

No. 18-1150

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

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STATE OF GEORGIA, ET AL., PETITIONERS,

*v.*

PUBLIC.RESOURCE.ORG, INC.

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*ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

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**BRIEF FOR THE PETITIONERS**

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## **QUESTION PRESENTED**

This Court has held, as a matter of “public policy,” that judicial opinions are not copyrightable. *Banks v. Manchester*, 128 U.S. 244, 253-254 (1888). Based on that precedent, lower courts have held that certain other “government edicts” having the force of law, such as state statutes, are not eligible for copyright protection.

The question presented is:

Whether the government edicts doctrine extends to—and thus renders uncopyrightable—works that lack the force of law, such as the annotations in the Official Code of Georgia Annotated.

(I)

## II

### **PARTIES TO THE PROCEEDINGS**

1. Petitioners, the State of Georgia and the Georgia Code Revision Commission, on behalf of and for the benefit of the General Assembly of Georgia, were plaintiffs and counter-defendants in the district court, and appellees below.
2. Respondent Public.Resource.Org, Inc., was the defendant and counter-claimant in the district court, and the appellant below.

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## **BRIEF FOR THE PETITIONERS**

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### **OPINIONS BELOW**

The court of appeals' opinion (Pet. App. 1a-53a) is reported at 906 F.3d 1229. The district court's order granting petitioners' motion for partial summary judgment and denying respondent's motion for summary judgment (Pet. App. 54a-73a) is reported at 244 F. Supp. 3d 1350. The district court's permanent injunction order (Pet. App. 74a-75a) is unreported.

### **JURISDICTION**

The court of appeals' judgment was entered on October 19, 2018. Justice Thomas extended the time for filing a petition for a writ of certiorari to March 4, 2019. The petition was filed on March 1, 2019. The Court granted the petition on June 24, 2019. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

Pertinent portions of relevant constitutional and statutory provisions—U.S. Const. art. I, § 8, cl. 8; 17 U.S.C. §§ 101, 102, 103, 105, and 106; O.C.G.A. §§ 1-1-1 and 1-1-7; and 2018 Ga. Laws 1123, § 54—appear in the appendix to the certiorari petition. Pet. App. 76a-84a. S.B. 52, § 54 (enacted May 12, 2019), is set forth in the appendix to this brief.

### **INTRODUCTION**

For decades, Georgia—like many other states—has contracted with a private company to publish its statutes. Georgia's current agreement requires the publisher to make the statutes available online, free of charge. The publisher also prepares an annotated compilation of Georgia's laws called the Official Code

of Georgia Annotated (“OCGA”). The annotations appear alongside the statutory text and consist of such materials as summaries of judicial decisions interpreting or applying particular statutes. The publisher prepares the annotations without charge to Georgia, relying instead on sales of the OCGA for compensation. Georgia caps the price of printed OCGA volumes at a fraction of that charged for competing, privately published annotations, and the OCGA’s annotations are available without charge at over 60 public facilities throughout Georgia.

The question here is whether the OCGA’s annotations are eligible for copyright protection. Citing the judicially created doctrine that certain “government edicts,” such as statutes and judicial decisions, are not copyrightable, the Eleventh Circuit held that Georgia’s registered copyrights in the OCGA’s annotations are invalid. It thus rejected Georgia’s infringement claim against respondent Public.Resource.Org, Inc. (“PRO”), which has posted online numerous OCGA volumes and supplements in their entirety. If allowed to stand, the decision below would require a wholesale reworking of Georgia’s established system for publishing its code, as the OCGA’s publisher has made clear that “it would lose all incentive to remain in [its] [c]ontract” with Georgia if it could not “recoup its significant investment \* \* \* in developing the [a]nnotations” through sales of copyright-protected publications. J.A. 674.

The Eleventh Circuit’s decision conflicts with a straightforward application of the Copyright Act’s text and this Court’s precedents. Those authorities establish that while the law itself is not copyrightable, works summarizing or discussing the law are eligible

for copyright protection. Under that rule, the OCGA’s annotations are copyrightable because, although they are aids for researching the law, it is undisputed they have no independent legal force; in other words, they do not establish any enforceable rights or obligations.

To start where there is common ground: The parties here agree that the law is not copyrightable. This Court established that rule in three nineteenth-century cases—*Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834), *Banks v. Manchester*, 128 U.S. 244 (1888), and *Callaghan v. Myers*, 128 U.S. 617 (1888). The rule reflects the “public policy” that because “the law \*\*\* bind[s] every citizen,” it should be “free for publication to all.” *Banks*, 128 U.S. at 253.

It is also common ground that statutory “annotations created by a private party generally can be copyrighted.” Pet. App. 2a; accord *id.* at 62a; Br. in Opp’n (BIO) 3. The Copyright Act expressly provides that “annotations” are copyrightable derivative works, and the Act does not exclude annotations discussing primary legal materials from that protection. 17 U.S.C. §§ 101, 103.

Nevertheless, the Eleventh Circuit ruled that Georgia cannot hold a copyright in the annotations that the private publishing company prepares for the OCGA under a work-for-hire agreement with the state. See 17 U.S.C. § 201(b) (addressing works for hire). Based on a novel, multifactor test lacking any basis in the Copyright Act’s text, the Eleventh Circuit held that although the OCGA’s annotations do “not hav[e] the force of law,” they are “sufficiently law-like” to be ineligible for copyright protection under the government edicts doctrine. Pet. App. 26a.

The Eleventh Circuit departed from the Copyright Act’s text and history in subjecting the OCGA’s annotations to a different rule than a private party’s annotations, which the court recognized “generally can be copyrighted,” Pet. App. 2a. While the Act specifically excludes “work[s] of the United States Government” from copyright protection, 17 U.S.C. § 105, Congress chose to allow copyright protection for works by state governments. It did so with the recognition that resource-constrained state governments frequently rely on copyright protection as an incentive for private publishers “to print and publish [state government works] at their own expense as a commercial venture”—precisely what Georgia did here. Copyright Law Revision: Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 87th Cong., 1st Sess., 129-130 (H.R. Judiciary Comm. Print 1961) (Copyright Law Revision Report). Accordingly, the Copyright Office recognizes that state-government-created “annotations that summarize or comment upon legal materials” are copyrightable, “unless the annotations themselves have the force of law”—which even the Eleventh Circuit concedes the OCGA’s annotations lack (Pet. App. 26a). U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices* § 313.6(C)(2) (3d ed. 2017), <https://www.copyright.gov/comp3> (*Compendium*). The Eleventh Circuit’s decision also conflicts with *Callaghan*—this Court’s last statement on the government edicts doctrine, which recognized the copyrightability of annotations prepared by Illinois’s official reporter of state supreme court decisions.

Without any foundation in statutory text or this Court’s precedents, the Eleventh Circuit’s decision

threatens to upend the longstanding arrangements of Georgia and numerous other states, which rely on copyright's economic incentives to make useful research aids available at little or no cost to taxpayers while also ensuring that actual laws are widely disseminated and easily accessible, without charge. This Court should reverse.

## STATEMENT

1. a. Federal copyright protection is a statutory right, not a common-law one. See *Wheaton*, 33 U.S. at 661-662. The Constitution empowers Congress “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. Const. art. I, § 8, cl. 8. Congress enacted the Nation’s first copyright statute in 1790 and has overhauled federal copyright law several times since, with the most recent comprehensive revision being the Copyright Act of 1976. See *Eldred v. Ashcroft*, 537 U.S. 186, 194-195 (2003).

“Copyright protection subsists \*\*\* in original works of authorship fixed in any tangible medium of expression.” 17 U.S.C. § 102(a). The statutory scheme grants copyright owners a bundle of exclusive rights, including the rights of reproduction and distribution. *Id.* § 106. This protection only extends to original expressions of ideas, not the ideas themselves. *Id.* § 102(b). However, even if certain elements in a work are ineligible for copyright protection, other elements can still be protected. See, e.g., *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348-349 (1991).

b. This case involves the “government edicts” doctrine, a narrow, judicially created exception to

copyright protection for certain works having the force of law. That doctrine originated in three cases this Court decided in the 1800s—*Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834), *Banks v. Manchester*, 128 U.S. 244 (1888), and *Callaghan v. Myers*, 128 U.S. 617 (1888). Those cases, which addressed the copyrightability of works reporting court decisions, held that judicial opinions are not copyrightable. See *Wheaton*, 33 U.S. at 667-668 (analyzing copyright protection for this Court’s first official reporter); *Banks*, 128 U.S. at 252-254 (denying copyright protection for state supreme court decisions); *Callaghan*, 128 U.S. at 647-650 (recognizing copyright in original matter authored by state supreme court’s official reporter, but not in “the judicial opinions” themselves).

Lower courts have extended that holding to state statutes. See *John G. Danielson, Inc. v. Winchester-Conant Props., Inc.*, 322 F.3d 26, 38 (1st Cir. 2003) (discussing case law). Accordingly, the Copyright Office, which registers copyrights and performs other administrative functions related to copyright law, recognizes a “longstanding public policy” that “government edict[s]” having “the force of law” cannot be copyrighted, including “legislative enactments, judicial decisions, administrative rulings, public ordinances, or similar types of official legal materials.” *Compendium* § 313.6(C)(2); see also 17 U.S.C. §§ 408-410, 701.

No statute directly codifies the government edicts doctrine. Instead, the Copyright Act provides that “[c]opyright protection \*\*\* is not available for *any* work of the *United States Government*,” regardless of whether the work constitutes a “government edict.” 17 U.S.C. § 105 (emphasis added). There is no parallel provision denying copyright protection for works of

state and local governments. See *County of Suffolk v. First Am. Real Estate Sols.*, 261 F.3d 179, 187 (2d Cir. 2001). Therefore, the Copyright Office recognizes that a “work that does not constitute a government edict may be registered [as copyrighted], even if it was prepared by an officer or employee of a state, local, territorial, or foreign government while acting within the course of his or her official duties.” *Compendium* § 313.6(C)(2).

The Copyright Office also recognizes that copyright protection is available for “annotations that summarize or comment upon legal materials issued by a federal, state, local, or foreign government, unless the annotations themselves have the force of law.” *Compendium* § 313.6(C)(2); accord *id.* § 717.1. That guidance accords with this Court’s decision in *Callaghan*, which held that annotations of judicial opinions—including those of a court’s official reporter—may be copyrighted. 128 U.S. at 649-650 (“[T]he reporter of a volume of law reports can obtain a copyright for it as an author, and \* \* \* such copyright will cover the parts of the book of which he is the author, although he has no exclusive right in the judicial opinions published.”). And it is consistent with the Copyright Act, which provides that “annotations” are copyrightable as “derivative works”—i.e., works “based upon one or more preexisting works.” 17 U.S.C. §§ 101, 103.

2. a. In 1977, the Georgia General Assembly created the Code Revision Commission (“Commission”) to assist with recodifying Georgia’s laws for the first time in decades.<sup>1</sup> Pet. App. 7a; 1977 Ga. Laws 922-923. See

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<sup>1</sup> The Commission is composed of Georgia’s Lieutenant Governor, four members of the Georgia Senate, the Speaker of the

generally J.A. 233-242; Terry A. McKenzie, *The Making of a New Code*, 18 Ga. St. B.J. 102 (1982), reproduced at J.A. 243-254. The Commission contracted with the Michie Company to prepare and publish the OCGA. Pet. App. 55a.

