

No.

In the Supreme Court of the United States

CANADIAN STANDARDS ASSOCIATION, PETITIONER

v.

P.S. KNIGHT COMPANY, LTD., ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

PETITION FOR A WRIT OF CERTIORARI

MICHAEL A. PARKS
KATHERINE E. COLVIN
ALEX D. WEIDNER
THOMPSON COBURN LLP
*55 East Monroe Street
Chicago, IL 60603*

WARREN DEAN, JR.
KATHLEEN KRAFT
THOMPSON COBURN LLP
*1909 K Street, N.W.,
Suite 600
Washington, DC 20006*

KANNON K. SHANMUGAM
Counsel of Record
MATTEO GODI
MIKAELA MILLIGAN*
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
*2001 K Street, N.W.
Washington, DC 20006
(202) 223-7300
kshanmugam@paulweiss.com*

* Admitted in Texas and practicing law in the District of Columbia pending application for admission to the D.C. Bar under the supervision of bar members pursuant to D.C. Court of Appeals Rule 49(c)(8).

QUESTION PRESENTED

Whether the government-edicts and merger doctrines strip concededly copyrighted and copyrightable works of protection under the Copyright Act merely because those works have been subsequently incorporated by reference into law.

**PARTIES TO THE PROCEEDING
AND CORPORATE DISCLOSURE STATEMENT**

Petitioner Canadian Standards Association has no parent corporation, and no publicly held company holds 10% or more of its stock.

Respondents are P.S. Knight Company, Ltd.; PS Knight Americas, Inc.; and Gordon Knight.

RELATED PROCEEDINGS

United States District Court (W.D. Tex.):

*Canadian Standards Association v. P.S. Knight Co.,
Ltd.*, Civ. No. 20-1160 (Jan. 4, 2023)

United States Court of Appeals (5th Cir.):

*Canadian Standards Association v. P.S. Knight Co.,
Ltd.*, No. 23-50081 (Aug. 9, 2024)

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statutory provisions involved	2
Statement	2
A. Background	4
B. Facts and procedural history	7
Reasons for granting the petition	13
A. The decision below is irreconcilable with this Court's precedents and implicates an existing circuit conflict	14
B. The decision below is erroneous.....	20
C. The question presented is exceptionally important and warrants the Court's review in this case	25
Conclusion	28
Appendix.....	1a

TABLE OF AUTHORITIES

Cases:

<i>American Society for Testing and Materials</i> <i>v. Public.Resource.Org, Inc.</i> , 896 F.3d 437 (11th Cir. 2018)	22, 23
<i>Baker v. Selden</i> , 101 U.S. (11 Otto) 99 (1880).....	5
<i>Banks v. Manchester</i> , 128 U.S. 244 (1888)	17, 22
<i>Benz v. Compania Naviera Hidalgo, S.A.</i> , 353 U.S. 138 (1957).....	26
<i>Callaghan v. Myers</i> , 128 U.S. 617 (1888).....	17
<i>Campbell v. Acuff-Rose Music, Inc.</i> , 510 U.S. 569 (1994).....	6
<i>Community for Creative Non-Violence v. Reid</i> , 490 U.S. 730 (1989).....	23

IV

	Page
Cases—continued:	
<i>Enterprise Management Ltd. v. Warrick</i> , 717 F.3d 1112 (10th Cir. 2013)	5
<i>Feist Publications, Inc. v. Rural Telephone Service Co.</i> , 499 U.S. 340 (1991).....	4, 5, 18
<i>Georgia v. Public.Resource.Org, Inc.</i> , 590 U.S. 255 (2020).....	3-5, 12, 16-20, 22, 23
<i>Golan v. Holder</i> , 565 U.S. 302 (2012)	6, 26
<i>Google LLC v. Oracle America, Inc.</i> , 593 U.S. 1 (2021).....	18
<i>International News Service v. Associated Press</i> , 248 U.S. 215 (1918).....	23, 24
<i>Itar-Tass Russian News Agency v. Russian Kurier, Inc.</i> , 153 F.3d 82 (2d Cir. 1998).....	6
<i>Oracle America, Inc. v. Google Inc.</i> , 750 F.3d 1339 (2014), cert. denied, 576 U.S. 1071 (2015).....	18, 19, 20
<i>Practice Management Information Corp. v. American Medical Association</i> , 525 U.S. 810 (Aug. 7, 1998).....	22
<i>Veeck v. Southern Building Code Congress International, Inc.</i> , 293 F.3d 791 (5th Cir. 2002), cert. denied, 539 U.S. 969 (2003)	11, 12, 14-18 22, 25, 27
<i>Wheaton v. Peters</i> , 33 U.S. (8 Pet.) 591 (1834)	17
<i>Zalewski v. Cicero Builder Development, Inc.</i> , 754 F.3d 95 (2d Cir. 2014).....	5
Statutes:	
15 U.S.C. 278h-1(c).....	24
15 U.S.C. 4303(a)	25
Copyright Act of 1976, 17 U.S.C. 101-1511:	
17 U.S.C. 102(a).....	4, 5, 20
17 U.S.C. 102(b).....	5, 20
17 U.S.C. 104(b).....	7
17 U.S.C. 105(a).....	21
17 U.S.C. 106	4

	Page
Statutes—continued:	
17 U.S.C. 107	6, 23
17 U.S.C. 201(a).....	4
17 U.S.C. 201(d).....	4
17 U.S.C. 201(e).....	21
17 U.S.C. 302(a).....	4, 20
17 U.S.C. 501(a).....	4
17 U.S.C. 502.....	4
17 U.S.C. 503.....	4
17 U.S.C. 504.....	4
17 U.S.C. 505.....	4
17 U.S.C. 506.....	4
National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113, 110 Stat. 775.....	21
Miscellaneous:	
Emily S. Bremer, <i>On the Cost of Private Standards in Public Law</i> , 63 U. Kan. L. Rev. 279 (2015).....	25, 26
63 Fed. Reg. 8545 (Feb. 19, 1998).....	21
H.R. Rep. No. 1476, 94th Cong., 2d Sess. 123 (1976).....	21
Cameron F. Kerry, <i>Small Yards, Big Tents: How To Build Cooperation on Critical International Standards</i> (2024) <tinyurl.com/BrookingsStandardsReport>	26
National Security Agency & Cybersecurity and Infrastructure Security Agency, <i>Enduring Security Framework, Recommendations For Increasing U.S. Participation & Leadership In Standards Development</i> (June 2024) <tinyurl.com/NSACISAWHITEPAPER>	25
World Intellectual Property Organization, Berne Convention (last accessed Nov. 12, 2024) <tinyurl.com/BerneMembers>	25

