

No. _____

In the
Supreme Court of the United States

INTERNATIONAL SECURITIES EXCHANGE, LLC,

Petitioner,

v.

CHICAGO BOARD OPTIONS EXCHANGE, INC.;

CME GROUP INDEX SERVICES, LLC;

THE MCGRAW-HILL COMPANIES, INC.,

Respondents.

**On Petition for a Writ of Certiorari to the
Illinois Appellate Court**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In 1976, with the “express objective of creating national, uniform copyright law,” Congress enacted Section 301 of the Copyright Act, which “broadly preempt[s]” state law. *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 740 (1989). Since then, the lower courts have consistently guarded against efforts to plead around the Copyright Act and accordingly have held that state-law claims for “misappropriation” fall within the Act’s preemption provision. In a stark departure from those precedents, however, the Illinois Appellate Court concluded that the Act does not preempt respondents’ state-law misappropriation claim. The result of that decision was to insulate an in-state entity, the Chicago Board Options Exchange (“CBOE”), from all competition when it comes to trading options based on the S&P 500 Index and the Dow Jones Industrial Average. The court found that even if the index values might come within the subject matter of the federal Copyright Act (and thus be preempted), a tort based on the misappropriation of the effort necessary to generate the index values was not preempted. The financial consequences of that decision are staggering. The reduction in trading costs if CBOE’s monopoly over just S&P 500 Index options were ended is estimated at nearly \$10 billion per year.

The question presented is: whether the scope of preemption under the federal Copyright Act extends to state-law claims based on the misappropriation of the effort necessary to create widely-disseminated facts and ideas that have been reduced to tangible media and thus fall within the Act’s subject matter.

PARTIES TO THE PROCEEDINGS

Petitioner, who was defendant-appellant in the Illinois Appellate Court, is International Securities Exchange, LLC (“ISE”). Respondents, who were plaintiffs-appellees in the Illinois Appellate Court, are the Chicago Board Options Exchange, Inc.; CME Group Index Services, LLC (successor-in-interest to Dow Jones & Company, Inc.); and The McGraw-Hill Companies, Inc.

On July 2, 2012, respondents CME Group Index Services, LLC and The McGraw-Hill Companies, Inc. formed S&P Dow Jones Indices LLC, a joint venture. S&P Dow Jones Indices LLC now owns, maintains, and licenses the S&P 500 and DJIA, the market indexes at issue in this case. S&P Dow Jones Indices LLC has not, however, been substituted for CME Group Index Services, LLC and The McGraw-Hill Companies, Inc. in the courts below. Accordingly, this petition refers to CME Group Index Services, LLC and The McGraw-Hill Companies, Inc. as “respondents.”

The Options Clearing Corporation (“OCC”) was a defendant-appellant below but does not join in this petition.

RULE 29.6 STATEMENT

Petitioner International Securities Exchange, LLC is a wholly-owned subsidiary of International Securities Exchange Holdings, Inc. (“Holdings”). Holdings’ immediate parent is U.S. Exchange Holdings, Inc., which is a wholly-owned subsidiary of Eurex Frankfurt AG. Eurex Frankfurt AG is a wholly-owned subsidiary of Eurex Zurich AG, which is 50% owned by Eurex Global Derivatives AG (“EGDAG”) and 50% owned by Deutsche Börse AG (“DBAG”). EGDAG is a wholly-owned subsidiary of DBAG, which is a publicly-held company traded on the Frankfurt Stock Exchange. The affiliates of ISE are Topaz Exchange, LLC; Longitude LLC; Longitude SA; and ETC Acquisition Corp. No other corporation owns 10% or more of the stock of International Securities Exchange, LLC.

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PETITION FOR WRIT OF CERTIORARI

By one measure, this is literally a \$10 billion case. Petitioner ISE's expert, a respected former SEC Chief Economist, estimated that the deadweight loss from inflated trading costs on the CBOE exchange, due to CBOE's monopoly over the trading of options on the S&P 500 Index ("S&P 500"), was \$9.7 billion per year, and this case involves CBOE's monopoly over options on both the S&P 500 and the Dow Jones Industrial Average ("DJIA"). Nor is this estimate speculative. Not long ago a Second Circuit decision introduced competition into the market for options trading on related products, and the result was exactly what one would expect from the end of a monopoly—trading costs fell dramatically.

The issue that gives rise to these enormous financial consequences is a straightforward question of federal law concerning the preemptive scope of the Copyright Act. Federal law controls the question of whether facts and ideas, published in a tangible form, are protected by the Copyright Act or can be freely distributed. Competition in the market for index options depends on whether the widely-published values for the S&P 500 and DJIA can be copied and used by exchanges and clearinghouses or whether they are the exclusive property of the index providers so that options on the indexes can be exclusively licensed to CBOE. Whatever the answer to that question, it is quintessentially a question of federal law to be decided by federal courts, not a matter of the state law of CBOE's home state.

The decision below nonetheless rejected ISE's preemption argument and found that use of the S&P

500 and DJIA index values would misappropriate the hard work that went into creating the indexes in violation of state tort law. That preemption decision conflicts with the approach of numerous federal decisions. Indeed, the Court of Appeals reached its decision by drawing a facile distinction between the index values (which it conceded might be within the exclusive domain of federal law) and the effort necessary to produce the values (which it found unpreempted). That spurious distinction provides a roadmap for evading preemption in virtually every case, since every work is created through an author's effort. Because the decision below conflicts with federal court decisions, threatens Congress' expressed interest in a uniform national copyright system, and inflicts practical consequences of billions of dollars a year, all to insulate a prominent in-state business from competition, ISE respectfully petitions for certiorari.

OPINIONS BELOW

The opinion of the Circuit Court of Cook County, Illinois, is unreported and reproduced at App. 38a-58a. The opinion of the Illinois Appellate Court is reported at 973 N.E.2d 390 and reproduced at App. 1a-36a. The order of the Illinois Supreme Court denying the petition for leave to appeal is unreported and reproduced at App. 37a.

JURISDICTION

The Illinois Appellate Court rendered its decision on May 25, 2012. The Illinois Supreme Court denied the petition for leave to appeal on September 26, 2012. On December 3, 2012, Justice Kagan extended

the time within which to file a petition for certiorari to and including January 25, 2013. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause to the United States Constitution is reproduced at App. 59a. Section 301 of the Copyright Act, 17 U.S.C. § 301, is reproduced at App. 60a-62a.