Under the Commission's supervision, Michie prepared a manuscript containing a compilation of Georgia statutes. Pet. App. 55a. After the General Assembly voted to adopt that manuscript as Georgia's official code, Michie added the types of annotations at issue here, such as summaries of judicial decisions interpreting or applying statutory provisions and summaries of relevant Georgia Attorney General opinions.<sup>2</sup> See *id.*; J.A. 237, 246; see also 1981 Ga. Laws, Extraordinary Sess., at 8-9. The OCGA took effect in 1982. OCGA § 1-1-9.

Consistent with the approach taken at the time of the OCGA's original enactment, the Georgia General Assembly has *never* reviewed and voted to approve individual OCGA annotations. Pet. App. 47a ("General Assembly does not individually enact each separate annotation as part of the ordinary legislative process"); *id.* at 48a (annotations are prepared "outside of the normal channels of the legislative process" and "are not voted on individually in the way that Georgia session laws are"). To the contrary, the General Assembly has repeatedly made clear that only the OCGA's statutory portion has the force of law, and that the OCGA's

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Georgia House of Representatives, four additional House members, and five Georgia State Bar members, including a superior court judge and a district attorney. OCGA § 28-9-2(a).

<sup>2</sup> Throughout this brief, Georgia uses the term "annotations" to refer to the OCGA components in which it claims copyright. See J.A. 496-497 (listing those components).

annotations are merely research aids lacking any legal effect. The first code section explains:

The *statutory portion* of the codification of Georgia laws prepared by the Code Revision Commission and the Michie Company pursuant to a contract entered into on June 19, 1978, is enacted and shall have the effect of statutes enacted by the General Assembly of Georgia. The statutory portion of such codification shall be merged with annotations, captions, catchlines, history lines, editorial notes, cross-references, indices, title and chapter analyses, and other materials pursuant to the contract and shall be published by authority of the state pursuant to such contract and when so published shall be known and may be cited as the “Official Code of Georgia Annotated.”

OCGA § 1-1-1 (emphasis added). Thus, at the code’s very beginning, the legislature distinguishes between the OCGA’s “statutory portion,” which “ha[s] the effect of statutes enacted by the General Assembly,” and “annotations,” which do not. A nearby provision likewise states that “[a]ll historical citations, title and chapter analyses, and notes set out in this Code are given for the purpose of convenient reference and *do not constitute part of the law.*” *Id.* § 1-1-7 (emphasis added).

The General Assembly also acknowledges annotations’ lack of legal effect in annual “reviser acts” making technical changes to the OCGA, such as correcting typographical errors. J.A. 301-302; see also OCGA § 28-9-5(c). Those bills reenact the OCGA’s “statutory portion.” E.g., S.B. 52, § 54 (enacted May 12, 2019); 2018 Ga. Laws 1123, § 54; 2017 Ga. Laws 819-820,

§ 54. At the same time, they expressly provide that the OCGA’s “[a]nnnotations” are “not enacted as statutes,” and thus lack the force of law. *E.g.*, S.B. 52, § 54(b) (2019); 2018 Ga. Laws 1123, § 54(b); 2017 Ga. Laws 819, § 54(b).

Consistent with this clear statutory language, the Georgia Supreme Court has explained that “the inclusion of annotations in an ‘official’ Code [does] not \*\*\* give the annotations any official weight.” *Harrison Co. v. Code Revision Comm’n*, 260 S.E.2d 30, 35 (Ga. 1979). Indeed, PRO itself has noted that “[o]nly the laziest student or lawyer would rely on a judicial summary [in the OCGA] without reading the actual judicial decision.” Def.’s Mem. Supp. Mot. for Summ. J. 23-24 (May 17, 2016), ECF No. 29-2.

b. The Commission now contracts with Matthew Bender & Co., part of the LexisNexis Group (“Lexis”), to maintain, publish, and distribute the OCGA. Pet. App. 55a. Like the Commission’s original contract with Michie, the current agreement requires Lexis not only to compile statutory provisions, but also to prepare annotations to those provisions, including summaries of relevant judicial decisions and of pertinent Georgia Attorney General opinions. *Id.* at 55a-56a; see also Pet. 9 n.2 (reproducing annotation to OCGA § 34-9-260); J.A. 714-725 (reproducing OCGA § 10-7-21’s annotations). Lexis’s attorney editors undertake a resource- and time-intensive process to prepare the annotations and ensure their accuracy and stylistic consistency. See J.A. 596-601, 671-674. As the district court explained, creating the annotations “requires a tremendous amount of work.” Pet. App. 69a. Lexis bears the full cost of preparing and publishing the

OCGA, without any monetary contribution from the state. See J.A. 536.

Georgia does not claim copyright in the OCGA's statutory text and numbering. J.A. 498. It does, however, hold a "registered copyright in the OCGA annotations."<sup>3</sup> Pet. App. 11a; see also OCGA § 28-9-3(15). The agreement grants Lexis an exclusive license to publish and sell the OCGA in printed, CD-ROM, and online formats. Pet. App. 7a-8a; J.A. 569, 571, 573-574. Lexis has explained that absent copyright protection for the OCGA's annotations, "it would lose all incentive to remain in [its] Contract [with Georgia] or create the Annotations," unless Georgia used taxpayer funds to "directly pa[y]" Lexis for its services. J.A. 674.

The Commission receives royalties on sales of the OCGA's CD-ROM and online versions. Pet. App. 8a. The Commission also establishes price controls: As of 2016, the price for a full set of approximately 50 printed OCGA volumes was capped at \$404—less than *one-sixth* the cost of West Publishing's competing annotated version of the Georgia code (\$2570). *Id.* at 7a; J.A. 564-566, 628; see also OCGA § 28-9-3(5).

To ensure Georgia's laws are readily accessible to the general public, the agreement requires Lexis to publish the code's unannotated statutory text online, without charge. Pet. App. 7a; J.A. 142-143, 552-554.

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<sup>3</sup> Lexis's contract contains a "work made for hire" provision specifying that Georgia shall hold the copyright in the OCGA's annotations. J.A. 567-568; see also 17 U.S.C. §§ 101, 201(b) (defining term and providing that for "a work made for hire, the employer or other person for whom the work was prepared is considered the author \* \* \* and \* \* \* owns all of the rights comprised in the copyright"); *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989) (discussing works for hire).

That website, which was accessed almost 79 million times between 2007 and 2015, is text searchable and includes statutory text, numbering, and captions, as well as history lines explaining when statutes were enacted and revised. J.A. 553, 628, 670-671. Pursuant to Lexis's contract, the CD-ROM version of the OCGA—complete with annotations—is also available to the general public without charge “at over 60 state and county-operated facilities throughout Georgia, such as libraries and universities.” Pet. App. 8a; see also J.A. 501-505, 556-557, 628.

3. Respondent PRO is a California-based nonprofit corporation operated by Carl Malamud. J.A. 112-113. Its primary activity is publishing government documents online, including several state codes, and encouraging the public to access them for free. See Carl Malamud, *10 Rules for Radicals* ¶120 (2010), <https://bit.ly/2LcM9U7>; Public.Resource.Org, *Official State Codes*, Internet Archive, <https://bit.ly/2C9KLyQ> (last visited Aug. 20, 2019). With full knowledge of Georgia’s registered copyrights, PRO intentionally purchased 186 printed OCGA volumes and supplements, scanned them, and posted them online. Pet. App. 8a-9a. PRO also distributed digital copies to Georgia legislators and other officials. J.A. 141.

After PRO refused to comply with cease and desist letters, Georgia filed an infringement suit in the U.S. District Court for the Northern District of Georgia. Pet. App. 9a. PRO counterclaimed for a judgment of non-infringement. *Ibid.* PRO continued copying and posting online newly published OCGA volumes and supplements after Georgia filed suit. *Id.* at 58a.

4. a. On cross-motions for summary judgment, the district court held that the OCGA’s annotations were copyrightable, PRO’s activities constituted infringement, and Georgia was entitled to injunctive relief. Pet. App. 65a, 73a. The district court affirmed the principle, established in *Wheaton*, *Banks*, and *Callaghan*, that “government documents having the force of law are uncopyrightable.” *Id.* at 63a. But it explained that the OCGA’s annotations were copyright eligible because the OCGA’s “commentary portions” are “not enacted into law by the Georgia legislature and do[] not have the force of law.” *Ibid.* The court cited the Copyright Act’s and the Copyright Office’s express recognition that “annotations” are copyrightable, as well as the “long line of cases recogniz[ing] copyright protection for annotated cases and statutes,” including *Callaghan*. *Id.* at 61a-62a. Indeed, PRO itself “admitted that annotations in an unofficial reporter would be copyrightable.” *Id.* at 62a. The court concluded that nothing in Georgia law or the agreement between Lexis and the Commission “transform[ed] copyrightable material into non-copyrightable material.” *Ibid.* To the contrary, treating the annotations and statutory text as “one uncopyrightable unit” would be “in direct contradiction to current Georgia law,” which expressly establishes that the annotations lack “the force of law.” *Id.* at 62a-64a.

b. The district court also rejected PRO’s reliance on the merger doctrine, which denies copyright protection where “there is only one or so few ways of expressing an idea that protection of the expression would effectively accord protection to the idea itself.” *BUC Int’l Corp. v. Int’l Yacht Council Ltd.*, 489 F.3d 1129, 1142 (11th Cir. 2007) (citation omitted). The district court

concluded that because there are a “multitude of ways to write a paragraph summarizing a judicial decision, and further, a multitude of ways to compile the different annotations throughout the O.C.G.A.” the “merger doctrine is inapplicable.” Pet. App. 65a.

The district court likewise rejected PRO’s “fair use” defense. The court analyzed the statutory fair use factors, see 17 U.S.C. § 107, and concluded that PRO’s decision to “cop[y] every word of the annotations verbatim and post[] them free of charge” was not fair use. Pet. App. 72a. The court reasoned that “it is inevitable that [the] market[]” for the OCGA would “be substantially adversely impacted” by PRO’s conduct because “people would be less likely to pay for annotations when they are available for free online.” *Id.* at 71a.

5. a. The Eleventh Circuit reversed. While acknowledging that “[t]he question is a close one” and “important considerations of public policy are at stake on either side,” the court held that the OCGA’s annotations are not copyrightable under the government edicts doctrine.<sup>4</sup> Pet. App. 2a, 4a.

Because the “foundations of the case law establishing [the government edicts] doctrine are far from clear,” the Eleventh Circuit concluded it needed to “resort to first principles.” Pet. App. 3a, 12a. The court interpreted *Wheaton*, *Banks*, and *Callaghan* to establish an “implicit and unstated” theory of “metaphorical \* \* \* citizen authorship” as the foundation for the government edicts doctrine. *Id.* at 12a, 18a, 21a (citation omitted). According to the Eleventh Circuit, because

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<sup>4</sup> Having reversed based on the government edicts doctrine, the Eleventh Circuit “ha[d] no occasion to address” PRO’s other defenses. Pet. App. 4a-5a.

