

**Submission to Federal Trade Commission
on Behalf of Public.Resource.Org**

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I. INTRODUCTION

In response to our [submission](#) to the Federal Trade Commission (the “Commission”), dated October 29, 2021, several members of the Commission’s various offices raised questions regarding whether Lexis and West’s conduct is protected under the state-action immunity doctrine. For the reasons addressed in this memorandum, the answer is clear: Lexis and West are not entitled to state-action immunity.

Since the U.S. Supreme Court ruled in 2020 that the Official Code of Georgia Annotated (O.C.G.A.) is an edict of government and thus not subject to copyright protection,¹ Lexis and West have taken a variety of actions to limit access to edicts of government, including: (i) deceiving consumers by asserting copyright and imposing unwarranted terms of use; (ii) lobbying state governments to enforce nonexistent copyrights; (iii) sending takedown notices to organizations who try to republish the materials and baselessly threatening suit for copyright infringement; (iv) refusing to allow sale of current codes, instead forcing customers to buy out-of-date versions of the code or inferior quality DVD copies; (v) limiting the ability of third parties to access, download and disseminate copies of official versions of state codes; (vi) bundling the sale of materials so consumers are forced to purchase products they do not want just to obtain access to the materials they need; and (vii) collecting user information without providing proper privacy notices. The public interest in making these materials openly and freely available is obvious: citizens should be able to know the law of the land in order to manage their personal and commercial activities and to defend against claims against them. Placing such important materials behind paywalls on the false premise that they are subject to copyright protection restricts the public’s access to those materials.

As discussed further below, in engaging in much of the conduct of concern, Lexis and West are acting as private parties and are thus unprotected by state-action immunity. While states appoint Lexis and West to assist with the preparation of annotations and supervise the preparation and content of annotated codes, they do *not* prescribe or supervise the format, price, means of access, and other terms upon which Lexis and West offer those government edicts to the public. Nor do the authorizing state statutes, which merely allow the states to contract with third party vendors to publish the edicts, clearly articulate a desire for those code vendors to engage in anticompetitive and anti-consumer practices. Absent state oversight of their practices, Lexis and West have inflicted serious harm on the American public, who deserve free and unfettered access to the law that governs them. The Federal Trade Commission is well within its authority to investigate this conduct and intervene.

¹ *Georgia v. Public.Resource.Org, Inc.*, [590 U.S.](#) (2019). The full docket, including 35 amicus curiae briefs, is available at <https://www.supremecourt.gov/docket/docketfiles/html/public/18-1150.html>.

II. LEXIS AND WEST ARE NOT PROTECTED BY STATE-ACTION IMMUNITY

Under the *Midcal* test, the state-action doctrine exempts a private party from antitrust liability when both (1) the State clearly articulates and affirmatively expresses a state policy to displace competition (“clear articulation”); and (2) the State itself actively supervises the policy (“active supervision”).² Lexis and West will not be able to demonstrate that either *Midcal* prong is satisfied with respect to the anticompetitive conduct discussed in our original submission to the Commission, namely, the restrictive and onerous terms upon which they make state codes and other edicts of government available to the public and the false assertion of copyright.

Lexis and West are properly characterized as private parties for the purposes of the *Midcal* analysis because their actions do not qualify as those of a sovereign state or a political subdivision. Accordingly, Lexis and West must meet both *Midcal* requirements.³

A. Clear Articulation

The clear-articulation prong of *Midcal* is satisfied when a state policy plainly shows that the State contemplated, either expressly or implicitly, the competitive effects of that policy and any anticompetitive consequences of the challenged conduct that inherently, logically, or ordinarily result from that state policy.⁴

Using Georgia as an example, the relevant state policy is Section 1-1-1 of the Georgia State Code, which establishes the Code Commission’s authority to contract with private code vendors and was affirmed by the Georgia Supreme Court’s holding in *Harrison*.⁵ Section 1-1-1 of the Georgia Code authorizes the Commission to act as the Georgia legislature for the purpose of “select[ing] a publisher [such as Lexis or West] and contract[ing] for and supervising the

² *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 100 S. Ct. 937, 943 (1980).