STATEMENT OF THE CASE

A. Indexes and Index Options

A market index value is a statistic that attempts to measure the performance of the stock market as a whole. To establish an index, an index provider selects stocks whose performance, taken in the aggregate, it believes to be representative of the overall performance of the stock market. The provider may perform various calculations, weighting, re-selection of stocks, or other processes, but once it selects the stocks and weights, the derivation of the index value is a straightforward matter of plugging in the trading values of the constituent stocks to generate a single number.

By far, the best-known market indexes in the United States are the DJIA and S&P 500 (the “Indexes”). The DJIA reflects the average of the stock market values of the shares of thirty leading companies in the United States; the S&P 500 incorporates five hundred leading companies. App. 39a. The Indexes are “widely disseminated” by their current owners, respondents CME Group Index

Services, LLC and The McGraw-Hill Companies, Inc. (the “Index Providers”), to “provide investors with a gauge by which to measure the overall activity of the stock market.” *Id.* at 2a.

The Index Providers re-calculate and publish their index values throughout the day via newspapers, news broadcasts, web sites, and other media. App. 39a. The general public uses the Indexes to discuss the state of the U.S. stock market; even non-investors know that it is bad news when the “Dow” is down 200 points. The Indexes are also widely used by sophisticated investors, money managers, and other financial industry participants for a variety of purposes, including, critically, to reduce systemic risk present in a portfolio, *i.e.*, the risk that the portfolio will suffer loss from general market movements—which cannot be eliminated by diversifying the portfolio. *See* Pet. Appellate Br. 9-10.

A standard strategy for controlling systemic market risk is to buy or sell options on the Indexes. *Id.* Index options are simply “a bet on the future value of the index.” App. 3a (internal quotation marks omitted). An index option gives its holder the transferable right, but not the obligation, to exercise the option and receive the difference between the index value when the index option is opened—the “strike price”—and the index value at the option’s expiration. *Id.* If on the expiration date the index value is above the strike price, the holder of a “call” option has the contractual right to receive the difference. If the index value is below the strike price, the holder of a “put” option has the contractual

right to receive the difference. Pet. Appellate Br. 14-15. In all events, the “bet” is settled by reference to the published value of the market index. *Id.* at 15.

The Options Clearing Corporation (“OCC”), an options industry clearinghouse, fixes the terms of all traded index options, issues the options contracts, clears every traded option, and settles investors’ exercise of options. Whether an option is “in the money” at its expiration—*i.e.*, whether it has any cash value—is determined by comparing the published strike price to the “special opening quotation” index value, or SOQ value, published on the expiration date.¹ The exchange listing the index option copies the published SOQ value from a copyrightable source—such as a website, newspaper, or television broadcast—and forwards it to OCC. OCC copies this distributed value, confirms it by copying other sources reporting the same published SOQ value, and then uses the copied SOQ value to calculate the settlement value. OCC then arranges for a cash transfer to the holder of the option. Pet. Appellate Br. 15-16.

The ability to copy and use published index values is thus integral to the existence of index options, just as the ability to copy and use published trading prices is integral to options on individual stocks. Without the ability to copy published index values, an exchange could not list, nor could OCC

¹ The “SOQ value” is calculated as of the time in a market day when all of the stocks listed in the underlying index have opened for trading. Pet. Appellate Br. 15 & n.4.

clear and settle, index options. Moreover, no investor would trade options on an exchange if those options could not be settled if exercised.

B. CBOE's Virtual Monopoly on Index Options

Respondent CBOE is a Chicago-based national securities exchange. App. 3a. CBOE was the first exchange to offer trading in index options. *Id.* at 39a. In 1983, it received an exclusive license from the S&P 500's then-owner to list and offer options on the S&P 500. In 1997, it received an exclusive license from the DJIA's then-owner to list and offer options on the DJIA. It retains this exclusivity; the Index Providers have refused to license such options to any other options exchanges, including ISE, which was founded in 2000 as a competitor to CBOE and has unsuccessfully sought licenses to list options on the Indexes. *See id.* at 3a-4a, 39a; Pet. Appellate Br. 11.

The deadweight economic loss associated with CBOE's monopoly on options on the DJIA and S&P 500 is staggering. The importance of options on the Indexes within both the options industry and the broader economy is hard to overestimate. By virtue of its exclusive control over options on the nation's two most well-known market indexes, CBOE handles nearly 95% of *all* index options by volume. *See* CBOE 2011 Market Statistics 167, *available at* <http://www.cboe.com/data/marketstats-2011.pdf>. In 2011, the value of S&P 500 options traded on CBOE was almost \$486 billion. *Id.* at 62. But because CBOE enjoys a monopoly over this lucrative market, trading costs in general and the bid-ask spread in

particular are inflated compared to similar markets with competition.

For example, when ISE successfully litigated the right to list options on an exchange-traded fund (ETF) tracking the DJIA without a license, *see Dow Jones & Co. v. Int’l Secs. Exch., Inc.*, 451 F.3d 295, 298-99 (2d Cir. 2006), CBOE lost its monopoly on that product. CBOE was forced to “aggressively reduce[] the transaction fees it charges customers to trade” such options, and trading volume in them accordingly “mushroomed.” Annette Nazareth, Commissioner, U.S. Securities & Exchange Commission, Remarks Before the Brooklyn Law School Symposium on the Structure Of Securities Markets (Nov. 10, 2006), *available at* <http://www.sec.gov/news/speech/2006/spch111006aln.htm>. Commissioner Nazareth lauded this “evidence of the salutary benefits of competition on the markets” and emphasized that the *Dow Jones* decision was “terribly important” because its result was “consistent with the SEC’s strong policy of promoting multiple listing and trading of products in our national market system.” *Id.* CBOE today controls only 19% of the index-linked ETF options market, as compared to its control of nearly 95% of the index options market. CBOE 2011 Market Statistics, *supra*, at 171.

The absence of comparable competition in the far larger market for options on the Indexes themselves inflicts enormous deadweight losses on investors and the broader economy. A former Director of the Division of Trading and Markets at the U.S. Securities and Exchange Commission, who also

served as the SEC's Chief Economist, has concluded that the lack of inter-exchange competition for S&P 500 options alone costs investors up to \$9.7 billion annually, due to additional trading costs such as inflated bid-ask spreads. App. 34a; Pet. Appellate Br. 14.

