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* AMERICAN SOCIETY FOR TESTING AND MATERIALS; NATIONAL FIRE PROTECTION ASSOCIATION, INC.; AMERICAN SOCIETY OF HEATING, REFRIGERATING, AND AIR CONDITIONING ENGINEERS, INC.; AMERICAN NATIONAL STANDARDS INSTITUTE; INTERNATIONAL ASSOCIATION OF PLUMBING & MECHANICAL OFFICIALS; INTERNATIONAL ELECTROTECHNICAL COMMISSION; INTERNATIONAL ORGANIZATION FOR STANDARDIZATION; NATIONAL ELECTRICAL MANUFACTURERS ASSOCIATION; NORTH AMERICAN ENERGY STANDARDS BOARD; AND UNDERWRITERS LABORATORIES INC. IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICI CURIAE*[1]

American Society for Testing and Materials d/b/a/ ASTM International ("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.

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

American Society of Heating, Refrigerating, and Air Conditioning Engineers ("ASHRAE") is a non-

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[1] Pursuant to Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amici*, their members, and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief.

profit organization dedicated to advancing the science of heating, ventilation, air conditioning, and refrigeration in order to help humanity and promote sustainability. ASHRAE has more than 57,000 members. Its members volunteer their time to advance the ASHRAE mission, including through development of consensus based standards that represent best practices in the relevant industries.

In 2013, ASTM, NFPA, and ASHRAE filed a copyright infringement action against Public.Resource.Org challenging Public.Resource.Org's unauthorized online posting of their copyrighted works. That litigation remains pending in the District Court for the District of Columbia and is discussed further in this brief.

The American National Standards Institute, Incorporated ("ANSI") is a not-for-profit membership organization that, for more than 100 years, has administered and coordinated the voluntary standardization system in the United States. ANSI facilitates the development of American National Standards ("ANSs") by accrediting the procedures of standards development organizations ("SDOs"). These SDOs work cooperatively to develop voluntary national consensus standards, some of which are incorporated by reference into government regulations, that are used in virtually every industry sector and in all aspects of daily life, from toys and food safety to electrical codes and the built environment. Accreditation by ANSI signifies that the procedures used by the standards developer in connection with the development of ANSs meet ANSI's essential requirements for openness, balance, consensus and due process. A number of the *amici* here are among the 243 ANSI accredited SDOs. ANSI

thus has an interest in ensuring that this Court's holding not cast doubt upon the critically important copyright protection for private standards that are subsequently incorporated by reference.

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

Founded in 1906, the International Electrotechnical Commission ("IEC") is a not-for-profit organization based in Geneva, Switzerland. The IEC is the leading global organization that publishes consensus-based International Standards and manages conformity assessment systems for electric and electronic products, systems and services, collectively known as electrotechnology. The IEC represents a global network of 173 countries. Close to 20,000 experts from industry, commerce, government, test and research labs, academia and consumer groups participate in IEC standardization work. IEC International Standards are developed through consensus and in accordance with the World Trade Organization principles. IEC International Standards also serve as a basis for national standardization.

The International Organization for Standardization ("ISO"), also based in Switzerland, is a non-governmental non-profit organization with members from 162 national standards bodies. Through its international consensus based processes, consistent with the World Trade Organization principles on international standards, ISO has developed and published over

21,000 voluntary International Standards on a number of subjects.

National Electrical Manufacturers Association ("NEMA") is the association of electrical equipment manufacturers, founded in 1926. NEMA sponsors the development of and publishes over 500 standards relating to electrical products and their use. NEMA's member companies manufacture a diverse set of products including power transmission and distribution equipment, lighting systems, factory automation and control systems, building controls and electrical systems components, and medical diagnostic imaging systems. To protect its copyright interest in standards publications that are referenced in federal regulations, NEMA appeared as *amicus curiae*, along with ANSI and other SDOs, in the litigation involving ASTM, NFPA, and ASHRAE in the Court of Appeals for the District of Columbia Circuit.

North American Energy Standards Board ("NAESB") was formed in 1994 as a not-for-profit standards development organization 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 through its collaborative, consensus-based process, a majority of which have been incorporated by reference in federal regulations by the Federal Energy Regulatory Commission.

Underwriters Laboratories Inc. ("UL") is an independent, not-for-profit standards developer dedicated to promoting safe living and working environments since its founding in 1894. UL's standards provide a critical foundation for the safety system in the United States and around the world, as well as promote innovation and environmental sustainability. With over 125 years of experience and the development of over 1,500 standards, UL advances safety science through careful research and investigation.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici are non-profit standards development organizations ("SDOs") and other groups that participate in developing private technical and specialized standards or that benefit from those 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. Consistent with their public-service mission and non-profit status, *amici* SDOs make these standards easily and widely accessible to the public. SDOs fund their work through the sale and licensing of their standards. The protection of the copyright laws makes it possible for them to do so.

