CASE NOT YET SCHEDULED FOR ORAL ARGUMENT

In the United States Court of Appeals
For the District of Columbia Circuit

Public.Resource.Org, Inc. *et al,*

Petitioners,

v. No. 23-1311

Federal Communications Commission, *et al,*

Respondents.

REPLY BRIEF OF PETITIONERS

On Petition to Review an Order of

The Federal Communications Commission

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SUMMARY OF ARGUMENT

Petitioner Public.Resource.Org has already established in *Georgia v. Public.Resource.Org, Inc,* 590 U.S. 255 (2020), that it has the right to publish the Official Code of the State of Georgia despite the fact that it was copyrighted. And in *American Society for Testing & Materials v. Public.Resource.Org*, 82 F.4th 1262 (D.C. Cir. 2023) (*ASTM*), this Court held that Public.Resource.Org has the right to publish copyrighted standards similar to those at issue here once they became law. Public.Resource.Org was the defendant in the prior cases and first had to purchase the materials in order to make them publicly available. In this case, it seeks a ruling that the respondent Federal Communications Commission (FCC) has an affirmative legal obligation under 5 U.S.C. §§ 552 & 553 to make its proposed and final rules readily available to the public without charge, notwithstanding the process known as Incorporation by Reference (IBR). Numerous agencies across the government, including the FCC, now use IBR in a manner that prevents the public from knowing what the law of their agency is, both as proposed and when it becomes final.

When IBR was adopted in the pre-Internet era, its purpose was to save the cost of reproducing in the Federal Register what are often voluminous technical standards that have been adopted by federal agencies as substantive rules, and hence are the law, apparently on the assumption that most of those who needed the standards already had access to them. Now that the FCC and every federal agency

has a website on which they can, and do, post all of their rules not subject to IBR, there is no longer a cost justification rationale for IBR. As the amicus brief submitted by the American National Standards Institute and sixteen standards organization makes clear, the only reason that the FCC did not publish the standards at issue in this case on its website is that the organizations that created them claimed a copyright, which amici fear will be destroyed if petitioners prevail. As an accommodation, the FCC used IBR to shield it from having to make these proposed and final rules readily available to the public. But amici are seeking copyright protection from the wrong entity. What amici need, and what much of their brief argues for, is a statutory exemption from sections 552 and 553, but only Congress, not the FCC or this Court, can provide one.[1]

Neither the FCC nor any other federal agency has offered any other reason why it has not published standards like these so that any interested person can read and copy them at no cost, just like all of the agency's other rules. But the FCC did

[1] Amici argue that the sky will fall – the whole world of standards development and IBR will be "destroyed" – if government agencies post online the texts of the standards made into law. Br. 9, 12. Amici ignore that this Court determined last year in *ASTM* that, even after "Public Resource has been posting [hundreds of] incorporated standards for fifteen years," those standards organizations "have been unable to produce any economic analysis showing that Public Resource's activity has harmed any relevant market for their standards." 82 F.4th at 1271. The Court in *ASTM* also noted that standards organizations regularly update their standards, and government agencies are generally slow to respond by turning any of those standards into law. "So," this Court found, "many of the builders, engineers, and other regular consumers of the plaintiffs' standards may simply purchase up-to-date versions as a matter of course" – long before agencies incorporate any of them by reference. *Id*.

not defend its failure to publish its proposed rules on the ground that their publication would subject the agency to liability for copyright infringement, and such a claim would surely fail in this Court under its ruling in *ASTM*. Instead, it relied on the IBR provision, which, as petitioners show in their opening brief and in this reply, applies only to final rules and even then, it mandates that rules not published in the Federal Register be "reasonably available" to the interested public. Telling members of the public that they can purchase the proposed rules from a sponsoring organization, or that they can come to the FCC's offices in Washington DC, where they can inspect but not copy them, as a means of making them "reasonably available," is surely "arbitrary" and "capricious" in violation of 5 U.S.C. § 706(2)(A) when the agency could post them on its website, essentially cost-free.