C. Proceedings Below

In 2006, after the Second Circuit permitted ISE to offer options on ETFs tracking the Indexes without a license from the Index Providers, ISE sought to list options on the Indexes themselves. Believing that the Index Providers would, as they did in *Dow Jones*, sue ISE claiming a violation of state misappropriation law, ISE brought a declaratory judgment action in the United States District Court for the Southern District of New York. App. 4a. ISE asserted that any state misappropriation claims the providers could bring would be completely preempted by Section 301(a) of the Copyright Act, 17 U.S.C. § 301(a), and that ISE's listing of options on the Indexes would not infringe any copyrights. *See Int'l Secs. Exch., LLC v. Dow Jones & Co.*, 2007 WL 2142068, at *1 (S.D.N.Y. July 25, 2007).

Rather than answer ISE's complaint, fewer than two weeks later, the Index Providers, along with their licensee CBOE, filed a complaint in the instant case against ISE and OCC in the Circuit Court of Cook County, Illinois. That complaint sought an injunction against ISE's proposed listing of the Index options based on—as ISE had predicted—state misappropriation law. Specifically, Count I alleged that ISE's listing of options on the DJIA and S&P 500 would constitute misappropriation of the

research and investment undertaken by the Index Providers to develop and maintain the Indexes, in violation of Illinois state law as set forth in *Board of Trade v. Dow Jones & Co.*, 456 N.E.2d 84 (Ill. 1983). App. 4a. Count II alleged tortious interference with CBOE's prospective business advantage, and Count III alleged unfair competition. *Id.* at 4a-5a. Shortly after filing the Illinois action, the Index Providers moved to stay the ISE's Southern District action. *Id.* at 6a.

ISE removed the Illinois action to the United States District Court for the Northern District of Illinois. App. 5a. Believing that it lacked jurisdiction, the district court remanded the case. *Id.* at 5a-6a. Following the remand, and notwithstanding that ISE had filed its suit first, the Southern District granted the Index Providers' stay motion. *See Int'l Secs. Exch.*, 2007 WL 2142068 at *3, *aff'd*, 2009 WL 46889 (2d Cir. Jan. 8, 2009).

The Cook County Circuit Court then granted respondents' motion for summary judgment. App. 38a-58a. It rejected ISE's argument that respondents' misappropriation claim is preempted by the Copyright Act, *id.* at 42a-49a, and held that the Illinois Supreme Court's *Board of Trade* decision governed that claim. *Id.* at 52a-56a.² The court

² The court treated Count I (misappropriation) and Count III (unfair competition) as "essentially the same," as did the Illinois Appellate Court. App. 9a. For brevity, this petition will refer only to the misappropriation claim. The court dismissed Count II as moot, and respondents did not appeal that determination; that claim is not before this Court.

permanently enjoined ISE from listing or providing options on the Indexes and from causing OCC to issue, clear trades in, or settle the exercise of such options. *Id.* at 57a-58a.

The Illinois Appellate Court affirmed. App. 1a-36a. The court acknowledged that the index values “are freely copied and distributed globally on almost a real-time basis.” App. 13a-14a. It also recognized that the index values, once published, “are in the public domain and may be freely used by anyone.” *Id.* at 14a (internal quotation mark omitted). And it noted respondents’ concession that they “may assert no rights in the published index values themselves, which have been held by courts to constitute ‘a matter of basic market fact.’” *Id.* (citing *New York Mercantile Exch., Inc. v. IntercontinentalExchange, Inc.*, 389 F. Supp. 2d 527, 542 (S.D.N.Y. 2005), *aff’d*, 497 F.3d 109 (2d Cir. 2007) (*NYMEX*)) (internal quotation marks omitted).

Nevertheless, the court held that respondents’ misappropriation claim is not preempted by the Copyright Act. It concluded that the Act had no preemptive effect because “[respondents’] claims are not premised on protecting ‘original works of authorship fixed in a tangible medium of expression,’” nor did respondents “seek to preclude ‘reproduction, performance, distribution or display’ of their indexes.” App. 13a. Rather, the court stated, respondents’ misappropriation claim “is premised on ISE’s unauthorized *use* of the research, expertise, reputation, and goodwill associated with the [respondents’] product for ISE’s own gain.” *Id.* at 14a. The court rejected ISE’s contention that

respondents' claim "centers on unauthorized copying or unlicensed distribution" as an "oversimplification." *Id.* Instead, the court asserted, respondents' claim "centers on ISE's unauthorized and unlicensed use of [respondents'] ideas, systems, and concepts" and thus did not fall within the Copyright Act's purview. *Id.*

The Court of Appeals also cited for support this Court's decision in *International News Service v. Associated Press*, 248 U.S. 215 (1918) (*INS*). It acknowledged that, as a pre-*Erie* articulation of federal common law, the decision is "no longer ... legally authoritative," App. 15a (quotation marks omitted), but it nonetheless concluded that "a 'hot-news' *INS*-like claim survives preemption," *id.* at 16a (citations omitted). Relying exclusively on legislative history, the court then held that the *INS* exception applied because ISE had purportedly "appropriated information in the form of data updates from the index providers' databases." *Id.* at 17a-18a.

The court rejected ISE's reliance on a litany of federal precedent. Among other things, the court believed *Dow Jones* was inapposite because it "clearly held" that the Copyright Act "does not preempt misappropriation claims of the type at issue here." App. 18a. It rejected *National Basketball Association v. Motorola, Inc.*, 105 F.3d 841 (2d Cir. 1997) (*NBA*), because "the gravamen of the plaintiffs' claims" in that case was "the unauthorized *copying* or the act of *distributing* the plaintiffs' information," while the instant case was "predicated on the unauthorized *use* of the providers' expertise and goodwill." App. 22a-23a. And it held that the Second Circuit's decision in *NYMEX, supra*, was inapposite because that case

“did not address preemption in general or preemption as it relates to a misappropriation claim specifically.” App. 25a. The court nevertheless asserted that the Illinois Supreme Court’s *Board of Trade* decision supported its preemption holding, even though *Board of Trade* also “did not address the preemption issue.” *Id.* at 18a. The court also relied on *Standard & Poor’s Corp. v. Commodity Exchange, Inc.*, 683 F.2d 704 (2d Cir. 1982), despite acknowledging that the decision “made no mention of copyright” or copyright preemption. App. 21a.

Having rejected ISE’s claim of preemption under the Copyright Act, the Court of Appeals then held that respondents had established misappropriation under Illinois state law as set forth in *Board of Trade*. *Id.* at 32a-33a. In so holding, the court acknowledged that “case law and commentaries have viewed with disfavor the *Board of Trade* decision and the tort of misappropriation itself.” *Id.* at 34a (citing authorities). The court also conceded that “[t]here is evidence that CBOE’s grip on the index options trading market is monopolistic” and that the SEC has recognized that “enhanced competition in the options markets” results in “the narrowing of [bid-ask] spreads,” which “can provide better prices for investors.” *Id.* at 33a-34a (internal quotation marks omitted). It acknowledged ISE’s expert’s calculations that CBOE’s monopoly over DJIA and S&P 500 indexes costs investors up to \$9.7 billion annually. *Id.* at 34a. And it noted the “uncontested fact” that CBOE’s trading fees decreased following *Dow Jones*. *Id.* The court nevertheless declared itself “bound by *Board of Trade*” and held for respondents on their state-law claim. *Id.* at 35a.