“the People, as the reservoir of all sovereignty, are the source of our law,” “the People are the constructive authors of those official legal promulgations that represent an exercise of sovereign authority.” *Id.* at 3a. Noting that the Copyright Act only protects “original works of authorship,” *id.* at 12a (quoting 17 U.S.C. § 102(a)), the court concluded that “any work of which the People are the constructive authors is intrinsically public domain material and is freely accessible to all so that no valid copyright can ever be held in it,” *id.* at 19a.

b. Having decided the government edicts doctrine should be grounded on the idea of constructive authorship by “the People,” the Eleventh Circuit turned to the doctrine’s scope. In its view, the dispositive question is whether a work is “sufficiently law-like so as to be properly regarded as a sovereign work” and “implicate the core policy interests undergirding” the rule that certain government edicts are uncopyrightable. Pet. App. 4a, 25a. Criticizing the district court for “relying \* \* \* on a bright line distinction between edicts that have the force of law and those that do not,” the Eleventh Circuit determined that “there exists a zone of indeterminacy” where, even if a work “may not be characterized as law,” public policy requires treating it as such for copyright purposes. *Id.* at 24a-25a.

In determining that the annotations here were “sufficiently law-like” to be attributable to the constructive authorship of the people of Georgia, Pet. App. 26a, the Eleventh Circuit analyzed three factors: who created the annotations, *id.* at 25a-26a, whether the annotations are “authoritative,” *id.* at 38a, and “the process by which the annotations were created,” *id.* at 47a.

i. While the Eleventh Circuit acknowledged that “the annotations were initially prepared by a private party” (Lexis), and “annotations created by a private party generally can be copyrighted,” Pet. App. 2a, 26a-27a, it concluded that this case fell outside of that general rule because, in its view, “the Georgia General Assembly is the driving force behind [the annotations’] creation,” *id.* at 26a. The court emphasized that the agreement between the Commission and Lexis contains instructions for preparing the annotations, *id.* at 26a-28a, and the Commission retains editorial control over the OCGA’s contents, *id.* at 28a-29a. The court also stated that “the OCGA annotations, once completed, are subject \*\*\* to the approval of the Georgia General Assembly”—not in the sense that the legislature actually reviews and votes to approve Lexis’s proposed text, but in the more general sense that the legislature votes “to make the OCGA the official codification of Georgia’s laws,” *id.* at 31a-32a (citing OCGA § 1-1-1); see also *id.* at 48a (annotations “are not voted on individually in the way that Georgia session laws are”).

ii. The Eleventh Circuit recognized that the annotations do “not carry[] the force of law,” Pet. App. 38a, and Georgia law expressly “disclaim[s] any legal effect in the annotations,” *id.* at 39a. But it concluded that because the annotations are “merged” with the OCGA’s statutory portions, their “attributes have been intermingled,” resulting in a “unified whole” that “imbues [the annotations] with an official, legislative quality.” *Id.* at 40a. Given the “branding of the Code as ‘Official,’” and its approval as such by the legislature, the Eleventh Circuit reasoned that “it would be only natural for the citizens of Georgia to consider the

annotations as containing special insight.” *Id.* at 41a-42a.

iii. Finally, the Eleventh Circuit acknowledged that the annotations are prepared “outside of the normal channels of the legislative process,” Pet. App. 48a, and that Georgia’s legislature “does not individually enact each separate annotation as part of the ordinary legislative process,” *id.* at 47a. But it gave greater weight to the fact that, in the court’s view, the General Assembly—in originally enacting OCGA § 1-1-1 and subsequently reenacting that provision through annual reviser bills, see pp. 9-10, *supra*—has “voted to adopt the annotations as prepared by the Commission as an integral part of the official Code,” and has annually “reaffirm[ed] [the OCGA’s] status as the official codification of Georgia’s laws.” Pet. App. 48a.

“[G]uided by [these] three factors,” the Eleventh Circuit concluded that although the OCGA’s annotations “do not carry the force of law,” they are “attributable to the constructive authorship of the People,” and thus “belong[] to the People” and “must be free for publication by all.” Pet. App. 51a-53a.

## SUMMARY OF ARGUMENT

The Copyright Act’s plain text establishes the OCGA’s annotations are copyrightable. The Act expressly provides that “annotations” are copyrightable “derivative works.” 17 U.S.C. §§ 101, 103. Accordingly, it is undisputed that privately published annotations are copyrightable. Nothing in the Copyright Act warrants treating the OCGA’s annotations differently. Denying the OCGA’s annotations copyright protection because they were prepared for the State of Georgia would conflict with Congress’s decision in 17

U.S.C. § 105 to exempt only works of the U.S. government—not of state governments—from copyright protection. Furthermore, the OCGA’s “merg[ing]” of annotations and uncopyrightable statutory text (Pet. App. 39a-40a) does not render the annotations uncopyrightable; the Copyright Act provides that “material contributed by the author” is copyrightable, even if it appears alongside “preexisting material” in the public domain. 17 U.S.C. § 103(b). And the Eleventh Circuit’s effort to ground its holding in the Act’s “authorship” requirement (Pet. App. 11a-12a) fails. Nothing in the Act supports the Eleventh Circuit’s conclusion that the OCGA’s annotations are uncopyrightable because an atextual, three-factor test purportedly suggests that the annotations are “sufficiently law-like” to be “attributable to the constructive authorship of the People.” Pet. App. 24a-26a.

The Copyright Act’s history confirms the OCGA annotations’ copyrightability. Congress enacted the modern Copyright Act with the understanding that states relied on copyright’s economic incentives to enlist private companies to publish works like the OCGA, and it chose not to disturb that longstanding practice.

Accordingly, published Copyright Office guidance recognizes that state-government-created “annotations that summarize or comment upon legal materials” are copyrightable, “unless the annotations themselves have the force of law”—which the OCGA’s annotations undisputedly lack. *Compendium* § 313.6(C)(2). The Copyright Office’s established position merits deference.

This Court’s precedents establishing the government edicts doctrine support the OCGA annotations’

copyrightability. *Wheaton* and *Callaghan* recognized that annotations added to judicial opinions by a court's official reporter are copyright eligible. *Banks*'s denial of copyright protection to state judicial opinions merely reflects the rule that "the law" itself is uncopyrightable, which is inapplicable here because the OCGA's annotations lack the force of law. *Banks*, 128 U.S. at 253.

Modern jurists have suggested several theoretical foundations for the government edicts doctrine, including the notion of citizen authorship, due process, the First Amendment, and the idea/expression dichotomy. None supports denying copyright protection to the OCGA's annotations, and the uncertainty regarding the government edicts doctrine's legal underpinnings militates against expanding it beyond the core principle that the law itself is uncopyrightable.

The Eleventh Circuit's unprecedented expansion of the government edicts doctrine would have substantial negative consequences. Precluding states from harnessing copyright's economic incentives to induce private publishers to prepare and publish annotated codes at negligible taxpayer expense will make it harder, not easier, for citizens to access useful legal research tools. Furthermore, expanding the government edicts doctrine beyond its traditional limits would inject substantial uncertainty into copyright law, undermining "Congress' paramount goal \* \* \* of enhancing predictability and certainty of copyright ownership," *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 749 (1989).

## ARGUMENT

It is important to be clear about what is and is not at issue here. The question presented is not whether “the law can be copyrighted.” Next-Generation Legal Research Platforms Amicus Br. 6.<sup>5</sup> Nor is it, as PRO contends, “whether Georgia’s only official code is an edict of government that cannot be copyrighted, because the law belongs to the People.” BIO 1. As the Eleventh Circuit and PRO acknowledge, see Pet. App. 8a; BIO 6, 13, Georgia does not claim copyright in the actual law—the OCGA’s statutory text. Through its contract with Lexis, Georgia makes its statutes freely available online.<sup>6</sup> Pet. App. 7a. If PRO or others are dissatisfied with Lexis’s website, they can republish the OCGA’s statutory text in whatever format they see fit. Indeed, PRO has already posted online a version of the OCGA’s statutory portion without annotations. J.A. 679-680. PRO could even take pages from printed OCGA volumes, redact the copyrighted annotations, and then publish those redacted pages online.

Instead, PRO has published *the entirety* of 186 OCGA volumes and supplements, including annotations that all agree are not the law, and in which Georgia claims copyright. Properly stated, the question here is whether the OCGA’s *annotations*, which lack the force of law, are eligible for copyright protection.

<sup>5</sup> Amicus-brief citations refer to the certiorari-stage briefs.

<sup>6</sup> The Eleventh Circuit emphasized that an OCGA annotation discussing a vacated federal district court decision states that “[a]ttorneys who cite unofficial publication of 1981 Code do so at their peril.” Pet. App. 41a (citation omitted). PRO, however, does not contend that Lexis’s free website fails to accurately reproduce the portions of the OCGA available on that site.

The Copyright Act’s text and history, as well as this Court’s precedents, establish that they are.

## I. THE COPYRIGHT ACT’S TEXT AND HISTORY ESTABLISH THE OCGA ANNOTATIONS’ COPYRIGHTABILITY

### A. Denying Copyright Protection Conflicts With Plain Statutory Text

1. The Constitution authorizes Congress, not the judiciary, to establish the scope of federal copyright protection. U.S. Const. art. I, § 8, cl. 8. Courts may not engage in “a free-ranging search for the best copyright policy.” *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017). Instead, they must interpret and apply the Copyright Act’s text as enacted by Congress. See *ibid*.

PRO dismisses analysis of the Act’s text as “a *non sequitur*” because the rule that government edicts having the force of law are uncopyrightable began as a “common law doctrine[”] established in *Wheaton, Banks, and Callaghan*. BIO 28. Absent evidence that Congress intended to disturb those decisions in enacting the modern Copyright Act, they are unquestionably relevant here. But as explained below, those decisions support the OCGA annotations’ copyrightability. See pp. 31-43, *infra*. PRO is thus seeking to modify and expand the government edicts doctrine as set forth in this Court’s nineteenth-century precedents. In the modern era—when courts recognize that “question[s] \* \* \* of public policy,” *Banks*, 128 U.S. at 253, generally should be decided by elected legislators rather than judges—analysis of the question presented here appropriately begins with the Copyright Act’s text. See *Star Athletica*, 137 S. Ct. at 1010; accord *Fourth Estate Pub.*

*Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881, 892 (2019); *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 667 (2014); see also *Quality King Distrib., Inc. v. L’Anza Research Int’l, Inc.*, 523 U.S. 135, 153 (1998) (“[W]hether or not we think it would be wise policy \* \* \* is not a matter that is relevant to our duty to interpret the text of the Copyright Act.”).

2. The Eleventh Circuit’s denial of copyright protection to the OCGA’s annotations conflicts with the Copyright Act’s plain language. It is undisputed that statutory annotations may constitute copyright-eligible “original works of authorship.” 17 U.S.C. § 102(a). The Copyright Act expressly provides that “annotations” may be copyrightable as “derivative works”—i.e., works “based upon one or more preexisting works.” *Id.* §§ 101, 103. And the Act contains no exemption excluding annotations discussing primary legal materials from protection. Accordingly, as the Eleventh Circuit acknowledged, “all agree that annotations created by a private party generally can be copyrighted.” Pet. App. 2a; accord BIO 3; Pet. App. 62a. The same rule should apply to the OCGA’s annotations because nothing in the Copyright Act warrants treating them differently than privately published annotations.

