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Copyright Law Cannot Copyright Law—Georgia v. Public.Resource.Org Inc., 140 S.Ct. 1498 (2020)

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COPYRIGHT LAW CANNOT COPYRIGHT LAW *GEORGIA V. PUBLIC.RESOURCE.ORG, INC.*, 140 S. CT. 1498 (2020)

Andy Taylor[†]

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I. INTRODUCTION

Almost exactly two hundred and thirty years after the enactment of the Copyright Act of 1790,¹ the U.S. Supreme Court ruled that copyright protections do not apply to Georgia’s official annotated code.² In so doing, the Court expanded the rule it adopted in its first copyright case, *Wheaton v. Peters*, which prevents *judges* from copyrighting their written opinions and transferring them to the court’s reporter of decisions, to its most recent copyright case.³ In *Georgia v. Public.Resource.Org, Inc.*, the Court’s majority ruled that the nineteenth-century era government edicts doctrine also excludes works created by *legislators*, acting in the course of their legislative duties, from copyright protection.⁴

This Paper begins with an overview of the facts and history of *Public.Resource.Org*,⁵ including a review of the various stakeholders and

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¹ Copyright Act of 1790, 124, 1st Cong. § 1 (1790).

² *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1504 (2020).

³ *Wheaton v. Peters*, 33 U.S. 591, 668 (1834).

⁴ *Public.Resource.Org*, 140 S. Ct. at 1508.

⁵ *Infra* Section II.A.

their interests in the case.⁶ An analysis of the Supreme Court's ruling follows.⁷ The analysis evaluates the rule adopted by the majority and compares it to the approach taken by the Eleventh Circuit. In particular, this Paper questions the Court's emphasis on the construct of "author" under the Copyright Act in determining whether a work is a law.⁸ Although both courts found for Public.Resource.Org, this Paper argues that the victor would have been better off with the framework the Eleventh Circuit used to conclude that the Official Code of Georgia Annotated ("OCGA") was uncopyrightable under the government edicts doctrine.⁹

Finally, this Paper explores what "law" is and the implications of the Court's approach to this question (at least in the context of copyright) on separate but related litigation to which Public.Resource.Org is a party. In short, the decision is a win for the general principle that no one owns the law, but it does not go so far as to free up the "raw materials" of democracy as Public.Resource.Org and its supporters might have hoped. This has implications for closely connected legal and policy disputes over the copyrightability of privately authored standards later incorporated by reference into federal, state, and local law.

II. THE *PUBLIC.RESOURCE.ORG* DECISION

A. *Facts and Procedural History*

It is long settled that law is not copyrightable.¹⁰ A trio of cases decided by the Supreme Court in the 1800s addressed questions of copyright in the context of judicial decisions.¹¹ In *Wheaton v. Peters*, the official reporter of the Supreme Court unsuccessfully argued it had been

⁶ *Infra* Section II.C.

⁷ *Infra* Section II.B.

⁸ *Infra* Sections III.A-B.

⁹ *Infra* Section III.C.

¹⁰ See, e.g., L. Ray Patterson & Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 UCLA L. REV. 719, 723 (1989); Robert M. Gellman, *Twin Evils: Government Copyright and Copyright-Like Controls over Government Information*, 45 SYRACUSE L. REV. 999, 1000-02 (1995); Deborah Tussey, *Owning the Law: Intellectual Property Rights in Primary Law*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 173, 174 (1998); Michael W. Carroll, *Open Access Publishing and the Future of Legal Scholarship: The Movement for Open Access Law*, 10 LEWIS & CLARK L. REV. 741, 742 (2006); Katie Fortney, *Ending Copyright Claims in State Primary Legal Materials: Toward an Open Source Legal System*, 102 L. LIBR. J. 59, 61 (2010); Beth Ford, *Open Wide the Gates of Legal Access*, 93 OR. L. REV. 539, 540 (2014); Elizabeth Scheibel, *No Copyright in the Law: A Basic Principle, yet a Continuing Battle*, 7 CYBARIS 350 (2016); Leslie A. Street & David R. Hansen, *Who Owns the Law? We Must Restore Public Ownership of Legal Publishing*, 26:2 J. INTELL. PROP. L. 205, 206 (2019).

¹¹ See *Wheaton v. Peters*, 33 U.S. 591 (1834); *Banks v. Manchester*, 128 U.S. 244 (1888); *Callaghan v. Myers*, 128 U.S. 617 (1888).

gifted a copyright in the judicial opinions it reported.¹² Unpersuaded, the Court ruled “that no reporter has or can have any copyright in the written opinions delivered by this court: and the judges thereof cannot confer on any reporter any such right.”¹³ Some five decades later, the Court heard a similar case concerning the copyrightability of state judicial opinions. In *Banks v. Manchester*, the Court elaborated on its *Wheaton* ruling, “explaining that ‘the judge who, in his judicial capacity, prepares the opinion or decision, the statement of the case and the syllabus or head note’ cannot ‘be regarded as their author or their proprietor, in the sense of [the Copyright Act].”¹⁴ However, in *Callaghan v. Myers*, the Court upheld a reporter’s copyright claim over “the matter which is the result of his intellectual labor.”¹⁵

The aforementioned cases comprise the government edicts doctrine.¹⁶ According to the majority in *Public.Resource.Org*:

These cases establish a straightforward rule: Because judges are vested with the authority to make and interpret the law, they cannot be the “author” of the works they prepare “in the discharge of their judicial duties.” This rule applies both to binding works (such as opinions) and to non-binding works (such as headnotes and syllabi). It does not apply, however, to works created by government officials (or private parties) who lack the authority to make or interpret the law, such as court reporters.¹⁷

While these cases long-ago addressed the copyrightability (or lack thereof) of judge-made law, and modern cases have similarly held that state statutes and local ordinances lack copyright protection,¹⁸ *Public.Resource.Org* presented a new question for the Court concerning

¹² *Wheaton*, 33 U.S. at 614–15.

¹³ *Id.* at 668.

¹⁴ *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1506 (2020) (quoting *Banks*, 128 U.S. at 253).

¹⁵ *See Callaghan*, 128 U.S. at 645, 647 (recognizing all but the opinions of the court as copyrightable, including a title-page, a statement of the entry of copyright, a list of the judges composing the court, a table of the cases reported in the volume, in alphabetical order, a head-note or syllabus to each opinion, with the names of the respective counsel, and their arguments in some cases, a statement of facts, and an index, arranged alphabetically, and consisting substantially of a reproduction of the head-notes).

¹⁶ Shyamkrishna Balganesh & Peter S. Menell, *The Uncopyrightability of Edicts of Government*, PENN LAW: LEGAL SCHOLARSHIP REPOSITORY 1, 3 (2019), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3113&context=faculty_scholarship [<https://perma.cc/2BDC-HUYY>].

¹⁷ *Public.Resource.Org*, 140 S. Ct. at 1507 (internal citations omitted).

¹⁸ *See Davidson v. Wheelock*, 27 F. 61 (C.C.D. Minn. 1866); *Howell v. Miller*, 9 F. 129 (6th Cir. 1898); *Bldg. Off. & Code Admin. v. Code Tech., Inc.*, 628 F.2d 730 (1st Cir. 1980); *Veeck v. S. Bldg. Code Cong. Int'l, Inc.*, 293 F.3d 791 (5th Cir. 2002) (en banc).

the copyrightability of annotated law. The issue arose out of a dispute between Georgia's Code Revision Commission (OCGA)—an arm of the state's General Assembly—and Public.Resource.Org, a “one-man”¹⁹ non-profit dedicated to “making government information more accessible.”²⁰

The Commission was originally established in 1977 to organize Georgia's statutes into a single code.²¹ State law expressly distinguishes between the “statutory portion” of the OCGA and the annotated portions.²² The legislature was also careful to note that “[a]ll historical citations, title and chapter analyses, and notes set out in [the OCGA] are given for the purpose of convenient reference and do not constitute part of the law.”²³ In 2006, the Commission contracted with Matthew Bender & Co., Inc., a division of the LexisNexis Group, to assemble “not only the statutory provisions, but also ‘annotations, captions, catchlines, headings, history lines, editorial notes, cross-references, indices, title and chapter analyses, research references, amendment notes, Code Commission notes, and other material related to or included in such Code at the direction of the Commission.’”²⁴ The work for hire²⁵ contract “state[d] that any copyright in the OCGA vests exclusively in ‘the State of Georgia, acting through the Commission.’”²⁶ While the contract required LexisNexis to make a free version of the unannotated code available on its website, it gave LexisNexis the exclusive right “to publish and sell the [annotated OCGA] as a printed publication, on CD-ROM and in an online version.”²⁷ By some accounts, LexisNexis sold copies of the OCGA for prices ranging from \$404 to \$1,200.²⁸

¹⁹ Steven Levy, *The Internet's Own Instigator*, WIRED (Sep. 12, 2016, 12:00 AM), <https://www.wired.com/2016/09/the-internets-own-instigator/> [https://perma.cc/7KCZ-CF7X].

²⁰ PUBLIC.RESOURCE.ORG, <https://public.resource.org/> [https://perma.cc/RJM7-ZA7Q].

²¹ *Public.Resource.Org*, 140 S. Ct. at 1504.

²² GA. CODE ANN. § 1-1-1 (2021).

²³ *Id.* § 1-1-7.

²⁴ Code Revision Comm'n v. Public.Resource.Org, Inc., 244 F. Supp. 3d 1350, 1353 (N.D. Ga. 2017), *rev'd*, 906 F.3d 1229 (11th Cir. 2018), *aff'd*, Georgia v. Public.Resource.Org, Inc., 140 S. Ct. 1498 (2020).

²⁵ The Copyright Act of 1976 defines “work made for hire” as “a work prepared by an employee within the scope of his or her employment,” for which the employer is “considered the author” for copyright purposes. Copyright Act of 1976, 17 U.S.C. §§ 101, 201(b) (2021). “Unless the parties expressly provide otherwise in a written agreement, the employer initially ‘owns all of the rights comprised in the copyright.’” Brief for the United States as Amici Curiae Supporting Petitioner at 3, Georgia v. Public.Resource.Org, Inc., 140 S. Ct. 1498 (2020) (No. 18-1150), 2019 WL 4167076 [hereinafter Amicus Brief for U.S. Supporting Petitioner].

²⁶ *Public.Resource.Org*, 140 S. Ct. at 1505.

²⁷ Code Revision Comm'n, 244 F. Supp. 3d at 1354.

²⁸ Molly Davis, *Supreme Court Should Stop Georgia from Charging Citizens \$404 per Year to Read Their Own Laws*, THE FEDERALIST (Nov. 6, 2019),

In defiance of takedown notices,²⁹ Public.Resource.Org “printed volumes and supplements of the [OCGA], scanned them all, and then posted those copies on its website.”³⁰ The organization even went so far as to mail digital copies of the OCGA directly to Georgia state legislators, in a brazen attempt to stir controversy.³¹ In 2015, the Commission filed suit against Public.Resource.Org for copyright infringement and sought injunctive relief.³² In its complaint, Georgia’s lawyers likened Public.Resource.Org’s actions to a “strategy of mass publication terrorism.”³³ The district court found for the Commission but noted the “unusual” nature of the case.³⁴ The trial judge relied on the fact that the Copyright Act lists,³⁵ and case law recognizes,³⁶ annotations as works entitled to copyright protection. Furthermore, the judge’s opinion noted that “the United States Copyright Office’s own treatise expressly recognizes the protectability of annotations.”³⁷

After losing in federal district court, Public.Resource.Org found a more favorable result on appeal to the Eleventh Circuit. Writing for a unanimous court, Judge Marcus held that:

[T]he annotations in the OCGA are sufficiently law-like so as to be properly regarded as a sovereign work For

<https://thefederalist.com/2019/11/06/supreme-court-should-stop-georgia-from-charging-citizens-404-per-year-to-read-their-own-laws/> [<https://perma.cc/AV86-4AUY>]; Josephine Wolff, *Supreme Court Says State Laws Aren’t Copyrightable*, SLATE (Apr. 29, 2020, 3:41 PM), <https://slate.com/technology/2020/04/georgia-state-law-copyright-lexis-nexis-supreme-court.html> [<https://perma.cc/Q2QY-D5VP>].

²⁹ The Digital Millennium Copyright Act, 17 U.S.C. § 512, established a “notice-and-takedown system [which] allows rightsholders to send a notification to [an] online service provider regarding infringing material that appears on the service provider’s system.” *Section 512 of Title 17: Resources on Online Service Provider Safe Harbors and Notice-and-Takedown System*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/512/> [<https://perma.cc/KW8R-AZCB>].

³⁰ Code Revision Comm’n, 244 F. Supp. 3d at 1354.