The Illinois Supreme Court denied ISE's petition for leave to appeal from the judgment of the Court of Appeals. App. 37a.

REASONS FOR GRANTING THE PETITION

The decision below is incorrect, conflicts with the federal courts of appeals, undermines the important federal interest in national uniformity of the copyright laws, and will entrench a multi-billion-dollar monopoly absent this Court's intervention. Congress enacted Section 301(a) of the Copyright Act with the clear and express intention of broadly preempting state law and ensuring national, uniform copyright law. Consistent with that manifest intent, federal courts addressing copyright preemption claims have construed Section 301(a) in an expansive manner. First, they have consistently held that the scope of copyright preemption is broader than the scope of copyright protection; federal law is just as concerned with preventing state-law protection for ideas and facts Congress wanted freely disseminated, as it is with duplicative state and federal protection. Second, courts have consistently held that state-law "misappropriation" claims are preempted by Section 301(a) and have rejected efforts to avoid preemption by reframing a claim as one for misappropriation of the effort necessary to create a work that comes within the subject matter of the Copyright Act.

Under these well-established principles, respondents' misappropriation claim is plainly preempted. The index values for the DJIA and S&P 500 are widely published in the tangible media of newspapers, broadcasts, and web sites throughout the day. Accordingly, those values fall squarely

within the preempted “subject matter” of Section 301(a), even if they are not copyrightable. The Illinois Appellate Court’s conclusion to the contrary proceeded on the erroneous belief that only copyrightable elements may be subject to Copyright Act preemption. Similarly, respondents’ misappropriation claim seeks to enjoin ISE’s copying and distribution of the published index values—conduct integral to the listing and clearing of index options. Nonetheless, the Court of Appeals viewed the claims as escaping preemption based on a spurious distinction between the index values themselves and the underlying effort to create them.

While the erroneous and anomalous nature of that decision is reason enough to grant certiorari, the decision below also significantly undercuts the important federal interest in nationally uniform copyright law. The importance of that interest has been recognized since the founding and was the driving force behind enactment of the current Copyright Act, especially Section 301(a). Actions arising under the Copyright Act are exclusively heard in federal court. But the decision below creates a roadmap for evading uniform federal law and the federal courts. Virtually any copyright claim can be recast as a complaint about misappropriating the effort necessary to create the copyrighted work—just as respondents did here, *after* ISE first filed suit in district court.

The general interest in uniformity is especially critical in the securities context. National securities exchanges like ISE and CBOE list thousands of products, serve national and international investors,

and transfer billions of dollars each year. Accordingly, they need a predictable, uniform legal framework in which to operate. The decision below creates only disharmony and instability, leaving exchanges and investors uncertain as to which financial products may be freely listed and harming the nation's securities markets.

Uniform federal laws protect against favoritism, disparity, and forum-shopping. All of those concerns are on full display here. The decision below insulates a prominent local monopoly from any competition. Concerns about forum-shopping were fully realized here; a dispute that started as ISE's federal court declaratory action was transformed into a state-law dispute in Cook County Circuit Court based on respondents' legal maneuvering, and the result was to entrench the local monopolist. The costs of the decision in terms of deadweight losses to investors and the broader economy are staggering. Because CBOE enjoys a monopoly on the \$486 billion annual trade in options involving the S&P 500, the estimated costs of the decision below translate into \$9.7 billion in trading costs for S&P 500 options alone.

Certiorari is imperative, finally, because this is the only opportunity that this Court will have to review the specific question presented and its enormous economic impact and, more broadly, the gaping loophole in Section 301(a) created by the decision below. Any exchange that wishes to offer options on the Indexes will find themselves in the Illinois courts and their efforts foreclosed. More generally, future plaintiffs will easily be able to avoid

the federal courts and federal copyright law by advancing state-law “misappropriation” claims that circumvent the Copyright Act. Further percolation will not resolve these serious problems, nor will it bring these issues before the Court again. To prevent the irreparable harm wrought by the incorrect and anomalous decision below, the Court’s review of this case is necessary.

I. The Court Of Appeals’ Decision Is Profoundly Incorrect And In Conflict With Decisions Of The Federal Courts Of Appeals.

The decision below is not just wrong, but dangerously wrong. By distinguishing between the copying of index values and the work that went into producing them and finding misappropriation of the latter subject to an unpreempted state-law tort action, the Illinois courts have created a roadmap for eviscerating Congress’ plan to develop a uniform federal law of copyright. The decision below cannot be reconciled with either the plain text of the Copyright Act or the well-established law set forth by the federal courts of appeals.

1. Before 1976, copyright law subsisted at both the federal and state levels, with publication serving as the line of demarcation. Federal law provided protection only for “published” works, while the states were free to extend copyright protection to “unpublished” works. *See Goldstein v. California*, 412 U.S. 546, 570 n.28 (1973); Copyright Act of 1909 § 2. In 1976, Congress overhauled the copyright system by enacting a “comprehensive statutory scheme” governing both “the existence and scope” of copyright

protection. *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1241 (2010). With the “express objective of creating national, uniform copyright law,” *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 740 (1989), Congress eliminated the previous federal-state regime and enacted an express federal preemption provision, which states:

On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

17 U.S.C. § 301(a).³

In enacting the new Copyright Act, Congress could not have been clearer about its intent to displace

³ Congress also identified actions for which state protection remains available, 17 U.S.C. § 301(b), though they are “merely the mirror of the conditions found in” Section 301(a). Joseph P. Bauer, *Addressing the Incoherency of the Preemption Provision of the Copyright Act of 1976*, 10 Vand. J. Ent. & Tech. L. 1, 16 (2007).

state law. *See PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2586 (2011) (noting that the “purpose of Congress” is the “touchstone in every pre-emption case”). The Act was designed to “substitut[e] a single Federal system” for the “anachronistic, uncertain, impractical, and highly complicated dual system” that existed previously. H.R. Rep. No. 94-1476, at 129 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5745. A broad preemption provision was necessary to “avoid the practical difficulties of determining and enforcing ... rights under the differing laws and in the separate courts of the various States.” *Id.* Accordingly, Section 301 was “stated in the clearest and most unequivocal language possible,” so as to “foreclose any conceivable misinterpretation of its unqualified intention that Congress shall act preemptively,” and to “avoid the development of any vague borderline areas between State and Federal protection.” *Id.* at 130.