The Eleventh Circuit, however, concluded that the OCGA’s annotations are uncopyrightable because Lexis, a private company, prepares the annotations for the State of Georgia under a work-for-hire agreement, and the annotations appear in Georgia’s official code book. See Pet. App. 51a-53a. That reasoning lacks any basis in the Copyright Act’s text.

Section 105 of the Act provides that copyright protection “is not available for any work of *the United*

*States Government.*” 17 U.S.C. § 105 (emphasis added); see also *id.* § 101 (defining “work of the United States Government”). Congress chose not to include in the Act any similar exclusion from copyright protection for works of state governments. Absent such an exemption, otherwise-copyrightable works—such as the annotations here—“are not excluded from protection” merely because state government officials were involved in their creation. *County of Suffolk v. First Am. Real Estate Sols.*, 261 F.3d 179, 187 (2d Cir. 2001); accord 1 David Nimmer, *Nimmer on Copyright* § 5.14 (2019); 2 William F. Patry, *Patry on Copyright* § 4:81 (2019). That follows from the fundamental interpretive principle that when “Congress includes particular language in one section of a statute” but omits it elsewhere, “it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted). Here, as in any case involving statutory interpretation, this Court must “respect not only what Congress wrote but, as importantly, what it didn’t write.” *Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1900 (2019) (opinion of Gorsuch, J.). Denying copyright protection to the OCGA’s annotations because they were prepared on behalf of the State of Georgia would conflict with Congress’s decision to exempt only works of the U.S. government—not of state governments—from copyright protection.

The Eleventh Circuit also suggested that “the merg[ing]” of annotations and uncopyrightable statutory text in an official code book somehow renders the annotations ineligible for copyright protection. Pet. App. 39a-40a. But that suggestion conflicts with the Copyright Act’s instruction that “material contributed

by the author” is copyrightable, even if it appears alongside “preexisting material” in the public domain. 17 U.S.C. § 103(b); see also *Feist Publ’ns*, 499 U.S. at 348 (“copyright protection” extends to “components of a work that are original to the author”); *Compendium* § 313.6(D) (“A derivative work \* \* \* that contains public domain material may be registered.”).<sup>7</sup> Nothing in the Copyright Act requires Georgia, as a precondition for obtaining copyright protection, to burden readers by segregating the annotations in a separately published work, rather than printing them alongside the statutory text.

3. The Eleventh Circuit attempted to ground its holding in the Copyright Act’s “authorship” requirement. Pet. App. 11a-12a (citing 17 U.S.C. §§ 102, 201(a)). But the Act’s limitation of copyright protection to “original works of authorship,” 17 U.S.C. § 102(a), does not support the analytic framework the Eleventh Circuit adopted here. Applying a novel three-factor test, the Eleventh Circuit held that the OCGA’s annotations are “sufficiently law-like” to be “attributable to the constructive authorship of the People,” and thus “inherently public domain material.”

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<sup>7</sup> The Eleventh Circuit predicated its “merg[ing]” theory on OCGA § 1-1-1, which states that the OCGA’s “statutory portion” shall be “merged with” (i.e., included in the same publication as) annotations and other non-statutory elements. Dwelling on the supposed “connotations” of “the word ‘merge,’” the Eleventh Circuit reasoned that “the constituent elements of the merger lose their distinct identity,” yielding a “new thing” with a different “nature.” Pet. App. 39a-40a. But whenever copyrightable and non-copyrightable elements appear in a single work, the “merged” product is in some sense distinct from its parts. Nevertheless, black-letter law establishes that the copyrightable elements of such works remain eligible for protection.

Pet. App. 12a, 24a-26a. At every turn, the Eleventh Circuit’s analysis strays from the Copyright Act’s text.

To start, the Act nowhere mentions the concept of “constructive authorship of the People.” Pet. App. 24a. By contrast, the Act expressly recognizes a different form of constructive authorship—the “work made for hire.” 17 U.S.C. § 101 (defining term); see also note 3, *supra*. PRO does not appear to dispute that the Commission has a valid work-for-hire agreement with Lexis with respect to the OCGA’s annotations. See J.A. 567-568. Therefore, under § 201(b) of the Copyright Act, the Commission “is considered the [annotations’] author.” 17 U.S.C. § 201(b). The Commission’s authorship claim is thus rooted in the Act’s text, while the Eleventh Circuit’s notion of “constructive authorship of the People” lacks any textual basis.

Given that the Copyright Act does not recognize the concept of “constructive authorship of the People,” it also unsurprisingly does not set forth the Eleventh Circuit’s three-factor test for determining whether a work is “sufficiently law-like” to be “attributable to the constructive authorship of the People.” Pet. App. 25a-26a. Nor does the Act establish any rule that works constructively authored by “the People” are “intrinsically public domain material and, therefore, uncopyrightable.” *Id.* at 3a. Even assuming that the Eleventh Circuit were correct that “the people of Georgia” constructively authored the OCGA’s annotations through “their agents in the General Assembly,” *id.* at 52a-53a, it is unclear why the state would be barred here from bringing an infringement suit on behalf of the Georgia people against a California corporation like PRO, J.A. 112.

In sum, while the Eleventh Circuit is correct that “‘authorship’ is central to the [Copyright Act’s] statutory scheme,” that term provides no foundation for the decision below. Pet. App. 12a. As even PRO appears to concede, the Eleventh Circuit engaged in an enterprise of “judge-made common law,” not statutory interpretation. BIO 28. Because “[t]here is simply no way to milk the [Eleventh Circuit’s] test \* \* \* from the language of the statute,” the Court should not adopt it. *Reid*, 490 U.S. at 742 (citation omitted).

#### **B. The Act’s History Confirms The Annotations Are Copyrightable**

The Copyright Act’s history confirms that Congress intended to allow states to use copyright’s economic incentives to enlist private companies to prepare and publish works like the OCGA.

1. The relevant history begins with the Printing Law of 1895, which provided that no publication of the *U.S. government* “shall be copyrighted.” Act of Jan. 12, 1895, ch. 23, § 52, 28 Stat. 601, 608; see also Copyright Law Revision: Studies Prepared for the Subcomm. on Patents, Trademarks, and Copyrights of the S. Comm. on the Judiciary, Study No. 33, at 29-31, 86th Cong., 2d Sess. (1961) (Study No. 33). During the period of study and review that preceded the Copyright Act of 1909’s enactment, the Copyright Office prepared a draft bill that would have extended that prohibition to certain state government works. See 2 E. Fulton Brylawski & Abe Goldman, *Legislative History of the 1909 Copyright Act* XXIX-XXX (1976) (reproducing October 1905 draft bill); 3 Brylawski & Goldman XXXII (March 1906 revised draft bill); see also Study No. 33, at 31; L. Ray Patterson & Craig Joyce, *Monopolizing*

*the Law: The Scope of Copyright Protection for Reports and Statutory Compilations*, 36 UCLA L. Rev. 719, 753 (1989). That draft provision, however, “encountered staunch opposition.” Patterson & Joyce, 36 UCLA L. Rev. at 753; accord Study No. 33, at 31; see also 3 Brylawski & Goldman 186-187 (reproducing “Stenographic Report of the Proceedings at the Third Session of the Conference on Copyright”). Accordingly, it was not included in the bill that was introduced in Congress. Study No. 33, at 31.

After that bill’s introduction, the question whether state government publications should be copyrightable was again raised. Critics suggested that the proposed bill be revised to exclude from copyright protection “any publication of \* \* \* any State government.” *Arguments Before the Comms. on Patents of the S. and H., Conjointly, on the Bills S. 6330 and H.R. 19853*, 59th Cong. 135 (1906) (statement of Charles Porterfield) (reproduced at 4 Brylawski & Goldman); accord *id.* at 414, 428. Congress, however, rejected that suggestion. As enacted, the 1909 Act—like the modern Copyright Act—only excluded from copyright protection U.S. government works, not state government works. Act of Mar. 4, 1909, ch. 320, § 7, 35 Stat. 1075, 1077.

2. In preparation for the drafting of the modern Copyright Act, the Copyright Office supervised a series of studies on copyright law, including an October 1959 study on “Copyright in Government Publications.” That study explained that “[i]n the nineteenth century much of the public printing for the States was done under contract by private publishers.” Study No. 33, at 28. Because private publishers “would not bear the expense of printing and publishing” without “exclusive rights,” “a number of States” provided that

“court reporters or other State officials who prepared copyrightable material in their official capacity should secure copyright in trust for or on behalf of the State.” *Ibid.* (footnotes omitted). “Such copyrights for the benefit of a State were sustained by the courts.” *Ibid.* Case law thus held that while “laws, court decisions, governmental rules, etc., [were] not subject to copyright,” “other material prepared for State Governments by their employees,” including “annotations,” were “copyrightable on behalf of the States.” *Id.* at 28-29.

The 1959 study recommended against departing from those well-established precedents, which the 1909 Act had left undisturbed. Study No. 33, at 31-32, 36. The study noted that “almost every State has claimed copyright in some of its publications” and that state governments registered “about 4,700 copyright claims” from 1950 to 1954. *Id.* at 36. The study explained that “perhaps the principal motivation for the States to secure copyright in their publications is to enable them to give exclusive rights to a private publisher to induce him to print and publish the material at his own expense.” *Ibid.* The study concluded that “no compelling reason” existed “to withdraw from the States the privilege they have exercised for many years of securing copyright in some of their publications.” *Ibid.*

Based on the studies it supervised, the Copyright Office in 1961 issued an influential report to Congress that served as the foundation for the modern Copyright Act. See *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 159-161 (1985). Like the 1959 study, the 1961 report noted that the judicially created government edicts doctrine does not prevent states “from securing

copyright” in “annotations, headnotes, or commentaries” added to “official documents.” Copyright Law Revision Report 129. The report also emphasized that in enacting the 1909 Copyright Act, Congress rejected efforts “to extend the prohibition” against copyrighting U.S. government works “to publications of State and local governments” because, historically, states have not always had “their own facilities for printing.” *Id.* at 129-130. Therefore, states have “contracted with private publishers who undertook to print and publish at their own expense as a commercial venture, for which the publishers required copyright protection.” *Id.* at 130.

In accordance with the 1959 study, the 1961 report did not recommend disturbing that longstanding state practice by amending the copyright laws to deprive state government works of copyright protection. And as explained above, when Congress enacted the Copyright Act of 1976, it chose to exclude only U.S. government works, not state government works, from copyright protection. See pp. 22-23, *supra*.

This history demonstrates that Congress chose to permit “copyright protection” for state government works so that “private publishers” like Lexis would agree “to print and publish” those works. Copyright Law Revision Report 130. Congress did so with the understanding that, under well-established precedents, such copyright protection would cover “annotations” to “official document[s],” such as the OCGA’s annotations. *Id.* at 129.

