No. 18-1150

IN THE

Supreme Court of the United States

STATE OF GEORGIA, ET AL.,

Petitioners,

v.

PUBLIC.RESOURCE.ORG, INC.

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF OF AMICI CURIAE LAW PROFESSORS NINA MENDELSON, ALAN MORRISON, ANNE JOSEPH O'CONNELL, AND PETER STRAUSS IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE[1]

Amici are professors of administrative law with particular expertise in government transparency, including issues such as the incorporation by reference of private standards into over 9,000 federal regulations.

Nina Mendelson is the Joseph L. Sax Collegiate Professor of Law at the University of Michigan Law School. She is an administrative law scholar and has written extensively on administrative law issues, including multiple articles on the incorporation by reference of private standards into public law.

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Peter Strauss is the Betts Professor of Law Emeritus at Columbia Law School and the co-author of a leading administrative law casebook. He has written widely on administrative law issues and published multiple articles

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amici curiae or their counsel made a monetary contribution to preparation or submission of the brief. Counsel for all parties have consented in writing to its filing.

on public access, privately drafted standards, both domestic and international, and incorporation by reference issues.

Amici have a strong interest in the development of administrative and copyright law in a manner that enables simple and universal access without charge to regulatory law. Amici agree with respondents that this Court should uphold the Eleventh Circuit ruling that the government edicts exception to copyrightability extends to the entire Official Code of Georgia Annotated. As scholars of federal incorporation by reference of private standards, amici write separately to urge the Court to reaffirm the application of the government edicts doctrine to all text that a government has adopted as the law. In particular, the government edicts doctrine applies to all federal regulatory text with the force of law, including language that federal agencies have adopted from private drafters through incorporation by reference.

SUMMARY OF ARGUMENT

Federal regulatory law contains thousands of "incorporations by reference" of other materials. Agencies have incorporated legal text originally drafted by private organizations ranging from the standards-focused American Society for Testing and Materials (ASTM) to industrial trade associations such as the American Petroleum Institute (API). Recent examples include rules addressing food additives, environmental safeguards for oil wells and pipelines, and child and infant product safety. Under current practices, privately drafted materials are incorporated only by reference. Their text does not appear in the Federal Register, the Code of Federal Regulations, or the agency's website, although the incorporated material has the same force of law as regulatory text appearing directly in those publications.

ASTM and other private standards drafting organizations argue in amicus briefs submitted in this case that the Court should jettison the government edicts doctrine for incorporated-by-reference material because copyright protection is needed for private standards development. Those amicus briefs do not tell the whole story.

Because the text of incorporated-by-reference material does not appear in the Code of Federal Regulations in the Federal Register, or on government websites, regulated entities and members of the public alike face substantial challenge in accessing the law. Standards made part of regulations through incorporation by reference are difficult to find and expensive to read. Pieces of binding federal regulations are now scattered across numerous private, difficult-to-navigate websites managed by the standards development organizations under claims of copyright. The private organizations reserve the right to choose the fee that must be paid to read the standards. A single standard can cost several hundred dollars. The private organizations have also eliminated access to some standards altogether. These barriers substantially impede regulated entities and the public at large from knowing the law, with destructive consequences for fair notice and the public's ability to participate in core government processes.

The question whether standards drafting organizations can maintain a copyright in particular text once it has been incorporated into the substance of federal law, enabling them to demand payment for access to the text or eliminate such access altogether, is at issue in pending litigation in the District Court for the District of Columbia between Public.Resource.Org, respondent here, and several private organizations. We agree with amicus ASTM that those issues should not be addressed by the

Court in this case, but rather should be resolved in litigation directly addressing them.

At the same time, we urge the Court, as it resolves whether the government edicts doctrine applies to the entire Official Code of Georgia Annotated, to reject the implications of the Solicitor General's brief that a government official must pen a standard for that standard to be a government edict. Instead, government *adoption* is the critical feature. A government-adopted standard with the force of law is a government edict to which public access is of vital importance, whether that standard includes only text penned by the government or also text incorporated by reference. Permitting private organizations to assert copyright over text with the force of law threatens that critical public access. Amici do not dispute that private standards can possess genuine value and be of public benefit, but a copyright-based regime is not the only means of rewarding private standards drafters when the government adopts text into binding federal regulations.

If the Court reaches the issue, it should reaffirm the application of the government edicts doctrine to all regulatory text with the force of law, no matter where it is located and irrespective of whether a private individual has had a hand in drafting it.