While this Court has not yet had occasion to interpret Section 301’s express preemption provision, the federal courts of appeals uniformly agree that Section 301(a) preempts state-law claims when two conditions are met: (1) the state-law claim protects rights within the “general scope” of the federal Copyright Act without requiring proof of an extra element to impose liability, and (2) the works at issue come within the “subject matter” of the Copyright Act. *See, e.g., Stuart Weitzman, LLC v. Microcomputer Resources, Inc.*, 542 F.3d 859, 864 n.5 (11th Cir. 2008); *Stromback v. New Line Cinema*, 384 F.3d 283, 300 (6th Cir. 2004); *NBA*, 105 F.3d at 848. The leading copyright treatise is in accord. *See* 1 M.

Nimmer & D. Nimmer, Nimmer on Copyright § 1.01[B] (hereinafter “Nimmer”).

First, under the “general scope” requirement, the state law must protect “legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by Section 106.” 17 U.S.C. § 301(a); *e.g.*, *Stromback*, 384 F.3d at 300. The exclusive rights granted by Section 106 include the rights to “reproduce,” “distribute,” and “display” material. 17 U.S.C. § 106. Under what is deemed the “extra element” test, only if the state claim requires an “extra element ... in addition to” the rights set forth in Section 106 does it survive preemption. *NBA*, 105 F.3d at 850; 1 Nimmer § 1.01[B][1] (noting that “the ‘extra element’ test generally furnishes the touchstone here”).

Applying this “extra element” test, the lower courts have consistently held state-law misappropriation claims preempted by Section 301(a). *See, e.g.*, *Stromback*, 384 F.3d at 301-02; *Daboub v. Gibbons*, 42 F.3d 285, 289 (5th Cir. 1995); *Hartman v. Hallmark Cards, Inc.*, 833 F.2d 117, 121 (8th Cir. 1987); *Ehat v. Tanner*, 780 F.2d 876, 878 (10th Cir. 1985); *see also* 1 Nimmer § 1.01[B][1][f][iii] (observing that “legions of cases have held preempted claims for misappropriation”). The reason for this consistency is straightforward: the gravamen of a “misappropriation” claim is that the defendant is engaging in copying, distribution, or display of the plaintiff’s material—exclusive rights protected by the Copyright Act. *See Ehat*, 780 F.2d at 878. As such, the claim is not “qualitatively different” from a copyright action, even if styled as “misappropriation.”

Wrench LLC v. Taco Bell Corp., 256 F.3d 446, 456 (6th Cir. 2001). That is the case even when the “misappropriation” claim is facially premised not on copying or reproduction but on the defendant’s alleged “use” of copied material or the “time, effort, and money” expended by the plaintiff in creating it. *Stromback*, 384 F.3d at 301; *Del Madera Properties v. Rhodes & Gardner, Inc.*, 820 F.2d 973, 977 (9th Cir. 1987) (holding claim for “misappropriation of [plaintiff’s] time and effort expended in producing” work preempted).

As these cases demonstrate, respondents are not the first to try to draw a distinction between the copied works and the effort that went into their generation. But the court below is the first court to sanction that distinction as a basis to avoid what would otherwise be the clear preemptive effect of the Copyright Act. And acceptance of this spurious distinction would provide a roadmap for avoiding preemption in virtually every case, since published works do not spring into existence without prior effort from the author and any dispute about unauthorized copying can be formulated as a complaint about the misappropriation of the work that went into creating that which was copied. As Nimmer observes, “[I]t is difficult to see any substance in the asserted distinction between ‘copying’ (or reproduction) and ‘appropriation’ (or misappropriation).” 1 Nimmer § 1.01[B][1][f][iii].⁴

⁴ By way of comparison, state-law claims that are routinely found not to be preempted, because of the existence of a qualitatively different extra element, include contract claims

Second, under the “subject matter” requirement, the material at issue must “come within the subject matter of copyright as specified in sections 102 and 103.” 17 U.S.C. § 301(a); *e.g.*, *Stromback*, 384 F.3d at 300. Section 102 provides that copyright protection subsists in original works of authorship including literary, musical, pictorial, and dramatic works, but does not extend to any “idea, procedure, process, system, method of operation, concept, principle, or discovery.” 17 U.S.C. § 102.

Critically, however, the subject matter inquiry does not ask whether the work is actually protected by federal law, but only whether it comes within the Copyright Act’s subject matter. Consistent with its intent to enact a sweeping provision preempting “borderline” cases, Congress was just as concerned about eliminating state-law protection for materials that federal law addressed but consciously did not protect as about situations in which in state and federal law might provide duplicative remedies. Consistent with that intent, courts have repeatedly held that “the scope of the Copyright Act’s subject matter is broader than the scope of the Act’s protections.” *Wrench*, 256 F.3d at 455. Thus, Section 301(a) “bars state law misappropriation claims with respect to uncopyrightable as well as copyrightable elements.” *NBA*, 105 F.3d at 849; *see also Montz v. Pilgrim Films & Television, Inc.*, 649 F.3d 975 (9th Cir. 2011); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447

(requiring the element of an agreement), fraud (requiring misrepresentation), and conversion (requiring defendant’s possession of property). *See Bauer, supra*, at 39-42.

(7th Cir. 1996); *Ehat*, 780 F.2d at 878; 1 Nimmer § 1.01[B][2] (“[F]ailure to meet the required standards for federal protection will not negate federal pre-emption.”); H.R. Rep. No. 94-1476, at 131. In short, the “shadow actually cast by the Act’s preemption is notably broader than the wing of its protection.” *United States ex rel. Berge v. Bd. of Trustees of the Univ. of Ala.*, 104 F.3d 1453, 1463 (4th Cir. 1997).

2. Under the foregoing well-established federal caselaw, respondents’ state-law misappropriation claim is clearly preempted by the Copyright Act. Copying and distributing the index values that the Index Providers publish are integral to ISE’s listing of index options and OCC’s clearing and settling such options, just as copying and distributing stock prices are critical to trading in stock options. For every index option ISE lists, on the expiration date of that option, ISE copies the single published index value—published in a newspaper, broadcast, or web site—that is the measure of settlement as defined in the options contract. ISE transmits the value to OCC, which copies it and calculates the settlement value of the option. Manifestly, what index options trading requires—and what respondents seek to enjoin through their misappropriation claim—is the copying and distributing of published index values. There is no “extra element” that respondents must establish “in addition to” showing that ISE and OCC copy and distribute the published index values when listing and clearing index options. *NBA*, 105 F.3d at 850. As such, respondents’ claim satisfies the “general scope” prong of federal preemption.