³ *Quadvest, L.P. v. San Jacinto River Auth.*, 7 F.4th 337, 346 (5th Cir. 2021).

⁴ See *FTC v. Phoebe Putney Health Sys.*, 133 S. Ct. 1003, 1011–14 (2013). Though *Phoebe Putney* involved an anticompetitive merger, the analytical framework for clear articulation set forth in the decision extends to other forms of anticompetitive conduct and helps determine whether a State has clearly articulated and affirmatively expressed the challenged restraint as a state policy. See *Diverse Power, Inc. v. City of LaGrange, Georgia*, 934 F.3d 1270, 1277 (11th Cir. 2019) (explaining that, post-*Phoebe* “we have to ask not only whether the Georgia legislature could have foreseen that cities would use their water monopoly to increase their share of an unrelated market . . . [but also] if such an anticompetitive move is the inherent, logical, or ordinary result” of the legislative scheme.”).

⁵ *Harrison Co. v. Code Revision Comm’n*, 244 Ga. 325, 330 (1979); see also *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 206 L. Ed. 2d 732 (2020).

codification of the laws enacted by the General Assembly, including court interpretations thereof.”⁶

The state policy relevant to the challenged anticompetitive conduct must “plainly show[]” that the State expressly or implicitly contemplated that policy’s anticompetitive effects.⁷ While a State need not “expressly state in a statute or its legislative history that the legislature intends for the delegated action to have anticompetitive effects,”⁸ the case law demonstrates a clear outer bound on what is sufficient to satisfy the clear articulation requirement. For example, a general grant of power (e.g., a law granting municipalities the power to enact ordinances governing local affairs),⁹ or a mere authorization to participate in a market, does not clearly articulate a desire to displace competition.¹⁰ Rather, the state policy must include explicit or implicit delegations of authority to engage in anticompetitive conduct.¹¹

Lexis and West cannot show that the States with which they contracted to prepare the codes contemplated, either implicitly or explicitly, a desire to displace competition with respect to the manner in which Lexis and West provide access to the code to the public. Nor is Lexis and

⁶ *Id.*; Ga. Code Ann. § 1-1-1 (West).

⁷ *FTC v. Phoebe Putney Health Sys.*, 133 S. Ct. 1003, 228 (2013); *Hass v. Or. State Bar*, 883 F.2d 1453, 1457 (9th Cir. 1989) (The relevant statutory provisions must “plainly show” that the state legislature contemplated the sort of activity that is challenged,” which occurs where the state confers express authority to take action that will foreseeably cause the anticompetitive effects.”).

⁸ *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 43 (1985).

⁹ *Comm. Commc'ns Co., Inc. v. City of Boulder*, 102 S. Ct. 835 (1982) (holding that a Colorado law granting municipalities the power to enact ordinances governing local affairs did not satisfy the clear-articulation test because such general grants of authority are typically used in ways that do not raise antitrust concerns).

¹⁰ *FTC v. Phoebe Putney Health Sys.*, 133 S. Ct. 1003, 228 (2013); *Kay Elec. Cooperative v. Newkirk*, 647 F.3d 1039, 1043 (C.A.10 2011) (“simple permission to play in a market” does not “foreseeably entail permission to roughhouse in that market unlawfully.”); *Cnty. Commc'ns Co. v. City of Boulder, Colo.*, 455 U.S. 40, (1982) (“rejecting proposition that “the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances” because such an approach “would wholly eviscerate the concepts of ‘clear articulation and affirmative expression’ that our precedents require.”); see also 1A P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 225a, p. 131 (3d ed.2006) (hereinafter *Areeda & Hovenkamp*) (“When a state grants power to an inferior entity, it presumably grants the power to do the thing contemplated, but not to do so anticompetitively”).