### C. Copyright Office Guidance Supports Georgia's Position

Copyright Office guidance accords with Georgia's reading of the Copyright Act's text and history, and supports Georgia's copyright claim in the OCGA's annotations. The Copyright Office's *Compendium* is an administrative manual that "provides instruction to agency staff" on registering copyrights and "expert guidance" on copyright law. *Compendium* 1. Before registering a work, the Copyright Office must determine that it "constitutes copyrightable subject matter." 17 U.S.C. § 410(a). The *Compendium* explains that although the Copyright Office "will not register a government edict," such as a "legislative enactment[]," the Office "may register annotations that summarize or comment upon legal materials issued by a \*\*\* state \*\*\* government." *Compendium* § 313.6(C)(2). Therefore, "[a]nnnotated codes that summarize or comment upon legal materials issued by a \*\*\* state \*\*\* government" may "be registered." *Id.* § 717.1. That rule applies "even if [the work] was prepared by an officer or employee of a state \*\*\* government while acting within the course of his or her official duties." *Id.* § 313.6(C)(2). Although the *Compendium* notes that registration would be improper if "the annotations themselves have the force of law," *ibid.*, that caveat is inapplicable here because, as the Eleventh Circuit recognized, the OCGA's annotations lack "the force of law," Pet. App. 26a. Therefore, the Eleventh Circuit's denial of copyright protection to the OCGA's annotations conflicts with the Copyright Office's settled views.

The Copyright Office *Compendium*'s guidance on copyrightability merits deference under *Skidmore v.*

*Swift & Co.*, 323 U.S. 134, 140 (1944). See, e.g., *Inhale, Inc. v. Starbuzz Tobacco, Inc.*, 755 F.3d 1038, 1041-1042 (9th Cir. 2014); *Southco, Inc. v. Kanebridge Corp.*, 390 F.3d 276, 286 & n.5 (3d Cir. 2004) (en banc) (Alito, J.); see also *Mazer v. Stein*, 347 U.S. 201, 213 (1954) (giving weight to Copyright Office’s interpretation). Indeed, the Copyright Act itself calls for a measure of deference to Copyright Office determinations. Under the Act, the Office’s registration of Georgia’s copyright in the annotations at issue here “constitute[s] prima facie evidence of the validity of [Georgia’s] copyright.” 17 U.S.C. § 410(c); see also Pet. App. 11a.

## **II. THIS COURT’S PRECEDENTS DO NOT DEPRIVE THE OCGA’S ANNOTATIONS OF COPYRIGHT PROTECTION**

As explained above, the Copyright Act’s text and history, as well as settled guidance from the agency charged with the Act’s administration, support the OCGA annotations’ copyrightability. The Eleventh Circuit nonetheless held that the annotations are uncopyrightable based on this Court’s nineteenth-century decisions in *Wheaton*, *Banks*, and *Callaghan*. Those decisions, however, support Georgia’s position. Collectively, they hold that judicial opinions are not copyrightable, but annotations added to opinions by a court’s official reporter are copyright eligible—notwithstanding the “official” status of the annotations’ author, or the fact that the annotations are combined with the uncopyrightable opinions in a single publication. Analogously, while the OCGA’s statutory text—the portion of the OCGA setting forth actual law—is not copyrightable, Georgia can claim copyright in the OCGA’s annotations.

**A. *Wheaton, Banks, And Callaghan Only Preclude Copyrighting Works Having The Force Of Law, And Expressly Authorize Copyrighting Annotations***

1. The fountainhead of the government edicts doctrine is *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834), a dispute between this Court’s first and second official reporters. See Act of Mar. 3, 1817, ch. 63, 3 Stat. 376 (providing for salaried official reporter). Henry Wheaton, the first official reporter, published reports containing not only the text of Justices’ opinions, but also his own annotations, including abstracts of the Court’s decisions and statements of the cases’ facts and procedural histories. See *Wheaton*, 33 U.S. at 617 (argument of Wheaton’s counsel); Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy*, 83 Mich. L. Rev. 1291, 1384-1385 & n.515 (1985). After Wheaton resigned, Richard Peters—the second official reporter—created condensed reports of this Court’s prior decisions that included portions of Wheaton’s annotations. See Joyce, 83 Mich. L. Rev. at 1364-1385. Wheaton sued Peters for copyright infringement.

The Court’s opinion in *Wheaton* focused on two questions not at issue here: (1) whether Wheaton could assert a common-law copyright claim to avoid then-existing statutory registration and notice requirements (the Court held that Wheaton could not), and (2) whether Wheaton had to prove substantial compliance with the statutory requirements to proceed with his infringement claim (the Court held that he did). *Wheaton*, 33 U.S. at 654-667. The Court remanded for a jury trial on whether Wheaton had complied with the statutory requirements. *Id.* at 667-668.

In the opinion's last sentence, the Court stated: "It may be proper to remark that the court are unanimously of opinion, that no reporter has or can have any copyright in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right." *Id.* at 668. The Court provided no further elaboration, and made no effort to tie its statement to the text of the governing Copyright Act of 1790.

Despite stating that Wheaton lacked a copyright in the Court's opinions, the Court implicitly recognized that Wheaton's *annotations* were copyrightable. That recognition is evident from the Court's decision to remand for a trial on whether Wheaton had complied with the applicable statutory requirements for perfecting his copyright claims. *Wheaton*, 33 U.S. at 667-668. As this Court later explained, remanding "would have been wholly useless and nugatory unless Mr. Wheaton's marginal notes and abstracts of arguments could have been the subject of a copyright." *Callaghan*, 128 U.S. at 649-650 (quoting *Gray v. Russel*, 10 F. Cas. 1035, 1039 (C.C.D. Mass. 1839) (Story, J.)). If Wheaton's annotations, like his reproductions of the Court's opinions, were uncopyrightable, there would have been no need to remand for further proceedings. Peters would have been entitled to judgment in his favor as a matter of law because none of the copied portions of Wheaton's reports would have been copyright eligible.<sup>8</sup>

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<sup>8</sup> The jury on remand found Wheaton had complied with the applicable statutory requirements, and thus Peters had infringed Wheaton's copyright. Joyce, 83 Mich. L. Rev. at 1385.

In contrast to the Eleventh Circuit’s decision below, see, e.g., Pet. App. 41a, the Court in *Wheaton* never suggested that Wheaton’s statutory position as official reporter precluded him from asserting copyright over his annotations. And by remanding the case for further proceedings on Wheaton’s copyright claims, the Court implicitly rejected Peters’s argument that by “mingl[ing]” original annotations with the Court’s uncopyrightable opinions, Wheaton had “forfeit[ed]” the right to object to the reproduction of “the whole” of his reports, including the portions that Wheaton had authored. *Wheaton*, 33 U.S. at 624 (argument of Peters’s counsel: “The lucubrations of the reporter assume the hue of the authoritative parts of his book.”). By contrast, the Eleventh Circuit here accepted precisely such an argument: It concluded that the “merg[ing]” and “intermingl[ing]” of annotations and statutory text in the OCGA “alter[s]” the annotations’ “distinct character,” rendering them ineligible for copyright protection. Pet. App. 39a-40a.

The Eleventh Circuit’s decision is thus irreconcilable with *Wheaton*. Much as Georgia has used a third-party publisher to assist with codifying its statutes, the Marshall Court lobbied Congress to create the position of official reporter given the delays and errors that had plagued unofficial reports of the Court’s decisions. See Joyce, 83 Mich. L. Rev. at 1293, 1305, 1309-1312, 1346-1347. Like Lexis, the early reporters depended on revenue from selling their publications. See Craig Joyce, *A Curious Chapter in the History of Judicature: Wheaton v. Peters and the Rest of the Story (of Copyright in the New Republic)*, 42 Hous. L. Rev. 325, 351 (2005) (salary was “wholly insufficient to overcome [reporter’s] dependence on [book] sales”). Just as

recognizing copyright protection in portions of those reporter volumes promoted their commercial viability—which in turn furthered this Court’s goal of ensuring that its decisions were accurately reported and widely disseminated—Georgia’s OCGA copyright helps ensure accurate codification at negligible taxpayer expense, while providing useful (but non-binding) annotations to facilitate legal research.

2. This Court’s 1888 decisions in *Banks* and *Callaghan* extended *Wheaton* to state judicial opinions—holding that while such opinions are not copyrightable, annotations of them are. The plaintiffs in *Banks* were the owners of Banks & Brothers (“Banks”), the state-authorized publisher of the Ohio Supreme Court’s decisions.<sup>9</sup> *Banks*, 128 U.S. at 247. Banks published a book containing advance copies of decisions that would later be compiled in the *Ohio State Reports*. *Id.* at 247-248. The Ohio Supreme Court’s official reporter recorded a copyright claim in that book on behalf of the State of Ohio. *Id.* at 248. A competing publisher, G.L. Manchester, then reproduced decisions from Banks’s book. *Id.* at 249. Banks sued Manchester for copyright infringement. *Id.* at 247.

The *Banks* trial court concluded—without contradiction by this Court—that the Ohio Supreme Court’s official reporter could claim copyright in materials that he authored, such as “abstracts of arguments of counsel.” *Banks v. Manchester*, 23 F. 143, 144-146 (C.C.S.D. Ohio 1885); see also *Banks*, 128 U.S. at 250. But it was undisputed in *Banks* that the materials

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<sup>9</sup> Ohio originally contracted for H.W. Derby & Co. to publish the supreme court decisions. *Banks*, 128 U.S. at 246-247. Derby assigned its rights to Banks. *Id.* at 247.

Manchester had copied—the Ohio Supreme Court’s opinions and its statements of the case and syllabuses—were “exclusively the work of the judges,” and were “not \*\*\* author[ed]” by the reporter.<sup>10</sup> *Banks*, 128 U.S. at 251. Accordingly, this Court began its analysis by noting that Ohio’s reporter could not claim copyright in the materials at issue because he was not their “author, inventor, designer, or proprietor.” *Id.* at 252; see also Rev. Stat. § 4952 (1878) (then-governing statutes accorded copyright protection to “[a]ny citizen of the United States or resident therein, who shall be the author, inventor, designer, or proprietor of any book, \*\*\* and the executors, administrators, or assigns of any such person”). Therefore, the state could not have obtained a copyright as the reporter’s “assignee.” *Banks*, 128 U.S. at 252-253.

The Court went on to consider whether Ohio’s *judges* could hold a copyright in the materials they authored, such that the state could claim copyright through an assignment from the judges. See *Banks*, 128 U.S. at 253. The Court held that they could not. *Ibid.* (judges cannot “be regarded as [the materials’] author or their proprietor, in the sense of § 4952”). Applying the “public policy” announced in *Wheaton*, the Court stated that “no copyright could \*\*\* be secured

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<sup>10</sup> In Ohio, the syllabus was written by the judge assigned to prepare the court’s opinion, was approved by all judges concurring in the judgment, and provided an authoritative recitation of “the points decided by the court.” 14 *Ohio Jurisprudence* § 247 (2d ed. 1955); accord *State v. Wilson*, 388 N.E.2d 745, 751 (Ohio 1979); see also *Banks*, 128 U.S. at 250 (syllabus “subject to revision by the judges concurring in the opinion”). The statement of the case provided context for the court’s holdings by setting forth the case’s facts and procedural history. See 14 *Ohio Jurisprudence* § 248.

in the products of the labor done by judicial officers in the discharge of their judicial duties.” *Ibid.* According to *Banks*, “[t]he whole work done by the judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all.” *Ibid.* Therefore, Manchester’s copying of the judge-authored materials at issue in *Banks* did not provide grounds for an infringement claim. See *id.* at 253-254.

