

No. 18-1150

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In The  
**Supreme Court of the United States**

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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 FOR INTERNATIONAL CODE COUNCIL,  
INC. AND THE AMERICAN GAS ASSOCIATION  
AS AMICI CURIAE SUPPORTING PETITIONERS**

—◆—  
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## INTEREST OF AMICI CURIAE

International Code Council, Inc. (“ICC”) is a non-profit organization dedicated to the development of model codes and standards.<sup>1</sup> Most U.S. communities and many global jurisdictions depend on ICC’s International Codes, also known as the I-Codes. The I-Codes are a set of coordinated building safety and fire prevention codes. They benefit public safety, providing minimum safeguards for people at home, at school, and in the workplace, and they support industry’s need for a single, standardized set of codes without regional variations.

Fifty states and the District of Columbia have adopted the I-Codes at the state or jurisdictional level. Federal agencies use the I-Codes as well, including the Architect of the Capitol, General Services Administration, National Park Service, Department of State, U.S. Forest Service, and the Veterans Administration. The Department of Defense refers to the *International Building Code* for constructing military facilities, including those that house U.S. troops around the world and at home. Amtrak uses the *International Green Construction Code* for new and extensively renovated sites and structures.

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<sup>1</sup> No counsel for a party authored this brief in whole or in part; no such counsel nor any party made a monetary contribution intended to fund the preparation or submission of the brief; and no person or entity, other than the amici curiae, their members, or their counsel made such a monetary contribution. See Sup. Ct. R. 37.6. All parties have consented in writing to the filing of this brief.

ICC publishes a new version of each I-Code every three years. These revisions may reflect changes in technology or best practices, or may expand and improve the revised I-Code to make it more effective. Producing the I-Codes costs millions of dollars each year: among other things, ICC must pay for the salaries and benefits of their administrative and expert staffs; office space and meeting facilities; information technology that allows for online participation in the development process; outreach and education efforts; and the costs of publication. To recover a portion of its costs, ICC relies heavily on revenues it earns from the sale or licensing of the I-Codes, which amounts account for a significant portion of ICC's total revenue each year.

Although ICC permits internet users to view I-Codes in read-only form on ICC's website for free, ICC depends on copyrights to sustain its ability to sell and license the I-Codes. Despite ICC's registered copyrights in the I-Codes, however, several entities—including respondent in this case—have reproduced complete versions of copyrighted I-Codes on their website. Currently, ICC is pursuing a copyright infringement action against UpCodes, Inc. *Int'l Code Council, Inc. v. UpCodes, Inc.*, No. 1:17-cv-6261 (S.D.N.Y.). UpCodes is a for-profit startup whose business model centers on allowing website users to copy, print, save, distribute, and manipulate I-Codes without restriction. In addition to selling premium access (which offers additional features like bookmarking, advanced searching, and project collaboration capabilities), UpCodes has given the world free access to unauthorized



copies of ICC's works, arguing that the works' incorporation into the laws of various jurisdictions destroys their federal copyright.

ICC accordingly has a profound interest in the outcome of this case. While the question on which certiorari was granted is narrow—whether the government edicts doctrine makes state-authored works that lack the force of law uncopyrightable—respondent's brief in opposition suggests that respondent may press the Court for a much broader ruling that extends beyond the state-authored works in this case. Were the Court to issue a broad ruling in respondent's favor by extending the holding of *Banks v. Manchester*, 128 U.S. 244 (1888), to *privately* authored works, the result would be devastating to ICC and many other standards development organizations. And it would compromise their nonprofit mission of promoting safety and protecting the public, upon which many governmental entities depend.

The American Gas Association ("AGA"), founded in 1918, represents more than 200 local energy companies that deliver clean natural gas throughout the United States. There are more than 74 million residential, commercial, and industrial natural gas customers in the U.S., of which 95 percent—more than 71 million customers—receive their gas from AGA members. AGA is an advocate for natural gas utility companies and their customers and provides a broad range of programs and services for member natural gas pipelines, marketers, gatherers, international natural gas companies, and industry associates. Today,

natural gas meets more than one-fourth of the United States' energy needs.

AGA's activities include research and analysis on end use gas technical issues for the mutual benefit of the gas utility industry and its customers. Research supporting natural gas end use codes and standards has played a vital role in maintaining the market viability of natural gas in residential and commercial applications and expanding end uses of natural gas, and contributes to the safe and economical use of natural gas. Based on its experience with natural gas end use codes and standards, AGA is concerned about judicial interpretations of copyright law that could impair the mission of standards development organizations.