ARGUMENT

The current regime of incorporated-by-reference legal text smacks of Erwin Griswold's 1930s-era description of the "intolerable situation" and the "chaos" of federal regulations. At that time, thousands of pages of new regulations, freshly issued by New Deal agencies, were obscurely published in "separate paper pamphlets" or even on a "single sheet of paper." Erwin Griswold, *Government in Ignorance of the Law—A Plea for Better*

Publication of Executive Legislation, 48 Harv. L. Rev. 198, 294 (1934); *see* Louis L. Jaffe, *Judicial Control of Administrative Action* 61 (1965) (some portions were "here and there in the desk drawers of NRA officials"). These laws included hundreds of "industry" codes drafted under the auspices of the National Industrial Recovery Act. *See* Mila Sohoni, *Notice and the New Deal*, 62 Duke L.J. 1169, 1179 (2013). The state of affairs resulted in an embarrassing colloquy in *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), when the "government attorney had to admit during oral argument that the [Petroleum Code] regulation being challenged had been revoked by the time the lawsuit [to enforce it] was filed"—a fact of which no one, including the government attorneys, had been aware. Mary Whisner, *A Manual "To Inform Every Citizen,"* 99 Law Libr. J. 159, 160 (2007). In response, Congress passed the Federal Register Act, requiring the public printing and distribution of any federal agency "regulation, rule, … code of fair competition, … or similar instrument," along with other documents. Pub. L. 74-220, 49 Stat. 500, §§ 3–4 (1935); *see* 44 U.S.C. §§ 1501, *et seq*.

Now, eight decades later, the acquiescence of federal agencies in copyright-facilitated private control of significant portions of agency regulations has turned the clock sharply back. For thousands of federal regulations with the force of law, chunks of federal regulatory text that were incorporated only by reference are scattered across the Internet and have even disappeared outright. Even worse, once the text is located, the private entities in control of it may demand that the reader agree to burdensome conditions or pay to gain access to it.

I. Without public access, incorporation by reference of private standards into the law undermines important public interests.

When this Court held in 1834 that judicial opinions cannot be copyrighted, it declared: "Whether legislative acts, or judicial constructions or decrees, knowledge of them is essential to the safety of all. … [T]he law cannot and ought not to be made the prisoner … of any individual." *Wheaton v. Peters*, 33 U.S. 591, 620–22 (1834). These principles apply no less to the text of federal regulations, regardless of whether its terms are stated directly or embodied in an industrial standard referenced in a regulation, and regardless of who initially participated in its drafting.[2]

A. Copyright-facilitated private control over federal regulatory text impairs public access to the law.

1. Federal agencies currently draw upon standards drafted by private organizations and incorporate text from those standards into binding regulations. The private standards drafting organizations include standards-focused membership organizations, such as the American National Standards Institute (ANSI) and ASTM, as well as industrial trade associations such as API and the American Herbal Products Association. These organizations draft voluntary standards for a variety of purposes that may or may not coincide with congressional goals embodied in regulatory statutes. But language that agencies draw from these private standards defines the

[2] As the Solicitor General's brief acknowledges (at 20 n.3), authorized executive agency works may be treated similarly to statutes for purposes of copyright law, including the government edicts doctrine.

law in numerous areas, including the substance of legal obligations to protect public health, safety, and the environment in connection with pipeline spills and explosions, nuclear power plant operation, and a wide variety of consumer products. *E.g.*, 49 C.F.R. §§ 195.3(b)(17), 195.264(e)(3) (regulation on storage of certain hazardous liquids, requiring compliance with API Standard 620 (2008 edition, including three later addenda)); 49 C.F.R. §§ 192.7(b)(7) & (c)(5), 192.112(b)(1)(ii) (regulation on pipeline fracture control, requiring compliance with API Spec 5L (2013 edition) or American Society for Mechanical Engineers (ASME) standard B31.8 (2007 edition)); 10 C.F.R. §§ 50.55a(a), (h)(2), (h)(3) (nuclear power reactor protection systems requirements, incorporating by reference IEEE Standard 603-1991 and "the correction sheet dated January 30, 1995"); 10 C.F.R. § 50.34 (f)(3)(v)(A)(1) (incorporating portions of 1980 edition of ASME Boiler and Pressure Vessel Code Section III Division 2); 16 C.F.R. § 1234.2 (incorporating ASTM F2670-18 on infant bath tubs).