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Canadian Standards Association respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-20a) is reported at 112 F.4th 298. The superseded opinion of the court of appeals is reported at 108 F.4th 329. The opinion of the district court (App., *infra*, 21a-54a) is reported at 649 F. Supp. 3d 334.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 2024. A petition for rehearing was denied on August 14, 2024 (App., *infra*, 55a-56a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in an appendix to this brief. See App., *infra*, 57a-59a.

STATEMENT

In this case, the court of appeals ignored the text of the Copyright Act and held that a copyright infringer may freely profit from the unauthorized sale of copies of copyrighted works created by a private entity, simply because those works were subsequently incorporated by reference into law. The question presented is whether the government-edicts and merger doctrines strip those copyrighted works of protection under the Copyright Act.

Petitioner is a nonprofit standards-development organization based in Canada. Respondents, a Canadian individual named Gordon Knight and two corporate entities he controls, are in the business of profiting from the sale of copies of petitioner's copyrighted works without its permission. Petitioner has Canadian copyrights in various technical standards and codes, some of which were later incorporated by reference into Canadian statutes and regulations. For years, Knight has profited from reproducing and selling unauthorized copies of petitioner's copyrighted standards to Canadian customers at discounted rates. And after a Canadian court enjoined Knight's infringement of petitioner's copyrights, Knight traveled to the United States in order to resume profiting off petitioner's works. Perhaps not surprisingly, the Canadian

court then held Knight in contempt for trying to circumvent its order.

Seeking further to enforce its copyrights, petitioner brought suit against respondents for copyright infringement in the United States. The district court granted summary judgment to petitioner on the ground that respondents had infringed its copyrights in violation of the Copyright Act. Over a dissent, however, the court of appeals reversed. Invoking its splintered en banc decision in an earlier case, the court of appeals relied on two judge-made doctrines: the government-edicts doctrine and the merger doctrine. Applying those doctrines, the court of appeals held that the district court could not enjoin Knight from selling commercialized copies of petitioner’s copyrighted standards because the standards, through incorporation by reference, had gained the force of law in certain jurisdictions.

The court of appeals’ decision conflicts with this Court’s precedent and implicates a circuit conflict over which the Solicitor General has already sided with petitioner. Under *Georgia v. Public.Resource.Org, Inc.*, 590 U.S. 255 (2020), the government-edicts doctrine focuses on whether the “authors” of the relevant work are empowered to speak with the force of law, not whether that work has (or later indirectly gains) the force of law. That doctrine cannot strip concededly copyrightable works authored by private entities of copyright protection. And because this Court clarified that whether a work constitutes “the law” is irrelevant to whether it is copyrightable, the merger doctrine—which is a creature of Section 102(b)’s prohibition on copyrighting facts or ideas—does not vitiate the copyrightability of a work simply because the work has subsequently been incorporated by reference into some jurisdiction’s law. In addition, the court of appeals’ decision reinforces an existing circuit conflict by

focusing the merger analysis on the time the work is copied, rather than the time the work is authored.

The court of appeals' decision has serious ramifications. It impairs the ability of private standards organizations to develop and update their materials. And it raises significant foreign-relations concerns by allowing foreign nationals to circumvent the copyright laws of countries that are signatories to the Berne Convention for the Protection of Literary and Artistic Works. This case is an ideal vehicle for this Court to provide guidance as to the effects of incorporation by reference into law on concededly copyrighted and copyrightable works. The petition for a writ of certiorari should be granted.

A. Background

1. Under the Copyright Act, “[c]opyright protection subsists * * * in original works of authorship.” 17 U.S.C. 102(a). That protection is “both instant and automatic,” vesting “as soon as a work is captured in a tangible form.” *Georgia*, 590 U.S. at 275. A copyright “vests initially in the author or authors of the work,” but may subsequently be transferred in whole or in part. 17 U.S.C. 201(a), (d). Once copyright protection attaches, it “endures for a term consisting of the life of the author and 70 years after the author’s death.” 17 U.S.C. 302(a). A valid copyright confers certain “exclusive rights,” including the rights to “reproduce the copyrighted work” and to “prepare derivative works based upon the copyrighted work.” 17 U.S.C. 106. Under the Act, “[a]nyone who violates any of the exclusive rights of the copyright owner * * * is an infringer of the copyright,” 17 U.S.C. 501(a), and is subject to civil and criminal sanctions, see 17 U.S.C. 502-506. To prove copyright infringement, a plaintiff must show “(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.” *Feist*

Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340, 361 (1991).

2. This case involves the intersection of three copyright doctrines: the government-edicts doctrine, the merger doctrine, and the fair-use doctrine.

The government-edicts doctrine creates a limit on the identity of the “authors” whose work may be copyrighted under the Act. See 17 U.S.C. 102(a). Any government officials “empowered to speak with the force of law cannot be the authors of—and therefore cannot copyright—the works they create in the course of their official duties.” *Georgia*, 590 U.S. at 259. In other words, copyrightability does not depend on “whether a given material carries the force of law,” but instead on the identity of the author. *Id.* at 263.

The merger doctrine limits which kind of expressive “works” may be copyrighted. As relevant here, the Act provides that copyright protection does not “extend to any idea.” 17 U.S.C. 102(b); see *Baker v. Selden*, 101 U.S. (11 Otto) 99 (1880). The same is true of facts: “The first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence.” *Feist*, 499 U.S. at 347. Under the merger doctrine, if an idea or fact “can only be expressed in a limited number of ways,” *Zalewski v. Cicero Builder Development, Inc.*, 754 F.3d 95, 102-103 (2d Cir. 2014), the idea or fact is said to “merge” with the expression, and the expression cannot enjoy protection under the Act, so as to avoid “giving the author a monopoly” over the underlying idea or fact. *Enterprise Management Ltd. v. Warrick*, 717 F.3d 1112, 1117 (10th Cir. 2013).