According to the FCC, as long as members of the public know where to look for the proposed and final rules, and there is no legal barrier to reading them, that is all that 5 U.S.C. §§ 553 and 552 require. It is immaterial how much it costs to obtain access, or where the documents are located (including on top of the Washington Monument), or whether the requester is permitted to save, copy, or send them to others. However, as this Court has often recognized in construing section 553(b), its purpose is to enable the public to participate in a meaningful way in rulemaking proceeds, and that purpose would be wholly frustrated by respondents' misunderstanding of that provision.

Respondents' contention that petitioners lack standing is also without merit. Their brief treats this case as if petitioners were asking the Court to overturn the substance of the rules that the FCC approved. But petitioners only seek a ruling that the FCC wrongly denied public access to the proposed and final rules. Properly understood, this is a case in which petitioners are invoking informational standing for which no further injury beyond the denial of a proper request is needed. For that reason, as more fully set forth in Point I below, petitioners easily have standing to litigate their claims. To be sure, petitioners' opening brief asked the Court to remand the case to the FCC to start the rulemaking process again, this time making the proposed rule available to the public at the start. However, if the Court concludes that the text of these rules must be made publicly available, but, because of standing restrictions, decides it does not have the power to require the FCC to start the rulemaking again, petitioners would not seek further review of that conclusion.

ARGUMENT

I. PETITIONERS HAVE INFORMATIONAL STANDING TO SEEK ACCESS TO THE PROPOSED AND FINAL RULES AT ISSUE IN THIS CASE.

Petitioners acknowledge that they did not follow Local Rule 28(a)(7), which requires a separate standing section in their brief. They did include all the information that was needed to establish their standing, as they had done in their

comments to the FCC, although they had no reason to think that it would be an issue. Pet. Br. at 10. Respondents never suggested that the statement of issues that petitioners filed should also have included standing, nor did respondents move to dismiss the petition for lack of standing, a common tactic by the Government, which would have enabled the issue to be decided before full merits briefing. The inclusion of a standing argument came as a complete surprise to counsel for petitioners. But what is more surprising is that respondents' brief failed to include (even to distinguish) the informational standing cases that petitioners cite in this reply. Those cases would have shown respondents why petitioners properly concluded that the basis for their standing to raise these claims was "readily apparent" and hence did not have to be argued in their opening brief. *State of Ohio v. EPA,* 98 F.4th 288, 300 (D.C. Cir. 2024) ("a petitioner whose standing is *not* readily apparent must show that it has standing in its opening brief") (internal quotation marks omitted, emphasis added).

Respondents treat the standing question as if petitioners were seeking to overturn the substance of the FCC's rules, in which case a different injury would be required. However, the essence of petitioners' claim is that they and the public at large were denied the information to which they were entitled by sections 553(b) and 552(a)(1). In this situation, the applicable test for Article III standing is set forth in

Maloney v. Murphy, 984 F.3d 50, 54 (D.C. Cir 2020), which petitioners readily satisfy:

> A rebuffed request for information to which the requester is statutorily entitled is a concrete, particularized, and individualized personal injury, within the meaning of Article III.

The dispute in *Maloney* was whether the fact that the information request to a federal agency there was made by seventeen members of the House of Representatives, pursuant to a specific statute authorizing them to make that request, destroyed their Article III standing. The majority held that it did not, but what is significant is that neither the defendant nor the dissenters contested that the Members had standing as private citizens to seek the requested records under the Freedom of Information Act, 5 U.S.C. § 552 (FOIA).[2]

Maloney is hardly alone in recognizing that informational standing is quite different from standing to assert other claims. In *Public Citizen v. Department of Justice,* 491 U.S. 440 (1989), the plaintiffs relied on the Federal Advisory Committee Act to challenge the President's use of a committee of the American Bar Association to vet his judicial nominees. Among other requirements, that Act

[2] Rehearing en banc was denied in *Maloney* over the dissent of five members of this Court, 45 F. 4th 215 (D.C. Cir. 2022). The Supreme Court granted review on the issue that divided this Court, *Carnahan v. Maloney*, 22-425, and after respondents suggested the case was moot, the Court remanded the case to this Court with instructions to dismiss.

mandated that any covered committee keep minutes, hold open meetings, and make documents not exempt from FOIA available to the public. The Court held that a

> refusal to permit appellants to scrutinize the ABA Committee's activities to the extent FACA allows constitutes a sufficiently distinct injury to provide standing to sue. Our decisions interpreting the Freedom of Information Act have never suggested that those requesting information under it need show more than that they sought and were denied specific agency records.

