ORAL ARGUMENT NOT YET SCHEDULED
No. 23-1311

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PUBLIC.RESOURCE.ORG, INC., ET AL.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,

Respondents.

On Petition for Review of an Order of the Federal Communications Commission

BRIEF OF *AMICI CURIAE* ON BEHALF OF AMERICAN NATIONAL STANDARDS INSTITUTE AND 16 STANDARDS ORGANIZATIONS IN SUPPORT OF RESPONDENTS

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CERTIFICATE AS TO PARTIES, RULINGS, & RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the *Amici Curiae* certify that:

(A) Parties and *Amici*:

Except for the following, all parties, intervenors, and *amici* appearing in this Court are listed in the Brief for Petitioners filed March 27, 2024, Brief for Respondents filed May 13, 2024, and any *amicus* briefs filed before this one:

- American National Standards Institute, Incorporated
- The American Petroleum Institute;
- American Society for Testing and Materials d/b/a/ ASTM International;
- American Society of Civil Engineers;
- American Society of Heating, Refrigerating and Air-Conditioning Engineers;
- American Society of Safety Professionals;
- Consumer Technology Association;
- International Association of Plumbing & Mechanical Officials;
- International Code Council, Inc.;
- The Institute of Electrical and Electronics Engineers, Incorporated;
- The International Electrotechnical Commission;
- The International Organization for Standardization;
- The National Fire Protection Association;
- North American Energy Standards Board;
- National Electrical Manufacturers Association;

- Telecommunications Industry Association; and
- ULSE Incorporated.

(B) Ruling under Review:

References to the rulings at issue appear in the Brief for Petitioners filed March 27, 2024.

(C) Related Cases:

The *Amici Curiae* are not aware of any related cases.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, each *Amici Curiae* represents that it has no parent corporation[1] and no publicly held corporation owns 10% or more of any of *Amici Curiae's* stock.

[1] ULSE Inc. has one corporate member—Underwriters Laboratories Inc., which is herein referred to as ULSE Inc.'s "parent." However, both Underwriters Laboratories Inc. and ULSE Inc. are nonprofit nonstock corporations.

D.C. CIRCUIT RULE 29(d) STATEMENT

The *Amici Curiae* state that a separate brief is necessary because the *Amici* offer a distinct and important perspective on the consequences of Petitioners' arguments, including the potential impact on copyright protections and the ability of *Amici* to develop publicly beneficial technical and specialized standards. The *Amici Curiae* are not aware of other *amicus* briefs that address these concerns.

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GLOSSARY OF ABBREVIATIONS

Abbreviation	Term
ANS	American National Standards
ANSI	American National Standards Institute, Incorporated
API	The American Petroleum Institute
ASCE	American Society of Civil Engineers
ASHRAE	American Society of Heating, Refrigerating and Air-Conditioning Engineers
ASSP	American Society of Safety Professionals
ASTM	American Society for Testing and Materials
CTA	Consumer Technology Association
FCC	Federal Communications Commission
IAPMO	International Association of Plumbing & Mechanical Officials
IBR	Incorporate by Reference
ICC	International Code Council, Inc.
IEC	The International Electrotechnical Commission
IEEE	The Institute of Electrical and Electronics Engineers, Incorporated
ISO	The International Organization for Standardization
NAESB	North American Energy Standards Board
NARA	National Archives and Records Administration
NEMA	National Electrical Manufacturers Association
NFPA	The National Fire Protection Association
NIST	National Institute of Standards and Technology
NPRM	Notice of Proposed Rule Making
NTTAA	National Technology Transfer and Advancement Act of 1995
OFR	Office of the Federal Register
OMB	Office of Management and Budget
PRO	Public.Resource.Org
SDO	Standards Development Organization
TIA	Telecommunications Industry Association
UL	ULSE Inc.
WTO	World Trade Organization

STATUTES AND REGULATIONS

All applicable statutes and regulations are reproduced in the Brief for Petitioners filed March 27, 2024 or Brief for Respondents filed May 13, 2024.[2]

[2] Additionally, relevant Federal Register publications are attached in the Addendum to this brief for the Court's convenience. *See* Add. A6-A48.

STATEMENT OF IDENTITY, INTEREST OF *AMICI CURIAE*, AND SOURCE OF AUTHORITY TO FILE

Amici Curiae include American National Standards Institute, Incorporated ("ANSI"), a national standards coordinating institution, along with 16 standards development organizations ("SDOs") that participate in developing technical and specialized standards.