Governments at every level have long-recognized the value of privately developed standards, which contribute critical technical expertise and reflect the most up-to-date methods. Accordingly, legislatures and administrative agencies across the country have, for over a century, adopted the prescriptive elements of privately published standards into their own statutes and regulations. In doing so, governments are able to capitalize on private investment and avoid the significant costs and redundancies of creating their own standards, as well as decrease regulatory burdens and increase efficiency and uniformity for industries that already rely on private standards and that otherwise would have to conform to a multitude of varying jurisdiction-specific requirements.

Litigation is currently pending in the District Court for the District of Columbia, between several *amici* SDOs and Public.Resource.Org, the Respondent here. In that case, Public.Resource.Org contends that

any time any jurisdiction makes reference to a privately developed standard in a statute or regulation, that standard immediately becomes "the law," and its copyright protection is forfeited. The question that litigation implicates—involving privately developed works that were undisputedly validly copyrighted at creation—is distinct from the question presented here. This case concerns works created by the government, either because the government directly authors the works or is deemed the author by the Copyright Act's work-made-for-hire provision. Whatever this Court decides in this case, *amici* respectfully request that the Court's holding not cast doubt upon longstanding and critically important copyright protection for private standards that are subsequently incorporated by reference. Those copyright questions should be resolved in the litigation directly addressing them, based on the complete record and arguments the involved parties develop.

ARGUMENT

I. COPYRIGHT PROTECTION IS ESSENTIAL TO PRIVATE STANDARDS DEVELOPMENT.

The Constitution expressly declares the Founders' goal of "promot[ing] the Progress of Science," and empowers Congress to further this goal "by securing for limited Times to Authors * * * the exclusive Right to their respective Writings." U.S. Const. art. 1, § 8, cl. 8. As this Court has long recognized:

> The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'

> Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.

Mazer v. *Stein*, 347 U.S. 201, 219 (1954).

For over a century, the incentive structure of the copyright laws has fostered the creation of standards by SDOs. The process of developing and revising standards requires an investment of considerable time and effort. Like other authors, SDOs recoup their investment through the copyrights they hold in those standards. Governments, in turn, rely on the standards that this system produces by incorporating them into their governing codes, allowing governments to obtain the benefit of the private-sector investment and draw on the considerable expertise that the standard-setting process brings to bear. Eliminating copyright protection would threaten this well-established system.

A. Private standards development is a resource-intensive process that depends on copyright protection.

1. "Standards" are technical works that describe product specifications, provide methods for manufacturing and testing, and offer recommended safety practices. Standards provide guidance that can range from the arcane, *e.g.*, ASTM E2311 (Standard Practice for QCM Measurement of Spacecraft Molecular Contamination in Space), to the broadly applicable, *e.g.*, NFPA 720 (Standard for the Installation of Carbon Monoxide (CO) Detection and Warning Equipment). And they cover fields as varied as psychological testing, *e.g.*, Standards for Educational and Psychological Testing; building design, *e.g.*, ASHRAE 90.2 (Energy-Efficient Design of Low-Rise Residential Buildings);

and toy safety, *e.g.*, ASTM F963 (Standard Consumer Safety Specification for Toy Safety).

In the United States, standards are principally developed by private SDOs, which have technical expertise in a particular area. Development processes vary, but most SDOs follow the requirements of the American National Standards Institute ("ANSI"), which accredits and coordinates standards development. To receive accreditation, standards must comply with the ANSI "Essential Requirements," which aim to allow "any person * * * with a direct and material interest" to participate in standards development by "expressing a position and its basis," "having that position considered," and "having the right to appeal." See ANSI Essential Requirements § 1.0 (Jan. 2019).[2] An SDO seeking approval for a standard must show that it did not impose any "undue financial barriers to participation," condition voting on membership status, or allow "any single interest" to exert disproportionate influence on the process. See *id.* § 1.1-.2. SDOs must establish a written procedure outlining their processes; solicit input from "diverse interest categories"; publicize standards activity where appropriate to provide the opportunity for full public participation; and allow for a "realistic," "readily available," and "impartial" appeals mechanism. See *id.* § 1.3, 1.5, 1.8-.9.

The National Fire Protection Association's ("NFPA") development process is illustrative. The process begins with the posting of a public notice online soliciting input from interested persons. After receiving public input, one of NFPA's over 250 Technical Committees—consisting of thousands of volunteers

[2] *Available at* www.ansi.org/essentialrequirements.

from the public, government, academia, and industry—holds a public meeting to consider and respond to all public comments. The Committee creates a draft standard that is posted to the NFPA website for another round of public review and comment. After the second comment period, the Technical Committee creates a revised draft that it submits to the NFPA Standards Council, together with any appeals. The Council decides appeals and, if appropriate, issues the standard as an official NFPA standard. All told, the process for NFPA to create a single private standard spans roughly two years, and NFPA undertakes this process for each of its over-300 standards every three to five years.