³¹ *Georgia v. Public.Resource.Org*, ELEC. PRIV. INFO. CTR., <https://epic.org/amicus/public-access/publicresourceorg/> [<https://perma.cc/XHQ2-WCB4>].

³² *Code Revision Comm’n*, 244 F. Supp. 3d at 1354.

³³ Amended Complaint for Injunctive Relief at 12, *Code Revision Comm’n v. Public.Resource.Org, Inc.*, 244 F. Supp. 3d 1350 (N.D.Ga. 2017) (No. 1:15-CV-02594-MHC 2015), 2015 WL 10008314; see also Adam Liptak, *Accused of ‘Terrorism’ for Putting Legal Materials Online*, N.Y. TIMES (May 13, 2019), <https://www.nytimes.com/2019/05/13/us/politics/georgia-official-code-copyright.html> [<https://perma.cc/Q64E-694F>].

³⁴ *Code Revision Comm’n*, 244 F. Supp. 3d at 1356 (“[M]ost official codes are not annotated and most annotated codes are not official.”).

³⁵ 17 U.S.C. § 101.

³⁶ See, e.g., *Lawrence v. Dana*, 15 F. Cas. 26 (C.C.D. Mass. 1869); *W.H. Anderson Co. v. Baldwin Law Pub. Co.*, 27 F.2d 82 (6th Cir. 1928).

³⁷ *Code Revision Comm’n*, 244 F. Supp. 3d at 1356 (citing U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES §§ 313.6(C)(2), 717.1 (3d ed. 2014)).

purposes of the Copyright Act, this means that the People are the constructive authors of those official legal promulgations of government that represent an exercise of sovereign authority. And because they are the authors, the People are the owners of these works, meaning that the works are intrinsically public domain material and, therefore, uncopyrightable.³⁸

Reasoning that the “ultimate inquiry is whether a work is authored by the People,” the court relied on three “critical markers,” namely “the identity of the public officials who created the work, the authoritativeness of the work, and the process by which the work was created.”³⁹

Georgia, on behalf of the Commission, petitioned the Supreme Court for a writ of certiorari.⁴⁰ It was supported by the United States⁴¹ and thirteen states (plus the District of Columbia).⁴² Unusually, Public.Resource.Org “acquiesced” in Georgia’s writ, stating that “because it is frequently sued [it] needs a clear rule governing when and to what extent it can post official codes adopted by state legislatures.”⁴³

B. U.S. Supreme Court’s Decision

Writing for an ideologically diverse majority, Chief Justice Roberts (joined by Justices Sotomayor, Kagan, Gorsuch, and Kavanaugh) upheld the Eleventh Circuit’s ruling, “though for reasons distinct from those relied on by the Court of Appeals.”⁴⁴ The Court rejected the “three markers” test employed by the circuit court, instead finding that “careful examination of our government edicts precedents reveals a straightforward rule based on

³⁸ Code Revision Comm’n for Gen. Assembly of Georgia v. Public.Resource.Org, Inc., 906 F.3d 1229, 1232–33 (11th Cir. 2018).

³⁹ *Id.* at 1232 (emphasis omitted).

⁴⁰ Petition for Writ of Certiorari, Georgia v. Public.Resource.Org, Inc., 140 S. Ct. 1498 (2020) (No. 18-1150).

⁴¹ See Amicus Brief for U.S. Supporting Petitioner, *supra* note 25 at 14, “[j]ust as an official court reporter is the ‘author’ of annotations he prepares to accompany judicial opinions, so too is [Georgia’s Code Revision Commission] the ‘author’ of statutory annotations that the entity either prepares or has prepared for it as a work made for hire,” which entitles the Commission to copyright protections of the annotations. *Id.*

⁴² Brief for the States of Arkansas, et al. as Amici Curiae Supporting Petitioner at 1, Georgia v. Public.Resource.Org, Inc., 140 S. Ct. 1498 (2020) (No. 18-1150), 2019 WL 4235530 [hereinafter Amicus Brief for Arkansas, et al.] (“By invalidating [Georgia’s] copyrights, the Eleventh Circuit’s interpretation of copyright law . . . would threaten the continued production of official annotated state codes.”).

⁴³ Brief of Respondent at *15, Georgia v. Public.Resource.Org, Inc., 140 S. Ct. 1498 (2020) (No. 18-1150), 2019 WL 5188978.

⁴⁴ *Public.Resource.Org*, 140 S. Ct. at 1506.

the identity of the author.”⁴⁵ As a result, the majority expanded the scope of the government edicts doctrine, holding that “copyright does not vest in works that are (1) created by judges and legislators (2) in the course of their judicial and legislative duties.”⁴⁶ A review of the facts led the Court to conclude that the Commission is an arm of the state legislature.⁴⁷ Satisfied that the OCGA is an original work of authorship of the Commission acting within the course and scope of the legislature’s official duties, the majority therefore concluded that “Georgia’s annotations are not copyrightable.”⁴⁸

In separate dissenting opinions, Justice Thomas and Justice Ginsburg argued that Georgia had a copyright interest in its annotated code, albeit for reasons as distinct as those put forward by the majority and Court of Appeals for why Georgia did *not* have a copyright interest.⁴⁹ Writing on behalf of Justice Alito and Justice Breyer,⁵⁰ Justice Thomas took issue with the majority’s “unwillingness to examine the root of a precedent”⁵¹ and charged the Roberts opinion with “textual deficiencies.”⁵² In particular, Justice Thomas found no basis for wholesale exclusion of copyright protections for legislative works based solely on the construction of “authorship.”⁵³ In essence, he would have upheld the annotations authored by LexisNexis in the same way the Court upheld a reporter’s copyright claim in *Callaghan*.⁵⁴ He also rejected the majority’s public policy argument that upholding Georgia’s copyright claim would result in an “economy class” version of the unannotated code online and a separate annotated code available at a price to “first class” readers.⁵⁵ Instead, Justice Thomas posited that “[t]he inability to access the OCGA merely deprives a researcher of one

⁴⁵ *Id.*

⁴⁶ *Id.* at 1508.

⁴⁷ *Id.* at 1504–05. Facts that the majority found persuasive in its opinion include: (1) the legislature established the Commission; (2) the majority of the Commission’s members are legislators; (3) the Commission is funded through appropriations provided for the legislative branch; (4) the Commission is staffed by the Office of Legislative Counsel; (5) the Commission is constitutionally within the sphere of the legislature’s authority; and (6) the Commission’s proposed statutory text and annotations are submitted annually to the legislature for approval. *Id.*

⁴⁸ *Id.* at 1508.

⁴⁹ *Id.* at 1518, 1523 (Thomas, J., dissenting) (Ginsburg, J., dissenting).

⁵⁰ Justice Breyer joined the dissent authored by Justice Thomas for all but Part II–A and footnote 6. *Id.* at 1513.

⁵¹ *Id.* at 1515 (Thomas, J., dissenting).

⁵² *Id.* at 1520 (Thomas, J., dissenting).

⁵³ *See id.* at 1519–20 (Thomas, J., dissenting).

⁵⁴ *Id.* at 1517–18 (Thomas, J., dissenting) (“Conclud[ing] that, as with the privately created annotations in *Callaghan*, Georgia’s statutory annotations at issue in this case are copyrightable.”).

⁵⁵ *Id.* at 1512.

specific tool, not to the underlying factual or legal information summarized in that tool.”⁵⁶

Justice Ginsburg, joined by Justice Breyer, wrote a separate dissenting opinion essentially endorsing the majority’s expansion of the government edicts doctrine to encompass works that are created by legislators in the course of their legislative duties.⁵⁷ Nonetheless, the dissenting Justices would have held Georgia’s copyright claim valid based on their argument that the OCGA was not authored in the course of the General Assembly’s *legislative duties*.⁵⁸ To elucidate this point, the Justices noted that (1) the annotations are created post-enactment of the statutes passed by the legislature, (2) the “annotations are descriptive rather than prescriptive,” and (3) the annotations “aim to inform the citizenry at large . . . [as opposed to] those seated in legislative chambers.”⁵⁹

For Supreme Court watchers, the *Public.Resource.Org* decision is noteworthy because of the unique judicial groupings that comprised both the majority and dissenting opinions. Not only did the majority make up a divergent cross-section of justices appointed by Presidents George W. Bush, Obama, and Trump, but the pairing of Justice Ginsburg and Justice Breyer in a joint dissent was perhaps just as surprising. Though both were considered “liberal” members of the Court, Justice Ginsburg and Justice Breyer repeatedly found themselves on opposite sides of copyright cases throughout their overlapping careers on the Court.⁶⁰ Justice Ginsburg was described as “the high court’s most fervently pro-copyright voice” who “carried the big pen” on numerous copyright cases.⁶¹ Justice Breyer, on the other hand, has a long history of copyright skepticism, even preceding his

⁵⁶ *Id.* at 1517–18 (Thomas, J., dissenting).

⁵⁷ *Id.* at 1522–23 (Ginsburg, J., dissenting).

⁵⁸ *Id.* at 1523 (Ginsburg, J., dissenting) (emphasis in original).

⁵⁹ *Id.* (Ginsburg, J., dissenting) (distinguishing codified statutes passed by the legislature from other works passed by a legislature, such as a guide to the state capitol commissioned by the Assembly of Georgia).

⁶⁰ Ryan Davis, *Ginsburg Remembered as Steadfast Pro-Copyright Voice*, LAW360 (Sept. 21, 2020, 11:26 PM), <https://www.law360.com/articles/1312244/ginsburg-remembered-as-steadfast-pro-copyright-voice> [https://perma.cc/J7E7-HBLN] (“While the public generally views the Supreme Court through a polarized and partisan lens, intellectual property cases tend not to break along those lines.”). Justice Ginsburg’s “most frequent sparring partner on copyright issues was Justice Stephen Breyer, with whom she was ideologically aligned on most other major issues but who takes a more skeptical view of copyrights and intellectual property.” *Id.*

⁶¹ Eriq Gardner, *A Supreme Court Without RBG May Impact Hollywood’s Grip on Intellectual Property*, BILLBOARD (Sept. 21, 2020), <https://www.billboard.com/articles/news/9452775/supreme-court-without-rbg-impact-hollywood-intellectual-property> [https://perma.cc/GY5E-4KNH].

time on the bench.⁶² It is therefore remarkable that these two Justices agreed with the majority on the applicable rule, disagreed with the majority on the application of the rule to the facts of the case before the Court, and agreed with *one another* that copyright protection should have been extended to the OCGA.⁶³

C. *Understanding the Stakeholders' Interests*

For some, reading the majority and dissenting opinions of this case will leave them asking, “what is the point?” Legislative annotations and the organization of information about state statutes might strike even the most eager law student as a bit technical or abstruse. Therefore, before turning to an analysis of the *Public.Resource.Org* decision and the copyrightability of the law, it is important to first understand the various stakeholders and their interests in the Court’s decision. The following overview of Public.Resource.Org and select amici curiae who filed briefs in support of Public.Resource.Org and Georgia frames the consequences of this case and other cases involving related questions of copyright protection for law-like works.

1. *What is Public.Resource.Org?*

Public.Resource.Org is the brainchild of Carl Malamud, the organization’s only staffer, who has been at the forefront of several efforts to bring public records into the public domain.⁶⁴ In the early 1990s, Malamud copied and compiled Securities and Exchange Commission (SEC) data about publicly traded companies, including annual reports, proxy statements and other documents and made them available on the internet for free.⁶⁵ He then coaxed the SEC into eventually running the

⁶² See Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 284 (1970) (“[T]he evidence now available suggests that, although we should hesitate to abolish copyright protection, we should equally hesitate to extend or strengthen it.”). In a speech delivered more than forty years after the publication of his article challenging copyright expansionism, Justice Breyer explained that he had endeavored to examine the application of the Coase Theorem to the field of copyright, which was the idea “that if there were no costs of distributing property rights, and no costs of engaging in transactions with regard to those property rights, then the initial distribution of rights would not matter, because no matter what that was, people would exchange rights to get what they wanted.” Stephen Breyer, *The Uneasy Case for Copyright: A Look Back Across Four Decades*, 79 GEO. WASH. L. REV. 1635, 1636–37 (2011).

⁶³ See *Public.Resource.Org, Inc.*, 140 S. Ct. at 1523 (Ginsberg, J., dissenting).

⁶⁴ Clint Hendler, *Carl Malamud, Public Printer*, COLUM. JOURNALISM REV. (Mar. 13, 2009), https://archives.cjr.org/campaign_desk/carl_malamud_public_printer.php [<https://perma.cc/FK5T-6S8D>].