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 facilitates the development of American National Standards ("ANS") by accrediting the procedures of SDOs. These SDOs work cooperatively to develop voluntary national consensus standards that are used in virtually every industry sector and in all aspects of daily life, from toys and food safety, to IT and the built environment. ANSI accreditation signifies that a standards developer's procedures used for the development of ANS meet ANSI's essential requirements for openness, balance, consensus, and due process. These requirements help ensure that the resulting standards promote reliability, interoperability, safety, and quality. Each of the SDO *Amici* are among the approximately 240 SDOs accredited by ANSI and are representative of ANSI's broader SDO community.

The *Amici* SDOs are:

The American Petroleum Institute ("API"). API is a nonprofit trade association representing all segments of America's natural gas and oil industry, which supports more than 11 million U.S. jobs. API's nearly 600 members produce, process, and distribute the majority of the nation's energy. API was formed in 1919 as a standards development organization. API has developed more than 800 standards petroleum, natural gas, and petrochemical equipment and operating standards that enhance operational and environmental safety, efficiency, and sustainability. These standards represent the industry's collective wisdom on everything from drill bits to environmental protection. API standards have been incorporated into federal regulations more than 600 times, and they are also the most widely cited petroleum standards by the international regulatory community.

American Society for Testing and Materials d/b/a/ ASTM International ("ASTM"). ASTM is a non-profit organization established in 1898 and headquartered in West Conshohocken, Pennsylvania. ASTM is dedicated to the development and publication of international voluntary consensus standards for materials, products, systems, and services. ASTM has developed more than 12,500 standards and has more than 30,000 members worldwide. Through its standards, ASTM positively impacts public health and safety, consumer confidence, and overall quality of life.

American Society of Civil Engineers ("ASCE"). 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"). 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.

American Society of Safety Professionals ("ASSP"). Founded in 1911, ASSP is a global association for occupational safety and health professionals. ASSP

develops industry consensus standards that promote safe work environments, improve productivity and drive continuous improvement.

Consumer Technology Association ("CTA"). CTA is a nonstock corporation incorporated under the laws of the Commonwealth of Virginia. Founded in 1924, CTA is a technology trade association representing North American member companies, from startups to global brands that support 18 million jobs. CTA educates U.S. policymakers to ensure the innovation economy is protected from laws and regulations that delay, restrict or ban the development of technologies. CTA owns and produces CES®, an annual trade show that showcases companies of consumer technology products and services.

International Association of Plumbing & Mechanical Officials ("IAPMO"). Founded in 1926, IAPMO is a not-for-profit membership organization dedicated to providing minimum requirements and standards for the protection of the public health, safety, and welfare. IAPMO coordinates the development of plumbing and mechanical codes and standards such as the *Uniform Plumbing Code* (UPC) and the *Uniform Mechanical Code* (UMC) through a consensus standards development process accredited by ANSI. This process brings together volunteers representing varied viewpoints and interests to achieve consensus on plumbing and mechanical issues. IAPMO codes are used by jurisdictions in the United States and abroad.

International Code Council, Inc. ("ICC"). 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.

The Institute of Electrical and Electronics Engineers, Incorporated ("IEEE"). IEEE is a not-for-profit public charity dedicated to the advancement of technology for the benefit of humanity with a 135+-year history of technological innovation. The organization comprises more than 420,000 members who participate in its activities across the world in more than 190 countries. IEEE, through its Standards Association, is a globally recognized SDO that has an open and inclusive process consistent with the World Trade Organization ("WTO") principles on international standardization. IEEE has a portfolio of over 1,000 active standards and over 1,000 standards under development for a wide range of industries including: power and energy, information technology, telecommunications, transportation, nanotechnology, and information assurance.

The International Electrotechnical Commission ("IEC"). Founded in 1906, IEC is an independent non-profit membership organization based in Geneva, Switzerland. IEC is the world's leading organization that develops and publishes consensus-based international standards in line with WTO's Technical Barriers to Trade Agreement Principles for all electrical, electronic and information technologies. IEC's work facilitates technical innovation, affordable infrastructure development, efficient and sustainable energy access, smart urbanization and transportation systems, climate change mitigation, and increases the safety of people and the environment. IEC represents a global network of around 170 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"). ISO is a non-governmental non-profit organization with members from approximately 171 national standards bodies. Through its international consensus-based processes, consistent with WTO principles on international standards, ISO has developed and published over 25,000 voluntary international standards on a number of subjects (including, but not limited to, areas such as health, management and services, food and agriculture, energy, environmental sustainability, building and construction, and IT and related technologies) through its network of approximately 50,000 experts from many stakeholder groups.

The National Fire Protection Association, Inc. ("NFPA"). 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 safe electrical design, installation, and inspection to protect people and property from electrical hazards.

North American Energy Standards Board ("NAESB"). 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.

