASTM standards. *Am. Soc'y for Testing & Materials, et al. v. Public.Resource.Org, Inc.*, 896 F.3d 437, 447 (D.C. Cir. 2018) ("*ASTM*"). The court, however, avoided those constitutional concerns and limited its decision to the fair-use

doctrine. *Id.* at 453. The D.C. Circuit held that, depending on the nature of the standard at issue, "it may be fair use … to reproduce part or all of a technical standard in order to inform the public about the law." *Id.* at 453. Judge Katsas wrote separately to enunciate that reprinting a copyrighted standard is likely a fair use "when an incorporated standard sets forth binding legal obligations, and when the defendant does no more and no less than disseminate an exact copy of it." *Id.* at 459 (Katsas, J., concurring). In "the unlikely event that disseminating 'the law' might be held not to be fair use," Judge Katsas concluded, the court would address the constitutional issues inherent in denying free access to the law. *Id.*

Even more recently, the Supreme Court underlined the public's right to access law in *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1504 (2020). The Court rejected Georgia's attempt to privatize ownership of non-binding annotations to the State's code. *Id.* at 1512-13. Georgia's legislature had contracted with LexisNexis to draft the annotations, subject to the approval of a legislative commission. *Id.* at 1505. The contract provided that LexisNexis retained an exclusive right to sell, distribute, or publish the annotated code. *Id.* The Court held, however, that the annotated code could not be copyrighted. *Id.* at 1506. Although the Court decided the case on copyright grounds, Chief Justice Roberts, writing for the Court, reinforced a "judicial consensus" dating back to the 19th Century that "authentic expression and interpretation of the law, which, binding every citizen, is free for publication to all." *Id.* at 1506-07 (quoting *Banks v. Manchester*, 128 U.S. 244, 253 (1888)) (emphasis omitted).

The "animating principle" behind the Court's decision in *Public.Resource.Org* was "that no one can own the law." *Id.* at 1507. Every citizen "'should have free access' to [the law's] contents." *Id.* In concluding the decision, the Chief Justice warned that a contrary holding would allow the government "to offer a whole range of premium legal works for those who can afford the extra benefit," or the government "might even launch a subscription or pay-per-law service." *Id.* at 1512-13.

Unfortunately, a "pay-per-law" service is not just some bleak, dystopian future—CPSC has been facilitating ASTM's operation of one for many years. This Court can avoid the serious constitutional doubts raised by the incorporation by reference of ASTM standards that are not publicly available. Section IV of this brief explains that constitutional doubts are overwhelming. Put succinctly, CPSC has no constitutional power to withhold from the public the publication of the Commission's binding rules, and its decision to do so violates both due process and the First Amendment.

Yet, in CPSC's view, granting monopolistic pricing power to a private organization, unbeholden to the citizenry, is good enough. This Court must assume, however, that Congress would have spoken more explicitly if it meant for CPSC to subvert free access to law. *Solid Waste*, 513 U.S. at 172. With no clear statement that Congress meant the Freedom of Information Act to create a "pay-per-law" system, *Public.Resource.Org*, 140 S. Ct. 1513, this Court should adopt Ms. Milice's reading that avoids the constitutional infirmities inherent in the Commission's reading.

Another purpose of the constitutional-avoidance doctrine reflects courts' sensitivity to ruling an act of Congress unconstitutional when "there is some other ground upon which to dispose of the case." *Nw. Austin Mun. Utl. Dist. No. One v. Holder*, 557 U.S. 193, 205 (2009). A ruling in Ms. Milice's favor under 5 U.S.C. § 706(2)(C) furthers this normative, prudential purpose too. As discussed more thoroughly in Section IV of this brief, CPSC's Rule violates 5 U.S.C. § 706(2)(B) as "contrary to constitutional right, power, privilege, or immunity."