Because they are published in tangible media like newspapers and web sites, the index values likewise clearly satisfy the “subject matter” prong. To be sure, the index values’ character and wide distribution in the media make it unlikely that federal law would prevent ISE from copying those values, but that in no way takes the materials out of the requisite “subject matter.” “For preemption purposes, ideas and concepts that are fixed in a tangible medium fall ... within the subject matter of copyright,” even if not themselves copyrightable. *Montz*, 649 F.3d at 979-80; *see NBA*, 105 F.3d at 849. Consequently, respondents’ misappropriation claim is preempted by the Copyright Act.

In holding otherwise, the Court of Appeals employed profoundly flawed reasoning that is at odds with federal precedent and provides a roadmap for avoiding preemption in virtually every case. The court first concluded that respondents’ misappropriation claim did not satisfy the “subject matter” requirement because the claim was not “premised on protecting ‘original works of authorship fixed in a tangible medium of expression.’” App. 13a (quoting 17 U.S.C. § 102(a)). But that determination turned on the court’s errant belief that copyright preemption (*i.e.*, subject matter) and copyright protection are coterminous. As noted, that proposition has been roundly rejected. *See* pp. 21-22, *supra*. Thus even if respondents’ claim centered on noncopyrightable “ideas, systems, and concepts,” as the court believed, App. 14a, the “subject matter” requirement is satisfied so long as the “ideas and concepts ... are fixed in a tangible medium,” *Montz*, 649 F.3d at 979-80, as is clearly the case regarding

the published index values. *See NBA*, 105 F.3d at 849 (“Section 301 bars state law misappropriation claims with respect to uncopyrightable as well as copyrightable elements.”). Wholly apart from whether federal copyright law precludes ISE’s use of the index values—and ISE clearly believes it does not—the values plainly fall within the subject matter of the Copyright Act.⁵

The Court of Appeals next concluded that respondents’ misappropriation claim did not satisfy the “general scope” requirement because, in its view, the claim did not “seek to preclude reproduction, performance, distribution or display of the[] indexes.” App. 13a (internal quotation marks omitted). Instead, the court observed, respondents’ claim “is premised on ISE’s unauthorized *use* of the research, expertise, reputation, and goodwill associated with the [respondents’] product for ISE’s own gain.” *Id.* at

⁵ Neither *Dunlap v. G&L Holding Group Inc.*, 381 F.3d 1285 (11th Cir. 2004), nor *Toney v. L’Oreal USA, Inc.*, 486 F.3d 905 (7th Cir. 2005), cited by the Court of Appeals, App. 14a, is to the contrary. Both cases merely stand for the unremarkable proposition that ideas *not* fixed in a “tangible medium” are not subject to preemption. As Nimmer observes, *Dunlap* “did not involve reproduction, distribution, performance or display” of the idea, 4-19D Nimmer § 19D.03[B][1], in stark contrast to the reproduction and distribution of published index values that occurs when ISE lists index options. In every case that involves materials fixed in a tangible medium, there will be some abstract idea in the background, but that is not enough to make a case like *Dunlap*. Once the idea is manifest in a tangible medium, that tangible manifestation of the idea—here the published index values—falls squarely within the subject matter of the Copyright Act.

14a. But that distinction is doubly faulty. First, it squarely conflicts with leading cases and commentaries that find no credible distinction between “reproduction” of a work and “use” of the time, skills, and expense expended to create that work. As noted, respondents are not the first to draw this distinction, just the first to get away with it. *See* pp. 19-20, *supra*.

Second, and more important, this spurious distinction provides a roadmap for eviscerating Congress’ intent, because any clearly preempted misappropriation claim can be redrawn to focus not on the copied materials (here, the index values), but on the hard work and associated goodwill involved in creating the materials. To take just one example, the work and resultant goodwill associated with picking the stocks and weights for the S&P 500 pales in comparison to the efforts and associated goodwill of the NBA in creating the preconditions necessary to generate basketball scores. But once those scores are distributed widely in the media, federal law applies and limits the NBA’s ability to control further copying. *See NBA*, 105 F.3d at 843. Under the Court of Appeals’ mistaken approach, the exclusive reach of the federal law could be easily circumvented by focusing not on the scores, but on the effort and associated goodwill involved in generating them. “[I]f the language of the [Copyright Act] could be so easily circumvented, the preemption provision would be useless, and the policies behind a uniform Copyright statute would be silenced.” *Daboub*, 42 F.3d at 290. This Court, moreover, has repeatedly held in a variety of contexts that it “would require the suspension of disbelief to ascribe to Congress the

design to allow its careful and thorough ... scheme to be circumvented by artful pleading.” *Block v. North Dakota ex rel. Bd. of Univ. and Sch. Lands*, 461 U.S. 273, 285 (1983) (quoting *Brown v. GSA*, 425 U.S. 820, 833 (1976)). Yet that is precisely what the decision below allowed and encourages.

The Court of Appeals supported its flawed analysis by asserting that Congress in enacting Section 301(a) “clearly intended to preserve some form of the tort of misappropriation,” particularly the “hot-news” claim that this Court recognized in *International News Service v. Associated Press*, 248 U.S. 215 (1918) (*INS*). App. 16a (citations omitted). But that reasoning does not save respondents’ claim. As an initial matter, the text of Section 301(a) says nothing about preserving any particular category of claim. In concluding otherwise, the court relied heavily—indeed almost exclusively—on legislative history, rather than the express preemption clause’s text or the “subject matter” and “general scope” tests courts have derived from that text.

Furthermore, even to the extent a “hot-news” *INS*-like claim survives preemption, the Court of Appeals made no attempt to ascertain “the *breadth* of the ‘hot-news’ claim that survives preemption.” *NBA*, 105 F.3d at 850. That is a “crucial question,” *id.*, since a construction of the “hot-news” exception broad enough to reach this case would swallow Section 301(a) whole. That would be an especially remarkable development given that *INS* was a narrow federal common law case from pre-*Erie* days that pre-dated the 1976 Copyright Act and its express preemption provision by more than half a

century. What is more, the *INS* decision “has long been regarded with skepticism by many courts and scholars and often confined strictly to its facts.” *Id.* at 852 n.7; see *Barclays Capital Inc. v. Theflyonthewall.com, Inc.*, 650 F.3d 876, 894 (2d Cir. 2011) (“*INS* itself is no longer good law.”); *McKevitt v. Pallasch*, 339 F.3d 530, 534 (7th Cir. 2003). For these reasons, courts addressing the interplay of Section 301(a) preemption and the “hot-news” exception have stressed the “narrowness” of the exception. *Barclays*, 650 F.3d at 896.