Id. at 449. The Court specifically included with the reach of informational standing the requirements that federal advisory committees must create charters and give notice of all their meetings. *Id.* at 450.

The Supreme Court went further in expanding the reach of informational standing in *Federal Election Commission v. Akins*, 524 U.S. 11 (1998). The plaintiffs there filed suit against the FEC over its decision not to treat the political committee operated by AIPAC as subject to the federal election laws. The Court (at 21) rebuffed the Government's claim that plaintiffs lacked standing, finding that

> The "injury in fact" that respondents have suffered consists of their inability to obtain information—lists of AIPAC donors (who are, according to AIPAC, its members), and campaign-related contributions and expenditures—that, on respondents' view of the law, the statute requires that AIPAC make public.

Respondents here failed to cite *Maloney, Public Citizen, or Akins,* but instead relied on cases challenging rules that were issued without doing an Environmental

Impact Statement,[3] or because of some other flaw in the rulemaking process.[4] Those cases have nothing to do with petitioners' information claims in this case.

There is another flaw in respondents' standing argument that should have been readily apparent to them. Petitioners' second claim is that the refusal to publish the final rules that are the subject of this petition to review is a violation of 5 U.S.C. 552(a)(1), which is part of the FOIA. It is not clear from respondents' brief whether their misguided standing argument applies to that claim as well as to the claim for access to the proposed rule. But if it does, it is plainly erroneous because no court has ever suggested that suits under FOIA lack standing because the plaintiffs have no more than a desire to have a copy of the record that has been requested. Thus, the FCC cannot hide behind a claim of standing, but must defend its withholding of the final rule on the merits.

Petitioners' claim that the FCC was required to make its proposed rules available to the public and not rely on the alternatives to Federal Register publication mandated by section 553(b) is only a slight variance on their final rule claim. The only path by which petitioners could obtain review of the FCC's denial of their request for public access to the proposed rule was to file this petition to review the

[3] *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658 (D.C. Cir. 1996).

[4] *Mendoza v. Perez*, 754 F.3d 1002 (D.C. Cir. 2014); *Sierra Club v. EPA*, 292 F.3d 895 (D.C. Cir. 2002); *State of Ohio v. EPA*, 98 F.4th 288 (D.C. Cir. 2024); and *Twin Rivers Paper Co. LLC v. SEC*, 934 F.3d 607 (D.C. Cir. 2019).

order approving the final rule. In that sense, the case is procedurally like *Akins,* where the Court upheld the plaintiff's claim based on informational standing when its claim was that the FEC had violated the applicable statute, thereby causing informational injury to the plaintiffs. Indeed, this case is even a clearer one for standing because here all the Court must do is decide whether there is a basis for denying access while the rulemaking is pending, whereas in *Atkins* the lower court still had to determine whether the FEC was justified in its refusal to conclude that AIPAC was operating a political committee under federal election law.

The environmental cases that respondents cite, and in which the Court found no standing, are nowhere near as favorable as respondents portray them. In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the Court ruled that the plans of the plaintiffs to return to the place where the affected species reside were too indefinite to give them standing. It nonetheless observed, "Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing." *Id.* at 562-63. Similarly, in *Summers v. Earth Island Institute,* 555 U.S. 488 (2009), the plaintiff challenged certain Forrest Service regulations which it claimed adversely affected a number of locations where its members have been or planned to go to view the flora and the fauna. There had been a settlement of the dispute for one site where a member of the plaintiff organization had recently visited, but there was no evidence of a similar connection

with any other potentially affected site. The claim was that the wrongful denial of the opportunity to comment gave the plaintiff standing, but the Court held that such a denial provided standing only with respect to a project to which a member had recently visited or had concrete plans to go.