Constitutional avoidance allows this Court to avoid any ambiguous reading that would force this Court to confront the unconstitutionality of a statutory scheme that sanctions secret law.[7] Like the other traditional interpretive tools discussed already, the

[7] CPSC's decision not to provide public access to its safety standards falls outside of any gap Congress may have authorized the agency to fill. *See Am. Farm Bureau*, 792 F.3d at 301. But even if this Court were to determine "reasonable availability" is an ambiguous term, CPSC's interpretation is "contrary to the statute" and not entitled to deference. *See U.S. v. Mead Corp.*, 533 U.S. 218, 227 (2001). Granting monopolist-pricing power over the law to a private organization is in direct contravention of decades of congressional policies that have sought to make law more accessible to the public. Agencies deserve no deference for interpretations that "would seriously undermine the principle that agencies should provide regulated parties fair warning of the conduct a regulation prohibits or requires." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156 (2012). CPSC's decision to allow ASTM to hide its rule behind a paywall is not entitled to deference because it is not "a reasonable policy choice for the agency to make." *Chevron*, 467 U.S. at 845.

Deference to CPSC is inappropriate in this case for several other reasons. *First*, the incorporation-by-reference exception to publication exists in FOIA's amendments to the APA, and "reviewing courts do not owe deference to an agency's interpretation of statutes outside its particular expertise and special charge to administrate." *Ardestani v. I.N.S.*, 502 U.S. 129, 148 (1991) (citing *Professional Reactor Operator Soc. v. NRC*, 939 F.2d 1047, 1051 (D.C. Cir. 1991) (no deference to agency interpretation of APA, because agency not assigned special role by Congress in construing that statute)).

avoidance doctrine confirms Congress' plainly stated meaning that CPSC must publish the text of its durable nursery safety standards, 15 U.S.C. §§ 2056a; 2058(c), and must make its rules "available to the public." 5 U.S.C. § 552. To the extent CPSC has asserted that incorporation by reference is an exception to this broad rule, this Court must reject CPSC's expansive reading of reasonable availability, so it does not undermine Congress' purposes of eliminating secret law and providing a free flow of public access to binding regulations. *See Cervase*, 580 F.2d at 1169, 1171.

*Second*, the Executive has announced policy positions contrary to CPSC's position here. *See Baldwin v. U.S.*, 140 S. Ct. 690, 695 (2020) (Thomas, J., dissenting from the denial of *certiorari*) ("Under traditional rules of statutory interpretation, this Court declined to give weight to late-arising or inconsistent statutory interpretation by the Executive."). In two separate White House circulars, the Office of Management and Budget ("OMB") has anticipated that agencies would publish standards incorporated by reference. In revised Circular A-119, OMB instructed agencies to "observe and protect" the rights of a copyright holder "[i]f a voluntary standard is used *and published* in an agency document." Office of Mgmt. & Budget, Circular No. A-119 Revised: Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities para. 1 (1998), *available at* https://www.whitehouse.gov/wp-content/uploads/2017/11/Circular-119-1.pdf. And in revised Circular A-130, OMB reiterated that "[t]he free flow of information between the government and the public is essential to a democratic society[,]" so "[t]he Federal Government shall provide members of the public with access to public information on Government websites." Office of Mgmt. & Budget, Circular No. A-130 Revised: Managing Information as a Strategic Resource (2016), *available at* https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/OMB/circulars/a130/a130revised.pdf. CPSC's present understanding of its obligations appears to contradict OMB's understanding.

*Third*, CPSC's rulemaking in this case did not purport to interpret some ambiguity the statutory provisions at issue. "[W]hen the agency doesn't ask for deference to its statutory interpretation, "[the court] need not resolve the ... issues regarding deference which would be lurking in other circumstances." *Hydro Res., Inc. v. U.S. E.P.A.*, 608 F.3d 1131, 1146 (10th Cir. 2010) (*Estate of Cowart v. Nicklos Drilling Co.,* 505 U.S. 469, 477 (1992)).

### B. CPSC's Rule Is Not Reasonably Available

Despite § 552(a)'s unambiguous mandate that agencies make all substantive rules "available to the public," CPSC interprets this statute to require something less. Relying on Part 51 of the Code of Federal Regulations,[8] CPSC provides to the public only a summary of its binding rule. *See* App'x Vol. 1 at 4. If the public wishes to see the

[8] To the extent that 1 C.F.R § 51.5 *et seq.* permits agencies to incorporate by reference private standards that are not freely available to the public, those rules also violate the plain language of 5 U.S.C. § 552(a). "Otherwise undefined in the regulation, the OFR's attention to 'reasonably available' in Part 51 involves no consideration whatever of the price the standard's owner may be charging for access to it, now or in future years, or the conditions being placed on that access." Strauss, 22 WM. & MARY BILL RTS. J. at 522.