National Electrical Manufacturers Association ("NEMA"). NEMA is the association of electrical equipment manufacturers, founded in 1926. NEMA

sponsors the development of and publishes over 700 standards relating to electrical products and their use. NEMA's member companies manufacture a diverse set of products focused on end-user markets in the grid, industrial, mobility and built environment sectors, including transformers, inverters, factory automation and control systems, building controls and electrical systems components, lighting systems, electric vehicle motors, and medical diagnostic imaging systems.

Telecommunications Industry Association ("TIA"). Founded in 1988, TIA develops consensus standards for a wide range of telecommunications products and equipment, such as private radio equipment, cellular towers, satellites, mobile device communications, vehicular telematics, and smart device communications. More than 1,000 individuals—representing network equipment manufacturers, service providers, government entities, and end users—currently serve on TIA's Engineering committees.

ULSE Inc. ("UL"). UL is an independent, not-for-profit standards developer dedicated to promoting safe living and working environments since the founding of its parent Underwriters Laboratories Inc. in 1894. UL's standards provide a critical foundation for the safety system in the United States and around the world, while also promoting innovation and environmental sustainability. With over 120 years of experience and the development of over 1,500 standards, UL advances a safer, more sustainable world.

* * *

Amici have significant interest in the resolution of this Petition. Petitioners seek to dramatically rewrite federal law and agency rules by destroying the copyright to the SDOs' standards. Petitioners ask the Court to compel agencies, such as the FCC, to post a copy of the SDO's standard on the agency's website, where the electronic copy may be copied, downloaded, and further distributed without limitation. According to Petitioners, this is necessary whenever an agency proposes to incorporate by reference ("IBR") such a standard in a final rule or regulation. The result would be to make *Amici's* works, which indisputably are protected by copyright, available for mass infringement. This would undermine *Amici*'s ability to fund the creation of these works that yield enormous public benefits.

Federal law authorizes and encourages IBR in a manner that respects rather than destroys copyright. Specifically, Congress required only that material be "reasonably available," which *all* of the standards at issue here were during the notice-and-comment period and after adoption of the relevant rule. Federal law balances the interests on all sides: agencies can rely on *Amici's* high-quality standards; the public benefits from the use of the high-quality standards at no cost; and the SDOs benefit because their copyright rights are preserved, enabling them to fund the consensus-oriented process that produces best-in-class, vetted standards that serve public and private goals.

Petitioners and Respondents have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2); D.C. Cir. Rule 29(a)(2).

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

No party's counsel authored this brief in whole or part. No party, counsel to any party, or any person other than the *Amici*, *Amici*'s members, or *Amici*'s counsel contributed money funding this brief's preparation or submission.

INTRODUCTION

The Petition seeks a rule that Congress and the agency charged with administering the Federal Register have never adopted and that would destroy the copyright protection that undergirds SDOs' critically important and hugely beneficial work.

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 and safety of a range of industries, consumer products, and regulatory fields. SDOs do so through open, consensus-based processes that ensure both due process and consideration of all points of view. Consistent with their public-service missions and non-profit status, *Amici* SDOs make their standards easily accessible to the public for free, read-only viewing online. Contrary to the Petitioners' claim, *all five standards at issue were and have been publicly available.* They were available at the Notice of Proposed Rule Making ("NPRM") stage, and they remain available to this day, for access by Petitioners and anyone else to read and comment on them.

Congress has long recognized the value of consensus technical standards developed through SDOs and the importance of agencies having the ability and incentives to rely on them in regulations. Congress directed agencies to rely on voluntary consensus standards where appropriate so the government can avoid the

significant costs and redundancies of creating its own standards, including costs in maintaining expertise across a vast landscape of technologies and best practices. Moreover, the persons most directly affected are able to participate in the drafting, review, and revision of the standards. Agency adoption of SDO-developed consensus technical standards thus decreases regulatory burdens and increases efficiency and uniformity for industries relying on such standards. In light of Congress's mandate and these benefits, tens of thousands of federal regulations are now based on consensus technical standards.[3]

A federal statute lays out the requirements for material that an agency seeks to IBR. Agencies can IBR *Amicis'*—and other SDOs'—standards and other extrinsic material in their regulations so long as the material is "reasonably available to the class of persons affected." 5 U.S.C. § 552(a)(1). That statutory provision respects the copyrights that SDOs hold in their standards and their corresponding ability to earn revenue to fund their standards development.

Petitioners seek to destroy all this. They demand that a federal agency make the full text of any copyright-protected standard (or portion thereof) that the agency is considering for IBR available online without restriction at the *agency's website*

[3] *See Standards Incorporated by Reference (SIBR) Database*, NIST, https://sibr.nist.gov/ (last visited May 9, 2024) (listing over 27,000 entries in database of standards IBR'd into federal regulations).

and without regard to the SDO's consent and without any remuneration to the SDO. That argument is contrary to federal law and to the repeated pronouncements of the Office of the Federal Register ("OFR") and other agencies. The result also would raise serious constitutional concerns under the Takings Clause. Petitioners' argument, if accepted, would undermine the infrastructure of U.S. innovation and the incentive system that are essential to our market-driven economy.