Finally for present purposes, the “rights” of the copyright owner are subject to various further limitations. One of the most familiar limitations is the “fair use” doctrine, a “judge-made doctrine” that Congress has since

codified (at 17 U.S.C. 107). *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 576-577 (1994). The fair-use doctrine addresses “the inherent tension in the need simultaneously to protect copyrighted material and to allow others to build upon it.” *Id.* at 575. It permits certain uses of a copyrighted work when imposing liability for infringement would “stifle the very creativity which [copyright] law is designed to foster.” *Id.* at 577 (citation omitted). Section 107 identifies a non-exclusive list of factors that are relevant to whether a particular use of a copyrighted work constitutes fair use: (1) “the purpose and character of the use”; (2) “the nature of the copyrighted work”; (3) “the amount and substantiality of the portion used in relation to the copyrighted work as a whole”; and (4) “the effect of the use upon the potential market for or value of the copyrighted work.” 17 U.S.C. 107.

2. The Berne Convention for the Protection of Literary and Artistic Works took effect in 1886 and is “the principal accord governing international copyright relations.” *Golan v. Holder*, 565 U.S. 302, 306-307 (2012). The United States has been a party to the Convention since 1989; Canada joined in 1928. App., *infra*, 31a n.6; see World Intellectual Property Organization, Berne Convention (last accessed Nov. 12, 2024) <tinyurl.com/BerneMembers>. Under the Berne Convention, a copyrighted work “must be protected abroad unless its copyright term has expired.” *Golan*, 565 U.S. at 308. When determining whether an author holding a valid copyright from a Berne Convention signatory is entitled to relief under American copyright law, courts apply foreign law to “determine[] the ownership and essential nature of the copyrights alleged to have been infringed,” but they apply domestic law to “determine[] whether those copyrights have been infringed in the United States and, if so, what remedies are available.” *Itar-Tass Russian News Agency v. Russian*

Kurier, Inc., 153 F.3d 82, 84 (2d Cir. 1998); see 17 U.S.C. 104(b).

B. Facts And Procedural History

1. a. Petitioner Canadian Standards Association has developed more than 3,000 voluntary standards in Canada. Those standards, such as the Canadian Electrical Code, are copyrighted under Canadian law. Petitioner published the first version of its Canadian Electrical Code in 1927 and has published revised versions ever since. Petitioner primarily sells its extrinsic standards to relevant tradespeople in Canada. Over the years, around 40% of petitioner's standards have been incorporated by reference into statutes and regulations at the federal, provincial, and territorial level. No government in Canada is obligated to incorporate any of petitioner's standards by reference. Moreover, those standards, when drafted by petitioner, do not have the force of law. App., *infra*, 2a, 14a; C.A. App. 2366-2367; D. Ct. Dkt. 63-1, at 372, 380.

This case involves seven of petitioner's standards that have been incorporated into Canadian law: the Canadian Electrical Code (2015, 2018, and 2021 versions); the Propane Storage and Handling Code (2015 and 2020 versions); and the Oil and Gas Pipeline Systems Code (2015 and 2019 versions). The relevant statutes and regulations do not enact the actual text of those extrinsic standards into law; instead, they incorporate the standards by reference. For example, one regulation states that "CSA Standard B149.1-15, *Natural gas and propane installation code*, published in August 2015 by the Canadian Standards Association, is declared in force as amended or replaced from time to time." App., *infra*, 2a-3a & n.1; see D. Ct. Dkt. 63-2, at 4.

b. Respondent Gordon Knight is the president and sole shareholder of respondent P.S. Knight Company,

Ltd., a Canadian company that publishes books. He is also the sole corporate director of respondent P.S. Knight Americas, Inc., an American company. Presently, respondents are in the business of profiting from selling unauthorized copies of petitioner's copyrighted works, including the seven standards at issue in this case. App., *infra*, 3a.

2. In 1985, Gordon Knight's father, Peter, published the first "Electrical Code Simplified" book, a version of petitioner's Canadian Electrical Code intended for residential applications. Initially, the book included references to petitioner's standards, and petitioner even attempted to negotiate an acquisition. But in the years before and after Gordon Knight assumed control of the business from his father, petitioner repeatedly informed the Canadian respondents that it wished to have its copyright respected and that they did not have a license to use it. App., *infra*, 3a; D. Ct. Dkt. 63-1, at 7.

In 2012, petitioner filed suit against Knight and his Canadian company in Canadian federal court, alleging that the "Electrical Code Simplified" infringed petitioner's copyright in the Canadian Electrical Code. In the course of that action, petitioner learned that Knight intended to reproduce and sell an identical copy of petitioner's 2015 Canadian Electrical Code. Petitioner subsequently filed a new lawsuit for copyright infringement. App., *infra*, 24a; D. Ct. Dkt. 63-1, at 286.

The Canadian trial court ruled in favor of petitioner, determining that petitioner held a valid copyright under Canadian law and that Knight was infringing on that copyright. The court permanently enjoined Knight and his Canadian entity from reproducing, distributing, or selling any publication that infringes upon petitioner's copyright. App., *infra*, 24a-25a.

In 2018, the Canadian Federal Court of Appeal affirmed. As relevant here, Knight argued that petitioner's standards were "incapable of being the subject of copyright by reason of [their] incorporation into statute and regulation." D. Ct. Dkt. 63-1, at 386. The Canadian appeals court disagreed, reasoning that petitioner's standards were "not prepared or published by or under the direction or control of Her Majesty or any government department," and that the standards' "incorporation by reference into federal, provincial and territorial statutes or regulations" granted neither the Queen nor the public the "right to print and publish the CSA Electrical Code." *Id.* at 399, 416, 419. In 2019, the Supreme Court of Canada denied leave to appeal. D. Ct. Dkt. 63-2, at 216.