### **SUMMARY OF ARGUMENT**

Despite the breadth of respondent's and the Eleventh Circuit's assertions about copyright deprivation, this case presents an uncommon and unrepresentative set of facts. Here, at least according to the Eleventh Circuit, the works are authored by a State and the copyrights are claimed by a State. Most other related cases involve a private author, which is one copyright holder. That more typical scenario can raise two constitutional issues that do not arise here: the Supremacy Clause bars state and local governments from defeating rights created by federal law, and the Takings Clause bars governments from expropriating private property without just compensation.

If all law and sufficiently law-like material is in the public domain—as respondent and the decision below maintain—incorporating privately authored works into law infringes both constitutional provisions. But the lower courts have barely begun to address these issues, and the lower courts in this case did not address them at all. Consistent with its usual practice, this Court should not express or imply a position on either issue. The Court thus should reject the sweeping claims made by respondent and the Eleventh Circuit, which have implications far beyond the governmental author and copyright holder in this case.

The Court should also reverse the judgment below. The Eleventh Circuit drew from this Court’s nineteenth century case law—which construed a completely different copyright statute than the one that governs today—a broad nonstatutory doctrine prohibiting copyrights for all government edicts. But this Court’s cases do not stand for such a broad doctrine. On the contrary, they stress the importance of hewing to the precise terms of Congress’s statutes. Although the Court has traditionally excluded judicial work product from copyright based on a self-imposed policy representing the judiciary’s consensus, it has never denied copyright protection for any other category of government edicts.

Meanwhile, Congress has given every indication that the so-called “government edicts” doctrine is narrowly limited. For example, the copyright statute excludes only works created by federal officials in their official capacities, 17 U.S.C. §§ 101, 105, and it

expressly rejects the notion that individual copyright owners' property rights may be eliminated through government action, 17 U.S.C. § 201(e). Courts may not expand on these provisions based on their own policy preferences by holding that other categories of law-like works are uncopyrightable or that governmental incorporation of privately authored works takes away their copyrights. Along with the Executive Branch, Congress has long supported incorporating privately authored works into law. If any tradeoff needs to be made between that pro-incorporation policy and copyright law, Congress is the appropriate branch of government to make it.

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## ARGUMENT

### **I. The Court Should Limit Its Focus To State-Authoring Works To Avoid Complex And Weighty Constitutional Questions.**

The unusual facts of this case obscure the constitutional difficulties that arise from respondent's and the Eleventh Circuit's sweeping assertions about the uncopyrightability of the law. According to the court below, the annotations here were developed and copyrighted by the State of Georgia. In the Eleventh Circuit's words, they were "created by Georgia's legislators in the exercise of their legislative authority," and "Georgia holds the copyright in the annotations in its own name." Pet. App. 4a, 6a.

This fact pattern is atypical. As the discussion in the certiorari-stage briefing shows, the legal issues in this area of the law arise most often in disputes about the copyrights on *privately* authored works that are *later* incorporated into law by government actors. See, e.g., *Am. Soc’y for Testing & Materials (ASTM) v. Public.Resource.Org, Inc.*, 896 F.3d 437 (D.C. Cir. 2018); *Veeck v. S. Bldg. Code Congress Int’l, Inc.*, 293 F.3d 791 (5th Cir. 2002) (en banc); *Practice Mgmt. Info. Corp. v. Am. Med. Ass’n*, 121 F.3d 516 (9th Cir. 1997); *CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Reports, Inc.*, 44 F.3d 61 (2d Cir. 1994); *Bldg. Officials & Code Adm’rs (BOCA) v. Code Tech., Inc.*, 628 F.2d 730 (1st Cir. 1980).

In its ongoing litigation against private standards developers, respondent maintains that such privately authored works lose their previous copyright protection when incorporated into law. In respondent’s view, “incorporation by reference makes these works a part of the ‘law,’ and the law can never be copyrighted.” *ASTM*, 896 F.3d at 446. Similarly, in this Court, respondent broadly insists that “the law belongs to the People,” without qualification based on whether “the law” was authored by the People’s representatives or by private citizens. Br. in Opp. 1. Even petitioners accept that “the law itself is not copyrightable.” Pet. Br. 2. Hence the Eleventh Circuit broadly asserted below that it was “clear and not contested” that “the law itself” is “intrinsically public domain material and, therefore, uncopyrightable,” even when privately authored. Pet. App. 3a; see also *id.* at 19a, 21a-22a.