Agencies may incorporate an entire private standard, a selected portion, or a portion of text that the agency then amends to suit its purposes. *E.g.*, 46 C.F.R. § 53.01-3 ("[Marine h]eating boilers shall be designed, constructed, inspected … in accordance with section IV of the ASME Boiler and Pressure Vessel Code (incorporated by reference; see 46 CFR 53.01-1) as limited, modified, or replaced by specific requirements in this part."). Once incorporated by agencies into duly-promulgated federal rules, this privately-drafted text indisputably has the same effect as if it were drafted initially by government officials and printed directly into the Code of Federal Regulations. *Cf.* ASTM Amicus Br. at 11 ("Rather than creating a new set of rules … legislatures and agencies

can refer to an already existing standard … when drafting statutes and regulations.").

ASTM's analogy to a school requiring students to learn a song lyric, ASTM Amicus Br. at 24, is far afield. Rather, at issue here are standards that, once adopted by federal regulators, have the full force of law behind them. Statutory enforcement provisions, including those authorizing civil and criminal sanctions and injunctive relief, extend to all duly promulgated regulations without exception for incorporated material. *E.g.*, 49 U.S.C. § 60120 (prescribing sanctions for violations of pipeline safety regulations); 46 U.S.C. § 3318 (prescribing penalties for violations of regulations, including regulations issued under 46 U.S.C. § 3306 with respect to marine boilers).

Conservatively, more than twenty-five private organizations have supplied text that is incorporated into the Code of Federal Regulations only by reference. Seven different private standards organizations have *each* supplied incorporated-by-reference material for hundreds of federal regulations. *See* Emily Schleicher Bremer, *Incorporation by Reference in Federal Regulations*, Report to the Administrative Conference of the United States, at 9 (Oct. 19, 2011), https://www.acus.gov/report/incorporation-reference-report. Moreover, text that has been incorporated by reference itself often incorporates by reference and requires compliance with still other private standards.

2. Although incorporated-by-reference text has the same legal effect as any regulatory text, it cannot be found in the Code of Federal Regulations, the Federal Register, on government websites, or in the government depository library system. Rather, when text from private standards developers is incorporated by reference

into federal rules, all that appears within the federal rule is a numeric reference to the standard and the name of the organization. The agency instead allows the incorporated text to be left under the control of the private drafting organization via organizational copyright claims.[3]

Incorporated-by-reference regulatory text is often extraordinarily difficult to locate. Contrary to amicus ASTM's assertion, there is neither widespread nor ready access to these standards. Take the Consumer Product Safety Commission's toy safety regulation, 16 C.F.R. § 1250.2. Among other provisions, that regulation incorporates ASTM F963-17, but only by reference. That standard includes multiple policy judgments aimed at safety, including a 65-decibel limit on sound-producing toys used close to the ear, and requirements regarding toy flammability, toxic ingredients, and sharpness. The

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[3] Office of Management and Budget (OMB) Circular A-119 instructs agencies that incorporate by reference copyrighted material to "work with the relevant standards developer to promote the availability of the materials … while respecting the copyright owner's interest in protecting its intellectual property." *See* OMB, Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities, Circular A-119, at 21 (Jan. 12, 2016), https://www.nist.gov/standardsgov/what-we-do/federal-policy-standards/key-federal-directives. The Freedom of Information Act (FOIA), 5 U.S.C. § 552(a)(1) requires publication of all agency rules in the Federal Register, but allows incorporation by reference of material that is "reasonably available" to affected persons, *id.* § 552(a)(1)(E). Although the incorporation is subject to Office of the Federal Register approval, that Office exercises no oversight over the material's availability. *See* 1 C.F.R. § 51.5(a). While the issue is beyond the scope of this case, incorporation by reference of materials with substantial impediments to public access, such as standards described in this brief, likely violates 5 U.S.C. § 552(a)(1)E).

text of the standard, which now has the full force of law, can be accessed only by searching through ASTM's website, where it is for sale at a price of $89. Both the search and the price are daunting obstacles for a parent or small toy maker subject to multiple federal rules. The standard itself incorporates more than fifteen additional ASTM standards, one of which is noted as withdrawn, and several others that would require further purchase. For example, the 2011 version of ASTM F1313, "Specification for Volatile N-Nitrosamine Levels in Rubber Nipples on Pacifiers" (which sets tolerance levels for this known animal carcinogen and which is one element of the federally-required ASTM F963-17) costs $50.[4]

The Pipeline and Hazardous Materials Safety Administration (PHMSA) safety regulations aimed at controlling pipeline fractures, 49 C.F.R. § 192.112(b)(1)(ii), require compliance with American Society for Mechanical Engineers (ASME) standard B31.8 (2007 edition), which costs $220.[5] PHMSA regulations also require pipeline operators to have public safety notification programs, including for first responders and the local community in case of a pipeline spill or explosion. *See* 49 C.F.R. § 192.616 (natural gas pipelines); 49 C.F.R. § 195.440 (hazardous liquids pipelines). Both regulations incorporate by reference the 2003 edition of API Standard RP 1162, "Public Awareness Programs for Pipeline Operators." *See* 49 C.F.R. §§ 192.7(b)(5), 195.3(b)(8) (specifying edition). A neighbor or nearby local government emergency response authority might well wish to know the

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[4] *See* https://www.astm.org/Standards/F1313.htm.