Less than a month after *Banks* was decided, this Court issued *Callaghan*. Justice Blatchford authored the Court’s unanimous opinions in both cases.

*Callaghan* involved a dispute over the publication of reports of the Illinois Supreme Court’s decisions. As state law permitted, the Illinois Supreme Court’s official, court-appointed reporter contracted with the *Callaghan* plaintiff, Eugene B. Myers, to publish his reports of the court’s decisions. *Callaghan*, 128 U.S. at 619-621, 645-647; see also *Myers v. Callaghan*, 5 F. 726, 726-728 (C.C.N.D. Ill. 1881). In addition to the court’s opinions, the reports contained annotations that the reporter authored, including “head-note[s]” or “syllabus[es],” “statement[s] of facts,” and summaries of counsel’s arguments. *Callaghan*, 128 U.S. at 645. In publishing competing volumes, the defendants copied the reporters’ annotations. *Id.* at 622, 660-662.

In Myers’s subsequent infringement suit against the defendants, the trial court concluded that materials written by the reporter were copyrightable. *Myers*, 5 F. at 728-729. The court explained that, “as construed by the courts and the profession,” Wheaton had “always been supposed to decide that Mr. Wheaton had a copyright in his reports, provided he had

complied with” the requisite statutory formalities. *Id.* at 728. Accordingly, the court noted, “[e]very reporter of the supreme court since has claimed copyright, \*\*\* and so, it is believed, has every reporter in this country, state and federal.” *Id.* at 729. The court found the defendants liable for infringement and awarded Myers damages and injunctive relief. See *id.* at 735-736; see also *Callaghan*, 128 U.S. at 633-634.

This Court affirmed the trial court’s holding that the reporters’ annotations were copyrightable. See *Callaghan*, 128 U.S. at 645-650. In contrast to the Eleventh Circuit here, *Callaghan* rejected the argument that the “law reports [were] public property” and could not “be the subject of copyright” because the court’s appointed reporter “was a public officer” and thus “was not an author” within the meaning of the copyright statutes. *Id.* at 645-647; see also *id.* at 634-637 (summarizing defendants’ argument). Like the trial court, this Court noted that “numerous reporters, officially appointed, made sworn public officers, and paid a salary under the governments both of States and of the United States,” had relied on the existence of copyright protection for original materials they added to reports. *Id.* at 647. Citing *Wheaton* and distinguishing *Banks*, the Court explained that “although there can be no copyright” in judicial opinions, “there is no ground of public policy on which a reporter \*\*\* can, in the absence of a prohibitory statute, be debarred from obtaining a copyright \*\*\* cover[ing] the matter which is the result of his intellectual labor.” *Ibid.* Because the original “work of [a] reporter \*\*\* may be the lawful subject of copyright,” the Court held that the Illinois Supreme Court’s official reporter

could “obtain a copyright” for the annotations he authored.<sup>11</sup> *Id.* at 649-650.

3. *Callaghan* accorded with a long line of case law recognizing that supplementary materials official reporters added to their reports of judicial opinions were “unquestioned and familiar subject[s] of copyright.” *Connecticut v. Gould*, 34 F. 319, 319 (C.C.N.D.N.Y. 1888); accord, e.g., *Banks & Bros. v. West Publ’g Co.*, 27 F. 50, 60-61 (C.C.D. Minn. 1886); *Little v. Gould*, 15 F. Cas. 612, 612-614 (C.C.N.D.N.Y. 1852); *Little v. Gould*, 15 F. Cas. 604, 606 (C.C.N.D.N.Y. 1851); *Gray*, 10 F. Cas. at 1039. States relied on that copyright protection as an incentive for private publishers to print reporter volumes. See *Little*, 15 F. Cas. at 614 (absence of copyright protection for supplementary materials would have rendered state’s “system of reporting \* \* \* impracticable and absurd”). Georgia’s arrangement with Lexis is merely one of many modern iterations of that longstanding state practice, which Congress chose not to disturb in enacting the Copyright Acts of 1909 and 1976. See pp. 26-29, *supra*; pp. 56-57, *infra*.

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<sup>11</sup> When *Banks* and *Callaghan* were decided, copyright protection only extended to authors who were U.S. “citizen[s]” or “resident[s].” *Banks*, 128 U.S. at 252. *Banks* thus questioned whether a state *itself*—as opposed to an individual state official who was a U.S. citizen or resident—“could take out a copyright.” *Id.* at 253. Because modern copyright law does not limit protection to authors who are U.S. citizens or residents, see, e.g., 17 U.S.C. § 104(b)(2), state governments and agencies can qualify as “authors” entitled to copyright protection. See p. 23, *supra*.

**B. Because The OCGA’s Annotations Are Not The Law, They Are Not Subject To The Government Edicts Doctrine**

1. In sum, *Wheaton* and *Callaghan* establish that the OCGA’s annotations are copyrightable, even though they are “merged” with statutory text in an “official” code book (Pet. App. 39a-42a). *Banks*, on which the Eleventh Circuit primarily grounded its decision, *e.g.*, *id.* at 24a-26a, merely indicates that enacted statutes are uncopyrightable because they constitute “the law, \* \* \* binding every citizen.” 128 U.S. at 253. That rule has no bearing here. Georgia does not claim copyright in the OCGA’s statutory text and numbering, and it is undisputed that the annotations in which Georgia does claim copyright lack “the force of law.” Pet. App. 26a.

This fundamental point is undisputed for good reason: Georgia law is pellucid that the annotations have no legal force. As an initial matter, the annotations *cannot* have the force of law because, as the Eleventh Circuit recognized, “the Georgia General Assembly does not individually enact each separate annotation as part of the ordinary legislative process.” Pet. App. 47a. To become law in Georgia, legislation must be approved by both Houses of the General Assembly and presented to the Governor. Ga. Const. art. III, § V; *id.* art. V, § II, para. IV. Because individual annotations do not satisfy these bicameralism and presentment requirements, they are not the law.

Furthermore, as the Eleventh Circuit also acknowledged, Georgia’s legislature has expressly—and repeatedly—“disclaim[ed] any legal effect in the [OCGA’s] annotations.” Pet. App. 39a. Georgia’s code

distinguishes between statutory text—the actual law—and other OCGA components, which “are given for the purpose of convenient reference and do not constitute part of the law.” OCGA § 1-1-7; see also *id.* § 1-1-1 (distinguishing between OCGA’s “statutory portion” and “annotations”). And Georgia’s annual reviser acts reenact only the OCGA’s statutory text and numbering. *E.g.*, S.B. 52, § 54(a) (2019). They expressly provide that the OCGA’s “[a]nnotations” are “not enacted as statutes.” *Id.* § 54(b).

Accordingly, the Georgia Supreme Court has authoritatively stated that the OCGA’s annotations lack “any official weight.”<sup>12</sup> *Harrison*, 260 S.E.2d at 35. Because it is not—and cannot be—disputed that the OCGA’s annotations lack the force of law, the government edicts doctrine does not prevent Georgia from claiming copyright in the annotations.

2. Further demonstrating that the Eleventh Circuit’s reliance on *Banks* is misplaced, the decision below conflicts with *Howell v. Miller*, 91 F. 129 (6th Cir.

<sup>12</sup> The Eleventh Circuit cited state court decisions which, in its view, had given weight to certain “OCGA comments.” Pet. App. 43a-44a. PRO did not rely below on those comments, for good reason: They were authored by Georgia State Bar committees, *not* by the Code Revision Commission or the OCGA’s third-party publisher. See OCGA, vol. 12, at 1-2, 14-15, 857-858, 968 (2017 ed.) (noting comments’ authors, and explaining “[t]he comments should not be considered to constitute a statement of legislative intention by the General Assembly of Georgia nor do they have the force of statutory law”); OCGA, vol. 40, at 166-167 (2011 ed.) (same). Georgia does not assert copyright claims in such comments. West has published Bar-committee comments in its annotated code book, *see, e.g.*, Ga. Code Ann. § 14-2-1302 (West 2018), and Georgia does not object to PRO’s publishing those comments too.

1898), which was written by Circuit Justice Harlan (who participated in this Court’s decisions in *Banks* and *Callaghan*) and was joined by then-Judge (later Chief Justice) Taft. *Howell* addressed the copyrightability of a work similar to the OCGA: the privately prepared, government-approved *Howell’s Annotated Statutes of Michigan*. Howell published annotated compilations of Michigan law, and the state legislature “passed an act” providing that “the general laws of the state, as collected and arranged in” Howell’s volumes, “should be received and admitted in all courts and proceedings, and by all officers,” as “evidence of the existing laws,” with “like effect as if published under and by the authority of the state.” *Id.* at 130-131 (citation omitted). Even though the state had effectively placed its “imprimatur” on Howell’s *Annotated Statutes*, Pet. App. 38a, the court held that Howell’s marginal references, notes, and digests of judicial decisions were copyrightable, “for they constitute[d] no part of that which is public property, and [were] plainly produced by the compiler.” *Howell*, 91 F. at 138. Howell distinguished *Banks* and cited *Callaghan* as support for its conclusion that “Howell was entitled to have copyrighted \* \* \* all in his books that may fairly be deemed the result of his labors.”<sup>13</sup> *Ibid.*

PRO contends the OCGA and Howell’s annotated code book “are not similar in the relevant sense” because “Howell did not publish his annotations under the authority of the state.” BIO 20. But, contrary to PRO’s suggestion, the state did not merely “assign[]

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<sup>13</sup> Ultimately, the court affirmed the denial of an injunction, finding insufficient evidence the defendant had copied Howell’s annotations rather than producing his own. 91 F. at 141-142.

some evidentiary effect to [Howell's] volumes." *Ibid.* The legislature provided that Howell's annotated code book "shall be received and admitted \*\*\* as evidence of the existing laws \*\*\* with the like effect as if published under and by the authority of the State." 1883 Mich. Pub. Acts 8 (emphasis added). Nothing in copyright law can reconcile (1) *Howell*'s recognition of copyright protection for annotations in a code book that state law mandated be treated with the "like effect as if published under and by the authority of the State," 91 F. at 138, and (2) the Eleventh Circuit's denial of copyright protection for annotations produced by a private publisher under a work-for-hire agreement with the state. If Harlan and Taft were right in *Howell*, the Eleventh Circuit was wrong here.