There are two points to note about these two cases. First, the alleged injuries there—denial of an opportunity to view wildlife—are not qualitatively different from what petitioners allege here under section 553(c): denial of "a meaningful opportunity to participate in the rulemaking," Whether the limited access to the proposal was a denial of that opportunity is a merits questions, but the alleged denial surely should be enough for standing purposes if the denials in *Lujan* and *Summers* would have sufficed, but for the lack of an immediate injury. Second, in this case, there is a specific rule on which petitioners would like to comment, and so there is no lack of imminence as in *Lujan* and *Summers.*

However, if something more is required, and petitioners do not believe there is, the following information further explains the interests of petitioners in obtaining access to the proposed and final rules at issue in this case.

People who write for the Make Community magazine frequently provide detailed technical information about radios, electromagnetic radiation, antennas and other topics. Make also produces Makerfaire, an annual set of exhibitions for the public which, since 2006, has involved 131,775 exhibitors and 7,678,821 attendees.

The exhibits are highly technical, including detailed instructions for "do it yourselfers" to create all sorts of devices, many of them involving sophisticated electronics. https://makerfaire.com.

The iFixit Community consists of thousands of volunteers who, as of the end of 2023, had published 101,082 guides for fixing 53,322 different devices, many of them consisting of complicated electronics. https://www.ifixit.com/News/88096/100000-guides-and-other-2023-community-milestones. Knowing what makes a device safe and lawful, including in this case electromagnetic radiation and other metrics, is an integral part of this process. The iFixit community serves millions of users, and its guides are available in English, German, French, Chinese, Japanese, Spanish, Italian, and Dutch.

Public Resource is also clearly affected: the organization makes the law, and proposed laws, available to citizens in all walks of life, including those in the Make and iFixit communities. www. https://law.resource.org/. This Court has recognized the important role Public Resource plays by making the law, and proposed laws, available in ways that the Government often does not. *ASTM* at 1270.

Finally, because petitioners clearly have standing to contest the refusal of the FCC to publish the final rule in the Federal Register (or on its website), if the Court agrees with petitioners that the FCC's refusal was contrary to law, that could, as a practical matter, moot the controversy with respect to the future publication of the

text of proposed rules when agencies seek to employ IBR. At present, the FCC's only reason for its non-publication policy is to protect the copyright interests of the organizations that created the standards underlying the rules. However, if the text of the final rules must be published, despite any copyright concerns, there would be no legitimate basis for not doing the same at the proposal stage, especially given the importance of the public comment process under section 553(b).

Once petitioners' claims are properly understood as those seeking access to information wrongly withheld by a federal agency, the standing issue disappears,

II. THE FCC ACTED CONTRARY TO LAW BY FAILING TO PUBLISH THE TEXT OF THE PROPOSED AND FINAL RULES IN THE FEDERAL REGISTER.

The FCC did not publish the text of either the proposed or the final rules in the Federal Register as required by sections 553(b) and 552(a)(1), nor did it post them on its website, which was not only feasible but could be done at almost no cost. Instead, the FCC told the public that it could come to its office in Washington DC (and for the final rule, at the Office of the Federal Register there) where they could read but not copy the rules. Or they could go to an online reading room for some but not all of the organizations that sponsored these rules, which are also read only. Or they could purchase an electronic copy of each standard for between $63 and $175, but again they would not be permitted to copy it or disseminate it to others.

Thus, the question presented on the merits is whether those other sources make the rules "reasonably available" to the public. They do not.

Respondents and their amici treat the "reasonably available" exception as if it were contained in both sections 552(a)(1) and 553(b), but it is found only in the former. Petitioners agree that no court would set aside a rule for which the proposed text was available on the agency's website, but had not been published in the Federal Register. However, the absence of an express exception in section 553(b) underscores the uphill battle that the FCC has to show that it complied with that provision given the very limited access that the public had to the text of these proposed rules.