⁶⁵ *Id.*

database,⁶⁶ now known as EDGAR.⁶⁷ Malamud's work was "praised by the White House and public interest groups as a model of public dissemination of government data in the computer age."⁶⁸ He has been involved with similar efforts regarding the federal patents database, the opinions of the U.S. Courts of Appeals,⁶⁹ and congressional hearings.⁷⁰

As Malamud explained in an interview, his "goal has always been policy change."⁷¹ In 2009, Malamud attempted to shape policy from inside the government when he launched a celebrated, albeit unsuccessful, campaign to run the U.S. Government Printing Office (GPO).⁷² If nominated and confirmed, Malamud pledged to "radically change how [the GPO] present[s] information on the Internet," by "enshrining principles of bulk data distribution into legislation."⁷³

Following his failed bid for Public Printer, Malamud continued his decades-long efforts to make the law and law-like information available for free access online. In addition to the Georgia state code, Malamud copied

⁶⁶ *An Internet Access to S.E.C. Filings to End Oct. 1*, N.Y. TIMES (Aug. 12, 1995), <https://www.nytimes.com/1995/08/12/business/an-internet-access-to-sec-filings-to-end-oct-1.html> [<https://perma.cc/G2RZ-8NMF>]. Malamud told consumers of the data to contact the SEC if they wanted to continue to have access and argued that the Paperwork Reduction Act required agencies with public records stored electronically to provide "timely and equitable access" in an "efficient, effective and economical manner." *Id.* After numerous requests from users of the data, the SEC agreed to operate the database. *Id.* This outcome represents a model that Malamud has pushed repeatedly through his work: challenging government to do the work of generating and supporting the continued provision of public materials rather than relying on the private sector. *Id.*

⁶⁷ *About EDGAR*, U.S. SEC. AND EXCH. COMM'N, <https://www.sec.gov/edgar/about> [<https://perma.cc/XH8A-JVNC>]. The Electronic Data Gathering, Analysis, and Retrieval (EDGAR) system "benefits investors, corporations, and the U.S. economy overall by increasing the efficiency, transparency, and fairness of the securities markets." *Id.* The system processes about 3,000 filings per day, serves up 3,000 terabytes of data to the public annually, and accommodates 40,000 new filers per year on average." *Id.*

⁶⁸ *Same-Day Internet Access to S.E.C. Filings*, N.Y. TIMES (May 1, 1995), <https://www.nytimes.com/1995/05/01/business/same-day-internet-access-to-sec-filings.html> [<https://perma.cc/R52C-Z5MA>] (noting before EDGAR, "[a] single document [could] cost more than \$50 if acquired through private companies that sell government data to the public.>").

⁶⁹ Levy, *supra* note 19.

⁷⁰ James Fallows, *Another Win for Carl Malamud (or: News You Won't See in the May 2007 Issue of the Atlantic)*, THE ATLANTIC (Mar. 9, 2007), <https://www.theatlantic.com/technology/archive/2007/03/another-win-for-carl-malamud-or-news-you-won-apos-t-see-in-the-may-2007-issue-of-the-atlantic/7543> [<https://perma.cc/JA24-HEWF>].

⁷¹ Hendler, *supra* note 64.

⁷² Tim Jones, *Yes We Scan: Carl Malamud for Public Printer*, ELEC. FRONTIER FOUND. (Mar. 2, 2009) <https://www.eff.org/deeplinks/2009/03/yes-we-scan> [<https://perma.cc/GV6N-FNSJ>].

⁷³ *Prepared Statement by Carl Malamud*, YES WE SCAN, <https://yeswescan.org/index.gpo.html> [<https://perma.cc/PG8U-FFTP>].

and redistributed codes from Arkansas, Colorado, Idaho, and Mississippi, as well as various municipal ordinances.⁷⁴ Unlike its dispute with Georgia, no formal legal action was taken against the organization by other governments.⁷⁵

Separately, Public.Resource.Org became embroiled in a protracted legal battle with standards developing organizations (SDOs) over Public.Resource.Org's copying and redistribution of standards developed by private SDOs, which were later incorporated by reference into law.⁷⁶ In testimony before the House Judiciary Committee, Malamud—sitting next to a representative of the American National Standards Institute⁷⁷—implored Congress to amend the Copyright Act to declare that “[e]dicts of government, such as judicial opinions, administrative rulings, legislative enactments, public ordinances, and similar official legal documents are not copyrightable for reasons of public policy.”⁷⁸ Malamud defined edicts of government as “the rules of general applicability by which we choose to govern ourselves as a society.”⁷⁹

2. Stakeholders that Supported Public.Resource.Org

Amici curiae who filed briefs in favor of Public.Resource.Org can be generally categorized as (1) disruptive legal research platforms, (2) public interest and open technology organizations, and (3) academics. The first two categories are addressed here.

The legal technology industry has seen profound growth in a short amount of time. In 2014, over thirty percent of legal tech platforms that participated in the American Bar Association's Techshow were “first timers” best described as legal startups.⁸⁰ From 2016 through 2018, the industry saw a whopping 713 percent growth in investment, primarily driven

⁷⁴ *An Edicts of Government Amendment: Hearings on Review of U.S. Copyright Law Before the Subcomm. on Cts., Intell. Prop. & the Internet of the H. Comm. on the Judiciary*, 113th Cong. 4 (2014) [hereinafter *Hearings on Review of U.S. Copyright Law*] (statement of Carl Malamud, Public.Resource.Org).

⁷⁵ *Id.*

⁷⁶ *See Freeing the Law with Public.Resource.Org*, ELEC. FRONTIER FOUND., <https://www EFF.org/cases/publicresource-freeingthelaw> [<https://perma.cc/J5W5-SGZC>].

⁷⁷ *About ANSI*, AM. NAT'L STANDARDS INST., <https://ansi.org/about/introduction> [<https://perma.cc/G3SG-3SUN>]. “The American Standard Institute (ANSI) is a private, non-profit organization that administers and coordinates the U.S. voluntary standards and conformity assessments system.” *Id.* Its membership includes SDOs. *Id.*

⁷⁸ *Hearings on Review of U.S. Copyright Law*, *supra* note 74 at 15; *see also* *Banks v. Manchester*, 128 U.S. 244, 253 (1888) (“The question is one of public policy.”).

⁷⁹ *Hearings on Review of U.S. Copyright Law*, *supra* note 74 at 2.

⁸⁰ Jobst Elster, *Start Me Up . . . I'll Never Stop*, LEGAL IT TODAY (June 10, 2015).

by electronic discovery and legal research needs.⁸¹ While the term “legal tech” is broad and extends well beyond research platforms, the growth in the market threatens the duopoly (real or perceived) that Westlaw and LexisNexis (referred collectively by the portmanteau “Wexis”)⁸² have long enjoyed.⁸³

Casetext, Docket Alarm, Fastcase, Free Law Project, Internet Archive, Judicata, Justia, and UniCourt are among the disruptive legal tech platforms that challenge the Wexis duopoly. In their amicus brief to the Court, these “next-generation legal research and analytics platforms and databases” argued that “an overbroad application of copyright to *core legal materials* will harm innovation, competition, and the public interest.”⁸⁴ These organizations did not offer a specific test or rule for the Court to consider but insisted that it must include the “legal core”—that is, “legal information that has been created, adopted, or imbued with the authority, imprimatur, or sanction of the state.”⁸⁵ In their view, this necessarily requires unimpeded public “access to a wider set of information than just statutes and judicial opinions.”⁸⁶ Further, these organizations rejected petitioner’s argument that only legal materials carrying the binding force of law can be covered by the government edicts doctrine because “some legal information carries sufficient authority or involvement of the state that it becomes just as essential as statutes and opinions in the actual operation of the law and governmental institutions.”⁸⁷

Public interest and open technology organizations shared the legal technology industry’s concern that the Court might determine that the OCGA falls outside of the scope of the government edicts doctrine but

⁸¹ Valentin Pivovarov, *713% Growth: Legal Tech Set an Investment Record in 2018*, FORBES (Jan. 15, 2019), <https://www.forbes.com/sites/valentinpivovarov/2019/01/15/legaltechinvestment2018/?sh=3d1ddc737c2b> [https://perma.cc/W3LR-PHPW]. Investment spiked from \$224 million to over \$1.6 billion in two years. *Id.*

⁸² See *Reed Elsevier, Inc. v. TheLaw.Net Corp.*, 269 F. Supp. 2d 942, 945 (S.D. Ohio 2003) (denying motion to dismiss West’s trademark dilution claim over reference to the “Wexis duopoly” on defendant’s website).

⁸³ LAC GRP., *LexisNexis Versus Westlaw Revisited* (Feb. 22, 2018), <https://lac-group.com/blog/lexisnexis-versus-westlaw-revisited/> [https://perma.cc/22DR-XURH] (“While Westlaw and Lexis continue to be at the top, their grip on market dominance has continued to loosen with the entrance of technology startups that are both well-funded and agile.”).

⁸⁴ Brief of Amici Curiae Next-Generation Legal Rsch. Platforms and Databases in Support of Respondent, *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498 (2020) (No. 18-1150), 2019 WL 5305481, at *1 [hereinafter *Amicus Brief for Next-Generation and Databases*] (emphasis added).

⁸⁵ *Id.* at *4.

⁸⁶ *Id.*

⁸⁷ *Id.* at *5.

lacked consensus over whether the OCGA was binding law. For example, the Internet Association—representing dozens of companies that make open government data available for public use—urged the Court not to limit the doctrine to government documents that impose binding legal obligations.⁸⁸ This may suggest that the Internet Association lacked confidence that Georgia’s annotated code carries the full force of law. On the other hand, the Center for Democracy and Technology (CDT) and the Cato Institute centered their amicus brief arguments on the premise that all people must have access to the laws that bind them, indicating that they may not have thought the binding effect of the OCGA was in question.⁸⁹

Despite the discrepancy over the binding effect of the OCGA, this category of amici supporting Public.Resource.Org agreed that the OCGA is, at a minimum, authoritative.⁹⁰ Additionally, they took umbrage with the commercialization of law and law-like materials online. In their amicus brief, Cato and CDT—an organization which advocates for an open, decentralized internet—argued that individual privacy and autonomy is harmed when authoritative government documents are only accessible in exchange for sensitive data, which LexisNexis collects from users when they visit the company’s website to view the OCGA.⁹¹ Similarly, the Internet Association noted that “[t]his places the public’s access to the only website that hosts the official version of the law at the mercy of business and technical choices made by a contractor like Lexis for its own commercial reasons.”⁹²

Collectively, the stakeholders that filed briefs in support of Public.Resource.Org saw the case as a fundamental issue of democracy and endeavored to push the bounds of the government edicts doctrine to cover any authoritative government document, regardless of its legal binding effect. Underneath the legal arguments, the disruptive legal research platforms were also motivated by an interest in breaking the backbone of a commercial arrangement between states and major incumbent legal databases, like LexisNexis, which impedes their ability to penetrate the market and make like material available on their own platforms for free.

⁸⁸ Brief of Amicus Curiae Internet Ass’n Supporting Respondent, *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498 (2020) (No. 18-1150), 2019 WL 5290509, at *11 [hereinafter Amicus Brief of Internet Ass’n] (arguing that this would be an unmanageable rule because “[n]ot all sources of legal authority set forth binding legal obligations”).

⁸⁹ Brief of the Ctr. for Democracy and Tech. and Cato Inst. As Amici Curiae in Support of Respondent, *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498 (2020) (No. 18-1150), 2019 WL 5290510, at *2 [hereinafter Amicus Brief of CDT and Cato Inst.].

⁹⁰ *Id.* at *3; Amicus Brief of Internet Ass’n, *supra* note 88, at *1-3.

⁹¹ Amicus Brief of CDT and Cato Inst., *supra* note 89, at *20.

⁹² Amicus Brief of Internet Ass’n, *supra* note 88, at *6-7.

3. *Stakeholders that Supported Georgia*

Georgia's position was supported in amicus briefs filed by (1) the U.S. Copyright Office (on behalf of the United States), (2) states with work made for hire codification schemes similar to Georgia's, (3) large, incumbent legal research companies, and (4) SDOs. The positions of the states and legal research companies are addressed in this Section, while the positions of the government and SDOs are dealt with later in this Paper.