The Court of Appeals did no such thing and instead extended *INS* (and its presumed, implicit non-preemptive penumbra) into uncharted waters. The court concluded that respondents satisfied the “hot-news” exception because, in the court’s view, “ISE, a direct competitor of CBOE ... has appropriated information in the form of data updates from the index providers’ databases.” App. 17a-18a. But that is a substantial expansion of *INS*. In *INS* the alleged misappropriator was a direct competitor of the party (AP) that generated the “hot-news.” Here, by contrast, ISE is not seeking to publish the Indexes in competition with the Index Providers, but rather seeks to copy the published index values to compete with CBOE. Nor does ISE copy the values directly from the Index Providers, but rather from third parties to whom the data is widely distributed.

This Court has stated that the conduct in *INS* “amounted to nothing short of theft of proprietary information.” *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 674 (1999); see *Barclays*, 650 F.3d at 905 (describing *INS*

as “tightly focused on the practices of the parties to the suit before it”). Plainly, that is not the case here. ISE simply copies facts—index values—that respondents have already published to the world and distributes them to OCC for settlement of options. Such unremarkable conduct simply does not constitute a “hot-news” claim, much less qualify for the narrow exception to preemption under Section 301(a). *See Fin. Info., Inc. v. Moody’s Investors Serv., Inc.*, 808 F.2d 204, 208 n.4 (2d Cir. 1986) (rejecting “hot-news” claim because the “material in question here was obtained through conventional channels”). This conflict over the breadth of a pre-*Erie* federal common law decision may seem anomalous, but because of the Court of Appeals’ belief that the *INS* decision informs the scope of the Copyright Act’s preemption provision, it is highly relevant to the distinctly federal question of Section 301’s scope.

The Court of Appeals also cited *Board of Trade* in support, but had to concede that the decision “did not address the preemption issue.” App. 18a. Its belief that the decision’s “silence” on the issue means that a misappropriation claim would not be preempted, *id.*, is wholly untenable; the Illinois Supreme Court’s failure to address an unraised issue says nothing about the preemptive effect of a federal statute on state law. Indeed, just a few pages later in its opinion, the Court of Appeals *rejected* ISE’s reliance on another decision because that case “did not address preemption.” *Id.* at 25a (citing *NYMEX*).

In short, the Court of Appeals’ decision cannot be squared with Congress’ intent to “broadly pre-empt[]” state-law claims under Section 301(a), and it adopted

interpretations of the “subject matter” and “general scope” requirements for Copyright Act preemption that are wildly out of step with principles set forth in the federal courts of appeals and leading commentaries. Worse still, the court gave determinative weight to a facile distinction between the copied works and the effort that went into producing them, which is a roadmap for evading preemption in virtually every case. And as shown next, the Court of Appeals did all this to benefit an in-state monopolist at the expense of billions of dollars in deadweight trading losses, not to mention the federal interest in uniformity. The Court should grant certiorari and reverse the Illinois Appellate Court’s erroneous and anomalous decision.

II. The Court Of Appeals’ Decision Undermines The Important Federal Interest Of Copyright Uniformity And Permanently Entrenches An In-State Monopolist.

The decision below works extraordinary and irreparable harm on the important federal interest of national uniformity in the copyright laws. It simultaneously imposes billions of dollars in deadweight trading losses that harm market efficiency to the sole benefit of an in-state monopolist. There is no reason for this Court to tolerate this massive one-two punch.

1. The compelling nature of the federal government’s interest in a uniform national copyright policy has been obvious since the founding. In explaining the necessity of the Constitution’s Copyright Clause, U.S. Const. art. I, § 8, cl. 8, James

Madison observed that “[t]he States cannot separately make effectual provision” for copyright. The Federalist No. 43, at 272 (James Madison) (Clinton Rossiter ed., 1961). Congress reaffirmed the need for a truly uniform national policy when it enacted Section 301(a) with the “express objective of creating national, uniform copyright law.” *Reid*, 490 U.S. at 740; see H.R. Rep. 94-1476, at 129 (stating that Act is designed to “carr[y] out the basic constitutional aim[] of uniformity”). Congress’ desire for “national, uniform copyright law” is also reflected in its grant of exclusive jurisdiction to federal district courts over cases arising under the Copyright Act. See 28 U.S.C. § 1338(a). Indeed, every federal court of appeals to have addressed the issue has concluded that the exceptional doctrine of complete preemption—under which state-law claims are considered to arise under federal law for purposes of federal jurisdiction—applies in copyright. See *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 64-65 (1987); *GlobeRanger Corp. v. Software AG*, 691 F.3d 702 (5th Cir. 2012); *Ritchie v. Williams*, 395 F.3d 283, 285-87 (6th Cir. 2005); *Briarpatch Ltd., L.P., v. Phoenix Pictures, Inc.*, 373 F.3d 296, 303-05 (2d Cir. 2004); *Rosciszewski v. Arete Assocs., Inc.*, 1 F.3d 225, 230-33 (4th Cir. 1993).

The Court of Appeals’ flawed decision, however, disrupts the national copyright uniformity that Congress has emphatically sought and courts have consistently upheld. The decision permits an Illinois native to plead around the Copyright Act and its preemptive force by the simple expedient of restyling a claim about copying works, which would otherwise fall within the Act’s ambit, as a claim for

“misappropriation” of the time, expense, or expertise expended in creating the subject matter at issue. Such an easy plead-around would strike at the heart of the interest in uniformity; the “policies behind a uniform Copyright statute would be silenced.” *Daboub*, 42 F.3d at 290. That misguided focus on the underlying effort in creating the work, as well as the Court of Appeals’ extremely broad reading of *INS*’s “hot-news” claim, creates the “patchwork protection that the drafters of the Copyright Act preemption provision sought to minimize.” *Barclays*, 650 F.3d at 898 (finding preemption and rejecting a “hot-news” exception for “disseminating factual information”).

The fact that all of this inures to the benefit of an in-state entity like CBOE underscores the basic concerns with uniformity. Copyright questions are supposed to be decided by federal courts applying uniform principles. Every copyright claim involves an allegation that the defendant has misappropriated another’s copyrighted work. When the copyright holder is a local fixture or employer, the need for clear rules and neutral forums is obvious and amply illustrated by this case.