¹¹ *FTC v. Phoebe Putney Health Sys.*, 133 S. Ct. 1003, 228 (2013); *Hass v. Or. State Bar*, 883 F.2d 1453, 1457 (9th Cir. 1989) (The relevant statutory provisions must “plainly show” that the state legislature contemplated the sort of activity that is challenged,” which occurs where the state confers express authority to take action that will foreseeably cause the anticompetitive effects.”)

West’s anticompetitive conduct an inherent or logical consequence of their role as preparers of the code in a particular state.

The case law interpreting the clear-articulation prong makes clear how express a state policy must be in evidencing a desire to displace competition. For example, in *Columbia Steel Casting*, the Ninth Circuit held that Oregon statutes authorizing the Oregon Public Utility Commission to approve public utilities’ agreements allocating exclusive service territories showed Oregon’s desire to displace competition in the market for the provision of electricity.¹² The Supreme Court in *Midcal* determined that a California wine pricing system that allowed wine producers to engage in resale price maintenance demonstrated an intent to displace competition in the wine wholesale market.¹³

By contrast, the state policies at issue in this case merely authorize the State to enter into a contract with third party vendors to prepare the code for the State. But the authority to contract with third-parties to prepare a state’s code is not the same as authority to grant *exclusive* rights to publish, assert non-existent copyrights, or the authority to charge the public or otherwise restrict access to copies of the official state code. The state statutes authorizing the state to enter into contracts with third parties do not explicitly or implicitly authorize *how* those vendors provide the code, and certainly do not envisage or authorize Lexis and West’s anticompetitive and restrictive practices with respect to pricing, bundling, formats, and terms of use, or false assertion of copyright.¹⁴

Neither does the statutory authority “to contract for the codification of state laws” inherently, logically, or ordinarily result in anticompetitive conduct such as supracompetitive pricing, unwanted bundling of various unrelated codes, restricting potential competitors’ access to the code, or any other conduct that foreseeably causes anticompetitive harm. Courts hold that the clear articulation prong is not met when the authority to act under state policy does not inherently lead to anticompetitive consequences.¹⁵ The Eleventh Circuit, for instance,

¹² *Id.*

¹³ *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 100 S. Ct. 937, 943 (1980).

¹⁴ The Georgia Code does not grant copyright over its state code or annotations to third party code vendors. Ga. Code Ann. § 1-1-1 (West). Rather, “[n]o valid copyright interest can be asserted in any part of the annotated compilation of Georgia statutes.” *Code Revision Comm’n for Gen. Assembly of Georgia v. Public.Resource.Org, Inc.*, 906 F.3d 1229 (11th Cir. 2018), *aff’d sub nom. Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498 (2020). Nor do other state statutes reviewed—including Arizona, Arkansas, Illinois, Maryland, Tennessee, and Virginia—grant copyright of a state code or its annotations to third party code vendors.

¹⁵ See *Quadvest, L.P. v. San Jacinto River Authority*, 7 F.4th 337 (5th Cir. 2021) (explaining that a monopoly is not the foreseeable result of a statutory grant of authority to conserve, control, and utilize storm and flood waters because statutory authority to thus participate in a market does not

determined that the clear articulation requirement was not satisfied for a City that tied provision of its natural gas utility to its water service utility where the relevant state statute merely authorized the City to develop and provide water systems.¹⁶ The Fifth Circuit similarly determined that the clear articulation requirement was not satisfied where a political subdivision participating in the surface water market entered into and enforced contracts that created a monopoly in a separate, but related, market for wholesale water because monopoly in the wholesale water market was not the foreseeable result of a statutory grant of authority to conserve, control, and utilize storm and flood waters, and mere authority to participate in a market “does not constitute authority to monopolize that market.”¹⁷