2. Creating and updating standards is expensive. While thousands of expert and lay volunteers provide input, the SDOs themselves must cover the cost of salary and benefits paid to their administrative and editorial staff who oversee the process and assist in drafting the actual text of standards. Some SDOs, like NFPA, also employ their own expert staff to give technical guidance to volunteer members of technical committees during the standards process. SDOs also pay for office and meeting space for multi-day meetings that may involve hundreds of participants. And they incur significant expenses in publishing various committee reports, collecting public input and comments, coordinating outreach and education efforts, and managing information technology. In 2018 alone, for instance, the American Society for Testing and Materials ("ASTM") spent more than $7.8 million on technical committee operations, and NFPA spent over $11 million. SDOs incur still more costs in publishing the standards.

SDOs are able to fund this considerable investment because they can generate revenue from selling, licensing, and otherwise distributing their standards to the professionals who use them in their work. Copyright protection is what makes this possible. NFPA, for example, generates about 65% of its revenue from the sale of copyrighted materials; approximately 75% of ASTM's revenues derive from the sale of copyrighted standards.

B. The public has long benefited from privately developed standards through incorporation by reference.

Federal state, and local governments have long benefited from privately developed standards. Rather than creating a new set of rules for a particular industry or practice out of whole cloth, legislatures and agencies can refer to an already existing standard—that is, incorporate it by reference—when drafting statutes and regulations. Governmental entities routinely acknowledge that SDOs retain their copyright protection for standards that have been incorporated by reference in this manner.

Incorporated standards play a critical role in promoting public health and safety. For example, states often incorporate NFPA 1971: Standard on Protective Ensembles for Structural Fire Fighting and Proximity Fire Fighting to provide guidelines for firefighter protective gear. See, *e.g.*, Cal. Code Regs. Tit. 8, § 3406; Wash. Admin. Code § 296-305-02002(1). The federal government has incorporated several ASTM standards that cover children's health and safety. See, *e.g.*, 16 C.F.R. § 1223.2 (ASTM F2088-13: Standard Consumer Safety Specification for Infant Swings); 16 C.F.R. § 1227.2 (ASTM F833-15: Standard Consumer Safety Performance Specification for Carriages and

Strollers); 16 C.F.R. § 1250.2 (ASTM F963-17: Standard Consumer Safety Specification for Toy Safety). And federal agencies have relied on NFPA 72: National Fire Alarm and Signaling Code, NFPA 99: Health Care Facilities Code, and NFPA 101: Life Safety Code to dictate safety requirements for government-operated facilities, as well as minimum safety requirements for facilities suitable for veterans and Medicare patients. See, *e.g.*, 38 C.F.R. § 17.74 (NFPA 72 and 101, medical foster homes for veterans); 42 C.F.R. § 483.90 (NFPA 72, 99, and 101, Medicare long term care facilities); 46 C.F.R. § 161.002-10(b) (NFPA 72, Coast Guard equipment); 38 C.F.R. § 51.200 (NFPA 99 and 101, state nursing home care facilities for veterans).

Incorporation by reference offers enormous public benefits. Governments are spared the cost and administrative burden of assembling the expertise and conducting the processes necessary to produce and update the standards—which in turn spares taxpayers from funding the endeavor. Emily S. Bremer, *On the Cost of Private Standards in Public Law*, 63 U. Kan. L. Rev. 279, 294 (2015). Moreover, because standards already often dictate industry norms, incorporation decreases "the burden of complying with agency regulation." OMB Circular A-119, at 5, 63 Fed. Reg. 8546, 8554 (Feb. 19, 1998), as revised 81 Fed. Reg. 4673 (Jan. 27, 2016).[3] The prospect of incorporation encourages private organizations to develop "standards that serve national needs" and promotes "efficiency, economic competition, and trade." *Ibid.*

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[3] *Available at* https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A119/revised_circular_a-119_as_of_1_22.pdf.

Additionally, the development and use of privately developed standards allows the government to be more nimble in addressing industry needs and emerging technologies. For example, as private and commercial use of drones began increasing exponentially, ASTM established a committee to address issues related to design, performance, quality acceptance tests, and safety monitoring for unmanned air vehicle systems. ASTM worked with industry, government officials, safety advocates, and others to develop numerous standards that increase drone and aircraft safety when drones operate in regulated airspace. The Federal Aviation Administration ("FAA") considers compliance with one of these standards—ASTM F3322-18—as one way for a drone manufacturer to demonstrate that it implemented risk mitigation techniques sufficient to merit waiving certain FAA regulations. See https://www.faa.gov/uas/resources/policy_library/section_352_responses/media/107_39_for_section_352.pdf.