But when the law incorporates material from privately authored works, that claim is neither clear nor uncontested. There is no question that privately authored standards or model codes receive copyright protection upon their creation—as long as they meet the usual requirements. See, *e.g.*, *Veeck*, 293 F.3d at 800 (acknowledging that “model building codes \* \* \* qua model building codes[] are facially copyright-protected). Because valid copyrights undoubtedly exist before such works’ incorporation into law, any claim that the works enter into the public domain when they become part of the law necessarily hinges on the notion that incorporation into law “somehow invalidate[s] [the private author’s] copyright.” *Id.* at 806 (Higinbotham, J., dissenting). If that were true, then any state or local government would have the power at any time to invalidate private actors’ previously valid copyrights by incorporating their copyrighted works into its laws.

The suggestion that state or local action can invalidate vested federal copyrights raises at least two serious constitutional concerns. As discussed next, such action would violate both the Supremacy Clause and the Takings Clause (as incorporated through the Fourteenth Amendment).

In this case, of course, these constitutional issues are not presented. Here, the entity responsible for the annotations’ legal effect (or lack thereof) is the same entity that developed and copyrighted them. Georgia has neither impaired a private actor’s vested federal rights nor taken a private actor’s property. Given the

particular facts of this case and the dangers in issuing an overbroad ruling, the Court should reject the sweeping assertions made by respondent, the court below, and occasionally even petitioners. And it should steer well clear of any ruling that would carry negative implications for the rights of private copyright owners. See, e.g., *Clinton v. Jones*, 520 U.S. 681, 690 (1997) (“[W]e have often stressed the importance of avoiding the premature adjudication of constitutional questions.”); *Spector Motor Serv. v. McLaughlin*, 323 U.S. 101, 105 (1944) (“If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality \* \* \* unless such adjudication is unavoidable.”).

#### **A. Respondent’s Views Contravene The Supremacy Clause.**

The Supremacy Clause makes federal law “the supreme Law of the Land” notwithstanding “any Thing in the Constitution or Laws of any State to the Contrary.” U.S. Const. Art. VI, Cl. 2. Federal supremacy means, among other things, that state and local governments may not curtail federal rights.<sup>2</sup>

That includes federal intellectual property rights. Copyright and patent laws derive from Congress’s

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<sup>2</sup> Under the Supremacy Clause, federal law overrides not just inconsistent state laws but inconsistent municipal laws as well. See, e.g., *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 633 (1973).

express power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. Const. Art. I, § 8, Cl. 8. Like any other valid exercise of Congress’s legislative authority, the copyright and patent statutes “are the supreme law of the land.” *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 229 (1964). So “[w]hen state law touches upon the area of these federal statutes, it is ‘familiar doctrine’ that the federal policy ‘may not be set at naught, or its benefits denied’ by the state law.” *Ibid.* (quoting *Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 173, 176 (1942)).

This Court has repeatedly held that States may not interfere with the rights and privileges established through Congress’s intellectual property legislation. See, e.g., *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 709-711 (1984) (holding that the Supremacy Clause preempts a state law interfering with a federally created right to obtain compulsory licenses for certain copyrighted works); *Sears*, 376 U.S. at 231-232 (holding that the Supremacy Clause preempts state-law impairment of the federal right to copy unpatentable articles); *Sperry v. Florida ex rel. Fla. Bar*, 373 U.S. 379, 404 (1963) (holding that the Supremacy Clause preempts a state law interfering with patent prosecutor’s federal right to practice before the United States Patent and Trademark Office). If even relatively minor elements of these legislative schemes are shielded from state interference, States *a fortiori* may not



destroy a previously valid federal copyright in its entirety.<sup>3</sup>

The Supremacy Clause implications of respondent's broad theories have not been litigated extensively in the lower courts. Only one court of appeals has addressed such arguments, and even then only in cursory fashion. In *BOCA*, the First Circuit hastily concluded that there was no preemption problem with a State's abridgment of a copyright in a privately authored work that had been incorporated into state law because such abridgment was consistent with and required by federal law. 628 F.2d at 735. But the First Circuit entirely overlooked 17 U.S.C. § 201(e), which expresses Congress's deliberate rejection of the involuntary elimination of individual authors' copyright interests through state action:

When an individual author's ownership of a copyright, or of any of the exclusive rights under a copyright, has not previously been transferred voluntarily by that individual author, no action by any governmental body or other official or organization purporting to seize, expropriate, transfer, or exercise rights

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<sup>3</sup> The copyright statute includes an express preemption provision that generally forbids States from creating their own species of private property rights in copyrightable subject matter. See 17 U.S.C. § 301(a). It is well settled, however, that an express preemption provision "does not bar the ordinary working of conflict pre-emption principles." *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000) (emphasis omitted). The presence of § 301(a) therefore in no way suggests that the States' lone obligation under the Supremacy Clause is to avoid establishing alternative copyright-like frameworks.

of ownership with respect to the copyright, or any of the exclusive rights under a copyright, shall be given effect under this title, except as provided under title 11 [*i.e.*, the Bankruptcy Code].

*Ibid.*

The *BOCA* court thus overlooked a critical provision of the copyright statute. Section 201(e) explicitly rejects *BOCA*'s premise—namely, that the federal copyright statute, or at least “a judicial gloss upon the Federal Copyright Act,” 628 F.2d at 735, *requires* the invalidation of the copyright for works incorporated into law. The plain language of § 201(e) proves the contrary: state actions “purporting” (*i.e.*, appearing) to “expropriate” (*i.e.*, deprive the owner of) copyright ownership do not in fact do so under the statute. 17 U.S.C. § 201(e); see, *e.g.*, *Oxford English Dictionary* (online ed. 2019) (defining “purport” as “appear ostensibly to be or do something” and defining “expropriate” as “dispossess (a person) of ownership” or “deprive of property”).

Section 201(e) confirms the Supremacy Clause problems that inhere in sweeping claims about the law belonging to the People. As applied to privately authored works incorporated into state or local law, that claim, shared by respondent and the Eleventh Circuit below, violates Section 201(e) and the Supremacy Clause. With so little attention paid to this issue in the lower courts—and zero attention paid to it in this case—the Court should avoid expressing or implying any view on the question here. See, *e.g.*, *Cutter v.*

*Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (“[W]e are a court of review, not of first view”).

### **B. Respondent’s Views Create Expansive Takings Clause Liability.**

The Constitution also prohibits governmental takings of private property without just compensation. See U.S. Const. Amend. V (“nor shall private property be taken for public use, without just compensation”). Although the Court has not yet held specifically that copyrights are property for Takings Clause purposes, there is no reason for doubt. The Court has long used the language of property to describe copyrights—describing copyright legislation as creating a “literary *property* of an author in his works.” *Wheaton v. Peters*, 33 U.S. 591, 657 (1834) (emphasis added). Congress’s copyright legislation proceeds from “the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors” and that “[s]acrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.” *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

The Court has squarely held that state-law trade secrets are property under the Takings Clause. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1000-1004 (1984). Trade secrets are assignable, can be held in trust, pass to trustees in bankruptcy, and are often described as “proprietary interest[s]” and in terms of “ownership.” *Id.* at 1002. This reasoning applies with

equal or greater force to copyrights and other categories of intellectual property. Cf. *E. Enters. v. Apfel*, 524 U.S. 498, 554 (1998) (Breyer, J., dissenting) (“The ‘private property’ upon which the Clause traditionally has focused is a specific interest in physical *or intellectual* property.”) (emphasis added).

In fact, the Second and Ninth Circuits—two circuits with extensive experience in copyright cases—have identified the particular tension between the Takings Clause and respondent’s specific legal theory. Again, that theory posits that incorporating copyrighted material into law eliminates a vested copyright. But as Judge Leval wrote for the Second Circuit in *CCC Information Services*, the theory that governmental adoption of privately authored works into law suffices to “deprive[] the copyright owner of its property would raise very substantial problems under the Takings Clause of the Constitution.” *CCC Info. Servs.*, 44 F.3d at 74; accord *Practice Mgmt.*, 121 F.3d at 520.

