No. 12-940

IN THE

Supreme Court of the United States

INTERNATIONAL SECURITIES EXCHANGE, LLC,

Petitioner,

v.

CHICAGO BOARD OPTIONS EXCHANGE, INCORPORATED; CME GROUP INDEX SERVICES, LLC; THE MCGRAW-HILL COMPANIES, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIRST DISTRICT

BRIEF IN OPPOSITION FOR RESPONDENTS CHICAGO BOARD OPTIONS EXCHANGE, INC. AND S&P DOW JONES INDICES LLC

PAUL E. DENGEL
STACIE R. HARTMAN
SCHIFF HARDIN LLP
233 South Wacker Drive
Chicago, IL 60606
(312) 258-5500

R. BRUCE RICH
Counsel Of Record
BENJAMIN E. MARKS
GREGORY SILBERT
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8000
bruce.rich@weil.com

Counsel for Respondents

246595

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Under well-established Illinois law, it is unlawful to offer financial instruments based on a stock-market index without a license from the index's owner. *See Bd. of Trade v. Dow Jones & Co., Inc.*, 98 Ill. 2d 109, 120-23 (1983). Courts "uniformly agree" (Pet. 18) that state-law claims are not preempted by federal copyright law unless they both (1) assert *rights* "equivalent to" rights within the general scope of federal copyright protection, and (2) involve *works* within the "subject matter" of federal copyright law. 17 U.S.C. § 301(b). Applying this uniform rule, an intermediate Illinois court held here that claims under *Board of Trade* to prevent the unlicensed offering of options based on stock-market indexes are not preempted, because they are not predicated on the copying or distribution of anything, much less of any copyrightable subject matter, but instead are based on the misappropriation of the index owner's expertise, reputation, and goodwill.

The question presented is whether federal copyright law preempts state-law misappropriation claims that are based on the unlicensed offering of index option contracts.

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

Chicago Board Options Exchange, Incorporated ("CBOE") states that its parent company is CBOE Holdings, Inc. and that CBOE Holdings, Inc. is a publicly held company that owns 10% or more of CBOE's outstanding stock.

S&P Dow Jones Indices LLC ("S&P Dow Jones") states that: (1) The McGraw-Hill Companies, Inc., a publicly traded company, is the ultimate parent corporation of S&P Dow Jones and owns through an affiliate more than ten percent of the stock of S&P Dow Jones; (2) CME Group Inc., a publicly traded company, owns through its affiliates more than ten percent of the stock of S&P Dow Jones; and (3) no other publicly traded company owns ten percent or more of the stock of S&P Dow Jones. The Illinois Appellate Court and the Circuit Court of Cook County have granted unopposed motions to substitute S&P Dow Jones, which now owns the stock indexes at issue in this case, as a party in place of CME Group Index Services, LLC and The McGraw-Hill Companies, Inc.

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BRIEF IN OPPOSITION

Respondents Chicago Board Options Exchange, Incorporated ("CBOE") and S&P Dow Jones Indices LLC ("S&P Dow Jones") (collectively, "Respondents") respectfully submit this brief in opposition to the petition for certiorari.

STATUTORY PROVISIONS INVOLVED

Section 301 of the Copyright Act, 17 U.S.C. § 301, is reproduced at Pet. App. 60a-62a.

INTRODUCTION

Respondent S&P Dow Jones maintains two renowned stock market indexes, the Dow Jones Industrial Average ("DJIA") and the Standard & Poor's 500 Composite Stock Price Index ("S&P 500"). Maintaining these indexes requires continuous analysis and the ongoing exercise of qualitative judgment by experts to ensure that the indexes continue to measure the performance of the market for "large-cap" U.S. stocks accurately and dependably. S&P Dow Jones's judgment and expertise, and the reputation and goodwill that flow from them, provide enormous value to exchanges and clearinghouses when the indexes are used as the bases for investment products like options and futures contracts. S&P Dow Jones earns substantial licensing revenues that reflect this value.

Many other companies offer and license their own market indexes. For example, Petitioner International Securities Exchange, LLC ("ISE") itself has created dozens of proprietary indexes and requires third parties to pay licensing fees to use those indexes for investment products. As ISE's Chairperson acknowledged, "[l]icensing of index-based products is the industry norm." Pet. App. 54a.

Now, however, Petitioner asserts that it may create and offer options based on S&P Dow Jones's indexes *without* obtaining a license—a proposition the Illinois Supreme Court firmly rejected thirty years ago in *Board of Trade*, 98 Ill.2d 109; *accord, Standard & Poor's Corp. v. Commodity Exch., Inc.*, 538 F. Supp. 1063 (S.D.N.Y.) ("*Comex*") (offering index futures on S&P 500 without a license would violate New York law), *aff'd*, 683 F.2d 704 (2d Cir. 1982). To evade this holding, Petitioner advances an argument that no court has ever accepted: that the state-law misappropriation claim recognized in *Board of Trade*, on which robust businesses that generate and maintain stock market indexes depend, is preempted by the Copyright Act.

Petitioner's assertion that the lower courts are in conflict over preemption of misappropriation claims is groundless. As Petitioner itself acknowledges, Pet. 18, the lower courts uniformly agree on the test for copyright preemption, which is codified in the Copyright Act's broad preemption savings provision, 17 U.S.C. § 301(b). Whether a state-law claim is preempted under section 301 of the Copyright Act depends upon the particular facts and circumstances of each case. The only case Petitioner cites that involved a claim similar to this one, *Dow Jones & Co. v. Int'l Secs. Exchange, Inc.*, 451 F.3d 295 (2d Cir. 2006), held that such a misappropriation claim was *not* within the scope of copyright and instead adjudicated the claim on state-law grounds. Because there is no disagreement about the applicable legal rule and no two courts have reached differing results when addressing similar facts, there is no conflict for this Court to address.

Absent any conflict, Petitioner's argument reduces to the contention that the lower court reached an incorrect result by misapplying a properly stated rule of law. But an error of this sort would not warrant review. *See* Sup. Ct. R. 10. In any event, Petitioner's preemption argument rests on a false factual premise that was refuted by the evidence and rejected below: that Petitioner seeks only to copy and distribute published index "values" to enable option contracts to be settled at expiration, acts which Petitioner claims fall within the preemptive sweep of section 301. The courts below, however, found that even if Petitioner were to undertake *any* copying or distributing of index levels, such acts would be incidental to the manner in which Petitioner would commercially exploit and profit from its unlicensed use of the indexes. Petitioner would profit by creating and offering new securities products based explicitly on S&P Dow Jones's indexes and earning fees when those options are traded. These activities *involve no copying or distribution* of index levels, and Illinois law places no restriction on such copying or distribution by Petitioner or anyone else.