The incorporation process also affords governments a great deal of flexibility. Typically, jurisdictions incorporate only portions of a standard relevant to the particular subject matter they seek to regulate. See, *e.g.*, Tenn. Comp. R. & Regs. 0800-03-04-.13(1)(a) (requiring documentation to include at a minimum that specified in section 4.1 of ASTM F 1159-03a).[4] Government can also choose to incorporate standards

[4] Even where a jurisdiction does purport to incorporate a standard in full, many standards include background material, explanatory guidance, and other elements that do not provide any sort of regulatory requirements. See, *e.g.*, NFPA 70 (2014) at 70-772 to 867 (informational annexes that "do[] not form a mandatory part of the requirements of this *Code*" but are "intended only to provide * * * informational guidance).

in different ways to serve different goals: as one permissible method for performing a task; to provide definitions; or to establish a standard for compliance. Compare, *e.g.*, 40 C.F.R. § 86.113-04 (listing various ASTM standards as reference procedures for testing fuel), with Tenn. Comp. R. & Regs. 1200-03-16-.27(2)(n) (defining "standard ferromanganese" as the alloy described in ASTM designation A99-66), and Nev. Admin. Code § 477.2835 (requiring aspects of firefighting training to comply with NFPA 1041 and 1403). Further differences arise because sometimes government entities make their own modifications to private standards. See, *e.g.*, Minn. R. 7511.6102 (incorporating NFPA 58 subject to a number of amendments and deletions).

Because the benefits of incorporation by reference are so numerous and so obvious, Congress has mandated that federal agencies rely on privately developed standards whenever possible. In the National Technology Transfer and Advancement Act of 1995, 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." Pub. L. No. 104-113 § 12(d), 110 Stat. 775, codified at 15 U.S.C. § 272.

Given all this, it is unsurprising that the practice of incorporating SDO-developed standards by reference is incredibly widespread. The Code of Federal Regulations contains over 23,000 sections incorporating standards by reference. Emily S. Bremer, *Technical Standards Meet Administrative Law: A Teaching Guide on Incorporation by Reference*, 71 Admin. L.

Rev. 315, 316-17 (2019). Every state employs the practice too: NFPA standards alone have been incorporated by reference, either directly or indirectly, in over 16,000 state and local statutes and regulations.

C. Copyright is vital to a sustainable private standards development system.

1. As noted, it is the availability of copyright protection that enables SDOs to recoup the bulk of the investment they make in the standards development process. Without it, their revenues would drop precipitously. See Plaintiffs' Memorandum of Law in Support of Their Motion for Summary Judgment and for a Permanent Injunction at 40, *Am. Soc'y for Testing & Materials* v. *Public.Resource.org, Inc.*, No. 13-CV-1215 (TSC) (D.D.C. Nov. 19, 2015), ECF No. 118-1 (quoting expert economist's conclusion that SDO "[p]laintiffs are likely to stand to lose a majority of their revenue and gross profits from the loss of copyright protection here").

Amici SDOs are non-profits. Like most businesses, they have to make difficult choices about where to invest their limited resources. Losing the revenue they have historically earned from the sale and licensing of works they create would force them to alter their business practices (to the extent they could survive at all) in ways that would gravely undermine their mission. First, SDOs could well be forced to reduce the rigor of their development process. That might mean less public participation, fewer technical experts, and less comprehensive discussion and review.

Second, SDOs might be forced to charge fees or to increase existing fees to those who wish to participate in the development process. Currently, SDOs receive and respond to input from a broad range of interested

parties, including individuals and entities who are unlikely to pay hefty fees to participate in the development process. For example, ASTM created ASTM D 4236: Standard Practice for Labeling Art Materials for Chronic Health Hazards in response to advocacy efforts by teachers who were concerned that their young students were eating crayons that could contain toxic or hazardous materials. If SDOs had to cover their costs through fees, it would likely reduce participation from public interest groups, academics, and interested members of the public. That decreased participation would likely lead to a commensurate increase in the power of regulated industries to influence standard setting. See Bremer, 71 Admin. L. Rev. at 329.

Third, the absence of copyright protection would threaten the breadth of standard-setting work that SDOs now engage in. Like many creative industries that rely on a few copyright "hits" to generate the revenue needed to support the full range of their expressive works, SDOs often rely on a few flagship standards to generate most of their revenues, and the sales of these standards effectively subsidize the production of standards that serve narrower markets and, accordingly, cannot generate enough revenue to cover the cost of their creation. See *id.* at 329-30. For example, ASTM generates 80% of its standards revenue from only about 20% of its standards. For NFPA, only roughly a dozen of its 300 standards generate any meaningful revenue. But the fact that a standard is not profitable does not mean that it is unimportant. For example, NFPA 1971: Standard on Protective Ensembles for Structural Fire Fighting and Proximity Fire Fighting generates very little revenue but provides lifesaving specifications for firefighter protective gear.