3. Knight then traveled to the United States in order to resume his infringement. On June 17, 2020, Knight incorporated respondent P.S. Knight Americas, Inc., in the State of Texas. App., *infra*, 4a. As he described his new enterprise: "So how can we re-release Knight's Code now? Well first 'we,' (that's me), incorporated a new entity in the US and transferred assets to that new entity. Knight's Code is re-released by PS Knight Americas Inc, from the US, and outside the direct jurisdiction of the [Canadian] Federal Court." *Id.* at 25a (alteration omitted). That move, Knight explained, was meant to make it "difficult for the [Canadian] Civil Service to prevent Canadians from accessing PS Knight products," which are "unaffected and still ship from Canada." D. Ct. Dkt. 63-2, at 238-239.

Respondents proceeded to offer for sale, without petitioner's permission, three other standards copyrighted by petitioner. Knight stated in a blog post that he began publishing those additional works to "offset" the financial costs imposed by the injunction issued by the Canadian federal courts and the "massive expenses" resulting from

petitioner's litigation to enforce its copyrights. App., *infra*, 27a; D. Ct. Dkt. 63-4, at 3-4. As Knight wrote, "the digital version of Knight's Code is [available] for less than half the price of [petitioner's] version." D. Ct. Dkt. 63-4, at 11. Respondents' publications do not reproduce the statutes or regulations that have incorporated petitioner's standards by reference; instead, respondents simply sell replicas of petitioner's standards. App., *infra*, 3a, 41a n.10, 46a n.13.

The Canadian trial court subsequently held respondents in contempt of court for violating the terms of the earlier injunction. As relevant here, respondents again argued that petitioner's Canadian Electrical Code "has been incorporated into law and may be freely reproduced without infringing copyright." D. Ct. Dkt. 63-2, at 185-186. The trial court again rejected that argument. *Ibid.* The court then permanently enjoined respondents from infringing petitioner's copyrights. App., *infra*, 28a-29a.

3. On November 20, 2020, petitioner filed suit against respondents in the United States District Court for the Western District of Texas. App., *infra*, 6a. In its complaint, as amended, petitioner alleged that respondents' activities in the United States were infringing seven of petitioner's copyrights in violation of the Copyright Act. *Ibid.* Respondents asserted counterclaims of invalidity and unenforceability. *Ibid.*

The district court granted petitioner's motion for summary judgment and denied respondents' cross-motion. App., *infra*, 21a-54a. Invoking comity and estoppel principles, the court first concluded that petitioner's copyrights were valid and enforceable under Canadian law. *Id.* at 32a-33a, 38a-41a. As to infringement, the district court held that respondents had concededly copied petitioner's copyrighted works without permission. *Id.* at 34a-38a. According to the court, neither the government-edicts

doctrine nor the merger doctrine rendered petitioner's copyrights unenforceable. *Id.* at 33a-34a, 41a. And because respondents were not entitled to a fair-use defense, the district court granted petitioner's motion for summary judgment. *Id.* at 44a-47a, 54a.

4. The court of appeals reversed. App., *infra*, 1a-15a. As a preliminary matter, the court of appeals noted that "the parties do not dispute[] that [petitioner] owns valid Canadian copyrights in all seven of the at-issue model codes"; as a result, the court's analysis focused solely on whether respondents infringed petitioner's copyrights. App., *infra*, 9a. The court of appeals proceeded to disagree with the district court's reasoning that the merger doctrine and the government-edicts doctrine—"the two main frameworks applied" in its earlier en banc decision in *Veeck v. Southern Building Code Congress International, Inc.*, 293 F.3d 791 (2002)—"both address copyrightability, not infringement." App., *infra*, 10a-11a. According to the court of appeals, "[respondents'] copying of [petitioner's] codes is not actionable under the United States' Copyright Act, as [petitioner's] model codes have become 'the law' of Canada, and, thus, [respondents'] copying of that 'law' was permissible under * * * *Veeck*." *Id.* at 9a. That conclusion was consistent with the Berne Convention, the court continued, because it did not "give foreign authors stronger copyright protection than that afforded to United States authors." *Id.* at 12a.

Judge Douglas dissented. App., *infra*, 16a-20a. She disagreed that *Veeck*'s holding was "outcome determinative in this case." *Id.* at 16a. In her view, *Veeck* held only that, "once adopted as 'the law' in the United States, [model] codes lost their copyright protection." *Id.* at 17a. But "Canada has determined that [petitioner's] model codes, whether adopted into Canadian law and regulations or not, are copyrightable," and "[those] determina-

tions on copyrightability are conceded by the majority and [respondents].” *Ibid.* For that reason, Judge Douglas concluded, *Veeck* was “inapplicable.” *Ibid.* Because “the overwhelming balance of factors cautions against a finding of fair use,” and given that respondents’ conduct was “egregious,” Judge Douglas would have affirmed the district court’s judgment. *Id.* at 18a, 20a.

5. Petitioner filed a petition for rehearing, asking the en banc court of appeals to overrule *Veeck* as inconsistent with this Court’s precedent. After making minor corrections to its opinion, the court denied rehearing. App., *infra*, 55a-56a.

REASONS FOR GRANTING THE PETITION

The court of appeals’ decision flies in the face of the text of the Copyright Act, this Court’s precedents, and the Berne Convention, and it implicates an existing circuit conflict. The court of appeals allowed respondents, whose infringement activities had already been enjoined by a Canadian court, to continue selling commercial copies of petitioner’s copyrighted works from the United States simply because, after their creation, those works had been incorporated by reference into Canadian law. According to the court of appeals, that result was mandated by its own precedents, which applied the government-edicts and merger doctrines to strip of copyright protection works that have gained the “force of law” through incorporation by reference. By invoking those judge-made doctrines, the court of appeals sidestepped consideration of the fair-use doctrine, which provides protection for certain uses of copyrighted works incorporated by reference into law.