In short, as the courts below recognized, ISE's interest in S&P Dow Jones's indexes has nothing to do with the evanescent index levels and everything to do with the indexes' reputations for accurately gauging the performance of the market segment they cover. ISE's desire to commercialize, and free ride upon, the expertise, reputation and goodwill embodied in S&P Dow Jones's indexes lies at the heart of this case and gave rise to the judgment below.

Accordingly, the legal interests protected by Respondents' misappropriation claims fall outside the ambit of the Copyright Act. Copyright law protects against unauthorized copying of tangible expressions of creative works of authorship, like books, music, and works of art. ISE's proposed incursions on Respondents' rights implicate none of these elements. The property interests involved here do not constitute works of authorship within the meaning of copyright law; they are not reduced to tangible form; and ISE's proposed commercial exploitation of them does not entail copying (as opposed to free riding upon) them. Because Respondents' misappropriation claims concern distinct, intangible assets, not copyrightable subject matter, and because Respondents do not seek to enjoin copying or distribution, their claims are not preempted.

Petitioner repeatedly alludes to a "deadweight loss" that purportedly results from S&P Dow Jones's determination to license the right to offer index options on the DJIA and S&P 500 exclusively to CBOE. These policy arguments, which have no bearing on preemption, are properly directed to the legislative and executive branches, not to this Court. In any event, permitting businesses to free ride on others' investments and expertise would always allow them to undercut their competitors; that does not make allowing free riding a sound policy choice here. The law governing licensing of proprietary indexes has been settled for thirty years and has fostered a flourishing, highly innovative industry that plays an important role in the functioning of the financial markets. The decision below, which merely reaffirmed this settled law, does not merit this Court's review.

STATEMENT OF THE CASE

A. The World-Renowned S&P and Dow Jones Indexes and the Marketplace for Securities Indexes

The DJIA and the S&P 500 are two of the world's most widely recognized stock indexes. Each is in demand in the marketplace as the basis for a wide variety of financial instruments, the returns of which are based on and linked to the performance of the index. The prominence and good reputation of these indexes are reflected in the many millions of dollars in licensing revenues generated from exchanges and other market participants that create and offer financial products based on the indexes. S&P Dow Jones offers thousands of additional indexes covering a wide variety of markets and market sectors. It invests millions of dollars each year in maintaining existing indexes and creating new ones. Many indexes are created specifically to be licensed as the basis of financial products such as index options. Resp. App. Br. 4.

Creating an index that will serve the needs of investors and form the basis of successful financial products requires skill and judgment. Index providers must first identify the market or market segment to be covered. Next they must determine an appropriate number of constituent securities or other components that reflect the breadth, depth, and liquidity of that market. They also must establish and apply criteria for selecting index components, designed to, among other things, ensure stability, predictability, and consistency. Each index component must be weighted and the index must be calculated according to a methodology developed by the index provider. Index providers must also establish rules to deal with mergers, takeovers, spin-offs, and other extraordinary corporate events experienced by components of the index. *See* Pet. App. 2a-3a; Resp. App. Br. 4-5.

Once an index has been created, maintaining it requires a continuous exercise of judgment, expertise, and investment of resources. ISE now denigrates this process as a "straightforward matter of plugging in the trading values of constituent stocks," Pet. 3, but the uncontested evidence demonstrates otherwise. *See* Pet. App. 2a-3a; Resp. App. Br. 5-6. Maintaining a successful index requires that experts constantly monitor the target market and make adjustments to the index constituents and calculation methodology to ensure that the index continues to represent that market accurately. As part of this process, S&P Dow Jones not only obtains market data from reliable sources, but also continuously monitors and analyzes company and financial data from SEC filings, reviews analyst reports, and utilizes advanced computer systems that process massive amounts of real-time data throughout the trading day.

S&P Dow Jones experts also must continuously make qualitative judgments regarding changes in the target market, and must determine, based on those judgments, whether the index's composition should be modified to ensure that the index continues to accurately reflect the market. Sometimes events such as a takeover or bankruptcy mandate the removal of a company from the index. S&P Dow Jones then must select an appropriate replacement based on a number of factors including the ongoing objective of having the indexes accurately represent the U.S. equity market and U.S. economy in terms of industry representation, the liquidity of the candidate company, and whether a candidate company might be better suited to meet a future need in the index. Whenever a change is made to a component stock, the resulting index calculations will necessarily yield a different level from what would have been calculated if a different substitution, or none at all, had been made. Resp. App. Br. 5-6.

S&P Dow Jones's activities have been part of a now well-established market in which, over the decades since *Board of Trade* and *Comex*, many entities collectively have devised thousands of new indexes to measure virtually every segment of the domestic and international financial markets. Numerous competing index providers, such as the Frank Russell Company, MSCI, and FTSE Group, have licensed their own indexes for use as the basis of options, futures, and an array of other products. Resp. App. Br. 9. True to the goals of the Illinois Supreme Court in *Board of Trade*, as recognized by the lower courts in this case, these products have afforded the public a broad range of new investment tools. Pet. App. 33a, 55a.

B. The Nature of the Financial Products at Issue

ISE seeks to list and offer, with the participation of the Options Clearing Corporation ("OCC"), unlicensed standardized index options based on the DJIA and the S&P 500. An index option confers on the holder the right, but not the obligation, to exercise the option and receive a cash amount based on the difference between the index level specified when the index option was opened and a settlement index level at the expiration of the option. Resp. App. Br. 6. ISE stands to profit from these activities irrespective of whether the options are exercised, and irrespective of the index levels at any given moment in time.

Index options allow investors to gain exposure, with one transaction, to the market segment represented by an index without the ongoing expense, time, and skill that would be required to obtain the same investment position by trading all the individual stocks represented by that index. In addition to providing a vehicle by which an investor can establish a position in the target market, index options are used by investors to hedge against risks in their existing portfolio and for other investment purposes. *Id.*

If S&P Dow Jones were to cease maintaining the DJIA and the S&P 500 by not updating index components and weighting on a frequent enough basis, the options would become ineffective as a tool for hedging market risks and financial products based on those indexes would have no appeal.

Unlicensed listing and trading of index options would deprive the public of the benefits that *Board of Trade* and *Comex* have fostered, as the incentives of index providers to create and maintain indexes would be greatly reduced by the lost revenue opportunities. Pet. App. 53a-55a. They also would lose the contractual ability they now have to limit their liability risk arising from trading losses[1] and

1. *See, e.g., Rosenstein v. Standard & Poor's Corp.*, 264 Ill. App. 3d 818 (1st Dist. 1993) (index provider owed duty of care to traders but was protected by exculpatory language in license with exchange and in rules that exchange was required by its index license to establish).

to supervise promotional activities by licensees that could tarnish their reputations. Resp. App. Br. 13-14.