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

pipeline operator's legal obligations. That standard (now superseded by a second edition) presently costs $133.[6] At times, API's list price for the incorporated-by-reference version of RP 1162 has exceeded $1,000. Peter Strauss, *Private Standards Organizations and Public Law*, 22 Wm. & Mary Bill of Rts. J. 497, 508, 535 n.255 (2013).[7]

Under this regime of private control, standards with the force of law have also disappeared, although agencies have not acted to repeal them. For example, current Nuclear Regulatory Commission safety requirements for nuclear power plant steel and concrete containment systems incorporate portions of ASME standards that seem unobtainable at any price. *See* 10 C.F.R. § 50.34 (f)(3)(v)(A)(1) (incorporating portions of 1980 edition of ASME Boiler and Pressure Vessel Code Section III Division 2). ASME does not list the 1980 edition for sale, and it appears to be out of print.[8] The 2017 edition of that

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

[7] These examples not only evidence the access difficulties but also hint at the monopoly potential resulting from an agency's decision to incorporate by reference. *See* Strauss, *Private Standards Organizations*, *supra*, at 509–10 (also discussing example of American Herbal Products Association pricing of "must-have" incorporated-by-reference standard, "Herbs of Commerce," at $250 while later, superseding edition was priced at $99.99).

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

(*Footnote continued*)

section of standards is for sale at $560.[9] Likewise, the Food and Drug Administration standard for bottled water that can permissibly be called "purified water" incorporates by reference the United States Pharmacopeia, 1995 edition. 21 C.F.R. § 165.110(a)(2)(iv). While the current edition is for sale at $850 and some former editions are available for $125 each, the edition incorporated by reference into the agency's regulation appears to be unavailable from the drafting organization.[10]

Some private standards organizations, including ASTM and API, have elected to offer online "reading rooms" for the particular standards that have been incorporated by reference into federal regulations. Although some incorporated material, including the toy safety standard, can be accessed in this way, onerous conditions apply to obtain access without charge.

As ASTM acknowledges, access through its reading room is "read-only." ASTM Amicus Br. 26. But what ASTM does not make clear is that the webpage does not merely bar downloading an entire standard, but blocks the text of the often-lengthy standards from being printed, saved, or cut and pasted in whole or in part. The ASTM reading room thus impedes all the ordinary ways in which a reader might engage legal text, including

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Amazon, Rules for Construction of Pressure Vessels/1980, https://www.amazon.com/Construction-Pressure-American-National-Standard/dp/9994291556 (stating that another section of the 1980 Boiler and Pressure Vessel Code is out of print).

[9] ASME, BPVC Section III–Rules for Construction of Nuclear Facility Components, *supra* note 8.

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

quoting it in comments that can be shared with regulating agencies or other concerned individuals.

Moreover, the reading rooms typically include oppressive click-through agreements as preconditions to seeing the incorporated standards. Before reading ASTM-drafted text with the force of law, for example, one must first provide personal information and then click "AGREE" to a license. Under the terms of the license, the licensee concedes that the material is copyrighted and promises not to "transmit the content … in any form … or in any way exploit any of the material … without the express authorization of ASTM"; to indemnify ASTM for certain disputes; and even to agree that all disputes will be litigated in Pennsylvania.[11] These requirements for accessing the law are remarkable in a democracy that prides itself on the rule of law and on the value of citizens' access to that law.

API likewise requires any individual who wishes to read its standards that have been incorporated by reference into federal regulations—including its standard on pipeline operation public awareness, RP 1162—to click on a license that warns that use of the standard is subject to similar limitations and that "API may pursue any remedy legally available to it if you fail to comply." It also requires the individual to agree to a District of Columbia forum selection clause.[12] The person must further agree that API may "suspend or discontinue providing" IBR standards "with or without cause and without notice." *See* Nina Mendelson, *Private Control over Access*

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

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

to Public Law: The Perplexing Federal Regulatory Use of Private Standards, 112 Mich. L. Rev. 737, 743 n.30, 753 nn.83–84 (2014).