OFR's failure as the ostensible check on agencies' use of incorporation by reference is unsurprising given the complete disinterest OFR has displayed toward the public's right to access the law. In 2014, OFR issued a direct final rule in response to a petition for rule making that argued the *en banc* Fifth Circuit's decision in *Veeck v. S. Bldg. Code Cong. Int'l, Inc.*, 293 F.3d 791 (5th Cir. 2002) (en banc), "cast[ed] doubt on the legality of charging for standards IBR'd [incorporated by reference]." *Incorporation by Reference*, 79 Fed. Reg. 66267. Several commenters complained that "any *charge* to an IBR'd standard effectively hides the law behind a pay wall[,] which is illegal and means the standard is not available." *Id.* at 66272. OFR's response sidestepped the constitutional issues. OFR acknowledged that incorporated materials "may not be as easily accessible as the commenters would like," but reasoned that the standards "are described in the regulatory text in sufficient detail so that a member of the public can identify the standard IBR'd into the regulation." *Id.* In other words, the people demanded their right to access the laws, and OFR said, "here, you can have a little summary instead." OFR "applaud[ed] the efforts of [] private organizations to make their IBR'd standards available to the public[,]" but disclaimed any authority "to require [private organizations] to upload and maintain their standards on their websites[.]" *Id.* at 66271. Agencies must do more than merely hope and suggest that private standard setters will make law available. They must fulfill that duty themselves.

binding standard, CPSC purports to make physical copies available in only two places: CPSC's headquarters in Bethesda, Maryland, and down the road at the National Archives in Washington, D.C. *Id.* at 05.

CPSC's Rule flouts Congress' plain command to make law publicly available. Law is not "available to the public" if it is "conditioned on the consent of a private party," *ASTM*, 896 F.3d at 458 (Katsas, J., concurring), and made available only to ASTM's customers rather than the public at large. The availability of CPSC's rule is—and will continue to be—unreasonable so long the Commission permits ASTM to control the public's access. At any time, ASTM can reduce the standard's price to $0, increase the price exponentially, or remove the standard from its website entirely. By tying the public's access to the whims of a private entity, CPSC has violated FOIA and the agency's own organic statute.

This state of affairs would be bad enough if CPSC followed its own understanding of FOIA's requirements, but CPSC has gone further and refused to honor its own commitment to providing access to the relevant standards at its reading room—despite what it has represented to the Office of the Federal Register. As mentioned above, CPSC informed both Ms. Milice and undersigned counsel that it does not make ASTM standards available for free public access in the Commission's reading room: "if you want to see it, you have to pay for it." App'x Vol. 2 at 105. CPSC apparently interprets FOIA's requirement so broadly that it considers public access to public records to be a mere suggestion to comply with whenever doing so is convenient

to the Commission. In addition to being unlawful conduct in its own right, CPSC's failure to provide a reading room in which interested persons may view incorporated-by-reference standards indicates that CPSC's interpretation of the statutory requirements is invalid.

## III. THE RULE IS SUBSTANTIVELY INVALID AS IT IS ARBITRARY AND CAPRICIOUS UNDER 5 U.S.C. § 706(2)(A)

A court must set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).[9] Arbitrary-and-capricious review "focuses a court on the agency's process of reasoning" as revealed by the administrative record. *NVE, Inc. v. Dep't of Health & Human Servs.*, 436 F.3d 182, 189-90 (3d Cir. 2006). An agency has acted arbitrarily and capriciously if "the agency relied on factors outside those Congress intended for consideration, completely failed to consider an important aspect of the problem, or provided an explanation that is contrary to, or implausible in light of, the evidence." *Id.* (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

The Commission's decision to promulgate binding regulations but make them available only if purchased at a monopoly-market price set by a private organization was