ARGUMENT

I. Federal Statutes and the Decisions of the Relevant Agencies Reject Petitioners' Arguments

A. Congress expressly provided that IBR'd material need only be "reasonably available," not freely available

The practice of federal agencies relying on consensus technical standards and balancing public policy goals with the interests of those organizations has been well-established for decades. *See, e.g.*, Physical test, 29 Fed. Reg. 18652, 18835 (Dec. 29, 1964) (codified at 49 C.F.R. § 78.39-16(c)(1)) (directing that yield strength "shall be determined" by certain methods "as prescribed in ASTM Standard E8-57T"); Tests of welds, 29 Fed. Reg. 18652, 18873 (Dec. 29, 1964) (codified at 49 C.F.R. § 78.57-17(d)(2)) (requiring testing to conform to "ASTM Standard E-23-60T"); Inspection and testing required when making alterations, repairs, or other such operations involving riveting, welding, burning or like fire-producing actions, 30 Fed. Reg. 16730, 16902 (Dec. 30, 1965) (codified at 46 C.F.R. § 71.60-1(a))

(providing that NFPA No. 306 "shall be used as a guide in conducting the inspections and issuance of certificates").

It was against this background that Congress set the "reasonably available" standard. In 1967, Congress required that regulations be published in the Federal Register and stated expressly that IBR'd material would be deemed to meet this requirement when "reasonably available to the class of persons affected thereby." *See* Act of June 5, 1967, Pub. L. No. 90-23, § 552, 81 Stat. 54, 54 (codified at 5 U.S.C. § 552):

> For the purpose of this paragraph, 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.

Id.

That language remains in 5 U.S.C. § 552(a)(1); 1 C.F.R. § 51.7(a)(3).

Congress not only authorized agencies to IBR consensus technical standards but expressly directed agencies to IBR such standards whenever possible. In 1992, Congress enacted the American Technology Preeminence Act of 1991, which asked the National Research Council to study standards development. Pub. L. No. 102-245, § 508, 106 Stat. 7, 29 (Feb. 14, 1992) (codified at 15 U.S.C. § 3701). The resulting study concluded that standards development "serves the national interest well" and that "[f]ederal government use of the standards developed by private standards organizations in regulation and public procurement has many benefits,"

including "lowering the costs to taxpayers and eliminating the burdens on private firms from meeting duplicative standards in both government and private markets."[4] Importantly, the NRC Study expressly stated that standards developers "offset expenses and generate income through sales of standards documents, to which they hold the copyright." *Id.* at 32. It also recommended that Congress enact legislation that would encourage federal agencies to use privately developed standards in their regulations. *Id.* at 158.

Congress accepted this recommendation in the National Technology Transfer and Advancement Act of 1995 ("NTTAA"). Pub. L. No. 104-113, § 12(d), 110 Stat. 775, 783 (Mar. 7, 1996) (codified at 15 U.S.C. § 272). There, Congress declared that "all Federal agencies and departments shall use technical standards that are developed or adopted by voluntary consensus standards bodies, using such technical standards as a means to carry out policy objectives or activities." *Id.* The exception to this requirement would be if use of voluntary consensus standards "is inconsistent with applicable law or otherwise impractical." *Id.*

Implementing the NTTAA, the Office of Management and Budget ("OMB") in 1998 revised Circular A-119 to provide systematic guidelines for federal agencies on the use of voluntary consensus standards. The policy directs all federal agencies

[4] National Research Council, *Standards, Conformity Assessment, and Trade: Into the 21st Century* 3 (1995), https://doi.org/10.17226/4921 ("NRC Study").

to incorporate "in whole, in part, or by reference" privately developed standards for regulatory and other activities "whenever practicable and appropriate." OMB Circular A-119, 63 Fed. Reg. 8546, 8554-55 (Feb. 19, 1998).[5] When doing so, OMB also requires agencies to "observe and protect the rights of the copyright holder." *Id.* at 8555.

This balance makes practical sense. The process of creating and updating standards requires massive investments of time and effort. These investments cannot be overstated. Particular development processes vary across SDOs. Many follow the requirements of ANSI, which accredits and coordinates standards development in accordance with ANSI's Essential Requirements, procedures that are substantially similar to the requirements of OMB Circular A-119 for voluntary consensus standards and that provide for ANSI's process-related oversight of standards that are approved as American National Standards ("ANS").[6] Others adhere to the OMB Circular A-119.[7] In either case, this process is resource-intensive.