### C. Regardless Of Its Theoretical Foundations, The Government Edicts Doctrine Does Not Justify Denying Copyright Protection To The OCGA's Annotations

As the Eleventh Circuit recognized, the government edicts doctrine's "foundations \*\*\* are far from clear." Pet. App. 12a. This Court's nineteenth-century precedents primarily justified the doctrine on the basis of "judicial consensus" and "public policy." *Banks*, 128 U.S. at 253 (emphasis omitted); see also *Wheaton*, 33 U.S. at 668 (Justices "unanimously of opinion"); *Callaghan*, 128 U.S. at 647 (declining to extend doctrine absent "public policy" justification). Modern jurists seeking firmer theoretical foundations have suggested various possibilities. Some, like the Eleventh Circuit, have proposed reading a "metaphorical concept of citizen authorship" into the Copyright Act. Pet. App. 21a (quoting *Veeck v. Southern Bldg. Code Cong. Int'l, Inc.*, 293 F.3d 791, 799 (5th Cir. 2002) (en banc)). Others

have sought to justify the doctrine, at least in part, by reference to due process concerns about notice and access to the law. *E.g., County of Suffolk*, 261 F.3d at 195; *Practice Mgmt. Info. Corp. v. American Med. Ass'n*, 121 F.3d 516, 519 (9th Cir. 1997), amended by 133 F.3d 1140 (9th Cir. 1998). Finally, the First Amendment and the idea/expression dichotomy codified at 17 U.S.C. § 102(b) have been suggested as possible foundations for the doctrine. *American Soc'y for Testing & Materials v. Public.Resource.Org, Inc.*, 896 F.3d 437, 458-459 (D.C. Cir. 2018) (Katsas, J., concurring) (*ASTM*).<sup>14</sup>

The uncertainty regarding the judge-made doctrine's legal underpinnings militates against expanding it beyond the core principle that the law itself is uncopyrightable. Congress's silence regarding the government edicts doctrine in the Copyright Act might be construed as acceptance of the well-established principle that statutes and judicial opinions are uncopyrightable. See *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527-528 (1994); cf. *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 185-188 (1994) (discussing "acquiescence doctrine"). Mere congressional silence, however, cannot be

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<sup>14</sup> The fair use doctrine codified at 17 U.S.C. § 107 has also been cited as a potential basis for the doctrine. *ASTM*, 896 F.3d at 458-459 (Katsas, J., concurring). The fair use defense, however, presupposes the existence of a "copyrighted work." 17 U.S.C. § 107. It thus cannot serve as the foundation for the government edicts doctrine's threshold rule that certain works (e.g., statutes or judicial opinions) are *ineligible* for copyright protection. Separate from its argument under the government edicts doctrine, PRO raised a fair use defense below, which the Eleventh Circuit did not reach, Pet App. 4a-5a, and the district court properly rejected, *id.* at 65a-72a.

construed as endorsement of the novel *expansion* of the doctrine PRO proposes, which would not only go beyond any “settled” or “uniform” understanding of its scope, *Fogerty*, 510 U.S. at 531-532, but would run *contrary* to historical consensus, see pp. 27-29, 31-43, *supra*. This Court should not expand a “judicial construct” of uncertain and contested foundations that Congress never expressly “enact[ed] in the [Copyright Act’s] text” and “did not expand when it revisited the law.” *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 164, 167 (2008).

In any event, none of the suggested theoretical foundations for the government edicts doctrine would support denying copyright protection to the OCGA’s annotations.

1. The Eleventh Circuit concluded that the government edicts doctrine rests on a “metaphorical concept of citizen authorship,” Pet. App. 21a (citation omitted), under which “the People” are deemed “constructive authors” of certain government works, *id.* at 19a. That theory has little (if any) basis in *Wheaton*, *Banks*, and *Callaghan*.<sup>15</sup> Moreover, adopting a self-consciously “metaphorical” reading of the Copyright Act would deviate from standard norms of statutory interpretation. *E.g.*, *Bates v. United States*, 522 U.S. 23, 29 (1997) (“[W]e ordinarily resist reading words or elements into a statute that do not appear on its face.”); cf. *Henneford v. Silas Mason Co.*, 300 U.S. 577, 586 (1937) (“dangers

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<sup>15</sup> *Banks* referred to the concept of “author[ship]” under the then-governing copyright statutes. 128 U.S. at 253. But the notion of constructive “citizen authorship” based on a theory of “popular sovereignty” (Pet. App. 19a-22a) does not appear in *Wheaton*, *Banks*, or *Callaghan*, much less in the modern Copyright Act.

\* \* \* lurk in metaphors"). Nonetheless, even if this Court construed its nineteenth-century cases as tacitly embracing a "citizen authorship" theory, the government edicts doctrine would not deprive the OCGA's annotations of copyright protection.

a. As the Eleventh Circuit correctly discerned, even if *Banks* adopted a "citizen authorship" theory, that theory does not extend to all works created by a state or its employees or contractors. Pet. App. 34a. *Callaghan*'s recognition of copyright in the Illinois Supreme Court reporter's annotations makes that clear. See *Veeck*, 293 F.3d at 797 n.8. Moreover, *Banks* explained what distinguishes the uncopyrightable subset of government works from the rest, stating that "[t]he whole work done by the judges constitutes the authentic exposition and interpretation of the law, *which, binding every citizen*, is free for publication to all." 128 U.S. at 253 (emphasis added). In other words, if there was a conception of citizen authorship tacitly at work in *Banks*, it was that "[t]he citizens are the authors of *the law*." *Veeck*, 293 F.3d at 799 (emphasis added) (citation omitted).

But if that is the government edicts doctrine's foundation, this case is resolved by the Georgia General Assembly's repeated enactments making clear that the OCGA's non-statutory portions are only a "convenient reference and do not constitute part of the law." OCGA § 1-1-7; see also pp. 40-41, *supra*. The Eleventh Circuit thought otherwise because it viewed the OCGA's annotations as falling within "a zone of indeterminacy at the frontier between edicts that carry the force of law and those that do not." Pet. App. 24a-25a. But even if such a "zone of indeterminacy" exists, the OCGA's annotations do not fall within it. They unambiguously

lack *any* legal force: Georgia statutory law expressly says so, see pp. 40-41, *supra*, and the Georgia Supreme Court has unequivocally agreed, *Harrison*, 260 S.E.2d at 35. The fact that the annotations are prepared by a private party (Lexis) and do not undergo the bicameralism and presentment necessary to create statutory law in Georgia only further highlights the point. See p. 40, *supra*.

b. In support of extending a “citizen authorship” rationale beyond works carrying the force of law, PRO asserts that all judicial opinions are uncopyrightable, even though only statements of legal holdings in opinions for the court generally have binding legal force—whereas concurrences, dissents, and dicta do not. See BIO 24-25.

But the rule that this Court has established for judicial opinions in no way supports denying copyright protection to the OCGA’s annotations. This Court has articulated the “public policy” supporting the copyright exclusion for judicial opinions as follows: “The whole work done by the judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all, whether it is a declaration of unwritten law, or an interpretation of a constitution or a statute.” *Banks*, 128 U.S. at 253. As PRO’s argument indicates, that statement may be somewhat overinclusive. Nonetheless, it is indisputable that in our system of government, courts bear the authority and responsibility “to say what the law is.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Judicial opinions are the vehicle by which judges carry out that responsibility.

A rule that would selectively grant or withhold

copyright protection for particular judicial opinions (or portions of opinions) would be extremely hard to administer. Identifying the portions of opinions that set forth binding law can be a difficult and contentious enterprise. *E.g., Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 66-68 (1996) (disagreement between majority and dissent on boundary between dicta and binding “rationale \*\*\* of \*\*\* earlier decisions”). Opinions’ statements of facts and procedural history often provide context necessary to understand the breadth of the court’s holding—especially in the many areas of law where “result[s] depend[] very much on the facts of each case,” *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004) (per curiam). It is sometimes necessary to consult non-majority opinions to determine which rules bind lower courts. See *Marks v. United States*, 430 U.S. 188, 192-194 (1977); see also, e.g., *Danforth v. Minnesota*, 552 U.S. 264, 286-287 (2008). And concurrences, or even dissents, are sometimes later viewed as setting forth the correct view of the law. *E.g., Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2083-2084 (2015) (relying on Justice Jackson’s concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)). A prophylactic rule that all judicial opinions are uncopyrightable thus constitutes sensible “public policy,” *Banks*, 128 U.S. at 253, providing a clear, administrable standard that prevents copyrighting binding case law.

But the same reasoning does not apply to the OCGA’s annotations. The annotations are *not* a vehicle for exercising any form of lawmaking authority. None of the annotations have independent legal force; they *never* authoritatively establish any enforceable rights or obligations binding *anyone* (let alone “every

citizen,” *Banks*, 128 U.S. at 253). At most they summarize or report on particular aspects of primary legal materials that the individuals preparing the annotations consider noteworthy. There is no need for an overinclusive prophylactic rule as to the OCGA because there is a readily administrable rule that protects free access to Georgia law: The annotations are copyrightable, but the OCGA’s statutory portions are not. The copyright exclusion for judicial opinions therefore does not support withholding copyright protection from the annotations.

Finally, it is worth stepping back and considering the implausibility of PRO’s reasoning. Based on arguable difficulties in applying *Banks*’s reasoning (i.e., “[t]he whole work [of] judges constitutes the authentic exposition and interpretation of the law, \* \* \* binding every citizen,” 128 U.S. at 253) to exotic hypothetical scenarios (e.g., a state’s attempt to claim copyright only in dissents), PRO leaps to the conclusion that the government edicts doctrine must be far *broader* than historically understood. According to PRO, the doctrine “can only” rest on an elaborate theory that certain works, even if lacking *any* legal force, nonetheless represent an “exercis[e] [of] sovereign power on behalf of the People,” and must fall into “the public domain.” BIO 24-25. But this tenuous chain of inferences finds no support in this Court’s precedents. A far simpler and more plausible explanation of *Banks* is that this Court adopted a slightly broader (and more administrable) rule than its rationale might justify as a matter of abstract theory. No matter how hard one squints, neither the Copyright Act nor this Court’s case law enacts PRO’s *ad hoc* theories about the relationship between popular sovereignty, democracy, and

copyright law.

2. PRO's effort to ground its reading of the government edicts doctrine in "principles of due process and \*\*\* the Rule of Law," BIO 31 (bolding omitted), also fails. Due process entitles citizens "to be informed as to what the State commands or forbids." *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). This Court has developed its jurisprudence on this "fair notice" requirement principally in cases where particular laws are challenged as "void for vagueness." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). Its precedents on the government edicts doctrine, by contrast, do not address due process *per se*. Some lower courts addressing the government edicts doctrine have, however, found fair notice considerations relevant, reasoning that if the law were copyrighted, the copyright holder might seek to "restrict [its] dissemination," *County of Suffolk*, 261 F.3d at 194, potentially preventing citizens from "learn[ing] of its requirements," *Building Officials & Code Adm'rs v. Code Tech., Inc.*, 628 F.2d 730, 734 (1st Cir. 1980).

Whatever importance fair notice principles might have for cases falling within the government edicts doctrine's traditional scope (such as efforts to copyright statutes), they are irrelevant here. "All the Due Process Clause requires is that the law give sufficient warning that [citizens] may conduct themselves so as to avoid that which is forbidden." *Rose v. Locke*, 423 U.S. 48, 50 (1975) (per curiam). Georgia's free online dissemination of its statutes—the actual law—more than satisfies that requirement.<sup>16</sup> See, e.g., *Texas v.*

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<sup>16</sup> The full OCGA (with annotations) is also publicly available without charge at over 60 sites throughout Georgia. Pet. App. 8a.