C. CBOE's Exclusive Right to List and Offer the Specific Index Options in This Case

CBOE is the largest options exchange in the United States and was the first exchange to offer trading in index options. CBOE originated options based on the DJIA and the S&P 500 and has licensed the exclusive right to offer such options from S&P Dow Jones. CBOE has made substantial investments over many years to create, develop, promote, educate investors about, and expand the market for index options generally and for options based on the S&P 500 and the DJIA in particular. Options on the DJIA and S&P 500 were new, untested products when CBOE first licensed the right to offer them. Aided by CBOE's investments, options based on those indexes have subsequently blossomed into some of the leading options contracts traded in the United States. Resp. App. Br. 7.

D. The Role of OCC

OCC is the sole clearing agency for standardized index options in the United States. Pet. App. 4a. It issues, clears, and settles every index option offered on securities exchanges in the United States; no exchange can offer index options without OCC's participation. *Id.* OCC, which is based in Illinois, was a co-defendant in the proceedings below and is bound by the injunction affirmed by the Illinois Appellate Court. OCC did not join ISE's petition for certiorari. Pet. ii.

E. ISE's Participation in the Index Options Marketplace

ISE, like CBOE, is a national securities exchange that specializes in options. Pet. App. 3a. ISE holds licenses to list and offer options based on a number of prominent indexes, including certain S&P Dow Jones indexes. *Id.* at 3a-4a. On multiple occasions, ISE has successfully competed for licenses to list index options that previously had been licensed exclusively to CBOE when the term of CBOE's license expired, and ISE itself has bid for exclusive licenses. Resp. App. Br. 7-8. ISE earns fees in connection with index options, but not from any copying or transmitting of index levels, which occurs (if at all) when the options are ultimately settled. Any such copying or transmitting is incidental and unnecessary to ISE's commercial activity. In fact, ISE admitted that only 9% of index options are ever settled, and that "no fee is earned at the time an option contract is settled." Pet. App. 47a. Rather, ISE earns revenues by charging its customers when option trades are made. Resp. App. Br. 11. ISE earns these fees *regardless* of whether the options are ultimately settled and whether any incidental copying of index levels occurs. Pet. App. 47a; Resp. App. Br. 11.

ISE also competes with S&P Dow Jones as a creator of its own proprietary indexes. Pet. App. 3a. ISE has created dozens of indexes for use as the basis of index options, including an index designed to compete directly with the S&P 500. Pet. App. 55a. ISE requires third parties to obtain licenses from ISE in order to offer financial products based on ISE's indexes. *Id.*

A decade ago, ISE requested a license to list and trade options based on the S&P 500, and it expressed interest in a license on the DJIA when the initial term of CBOE's license expired. S&P Dow Jones's predecessors, however, chose to continue to license to CBOE the exclusive use of those indexes in connection with index options. Resp. App. Br. 10. No longer willing to compete fairly in the marketplace for those rights, ISE endeavored without success to have the Securities and Exchange Commission ("SEC") bar exclusive licensing of indexes as the basis for index options. Pet. App. 55a-56a. When the SEC did not do so, ISE asked the courts to hold that longstanding state law was preempted so that ISE may list and offer options based on the DJIA and S&P 500 without obtaining a license.

F. The Proceedings Below

During the course of this litigation, ISE has argued before six different courts—three state and three federal—that Respondents' misappropriation claims are preempted. Not one court has been persuaded.

Shortly after the Complaint was filed in the Illinois Circuit Court, ISE removed this action to federal court, arguing that the claims were preempted by copyright law. The district court for the Northern District of Illinois thoroughly examined that contention, rejected it, and remanded the case to state court. *See Chicago Bd. Options Exch., Inc. v. Int'l Secs. Exch., Inc.*, No. 06 C 6852, 2007 WL 604984, at *4-6 (N.D. Ill. Feb. 23, 2007) ("*CBOE*"). The district court concluded that the state-law claims are not based on "copying and distributing" index values "embodied within works such as Internet websites and newspapers," as Petitioner and its *amici* continue to argue. *Id.* at *5. Rather, as the court correctly observed, the suit is based on ISE's "intended use of [the] research and development used to create the Indexes, in addition to goodwill, skills, labor, reputation, and necessary expenditures." *Id.* The court found that ISE, by linking its own financial derivatives to S&P Dow Jones's indexes and offering them to investors, would misappropriate Respondents' "good will and [their] reputation for accuracy" under longstanding Illinois law. *Id.* (quoting *Bd. of Trade*, 98 Ill.2d at 121-22).

When ISE asked the district court for the Southern District of New York and then the Court of Appeals for the Second Circuit (in a parallel declaratory judgment action that ISE brought) to find Respondents' state-law claims preempted by copyright law, those courts declined to do so. *See Int'l Sec. Exch., LLC v. Dow Jones & Co., Inc.*, 2007 WL 2142068 (S.D.N.Y. July 25, 2007), *aff'd*, 2009 WL 46889 (2d Cir. Jan. 8, 2009).

ISE then moved the Illinois Circuit Court to dismiss the Complaint on preemption grounds, but the court found ISE's arguments unpersuasive and denied the motion. When ISE moved for leave to file a petition for writ of prohibition in the Illinois Supreme Court on the ground that the Circuit Court did not have jurisdiction to hear the allegedly preempted claims, the court denied the motion. *See Int'l Sec. Exch., LLC v. Maki*, No. 108426 (Ill. June 11, 2009).

ISE moved at the close of discovery for summary judgment on its preemption defense, and the Circuit Court again rejected that defense on multiple grounds. Pet.

App. 42a-49a. The Circuit Court recognized that ISE's sweeping view of the preemptive effect of copyright law on the misappropriation tort "is incorrect." *Id.* at 43a-44a. The court held that ISE could not satisfy either prong of the two-prong test set forth in the savings clause of the preemption provision of the Copyright Act, section 301(b). Like the Northern District of Illinois, the Circuit Court recognized that ISE's preemption defense depends on a mischaracterization of Respondents' claims: "Plaintiffs' claims are not premised upon the copying of published index values from websites and other sources. Rather, it is the connection of ISE's proposed financial product to, and association with, the DJIA and S&P 500 that will allow ISE to exploit Plaintiffs' research efforts, skills, expertise, reputation, and goodwill that are embodied in the indexes. Such intangible assets are not capable of being fixed in a tangible medium and are therefore not the subject matter of copyright." Pet. App. 45a (citations omitted).