If incorporation of a privately authored work indeed destroys the private author’s copyright, governments may not constitutionally incorporate such works into law without paying just compensation for the copyright’s invalidation. The first government to incorporate specific copyrighted material into its laws would have to compensate the copyright owner not just for its own use of that material, but for the wholesale elimination of all of the author’s rights of ownership. That would create a substantial first-mover penalty for incorporation and require a radical shift in the practice of state and local governments throughout the

country—to say nothing of the practice of private actors, such as ICC, that develop the works. In adjudicating the limited question presented by this case, the Court should be careful not to prejudge the Takings Clause questions that flow from respondent’s and the Eleventh Circuit’s views as to the effect of incorporation of privately authored works.

It has been suggested that any Takings Clause problem evaporates if the copyright owner has encouraged or permitted the government entity to incorporate the copyrighted work into its laws. See, *e.g.*, *Veeck*, 293 F.3d at 803 (majority opinion). But in such circumstances, governments receive encouragement or permission on the mutual understanding that the private author retains the copyright despite the governmental use. See, *e.g.*, *id.* at 822 (Wiener, J., dissenting) (“SBCCI expressly reserved its copyright in the codes.”). The fact that an author may encourage a government’s use of its work does not mean the author consents to relinquish its copyright altogether, least of all when both author and government believe and affirm that the specified governmental use is fully consistent with continuing copyright validity.

As with the Supremacy Clause, lower courts have barely brushed the surface of these issues, and they were not presented to the court below given the facts of this case. For this reason, too, the Court should reject respondent’s and the Eleventh Circuit’s broadly stated views.

## II. Any Expansion Of *Wheaton* And *Banks* Should Be Left To Congress.

The court below expanded judge-made doctrine by holding that copyright does not extend to “sufficiently law-like” materials. Pet. App. 4a. That conclusion rests on a misreading of this Court’s 19th-century decisions in *Wheaton* and *Banks*. Contrary to the Eleventh Circuit’s interpretation, neither *Wheaton* nor *Banks* declares that “‘the law’ [is] excluded from copyright protection” or that “government edicts cannot be copyrighted.” *Id.* at 13a, 15a. And even if this pair of cases did stand for those broad propositions, the Eleventh Circuit’s exclusion of annotations lacking the force of law improperly expands *Wheaton* and *Banks* still further in contravention of this Court’s later precedent.

The *Wheaton* case had several important holdings unrelated to the questions that arise here. *Wheaton*’s first holding is that there is no common-law copyright that exists separate from the federal statutory framework after an author publishes the work. 33 U.S. at 654-661. A valid copyright “must be sustained under the acts of congress,” not the common law. *Id.* at 662. Next, the Court held that, under the then-applicable statutory framework, obtaining a copyright required publishing notice of the claimed copyright in the newspapers and depositing a copy of the work with the Department of State. *Id.* at 662-668. Because it was not clear from the record whether Henry Wheaton had complied with these formal requirements, the Court remanded for further proceedings. *Id.* at 667-668.

Only after those two holdings, in the final sentence of its opinion, did the Court state, “It may be proper to remark that the court are unanimously of opinion, that no reporter has or can have any copyright in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right.” *Id.* at 668. The Court thus made clear that it had not granted, and lacked any power to grant, a copyright in the Justices’ judicial opinions to a private party.

The ruling in *Banks* was also restricted to the judiciary’s own work product. In particular, it held that Ohio’s officially appointed reporter of decisions could not secure a copyright for his published volumes in Ohio’s name. 128 U.S. at 245. While the Court did invoke *Wheaton*’s statement about copyrighting judicial opinions, the starting and focal point of its analysis was “the means \* \* \* prescribed by congress” for securing a copyright, because copyright law “depends *wholly on the legislation of congress.*” *Id.* at 252 (emphasis added).

In *Banks* as in *Wheaton*, the terms of the copyright statute were paramount. At the time of *Banks*, the statute restricted copyrights to United States citizens and residents who had authored the relevant work. *Ibid.* The Court’s holding rested first and foremost on a straightforward application of those express restrictions to the facts of the case: “these provisions of the statute do not cover the case of the state of Ohio in reference to what [the reporter] undertook to obtain a copyright for.” *Ibid.* First, the State of Ohio could not

“properly be called a citizen of the United States, or a resident therein.” *Id.* at 253. And second, the reporter, “although he may have been a citizen of the United States, or a resident therein, was not the author” of the work at issue. *Id.* at 252. Far from broadly holding that the law is uncopyrightable, the Court expressly declined to opine whether the State could hold a copyright as the assignee of someone who, unlike the reporter in *Banks*, was the actual author of the relevant book. *Id.* at 253.