Respondents also contend that "reasonably available" does not mean available to the world, and quotes the phrase that follows it —"to the class of persons affected thereby"—to suggest that less that universal notice will suffice. However, that entire sentence is limited by the introductory phrase "[f]or the purpose of this paragraph," and the paragraph as a whole is directed to assuring that no person may "be required to resort to, or be adversely affected by a matter to be published in the Federal Register and not so published." In other words, the IBR exception does not permit agencies to avoid Federal Register publication on a wholesale basis, but allows agencies to enforce unpublished rules against any class of persons for whom the rules are "reasonably available." To the extent that respondents suggest that either

the Office of Management and Budget or the Office of the Federal Register have defined "reasonably available" in a manner that would uphold what the FCC did here, both agencies have made clear that they have no such power.[5]

The FCC objects to having to include these very lengthy standards in the Federal Register as contrary to the goal of reducing the cost of issuing regulations. Petitioners do not disagree, at least insofar as the requirement would be imposed on the print edition of the Federal Register. But there is a ready alternative way to comply with the IBR statute and section 553: simply include in the Federal Register notice, in addition to what is already posted, a link to the agency's website where the text of the proposed or final rule is available.

Respondents further object to the notion that this Court could require the FCC to post anything on its website because that would impose an additional burden forbidden by *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense*

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[5] Office of Management and Budget Circular A-119, https://www.whitehouse.gov/wp-content/uploads/2020/07/revised_circular_a-119_as_of_1_22.pdf at 6-7 ("it is not within the purview of the Circular to define reasonable availability. Rather, it is by statute the responsibility of the Office of the Federal Register (OFR) to address this issue."); Office of Federal Register Final Rule, 79 Fed. Reg 66267, 66276 (Col 2) (November 7, 2014) ("We decline to define 'reasonably available.'") 66276 (Col. 3) ("The OFR (including the Director) does not have the subject matter expertise or the familiarity with the affected parties to make a case-by-case analysis of 'reasonable availability.' We must rely on the analysis of the agency.")

Council, Inc., 435 U.S. 519 (1978). Whatever that case precludes, it surely does not bar a court from ordering an agency to employ an equally effective procedure—posting a proposed or final rule on its website— when the primary procedure, including the rule in the Federal Register, is more costly or burdensome.

Much of respondents' brief on the merits argues that enabling any interested person to have their own copy of a proposed rule, whether in paper or on a screen, to do with it what that person wishes, is not necessary because everyone can purchase a copy, and there are many possible ways to use the read-only versions available on the websites of some, but not all of the sponsoring organizations. But section 553 was not established to be an obstacle course, with agencies authorized to erect as many barriers as they can to prevent the public from commenting on proposed rules. Rather, section 553(c) provides that, after giving the required Federal Register notice, "the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." And that opportunity must be meaningful, which is the message that the cases petitioners cited in their opening brief at 28-31 convey, although they are admittedly not directly on point, because in all those cases there was no hidden text, although the agency failed in some other respect to make the opportunity to participate "meaningful."

Similarly, the FCC contends that petitioners and other members of the public do not *really* need to see these technical rules because they are only meant for those

in the industry, who presumably have bought the standards before they were proposed for IBR. Aside from its flaw of being elitist, that approach finds no basis in section 553(c) which allows "interested persons," without limitation, to participate in the rule making. As noted in petitioners' opening brief (8-10), the FCC posed a number of questions about these proposed rules, but without access to their text, it would be impossible to respond to what the FCC considered to be important issues. Moreover, interpreting "interested persons" to be rule-specific requires agencies to guess who would and would not be interested (even though no one had yet seen the proposed rule) causing confusion and engendering unnecessary litigation, when the simple solution is to make the text of proposed rules available to everyone through the Federal Register, as section 553(b) requires.