Amicus ASTM cites the practice of the National Fire Protection Association (NFPA) of posting its standards online. ASTM Amicus Br. 26. But access to NFPA standards similarly requires providing personal information, agreeing that the NFPA can "suspend or discontinue" providing the standard "with or without cause and without notice," and accepting a forum selection clause identifying Massachusetts.[13]

In addition, the ANSI, whose website hosts a reading room for 11 standards organizations, requires the reader to agree not to "copy, use, … condense, or abbreviate" the text, and that ANSI "may terminate … access … at any time and for any reason."[14] An individual, business entity, or journalist seeking to learn the content of regulatory law to comply with it, write about it, discuss it with others, or participate in federal agency proceedings to amend regulations would understandably be chilled from doing so by such license agreements. Indeed, such activity could arguably violate agreements not to "use" text, "transmit the content" or "in any way exploit" the material. But if the reader does not agree to the license, the legal text cannot be accessed without charge.

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[13] *E.g.*, NFPA, Codes & Standards, https://www.nfpa.org/codes-and-standards/all-codes-and-standards/list-of-codes-and-standards/detail?code=704. (To view the click-through license, click on "Free Access" and create a profile.)

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

Furthermore, entities that offer reading rooms do not include all standards. For example, ASTM F1313 on pacifiers is not available in the reading room. Some organizations, including ASME, provide no option at all for access without charge. And although some federal agencies keep a paper copy of the standard for inspection (but not copying), generally in a Washington, D.C. area headquarters, even residents of the D.C. area can face significant difficulties and this opportunity is useless, as a practical matter, to individuals residing elsewhere. *See* David Hilzenrath, *Big Oil Rules: One Reporter's Runaround to Access 'Public' Documents*, Program on Government Oversight (Dec. 6, 2018), https://www.pogo.org/investigation/2018/12/big-oil-rules-one-reporters-runaround-to-access-public-documents/. Thus, for many standards, purchase is the only means of access.

B. Obstacles to public access to standards incorporated by reference hinder compliance with the law, public discussion of the law, and participation in governance.

The difficulty of locating and the cost and conditions of reading privately-controlled legal standards are significant roadblocks to seeing the law. The obstacles undercut the due process-required "fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations*, 567 U.S. 239, 253 (2012). That standards may be "technical and specialized," ASTM Amicus Br. 6, underscores the importance of access. *Cf. Cheek v. United States*, 498 U.S. 192, 205 (1991) (stating that "in 'our complex tax system, uncertainty often arises even among taxpayers who earnestly wish to follow the law'") (quoting *United States v. Bishop*, 412 U.S. 346, 360–61 (1973)).

Thus, for example, small businesses have reported that access difficulties impede their ability to know their

obligations. As the Modification and Replacement Parts Association, an association of small suppliers of aircraft parts, stated in publicly-filed comments in an Office of the Federal Register proceeding, "The burden of paying high costs simply to know the requirements of regulations may … driv[e] small businesses and competitors out of the market, or worse endanger the safety of the flying public by making adherence to regulations more difficult."[15] Numerous other industry groups have made similar points.[16]

Likewise, the obstacles impede access for local governments with responsibilities under federal law. For

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[15] *See* Modification and Replacement Parts Ass'n, Comments, Incorporation by Reference, at 14 (June 1, 2012), https://www.regulations.gov/document?D=NARA-12-0002-0158.

[16] *See* National Propane Gas Ass'n, Comments, Proposed Rulemaking for Incorporation by Reference, at 1 (Dec. 30, 2013), https://www.regulations.gov/document?D=OFR-2013-0001-0019 (on behalf of 90% small business membership, stating access costs "can be significant for small businesses in a highly regulated environment, such as the propane industry"); American Foundry Society, Comments, Incorporation by Reference (IBR) Notice, at 1–2 (June 1, 2012), https://www.regulations.gov/document?D=NARA-12-0002-0147 ("Obtaining IBR material can add several thousands of dollars of expenses per year to a small business, particularly manufacturers …. [T]he ASTM foundry safety standard alone cross references 35 other consensus standards and that is just the tip of the iceberg on safety standards."); National Tank Truck Carriers, Comment, Incorporation by Reference, at 1–2 (May 30, 2012), https://www.regulations.gov/document?D=NARA-12-0002-0145 (stating that regulated entities "have no option but to purchase the material at whatever price is set by the body which develops and copyrights the information. ... [W]e cite the need for many years for the tank truck industry to purchase a full publication from the Compressed Gas Association just to find out what the definition of a 'dent' was. ... HM-241 could impact up to 41,366 parties and ... there is no limit on how much the bodies could charge ....").