The thirteen states,⁹³ and the District of Columbia, that filed an amicus brief in favor of Georgia had, at one time or another, all claimed a copyright in their annotated codes.⁹⁴ Their brief argued that the Eleventh Circuit's ruling would upend the work made for hire arrangements that they relied on to contract with third-party annotators who recouped costs by selling the code.⁹⁵ If their annotated codes did not enjoy copyright protection, then the annotators would charge states for producing the codes or halt production altogether.⁹⁶ The effect of this would be to increase the costs on lawyers, who rely on annotated codes to begin their legal research.⁹⁷

Aside from the functionalist reasoning relied on by the states, State and D.C. amici also took the position that “[a]nnotations are not themselves the law, nor authoritative guidance on it.”⁹⁸ This argument—at least with respect to the claim that the annotations do not provide authoritative guidance—is hard to square with the facts of *Public.Resource.Org*, where the Commission approved the annotations,⁹⁹ and also with amici's own argument that the annotations are “a starting point” that lawyers use to understand state law.¹⁰⁰ Finally, the State and D.C. amici emphasized that the case law relied on by the Eleventh Circuit interpreted a practically ancient version of federal copyright statute and questioned whether it is still applicable under current law.¹⁰¹ For example, the State and D.C. amici noted that the Copyright Act expressly excludes works authored by the United States Government from copyright protection,¹⁰² but it contains no similar exclusion for state-authored works.¹⁰³

⁹³ Arkansas, Alabama, Alaska, Idaho, Kansas, Mississippi, Nebraska, South Carolina, South Dakota, Tennessee, Utah, Vermont, and Virginia. *See* Amicus Brief for Arkansas, et al., *supra* note 42, at *1.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at *3.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *See* Brief of Respondent, *supra* note 43, at *52.

¹⁰⁰ Amicus Brief for Arkansas, et al., *supra* note 42, at *3.

¹⁰¹ *See id.* at *4. (“[T]he theory behind [the government edicts doctrine] under existing copyright law . . . is unclear.”)

¹⁰² *Id.*

¹⁰³ *Id.* at *7-8.

The states' position was reinforced by LexisNexis and the publishing amicus Matthew Bender & Co., Inc., which annotated the OCGA. The annotator stressed "the painstaking, creative efforts that [it] performed to create this work of authorship" and noted that it "follows a similar, time-consuming process to create annotations for many other States."¹⁰⁴ Furthermore, Matthew Bender & Co. contended that Public.Resource.Org's actions not only infringed on Georgia's valid copyright but that a ruling in the organization's favor would "destroy the economic incentive for creating this deeply valuable work, while imposing needless costs on the public."¹⁰⁵ Citing case law, Matthew Bender & Co. urged the Court to consider the risks that such an outcome would have on "[t]he economic philosophy behind' the Copyright Clause" of the Constitution.¹⁰⁶

Having established its interest in the case and articulated the harm that upholding the Eleventh Circuit's ruling would have on private development of annotated codes, the legal research giant attacked the argument that the annotations were binding. First, Matthew Bender & Co. cited Georgia's own code and state supreme court decisions, which "make clear that the Annotations have no 'official weight[.]'"¹⁰⁷ Second, to underscore this point, Matthew Bender & Co. provided the following sample annotation, from the 2014 edition of the Annotations, for *Cho Carwash Prop., LLC v. Everett*, 755 S.E.2d 823 (Ga. 2014), and section 34-9-260 of OCGA:

Award of workers' compensation benefits was upheld because there was some evidence to support the administrative law judge's calculation of the claimant's average weekly wage under [OCGA] § 34-9-260(3) based on the claimant's testimony that the claimant was supposed to work from the car wash's opening until its close.¹⁰⁸

As explained by Matthew Bender & Co., "[n]o part of the part of the above Annotation is Statutory Text or a judicial opinion, and it carries no force of law."¹⁰⁹ Third, Matthew Bender & Co. cited the plain text of Copyright Act itself, which protects annotations of "derivative work[s],"¹¹⁰ and provided nearly twenty examples of the U.S. Copyright Office registering state-owned

¹⁰⁴ Brief for Matthew Bender & Co., Inc. as Amicus Curiae in Support of Petitioners, *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498 (2020) (No. 18-1150), 2019 WL 4235527, at *1 [hereinafter Amicus Brief for Bender & Co.].

¹⁰⁵ *Id.* at *2.

¹⁰⁶ *Id.* at *3 (quoting *Mazer v. Stein*, 347 U.S. 201, 219 (1954)).

¹⁰⁷ *Id.* at *2 (quoting *Harrison Co. v. Code Revision Comm'n*, 260 S.E.2d 30, 35 (Ga. 1979)).

¹⁰⁸ *Id.* at *6 (citations omitted).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at *14 (quoting 17 U.S.C. § 101, 103(a)).

annotations.¹¹¹ Finally, it characterized the Eleventh Circuit's analysis of the authoritativeness of the OCGA as an "unfocused inquiry, divorced from any holding or reasoning in *Wheaton*, *Callaghan*, and *Banks* or the Copyright Act's text."¹¹²

In effect, the states and incumbent legal research community regarded the Eleventh Circuit's ruling as a departure from settled case law, the copyright statute, and the Copyright Office's own longstanding practice. Both stressed the practical effects of upholding the circuit court's decision on the publishing model that states and annotators had enjoyed. While they also agreed that the OCGA was not binding, a small fissure emerged over the authoritativeness of the annotations, with the states taking the position that the OCGA was not authoritative at all and LexisNexis arguing that authoritativeness was irrelevant to the inquiry altogether.

III. ANALYSIS

The *Public.Resource.Org* Court faced the fundamental challenge of balancing the weight of its copyright precedents and the Copyright Act itself against the commercialization of legal materials¹¹³ and the principle of rule of law.¹¹⁴ Despite compelling facts and law on Georgia's side (not to mention the two copyright heavyweights¹¹⁵ on the bench), the judicial interest in rule of law was too great to be confined by the Court's prior decisions which, by themselves, favor a finding that the OCGA is copyrightable.¹¹⁶

This Section considers why the Court chose to rely on the identity of the author to determine whether a particular work is an edict of government rather than the content of the work. Next, this Section addresses open questions left by the decision concerning what materials can be said to constitute law. Finally, this Section explores the (possibly unintended) impact of this case on privately authored works incorporated by reference¹¹⁷ into law.

¹¹¹ *Id.* at *15-16.

¹¹² *Id.* at *23-24.

¹¹³ See Street & Hansen, *supra* note 10, at 206 ("[P]ublishers now use powerful legal tools to control who has access to the text of the law, how much they must pay, and under what terms.").

¹¹⁴ See *Overview - Rule of Law*, U.S. COURTS, <https://www.uscourts.gov/educational-resources/educational-activities/overview-rule-law> [<https://perma.cc/QB8Q-J6D7>].

¹¹⁵ See *supra* notes 60-63 (discussing Justices Ginsburg and Breyer).

¹¹⁶ See Ed Krayewski, *Official Law of Georgia is Copyrighted, and the State Enforces that Copyright*, REASON (Mar. 31, 2017), <https://reason.com/2017/03/31/official-law-of-georgia-is-copyrighted-a/> [<https://perma.cc/54L9-LFYH>].

¹¹⁷ "[I]ncorporation by reference is a term of art for the practice of codifying material published elsewhere by simply referring to it in the text of a regulation." Emily S. Bremmer, *Incorporation by Reference in an Open-Government Age*, 36 HARV. J.L. & PUB. POL'Y 131, 133 (2013).

A. Copyright Exclusions Based on Author

While the long-term effect of the *Public.Resource.Org* ruling on commercial legal materials and state-sanctioned annotations is unclear, an immediate impact of the decision is the creation of an anomaly in modern copyright law in which certain works are ineligible for protection based on the judge-made legal fiction of constructive authorship.¹¹⁸ The Court's focus in *Public.Resource.Org* on the identity of the author is consistent with the nineteenth-century case law that makes up the government edicts doctrine as applied to the nation's eighteenth-century copyright statute.¹¹⁹ Yet, such focus reflects a departure from today's code.

The courts are generally wary of looking beyond the Copyright Act in assessing whether a particular work is entitled to protection. In *Sony Corp. v. Universal City Studios, Inc.*, the Court characterized “[t]he judiciary’s reluctance to expand the protections afforded by the copyright without explicit legislative guidance” as “a recurring theme” in its copyright jurisprudence.¹²⁰ Citing *Wheaton*, the Court in *Sony Corp.* went so far as to assert that “the protection given to copyrights is wholly statutory.”¹²¹

The first federal Congress enacted the Copyright Act of 1790 to protect the “author or authors” of certain works.¹²² Under its modern statutory construct, however, the Copyright Act of 1976 extends copyright protection to “original works of authorship.”¹²³ Thus, the original emphasis of copyright protection in the author now attaches instead to the author’s original works. With the sole exception of works authored by the U.S. Government, nowhere in the Copyright Act is a work of authorship denied copyright protection based on identity of the human author of the work.¹²⁴

Modern law categorically precludes any work of the U.S. Government from copyright protection.¹²⁵ This limitation generally extends

¹¹⁸ See *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498 (2020).

¹¹⁹ See *id.*

¹²⁰ *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 431 (1984) (citing *Teleprompter Corp. v. CBS*, 415 U.S. 394 (1974); *Fortnightly Corp. v. United Artists*, 392 U.S. 390 (1968); *White-Smith Music Publ’g Co. v. Apollo Co.*, 209 U.S. 1 (1908); *Williams & Wilkins v. United States*, 420 U.S. 376 (1975)).

¹²¹ *Sony Corp.*, 464 U.S. at 431. (citing *Wheaton v. Peters*, 33 U.S. 591, 661–62 (1834)).

¹²² Copyright Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124 (repealed 1831).

¹²³ 17 U.S.C. § 102(a).

¹²⁴ As explained by the U.S. Copyright Office, “the Office will refuse to register a claim if it determines that a *human being* did not create the work.” U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFF. PRACS. § 306 (3d ed. 2017) (emphasis added).

¹²⁵ 17 U.S.C. § 105. This section of the 1976 Act carries forward a substantially similar prohibition in section 7 of the Copyright Act of 1909, which provided that “[n]o copyright shall subsist . . . in any publication of the United States Government” *An Act to Amend and Consolidate the Acts Respecting Copyright*, 60th Cong., 2d Sess. (as passed by Congress

to works made for hire.¹²⁶ As explained in the House Report accompanying the 1976 rewrite of the Copyright Act, “[S]ection 105 is intended to place all works of the United States Government, published or unpublished, in the public domain.”¹²⁷ According to the U.S. Copyright Office, this “includes legislation enacted by Congress, decisions issued by the federal judiciary, regulations issued by a federal agency, or any other work prepared by an officer or employee of the U.S. federal government while acting within the course of his or her official duties.”¹²⁸ Furthermore, “[a]s a matter of longstanding public policy, the U.S. Copyright Office will not register a government edict that has been issued by any state, local, or territorial government, including legislative enactments, judicial decisions, administrative rulings, public ordinances, or similar types of official legal materials.”¹²⁹

While the courts generally refrain from increasing the scope of copyright protection to subject matters without a statutory basis, one cannot help but notice that there is no language in the Copyright Act to limit protection for works authored by state legislators like there is for U.S. Government-authored works. Section 105 of the Copyright Act essentially codifies *Wheaton* but does not sweep in state edicts governed by *Banks*. Looked at through general principles of statutory interpretation, congressional silence on the copyrightability of works authored by the states draws a “negative inference: *expressio unius est exclusio alterius* (the inclusion of one is the exclusion of others).”¹³⁰ When presented with the opportunity to legislate on the copyrightability of law generally, Congress surgically addressed federally authored works and chose to go no further.¹³¹ To reason otherwise would amount to “enlargement” of the statute rather than “construction” of it,¹³² which *Sony Corp.* eschews. That the Copyright

Mar. 9, 1909), <https://www.copyright.gov/history/1909act.pdf> [https://perma.cc/79RT-B446].

¹²⁶ H.R. REP. NO. 94-1476, at 58 (1976).

¹²⁷ *Id.* at 59.

¹²⁸ U.S. COPYRIGHT OFF., *supra* note 124, § 306.

¹²⁹ *Id.* § 313.6(C)(2). A policy innovation of the Copyright Act of 1976 is that registration of a copyright is not a prerequisite of protection. *See* 17 U.S.C. § 408. Thus, before the *Public.Resource.Org* ruling, the policy of the Copyright Office not to register government edicts issued by state, local, and territorial governments was not necessarily determinative of whether such works were protected by copyright law.

¹³⁰ LARRY M. EIG, CONG. RES. SERV., STATUTORY INTERPRETATION: GEN. PRINCIPLES AND RECENT TRENDS 18 (2014).

¹³¹ *See generally* Preemption of a State Law Claim by Federal Copyright Act, 76 A.L.R.6TH 289 (2012).

¹³² *Iselin v. United States*, 270 U.S. 245, 251 (1926); *see also* *Lamie v. United States Tr.*, 540 U.S. 526, 538 (2004) (“[T]here is a basic difference between filling a gap left by Congress’ silence and rewriting rules that Congress has affirmatively and specifically enacted.”) (citing *Mobil Oil Corp. v. Higginbotham*, 98 S. Ct. 210 (1978)).