Respondents rely on *Center for Biodiversity v. EPA,* 82 F.4th 959 (10th Cir. 2023), where the failure to include in the rulemaking docket the text of the state's rules, which were incorporated in the proposed agency rule, was not fatal. That case is not helpful to respondents for several reasons. First, as the court noted, there was no claim that the notice under section 553(b) was inadequate, which is the issue here. Second, the docket did include a cite to the applicable state regulations, even if the objectors claimed it was difficult to locate their text. Third, it does not appear that the petitioner was unable to locate the applicable regulations or that the difficulty in accessing them actually interfered with its ability to comment meaningfully. By

contrast, here, the FCC is acquiescing in, indeed endorsing, a regime wherein private parties deliberately make the texts of regulations difficult to access, by charging fees for premium access, offering free access that is difficult to use, and prohibiting members of the public from copying the law or communicating their provisions to fellow citizens.

At various places in their brief, respondents argue that the FCC complied with the notice requirements of section 553(b), albeit indirectly and in pieces. They suggest that the law allows an agency to include only a summary of the substance of the proposed rules, which might be acceptable in some situations, but surely not here for the hundreds of pages of highly technical provisions.[6] Nor do abstracts of the standards provide any meaningful information, as shown by the twelve-line abstract of IEEE/ANSI C623.10-2020 included in petitioners' opening brief at Add. 12a. Much more significant is that the authoritative Attorney General's Manual on the Administrative Procedure Act (1947) discussed in petitioners' opening brief in note 3 on page 20, set forth certain conditions under which the text would not have to be published, but then specifically stated that, if the text were not published, a copy of

[6] The notice that appeared in the Federal Register, which is reproduced in the Addendum to petitioners' opening brief has an eight-line summary, which provides no useful information for anyone interested in commenting. Add 1a. The FCC's official notice, starting at JA 36, does not contain a summary.

the proposed rule would have to be provided by "the agency upon request." Manual at 29.

Respondents also contend that the availability of the reading rooms (for two of the organizations) eliminates any problem of access. As petitioners showed in note 1, page 12 of their opening brief, this Court in *ASTM* has soundly rejected any claim that these reading rooms are an adequate substitute for actual or even convenient access generally, let alone under sections 552(a)(1) and 553(b) for which Federal Register notice is the required norm.

Respondents seem to contend that public notice serves no significant public purpose and that insisting on Federal Register notice is an unnecessary burden when the people who are legitimately interested in the rule will have all the notice that they need. That is not, of course, what section 553(b) says, nor is it the overall approach of section 553 and the decisions of this Court that have construed it. That attitude may have been in fashion at one time, but petitioners believe that the better approach is that found in *Mullane v. Central Hanover Bank & Trust Co.,*339 U.S. 306, 315 (1950), where Justice Robert Jackson set forth the "Golden Rule" of due process notice:

> But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.

Of course, assuring that everyone who might be interested in a proposed rule receive actual notice of its text would be impractical and is not what section 553(b) or due process requires. But neither does section 553(b) permit wholesale refusals to exclude the text of the rule when there is a direct and inexpensive means of providing it: include a link to the text in the Federal Register notice. Even less explicable is why an agency seeking to inform the public of the law it issues would refuse to include in its Federal Register notice for the final rule a link to its website where the text can be posted.

The final rules at issue in this case are not "reasonably available" to anyone, except those who purchased them from the sponsoring organizations —and, even then, only with substantial restrictions on their use. Because the final rules are "the law," and the law cannot be copyrighted, *Georgia v. Public.Resource.Org, Inc. supra,* respondents wrongly refused to make the final rules publicly available.

CONCLUSION

For the foregoing reasons, the order of respondent Federal Communications Commission dated September 29, 2023, approving the rules described at 88 Fed. Reg 67108-16, should be reversed The Court should declare that the FCC's refusal to publish the text of both the proposed and final rules under that order was contrary to law and that they must be published promptly The case should be remanded for further proceedings in compliance with 5 U.S.C. § 553(b) and 5 U.S.C. § 552(a)(1),

with directions that the rules remain in effect in the interim.

Respectfully Submitted

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

1. This reply brief complies with type-volume limit of Fed. R. App. P. 32(a)7(B) because, excluding parts of the document exempted by Fed R. App. P. 32(f), this brief contains 4954 words.
2. This brief complies with the typeface requirements of Fed R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface in Microsoft Office Word, LTSC Professional Plus 2021 in 14-point Times New Roman.

/s/ Alan B. Morrison

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