[9] While courts review agency action for reasonableness using an arbitrary and capricious standard and use the same language as they do for review under 5 U.S.C. § 706(2)(A), "the Venn diagram of the two inquiries is not a circle." *Humane Soc. of the U.S. v. Zinke*, 865 F.3d 585, 605 (D.C. Cir. 2017). Each inquiry is distinct, and agency action may be invalid under either form of review. *Id.*

arbitrary and capricious. *See* App'x Vol. 2 at 100. According to a letter CPSC sent to Ms. Milice's counsel, the Commission does not publish its standards because it is "limited" by its organic statute and OFR's legal interpretations. *Id.* at 99-101. But FOIA allows for incorporation by reference *only* if the agency makes the incorporated material reasonably available. 5 U.S.C. § 552(a). Moreover, CPSC asserted that it might not be able to publish the text of the binding standards without violating copyright law in some instances. App'x Vol. 2 at 101. Incredibly, the Commission's letter acknowledged the holding of the United States Court of Appeals for the Fifth Circuit in *Veeck v. S. Bldg. Code Cong. Int'l, Inc.*, 293 F.3d 791 (5th Cir. 2002) (*en banc*), which held that copyright law *did not* prevent publication of binding legal standards, but in the same breath CPSC dismissed that decision in favor of OFR's legal interpretations. App'x Vol. 2 at 100.

CPSC's statutory argument is backward. As explained throughout this brief, CPSC does not appreciate its legal obligation to make its regulations publicly available. The Commission's organic statute imposes a publication requirement. *See* 15 U.S.C. § 2058(c). And neither Congress nor the Federal Register's incorporation-by-reference process *prohibits* CPSC from publishing its regulations online. CPSC mistakes the statutory availability of incorporation by reference as a prohibition against publishing its regulations in some readily accessible forum like, for instance, the Commission's website. Online publication would satisfy CPSC's publication requirement, 15 U.S.C. § 2058(c), without offending FOIA's incorporation-by-reference exception or the

processes set out by the Federal Register. *See* 5 U.S.C. § 552(a); 1 C.F.R. § 51 *et seq*.

In the Commission's view, however, Congress allowed for incorporation by reference based on its "recogn[ition] that it may not always be lawful to publish the full text of a rule in the Federal Register." App'x Vol. 2 at 100. Unsurprisingly, CPSC did not support this claim with any legal citation, *id.*, because this too is wrong. The history of incorporation by reference, outlined in more detail in Section II.A.2, reveals that Congress' purpose was to protect the bound version of the Code of Federal Regulation from becoming impractically large—not a desire to protect copyrights.

Moreover, CPSC's underlying premise *about* copyrights is also baseless. CPSC brushed aside the *en banc* Fifth Circuit's decision in *Veeck*, 293 F.3d at 806, because OFR disagreed with the court's conclusion that copyright protections do not apply to private standards that are incorporated by law. App'x Vol. 2 at 100. But it is the office of Article III courts—not the Office of the Federal Register—to say what the law of copyrights is. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Indeed, any lingering doubts about the copyright issue have been plainly refuted by the Supreme Court's recent decision in *Public.Resource.Org, Inc.*, 140 S. Ct. at 1504, which not only reaffirmed the longstanding rule that no one can copyright the law, but even extended that principle to "non-binding" government edicts. To the extent CPSC has chosen to hide ASTM standards behind a paywall based on its completely unfounded fear of

copyright infringement, the Commission's conduct was arbitrary and capricious.[10]

And there's yet another reason CPSC acted arbitrarily and capriciously. CPSC failed to address the profound constitutional violations its incorporation practices created. As discussed in Section IV, there are several reasons CPSC is violating the Constitution. Yet, the agency brushed aside those concerns without engaging in any meaningful analysis. App'x Vol. 2 at 100. By ignoring these constitutional protections, the agency's conduct was arbitrary and capricious.

The administrative record also reveals the Commission's complete disregard for the public's interest in accessing CPSC's regulations. CPSC's response to NCLA's adverse comment during the rulemaking—which the agency refused to recognize as adverse—shows the Commission's arbitrary reasons for not making the Rule publicly accessible, and it failed entirely to acknowledge the public's interest in knowing the law. *Id.* Instead, CPSC argued that the FOIA—a statute based on free access to the law—and a specious fear of copyright infringement *required* the agency to keep the law hidden.

Perhaps CPSC's position was best articulated by the Commission's representative in a January 9 phone call with undersigned counsel: "we don't come up with them; the labs who come up with them have to make money somehow." App'x

[10] This circuit has not squarely resolved this issue, but in *CCC Info. Servs., Inc. v. Maclean Hunter Market Reports, Inc.*, 44 F.3d 61, 74 n.30 (3d Cir. 1994), the panel opined that "the adoption of a private work into law might well justify a fair use defense for personal use." In light of the Supreme Court's recent holding in *Public.Resource.Org*, it is safe to say that CPSC's purported fear of copyright liability for allowing Ms. Milice to view the text of the applicable ASTM standard is unfounded. *See* 140 S. Ct. at 1504.