Office refuses to register state government edicts supports this point, since its refusal was based on policy—not on law.

In its brief for the Court, *Public.Resource.Org* claimed that the OCGA is simply not a work of authorship because it is a government edict.¹³³ Presented with this argument by one of the parties, the Court could have performed an analysis of the annotations to determine whether they are “original works of authorship fixed in any tangible medium of expression.”¹³⁴ If the Court had applied that analysis, the Court would have likely found that the annotations fall into the category of literary works and then proceeded to consider whether the OCGA is sufficiently original.¹³⁵ A finding of originality would then lead the Court to consider whether the original work is nevertheless covered by an exception in the statute, such as the general prohibition on extending copyright protection “to any idea, procedure, process, system, method of operation, concept, principle, or discovery.”¹³⁶ Instead, the Court declined to even consider whether the OCGA is a work of authorship, likely because the annotations satisfy the *prima facie* elements required to be copyrightable.¹³⁷

The majority in *Public.Resource.Org* also elected not to evaluate either the binding effect or the authoritativeness of the OCGA, despite amici’s intense focus on those two prongs for purposes of analyzing the work as a government edict. In fact, the Court expressly rejected this approach, which was a factor employed by the Eleventh Circuit.¹³⁸

The Eleventh Circuit’s reasoning hews closely to the Robert’s opinion insofar as it “relied] on the *identity* of the public officials who created the works” in question, however, the circuit court did not rely on authorship alone in its analysis.¹³⁹ In this sense, the appellate court was “guided by a consideration of those characteristics that are the hallmarks of [copyright] law” and not just one element.¹⁴⁰ The significance of the

¹³³ Brief of Respondent, *supra* note 43, at *2.

¹³⁴ 17 U.S.C. § 102(a).

¹³⁵ The originality requirement is “the bedrock principle of copyright” and “the very premise of copyright law.” *Feist Publ’n, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 347 (1991) (citation omitted). “To qualify for copyright protection, a work must be . . . independently created by the author” and “possess[] at least some minimal degree of creativity.” *Id.* at 345.

¹³⁶ 17 U.S.C. § 102(b); *see also* U.S. COPYRIGHT OFF., CIRCULAR 33, WORKS NOT PROTECTED BY COPYRIGHT (2017).

¹³⁷ There are three distinct elements required to qualify as a copyrightable compilation: “(1) the collection and assembly of pre-existing material, facts, or data; (2) the selection, coordination, or arrangement of those materials; and (3) the creation, by virtue of the particular selection, coordination, or arrangement, of an ‘original’ work of authorship.” *Feist Publ’n*, 499 U.S. at 357.

¹³⁸ *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1506 (2020).

¹³⁹ Code Revision Comm’n for Gen. Assembly of Georgia v. *Public.Resource.Org, Inc.*, 906 F.3d 1229, 1232 (11th Cir. 2018) (emphasis in original).

¹⁴⁰ *Id.*

departure between the Eleventh Circuit and the Supreme Court on this point cannot be overstated. This is because the Eleventh Circuit's approach invites a broader and more thorough examination of whether a work of authorship is "law," which might leave the door open for other "law-like" works to lose copyright protection.¹⁴¹

All nine of the Justices agree with the fundamental principle that no one owns the law.¹⁴² The debate, then, was less about whether a state government can own the law than whether the annotations in question were government edicts.¹⁴³ The majority's use of a blunt framework to determine whether the annotations were covered by the government edicts doctrine—by looking to the author, as opposed to the author's work—is a pragmatic exercise in judicial efficiency. The holding favors certainty and predictability over the more nuanced analyses put forward by Justice Thomas and Justice Ginsburg. Yet the Court's reasoning should disappoint *Public.Resource.Org.*, the respondent, and many of the interested parties who favored the Eleventh Circuit's approach. This is because the decision potentially leaves many law-like works that are privately authored and arguably carry the same or greater weight than annotations out of reach from the government edicts doctrine.

B. *What is Law?*

By examining the author alone to determine whether a work is a law, the majority in *Public.Resource.Org* sidestepped difficult questions at the heart of the government edicts doctrine. Chief among them: what is "law," exactly?

At the federal level, a bill passed by Congress cannot become a law without meeting the constitutional procedural requirements of bicameralism and presentment to the president.¹⁴⁴ To determine whether these requirements have been met, the Court considers, *inter alia*, whether an action by the legislature is "essentially legislative in purpose and effect."¹⁴⁵ It does so by analyzing if the action "had the purpose and effect of altering the legal rights, duties and relations of persons."¹⁴⁶ In Georgia, substantially similar requirements exist, and revisions to the OCGA itself require

¹⁴¹ *Id.* at 1233.

¹⁴² *Public.Resource.Org, Inc.*, 140 S. Ct. at 1507 ("The animating principle behind this rule is that no one can own the law.").

¹⁴³ *Id.* at 1503.

¹⁴⁴ U.S. CONST. art. I, § 7.

¹⁴⁵ *INS v. Chadha*, 462 U.S. 919, 952, 960 (1983) (holding the legislative veto unconstitutional).

¹⁴⁶ *Id.* at 952.

bicameral support in the General Assembly before being presented to the governor.¹⁴⁷

However, passage of a bill that is signed by the chief executive does not end the inquiry. Those enacted bills are later scrutinized by judges and, in some cases, held to be unconstitutional.¹⁴⁸ Thus, a measure codified into positive law may have no force or effect if it has been struck down by the courts even though it remains codified. Further, common law—the law created by judges—is binding without the aid of a statute passed by a legislature. Regulations promulgated by the executive branch, with or without the explicit direction of a legislative body, may be appropriately considered binding law.¹⁴⁹ Non-binding guidance issued by an executive branch may even be factored into a person’s compliance with the law.¹⁵⁰

In *Banks*, the Court declared “the law, which, bind[s] every citizen,” uncopyrightable.¹⁵¹ Based on this, some supporters of Georgia’s position understood that to mean only law with direct binding effect is covered by government edicts doctrine.¹⁵² On the other hand, supporters of Public.Resource.Org generally stressed the authoritative nature of a government document to determine whether it is a law.¹⁵³ Their claim is supported by *Callaghan*, which denied “copyright in the opinions of the judges, or in the work done by them in their official capacity as judges,”¹⁵⁴ suggesting that even dissenting opinions, which are by definition *not* binding law, are nevertheless covered by the doctrine. Black’s Law Dictionary satisfies either point of view, defining law as “[t]he regime that orders human activities and relations through systematic application of . . . force” or, in the alternative, “[t]he aggregate of legislation, judicial precedents, and accepted legal principles; the body of authoritative grounds of judicial and administrative action.”¹⁵⁵

As observed by Leslie A. Street and David R. Hansen, “[d]espite what appears to be a clear rule against copyright protection over the law,

¹⁴⁷ GA. CONST. art. III, § 5, para. XIII (“All bills and all resolutions which have been passed by the General Assembly *intended to have the effect of law* shall become law if the Governor approves or fails to veto the same”) (emphasis added); GA. CODE ANN. § 1-1-1.

¹⁴⁸ *Cobb County v. Campbell*, 350 S.E.2d 466, 467 (Ga. 1986).

¹⁴⁹ Exec. Order No. 13891, 84 Fed. Reg. 55235 (Oct. 9, 2019) (“Departments and agencies (agencies) in the executive branch adopt regulations that impose legally binding requirements on the public even though, in our constitutional democracy, only Congress is vested with the legislative power.”).

¹⁵⁰ *Id.* (“[A]gencies have sometimes used [guidance] inappropriately in attempts to regulate the public . . . [e]ven when accompanied by a disclaimer that it is non-binding.”).

¹⁵¹ *Banks v. Manchester*, 128 U.S. 244, 253 (1888).

¹⁵² *See, e.g.*, Amicus Brief for Matthew Bender & Co., *supra* note 104, at 2.

¹⁵³ *See, e.g.*, Amicus Brief for Next-Generation and Databases, *supra* note 84, at 1.

¹⁵⁴ *Callaghan v. Meyers*, 128 U.S. 617, 647 (1888) (emphasis added).

¹⁵⁵ *Law*; BLACK’S LAW DICTIONARY (11th ed. 2019).

publishers continue to assert copyright[s]” in such materials.¹⁵⁶ This dichotomy exists because notions of what “law” is are not universally accepted.¹⁵⁷ For example, although there is no argument that legislators and judges make law, virtually any law student would point to the American Law Institute’s (ALI) Restatement of Torts¹⁵⁸ and the Model Penal Code (MPC)¹⁵⁹—which no state has adopted in its entirety—as “law.” This is because these “law-like” materials are tested on the bar exam.¹⁶⁰ Moreover, the Restatement is frequently adopted, verbatim, in judicial opinions¹⁶¹ and the MPC. Even when adopted in modified form by a state’s legislature, it is used as a critical reference point to understand legislative intent and statutory construction.¹⁶² Notably, when these materials are referenced or adopted in case law, the ALI retains a copyright interest in material related to such work, such as those portions that are not expressly incorporated into the text of a judicial opinion.¹⁶³ For example, comments and illustrations used to give meaning to the Restatement retain their copyright protection despite the fact that they could be critical to understanding the significance of a particular word or phrase in the Restatement as adopted by a court. However, because the ALI is not a legislator or a judge, it is not a judicial or legislative author under the majority’s view of the government edicts doctrine. This is in spite of the fact that the ALI’s works of authorship are, at least by some accounts, the “raw materials” of the law, which are critical to understanding its meaning, not unlike the annotations of Georgia’s official code.¹⁶⁴

It may seem obvious that the government edicts doctrine should only cover works authored by a government entity charged with making law.

¹⁵⁶ Street & Hansen, *supra* note 10, at 222.

¹⁵⁷ *Id.* at 210.

¹⁵⁸ See RESTATEMENT (THIRD) OF TORTS (AM. L. INST.) (2013).

¹⁵⁹ See MODEL PENAL CODE (AM. L. INST.) (1962).

¹⁶⁰ See AdaptiBar, *What Law Should I Apply on the MBE?* (July 2, 2019), <https://blog.adaptibar.com/what-law-apply-mbe/> [<https://perma.cc/G5TZ-3ERY>].

¹⁶¹ See, e.g., *Thompson v. Kaczinski*, 774 N.W.2d 829, 839 (Iowa 2009) (“[T]he [Restatement] drafters’ clarification of scope of liability sound . . . and, accordingly, adopt it.”).

¹⁶² See, e.g., *People v. Goetz*, 497 N.E.2d 41, 50 (N.Y. 1986) (“New York[s] [refusal to] follow the Model Penal Code’s equation of a mistake as to the need to use deadly force” was the determinative factor in construing the state’s penal code).

¹⁶³ See, e.g., DEBORAH A. DEMOTT, *Restatements and Non-State Codifications of Private Law*, in *CODIFICATION IN INTERNATIONAL PERSPECTIVE* 75-90 (Wen-Yeu Wang ed., 2014) (noting that ALI owns a copyright in the Restatement as part of its long-lived joint venture with the West Publishing Company).

¹⁶⁴ American University Washington College of Law, Program on Information Justice and Intellectual Property, *IP at the Supreme Court Series: Georgia v. Public.Resource.Org, Inc.*, YOUTUBE (Dec. 2, 2019), <https://www.youtube.com/watch?v=OcpoSl6qZ-E&feature=youtu.be> [<https://perma.cc/JC54-CY6Q>] (quoting panelist Joseph C. Gratz).

Yet that presupposes that everyone looks to the works of legislatures and judges alone to know the law. This one-dimensional approach to knowing the law bears little resemblance to reality. In fact, lawyers would commit legal malpractice if they looked to a statute alone to understand its true meaning.¹⁶⁵ Street and Hansen identify three critical attributes that accompany “the law,” writing that “only an official, authentic and authoritative source is accorded the full weight of ‘the law.’”¹⁶⁶ These three elements overlap to a large extent with the three “markers” used by the Eleventh Circuit to ascertain whether the OCGA was a government edict.¹⁶⁷ Neither approach relies exclusively on authorship to determine what is law.