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

Further, SDOs would be unlikely to engage in the kind of innovation needed to develop new standards that respond to emerging issues. For example, responding to the string of mass shootings in this country, NFPA set out to develop a standard for active shooter incidents in 2017. To create that standard, NFPA solicited input from first responders, emergency personnel, medical professionals, and hospital staff, and put together a Technical Committee of about 80 members. The result was the 2018 release of NFPA 3000: Standard for an Active Shooter/Hostile Event Response (ASHER) Program—the first and only standard in the world addressing active shooter responses. From the outset, NFPA recognized that it would be unlikely to ever recoup its investment—the standard will primarily be used to develop protocols and train staff, rather than as a day-to-day guidebook. NFPA 1600: Standard on Continuity, Emergency, and Crisis Management is similar: NFPA revised the standard in the wake of the September 11 attacks to guide communities in responding to future crises. Far from planning to profit from the standard, NFPA made a decision to give away the standard following the attacks on 9/11; NFPA estimates it has given approximately 120,000 copies of NFPA 1600 to individu-

als and entities who might be called upon to participate in emergency response. NFPA was able to complete these critically important projects because of sales and licensing of its more profitable standards. Without those revenues—and the copyright that allows for them—these crisis-management standards might never have been created.

2. If private standard setting were crippled by the elimination of copyright protection for standards that governments incorporate by reference, government institutions might attempt to fill the void themselves. But it is highly unlikely that they would possess (or be able to generate) the capacity to invest the time and resources that SDOs now invest.

The absence of meaningful nationwide standard development by SDOs would also threaten dis-uniformity as each individual jurisdiction made its own judgments about particular standards. Moreover, rather than a single standard, multiple jurisdictions would likely set out to develop their own rules for a particular field. This would be particularly likely for standards that have relevance only at the local level—for example, ASTM's rollercoaster standards are widely incorporated by states and localities, but have never been the subject of federal regulation. The process would be doubly inefficient, duplicating efforts on the front end, and requiring industries to meet multiple jurisdictions' requirements on the back end. And, while national SDOs solicit broad input from leading experts and participants with a wide variety of interests, an individual jurisdiction would be unlikely to attract the same intensity or diversity of views, worsening the resulting regulation it crafted.

3. In short, copyright protection for privately developed standards is working exactly as this Court and

the Constitution intended—as an efficient economic incentive "To promote the Progress of Science * * * by securing for limited Times to Authors * * * the exclusive Right to their * * * Writings." U.S. Const. art. 1, § 8, cl. 8; see also *Mazer*, 347 U.S. at 219. Removing this incentive would distort the current system of standards development through some combination of a less robust process, more capture by industry, and fewer and less frequently updated standards. Government entities would be forced to choose between continuing to rely on the resulting inferior standards, or attempting to craft and update their own rules through a process that would impose significant public expense and would introduce substantial inefficiencies for industry that would have to conform to multiple states' and localities' requirements.

D. Whether copyright subsists in standards incorporated into law is being addressed in separate litigation.

Public.Resource.Org (Respondent here) has made it its mission to post thousands of privately developed and copyrighted standards online. Its position is that any standard incorporated by reference has become "the law" and automatically loses copyright protection. In 2013, several *amici* SDOs filed an infringement lawsuit against Public.Resource.Org in the District Court for the District of Columbia, challenging its verbatim copying and distribution of their copyrighted standards. See Docket No. 1:13-CV-01215. After over a year of discovery, the district court granted summary judgment to plaintiff SDOs. *Am. Soc'y for Testing & Materials* v. *Public.Resource.org, Inc.*, No. 13-CV-1215 (TSC), 2017 WL 473822 (D.D.C. Feb. 2, 2017) ("*ASTM*"). The district court concluded that nothing in the Copyright Act divested copyrighted works of

their copyright upon incorporation by reference, nor did this Court's precedent forbidding copyright in government authored works bar copyright in privately developed standards. See *id.* at *9-14.

On appeal, the Court of Appeals for the District of Columbia Circuit remanded for additional factual development regarding fair use. *Am. Soc'y for Testing & Materials* v. *Public.Resource.Org, Inc.*, 896 F.3d 437 (D.C. Cir. 2018). The court of appeals recognized that, if it concluded that incorporated standards could never retain copyright, it would mean opening the doors not just to entities like Public.Resource.Org that seek to "serve[] a public end," but also to any competitor who "merely sell[s] duplicates at a lower cost." *Id.* at 447. The court of appeals saw fair use as a potential means of resolving the case in a narrower way that would avoid allowing anyone to profit off of plaintiffs' millions of dollars of investment in thousands of copyrighted standards.

The case is now on remand to the district court for additional fact development regarding fair use. The further factual development and briefing in that court will provide a fuller basis for evaluating the extent to which a fair use defense accommodates the concerns raised by Public.Resource.Org, and the extent to which the plaintiffs' provision of access to all of its standards addresses those concerns.