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[5] This Federal Register Notice, and other select portions of the Federal Register relevant to this brief, are included in the Addendum. *See* Add. A6-A48.

[6] *See, e.g.*, NRC Study at 35 (describing ANSI's role); *ANSI Essential Requirements 1.0 Essential Requirements for Due Process*, ANSI (Jan. 2020), www.ansi.org/essentialrequirements; *Overview of the U.S. Standardization System*, ANSI, https://www.standardsportal.org/usa_en/standards_system.aspx (last visited May 9, 2024).

[7] *See, e.g.*, *Setting the Standards: Strengthening U.S. Leadership in Technical Standards*, NIST (Mar. 17, 2022), https://www.nist.gov/speech-testimony/setting-standards-strengthening-us-leadership-technical-standards.

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 standards. Some SDOs, like API, ICC, NEMA and NFPA, also employ their own expert staff to give technical guidance to volunteer members of technical committees during the standards process; these SDOs must recover these costs as well as (in some cases) finance scientific research supporting the standards, which costs some SDOs millions of dollars annually. SDOs also pay for office and meeting space and travel-related costs for multi-day meetings that may involve hundreds of participants. SDOs incur significant expenses in publishing various committee reports, collecting public input and comments, coordinating outreach and education efforts, managing information technology, and publishing the standards. In 2018 alone, for instance, NFPA spent over $11 million on technical committee operations.

Three of the specific standards at issue were developed by the C63 Accredited Standards Committee,[8] and its standards development process is illustrative.[9] The

[8] C63 is a trademark owned by the not-for-profit United States EMC Standards Corporation. IEEE provides secretariat services for C63, owns the copyright for C63 standards, and administers its sales and licensing program.

[9] *See generally Operating Procedures for Accredited Standards Committee C63®—Electromagnetic Compatibility (EMC)*, C63 (Oct. 8, 2020), https://www.c63.org/documents/misc/admin/C63_P&Ps_7_28_20.pdf (describing C63's operating procedures).

process begins when someone has an idea for improving an existing C63 standard or developing a new standard within C63's area of interest (electromagnetic compatibility). That person (or persons) submits a project authorization request to C63's "Main Committee." If the Main Committee approves the request, the Secretariat will prepare a "PINS notice," which is published in the ANSI Project Initiation and Notification System and in ANSI's Standards Action, a free weekly publication covering current standards development activities. During a 30-day notice period, individuals can comment on the proposed standards development activity or express interest in joining. Once the 30-day period has passed, C63's Main Committee will assign the project to a working group, which anyone can join as a voting member or nonvoting observer. The working group will develop a draft standard or a draft amendment to an existing standard, and the draft will go through one or more rounds of review and comment by all members. Once the working group is satisfied with the draft, the Main Committee will submit the draft to a balloting group, which is open to all C63 members (subject to requirements for a balance of interests). After final approval, C63 submits the standard to ANSI for a public review period of 30 to 60 days, depending on the means by which the standard is made available. Public comments are submitted to C63 directly, or ANSI will provide those comments to C63, which must attempt to resolve any negative comments and tell the commenter in writing of the resolution. All submitters of unresolved public

comments or negative votes with unresolved comments also have the right to file a procedural appeal to C63 and then to ANSI. At the completion of this process, the standard is final.

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 at 36. IEEE, for example, generates about 53% of its revenue from the sale or licensing of copyrighted materials and NFPA about 65%. 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.

Given the history of IBR, it makes no logical sense to argue that Congress intended for "reasonably available" to mean "freely available." Indeed, when Congress *intends* for standards to be freely available online, it says so expressly. For example, in passing the Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011, Congress required that the Pipeline and Hazardous Materials Safety Administration not IBR standards unless those standards have been made available free of charge to the public online. Pub. L. No. 112–90, § 24, 125 Stat. 1904, 1919 (Jan. 3, 2012) (codified at 49 U.S.C. § 60102(p)). Congress has mandated that other agencies IBR standards *without* a similar requirement. *See, e.g.,* 15 U.S.C. § 2056(b)

(requiring Consumer Product Safety Commission to rely on "voluntary consumer product safety standards").

B. The relevant federal agencies have correctly rejected petitioners' arguments

The Petition continues Petitioners' longstanding efforts to rewrite Congress's "reasonably available" standard without going through the legislative process. The Petition does not disclose that Petitioner Public.Resource.Org ("PRO") tried and failed to obtain the result it seeks here from OFR, which has responsibility for the Federal Registrar.