instance, the New York City Department of Environmental Protection, which is responsible under federal law for delivering high-quality drinking water and wastewater services, has noted its concern about the impediments to accessing binding standards: "The high costs of many of the [voluntary consensus] standards and the extensive licensing requirements preclude easy access."[17]

This regime also blocks those with entitlements from learning the content of the law that governs them. For example, Vermont Legal Aid has reported that the high costs of accessing rules that have been incorporated by reference impairs Medicare recipients, particularly low-income seniors, from knowing their rights and filing effective appeals.[18] The barriers to seeing legal text also frustrate the ability of citizens to make informed choices regarding where to live, whether to drink purified bottled water, or which toys or other products to buy for their children, as Consumer Reports has explained.[19] Nonprofit organizations that advocate for citizens have

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[17] N.Y. City Dep't of Environmental Protection, Comment, Incorporation by Reference, at 1 (May 25, 2012), https://www.regulations.gov/document?D=NARA-12-0002-0119.

[18] *E.g.*, Senior Citizens Law Project of Vermont Legal Aid, Comments, Incorporation by Reference (June 1, 2012), https://www.regulations.gov/document?D=NARA-12-0002-0154 ("Many Vermont seniors cannot afford to pay for the privilege of reading documents incorporated into state and federal regulations.").

[19] *See* Consumers Union and Consumer Federation of America, Comments on Incorporation by Reference (Jan. 31, 2014), https://www.regulations.gov/document?D=OFR-2013-0001-0034 (noting importance of accessible standards to identify noncompliant products, notify agencies, and alert consumers).

raised similar concerns.[20] Put simply, the content of regulatory standards, not just their existence, is important to the public.

These obstructions to seeing federal regulatory law also corrode core governance mechanisms, including the right of "interested persons" to petition agencies to change rules and to participate in federal agency rulemaking processes under the Administrative Procedure Act.[21] The obstacles also impede public discussion of government, which is critical to holding federal agencies accountable for its regulatory decisions, including decisions to incorporate private standards by reference. The goals of private standards may differ from the statutes that federal agencies are required to implement, and a private standard need not meet any public process or consensus requirement before an agency considers it for incorporation by reference. Opportunities to participate in

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[20] *See* Public Citizen, et al., Comments on NPRM, Incorporation by Reference, at 1 (Jan. 31, 2014) https://www.regulations.gov/document?D=OFR-2013-0001-0031 (reporting on behalf of multiple nonprofit, public interest organizations that "free access … will strengthen the capacity of organizations like ours to engage in rulemaking processes, analyze issues, and work for solutions to public policy challenges … and strengthen citizen participation in our democracy").

[21] The Administrative Procedure Act requires that "interested persons" be given an "opportunity to participate" in a rulemaking and to petition for amendment or a repeal of a rule. 5 U.S.C. § 553(c), (e). Although those issues are beyond the scope of this case, agency proposals to use, as well as final adoption of, incorporated-by-reference rules that are under private control and subject to access restrictions also may violate section 553's critical public participation requirements and other laws governing the administrative state.

these private processes are limited.[22] *E.g.*, Strauss, *Private Standards Organizations*, *supra*, at 541 (describing "pay to play" models of some organizations).

Without full access to federal regulatory text, the public cannot hold federal agencies accountable for the content of federal regulations, whether by discussing the regulations in their communities, petitioning the agency for regulatory revision, writing their members of Congress, or voting in the Presidential election. *Cf. Globe Newspaper Co. v. Superior Court for the Cty. of Norfolk*, 457 U.S. 596, 604 (1982) (First Amendment requires open court records to protect the free discussion of government affairs); *Leigh v. Salazar,* 677 F.3d 892, 900 (9th Cir. 2012) ("[A] court cannot rubber-stamp an access restriction simply because the government says it is necessary."). Legislative history accompanying FOIA draws the same link: "'The right to speak and the right to print, without the right to know, are pretty empty.'" *See* H.R. Rep. No. 89-1497 at 2 (1966) (quoting Dr. Harold Cross).