This case also clearly illustrates that concerns with forum-shopping are not abstract musings. Not only has the Court expressed “particular concern” about forum-shopping as a general matter, *Yee v. City of Escondido*, 503 U.S. 519, 538 (1992), but Congress’ grant of exclusive jurisdiction to district courts to adjudicate claims arising under the Copyright Act demonstrates its clear intent specifically to foreclose such conduct in this context. This case, however, could not represent a more

egregious example of the forum-shopping that this Court and Congress have sought to prevent. *After* ISE filed suit under the Copyright Act in the Southern District of New York, respondents filed a misappropriation claim arising out of the exact same facts in Illinois state court, in order to gain the benefit of the more favorable forum and the Illinois Supreme Court's *Board of Trade* decision—which, in the end, they did.

The need for uniformity is especially compelling in the securities context in which this case arises. National securities exchanges located around the country—including ISE and CBOE—offer and list hundreds if not thousands of different financial products each year, with new products routinely introduced. By permitting plaintiffs to invoke state-law theories in their home jurisdictions so as to circumvent federal law intended to promote national uniformity, decisions like the one below create disharmony, unpredictability, and instability for exchanges, investors, and the broader economy. For example, at present, any exchange *may* list options tied to shares of ETFs created by the Index Providers that track the DJIA and S&P 500 (as the Second Circuit held in *Dow Jones*), but it *may not* list options tied to the DJIA and S&P 500 themselves (as the Illinois Appellate Court held below), which remain within the exclusive province of CBOE. This inconsistency makes no sense as a matter of economic reality or the interests of the securities markets in providing an efficient mechanism to manage risk, but instead reflects differences in a legal regime Congress intended to be uniform.

2. On top of all this, the decision below imposes staggering deadweight losses on investors and the broader national economy. As the court below acknowledged with considerable understatement, “[t]here is evidence that CBOE’s grip on the index options trading market is monopolistic.” App. 33a. In reality, the evidence is overwhelming. In 2011, owing to its exclusive control over options on the DJIA and S&P 500, the nation’s best-known indexes, CBOE handled nearly 95% of *all* index options by volume. That same year, the value of S&P 500 options *alone* traded on CBOE was \$486 billion. As the decision below acknowledged, a former Chief Economist for the SEC has determined that the absence of competition for S&P 500 options alone costs investors up to \$9.7 billion each year. *See* pp. 6-8, *supra*; App. 33a-34a.

That estimate is not speculative, but is based directly on the impact on trading costs and bid-ask spreads of the Second Circuit’s *Dow Jones* decision, which introduced competition into the offering of options on index-linked ETFs. It is undisputed that once ISE began listing options on ETFs tracking the DJIA and S&P 500 following *Dow Jones*, the result is what happens every time competition is introduced into a monopoly: prices fell, *i.e.*, CBOE’s trading fees immediately decreased. App. 34a. That result is consistent with the SEC’s recognition that “enhanced competition in the options markets” results in “the narrowing of [bid-ask] spreads,” which “can provide better prices for investors.” *Id.* at 33a-34a (internal quotation marks omitted). And it is “consistent with the SEC’s strong policy of promoting multiple listing and trading of products in our national market

system,” as former SEC Commissioner Nazareth has remarked. *See* p. 7, *supra*. But the Court of Appeals’ decision deprives the public of such “salutary benefits of competition on the markets.” *Id.* And it entrenches the deadweight loss engendered by the existing monopoly over the products in question.

In this regard, the Court of Appeals’ decision is perhaps most troubling because it entrenches the monopoly power of an Illinois entity that deliberately sought out the Illinois state courts after its out-of-state competitor first filed suit in a New York federal court. Quite apart from obvious forum-shopping overtones of such conduct, the decision below smacks of the sort of in-state protectionism the Court has always regarded as profoundly troubling. *See, e.g., Granholm v. Heald*, 544 U.S. 460, 472 (2005); *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273-74 (1988). The twin actions of respondents’ seeking out the Illinois courts, and the Illinois courts’ cementing an in-state plaintiff’s monopolist status, are cause for equal suspicion. Of course, federal law and federal preemption principles are designed to avoid such outcomes; but they cannot function as intended when a state court so plainly misunderstands and misapplies them, as here. *Cf. Bauer, supra*, at 5 (noting that state courts “have both less experience in applying a federal statute like the Copyright Act and a diminished interest in recognizing the primacy of a federal regime displacing state law”).

3. What makes the Court’s review of this case truly imperative is that the Court of Appeals’ decision forecloses further scrutiny by other courts of the specific question presented and, more generally,

creates a roadmap for future evasions of Section 301(a). As to the specific issue, the hope for competition in options trading on the DJIA and S&P 500 rests with this Court. Should any other securities exchange wish to list options on the Indexes, respondents will do exactly what they did here, which is to file suit in the Illinois courts and gain the benefit of the decision below. Further percolation is unavailable; the decision below ensures that only CBOE will ever be able to offer options on the DJIA and S&P 500, entrenching its monopoly position and harming investors and the larger economy to the tune of ten billion dollars annually.

More broadly, the decision below eviscerates Congress' clearly expressed intention to establish uniform national rules for what is protected and not protected when it comes to the subject matter of the federal copyright laws. This case well-illustrates the consequences of whether widely-disseminated facts, like the index values, are protected by the copyright laws. The answer to that question can impose billions of dollars in costs, interfere with the efficient operation of markets, and create huge windfalls for monopolists. Whatever the ultimate answer, it is manifestly a question of federal copyright law that should not turn on the vagaries of state law or whether a court accepts the spurious distinction between works and the effort that went into creating them. *See Kircher v. Putnam Funds Trust*, 547 U.S. 633, 647-48 (2006) (underscoring importance of this Court's review of state-court decisions rejecting federal preemption).

This case illustrates the tendency of state courts to yield to the temptation of protecting local monopolists, with the attendant risks of forum-shopping. Congress designed Section 301 to eliminate that temptation and provide uniform federal rules. The decision below creates profound legal and practical conflicts. Not only is its analysis inconsistent with a whole body of federal precedent; it creates a dynamic where options on ETFs tracking the S&P 500 and DJIA are competitive, but options on the indexes themselves are not. That result makes no practical sense and stems entirely from legal differences that this Court can and should resolve. Finally, the fact that the decision below paves the way for a permanent monopoly conveyed by Illinois courts on an in-state monopolist make this Court's review particularly appropriate and particularly imperative.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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