II. THE GOVERNMENT EDICTS DOCTRINE DOES NOT APPLY TO STANDARDS THAT ARE PRIVATELY DEVELOPED AND PROPERLY COPYRIGHTED AT CREATION.

For the reasons discussed above, the question of whether and to what extent incorporation by reference affects copyright in privately developed standards is

one of genuine importance. *Amici* believe the answer to that question is straightforward: nothing in the Copyright Act or this Court's precedents supports the proposition that privately developed standards incorporated into law lose their copyright.

But the Court need not, and *amici* respectfully submit should not, answer that question here, because the case does not present it. The question in this case is whether a work prepared with government direction and supervision is eligible for copyright protection. The separate litigation that certain *amici* are pursuing against Public.Resource.Org presents a different question: whether incorporation of a privately developed work that is unquestionably copyrighted at the time of fixation terminates the copyright. Accordingly, whatever the Court decides on the question presented, this Court should be careful not to cast doubt on the legally distinct—and exceedingly consequential—question raised by incorporation by reference.

A. The "government edicts" exception has no application to properly copyrighted, private standards that are incorporated by reference.

In a trio of 1800s decisions, this Court laid out what has come to be known as the "government edicts" exception to copyright. First, in *Wheaton* v. *Peters*, 33 U.S. 591 (1834), the Court held that a reporter could not "have any copyright in the written opinions delivered by this court." *Id.* at 668. Half a century later, the Court extended that rule to state judicial opinions in *Banks* v. *Manchester*, 128 U.S. 244 (1888). Then, in the same year as *Banks*, the Court recognized a significant limitation on these cases, holding that while judicial opinions could not be copyrighted, annotations

to such opinions were amenable to copyright. See *Callaghan* v. *Myers*, 128 U.S. 617 (1888).

These cases—which for shorthand we refer to as the *Banks* line of cases—do not call into doubt the continued copyright protection in privately authored standards incorporated into law as the inquiry in each was whether there was direct government authorship at the time of creation of the work.

1. To begin, the *Banks* cases speak to an entirely different scenario—one where the government was responsible for the work's creation. As the Eleventh Circuit framed the issue below, "just as the uncopyrightable works in *Banks* were created by the Ohio Supreme Court, the annotations [at issue] are, in a powerful sense, a work created by the Georgia state legislature." *Code Revision Comm'n for Gen. Assembly of Georgia* v. *Public.Resource.Org, Inc.*, 906 F.3d 1229, 1243 (11th Cir. 2018); *id.* at 1245-46 ("That Georgia's legislators are in a very real way the creators of the annotations is a powerful indication that the annotations are subject to the *Banks* rule."). Privately developed standards are not authored by any government—they are developed by private SDOs. SDOs make independent decisions about when and whether to develop a new standard or update a previous one. Sometimes government officials will request that an SDO develop a standard to address a particular problem. For example, following the 2016 Pulse nightclub shooting, the Orlando fire chief approached NFPA to see if the organization could do anything to help communities prepare for similar events in the future. That request led NFPA to develop its active shooter standard, NFPA 3000. But NFPA made that choice based on its independent assessment that there was a pressing

need for guidance in this area and that it had the expertise to address that need. Moreover, NFPA solicits and considers requests for new standards not just from government officials like the Orlando fire chief, but from any member of the public.[5]

Further, the content of standards is based on technical and policy judgments—not government dictate. Contra, *e.g.*, 906 F.3d at 1244 (finding "great significance" in state commission's "intimate involvement in the creation of the annotations"). Individuals affiliated with government institutions may provide feedback during the standards development process but—true to SDOs' commitment to seek to ensure a balanced process—their voices are given the same weight as the voice of any member of the public.

When an SDO produces a standard, the work represents one expression of what its authors consider to be the state-of-the-art practices in the industry. But that is just one view. The standard is not the only way to express the matter described—for example, both NFPA 5000: Building Construction and Safety Code and ICC International Residential Code provide rules and guidance for residential building. Nor does the developed standard represent a legally authoritative view. Contra, *e.g.*, 906 F.3d at 1248 (focusing on "authoritative" nature of annotations).[6]

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[5] See NFPA, *How to Submit a request for a NFPA project*, https://www.nfpa.org/Codes-and-Standards/Standards-development-process/How-the-process-works/New-projects-and-draft-documents#HowToSubmit (providing online form for requesting that NFPA develop a standard).