Moreover, while ISE persists in maintaining that "[t]he ability to copy and use published index values is . . . integral to the existence of index options," Pet. 5, the Circuit Court found the evidence to be directly to the contrary. Citing admissions by ISE's Chief Executive, the Circuit Court noted that "the copying of index levels, *if any*, is incidental as it relates to how [ISE and OCC] would profit from the unlicensed use of the Plaintiffs' indexes." Pet. App. 47a (emphasis added).

The Illinois Appellate Court affirmed. Pet. App. 13a-14a. It had "no difficulty in concluding the plaintiffs' claims are not premised on protecting 'original works of authorship fixed in a tangible medium of expression,'" as required by the subject matter prong of the preemption analysis. *Id.* at 14a (quoting 17 U.S.C. §102(a)). "Nor do the plaintiffs seek to preclude 'reproduction, performance, distribution or display' of their indexes. . . .[P]laintiffs' claims are not predicated on wrongful copying." *Id.* (quoting 17 U.S.C. §102(a)).

The Appellate Court also rejected ISE's policy arguments challenging the continued validity of *Board of Trade*. Observing that the few factual differences between *Board of Trade* and this case would only have made the *Board of Trade* court *more* likely to protect the providers' interest in the indexes, Pet. App. 32a, the Appellate Court noted that the Illinois Supreme Court is "equipped to address these concerns should it be disposed to review this decision." Pet. App. 35a.

ISE petitioned the Illinois Supreme Court for leave to appeal, making the same arguments it makes here. The court denied the petition without dissent.

REASONS FOR DENYING THE PETITION

The unanimous decision below, affirming the trial court, was rendered by an intermediate-level state court, and the state's highest court declined to grant review. This alone is sufficient reason for this Court to deny the petition. *See Huber v. N.J. Dep't of Envtl. Prot.*, 131 S. Ct. 1308, 1308 (2011) ("[B]ecause this case comes to us on review of a decision by a state intermediate appellate court, I agree that today's denial of certiorari is appropriate.") (statement by Alito, J., joined by Roberts, C.J., and Scalia and Thomas, JJ.).

Beyond this, there is no conflict between the Illinois Appellate Court's decision and that of any other court. As Petitioner recognizes, Pet. 18, the lower courts uniformly agree on the proper test for determining whether section 301 of the Copyright Act preempts a particular state-law claim. As there is no disagreement about the applicable legal rule and no court has reached a different conclusion from the court below in a case involving similar facts, there is no conflict for this Court to address.

Petitioner disagrees with how the court below applied the uniformly accepted legal rule to the facts of this case. But like numerous courts before it, the Illinois Appellate Court correctly determined that the Copyright Act's broad preemption savings provision preserves state-law claims that do not concern copyrightable subject matter or do not seek to enjoin copying or distribution.[2]

Petitioner also relies on tenuous policy arguments that are completely irrelevant to the issue of preemption.

2. Petitioner questions the Illinois courts' competence to address its preemption defense and their integrity in doing so. Pet. 1, 15, 27, 34. Contrary to Petitioner's contention that preemption is "quintessentially a question of federal law to be decided by federal courts," Pet. 1, it is well-established that "when a state proceeding presents a federal issue, even a pre-emption issue, the proper course is to seek resolution of that issue by the state court." *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 149-50 (1988). There is no merit to Petitioner's attacks on the integrity of the Illinois courts or its suggestion that it lost below because CBOE is based in Illinois. The result flowed directly from the application of *Board of Trade*, a case decided by the Illinois Appellate Court and the Illinois Supreme Court *adversely* to the local interest, the Chicago Board of Trade, in favor of Dow Jones, an out-of-state entity.

The "deadweight" loss claimed by Petitioner relates solely to *exclusive* licensing, but Petitioner's preemption argument would end *any* licensing of market indexes, exclusive or otherwise. Petitioner's expert conceded that he had not even considered the policy ramifications of licensing generally. Resp. App. Br. 24-25. The policy considerations that should concern the Court are the harmful consequences that would follow from disrupting three decades of settled expectations, which have produced robust, innovative index businesses that ably serve the public and the financial markets.

I. There Is No Conflict For This Court To Resolve

Petitioner concedes there is no disagreement among the lower courts over the legal rule governing copyright preemption. *See* Pet. 18 (the lower courts "uniformly agree" on the test to determine whether section 301 of the Copyright Act preempts a state-law claim). The Illinois Appellate Court undisputedly applied this same test here. *See* Pet. App. 12a-13a. The Court should deny the Petition for this reason alone. *See* Sup. Ct. R. 10.

Nor is there any conflict between the result in this case and the decision of any other court. The only case Petitioner cites involving claims similar to this case, *Dow Jones*, likewise concluded that those claims were not preempted. The other cases Petitioner relies on are either factually inapposite or did not address copyright preemption at all. Because no two courts have "decided [this] issue in opposite ways, based on their holdings in different cases with very similar facts," there is no conflict for this Court to resolve. Eugene Gressman et al., Supreme Court Practice 242 (9th ed. 2007); *see also*

Lynce v. Mathis, 519 U.S. 433, 436 (1997); *Newport News Shipbuilding & Dry Dock Co. v. Schauffler*, 303 U.S. 54, 57 (1938).

Dow Jones addressed state-law misappropriation and unfair competition claims challenging the unlicensed creation, listing, and trading of option contracts on shares in exchange-traded funds ("ETFs") that, pursuant to separate licenses, were designed to track the DJIA and S&P 500's performance. 451 F.3d at 299-301. The court in *Dow Jones* did not hold these claims preempted, as Petitioner implies, Pet. 32. To the contrary, it concluded that the disputed "information *does not fall within the scope of federal copyright law*." 451 F.3d at 302 n.8 (emphasis added); *cf.* 17 U.S.C. § 301(b)(3). That is why the court below—rather than "reject[ing]" *Dow Jones* as "inapposite," as Petitioner states, Pet. 11—cited *Dow Jones*'s "clear[] h[o]ld[ing] that copyright law does not preempt misappropriation claims of the type at issue here." Pet. App. 18a; *see also id.* at 19a. Thus, the only case similar to this one that Petitioner cites as creating a purported conflict directly supports the result below.