In *Public.Resource.Org*, the Eleventh Circuit’s approach is a less expedient but more practical way of uncovering what is “law,” which both parties agreed cannot be copyrighted.¹⁶⁸ This is because it creates space for the full gambit of law-like works not authored by legislators and judges to be freed from internet paywalls and terms of services and opened to public access so that every citizen may fulfill their duty to know the law.¹⁶⁹ This not only accords with the needs and professional obligations of legal practitioners¹⁷⁰ but also with pro se parties, amateurs, and other professionals

¹⁶⁵ See, e.g., Carol M. Bast & Susan W. Harrell, *Ethical Obligations: Performing Adequate Legal Research and Legal Writing*, 29 NOVA L. REV. 49, 49 (2004) (“Failure to adequately research or write well, or both, is a violation of ethics rules and can result in a reprimand, suspension, or disbarment from the practice of law; a client may decide that it is the basis of a legal malpractice lawsuit.”); Daniel E. Pinnington, *The Biggest Malpractice Risks*, AM. BAR ASS’N (Apr. 2, 2019), https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2011/march/the_biggest_malpractice_claim_risks/ [https://perma.cc/K63L-W9CF] (failing to know or apply substantive law is the most common malpractice error that a lawyer can commit); Sarah Lamdan, *When Westlaw Fuels ICE Surveillance: Legal Ethics in the Era of Big Data Policing*, 43 N.Y.U. REV. L. & SOC. CHANGE 255, 284 (2019) (“Lawyers need computer-assisted legal research to do their jobs, as proper legal research is necessary to avoid malpractice.”).

¹⁶⁶ Street & Hansen, *supra* note 10, at 211.

¹⁶⁷ Code Revision Comm’n for Gen. Assembly of Georgia v. Public.Resource.Org, Inc., 906 F.3d 1229, 1232 (11th Cir. 2018).

¹⁶⁸ Brief for the Petitioners at 2, Georgia v. Public.Resource.Org, Inc., 140 S. Ct. 1498 (2020) (No. 18-1150), 2019 WL 4075096 (“[T]he law itself is not copyrightable.”); Brief of Respondent, *supra* 43, at *1 (“[L]egal works ‘published under the authority of the State are not the proper subject of private copyright.’” (quoting *Callaghan v. Myers*, 128 U.S. 617, 649–50 (1888))).

¹⁶⁹ See *Nash v. Lathrop*, 6 N.E. 559, 560 (1886) (“Every citizen is presumed to know the law thus declared, and it needs no argument to show that justice requires that all should have free access to the opinions, and that it is against sound public policy to prevent this, or to suppress and keep from the earliest knowledge of the public the statutes, or the decisions and opinions of the justices.”).

¹⁷⁰ MODEL RULES OF PRO. CONDUCT, Preamble 6 (AM. BAR ASS’N 1983) (“As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education.”).

striving for legal compliance in their jobs and daily lives.¹⁷¹ Although less “straightforward” than the Court’s “just look to the author” approach, the Eleventh Circuit’s markers are more consistent with the Copyright Act and the Court’s historical approach to determining copyrightability based on the work itself, rather than the work’s author.

C. Implications for Technical Manuals, Standards, Building Codes, and Other Law-Like Materials

While Public.Resource.Org can understandably be pleased with the ruling in its favor, the Roberts opinion may have a limiting (if not fatal) impact on separate pending litigation to which Public.Resource.Org is a party.¹⁷² In *American Society for Testing and Materials (ASTM) v. Public.Resource.Org, Inc.*, private organizations that develop technical standards later incorporated by reference into law sued Public.Resource.Org for copyright and trademark infringement after it distributed those standards on the internet.¹⁷³

Although these standards may be “boring [and] technical,”¹⁷⁴ the fact is that “Federal, state, and local governments . . . have incorporated by reference thousands of these standards into law.”¹⁷⁵ As a result of copyright restrictions, these privately created, nongovernment works are sometimes only accessible at a cost and may not be copied or shared with others.¹⁷⁶ Yet, many of these works carry equal weight to statutes since they have the binding force of law.¹⁷⁷

Through public-private partnerships, hundreds of private SDOs develop technical and industry-specific standards in the United States, many of which are followed by the government at the federal, state, and local level.¹⁷⁸ In fact, federal statute and executive branch policy promote the adoption of these privately authored works into federal laws and

¹⁷¹ See LawResourceOrg, *Show Me the Manual*, YOUTUBE (July 14, 2012), <https://www.youtube.com/watch?v=2tOJdGaMvVw> [https://perma.cc/QCX6-KLT2] [hereinafter *Show Me the Manual*].

¹⁷² *Am. Soc’y for Testing & Materials v. Public.Resource.Org, Inc.*, 896 F.3d 437, 458 (D.C. Cir. 2018) (vacating permanent injunctions against defendant, Public.Resource.Org, Inc., and reversing district court’s denial of summary judgement against defendant’s fair use defense claim under the Copyright Act).

¹⁷³ *Id.* at 444.

¹⁷⁴ *Show Me the Manual*, *supra* note 171.

¹⁷⁵ *Am. Soc’y for Testing & Materials*, 896 F.3d at 440.

¹⁷⁶ *Show Me the Manual*, *supra* note 171.

¹⁷⁷ *Am. Soc’y for Testing & Materials*, 896 F.3d at 440.

¹⁷⁸ *The Scope of Copyright Protection: Hearing Before the Subcomm. on Cts., Intell. Prop. & the Internet of the H. Comm. on the Judiciary*, 113th Cong. 1-2 (2014) (statement of Patricia Griffin, Vice President and General Counsel, American National Standards Institute) [hereinafter Griffin].

regulations.¹⁷⁹ In 1995, Congress passed the National Technology Transfer and Advancement Act which directs “all Federal agencies and departments [to] 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.”¹⁸⁰ As of August 2016, over 24,000 standards were incorporated by reference into the Code of Federal Regulation.¹⁸¹ This represents a 250 percent increase in the number of privately developed standards incorporated by reference over a four year period.¹⁸²

Pursuant to the Freedom of Information Act (FOIA), federal agencies must publish in the Federal Register “substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency.”¹⁸³ This mandate, which serves as a means of public notice—a key requirement under the principle of the rule of law¹⁸⁴—may be achieved when privately authored standards are incorporated by reference.¹⁸⁵ According to the National Archives and Records Administration (NARA), incorporation by reference is “used primarily to make privately developed technical standards Federally enforceable” and has the legal effect of treating the material “as if it were published in the *Federal Register* and [Code of Federal Regulations].”¹⁸⁶

Under implementing regulations, federal agencies must summarize the material to be incorporated by reference in the rulemaking process and “[d]iscuss, in the preamble of the final rule, the ways that the materials it incorporates by reference are reasonably available to interested parties and

¹⁷⁹ *Id.*

¹⁸⁰ National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113, § 12(d)(1), 110 Stat. 775 (1996) (codified at 15 U.S.C. 3701 note); *see also* OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB CIRCULAR NO. A-119, REVISED, FEDERAL PARTICIPATION IN THE DEVELOPMENT AND USE OF VOLUNTARY CONSENSUS STANDARDS AND IN CONFORMITY ASSESSMENT ACTIVITIES (1998) (“All federal agencies must use voluntary consensus standards in lieu of government-unique standards in their procurement and regulatory activities, except where inconsistent with law or otherwise impractical.”) [hereinafter OMB CIRCULAR NO. A-119].

¹⁸¹ NAT’L INST. OF STANDARDS AND TECH., STANDARDS INC. BY REFERENCE DATABASE, <https://sibr.nist.gov/> [<https://perma.cc/6V2A-KUBH>] (“*This database has not been updated since August 16, 2016 and is being provided as a source for historical data.*”).

¹⁸² *Compare id. with* Bremmer, *supra* note 117, at 150.

¹⁸³ Freedom of Information Act, 5 U.S.C. § 552(a)(1)(D) (2021).

¹⁸⁴ *Overview - Rule of Law*, *supra* note 114 (“Rule of law is a principle under which all persons, institutions, and entities are accountable to laws that are: [p]ublicly promulgated . . .”).

¹⁸⁵ 5 U.S.C. § 552(a)(1).

¹⁸⁶ *Code of Federal Regulations Incorporation by Reference*, U.S. NAT’L ARCHIVES AND REC. ADMIN.: FED. REG., (Oct. 10, 2019), <https://www.archives.gov/federal-register/cfr/ibr-locations.html> [<https://perma.cc/H8NA-BA6L>].

how interested parties can obtain the materials.”¹⁸⁷ The term “interested parties” deviates from the statute itself, which directs that matters required to be published in the Federal Register be made “reasonably available to the class of persons affected thereby.”¹⁸⁸ As explained by NARA, which declined to define the term “class of persons,” this subtle change “could be read as an indication that the [material incorporated by reference] must be reasonably available to those who must directly comply with the regulation.”¹⁸⁹ During the rulemaking process, comments were submitted to NARA encouraging the agency to make these materials available to any person, but the agency noted that FOIA makes it “acceptable to have material reasonably available beyond the class of persons affected but it is not required.”¹⁹⁰

The Federal Incorporation by Reference Rule’s reasonable availability requirement represents a balance between U.S. copyright law, U.S. international trade obligations, and agencies’ ability to substantively regulate under their authorizing statutes.¹⁹¹ Although not directly addressed in statutory law, executive branch policy expressly directs federal agencies to “observe and protect the rights of the copyright holder[s]” when a voluntary standard “is used and published in an agency document.”¹⁹² While NARA takes the position that “when the Federal government references copyrighted works, those works should not lose their copyright,”¹⁹³ case law not yet considered by the Supreme Court suggests a more nuanced rule emerging from the lower courts. It is unclear whether the rule pronounced by the Court in *Public.Resource.Org* augments or displaces the lower courts’ incorporation by reference jurisprudence.

In *Building Officials & Code Administration v. Code Technology, Inc.*, the First Circuit considered whether the principle “that judicial opinions and statutes are in the public domain and are not subject to copyright” applied to “state-promulgated administrative regulations which are modelled on a privately developed code.”¹⁹⁴ Building Officials and Code Administration (BOCA), a private SDO, developed building codes which the Commonwealth of Massachusetts adopted into its law, with minor state-specific modifications.¹⁹⁵ After Code Technology, Inc. copied the official code from state sources and redistributed the material, BOCA obtained a

¹⁸⁷ 1 C.F.R. § 51.5(a)(1) (2015).

¹⁸⁸ 5 U.S.C. § 552(a)(1).

¹⁸⁹ Incorporation by Reference, 79 Fed. Reg. 66276 (Nov. 7, 2014).

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² OMB CIRCULAR NO. A-119, *supra* note 180.

¹⁹³ Incorporation by Reference, *supra* note 189.

¹⁹⁴ *Bldg. Officials & Code Adm. v. Code Tech., Inc.*, 628 F.2d 730, 734 (1st Cir. 1980).

¹⁹⁵ *Id.* at 731.

preliminary injunction from a trial court to prevent further distribution of the material.¹⁹⁶ Amid extensive exploration of the government edicts doctrine, the First Circuit reversed, claiming (unconvincingly) that its ruling was not based upon the underlying legal issues.¹⁹⁷

BOCA argued that section 105 of the Copyright Act, which expressly disclaims copyright abridgement by the Federal Government's own publication of copyright material, creates a state analogy whereby "a state's use of copyrighted material cannot affect its copyright protection."¹⁹⁸ The circuit court characterized this argument as a "misunderstanding" of congressional intent.¹⁹⁹ Comparing section 8 of the 1909 copyright statute, which barred "any publication of the United States government" from copyright protection, to section 105 of the new Act, which excludes from copyright protection any "work of the United States government"—a defined term in the statute—the court concluded that Congress had specifically sought to ameliorate the "danger" created by the ambiguity of the 1909 law "that privately written and copyrighted works would lose protection simply by inclusion in a government publication."²⁰⁰ Thus, the court found "section 105 of the Federal Copyright Act, and its predecessor section 8 of the old Act, do not protect BOCA's material against the loss of its copyright protection through adoption as state law."²⁰¹ Critically, the court also distinguished the adoption of copyright material into law "from mere publication by the government."²⁰²

More than a decade after the First Circuit's decision, the Second Circuit considered a fact pattern which it decided was clearly too comparable to a government's mere reference to a work of authorship for such work to be considered an edict of government. In *CCC Information Services, Inc. (CCC) v. Maclean Hunter Market Reports*, Maclean appealed a judgement by a lower court that its *Automobile Red Book—Official Used Car Valuations* (the "Red Book") was uncopyrightable.²⁰³ CCC, the alleged infringer of the work, provided customers with automobile valuations based on the Red Book, which was also used under the laws of several states to calculate minimum insurance payments for the "total loss" of a vehicle.²⁰⁴

¹⁹⁶ *Id.* at 731-32.

¹⁹⁷ *See generally id.* at 732-36. Despite claiming to "leave the door slightly ajar" with respect to the legal merits, the court was unmistakably clear that BOCA's works were government edicts ineligible for copyright protection. *Id.* at 736.

¹⁹⁸ *Id.* at 735.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.* at 736.

²⁰² *Id.* at 735.