*West Publ'g Co.*, 882 F.2d 171, 177 (5th Cir. 1989) (access to statutory law satisfies due process requirements; copyright in annotated code did not impinge on “any due process right [Texas residents] could conceivably have to access Texas laws”). Georgia’s copyright in the OCGA’s annotations does not raise any due process concerns because they lack “the force of law.” Pet. App. 26a; cf. *Beckles v. United States*, 137 S. Ct. 886, 894 (2017) (non-binding sentencing guidelines “do not implicate” fair notice concerns).

Even if the annotations’ lack of legal force were not dispositive, any potential residual due process concerns would be *highly* attenuated. Although PRO cites this Court’s fair notice jurisprudence to justify its copying (BIO 32), it never argues (nor could it) that Georgia’s statutes are not “reasonabl[y] \*\*\* understand[able]” to “people of ordinary intelligence.” *Hill v. Colorado*, 530 U.S. 703, 732 (2000). Moreover, there is no “evidence that anyone wishing to use the [annotations] has any difficulty obtaining access to [them]” through reasonable efforts, such as visiting a public library. *Practice Mgmt.*, 121 F.3d at 519; accord *West Publ'g*, 882 F.2d at 177.

In fact, PRO does not point to a single real-world instance where lack of access to the OCGA’s annotations deprived anyone “at peril of life, liberty or property,” *Lanzetta*, 306 U.S. at 453, of “a reasonable opportunity to understand” Georgia’s statutes, *Hill*, 530 U.S. at 732. PRO speculates that “some” Georgia residents “may” face such a predicament unless PRO can post every annotation online. BIO 34. But just as “speculation about possible vagueness” in some “hypothetical situations” will “not support a facial attack on a statute” under the Due Process Clause, *Hill*, 530 U.S.

at 733, speculation about possible problems for hypothetical individuals cannot insulate PRO's indiscriminate copying from challenge. Cf. *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (plaintiff generally "cannot rest his claim to relief on the legal rights or interests of third parties").

Finally, "[d]ue process is flexible," and its requirements are tailored to the demands of "the particular situation." *Jennings v. Rodriguez*, 138 S. Ct. 830, 852 (2018) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). Any hypothetical notice concerns (which, again, would be highly attenuated) must be balanced against the "fiscal and administrative burdens" imposed by alternatives to the current approach. *Mathews v. Eldridge*, 424 U.S. 319, 334-335 (1976). Lexis relies on sales of copyright-protected publications to recoup its OCGA preparation and publishing costs. See p. 55, *infra*. Therefore, absent copyright protection, Georgia will either have to divert scarce tax revenues to pay Lexis directly, or—because due process does not require states to produce annotated codes *at all*—simply leave annotations' production to the private market, making it *more* difficult for citizens of limited means to access annotations. Neither the "Due Process Clause" nor the "Rule of Law" (BIO 34) mandates such perverse outcomes.

Indeed, the Second and Ninth Circuits, which have incorporated fair notice and due process considerations into their tests under the government edicts doctrine, have balanced such concerns against the need for economic incentives to promote works' creation. *County of Suffolk*, 261 F.3d at 194-195; *Practice Mgmt.*, 121 F.3d at 518-519. Such an approach would require upholding Georgia's copyright in the

annotations because any due process concerns are non-existent or *de minimis*, whereas the economic incentives that copyright makes possible are central to Georgia's arrangement with Lexis.

3. Although PRO's amici cite the First Amendment in arguing against copyright protection here (R St. Inst. Amicus Br. 9-10), this Court has recognized that "copyright's built-in free speech safeguards"—such as the fair use defense and the principle that copyright protects only the *expression* of ideas, not ideas themselves—"are generally adequate" to avoid First Amendment concerns. *Eldred v. Ashcroft*, 537 U.S. 186, 219-221 (2003); accord *Golan v. Holder*, 565 U.S. 302, 327-329 (2012). Georgia's copyright claim in the OCGA's annotations does not prevent anyone from expressing any ideas regarding, or preparing their own annotations of, Georgia's statutes. See 17 U.S.C. § 102(b). Indeed, West publishes its own annotated version of Georgia's code. J.A. 627.

Consistent with First Amendment values, copyright protection here "promotes" the creation and publication of \* \* \* expression" by providing the requisite economic incentive for Lexis to prepare the OCGA's annotations (while also agreeing to maintain a website where the text of Georgia's statutes is available without charge). *Eldred*, 537 U.S. at 219. Thanks to Georgia's arrangement with Lexis, interested readers have access to an annotated code at an attractive price (about \$400 for approximately 50 printed volumes) without burdening Georgia taxpayers. See Pet. App. 7a. The First Amendment does not provide a shield for PRO to scan 186 volumes and supplements' worth of annotations and post them online in their entirety, obliterating Lexis's incentive to produce those

annotations in the first place. See *id.* at 71a-72a; J.A. 674; cf. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) (fair use doctrine does not “empower[] a court to ignore a copyright whenever it determines the underlying work contains material of possible public importance” (citation omitted)).

4. It has also been suggested that the government edicts doctrine might rest on section 102(b) of the Copyright Act—“which denies copyright protection to ‘any idea, procedure, process, system, method of operation, concept, principle, or discovery,’” *ASTM*, 896 F.3d at 458-459 (Katsas, J., concurring) (quoting 17 U.S.C. § 102(b))—along with the concomitant “merger” doctrine, see p. 13, *supra*. See generally *Baker v. Selden*, 101 U.S. 99 (1880). That rationale, however, would not justify withholding copyright protection from the OCGA’s annotations.

It may be sensible to say that the verbatim expressions in legally binding texts merge with the uncopyrightable “idea” of the law itself because the law’s content can only be precisely expressed in the exact words used by the legislature, court, or other lawmaker. See *Veeck*, 293 F.3d at 800-802. But as the district court here explained, “there are a multitude of ways to write” and compile summaries of specific aspects of primary legal materials that a particular author deems noteworthy. Pet. App. 65a. Otherwise, even entirely unofficial summaries of judicial opinions—such as those in West’s annotated Georgia code—would be uncopyrightable. Cf. Pet. App. 2a (“all agree that annotations created by a private party generally can be copyrighted”). The OCGA’s annotations are not categorically ineligible for copyright protection under § 102(b) and the merger doctrine.

### III. THE ELEVENTH CIRCUIT'S APPROACH CREATES SUBSTANTIAL UNCERTAINTY AND DISRUPTION WITHOUT CORRE- SPONDING BENEFIT

1. “Beneath the facade of their inventive \*\*\* interpretation” of this Court’s precedents, PRO and its amici “forcefully urge” what is, at bottom, a “policy” argument. *Eldred*, 537 U.S. at 222. While this case can—and should—be decided based on well-settled legal principles alone, the final irony is that the Eleventh Circuit’s unprecedented expansion of the government edicts doctrine represents profoundly bad policy.

Georgia’s relationship with Lexis allows the state to make a useful research aid available at little to no cost to taxpayers. But this arrangement cannot work unless Lexis’s OCGA sales allow it to recoup the costs of the “tremendous amount of work” it performs to produce the annotations. Pet. App. 69a. As the district court concluded (and the Eleventh Circuit never contested), PRO’s copying fatally undermines that incentive. *Id.* at 71a-72a.

Therefore, if the Eleventh Circuit’s decision stands, Georgia will likely be required to divert resources from other priorities (or increase taxes) to pay for preparing and publishing the annotations, or cease publishing them altogether. See J.A. 674 (Lexis “would lose all incentive to remain in [its] [c]ontract” if “[a]nnotations were not subject to copyright”). Terminating the publication of the price-capped OCGA would be costly to users of its annotations: As of 2016, the price of West’s unofficial annotated code book (\$2570) was over *six times* the OCGA’s price (\$404), and basic economics suggests West’s price could increase without the

OCGA’s competition. Furthermore, the Eleventh Circuit’s decision undermines Lexis’s incentive to agree to continue publishing an unannotated version of Georgia’s statutes online, without charge. See Pet. App. 7a; see also Matthew Bender Amicus Br. 15.<sup>17</sup>

In short, copyright allows Georgia to make statutory annotations *more* readily available to the general public than they would be in a fully private market, without unduly burdening taxpayers. The Commission’s arrangement with Lexis is a textbook example of copyright serving its “ultimate[] \* \* \* purpose of enriching the general public through access to creative works,” *Kirtsaeng v. John Wiley & Sons, Inc.*, 136 S. Ct. 1979, 1986 (2016) (citation omitted), by “suppl[ying] the economic incentive to create and disseminate” them, *Harper & Row*, 471 U.S. at 558. Undermining that salutary arrangement would make it harder, not easier, for citizens to access useful legal research tools.

2. About one-third of states claim copyright in annotations to their statutes, and the Eleventh Circuit’s reasoning here “would likely invalidate the copyrights in all” official annotated state codes nationwide. States Amicus Br. 4; see also BIO 11-12; Next-Generation Legal Research Platforms Amicus Br. 20; Software & Info. Indus. Ass’n (SIIA) Amicus Br. 15-16; Pet. 34-35. If that occurred, states would be left scrambling to determine how to move forward—whether by

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<sup>17</sup> PRO urges Georgia to “ensure the publication of the OCGA by creating it using its own staff or by paying Lexis.” BIO 18. But as a California corporation, PRO—unlike Georgia’s residents and their elected representatives—would not bear the costs that approach would require in terms of diverting scarce state resources or increasing taxes.

adjusting budgets to compensate for the disruption to their settled practices, or simply abandoning the field to the private market.

Every state must make policy-laden decisions about whether to have an official annotated code, and if so, how to produce it. Those decisions involve judgments about how to balance competing considerations like taxpayer expense, the annotations' coverage and quality, and cost and ease of access for readers. While states' specific approaches vary, many involve the use of copyrights. As discussed above, that is not some recent aberration: There is a long history in American legal publishing of states working with private publishers. And despite PRO's rhetoric about "our democracy," BIO 2, 11, the reality is that PRO asks this Court to extend a judge-made doctrine to override the decisions of numerous states' democratically elected governments—which, unlike PRO, are "familiar with local conditions," *McLean v. Arkansas*, 211 U.S. 539, 547 (1909). The Court should reject that request.

3. Finally, expanding the government edicts doctrine beyond its traditional limits would create substantial uncertainty regarding the copyrightability of a wide range of state-created works, state-adopted works, and "law-adjacent" materials. SIIA Amicus Br. 4. As this Court has emphasized, "it is peculiarly important that the boundaries of copyright law be demarcated as clearly as possible." *Fogerty*, 510 U.S. at 527. But like other balancing tests, the Eleventh Circuit's multifactor standard risks "unpredictable and at times arbitrary results," *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 136 (2014), and "the open-ended rough-and-tumble of factors[] invit[es] complex argument[s]" and "virtually

inevitable appeal[s]," *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547 (1995). The Eleventh Circuit's novel expansion of the government edicts doctrine thus undercuts "Congress' paramount goal \* \* \* of enhancing predictability and certainty of copyright ownership," *Reid*, 490 U.S. at 749, and cannot stand.

### CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

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AUGUST 2019