This Court has invalidated much smaller obstructions than those at issue here as inconsistent with similar core

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[22] Some organizations express a laudable commitment to openness and balance, *see* ASTM Amicus Br. at 2. However, only ASTM members may participate in standards development, and the lowest level of membership costs $75 per year. *See* ASTM, Technical Committees, http://www.astm.org/COMMIT/newcommit.html ("Any interested individual can participate on a Technical Committee [that develops and maintains ASTM standards] through ASTM membership."); ASTM, Benefits for ASTM Participating Members, http://www.astm.org/MEMBERSHIP/participatingmem.htm. Meanwhile, the membership of API is drawn entirely from the petroleum industry. *See* API, About API, https://www.api.org/about ("We speak for the oil and natural gas industry."). Draft standards often must be purchased from the organization in order to engage in any form of participation. *See* Mendelson, *supra*, at 780–81.

principles of democratic government, such as the right to vote. *Cf. Harper v. Va. State Bd. Of Elections*, 383 U.S. 663, 666–68 (1966) (invalidating state $1.50 poll tax as effective denial of right to vote); *Lubin v. Panish,* 415 U.S. 709, 717–18 (1974) (striking down $701 filing fee requirement for California election on equal protection grounds, given "our tradition … of hospitality toward all candidates without regard to their economic status"). For many rules, moreover, budget constraints may be connected with substantive interests. For example, consumers will likely have smaller budgets than manufacturers; families living near a pipeline will likely have smaller budgets than the pipeline operator. Requirements to pay to read the law can distinctively and systematically disadvantage those interests.

Finally, these obstructions are inconsistent with a centuries-long, constitutive American tradition of meaningful free access to our binding laws. That all citizens should be able to see the law is bedrock. In 1795, Congress provided for public printing of the laws. *See* H.R. Journal, 3d Cong., 2d Sess. 328–39 (1795) (describing Act of Mar. 3, 1795). In the early 1800s, Congress provided free public access to federal statutes through a network of state and territorial libraries, followed by the creation of the Federal Depository Library System. Act of Dec. 23, 1817, res. 2, 3 Stat. 473; Act of Feb. 5, 1859, ch. 22, § 10, 11 Stat. 379, 381. In the 1930s, Congress extended that access to federal regulations through the Federal Register Act. *See* 44 U.S.C. § 1501, *et seq*. Congress has further deepened the tradition by requiring the Government Printing Office to make available universal online access to statutes and regulations. *See* 44 U.S.C.

§ 4102(b).[23] Federal law also now requires online public access to a wide variety of government documents and materials, including nonbinding agency guidance materials. *See* FOIA, 5 U.S.C. § 552(a)(2) (reflecting an amendment made by the Electronic Freedom of Information of Act Amendments of 1996); E-Government Act of 2002, Pub. L. No. 107-347, §§ 206, 207(f), 116 Stat. 2899, 2915–16, 2918–19, *codified at* 44 U.S.C. § 3501 note). With the sole exception of legal obligations that are incorporated by reference, all federal statutes and regulations are now freely available online and in the approximately 1,200 governmental depository libraries. Mendelson, *Private Control*, *supra*, at 764-66.

II. Private involvement in the drafting of legal text does not immunize it from the government edicts doctrine.

A. The government edicts doctrine bars the assertion of copyright when a government adopts text as law.

In regulating, federal agencies must decide that governmental action is needed to address a problem and then, following appropriate administrative procedure, promulgate the text that composes the content of binding regulatory law. When an agency elects to incorporate private text into the regulatory law, that text then becomes the law. The agency's decision "converts [its] terms into the very stuff of legal obligation." Strauss, *Private Standards Organizations*, *supra*, at 513. The public's interest in knowing its obligations and rights un-

[23] 44 U.S.C. § 4102(b) (2006) (capping recoverable costs as "incremental costs of dissemination" and requiring no-charge online access in government depository libraries). The GPO does not charge a fee for online access.

der the law, as well as in fully participating in our Republic's governing processes, is no different because a private individual has had a hand in drafting the text. In short, the adoption of text as having legal force is sufficient to make that text a government edict and is thus sufficient for the government edicts doctrine to apply; a government official need not pen the standards.

Below, the Eleventh Circuit correctly reasoned that the government edicts doctrine "is dependent on whether the work is the law, or sufficiently like the law, so as to be deemed the product of the direct exercise of sovereign authority, and therefore attributable to the constructive authorship of the People." Pet. App. 25a; *see also Banks v. Manchester*, 128 U.S. 244, 253 (1888) (stating that the "work done by the judges constitutes exposition and interpretation of the law, which binding every citizen, is free for publication to all"). The Fifth Circuit has likewise recognized that, once incorporated into law, private code language "enter[s] the public domain and [is] not subject to the copyright holder's exclusive prerogatives." *Veeck v. Southern Bldg. Code Congress Int'l*, 293 F.3d 791, 793 (5th Cir. 2002) (en banc); *see also Bldg. Officials & Code Adm. v. Code Tech., Inc.*, 628 F.2d 730, 734 (1st Cir. 1980) (refusing to enforce preliminary injunction against publisher of state code that included text drawn from privately-drafted model building code). *But see Practice Mgmt. Info. Corp. v. Am. Med. Ass'n*, 121 F.3d 516, 518 (9th Cir. 1997), *amended*, 133 F.3d 1140 (9th Cir. 1998) (permitting AMA to retain copyright and control over sale of private standards despite adoption of them in Medicare and Medicaid regulations); *CCC Info. Servs. Inc. v. MacLean Hunter Mkt. Reports, Inc.*, 44 F.3d 61, 67 (2d Cir. 1994) (permitting copyright owner to control Red Book automotive value data despite state insurance statutes' reliance on them).