Only then did *Banks* address the alternative possibility that the judges—who in fact had authored the opinions, syllabuses, and other materials—might be able to obtain a copyright and assign it to Ohio. *Ibid.* Much as in *Wheaton*, the Court was speaking for judges in particular when it endorsed the “public policy” that “[t]he whole work done by the judges” should be “free” to those it binds. *Ibid.* The Court explained that judges’ salaries relieve the need for any “proprietaryship, as against the public at large, in the fruits of their judicial labors.” And it stressed that “there has always been a judicial *consensus* \* \* \* that no copyright could, under the statutes passed by congress, be secured in the products of the labor done by judicial officers in the discharge of their judicial duties.” *Ibid.*

*Wheaton* and *Banks* are best read as recognizing a “judicial consensus” limited to the extent to which *judges* may claim ownership over their judicial work product. Both cases express views about the Justices’ own profession and the proper role of the judiciary in this country. Yet while they recognize that judges’



work should be free to all as a policy matter, neither decision holds all law—let alone all law-like materials—categorically ineligible for copyright.<sup>4</sup>

Instead of embracing such sweeping rules, *Wheaton* and *Banks* underscore that copyright law depends in the first instance on the language of Congress’s statutes. And within a month of *Banks*, in an opinion authored by the same Justice as *Banks*

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<sup>4</sup> Petitioners’ opening brief regrettably obscures this point by occasionally characterizing *Wheaton* and *Banks* as establishing that “the law” is uncopyrightable. See, e.g., Pet. Br. 3. Elsewhere, however, petitioners correctly observe that this Court merely “held that judicial opinions are not copyrightable” and that lower courts were responsible for extending those holdings to state statutes. *Id.* at 6.

Petitioners also go astray in suggesting that Congress might have silently acquiesced in decisions holding “that statutes \* \* \* are uncopyrightable.” *Id.* at 44. To be sure, “the principle of ratification,” sometimes called the prior construction canon, applies when Congress legislates against the backdrop of a “uniform construction” of “identical” language in a previous statute. *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527-532 (1994); see also, e.g., *Lightfoot v. Cendant Mortg. Corp.*, 137 S. Ct. 553, 563 (2017). But that principle has no application here because the so-called government edicts doctrine is rooted in policy, not any language in any statute. And the most relevant language in the current copyright statute, 17 U.S.C. § 105, addresses the copyrightability of government works very differently than the prior case law. See, e.g., *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994) (“Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change.”) (citation omitted).

(Justice Blatchford), the Court drove home the same point in *Callaghan v. Myers*, 128 U.S. 617 (1888).

In *Callaghan*, the plaintiff claiming copyright ownership was the official reporter for the Illinois Supreme Court, who held a public office established by state law. *Id.* at 645. He claimed copyright in volumes of his law reports, which included not only the opinions of the court but also materials resulting from his own “intellectual labor,” including descriptions of the facts and arguments of counsel in particular cases. *Ibid.* The Court squarely rejected the view “that these law reports are public property, and are not susceptible of private ownership, and cannot be the subject of copyright under the legislation of Congress.” *Ibid.* Only the judicial opinions themselves, which the reporter did not author, were excluded from copyright protection. *Id.* at 647 (citing *Banks*, 128 U.S. 244).

Rejecting public policy considerations, the Court declined to exclude the reporter’s own contributions to the reports from copyright because no statute prohibited it: “there is no ground of public policy on which a reporter who prepares a volume of law reports, of the character of those in this case, can, *in the absence of a prohibitory statute*, be debarred from obtaining a copyright for the volume which will cover the matter which is the result of his intellectual labor.” *Ibid.* (emphasis added). The Court reached that result even though the reporter earned a salary from the State and even though the “opinions of the court \* \* \* would be comparatively valueless” without his contributions, which appeared alongside the opinions in “the official edition

of the reports.” *Id.* at 646, 649. *Callaghan* thus permitted an officially appointed reporter to copyright his characterizations of case facts and counsel’s arguments, even though by the Court’s own estimation much of the value of the judicial decisions depended on them. That holding is flatly inconsistent with the Eleventh Circuit’s broad view that one cannot copyright “law-like” materials that cast an “undeniable, official shadow over how \* \* \* laws are interpreted and understood.” Pet. App. 38a.