[6] For this reason, the merger doctrine is inapposite. Contra Georgia Br. 54. That doctrine looks to whether, at the time a work is created, there is essentially one (or an extremely limited number

Unlike a government edict, at the time of a standard's creation, it is just a privately developed, expressive work—and it unquestionably can be copyrighted. See *Fourth Estate Pub. Benefit Corp.* v. *Wall-Street.com, LLC*, 139 S. Ct. 881, 887 (2019) ("An author gains 'exclusive rights' in her work immediately upon the work's creation" (quoting 17 U.S.C. § 106)). It is only once a jurisdiction subsequently incorporates a privately authored standard that government makes any decisions vis-à-vis the already created and copyrighted expressive work. At that point, though, the question is not whether the standard *can be* copyrighted, but instead whether the standard *loses* its copyright. Indeed, even the Respondent—which is embroiled in litigation related to incorporation by reference and which would, accordingly, have strong reasons to lump that practice into this case—recognizes that "[t]he copyrightability of" privately developed works incorporated by reference "is distinct from the central issue in this case." Br. in Opp. 16. Just as nobody suggests that song lyrics quoted in a judicial opinion or a book designated as required reading in a school district suddenly become "government edicts," standards that have been incorporated do not lose their private authorship once the government decides to reference them.

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of ways) to express the idea. The merger doctrine does not divest copyright protection from an author whose choices were not so limited at the time she created the work. See *Oracle Am., Inc.* v. *Google Inc.*, 750 F.3d 1339, 1361 (Fed. Cir. 2014). The fact that a work, post-creation, becomes a popular or even standard way of expressing an idea does not bring the merger doctrine into play; a contrary approach would undermine copyright laws' incentives for creating new expressive works.

2. Beyond being directed to a distinct situation, the government edicts cases raise public policy concerns not implicated by incorporation by reference. First, the *Banks* cases rest on an acknowledgment that where the public directly funds the work's creation, the public—and not a private entity—should have full ownership and control of that work. See *Banks*, 128 U.S. at 253 (explaining that copyright could not "be secured in the products of the labor done by judicial officers in the discharge of their judicial duties"); *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) ("the public owns the opinions because it pays the judges' salaries"). Privately developed standards are the product of private, not public, investment. Indeed, they are precisely the sort of works where copyright protection is *most* appropriate because, as explained, without the economic incentive copyright provides, they would cease to exist in their current form.

Second, the *Banks* cases rest on a "due process requirement of free access to the law." *Practice Mgmt.*, 121 F.3d at 519; see *Banks*, 128 U.S. at 253 ("The whole work done by the judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all"). Ensuring widespread and ready access to standards is core to *amici* SDOs' organizational missions and nonprofit status. For this reason, like other copyright creators who control access to their creations, many *amici* SDOs choose to make their standards accessible in a range of ways.[7] Most notably, many of the *amici* SDOs

[7] Indeed, at least at the federal level, incorporation by reference actually *requires* that the incorporated standards be reasonably accessible. See, *e.g.*, 1 C.F.R. § 51.7(a)(3) (a standard is "eligible

make any standard they are aware has been incorporated into law available on their websites for reading free of charge. And some SDOs go even further: NFPA, for example, makes all of its standards available online.[8] The SDOs that provide this access do not make their standards available for wholesale download, as Public.Resource.Org does. In this way, members of the public interested in reading what an incorporated standard says may readily do so. The read-only restriction ensures that people may not download the entirety of the published work—including many elements that are explanatory rather than prescriptive, see *supra* note 4—which would substitute for the SDO's work.[9]

In the pending litigation involving *amici* SDOs, Public.Resource.Org turned up and the district court found "no evidence" that *amici's* standards were "unavailable to the public." *ASTM*, 2017 WL 473822, at *11; see also *id.* (cataloguing "undisputed record evi-

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for incorporation by reference" only if it "[i]s reasonably available to and usable by the class of persons affected").

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

[9] Far from remedying any due process issue, any holding that incorporation by reference renders standards "government edicts" that no longer have copyright protection could *create* constitutional issues. See *CCC Info. Servs., Inc.* v. *Maclean Hunter Mkt. Reports, Inc.*, 44 F.3d 61, 74 (2d Cir. 1994) ("[A] rule that the adoption of such a reference by a state legislature or administrative body deprived the copyright owner of its property would raise very substantial problems under the Takings Clause of the Constitution.").

dence" showing ways in which standards were accessible). As there is no "evidence that anyone wishing to use [*amici*'s standards] ha[d] any difficulty obtaining access to [them]," due-process concerns have no relevance with respect to such standards. *Practice Mgmt.*, 121 F.3d at 519.

B. No statute divests standards of their copyright when they are subsequently incorporated into law.

Congress's statutory scheme "govern[s] the existence and scope of copyright protection." *Reed Elsevier, Inc.* v. *Muchnick*, 559 U.S. 154, 157 (2010) (citation and alteration omitted). Whether incorporated standards lose copyright is, thus, ultimately a question of statutory interpretation. Nothing in the Copyright Act—or any other statute—suggests that Congress thought incorporation should divest standards of copyright.