In 2012, PRO, along with other parties, asked OFR to revise its regulations regarding incorporation by reference, and specifically, to interpret "reasonably available" as available "[f]or free … [t]o anyone online." Incorporation by Reference, 77 Fed. Reg. 11414, 11414-16 (Feb. 27, 2012) (petition for rulemaking and request for comments); *see* Add. A19-A21. PRO insisted "that statutory authority and social development … require[d] that material IBR'd into the CFR [or proposed at the NPRM stage] be available online and free of charge." Incorporation by Reference, 78 Fed. Reg. 60784, 60784 (Oct. 2, 2013) (partial grant of petition and notice of proposed rulemaking); *see* Add. A22.

The OFR disagreed, concluding: "Federal law [does not] require … that all IBR'd standards … be available for free online." *Id.* at 60787. The OFR explained:

> If we required that all materials IBR'd into the CFR be available for free, that requirement would compromise the ability of regulators to rely on voluntary consensus standards, possibly requiring them to create their own standards, which is contrary to the NTTAA and the OMB Circular A–119.

Id. at 60785. *See also* Incorporation by Reference, 79 Fed. Reg. 66267 (Nov. 7, 2014) (final rule) (codified at 1 C.F.R. § 51.5); *see* Add. A37-A48.

In the rulemaking process, OFR rejected a number of comments similar to the arguments Petitioners make here.

First, OFR rejected the argument that if the public or interested parties have to pay for materials at the NPRM stage, they are "denie[d]" "the ability to fully participate in the rulemaking.'' 78 Fed. Reg. at 60787. OFR explained that "[t]hese materials may not be as easily accessible as the commenter would like, but they 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" and "anyone wishing to locate a standard has contact information for … both the standard's publisher and the agency IBRing the standard." *Id*. "Transparency does not automatically mean free access." *Id.* at 60788.

Second, in response to the comments "that having the material available for inspection at the agency or OFR imposed insurmountable barriers on the poor" or those with disabilities, OFR cited other examples of instances where the government charged for access and recognized that fees were necessary to defray the cost of creation. *Id.* at 60786.

Third, OFR noted that 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.* at 60792.

Rather than accept the position that material proposed to be IBR'd or ultimately IBR'd be available for free online, 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).

OMB also considered similar positions when it revised Circular A-119 in 2016. On the issue of how federal agencies could ensure IBR'd standards could be made "reasonably available," OMB provided that it should be handled case-by-case and in connection with the relevant SDO:

> If an agency incorporates by reference material that is copyrighted or otherwise subject to legal protection and not freely available, the agency should work with the relevant standards developer to promote the availability of the materials, consistent with applicable law, such as through the use of technological solutions, low-cost-publication, or other appropriate means, while respecting the copyright owner's interest in protecting its intellectual property.

Off. of Mgmt. & Budget, Exec. Off. of the President, *OMB Circular A-119: Federal Participation in the Development and Use of Voluntary Consensus Standards and*

in Conformity Assessment Activities (Jan. 26, 2016), 2016 WL 7664625, at *19. In outlining the variety of "[f]actors to consider" to determine "whether a standard is 'reasonably available,'" the OMB's final circular—was consistent with OFR's conclusion, making clear that there is not a universal solution to make standards reasonably available to the public. *Id.* at *19 (citing 1 C.F.R. § 51.5). Instead, "reasonable availability is context-specific." *Id.*

Consistent with these considerations, the National Archives and Records Administration ("NARA") has developed a process for IBR, including an Incorporation by Reference Handbook.[10] Federal agencies seeking to IBR private standards and codes "must provide IBR material" to NARA "in an accessible, read-only electronic format, typically as a PDF file." *Id.* at 6. No special accessibility requirements are imposed on IBR material, other than that the material be "read-only" and in "electronic format." *Id.*

II. Consistent With the Law, the Standards at Issue Here Were Reasonably Available to Petitioners, Including Online

Petitioners had "reasonably available" access, consistent with the correct reading of the statute. Petitioners had no-cost online access to all five of the standards at issue, through ANSI's and IEEE's view-only reading rooms, well before the date

[10] *See* Off. of Fed. Reg. Nat'l Archives and Records Admin, *Incorporation by Reference Handbook* (June 2023 ed.), https://www.archives.gov/federal-register/write/ibr.

when the FCC's NPRM was issued on September 29, 2023. Specifically, 17025:2017 and 17011:2017 are freely available for online viewing to anyone, including Petitioners, in the ANSI IBR Portal.[11] The three "C63" ANSI/IEEE standards—ANSI/C63.25.1:2018, ANSI/C63.10:2020, and ANSI/C63.4a:2017—can be accessed both on the ANSI IBR Portal[12] as well as on IEEE's website.[13]

ANSI and the SDO *Amici* make their IBR'd standards and codes reasonably available in a number of ways to anyone who needs or wants to view them. SDOs make the standards available in a variety of formats, including subscriptions, compilations, and various other electronic products. Some SDOs do so through multiple distribution channels, including online public "reading rooms" or similar platforms that offer read-only access at no monetary charge. They may also provide retail sales sites where readers can purchase copies that provide the same substantive content but with greater functionality.