²⁰³ *CCC Information Services, Inc. v. Maclean Hunter Market Reports*, 44 F.3d 61, 63 (2d Cir. 1994).

²⁰⁴ *Id.* at 64.

Distinguishing the case before it from *Building Officials & Code Administration*, the Second Circuit reversed the court below and concluded that Maclean had a valid copyright, stating that it was “not prepared to hold that a state’s reference to a copyrighted work as a legal standard for valuation results in loss of the copyright” despite compelling “policy considerations that support CCC’s argument.”²⁰⁵

The Ninth Circuit considered another incorporation by reference from a case in 1997 involving a medical procedure code developed by the American Medical Association (AMA).²⁰⁶ Pursuant to an act of Congress requiring the Health Care Financing Administration (HCFA) to establish a uniform code for identifying physicians’ services for use in completing Medicare and Medicaid claim forms, HCFA contracted with the AMA to use its privately-developed code.²⁰⁷ After the code was incorporated by reference into HCFA rules through the Code of Federal Regulations, Practice Management, a publisher and distributor of medical books, sought declaratory judgement that the AMA authored code lost its copyright protection once incorporated by reference in HCFA regulations.²⁰⁸

Like the First Circuit in *BOCA* and the Second Circuit in *CCC*, the Ninth Circuit was unwilling to abrogate the AMA’s copyright protection due to the mere reference of its code in federal regulations.²⁰⁹ Moreover, the court reasoned that there was no evidence that incorporation by reference limited public access to the AMA’s code²¹⁰ and agreed with the AMA that “invalidating its copyright on the ground that the [code] entered the public domain when HCFA required its use would expose copyrights on a wide range of privately authored model codes, standards, and reference works to invalidation.”²¹¹ This, the court explained, would undermine the purpose of copyright to promote the arts and sciences.²¹²

In a more recent appeals court case, *Veeck v. Southern Building Code Congress, Inc.*, the Fifth Circuit considered “the extent to which a private organization may assert copyright protection for its model codes, after the models have been adopted by a legislative body and become ‘the

²⁰⁵ *Id.* at 74.

²⁰⁶ *Prac. Mgmt. Info. Corp. v. Am. Med. Ass’n*, 121 F.3d 516 (9th Cir. 1997).

²⁰⁷ *Id.* at 517. HCFA is now known as the Centers for Medicare & Medicaid Services (CMS). *HCFA Becomes CMS*, EMERGENCY MED. NEWS (Sept. 2001), https://journals.lww.com/em-news/fulltext/2001/09000/hcfa_becomes_cms.18.aspx#:~:text=The%20Health%20Care%20Financing%20Administration,and%20Medicaid%20Services%20 [https://perma.cc/TSV8-X6ZX].

²⁰⁸ *Prac. Mgmt. Info. Corp.*, 121 F.3d at 518.

²⁰⁹ *See id.* at 519–20.

²¹⁰ *Id.* at 519.

²¹¹ *Id.*

²¹² *Id.* at 518.

law.”²¹³ The controversy arose when Veeck, a private website operator, posted the building codes of two Texas municipalities, which were based on a model code developed by Southern Building Code Congress International, Inc. (SBCCI).²¹⁴

In a split decision, the court determined that “SBCCI is the ‘author’ of model building codes that, qua model building codes, are facially copyright-protected.”²¹⁵ Nevertheless, the court held that “as *law*, the model codes enter the public domain and are not subject to the copyright holder’s exclusive prerogatives.”²¹⁶ The majority explained that under the merger doctrine, the codes became ineligible for copyright protection once the work was incorporated into the cities’ municipal code.²¹⁷ The court distinguished its ruling from other cases based on the important fact that the code in *Veeck* was “promoted by its author, SBCCI, precisely for use as legislation,”²¹⁸ whereas “other voluntary consensus standards are usually ‘created by private groups for reasons other than incorporation into law.’”²¹⁹

According to Emily S. Bremmer, “*Veeck* and related cases show that the scope of copyright protection for privately authored materials used in the law depends upon a variety of factors, including the nature of the material at issue, the purpose for which it was created, and the way the government uses it.”²²⁰ For example, the government’s mere reference to a privately authored work incorporated by reference into law does not automatically invalidate its copyright. On the other hand, wholesale adoption of privately authored works into law may cause it to lose copyright protection as law, especially if the law is binding on the public.²²¹ Furthermore, whether the government participates in the standards development process and whether the SDO promotes the adoption of its works into law are also relevant factors in assessing the copyrightability of the material.

²¹³ 293 F.3d 791, 793 (5th Cir. 2002) (en banc).

²¹⁴ *Id.* at 801.

²¹⁵ *Id.* at 800.

²¹⁶ *Id.* at 793 (emphasis in original).

²¹⁷ *Id.* at 801–02. “If an idea is susceptible to only one form of expression, the merger doctrine applies and § 102(b) excludes the expression from the Copyright Act. As the Supreme Court has explained it, this ‘idea/expression dichotomy strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author’s expression.’” *Id.* at 801 (quoting *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 556 (1985)).

²¹⁸ *Id.* at 804 (citing *CCC Info. Services v. Maclean Hunter Market Reports, Inc.*, 44 F.3d 61 (2nd Cir.1994); *Practice Management Info. Corp. v. American Medical Ass’n*, 121 F.3d 516 (9th Cir. 1997), *opinion amended by* 133 F.3d 1140 (9th Cir. 1998)).

²¹⁹ Bremmer, *supra* note 117, at 169 (quoting *Veeck*, 293 F.3d at 804–05).

²²⁰ *Id.*

²²¹ *See id.*

Considering Public.Resource.Org's mission and history, it is not surprising that it, too, is involved in a dispute over the copyrightability of privately authored standards incorporated by reference into law. In *ASTM*, Malamud's organization was sued by six SDOs for publishing hundreds of their privately-authored standards on the internet.²²² The trial court granted partial summary judgement in favor of the SDOs and issued injunctions to prevent Public.Resource.Org from redistributing the works.²²³ On appeal, the D.C. Circuit reversed and remanded, finding that the lower court did not properly consider Public.Resource.Org's fair use defense, "and le[ff] for another day the question of whether the Constitution permits copyright to persist in works incorporated by reference into law."²²⁴

Although the court of appeals did not reach a conclusion on the merits of Public.Resource.Org's claim that the SDO's standards were uncopyrightable, the court considered the various jurisdictional processes by which works are incorporated by reference into law and also the varying legal consequences of incorporation.²²⁵ Depicting the process and its consequences as a spectrum, the court found that "[a]t one end of this spectrum lie incorporated standards that define one's legal obligations . . . except that the specific legal requirements are found outside the two covers of the codebook."²²⁶ On "the other end of the spectrum lie standards that serve as mere references but have no direct legal effect on any private party's conduct."²²⁷ This analysis gives a subtle nod to the reasoning used by circuit courts in other incorporation by reference cases, including *BOCA*, *CCC*, and *Veck*. Also, like the Eleventh Circuit's ruling in *Public.Resource.Org*, it makes for at least the fourth circuit court to evaluate the copyrightability of law and law-like works in terms of the process of its creation and its authoritativeness or binding effect.²²⁸ This is in stark contrast to the Supreme Court's approach of determining copyright protection based solely on the identity of the author.

Public.Resource.Org's victory at the Supreme Court may come at the expense of losing this separate but related legal fight. Had the majority in *Public.Resource.Org* adopted the "three marker" test used by the Eleventh Circuit, Public.Resource.Org might be on stronger footing in its campaign to free technical standards carrying the force of law from copyright restrictions. In fact, many organizations that filed briefs in support of

²²² *Am. Soc'y for Testing and Materials v. Public.Resource.Org, Inc.* 896 F.3d 437 (D.C. Cir. 2018).

²²³ *Id.* at 440.

²²⁴ *Id.* at 447.

²²⁵ *Id.* at 441-42.

²²⁶ *Id.* at 442-43.

²²⁷ *Id.* at 443.

²²⁸ *See generally id.*

Georgia²²⁹ out of concern that the Court might adopt a broader rule sweeping in these legal materials should be pleased that the majority's opinion may have put those materials entirely out of scope of the government edicts doctrine before ever hearing a case on the matter. This is so because privately authored works adopted by reference into legislative enactments only satisfy one of the Court's two requirements under the rule adopted by the majority in *Public.Resource.Org*.²³⁰ Here, again, "authorship" is the critical factor. Because organizations like the American Society for Testing and Materials are not legislators or judges, the rule adopted in *Public.Resource.Org* would likely preclude the government edicts doctrine from applying to their works of authorship once incorporated into administrative regulations.

Assuming that these types of works retain copyright protection and do not fall under the government edicts doctrine, there are two likely ways to open access to this information. Legislatures could enact these standards in their entirety (as opposed to adoption by reference), in which case they would likely lose their copyright protection. Alternatively, parties could assert a fair use defense. Both approaches have drawbacks.

Prior to the Court's decision in *Public.Resource.Org*, Malamud confidently argued that "even if the law is created by a private party, once it is enacted as the law of the land, anybody can make copies."²³¹ The *Public.Resource.Org* Court's decision proves Malamud wrong.²³² Government copying of privately authored original work—even when adopted into law—would likely constitute a "taking" of private property for public use under the Takings Clause of the Constitution, which would require the government to pay just compensation.²³³ Some argue that this

²²⁹ See, e.g., Brief for American Society for Testing and Materials d/b/a/ ASTM International ("ASTM") as Amici Curiae Supporting Petitioner, *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498 (2020) (No. 18-1150), 2019 WL 4192161; Brief for International Code Council, Inc. and the American Gas Association as Amici Curiae Supporting Petitioner, *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498 (2020) (No. 18-1150), 2019 WL 4235528 [hereinafter Amicus Brief for Int'l Code Council & Am. Gas Ass'n].

²³⁰ See *Public.Resource.Org*, 140 S Ct. at 1508.

²³¹ Carl Malamud, *Three Revolutions in American Law*, PUBLIC.RESOURCE.ORG (Oct. 22-23, 2009) ("A good example of this are our public safety codes: the building codes, fire codes, electrical, plumbing, boiler, fuel & gas, and the other codes that govern our daily lives.").

²³² See *Public.Resource.Org, Inc.*, 140 S. Ct. at 1506 (holding that the government edicts doctrine "does not apply . . . to works created by government officials (or private parties) who lack the authority to make or interpret the law . . .").

²³³ U.S. CONST. amend V. Prior to the adoption of the Fourteenth Amendment, the Supreme Court held that the Bill of Rights did not apply to the states. *Barron v. Baltimore*, 32 U.S. 243, 250-51 (1833). However, under the incorporation doctrine, portions of the first ten amendments to the Constitution are applicable to the states through the Equal Protection Clause of the Fourteenth Amendment. In the late 19th Century, the Court ruled that when "private property is taken for the state or under its direction for public use, without

would undermine the purpose of copyright altogether because it would create a disincentive for standards-setting bodies and other private parties from developing model codes for which they have a “unique” and specialized expertise to “develop very technical areas of the law,” like fire and building safety.²³⁴ However, others have 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.”²³⁵ The Copyright Act itself states:

When an individual author’s ownership of 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 of ownership with respect to the copyright, or any of the exclusive rights under a copyright, shall be given effect.²³⁶

Although “[t]here is no strict formula assessing a Takings Clause claim,”²³⁷ the Supreme Court has identified (1) “[t]he economic impact of the regulation on the claimant,” (2) “the extent to which the regulation has interfered with distinct investment-backed expectations,” and (3) “the character of the governmental action” as “several factors that have particular significance.”²³⁸ The *Veeck* court found neither a Copyright Act nor a Taking Clause violation “because SBCCI urged localities to adopt its model codes.”²³⁹ Thus, the issue in cases involving governmental adoption of model codes “is not the voluntariness of the appropriation but the legal consequences flowing from the permission” that SBCCI gave.²⁴⁰

compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the fourteenth amendment of the constitution of the United States.” *Chicago, Burlington & Quincy R.R. Co. v. City of Chi.*, 166 U.S. 226, 241 (1897). As recently observed by a unanimous Court, “[c]opyrights are a form of property.” *Allen v. Cooper*, 140 S. Ct. 994, 1004 (2020) (citing *Fox Film Corp. v. Doyal*, 286 U.S. 123, 128 (1932)).

²³⁴ American University Washington College of Law, Program on Information Justice and Intellectual Property, *IP at the Supreme Court Series: Georgia v. Public.Resource.Org, Inc.*, YOUTUBE (Dec. 2, 2019), <https://www.youtube.com/watch?v=Ocposl6qZE&feature=youtu.be> [https://perma.cc/8HXF-DE7D] (comment by panelist Amy Chai).