Congress enacted the Copyright Act of 1976 against a backdrop of incorporation by reference: ten years prior to its passage, Congress had authorized federal agencies to incorporate works into federal regulations. See Act of June 5, 1967, Pub. L. No. 90-23, § 552, 81 Stat. 54, 54 (codified at 5 U.S.C. § 552). The 1976 Act specifies various ways that copyright could be divested. See*, e.g.*, 17 U.S.C. §§ 204, 302; contra H.R. Rep. 94-1476 at 60 ("[P]ublication or other use by the Government of a private work would not affect its copyright protection in any way."). If Congress had thought incorporation by reference should affect copyright status, it would presumably have listed such incorporation as a basis for losing copyright. That it did not suggests that Congress did not view the already-familiar practice as creating any issue for continuing copyright in incorporated standards.

Indeed, far from treating incorporation as the end of copyright, Congress has endorsed incorporation by reference. In 1991, Congress enacted Public Law 102-245, requesting that the National Research Council study standards development. 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." Standards, Conformity Assessment, and Trade: Into the 21st Century 3 (National Academy Press 1995).[10] The study further noted standards developers "offset expenses and generate income through sales of standards documents, *to which they hold the copyright*." *Id.* at 32 (emphasis added). And the study recommended that Congress enact legislation that would encourage federal agencies to use privately developed standards in their regulations.

Congress followed that guidance in the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), which requires federal agencies to use privately developed standards whenever possible. Pub. L. No. 104-113, § 12, 110 Stat. 775, 782-83 (1996). Arguing that incorporation by reference strips works of their copyright protection thus requires pressing the claim that Congress directed all federal agencies to engage in a practice that would result in the loss of copyright in thousands of private works—a suggestion

[10] *Available at* http://www.nap.edu/read/4921/chapter/1.

that has never been made by Congress despite the long history of incorporation of privately developed standards.[11] Even more untenably, it requires arguing that Congress encouraged agencies to engage in an entirely self-defeating practice—one that would strip standards developers of their ability to "offset expenses and generate income" through sales of copyrighted standards.

If Congress had "intended to revoke the copyrights of * * * standards when it passed the NTTAA, or any time before or since, it surely would have done so expressly." *ASTM*, 2017 WL 473822, at *11 (citing *Whitman* v. *Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) (Congress "does not * * * hide elephants in mouseholes.")). That it has, instead, seen fit to promote incorporation by reference suggests that it does not see the practice as creating any threat to copyright protection.

C. The holding in this case need not reach the copyright issues in cases involving privately developed standards.

Over the past four decades, five courts of appeals have had the opportunity to conclude that incorporation by reference strips privately developed standards of their copyright. None have so held. Instead, every court of appeals has either conclusively decided that

[11] The legislative history of the Copyright Act of 1976 runs directly contrary to this view. See H.R. Rep. 94-1476 at 60 ("The committee here observes: (1) there is nothing in section 105 [of the Copyright Act of 1976] that would relieve the Government of its obligation to secure permission in order to publish a copyrighted work; and (2) publication or other use by the Government of a private work would not affect its copyright protection in any way.").

incorporated standards retain their copyright[12] or has declined to reach the issue—often out of recognition of the important work that SDOs perform and out of a concern for upending the longstanding system of privately developed standards.[13]

This Court will have the opportunity to address the copyright implications of incorporation by reference, should it wish to do so, if the current litigation against Public.Resource.Org in the District Court for the District of Columbia reaches this Court. At that point, the Court will be able to decide this question not only when cleanly presented, but on a fully developed record. *Amici* respectfully submit that the holding in this case should avoid any suggestion that privately devel-

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[12] See *Practice Mgmt.*, 121 F.3d at 521 (copyright holder did not lose copyright "when use of [its work] was required by government regulations"); *CCC Info. Servs., Inc.*, 44 F.3d at 74 (rejecting argument "that a state's reference to a copyrighted work as a legal standard for valuation results in loss of the copyright").

[13] See *Am. Soc'y for Testing & Materials*, 896 F.3d at 447 (declining to decide copyrightability, in part, to "limit[] the economic consequences that might result from the SDOs losing copyright" and to "avoid[] creating a number of *sui generis* caveats to copyright law"); *Veeck* v. *S. Bldg. Code Cong. Int'l, Inc.*, 293 F.3d 791, 793 (5th Cir. 2002) (holding that "as *law*" model codes that had been incorporated into law "enter the public domain and are not subject to the copyright holder's exclusive prerogatives," while "[a]s model codes" they "retain their protected status"); *Bldg. Officials & Code Adm.* v. *Code Tech., Inc.*, 628 F.2d 730, 736 (1st Cir. 1980) (declining to resolve copyrightability issue and noting that "the rule denying copyright protection to judicial opinions and statutes grew out of a much different set of circumstances than do * * * technical regulatory codes" developed by groups that "serve an important public function").

oped standards that are later incorporated by reference are analogous to works developed at the government's direction and under its supervision.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court not issue any decision that would cast doubt on copyright protection in privately developed standards that have been incorporated by reference.

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