Vol. 2 at 105. But a decision to protect ASTM's bottom line at the expense of the public's right to access the law is arbitrary and capricious at best.

The public's right to access the law is an important consideration in agency rulemaking. Free public access to the Commission's safety standards allows for informed consumer choice, improved safety standards, and notice of binding legal obligations. Put simply, CPSC's rationale betrays that the Commission "completely failed to consider an important aspect of the problem" and misunderstood the statute's meaning. *See NVE*, 436 F.3d at 189-90. CPSC chose a path of expediency with no true regard for the public's right and need to access the Commission's binding regulations. Section 706(2)(A) mandates that this Court set aside the Rule.

## IV. THE RULE IS CONTRARY TO CONSTITUTIONAL RIGHT, POWER, AND PRIVILEGE UNDER 5 U.S.C. § 706(2)(B)

The APA requires courts to set to set aside agency action that is "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(B). The agency gets no deference on questions of constitutional law. *Id.* at § 706(2) ("[T]he reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."); *People for Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife Servs.*, 852 F.3d 990, 999-1000 (10th Cir. 2017) ("[W]e review de novo claims alleging constitutional abuse by an agency.") (citations omitted). CPSC's Rule violates § 706(2)(B) because CPSC cannot constitutionally withhold publication of its binding rules. Its decision to

do so deprives the regulated public of notice of legal obligations (as required by due process) and free access to the law (as required by the First Amendment).

### A. Our Constitutional System Does Not Allow for Privately Held Law

CPSC's failure to make its standards freely accessible to the public is unconstitutional. As the Supreme Court just recognized this Term, there is a longstanding "rule [] that no one can own the law." *Public.Resource.Org, Inc.*, 140 S. Ct. 1507. Citizens are the authors of the Republic's laws, and the law must remain free in the public domain. *Veeck*, 293 F.3d at 799-800. As such, citizens "must have free access to the laws which govern them." *Bldg. Officials & Code Adm. v. Code Tech., Inc.*, 628 F.2d 730, 734 (1st Cir. 1980) [hereinafter "*BOCA*"]; *see also Public.Resource.Org*, 140 S. Ct. 1507 ("'[I]t needs no argument to show … that all should have free access' to [the law's] contents.") (quoting *Nash v. Lathrop*, 6 N.E. 559, 560 (Mass. 1886)). Without access to the law, citizens cannot give their informed consent to be governed. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980) (plurality) ("It is difficult for [the People] to accept what they are prohibited from observing.").

Making the law inaccessible is a trick of tyrants. *See* Suetonius, *The Lives of the Twelve Caesars*, *Caligula* 470 (1907) ("When taxes of this kind had been proclaimed, but not published in writing, inasmuch as many offences were committed through ignorance of the letter of the law, he at last, on the urgent demand of the people, had the law posted up, but in a very narrow place and in excessively small letters, to prevent

the making of a copy."). "Rudimentary justice requires that those subject to the law must have the means of knowing what it prescribes." Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1179 (1989).

CPSC's attempt to privatize ownership of the law is contrary to our basic form of government. By refusing to publish a copy of the standard that CPSC incorporated by reference, CPSC has granted ASTM monopoly ownership of the law. But an ownership interest in the Rule was not CPSC's to give away. *See Veeck*, 293 F.3d at 799-800. The Rule, therefore, was contrary to CPSC's constitutional power. *See* 5 U.S.C. § 706(2)(B).

Like all law in the United States, the Rule is—and must remain—part of the public domain. *Veeck*, 293 F.3d at 799-800. "[N]o one can own the law." *Public.Resource.Org, Inc.*, 140 S. Ct. at 1507.

### B. The Due Process Clause Requires Free Access to Law

Preventing free public access to the law not only violates our constitutional compact, it also violates due process. "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). Due process under the Fifth Amendment requires at least this much. *Id.*; *see also Armstrong v. Maple Leaf Apartments, Ltd.*, 436 F. Supp. 1125, 1145 (N.D. Okla. 1977) ("The Court further concludes that the due process of law rights of the defendant as

guaranteed by the Fifth Amendment of the United States Constitution were violated in the application to this case for the reason that Congress did not provide any reasonable means by which the defendants or their attorneys could have acquired notice or knowledge of the existence or content of the Act."), *aff'd in part*, 622 F.2d 466 (10th Cir. 1979).