Petitioner nevertheless describes *Dow Jones* as "inconsistent[]" with the result below, apparently because in *Dow Jones* Petitioner "successfully litigated the right to list options on an . . . ETF . . . tracking the DJIA without a license." Pet. 7. But the result in *Dow Jones* had nothing to do with preemption; it rested on an interpretation of state law. The Second Circuit determined that the state-law claims failed on the facts presented because "[b]y authorizing the creation [and public sale] of ETFs using their proprietary formulas, . . . the plaintiffs have relinquished any right to control resale and public trading of those [ETF] shares, notwithstanding the fact that plaintiffs' intellectual property may be embedded in the shares." *Dow Jones*, 451 F.3d at 302-03. That authorization, which was dispositive in *Dow Jones*, is absent here. And the court in *Dow Jones* ruled expressly that its decision did not extend to the facts presented in this case: "Our holding does not address the situation where a proprietary index is employed in the creation of a financial instrument." *Id.* at 303 n.9 (citing *Board of Trade* and *Comex*). Accordingly, *Dow Jones* is completely consistent with this case, and both courts concluded that the federal copyright regime was inapplicable.

Petitioner also incorrectly suggests a conflict with *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841 (2d Cir. 1997) ("*Motorola*"), a factually inapposite pre-*Dow Jones* Second Circuit decision. *See* Pet. 11, 18-19, 21-26. Indeed, when Petitioner argued while litigating *Dow Jones* that *Motorola* "severely limit[ed] the scope of a misappropriation claim under New York law," the Second Circuit rejected that argument because "*Motorola* did not purport to address the scope of a misappropriation claim where, as here, the information does not fall within the scope of federal copyright law." *Dow Jones*, 451 F.3d at 302 n.8.

Motorola involved a "hot news" misappropriation claim challenging real-time transmission of NBA basketball scores and other data. *See Motorola*, 105 F.3d at 845. The misappropriation claims here, by contrast, are not "hot news" claims. *See* Pet. App. 46a. The Second Circuit held that the "hot news" claim asserted in *Motorola* was preempted primarily because the defendants collected their own data instead of free riding on the plaintiffs' data collection. *Motorola*, 105 F.3d at 845, 848-54. This holding permitted the defendants in *Motorola* to continue in their "collection and retransmission of strictly factual material about the games." *Id.* at 853.

There is no dispute that Petitioner may engage in analogous conduct here; it may copy and distribute strictly factual information regarding the DJIA and S&P 500 index levels. *See* Pet. App. 14a, 48a. But unlike the defendants in *Motorola*, Petitioner does not seek merely to distribute factual information. When Petitioner offers index options, it is not marketing to investors the right to receive "news" about the levels of the underlying indexes at a particular point in time, like the news about basketball scores sold in *Motorola*. Instead, ISE hopes to create new securities products that utilize and derive their value from the ongoing creativity, judgment, expertise, reputation, and goodwill of the index provider. Petitioner's attempt to equate index option trading with disseminating factual information about the reported levels of the indexes at a particular point in time rests on a clear factual misstatement, *see* Sup. Ct. R. 15(2), as recognized by the courts below. *See* Pet. App. 23a, 47a; *see also supra* 13; Resp. App. Br. 10-13 (detailing ways ISE and OCC would use the indexes that do not relate to copying or distributing index levels).

Petitioner fares no better by relying on *N.Y. Mercantile Exch., Inc. v. Intercontinental-Exchange, Inc.*, 497 F.3d 109 (2d Cir. 2007) ("*NYMEX*"). *See* Pet. 10-11. In *NYMEX*, a futures exchange asserted a copyright infringement claim against a rival exchange based on alleged copying of the settlement prices it used to value its customers' open trading positions on gas and oil futures.

But, as the Illinois Appellate Court observed, NYMEX asserted no rights comparable to those asserted here, and the *NYMEX* court considered neither a misappropriation claim nor a preemption defense. Pet. App. 24a-25a. Moreover, *NYMEX* had nothing to do with stock indexes or the creation of a security based on the intellectual property embedded in such indexes.

Other cases relied on by Petitioner also present no conflict with the decision below. Cases involving copyrightable subject matter such as books and films, and claims that seek to vindicate rights protected by section 106 of the Copyright Act such as reproduction are irrelevant to both the facts and the legal issue presented here. *See* Pet. 18-20, 27 (citing *Stromback v. New Line Cinema*, 384 F.3d 283 (6th Cir. 2004) (copying poem and screenplay); *Daboub v. Gibbons*, 42 F.3d 285 (5th Cir. 1995) (copying song); *Hartman v. Hallmark Cards, Inc.*, 833 F.2d 117 (8th Cir. 1987) (copying script and graphics); *Ehat v. Tanner*, 780 F.2d 876 (10th Cir. 1985) (copying researcher's notes); *Wrench LLC v. Taco Bell Corp.*, 256 F.3d 446 (6th Cir. 2001) (copying cartoon character expressed in storyboards, scripts, and drawings); *Del Madera Properties v. Rhodes & Gardner, Inc.*, 820 F.2d 973 (9th Cir. 1987), *overruled*, *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994) (copying map); *Barclays Capital Inc. v. Theflyonthewall.com, Inc.*, 650 F.3d 876 (2d Cir. 2011) (copying equity research reports)). All these cases involved attempts to enjoin copying or distributing copyrightable subject matter. Here, by contrast, there has been no attempt to restrain Petitioner from copying or distributing anything, much less copyrightable subject matter. *See* Pet. App. 13a-14a, 46a.

To the extent Petitioner suggests that courts have universally held that all misappropriation claims are preempted, *see* Pet. i, 13, 19, this fundamentally misstates the case law. Indeed, courts agree that misappropriation and similar state-law claims are *not* preempted where, as here, they do not seek to enjoin unauthorized acts of copying or distribution or do not involve a work of authorship fixed in a tangible medium of expression. *See, e.g., Stewart Title of Cal., Inc. v. Fid. Nat'l Title Co.*, 279 F. App'x 473, 476 (9th Cir. 2008) (misappropriation claim preserved); *U.S. Trotting Ass'n v. Chi. Downs Ass'n, Inc.*, 665 F.2d 781, 785 n.6 (7th Cir. 1981) (same); *Toney v. L'Oreal USA, Inc.*, 406 F.3d 905 (7th Cir. 2005) (misappropriation of right of publicity claim preserved); *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1004 (9th Cir. 2001) (same); *Brown v. Ames*, 201 F.3d 654, 657-58 (5th Cir. 2000) (same); *Nat'l Car Rental Sys., Inc. v. Comp. Assocs. Int'l, Inc.*, 991 F.2d 426 (8th Cir. 1993) (breach of contract claim preserved); *G.S. Rasmussen & Assocs., Inc. v. Kalitta Flying Serv., Inc.*, 958 F.2d 896 (9th Cir. 1992) (conversion and unjust enrichment claims preserved); *Altera Corp. v. Clear Logic, Inc.*, 424 F.3d 1079, 1089 (9th Cir. 2005) (tortious interference claim preserved); *see also Feist Pubs., Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 354 (1991) (recognizing that "theory of unfair competition" could supply protection where copyright does not).