The decision below is a backdoor attempt to resuscitate the very inquiry that this Court foreclosed in *Georgia v. Public.Resource.Org, Inc.*, 590 U.S. 255 (2020). There, the Court made clear that there is no basis under the

Copyright Act to distinguish between different categories of content based on their legal effects. The court of appeals further erred by applying the merger doctrine as of the time of infringement, rather than the time of creation. As the Federal Circuit has made clear, the proper inquiry is whether, at the time petitioner authored the model standards at issue in this case, it had multiple expressive options at its disposal. It is undisputed here that petitioner did. Rather than layering one judge-made test on top of another, the court of appeals should have proceeded to the fair-use inquiry mandated by Congress, and it should have given effect to the United States's obligations under the Berne Convention.

The decision below runs roughshod over this Court's recent precedent and reaffirms an existing circuit conflict. It also raises serious foreign-relations concerns. This case presents an ideal vehicle in which to consider the question presented. The petition for a writ of certiorari should be granted.

A. The Decision Below Is Irreconcilable With This Court's Precedents And Implicates An Existing Circuit Conflict

According to the court of appeals, works authored by a private entity lose protection under the Copyright Act once they are incorporated by reference into law by some governmental authority somewhere in the world. In the court of appeals' view, that holding was necessitated by application of the government-edicts and merger doctrines. That conclusion flies in the face of this Court's precedents, which hold that copyrightability does not turn on whether a work has or gains the force of law, but instead on who the author is. And, as to the merger doctrine, it also implicates an existing circuit conflict.

1. In applying the Act to petitioner's concededly copyrightable and copyrighted standards, the court of ap-

peals deemed itself bound by its en banc decision in *Veeck v. Southern Building Code Congress International, Inc.*, 293 F.3d 791 (5th Cir. 2002), cert. denied, 539 U.S. 969 (2003), which held that copyrighted works adopted by two municipalities in Texas lost protection under the Act once they became “the law” of those municipalities.

In *Veeck*, the court of appeals first grounded its holding in this Court’s precedents on the government-edicts doctrine. Those precedents, the court reasoned, stand for the proposition that model building codes as “the law” are “not amenable to copyright” regardless of whether a private entity had authored them. 293 F.3d at 796. According to the court of appeals, a narrow focus on the question of who exactly wrote the text of those model codes “ignores the democratic process”: “when a governmental body consciously decides to enact proposed model building codes,” the public becomes “the final ‘author[.]’ of the law,” through a “metaphorical concept of citizen authorship,” “regardless of who actually drafts the provisions.” *Id.* at 799 (citation omitted).

As an alternative to the government-edicts doctrine, the court of appeals relied on the merger doctrine. See 293 F.3d at 800. According to the court, the model codes “transformed into the ‘fact’ and ‘idea’ of the towns’ buildings codes” once, after their creation, they became “the law” through incorporation by reference. *Id.* at 802. The court of appeals implicitly acknowledged that there were “other methods of expressing” the model codes at the time they were created, but reasoned that those alternative expressions were “foreclosed” following incorporation by reference. *Id.* at 801.

Six judges dissented. Judge Higginbotham, joined by three other judges, explained that the fact that “parts of the copied material contain the same expressions as the adopted codes of two Texas cities is no defense unless the

use by the cities of the protected expression somehow invalidated [the author]’s copyright.” 293 F.3d at 806. But this Court’s precedents applying the government-edicts doctrine, he reasoned, are “about authorship.” *Id.* at 807. As to the merger doctrine, Judge Higginbotham described the majority’s reasoning as “wholly tautological”: “A complex code, even a simple one, can be expressed in a variety of ways,” and “[t]hat reality is not ended by choosing one manner of expression to enact [into law] and then pronouncing that this normative rule—‘the law’—can only be expressed in one way.” *Ibid.* Finally, any “impediment” to the use of a copyrighted work enacted into law could be “avoided by the doctrines of fair use and implied license.” *Ibid.*

Judge Wiener, joined by five other judges, criticized the majority’s “blanket, *per se* rule” that, “once a copyrighted work is enacted into law by reference, it loses its entire copyright protection, *ipso facto*, regardless of the nature of the author.” 293 F.3d at 808. Like Judge Higginbotham, Judge Wiener observed that this Court’s cases applying the government-edicts doctrine “turn[] not on the nature of the *work* but on the nature of the *author*.” *Id.* at 810. According to Judge Wiener, the view that, after incorporation by reference, the public becomes the “author” of a model code “has great symbolic, ‘feel-good’ appeal,” but finds no support in this Court’s precedent or the text of the Copyright Act. *Id.* at 814. With respect to the merger doctrine, he noted, “there exist considerably more than a tiny, finite number of ways to express a building code.” *Id.* at 821. Like Judge Higginbotham, Judge Wiener noted that the doctrines of fair use and implied license would protect certain uses of copyrighted works enacted into law. See *id.* at 817.

2. Since the court of appeals’ earlier decision in *Veeck*, this Court has made clear that whether “the law”

is uncopyrightable does not depend on its binding nature but instead on its authorship.

In *Georgia v. Public.Resource.Org, Inc.*, 590 U.S. 255 (2020), the Court considered “[w]hether the government edicts doctrine extends to—and thus renders uncopyrightable—works that lack the force of law, such as the annotations in the Official Code of Georgia Annotated.” Pet. Br. at i, *Georgia, supra* (No. 18-1150) (Aug. 23, 2019). In that case, a company had drafted statutory annotations pursuant to a work-for-hire agreement with a Georgia state commission. See 590 U.S. at 261. When the company copied the annotated code, Georgia sued, arguing that the annotations were not in the public domain because, unlike statutes, they did not carry the “force of law.” *Id.* at 261-263. The district court agreed with Georgia. *Id.* at 262. But the Eleventh Circuit reversed, relying on *Veck* to hold that “a work is attributable to the constructive authorship of the People” cannot be copyrighted. *Id.* at 262-263 (citation omitted).

This Court affirmed the Eleventh Circuit’s judgment, but it did so on different grounds. The Court reasoned that it was irrelevant “whether a given material carries the force of law” or to whom “constructive authorship” may be attributed. 590 U.S. at 263. “Rather than attempting to catalog the materials that constitute ‘the law,’” the Court continued, the government-edicts doctrine “bars the officials responsible for creating the law from being considered the ‘author[s]’ of *whatever work* they perform in their capacity as lawmakers.” *Id.* at 265-266 (internal quotation marks and citation omitted). The Court held that the government-edicts doctrine applies to “non-binding, explanatory legal materials,” as long as they are “created *by a legislative body* vested with the authority to make law.” *Id.* at 259. The Court based its holding on the text of the Copyright Act, which provides “no

basis” to “distinguish[] between different categories of content with different effects.” *Id.* at 274. According to the Court, legislators and judges cannot be considered authors entitled to copyright in their official works, because those officials are “vested with the authority to make and interpret the law.” *Id.* at 265.