Courts have long recognized that limiting access to legal requirements offends basic precepts of due process. In *Banks*, the Supreme Court concluded that judicial opinions could not be copyrighted, in part because of the "public policy" requirement that "[t]he whole work done by the judges constitutes the authentic exposition and *interpretation of the law, which, binding every citizen, is free for publication to all*, whether it is a declaration of unwritten law, or an interpretation of a constitution or a statute." 128 U.S. at 253-54 (emphasis added). The First and Fifth Circuits have announced similar standards more recently:

> Due process requires people to have notice of what the law requires of them so that they may obey it and avoid its sanctions. So long as the law is generally available for the public to examine, then everyone may be considered to have constructive notice of it; any failure to gain actual notice results from simple lack of diligence. But if access to the law is limited, then the people will or may be unable to learn of its requirements and may be thereby deprived of the notice to which due process entitles them.

*BOCA*, 628 F.2d at 734; *see also Veeck*, 293 F.3d at 799-800 (following *Banks* and *BOCA*).

Although this Court declined to rule on whether to adopt *BOCA*'s rationale in

the Third Circuit,[11] *see CCC Info. Servs., Inc. v. Maclean Hunter Market Reports, Inc.*, 44 F.3d 61, 74 (3d Cir. 1994), this Court has held that no one can claim to be ignorant of or misled by what the law requires because "everyone[] has access to the law." *Ruehl v. Viacom*, 500 F.3d 375, 384 (3d Cir. 2007); *see also Public.Resource.Org*, 140 S. Ct. at 1507 ("'Every citizen is presumed to know the law,' and 'it needs no argument to show … that all should have free access' to its contents.") (quoting *Nash*, 6 N.E. at 560). Without access to the law, this logic collapses. And, as the Supreme Court made clear in *Public.Resource.Org*, placing a price on viewership of the law would cause many "to think twice before using official legal works that illuminate the law we are all presumed to know and understand." 140 S. Ct. at 1513.

A scheme, like the one CPSC employs here, violates these basic principles of due process by failing to notify the public of the standard the Rule incorporates by reference. "[I]f notice is to be effective, ready public access must be provided to anyone potentially affected by the law, not just to those who must comply." Mendelson, 112

[11] In a footnote in *CCC Info*, this Court cited favorably to a middle-ground approach to the underlying copyright claim: "the adoption of a private work into the law might well justify a fair use defense for personal use, but should not immunize a competitive commercial publisher from liability since this would 'prove destructive of the copyright interest[.]'" 44 F.3d at 74 n.30 (quoting Melville B. Nimmer & David Nimmer, *Nimmer on Copyright*, § 5.06[C] at 5-60 (1994)). It is not necessary, however, to answer the copyright issues to resolve this case. The legal question that gives rise to this case is simply whether CPSC must provide reasonable access to the law—not how CPSC decides to accomplish its constitutional duty to do so. Neither Ms. Milice nor this Court needs to decide how the Commission and ASTM should handle the standard's copyright.

MICH. L. REV. at 771. Without access to binding law, "a person might never be aware of a document containing a regulation affecting him until some federal bureaucrat produced a copy of the document and attempted to apply it to him." *Cervase*, 580 F.2d at 1168.

But under CPSC's current regime, anyone seeking access to the content of the law must either pay a private entity for the privilege or make the trip to Bethesda, MD, for the right to simply see (but even then, not copy) the law in the agency's reading room—and even that latter option does not really exist. App'x Vol. 1 at 6. This absurd policy offends the most basic requirement that the law be knowable, and it smacks of placing the law "in a very narrow place and in excessively small letters, to prevent the making of a copy." *See The Lives of the Twelve Caesars* 470; *Nash*, 6 N.E. at 560 ("[I]t is against sound public policy to prevent [free access to judicial opinions], or to suppress and keep from the earliest knowledge of the public the statutes.").