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[11] *See ISO IBR Standards Available*, ANSI, https://ibr.ansi.org/Standards/iso6.aspx (last visited May 10, 2024). For the Court's convenience, Screenshots of the ANSI IBR Portal are included in the Addendum at A1-A2.

[12] *See Standards Hosted by SDOs*, ANSI https://ibr.ansi.org/Standards/Default.aspx#sdo (last visited May 10, 2024) (listing and linking to IEEE IBR Standards).

[13] *See IEEE Standards Reading Room*, IEEE, https://ieeexplore.ieee.org/browse/standards/reading-room/page?pageNumber=3 (last visited May 10, 2024). *See also* Add. A4 (screenshots).

ANSI, for example, in addition to its online store, offers an IBR Portal that provides free, read-only, online access to standards that have been incorporated by reference into the CFR.[14] In 2023, over 50,000 individuals visited the ANSI IBR Portal and viewed over 770 standards. The standards available at ANSI's IBR portal include standards from a number of SDOs that rely on ANSI to make their IBR'd standards available for no-cost review.[15] For example, *Amicus* NEMA relies upon the ANSI IBR Portal to host 25 of its standards that have been incorporated by reference in federal regulations. *Id.* ANSI's IBR Portal also hosts the IBR'd standards (ISO-90 standards and IEC-58 standards) of the two leading international organizations, *Amici* ISO and IEC. *Id.* ANSI's IBR Portal has become a useful tool in the IBR process for anyone seeking to know the law and follow it.[16]

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[14] In addition to the IBR Portal, ANSI also creates portals where standards referenced during rulemaking can be posted during NPRM comment periods. These portals require the viewer's consent to an end-user license agreement to protect the SDOs' copyright on the hosted standards. These websites are under constant review and change. Indeed, since late last year, ANSI has engaged in a comprehensive effort to enable greater accessibility and has added accessibility tools to allow users with disabilities to enjoy the benefits of all of ANSI's offerings.

[15] *See Standards Hosted by ANSI*, ANSI https://ibr.ansi.org/Standards/Default.aspx#hosted-ansi (last visited May 10, 2024).

[16] Petitioners' *amici* do not identify any actual instances where someone affected by one of the standards at issue could not access it. The *amicus* brief for Reporters Committee for Freedom of the Press and the New York Times Company did not identify any IBR'd standards that journalists could not obtain or access. The *amicus* brief for Accessibility Research and Advocacy Organizations, representing the visually impaired, does not even mention the fact that Congress

The ANSI IBR Portal is easy to use and has been positively received by U.S. government, industry, and SDOs as a comprehensive solution to the issue of access to standards that are IBR'd by the federal government, as well as state and local governments. As shown in the screenshots in the Addendum, the second tab at the top—"Hosted by ANSI"—includes the IBR'd standards of *Amici* ISO and IEC, as well as the IBR'd standards of 10 other SDOs. *See* Add. A1, A3. The two ISO/IEC standards at issue in the FCC's rulemaking (ISO/IEC 17011 and 17025) can be found on page 7 of that list. *See* Add. A2. On ANSI's IBR Portal alone, there are currently over 260 standards available for online viewing.[17]

Other SDOs provide their own IBR reading rooms. For example, *Amici* API, IAPMO, ICC, IEEE, NFPA, and UL host their own reading rooms that are accessible directly or through links on the ANSI IBR Portal.[18] Like the ANSI IBR Portal, these reading rooms provide free, online access to IBR'd standards. These can be accessed through the third tab at the ANSI IBR Portal—"Hosted by SDOs"— that

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has already adopted the Chafee Amendment, providing a mechanism for ensuring visually impaired individuals have access to copyrighted materials. *See* 17 U.S.C. § 121. This statute allows organizations serving the visually impaired to copy works without permission from the copyright owner, as long as those copies are available exclusively for the use of the visually impaired. *Id*.

[17] *See generally* ANSI, https://ibr.ansi.org/.

[18] *See Standards Hosted by SDOs*, ANSI https://ibr.ansi.org/Standards/Default.aspx#sdo (last visited May 10, 2024) (listing and linking to IEEE IBR Standards). *See also* Add. A3 (screenshot).

provides links to the portals and reading rooms of 16 other SDOs. *See* Add. A1, A3. For example, clicking on "IEEE" will take the viewer to the "IEEE Standards Reading Room," where the viewer can access the 64 IEEE standards that have been IBR'd.[19] The three IEEE standards at issue in the FCC's rulemaking, the "C63" standards, can be found on page 3 of that list. *Id.*

Petitioners' argument that the FCC violated its obligation to make NPRM-referenced standards reasonably available fails because the standards were reasonably available to Petitioners, in accordance with OFR and OMB rules, for the entire period of proposed rulemaking through publication of the final rule. Petitioners' claim that the FCC's final rule should have been published in the Federal Register fails for the same reason: all that is required for IBR'd text is that it be made "reasonably available," and the record shows unequivocally that it was in this case. In short, Petitioners have no basis to complain that they have been denied access to any of the standards at issue, either during rulemaking or after publication of the final rule.