That “straightforward rule,” this Court explained, followed from the same decisions on which the court of appeals had relied in *Veeck*. See *Georgia*, 590 U.S. at 265. In *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834), the Court stated that “no reporter has or can have any copyright in the written opinions delivered by this [C]ourt,” and that “the judges thereof cannot confer on any reporter any such right.” *Id.* at 668. In *Banks v. Manchester*, 128 U.S. 244 (1888), the Court grounded its reasoning in *Wheaton*, reiterating 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].” *Id.* at 253. But in a companion case to *Banks*, the Court made clear that a reporter is free to “obtain[] a copyright” over explanatory materials that the reporter has created, even where the reporter is “a sworn public officer[] appointed by the authority of the government.” *Callaghan v. Myers*, 128 U.S. 617, 647 (1888). Those cases make clear that the government-edicts doctrine “applies both to binding works (such as opinions) and to non-binding works (such as headnotes and syllabi),” but “does not apply * * * to works created by government officials (or private parties) who lack the authority to make or interpret the law, such as court reporters.” *Georgia*, 590 U.S. at 265.

While making clear that the law is uncopyrightable because of its authorship, regardless of its binding nature, the Court declined to apply the merger doctrine. Petition-

ers had argued that the annotations at issue were “not categorically ineligible for copyright protection under [Section] 102(b) and the merger doctrine.” Pet. Br. at 54, *Georgia, supra* (No. 18-1150). In response, this Court clarified that “the law” is uncopyrightable because it fails the “authorship” requirement under Section 102(a). See 590 U.S. at 259. That is because, unlike Section 102(a), Section 102(b) focuses on the distinction between “creation and discovery,” *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 347, 356 (1991), and the merger doctrine—“if [it] exists”—“appl[ies]” Section 102(b) by barring copyright protection over an existing “idea” that is itself uncopyrightable “when there is only one way to express” that idea. *Google LLC v. Oracle America, Inc.*, 593 U.S. 1, 48 (2021) (Thomas, J., dissenting).

3. By focusing on whether a copyrighted work eventually becomes binding law, rather than on the identity of the work’s author, the court of appeals applied the merger doctrine in light of the circumstances at the time of infringement, rather than at the time of creation. That view, which the court of appeals initially adopted in *Veck*, is not just inconsistent with *Georgia* but is also diametrically opposed to the approach of the Federal Circuit.

In *Oracle America, Inc. v. Google Inc.*, 750 F.3d 1339 (2014), cert. denied, 576 U.S. 1071 (2015), the Federal Circuit held that merger is assessed at the time the work is created. The issue in that case was whether Google had infringed Oracle’s copyrights in “packages of computer source code” written in “the Java programming language” by copying the code “verbatim” and “inserting that code into parts of [Google’s] Android software.” *Id.* at 1347, 1351. The district court had determined that “there was only one way” for Google to “make its program interoperable with [Oracle’s] program,” and thus the merger

doctrine barred Oracle’s source codes from receiving copyright protection. *Id.* at 1360, 1371. But the Federal Circuit disagreed, holding that the district court had erred by “focusing its merger analysis on the options available to Google at the time of copying” rather than “on the options that were available to [Oracle] at the time it created the [copyrighted] packages.” *Id.* at 1361. According to the court of appeals, “[i]t is well-established that copyrightability and the scope of protectable activity are to be evaluated at the time of creation, not at the time of infringement.” *Ibid.* When Oracle created the copyrighted codes, its options were limitless—“[t]his was not a situation where Oracle was selecting among preordained names and phrases to create its packages”—so the merger doctrine did not apply. *Ibid.*

* * * * *

The court of appeals’ decision cannot be reconciled with this Court’s precedents on whether the government-edicts and merger doctrines can strip concededly copyrighted and copyrightable works of protection under the Copyright Act merely because those works have been subsequently incorporated by reference into law somewhere in the world, by some jurisdiction. Because there is no dispute that petitioner holds valid copyrights in its standards, the government-edicts doctrine, which renders certain legal materials uncopyrightable when authored by public officials with lawmaking authority, should have had no place in the court’s analysis. Moreover, the court of appeals’ application of the merger doctrine in light of the status of petitioner’s standards as “the law” and based on the circumstances at the time of infringement is incompatible with *Georgia* and reaffirms an existing conflict between the Fifth Circuit and the Federal Circuit. The Court should grant review and confirm that works of

authorship can retain protection regardless of whether they later obtain the force of law.

B. The Decision Below Is Erroneous

The court of appeals erred by applying the government-edicts and merger doctrines to petitioners' copyrighted standards. The court of appeals' analysis skirts the plain text of the Copyright Act and ignores the fair-use doctrine—the most obvious solution for any problem with copyright protection in this context.

1. The court of appeals' application of the government-edicts and merger doctrines beyond the copyrightability prong, to strip of protection concededly copyrightable and copyrighted works, cannot be reconciled with the text and structure of the Copyright Act.

a. The text of the Copyright Act makes clear that both doctrines concern copyrightability, not infringement. Section 102(a) provides that “[c]opyright protection subsists * * * in original works of authorship.” 17 U.S.C. 102(a). The government-edicts doctrine recognizes an exception to that rule of copyrightability. See *Georgia*, 590 U.S. at 267, 269. Section 102(b), the basis of the merger doctrine, similarly sounds in copyrightability, insofar as it provides that “[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system * * * or discovery.” 17 U.S.C. 102(b). For that reason, a court should perform the government-edicts and merger analyses based on the circumstances that existed not when the alleged infringer's copying occurred, but instead when the work was created. See *Georgia*, 590 U.S. at 259, 273-274; *Oracle*, 750 F.3d at 1361.

b. Moreover, under the Act, “[c]opyright in a work * * * subsists from its creation and[] * * * endures for [the copyright] term.” 17 U.S.C. 302(a). The Act does

not contemplate the possibility that an author holding a valid copyright may be stripped of copyright protection in light of later events, aside from a provision that is inapplicable here. Section 201(e), which concerns “involuntary transfer,” makes clear that “no action by any governmental body or other official or organization purporting to * * * exercise rights of ownership with respect to the copyright, or any of the exclusive rights under a copyright, shall be given effect.” 17 U.S.C. 201(e). The purpose of that provision is to “reaffirm the basic principle that the United States copyright of an individual author shall be secured to that author, and cannot be taken away by any involuntary transfer.” H.R. Rep. No. 1476, 94th Cong., 2d Sess. 123 (1976).