This uniformity among the lower courts reflects the unambiguous text of the Copyright Act's preemption savings clause, which is discussed below. *See infra* Point II; 17 U.S.C. § 301(b). The lower courts' uniform agreement that certain state-law claims survive preemption also aligns with the Act's legislative history—including the very legislative history that Petitioner cites as alleged support for its sweeping preemption claims. Pet. 18. That history confirms that "'[m]isappropriation' is not necessarily synonymous with copyright [and] is not preempted if it is in fact based neither on a right within the general scope of copyright as specified by section 106 nor on a right equivalent thereto." H.R. Rep. No. 94-1476, at 132 (1976).[3] *See* Pet. App. 15a-17a; *see also CBOE*, 2007 WL 604984, *4-5 (examining statute and legislative history). Long after *Board of Trade* and *Comex* were decided, Congress reaffirmed its intent to preserve misappropriation claims in the House Report accompanying the 1990 amendments to the Copyright Act: "State law causes of action such as those for misappropriation . . . are not currently preempted under section 301, and they will not be preempted under the proposed law." H.R. Rep. No. 101-514, at 21, reprinted in 1990 U.S.C.C.A.N. 6915, 6931 (1990).

Consistent with the statutory text and legislative history, the lower courts agree that misappropriation claims that come within section 301's preemption savings clause, like Respondents' claims here, are not preempted.

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3. Petitioner acknowledges that state-law claims based on misappropriation of "hot news" survive copyright preemption. Pet. 26-27; *see Barclays Capital Inc. v. Theflyonthewall.com, Inc.*, 650 F.3d 876, 894 (2d Cir. 2011) ("[I]t is generally agreed that a 'hot news' *INS*-like claim survives preemption."); *Motorola*, 105 F.3d at 848 (same). But Petitioner's contention that a "hot news" claim is the only form of misappropriation that survives preemption cannot be squared with the text or legislative history of section 301, which states that a "hot news" claim is *only one example* of the type of misappropriation that states remain free to regulate. H.R. Rep. No. 1476, 94th Cong., 2d Sess. 131-32 (1976).

II. The Illinois Appellate Court Correctly Rejected Petitioner's Preemption Argument

The bulk of ISE's petition is devoted not to identifying a genuine lower-court conflict regarding the correct legal standard, but rather to urging the Court to correct what Petitioner perceives to be a misapplication of that standard. Petitioner does not take issue with the preemption test codified in section 301, which it concedes is "uniformly" applied (Pet. 18) and which the lower courts properly stated and utilized in this case. Rather, Petitioner contends that the court below did not correctly apply that law to the facts of this case. That is rarely a sufficient ground for certiorari. S. Ct. R. 10. In any event, the court below correctly held that section 301 does not preempt Respondents' misappropriation claims.

Preemption provisions must be "narrowly construed," using the "purpose of Congress [as] the ultimate touchstone" of the preemption inquiry. *Altria Group Inc. v. Good*, 555 U.S. 70, 76-77, 87 (2008). In section 301, Congress unequivocally expressed its intent to *preserve* state law from preemption when either the subject matter or the right protected falls outside the ambit of copyright law. *See* 17 U.S.C. § 301(b); *see also* H.R. Rep. No. 94-1476, at 132 (1976); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 165 (1989) (exclusive federal copyright jurisdiction does not "deprive the States of the power to adopt rules for the promotion of intellectual creation within their own jurisdictions") (citing *Aaronson v. Quick Point Pencil Co.*, 440 U.S. 257, 262 (1979); *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 478-79 (1974)).

Congress included in section 301 a broadly worded preemption savings clause—virtually ignored by Petitioner—which preserves "any rights or remedies" under state law with respect to:

> (1) subject matter that does not come within the subject matter of copyright, as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression; or . . .
>
> (3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 . . . .

17 U.S.C. §301(b); *see* Pet. App. 12a-15a (analyzing statutory text). As this provision reflects, Congress intended Section 301 to preempt not "state law," Pet. i, 17-18, but rather only state "copyright regulation," *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 740 (1989), *i.e.*, state causes of action that "approximate copyright claims." Pet. App. 16a.

As the courts below correctly held, the Copyright Act's preemption savings clause preserves the misappropriation claims asserted here for two independent reasons: (i) the work in question is not within the subject matter of copyright as specified in section 102; *and* (ii) the right asserted is not equivalent to rights within the general scope of copyright specified in section 106. 17 U.S.C. § 301(b).

A. Respondents' Indexes Are Not Within the Subject Matter of Copyright Because They Are Neither "Works of Authorship" Nor "Fixed in a Tangible Medium of Expression"

Because the misappropriation claims in this case do not seek protection for "works of authorship" that have been "fixed in [a] tangible medium of expression," they are not "within the subject matter of copyright" and therefore are not preempted. 17 U.S.C. § 301(b)(1).

Attempting to cast its activities into a copyright preemption mold, ISE has maintained the artifice that the only use it proposes to make of S&P Dow Jones's indexes is to copy their published levels—a proposition which, if true, assertedly would insulate ISE's activities from state misappropriation law. *See* Pet. 22. But, as recognized by both the state and federal courts below, ISE's proposition is demonstrably untrue. The unfair competition in which ISE seeks to engage is not dependent upon copying or distribution of index levels. Indeed, Illinois law places no restriction on such copying or distribution. The unfair competition, instead, is ISE's effort to create commercial products whose public acceptance and value would result, not from ISE's own entrepreneurship, but from S&P Dow Jones's expertise, reputation, and goodwill. ISE's proposed activities would misappropriate these purely intangible assets, which indisputably are *not* the proper subject matter of copyright. *See Dow Jones*, 451 F.3d at 302 n.8.

As both the Circuit Court and the Illinois Appellate Court recognized, the distinction between the protectable intangible assets embodied in S&P Dow Jones's index businesses and the published index level is analogous to the distinction between an individual's "persona" (which is protectable by state misappropriation law) and a photograph of the individual, *i.e.*, a tangible manifestation of her persona (which is copyrightable). Pet. App. 14a-15a, 45a. Unlike a photograph, which is unquestionably within the subject matter of copyright, a persona "can hardly be said to constitute a 'writing' of an 'author' within the meaning of the copyright clause of the Constitution." *Toney v. L'Oreal USA, Inc.*, 406 F.3d 905, 909 (7th Cir. 2005) (quoting *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1003-04 (9th Cir. 2001)); *see also Brown v. Ames*, 201 F.3d 654, 658 (5th Cir. 2000) ("A persona does not fall within the subject matter of copyright—it does not consist of 'a "writing" of an "author."'") (internal citation omitted).