This Court should continue its past cases’ emphasis on the terms of Congress’s copyright legislation. There is no provision in the copyright statute that supports the Eleventh Circuit’s “metaphorical concept of citizen authorship.” Pet. App. 21a-23a (citation omitted). Quite the opposite, Congress took a direct and literal approach in establishing limitations regarding government authorship. Against the backdrop of *Wheaton* and *Banks*—with their judicially created exception for judge-authored works—§ 105 specifically provides that “[c]opyright protection under this title is not available for any work of the United States Government.” 17 U.S.C. § 105. The last six words are expressly defined: “A ‘work of the United States Government’ is a work prepared by an officer or employee of the United States Government as part of that person’s official duties.” 17 U.S.C. § 101.

In the time since *Wheaton* and *Banks*, Congress has considered the question of copyright for governmental works and carved out a specific category of those works from copyright eligibility. Under the usual

principles of statutory interpretation, courts have no license to disregard the specific line Congress drew and create their own, additional exceptions for other governmental works. See, e.g., *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-617 (1980) (“Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.”); *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 232-233 (2011) (applying *expressio unius* canon to a statute covering only some of the disputes that had arisen under the common law).

The suggestion that courts may fashion new exceptions for law-like works even though Congress addressed the issue in § 105 could upend copyright law. Up and down the statute, Congress made decisions about how to codify doctrines that originally surfaced through case law. Two prominent examples are the fair use and first sale doctrines. Both originated in judicial decisions, but the 1976 copyright statute included express provisions for each. See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 576-577 (1994) (citing 17 U.S.C. § 107); *Quality King Distribs., Inc. v. Lanza Research Int’l, Inc.*, 523 U.S. 135, 141-142 (1998) (citing 17 U.S.C. § 109(a)). Now that Congress has entered these fields, courts have no authority to create new “bright-line rules” untethered to Congress’s statutory prescriptions. *Campbell*, 510 U.S. at 577. Nor may courts stray from their “duty to interpret the text of the Copyright Act” based on their sense of “wise policy.” *Quality King*, 523 U.S. at 153.

Unfortunately, some courts have done just that for works that have the force of law or are sufficiently law-like. In its ruling below, the Eleventh Circuit expanded *Banks*'s policy concern about judge-owned copyrights based on "a substantial public policy interest in public access to state-created legal edicts"; in the Eleventh Circuit's view, copyright law should reflect the principle that "providing free access to such works promotes an informed citizenry." Pet. App. 35a n.2. The First Circuit similarly gave priority to "the very important and practical policy that citizens must have free access to the laws which govern them." *BOCA*, 628 F.2d at 734.<sup>5</sup>

But there are competing policy considerations, too. Many elected officials have concluded that copyright protection offers "the most practical path" in developing and publishing legal or other governmental materials. *Veeck*, 293 F.3d at 806 (Higginbotham, J., dissenting). That is particularly true in the standards-development context.

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<sup>5</sup> The *BOCA* appeal arose from a preliminary injunction, however, and the First Circuit stressed that it was not "finally" settling the legal issues before it. 628 F.2d at 736. The court acknowledged the "important public function" of standards development organizations, which "arguably \* \* \* do a better job than could the state alone in seeing that complex yet essential regulations are drafted, kept up to date and made available." *Ibid.* And it further conceded that the *Wheaton* and *Banks* line of cases "grew out of a much different set of circumstances." *Ibid.* It therefore decided that the copyright holder in *BOCA* "should at least be allowed to argue its position fully on the basis of an evidentiary record, into which testimony and materials shedding light on the policy issues [could] be placed." *Ibid.*

Nearly a decade before the current copyright statute's enactment, Congress authorized federal agencies to incorporate privately authored standards into federal regulations by reference (rather than reproducing their full text in the *Federal Register*). Act of June 5, 1967, Pub. L. No. 90-23, 81 Stat. 54, 54 (codified at 5 U.S.C. § 552(a)(1)) (“[M]atter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.”).