Consistent with the foregoing principles, the federal government’s use or incorporation of copyrighted works into law will not strip them of copyright protection. The distinction between works created by the federal government and private works used by the federal government is embodied in Section 105(a), which provides that copyright protection “is not available for any work of the United States Government.” 17 U.S.C. 105(a). When the National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113, 110 Stat. 775, provided that federal agencies “shall use technical standards that are developed or adopted by voluntary consensus standards bodies,” § 12(d)(1), 110 Stat. 783, the Office of Management and Budget issued instructions making clear that, “[i]f a voluntary standard is used and published in an agency document, [the] agency must observe and protect the rights of the copyright holder and any other similar obligations.” 63 Fed. Reg. 8545, 8554-8555 (Feb. 19, 1998).

The Solicitor General has consistently reaffirmed those principles. In a case involving a requirement that the government use copyrighted codes to identify physi-

ciens’ procedures for reimbursements, the Solicitor General explained that “[n]othing in the Copyright Act—either at the time of *Banks* or at present—would permit a termination of copyright protection.” U.S. Br. at 7 & n.9, *Practice Management Information Corp. v. American Medical Association*, 525 U.S. 810 (No. 97-1254) (Aug. 7, 1998). Indeed, as the Solicitor General more recently emphasized, “[t]o make a work’s copyrightability turn on events that occurred years after its creation would be contrary to the basic design of the Copyright Act,” and “[i]t therefore would be particularly destructive of copyright principles * * * retroactively [to] divest[] * * * copyright protection.” U.S. Br. at 19, 22, *Google LLC v. Oracle America, Inc.*, 593 U.S. 1 (No. 18-956) (Feb. 19, 2020).

3. The court of appeals’ concern that citizens should be able to “reproduce copies of the law for many purposes,” *Veeck*, 293 F.3d at 799; see *Georgia*, 590 U.S. at 264, is best addressed not by applying two judge-made doctrines that relate to copyrightability and then layering them on top of the infringement inquiry, but instead by applying the textually enumerated doctrine of fair use.

a. In *American Society for Testing and Materials v. Public.Resource.Org, Inc.*, 896 F.3d 437 (2018), the D.C. Circuit analyzed, through the lens of the fair-use doctrine, an infringement claim involving model codes incorporated by reference. In that case, a nonprofit organization copied and reposted standards developed created by various standards organizations, all of which had been incorporated by reference into various federal and state laws. See *id.* at 441-444. Those organizations, which held valid copyrights in the standards at issue, sued the nonprofit for infringement. See *id.* at 444. Both sides urged the court to adopt a bright-line rule providing that copying standards incorporated by reference either always or never constituted infringement. See *id.* at 446. But the

D.C. Circuit took a narrower approach that stayed “within the confines of the Copyright Act” and analyzed whether the nonprofit’s copying constituted fair use. *Id.* at 447.

Applying a fair-use analysis to cases involving model codes and extrinsic standards has two principal virtues. First, unlike the court of appeals’ approach here, which distorts the government-edicts and merger doctrines, a fair-use analysis is grounded in the statutory text of the Copyright Act. Such an analysis would conform with the Act’s primary objective of creating a “uniform” framework that promotes the “predictability and certainty of copyright ownership” in the United States. *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 740, 749 (1989). Second, a fair-use analysis allows courts to consider “the purpose and character of the use,” and distinguish between use “for nonprofit educational purposes” (as in *Georgia* and *American Society*) and use of a “commercial nature,” such as respondents’ use here. 17 U.S.C. 107. Applying a fair-use analysis would discourage commercial actors such as respondents from freely profiting from the works of another. *Cf. International News Service v. Associated Press*, 248 U.S. 215, 239 (1918).

b. As Judge Douglas explained in her dissent, respondents here cannot prevail under the fair-use doctrine. *App.*, *infra*, 20a. While the second statutory factor—the nature of the copyrighted work—may well be “neutral” where, as here, the work has been incorporated by reference into law, *id.* at 18a-19a, the remaining three factors weigh heavily against respondents. As to the first factor, respondents are a commercial competitor of petitioner, and their egregious conduct—“incorporating a new entity in the United States and transferring assets to that entity” to avoid an injunction and a contempt order issued by a Canadian court—suggests the “character of the use” was deeply inappropriate. *Ibid.* As to the third factor,

respondents copied petitioner’s codes “in their entirety.” *Ibid.* And as to the fourth factor, “[petitioner] has suffered market harm because of [respondents’] actions.” *Id.* at 20a. The court of appeals should have analyzed this case through the lens of fair use, rather than relying on a soup of judge-made tests.

C. The Question Presented Is Exceptionally Important And Warrants The Court’s Review In This Case

This Court’s intervention is necessary here. Not only is the decision below incorrect and on the wrong side of a circuit conflict, but it substantially undermines the ability of standards-development organizations to continue performing their societally vital role. Moreover, by authorizing actors subject to foreign injunctions and contempt orders to relocate to the United States and then continue their unauthorized copying of concededly copyrighted and copyrightable materials, the court of appeals’ decision raises significant foreign-relations concerns. Because there is no dispute among the parties that the relevant works are copyrighted and copyrightable as a matter of Canadian law, this case provides an excellent vehicle for the Court to clarify the impact of incorporation by reference into law on copyright infringement under the Copyright Act.