Similarly, S&P Dow Jones's expertise, reputation, and goodwill associated with maintaining leading indexes do not constitute "writings" of "authors" within the meaning of copyright law, but, instead, represent intangible assets subject to state-law protection. Neither, by their very nature, are these assets "fixed in [a] tangible medium of expression." 17 U.S.C. § 301(b)(1). The fact that, at any given moment, the index levels may be published does not strip S&P Dow Jones of the protections of state misappropriation law any more than a photograph of an individual deprives her of separable state-law rights in her persona.

Petitioner and its law professor amici misleadingly attempt to reduce the creativity, judgments, expertise, and goodwill associated with the indexes to "effort," *see* Pet. 2, 14, 20, or the "sweat of the brow" that has gone into "compiling facts," *see* Br. of *Amici Curiae* Copyright Law

Professors in Supp. of Pet. 8. The indexes, however, are not fixed collections of pre-existing factual information that S&P Dow Jones merely compiled, akin to the telephone directory listings in *Feist*. They are continuing endeavors requiring the creative exercise of judgment and expertise involving manifold discretionary decisions. *See supra* 5-7. Competing indexes assess the same market segment in very different ways. That is why, for example, on a given day, the S&P 500 may rise 1% and finish at 1500 while the DJIA rises 1.3% and finishes at 14,000, even though both indexes measure the behavior of U.S. large-cap stocks. As the thirty years since *Board of Trade* have shown, there are innumerable ways to assess financial markets. An index's commercial success does require significant effort but it also requires creativity, skill, and the continuous exercise of discretionary judgment. It is S&P Dow Jones's expertise in making these judgments and its associated reputation and goodwill that Petitioner seeks to misappropriate. The decisions below, and the *Board of Trade* precedent they followed, recognized as much. None of these was predicated on protecting mere "effort" or "sweat of the brow."

That this action falls outside the subject matter of copyright does not "provide[] a roadmap for evading preemption in virtually every case," as Petitioner repeatedly asserts. Pet. 2; *see also id.* at 14, 16, 20, 23, 25, 29, 34-35. The decision below has no bearing on preemption in cases that—unlike this one—concern "works of authorship that are fixed in a tangible medium." 17 U.S.C. § 301(a).

B. Respondents' State-Law Rights Are Not Equivalent to Rights Within the General Scope of Copyright

Petitioner's preemption argument fails for a second, independent reason: the rights Respondents assert "are not *equivalent* to any of the exclusive rights within the general scope of copyright as specified by section 106." 17 U.S.C. § 301(b)(3) (emphasis added). The rights specified by section 106 include, as relevant here, reproduction and distribution. *See* 17 U.S.C. § 106(1), (3). Accordingly, if a state-law right is not "equivalent to"—*i.e.*, if it is different from or requires an extra element "instead of or in addition to the acts of reproduction [or] distribution"—"then the right does not lie within the general scope of copyright, and there is no preemption." *Motorola*, 105 F.3d at 850; *see also* Pet. 19. The equivalence test is not met in this case because the state-law right asserted here is not a right to enjoin or otherwise control copying or distribution.

The qualitative difference between Respondents' claims and copyright infringement claims is obvious. Copyright infringement involves copying or distribution of copyrightable materials, but Illinois law places no impediment upon Petitioner's copying or distributing index levels, as the Illinois Appellate Court explained. *See* Pet. App. 13a-14a. Conversely, the acts that form the basis of the *actual* state-law claims—the creation and offering of option contracts based on the indexes—can be accomplished by Petitioner (with the necessary participation of OCC) without any copying or distribution of the index levels. Pet. App. 46a-47a; *see also* Resp. App. Br. 10-13 (describing ways in which ISE and OCC would use the indexes without copying or distributing "index values"); *id.* at 35 (noting admissions by ISE's CEO that ISE could offer index options without copying index levels).

That the state-law claims here do not target copying or distribution sets this case apart from all the "general scope" cases cited by Petitioner. *See* Pet. App. 22a ("In [*Motorola*] and the other cases relied on by ISE, the gravamen of the plaintiffs' claims was the unauthorized *copying* or the act of *distributing* the plaintiffs' information, which brought the claims within the scope of the Copyright Act.") (emphasis in original). For example, *Motorola* met the "general scope" requirement because the claim challenged defendants' dissemination of factual information. *See* 105 F.3d at 847-48, 853-54; *see also Stromback v. New Line Cinema*, 384 F.3d 283, 302 (6th Cir. 2004) (misappropriation claim preempted where defendant "*copied* portions of [plaintiffs' copyrighted] poem and screenplay"); *Daboub v. Gibbons*, 42 F.3d 285, 289 (5th Cir. 1995) (misappropriation claim preempted based on "improper *copying* of [plaintiff's] song"); *Hartman v. Hallmark Cards, Inc.*, 833 F.2d 117, 119, 121 (8th Cir. 1987) (misappropriation claim preempted where it was "a reformulation of [plaintiff's] copyright claims" based on its "copyrighted graphics and script"); *Ehat v. Tanner*, 780 F.2d 876, 877-78 (10th Cir. 1985) (misappropriation claim preempted where it challenged "unauthorized *reproduction* and sale of literary material in which [plaintiff] claims a proprietary interest") (emphases added).

Here, in contrast, there is no dispute that Petitioner may freely copy and distribute published index levels. But the evidence showed that if Petitioner engaged in any copying and distribution of index levels, those acts would be merely "incidental" to how Petitioner would profit from offering unlicensed index options. Pet. App. 47a. Unlike the defendants' customers in *Motorola*, the purchasers of index options are not buying a right to receive information. Indeed, information about index levels at any particular point in time is already widely available to the public. Instead, the value to investors from unlicensed index options derives from S&P Dow Jones's expertise in continuously assessing changing market conditions. Investors who purchase the index options depend on S&P Dow Jones's proven ability, on an ongoing basis, to maintain and adjust the indexes in light of ever-changing market circumstances such that the indexes remain a valid and useful proxy for the dynamic market they measure. It is this ability that makes index options valuable as a tool for efficiently gaining exposure to the market or for hedging against market risks. ISE would profit from trading unlicensed options so predicated upon S&P Dow Jones's expertise, and this misappropriation would be wholly independent from any copying or distribution of published index levels.