Equipped with that new authority, “[i]n the 1970s, federal policy began to prefer that agencies use such standards in regulations instead of creating ‘government unique’ standards.” Emily S. Bremer, *Incorporation by Reference in an Open-Government Age*, 36 Harv. J.L. & Pub. Pol’y 131, 134 (2013). The same year the copyright statute was enacted, the Office of Management and Budget proposed that federal agencies “[u]se commercial standards in lieu of in-house standards” where appropriate and “[c]ite applicable commercial standards in *Federal Register* publications, regulatory orders, or related in-house documents.” Federal Interaction with Commercial Standards-Setting Bodies, 41 Fed. Reg. 53,723, 53,724 (proposed Dec. 8, 1976); see also, e.g., Occupational Safety and Health Standards, 39 Fed. Reg. 23,502, 23,538 (June 27, 1974) (incorporating several privately authored electrical and safety codes by reference).

Yet there is no hint in the contemporaneous copyright statute that such incorporation of privately

authored standards would destroy copyright. All indications, instead, are to the contrary. The statute says that copyrights initially vest in the works' authors, 17 U.S.C. § 201(a), are divested through transfer or the copyright term's expiration, 17 U.S.C. §§ 204, 302, and are *not* divested through governmental expropriation or use, 17 U.S.C. § 201(e). The statute has only a targeted exclusion for works of the United States Government, defined in a way that would not include privately authored works incorporated by reference. 17 U.S.C. §§ 101, 105. In fact, the House Report states that "publication or other use by the Government of a private work would not affect its copyright protection in any way." H.R. Rep. No. 1476, 94th Cong., 2d Sess. 60 (1976). With the increasing prevalence of incorporation by reference, Congress easily could have written the statute to terminate copyright protection upon incorporation. But it did the opposite.

Since the 1970s, incorporation by reference has become an even greater fixture of federal policy. In 1992, Congress asked the National Research Council to prepare a report addressing the use of privately developed standards. American Technology Preeminence Act of 1991, Pub. L. No. 102-245, § 508, 106 Stat. 7, 29 (1992).

The report concluded that the "U.S. standards development system serves the national interest well." National Research Council, *Standards, Conformity Assessment, and Trade into the 21st Century* 157 (1995), <http://www.nap.edu/read/4921/chapter/1>. But it "identified a serious need for improvement" in "increas[ing] federal use of voluntary consensus-based standards

developed in the private sector” given the “many benefits” that such use of privately authored standards provides. *Ibid.* Those benefits include reduced costs to federal agencies and taxpayers as well as reduced burdens on regulated actors by elimination of duplicative standards. *Ibid.* At the same time, the report recognized that standards-development organizations rely on their copyrights to offset their expenses. *Id.* at 32.

Congress responded by encouraging federal agencies to expand their use of privately authored standards. It passed legislation generally mandating 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 determined by the agencies and departments.” National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113, § 12(d), 110 Stat. 775, 783 (1996) (codified at 15 U.S.C. § 272 note).

Since then, the Office of Management and Budget has issued guidelines for agencies’ use of privately developed standards, stating that the “agency must observe and protect the rights of the copyright holder.” OMB Circular No. A-119, 63 Fed. Reg. 8545, 8554-55 (revised Feb. 19, 1998); see also Incorporation by Reference, 79 Fed. Reg. 66,267, 66,268 (Nov. 7, 2014) (“If we required that all materials [incorporated by reference] into the [*Code of Federal Regulations*] be available for free, that requirement would compromise the ability of regulators to rely on voluntary consensus



standards \* \* \* , which is contrary to the [National Technology Transfer and Advancement Act] and the OMB Circular A-119.”).

At no point has Congress hinted that copyright law should be modified to account for the increasing incorporation of privately authored works into the law. Were courts to make that modification on Congress’s behalf, they would be impermissibly taking sides between “two competing policies”: innovation and standardization through the engine of copyright, on the one hand, and insistence that all law and sufficiently law-like materials be free from copyright restrictions, on the other. *Veeck*, 293 F.3d at 807 (Higginbotham, J., dissenting).

The judiciary is ill suited to choosing between these competing policies, particularly in light of quickly changing circumstances. Technological advances already make the law more accessible to the citizenry than ever before. And many standards development organizations, like ICC, make read-only versions of their creations freely available online. If current circumstances require additional policy judgments, those judgments fall on legislators’ shoulders. None of Congress’s existing legislation authorizes courts to restrict or eliminate a privately authored work’s copyright because of the work’s use by the government.



**CONCLUSION**

The judgment of the court of appeals should be reversed.

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