In an era where government officials increasingly outsource their work to the private sector, a ruling that the government edicts doctrine applies only to law initially penned by a government official would effectively allow private parties to control public access to the text of the law. Privately controlled legal access could result whenever a regulator or legislature assembled the text of binding law by incorporating language from a publication created by any source, whether a standards organization, a private corporation, or a law professor—all of whom are regular participants in rulemaking and lawmaking discussions. Adopting the argument of ASTM and other amici would thus enable private entities to wall off significant portions of law from the public, with devastating results for fair notice, due process, and core governance processes.

No statute requires such a result. The National Technology Transfer Act of 1995 encourages agencies to use "technical standards" developed by "voluntary consensus standards bodies." Pub. L. 104-113, § 12(d), *codified at* 15 U.S.C. § 272 note. But nothing in that Act indicates either Congress's endorsement of current incorporation by reference approaches or any aim to abandon the 185-year-old government edicts doctrine that the text of the law is not to be under private control. *Cf. Whitman v. American Trucking Ass'ns,* 531 U.S. 457, 468 (2001) (Congress does not "hide elephants in mouseholes").

B. Copyright-facilitated sale of private incorporated-by-reference standards is not the only recompense for private standards development.

Standards drafted by private organizations undoubtedly possess significant value in a wide range of settings. Permitting private organizations to maintain copyrights

and, thus, sole control over access to incorporated-by-reference text with the force of law, however, is not permitted by the government edicts doctrine. It also is not the only means of rewarding private organizations for this work.

First, it is not clear that the work of standards development organizations would be negatively impacted by providing open access to the legal text that a federal agency has incorporated by reference. *See* Peter Strauss, *Incorporating by Reference: Knowing the Law in the Electronic Age*, 39 Winter Admin. & Reg. L. News 36 (2014) (reporting statement of head of National Fire Protection Agency that NFPA had provided online access to standards "without appreciable damage to a financial base heavily dependent on sales of its standards"). These organizations generally do not object to and even advocate for agency utilization of their standards as the binding law. As one very recent example, API suggested incorporation of one of its standards in a recent Interior Department rulemaking governing oil well blowout preventer systems in the Outer Continental Shelf.[24] Incorporation by reference can be a point of pride. *See generally* Strauss, *Private Standards Organizations*, *supra*, at 509–10 (discussing considerations that may offset any reduced market for standards that have been incorporated into federal law). For example, ANSI advertises

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

that membership benefits include "Influenc[ing] U.S. and ANSI Positions and Policies." *See* ANSI, Membership, https://www.ansi.org/membership/benefits/benefits?menuid=2#Engage.

Meanwhile, federal agencies can and already do provide private drafting organizations with support. That support can include "direct financial support (e.g., grants, memberships, and contracts)," as well as administrative support and technical support, including the participation of agency personnel. OMB, Circular A-119, *supra* note 3 ("What forms of support may my agency provide to standards development?"). If a private organization did not anticipate sufficient reward from an agency's adoption of text it had prepared, it could negotiate with the regulating agency to pay it for the use of its text, effectively contracting for the work. *See* Strauss, *Private Standards Organizations*, *supra*, at 515. If a private organization were not interested in negotiating, the federal agency would face a choice between taking particular text, subject to any organizational right to compensation, or drafting its own distinctive language. *See id.* at 546; Emily Bremer, *On the Cost of Private Standards in Public Law,* 63 Kan. L. Rev. 279, 294 (2015) (suggesting that "affected copyright owners may have a viable takings claim").

In short, a public-private partnership in standards development could take any of several paths. The government edicts doctrine and the important public policy considerations it serves foreclose only one such path. The text of the binding law may not be left under the private control represented by the copyright regime.

CONCLUSION

For the foregoing reasons and the reasons set forth in the brief of respondent, the decision below should be affirmed.

Respectfully submitted,

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