Instead of publishing the Rule in a place where the public could access the law freely, CPSC created a monopolistic pricing system. CPSC's rule forces the access-seeking public to rely on the whims of ASTM, a private organization with every incentive to drive up the market prices for its standard(s). And whenever demand for purchase of the applicable standard decreases, ASTM can simply amend the standard, forcing all interested parties to repurchase it. The effects of this monopolistic-pricing system are not merely theoretical. Professor Strauss has identified instances of private organizations like ASTM charging *less* money for new standards than for an out-of-date

standard that is still incorporated-by-reference into an agency's binding rule. Strauss, 22 WM. & MARY BILL RTS. J. at 509-10. The market price for an incorporated standard will "be artificially inflated" and that price "will persist even after the standard has been modified or displaced by … a voluntary consensus standard, if the governing law incorporating the earlier version of the standard has not changed." *Id.* at 513, 519. "[T]he price for the standard is a price for the law, plain and simple." *Id.* at 513.

Moreover, this price and other limitations on access "are not random; they systematically exclude people based on budgetary constraints. For many of these rules, budgetary constraints likely will be connected with substantive interests under the rule." Mendelson, 112 MICH. L. REV. at 791. Because individual consumers are "generally likely to have smaller budgets than manufacturers[,]" "[a] financial barrier to accessing product safety standards is likely to distinctively and systematically disadvantage consumer interests." *Id.* And even for individual consumers who could afford to travel to Bethesda to view the standard in CPSC's reading room, that decision makes little financial sense for any member of the public whose geographic distance would cause travel costs to exceed the standard's cost—let alone the cost of an infant bath seat!

Although this Court should be wary of the monopolistic-pricing system that CPSC's Rule has created, the Rule would violate due process even under a more egalitarian model. The Commission's failure to publish the standard underlying the Rule deprives the public of fair notice in violation of due process regardless of what price ASTM may set for the standard.

### C. The First Amendment Protects Free Access to Law

The Supreme Court has explained that "a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982). Limitations of the public's free access to the law undermines the First Amendment rights to discuss governmental affairs, petition the government, and a free press. *See Richmond Newspapers*, 448 U.S. at 575-76 ("In guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees.").

CPSC's failure to make the Rule's binding safety standards publicly accessible violates the First Amendment. The public's ability to speak freely about the Commission's rules, to petition CPSC to promulgate more (or, in some cases, less) stringent safety standards, and to read about CPSC's Rule in the press are all subverted by the Commission's current practice. The First Amendment requires free access to the law.

The current practice of making standards available only in Bethesda does not solve this problem. Nor would CPSC's reliance on ASTM's online reading room. Citizens must be able to do more than "investigate" what the law says, they must be able to disseminate that information and discuss the law's contents freely.

Because CPSC's failure to make law freely available is unconstitutional, the Rule violates Section 706(2)(B) as well.

## CONCLUSION

This Court should restore the public's free access to the law. By refusing to publish the safety standard that the Rule incorporates by reference, CPSC has created a pay-per-law service run by a private monopolist. *See Public.Resource.Org*, 140 S. Ct. at 1513. In doing so, CPSC violated four provisions of the APA, 5 U.S.C. § 706(2). To remedy these violations, this Court must vacate the Rule so that CPSC can restart the notice-and-comment rulemaking process with the safety standard publicly available. CPSC must then ensure the standard's continued public availability for the lifetime of the Rule.

May 18, 2020

Respectfully,

/s/ Jared McClain

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## REQUEST FOR ORAL ARGUMENT

Ms. Milice requests oral argument to offer this Court a chance to develop and clarify the issues and facts in this case more fully.

## CERTIFICATE OF BAR MEMBERSHIP

I, Jared McClain, certify that I am a member of the bar for the United States Court of Appeals for the Third Circuit.

Respectfully,

/s/ Jared McClain
Jared McClain
New Civil Liberties Alliance

## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in 14-point, plain, roman-style font. This brief also complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7). This brief contains 12,973 words.

I further certify that the electronic version of this brief was scanned with Trend Micro Antivirus. It contains no known viruses. Any paper copies of this brief that this Court might order New Civil Liberties Alliance to file will be identical to the electronic version.

Respectfully,

/s/ Jared McClain
Jared McClain
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## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed Petitioner's Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system on May 18, 2020. Until further notice from this Court, NCLA has deferred filing paper copies based on the Court's March 17 Notice addressing the COVID-19 pandemic. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Respectfully,

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