[19] *See IEEE Standards Reading Room*, IEEE, https://ieeexplore.ieee.org/browse/standards/reading-room/page?pageNumber=3 (last visited May 10, 2024). *See also* Add. A4. (screenshots)

III. Petitioners' Reliance on *American Society for Testing & Materials v. Public.Resource.Org, Inc*. is Misplaced

Petitioners suggest that this Court's decision in *American Society for Testing & Materials v. Public.Resource.Org, Inc*., 82 F.4th 1262 (D.C. Cir. 2023) *("ASTM II")*, supports their interpretation of 5 U.S.C. §§ 552(a), 553. It does not. That case did not purport to construe those statutes, and it did not involve an administrative challenge under the Administrative Procedure Act.

Rather, PRO argued that a government's decision to IBR an SDO's work negates copyright in the underlying standard. *See Am. Soc'y for Testing & Materials v. Public.Resource.Org, Inc.*, 896 F.3d 437, 446 (D.C. Cir. 2018) ("*ASTM I*"). In *ASTM I*, this Court declined to embrace that position and instead decided the case through application of the fair-use doctrine. *Id.* at 447-54; *see also ASTM II* at 1267-72. That fact-intensive doctrine "must be evaluated in the context of the specific use at issue." *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith,* 598 U.S. 508, 143 S. Ct. 1258, 1284 (2023). Deciding whether a private party has committed infringement under the Copyright Act is completely different from determining a federal agency's obligations under an entirely different section of the U.S. Code.

Furthermore, while not directly before this Court, requiring the FCC to publish online standards that are referenced in an NPRM or in a final rule would have serious ramifications. Courts have noted that similar rules could run afoul of the Takings Clause—a concern amplified in the context of an NPRM, where the

standard has merely been *proposed* to be IBR'd.[20] *See CCC Info. Servs. v. MacLean Hunter Mkt. Reports, Inc.*, 44 F.3d 61, 74 (2d Cir. 1994) (noting that a rule that the incorporation of a standard by a "legislature or administrative body deprived the copyright owner of its property would raise very substantial problems under the Takings Clause"), *cert. denied*, 516 U.S. 817 (1995); *Practice Mgmt. Info. Corp. v AMA*, 121 F.3d 516, 520 (9th Cir.), *cert. denied*, 522 U.S. 933 (1997) (noting same concern). *Amici* submit that in construing sections 552(a) and 553, this Court should seek to avoid a Takings Clause problem.

CONCLUSION

Federal agencies derive great benefit from the standards development activity that SDOs facilitate, and they save taxpayer dollars at the same time. Agencies that incorporate these SDO-developed standards have recognized the requirements of the

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[20] Petitioners suggest that the FCC would have a fair use defense for posting *Amici's* standards online without the copyright holder's authorization. That is far from clear and, in any event, misses the entire purpose of the "reasonably available" standard. The balance of IBR is premised on an agency's incorporating the standard by reference and *not* posting it online. As OFR recognized, if IBR'd materials were posted on the agencies' website, it would undermine both SDOs' ability to fund standards creation, and also the government's future interest in relying on voluntary consensus standards. *See* 78 Fed. Reg. 60784, 60785 ("If we required that all materials IBR'd into the CFR be available for free, that requirement would compromise the ability of regulators to rely on voluntary consensus standards, possibly requiring them to create their own standards, which is contrary to the NTTAA and the OMB Circular A-119.").

SDO ecosystem (including the need for those activities to be financially sustainable), and they have arrived at a reasonable balancing of those requirements with the agencies' legal obligations and the public interest in access to IBR material. This Court should not disturb that balance and should instead uphold the FCC's decisions.

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Dated May 20, 2024

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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limitation imposed by the Federal Rules of Appellate Procedure and the D.C. Circuit Rules. The document was prepared in Microsoft Word using proportionally spaced typeface with size 14 Times New Roman font. The document contains 6,431 words, excluding the aspects of the exempted by Federal Rule of Appellate Procedure 32(f) and D.C. Circuit Rule 32(e)(1).

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CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2024, I caused the foregoing Brief of *Amici Curiae* Amici Curiae American National Standards Institute and 16 Standards Organizations in Support of Respondents to be electronically filed with the Clerk of the Court using CM/ECF, which will automatically send email notification of such filing to all counsel of record.

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