Contrary to Petitioner's contention, Pet. 25, this case is by no means the "first" to recognize that state law may provide a remedy for free riding that does not fall within the scope of section 106 of the Copyright Act. Indeed, numerous courts have held that such claims are not preempted where, as here, the claims do not seek to enjoin copying or distribution. *See, e.g.*, *G.S. Rasmussen & Assoc., Inc. v. Kalitta Flying Serv., Inc.*, 958 F.2d 896, 904-05 (9th Cir. 1992) (finding no preemption and describing the right to "use" plaintiff's flight certification as a "much different interest" than copying the documents); *Nat'l Car Rental Sys., Inc. v. Computer Assocs. Int'l Inc.*, 991 F.2d 426, 432-33 (8th Cir. 1993) (breach of contract claims based on unauthorized "use" of computer software are not equivalent to copying and thus not preempted); *U.S. Trotting Assoc. v. Chicago Downs Assoc., Inc.*, 665 F.2d 781, 785 n.6 (7th Cir. 1981) (misappropriation claim based on unauthorized use of information on trotting-horse certificates is not preempted); *United States Golf Ass'n v. Arroyo Software Corp.*, 81 Cal. Rptr. 2d 708, 717 (Ct. App. 1999) (no preemption where golf association's misappropriation claim sought to bar defendant's "use" of association's handicapping formulas and "did not seek to bar [defendant] from simply copying the Formulas"; noting that "Copying is an exclusive right protected under the Act; use is not."); *see also* Pet. App. 23a-24a, 47a-48a.

As with Petitioner's failure to meet the "subject matter" requirement for preemption, the fact that Petitioner could not satisfy the "general scope" requirement does not provide a "roadmap" to evade preemption in every case. Petitioner claims that, by the reasoning of the decision below, the plaintiff in *Motorola* could have escaped preemption by pointing to the efforts and goodwill "necessary to generate basketball scores." Pet. 25. This is incorrect because, as the court below observed, the plaintiff in *Motorola* still would have been asserting a right to preclude the defendants from copying and disseminating factual information—which is what brought the claim within the general scope of copyright. Pet. App. 22a. Because the misappropriation claims here do not seek to enjoin copying or distribution of index levels, the claims are not within the general scope of copyright.

III. The Policy Arguments Advanced by Petitioner and Its *Amici* Are Misdirected and Incorrect

Petitioner and its *amici* offer various policy arguments that are irrelevant to copyright preemption and are appropriately directed to the political branches of government or to the state court, not to this Court. These arguments are, in any event, erroneous.

Petitioner repeatedly asserts that CBOE's "monopoly" on options derived from S&P Dow Jones's indexes creates a "deadweight loss" that Petitioner's expert values at billions of dollars. *See, e.g.*, Pet. 29; *see also* Br. of *Amici Curiae* Business Professors in Supp. of Pet'r ("Bus. Prof. Br.") 6. These assertions, grounded in securities and antitrust law, have no bearing on copyright preemption, the sole issue presented here. Preemption of state law does not turn on conjectures about economic efficiency or on whether or to whom rights recognized under state law are licensed.[4]

The policy arguments made by Petitioner and its *amici* are also beside the point because they focus not on whether indexes may be licensed at all, but rather

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4. The business professor *amici* admit that their arguments have nothing to do with copyright preemption and are directed instead toward their own conceptions of "net social welfare," sound economic policy, and "maximal social benefit." Bus. Prof. Br. 17. But *amici*'s policy preferences provide no ground for the Court to disregard governing statutory language and the clear intent of Congress. *See, e.g.*, *Dimension v. Board of Governors*, 474 U.S. 361, 373-75 (1986) (statutory provisions like preemption and savings clauses are result of "processes of compromise" and cannot be overridden by economic policy arguments made to courts).

on whether indexes may be licensed *exclusively*.[5] Yet Petitioner argues that *any* state-law licensing requirement for proprietary indexes, not merely exclusive licensing, is preempted by the Copyright Act. None of Petitioner's policy arguments addresses the ramifications of non-exclusive index licensing.

Nor does Petitioner confront the significant adverse social impact of the copyright preemption rule it advocates. Allowing businesses to free ride on the investments, expertise and goodwill of their competitors may reduce transaction costs, but it also inflicts an unwanted social cost by squelching innovation. Whether the social-value calculation favors innovation or free-riding has nothing to do with whether copyright law preempts Respondents' misappropriation claims. Absent preemption, it is up to state courts to balance any competing interests, and the Illinois Supreme Court definitively held in *Board of Trade* that this balance favors promoting innovation: "[T]he possibility of any detriment to the public which might result from our holding that defendant's indexes and averages may not be used without its consent . . . are outweighed by the resultant encouragement to develop new indexes specifically designed for the purpose of hedging against the 'systematic' risk present in the stock market." *Board of Trade*, 98 Ill.2d at 121.

5. There is no federal securities regulatory policy against exclusive licensing of indexes as the basis of financial products, notwithstanding what Petitioner and amicus Citadel incorrectly assert. *See* Pet. 7; Br. for Citadel Investment Group as Amicus Curiae in Supp. of Pet. 13-15. As the Circuit Court recognized, the SEC has not adopted any such policy, notwithstanding ISE's specific request that it do so. Pet. App. 55a-56a; *see also* Resp. App. Br. 26-27.

If any policy consideration is relevant here, it is the adverse impact of Petitioner's effort to upset three decades of settled expectations by entities that made significant investments to create indexes and develop markets for index-based products. In the thirty years since *Board of Trade*, these markets have developed based on the expectation that investments in producing and establishing market indexes have the potential to produce reasonable returns. The entire marketplace (including Petitioner, when consistent with its business interests) has accepted the principle that financial products based directly on an index—including options, futures, mutual funds, ETFs, swaps, warrants, and others—require a license from the index provider. Resp. App. Br. 9-10, 18-19. As Petitioner's Chairperson admitted, "licensing of index-based products is the industry norm." Pet. App. 54a; *see also* Resp. App. Br. 19 (admission by OCC General Counsel that he "can't think of an issue that would have been more novel than an exchange trying to trade index options without a license"). Petitioner's assertion that the decision below "creates only disharmony and instability" for investors and exchanges, Pet. 15, rings hollow given that the decision below reaffirmed the law that has been in effect for decades, and upon which these industries depend. Petitioner has identified no basis for this Court to overturn that settled precedent.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

PAUL E. DENGEL
STACIE R. HARTMAN
SCHIFF HARDIN LLP
233 South Wacker Drive
Chicago, IL 60606
(312) 258-5500

R. BRUCE RICH
Counsel Of Record
BENJAMIN E. MARKS
GREGORY SILBERT
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8000
bruce.rich@weil.com

Counsel for Respondents

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