²³⁵ Amicus Brief for Int’l Code Council & Am. Gas Ass’n, *supra* note 229, at 15 (citing *Veeck v. S. Bldg. Code Cong. Int’l, Inc.* 293 F.3d 791, 803 (5th Cir. 2002) (en banc)).

²³⁶ 17 U.S.C. § 201(e). This section of the Copyright Act applies narrowly to copyrights owned by individuals, rather than SDOs.

²³⁷ *Int’l Code Council, Inc. v. UpCodes, Inc.*, No. 1:17-CV-06261, 2020 WL 2750636, at *13 (S.D.N.Y. May 27, 2020).

²³⁸ *Penn. Ct. Trans. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

²³⁹ *Veeck*, 293 F.3d at 803.

²⁴⁰ *Int’l Code Council, Inc.*, No. 1:17-CV-06261, 2020 WL 2750636, at *14 (quoting *Veeck*, 293 F.3d at 794, 803).

Regardless, this debate may be purely academic because of the Supreme Court's ruling in *Allen v. Cooper*; another copyright case decided a month before *Public.Resource.Org*. In that case, the Court held that an act of Congress abrogating states' immunity from copyright infringement suits was unconstitutional, despite the legislature's clear language.²⁴¹ The ruling therefore calls into question what effective remedy a SDO would have against government copying of protected works of original authorship into state statutes and regulation. Although private persons could still seek injunctive relief against a state for copyright infringement, it is hard to imagine the judicial branch interfering with a state legislature's ability to make laws.²⁴² Based on the Court's reasoning in *Allen*,²⁴³ it appears likely that Congress would have to identify a pattern of states infringing on copyrights through state laws and provide for a narrow cause of action against the states tailored toward such behavior in order to pass muster under the Fourteenth Amendment.

Alternatively, these standards could be copied without constituting infringement under the fair use doctrine,²⁴⁴ "which permits unauthorized copying in some circumstances, so as to further copyright's very purpose, '[t]o promote the Progress of Science and useful Arts.'"²⁴⁵ However, as the Roberts opinion notes in *Public.Resource.Org*, "that defense, designed to accommodate First Amendment concerns, is notoriously fact sensitive and often cannot be resolved without a trial."²⁴⁶ This is because the application of the fair use doctrine depends on the use of a multifactor test that weighs all factors in light of the circumstances.²⁴⁷

²⁴¹ *Allen v. Cooper*, 140 S. Ct. 994, 1007 (2020) ("[T]he balance the [Copyright Clarification Remedy Act] strike[s] between constitutional wrong and statutory remedy is . . . askew" under the Court's "congruence and proportionality" test for determining whether a state's sovereign immunity can be overcome by proper congressional enforcement of the Fourteenth Amendment's Equal Protection Clause).

²⁴² In response to a request from members of the House Judiciary Committee, the United States Register for Copyrights reported to Congress that "injunctive relief, which would be the only remedy available in copyright infringement cases against states if states have Eleventh Amendment immunity, is inadequate as a deterrence to copyright infringement." H.R. REP. NO. 101-282, at 3 (1989) (quoting REGISTER OF COPYRIGHTS, COPYRIGHT LIABILITY OF STATES iv (1988)).

²⁴³ 140 S. Ct. at 1003-07.

²⁴⁴ 17 U.S.C. § 107.

²⁴⁵ *Campbell v. Acuff-Rose Music, Inc.* 510 U.S. 569, 575 (1994) (quoting U.S. CONST., art. I, § 8, cl. 8).

²⁴⁶ *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1513 (2020) (citing *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 552 (1985)).

²⁴⁷ *See, e.g., Authors Guild v. Google, Inc.* 804 F.3d 202, 213-14 (2d Cir. 2015) ("The statute 'calls for case-by-case analysis'" and recognizing that "some of the statute's four listed [fair use] factors are more significant than others.") (quoting *Campbell*, 510 U.S. at 577).

In *ASTM*, the D.C. Circuit considered three factors relevant to a fair use analysis in the context of works incorporated by reference into law. First, where an SDO makes copies of its standards online in a “controlled reading room,” how much additional harm does the alleged infringer cause to the market of such standards?²⁴⁸ Second, “wholesale copying may be unjustified if a law incorporates by reference only a few select provisions of a much longer standard.”²⁴⁹ And finally, “how, if at all, does the infringement affect the market for derivative works, particularly considering that the standards are regularly updated and that the private parties most interested in the standards would presumably remain interested in having the most up-to-date ones?”²⁵⁰

At least one incorporation by reference case decided a month after the Supreme Court’s decision in *Public.Resource.Org* analyzed an SDO’s copyright infringement claim using several guideposts beyond mere authorship, suggesting that the Court’s ruling may not go so far as to occupy the incorporation by reference field as the author of this Paper believes it might. In *International Code Council, Inc. v. UpCodes, Inc.*, the Southern District of New York considered a copyright infringement claim by the International Code Council (ICC), a SDO founded by three predecessor SDOs which merged in 1994, including SBCCI, against a web-based startup that provides “easy and convenient access to materials of particular importance to members of the architecture, engineering, and construction (‘AEC’) industries.”²⁵¹

Like in *Veeck*, the ICC produced model codes which were adopted into law through a multi-step process which “involves significant participation by government representatives, who compose at least one-third of each committee and vote on important decisions regarding changes to the model codes.”²⁵² On cross-motions for summary judgement, the trial court considered the relevant case law, including the *Public.Resource.Org* and *Veeck* decisions, from which it summarized five “guideposts to assess whether notice of the purported copyrighted work is needed for a person to have notice of ‘the law,’” including:

- (1) whether the private author intended or encouraged the work’s adoption into law;
- (2) whether the work comprehensively governs public conduct, such that it resembles a ‘law of general applicability’;
- (3) whether the

²⁴⁸ *Am. Soc’y for Testing and Materials v. Public.Resource.Org, Inc.* 896 F.3d 437, 453 (D.C. Cir. 2018).

²⁴⁹ *Id.*

²⁵⁰ *Int’l Code Council, Inc. v. UpCodes, Inc.*, No. 1:17-CV-06261, 2020 WL 2750636, at *27 (S.D.N.Y. May 27, 2020) (citing *Am. Soc’y for Testing & Materials*, 896 F.3d at 453).

²⁵¹ *Id.* at *3.

²⁵² *Id.* at *2.

work expressly regulates a broad area of private endeavor; (4) whether the work provides penalties or sanctions for violation of its contents; and (5) whether the alleged infringer has published and identified the work as part of the law, rather than the copyrighted material underlying the law.²⁵³

It is curious why the district court did not end its analysis by concluding that the works are protected by copyright since they were simply developed by a private party. Rather than limiting its analysis to the Supreme Court's holding in *Public.Resource.Org* that the government edicts doctrine "does not apply . . . to works created by government officials (or *private parties*) who lack the authority to make or interpret the law,"²⁵⁴ the court thought it significant that "these laws incorporate significant amounts of material authored by a private entity rather than by government officials empowered to speak with the force of law," and therefore presented "an unusual fact pattern that the author-focused Government Edicts doctrine does not directly address."²⁵⁵ Instead, the court was guided by the "animating principle" articulated in *Public.Resource.Org* that "no one can own the law"²⁵⁶ and may have been persuaded that the fact pattern before it was more like *BOCA*, *CCC*, and *Veck*. This led it to conclude that the work was uncopyrightable because it was more than merely referenced into law and because the process by which the standards were created involved government officials.²⁵⁷ In other words, the multifactor approach taken by the Eleventh Circuit may have felt to the district court like a more complete and satisfying analysis through which to frame its decision than the Supreme Court's author-only reasoning.

Regardless of how the *UpCode* case proceeds, a key consideration for SDOs following *Public.Resource.Org* is whether and to what extent government officials are involved in the standards-development process. In testimony before Congress, the representative of one SDO membership organization touted that "federal, state, and local governments are active partners in the development of standards and codes."²⁵⁸ At least in part, this is because federal law and White House policy not only encourage but, in fact, mandate participation²⁵⁹ of federal agency officials in the development

²⁵³ *Id.* at *16.

²⁵⁴ *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1507 (2020) (emphasis added).

²⁵⁵ *UpCodes, Inc.*, No. 1:17-CV-06261, 2020 WL 2750636, at *8.

²⁵⁶ *Id.* (quoting *Public.Resource.Org*, 140 S. Ct. at 1507).

²⁵⁷ *Id.* at *10–13.

²⁵⁸ Griffin, *supra* note 178.

²⁵⁹ "Federal agencies and departments shall consult with voluntary, private sector, consensus standards bodies and shall, when such participation is in the public interest and is compatible with agency and departmental missions, authorities, priorities, and budget resources, participate with such bodies in the development of technical standards." National

of voluntary standards “when consultation and participation is in the public interest and is compatible with their missions, authorities, priorities, and budget resources.”²⁶⁰

Despite federal encouragement, under the Supreme Court’s holding in *Public.Resource.Org*, the greater the participation of government officials, the more likely the work would be considered uncopyrightable based on the identity of the author.²⁶¹ This was observed by the court in *UpCode*, which noted with particularity the fact that nearly one-third of the ICC’s committees were comprised of government representatives who also wielded votes on important decisions about the development of the codes.²⁶² While it remains to be seen whether and to what extent the level or amount of participation by government officials in the development of standards incorporated by reference into law is material to analyzing whether the standards are a work of authorship by the government, it is possible that either the Copyright Act²⁶³ or recent case law could be used to conclude that too much government involvement would render the material uncopyrightable. In the alternative, a strict reading of the Court’s holding limits the scope of the doctrine to judges and legislators, which would leave administrative law promulgated by regulators out of scope.

Had the Eleventh Circuit’s approach to the government edicts doctrine been upheld by the Supreme Court, there is a greater likelihood that other privately authored materials carrying the force of law might lose copyright protection. Without relying on authorship alone, courts would be free to conclude that the binding effect or authoritativeness of a privately authored work bears a close enough resemblance to traditional notions of law to be edicts of government. Instead, under a strict reading of the Court’s ruling, many privately authored standards incorporated by reference into law will retain their copyright protection unless the Court’s ruling supplements rather than supersedes the circuit courts’ incorporation by

Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113, § 11(d)(2), 110 Stat. 775 (1996) (codified at 15 U.S.C. § 3701).

²⁶⁰ OMB CIRCULAR NO. A-119, *supra* note 180; *see also* SUBCOMMITTEE ON STANDARDS, NAT’L SCI. & TECH. COUNCIL, EXEC. OFF. OF THE PRESIDENT, *Federal Engagement in Standards Activities to Address National Priorities: Background and Proposed Recommendations* (Oct. 10, 2011) (“Agencies should consider participating in standard-setting activities in order to maintain awareness of emerging revisions.”).

²⁶¹ At a minimum, the Court’s ruling in *Public.Resource.Org* covers judges and legislators. It appears likely that other government officials in administrative agencies, for example, could also be covered based on the First Circuit’s decision in *BOCA*.

²⁶² *Int’l Code Council, Inc. v. UpCodes, Inc.*, No. 1:17-CV-06261, 2020 WL 2750636, at *2 (S.D.N.Y. May 27, 2020).

²⁶³ *See* 17 U.S.C. § 105 (excluding works of the United States Government from copyright protection). This restriction under the Copyright Act is not applicable to state or local government officials.

reference jurisprudence. By not addressing this directly, the Court leaves unresolved the future of public access to these law-like materials.

IV. CONCLUSION

The U.S. Supreme Court's expansion of the government edicts doctrine in *Public.Resource.Org* should reassure those who believe that no one can own the law. The majority appropriately decided that all works authored by legislators and judges acting in their official capacity are not copyrightable. This is a victory for open access to the law and will hopefully encourage states and other jurisdictions with the power to enact laws to make government edicts and "law-like" materials recognized under their laws widely available. This could promote greater citizen understanding of the law and a more learned society.

Despite the generally positive result of *Public.Resource.Org*, the Supreme Court only partially moved the needle for those who would like to promote greater access to the law and other legal materials. The Eleventh Circuit's "three marker" test for determining whether a work is sufficiently law-like to lose copyright protection was more in line with the Copyright Act and offered advocates for open access to the "raw materials" of the law a better chance at furthering pending cases that would break down legal barriers to the law.

By looking at the author alone to determine whether a work is a government edict, the diverse group of Justices that sided with *Public.Resource.Org* overemphasized one element of the Copyright Act to the exclusion of others. The full impact of their ruling will not be known for some time, but it may give comfort to technical standards-setting bodies and other private groups that copyright works later incorporated into law. Unfortunately for *Public.Resource.Org* and other advocates for open access to the law, the Roberts opinion might be construed as leaving those works out of scope of the government edicts doctrine.