1. The law recognizes the integral role of privately developed standards in a variety of ways. For example, Congress recently directed the National Institute of Standards and Technology to help develop a “voluntary risk management framework for trustworthy artificial intelligence systems” that “shall * * * incorporate voluntary consensus standards and industry best practices.” 15 U.S.C. 278h-1(c). Separately, when it comes to the treble-damages remedy available for antitrust violations, Congress has exempted claims relating to “a standards

development activity engaged in by a standards development organization.” 15 U.S.C. 4303(a).

The importance of standards development has been consistently recognized by the Executive Branch. As the Solicitor General has explained, “[t]he continued ability of private standards organizations to develop and update their materials at a high level of quality and integrity is of substantial importance to the federal government.” U.S. Br. at 18, *Veeck v. Southern Building Code Congress International, Inc.*, 539 U.S. 969 (2003) (No. 02-355) (May 30, 2003). Indeed, as of 2003, “the Code of Federal Regulations contain[ed] more than 7000 references to privately developed codes and standards, upon which federal agencies rely in a very wide variety of settings.” *Ibid.* It is thus unsurprising that, to this day, defense agencies continue to view standards development as “critical to maintaining the [Nation’s] robust position in the marketplace.” National Security Agency & Cybersecurity and Infrastructure Security Agency, *Enduring Security Framework, Recommendations For Increasing U.S. Participation & Leadership In Standards Development* 4-5 (June 2024) <tinyurl.com/NSACISAWHITEPAPER>. The protection and promotion of standards development is especially vital in areas in which consistency is important, such as electrical maintenance and installation—the subject of one of petitioner’s codes at issue. *Cf. National Fire Protection Association v. UpCodes, Inc.*, Civ. No. 21-5262, Dkt. 13-2, ¶ 42 (C.D. Cal. July 9, 2021).

The court of appeals’ erroneous rule would significantly harm domestic and foreign standards-development organizations. Preserving copyright protection for privately developed standards “fund[s] the development of essential standards that convey significant public benefits.” Emily S. Bremer, *On the Cost of Private Standards in Public Law*, 63 U. Kan. L. Rev. 279, 294 (2015). “If not

through fees for published standards, the public will have to pay the significant costs of standards development through some other mechanism.” *Ibid.* And those costs continue to be substantial, as standards development is “critical” to the “strategies for [artificial intelligence] and other emerging technologies” of the United States, China, and the European Union, and revenues from subscriptions, membership, and licensing “are chiefly what sustain the system of standardization.” Cameron F. Kerry, *Small Yards, Big Tents: How To Build Cooperation on Critical International Standards* 1, 37 (2024) <tinyurl.com/BrookingsStandardsReport>. The continued availability of model standards—to government entities and professional users alike—thus depends in large measure on the revenue that standards-development organizations raise from selling their copyrighted works to commercial users.

2. The decision below also raises significant foreign-relations concerns, turning the Fifth Circuit into a safe haven for copyright pirates to infringe on the intellectual-property rights of foreign standards-development organizations in violation of the treaty obligations of the United States. When the United States adopted the Berne Convention, Congress “determined that U.S. interests were best served by our full participation in the dominant system of international copyright protection,” including by “ensuring exemplary compliance with our international obligations.” *Golan v. Holder*, 565 U.S. 302, 335 (2012). Instead of honoring the Nation’s treaty obligations, however, the court of appeals ran “interference in * * * a delicate field of international relations,” contrary to the “affirmative intention of * * * Congress.” *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957).

Despite paying lip service to the fact that petitioner holds concededly valid Canadian copyrights in its model

standards, see App., *infra*, 9a, the court of appeals proceeded to conclude that such copyrights became impotent the moment petitioner’s copyrighted works were incorporated by reference into law. That conclusion ignored the Canadian courts’ determination that “[petitioner’s] model codes, whether adopted into Canadian law and regulations or not, are copyrightable.” *Id.* at 17a (Douglas, J., dissenting). Under the court of appeals’ approach, any copyright infringer may relocate to the Fifth Circuit in order to sell works authored and copyrighted by standards-development organizations with impunity, as long as the works have been incorporated by reference into law—somewhere, by some governmental entity. And by harnessing the power of the Internet, those would-be infringers can continue to market and sell those works to customers located in the jurisdiction under whose copyright law the codes are protected—as respondents are doing here.

3. This case presents an ideal vehicle to resolve the question presented. Respondents did not dispute before the court of appeals that, under the Berne Convention, Canadian law governs the question of whether a work is copyrightable. See App., *infra*, 7a-9a; Resp. C.A. Reply Br. 11. Similarly, respondents did not dispute that “[petitioner] owns valid Canadian copyrights in all seven of the at-issue model codes.” App., *infra*, 9a. Accordingly, unlike the decision in *Veeck*—which “may have muddied the waters by extensively utilizing *copyrightability* reasoning” while seemingly reaching a holding on *infringement*, *id.* at 11a (emphasis added)—the decision below clarified that petitioner’s works are copyrightable, but nevertheless held that respondents’ actions did not constitute copyright infringement, see *id.* at 11a, 15a.

This case thus neatly raises the question of whether the government-edicts and merger doctrines can strip

copyrighted and copyrightable works of protection under the Copyright Act merely because those works have been subsequently incorporated by reference into law. The Court should grant review and answer that question.

CONCLUSION

The petition for a writ of certiorari should be granted. In light of the government's previous briefs on related questions and the foreign-relations concerns presented here, the Court may wish to call for the views of the Solicitor General.

Respectfully submitted.

MICHAEL A. PARKS
KATHERINE E. COLVIN
ALEX D. WEIDNER
THOMPSON COBURN LLP
*55 East Monroe Street
Chicago, IL 60603*

WARREN DEAN, JR.
KATHLEEN KRAFT
THOMPSON COBURN LLP
*1909 K Street, N.W., Suite 600
Washington, DC 20006*

KANNON K. SHANMUGAM
MATTEO GODI
MIKAELA MILLIGAN*
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
*2001 K Street, N.W.
Washington, DC 20006
(202) 223-7300
kshanmugam@paulweiss.com*

NOVEMBER 2024