B. Active Supervision

Private parties only benefit from state-action immunity if their conduct is actively supervised by the State.¹⁸ The degree and nature of the requisite supervision depends on the circumstances, particularly the conduct authorized and the discretion granted to private parties under the relevant state policy.¹⁹ However, it is clear that “[t]he mere potential for state supervision is not an adequate substitute for a decision by the State.”²⁰ Furthermore, state policies granting private parties the authority to engage in conduct with a high risk of self-dealing, such as setting prices, require a higher degree of active supervision.²¹ While active supervision entails a fact-specific inquiry, courts have identified three constant requirements, all of which must be met: (1) the supervisor – a State government official or entity acting on behalf of the State – must review the substance of the anticompetitive conduct; (2) the supervisor must have the power to veto or modify particular anticompetitive practices at issue; and (3) the

inherently lead to monopoly or ordinarily displace competition in, or extend authority over, a separate but related market.”); *Diverse Power, Inc. v. City of LaGrange, Georgia*, 934 F.3d 1270 (11th Cir. 2019) (holding that a city was not entitled to state-action immunity when it tied provision of its natural gas utility to its water service utility based on a state statute that allowed the city to develop and provide water systems because tying the natural gas utility to the water utility was not the inherent, logical, or ordinary result of the statute.).

¹⁶ *Diverse Power, Inc. v. City of LaGrange, Georgia*, 934 F.3d 1270, 1277 (11th Cir. 2019).

¹⁷ *Quadvest*, 7 F.4th at 347.

¹⁸ *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 100 S. Ct. 937, 943 (1980)

¹⁹ *Freedom Holdings, Inc. v. Cuomo*, 624 F.3d 38, 61–62 (2d Cir. 2010) (“The active supervision required to secure state-action immunity necessarily depends on the facts of each case.”)

²⁰ *Veritext v. Bonin*, 901 F.3d 287, 292 (5th Cir. 2018); *F.T.C. v. Ticor Title Ins. Co.*, 504 U.S. 632, 636 (1992).

²¹ *See also Freedom Holdings, Inc. v. Cuomo*, 624 F.3d 38, 61–62 (2d Cir. 2010) (Where a state statute “effectively allowed one private party to set the prices charged by another private party,” state supervision of price schedules was necessary to ensure that the anticompetitive arrangement was a true exercise of state regulatory authority, as opposed to private control.).

supervisor must actually evaluate or regulate the anticompetitive practices.²² Lexis and West fail to meet any of these three requirements.

While some state actors (e.g., the Georgia legislature) may actively supervise the preparation and content of the code and annotations that Lexis and West create on the states' behalf, the states do not actively review, regulate, or have the power to veto the *terms* on which that code is provided to the public (e.g., pricing, bundling, available formats, restrictions on use, etc.). Courts have made distinctions in situations in which the State actively supervised certain aspects of a private party's conduct but not others. For example, in *Patrick*, the Supreme Court held that a Health Division did not actively supervise private hospitals' peer-review decisions where the Division only had statutory authority to review a hospital's peer-review procedures, not the actual decisions made by peer-review committees (in that case, the decision to deny hospital privileges to a physician in a competing clinic).²³

Lexis and West abuse the limited discretion they are given by the states, and make *unsupervised* decisions relating to commercial pricing and licensing of the annotated codes they provide.²⁴ Lexis and West further abuse this limited discretion given to them by States to impose

²² See *N. Carolina Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1116 (2015) ("The Court has identified only a few constant requirements of active supervision: The supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it; *Patrick v. Burget*, 486 U.S. 94, 102 (1988) the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy; and the mere potential for state supervision is not an adequate substitute for a decision by the State" (citations and internal quotation omitted)); see also *F.T.C. v. Ticor Title Ins. Co.*, 504 U.S. 632, 634–35 (1992) ("Our decisions make clear that the purpose of the active supervision inquiry is not to determine whether the State has met some normative standard, such as efficiency, in its regulatory practices. Its purpose is to determine whether the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties. Much as in causation inquiries, the analysis asks whether the State has played a substantial role in determining the specifics of the economic policy. The question is not how well state regulation works but whether the anticompetitive scheme is the State's own.")

²³ Oregon's Health Division had general supervisory powers over matters relating to the preservation of life and health, including the licensing of hospitals and the enforcement of health laws, and had the authority to review hospitals' required peer-review procedures and impose penalties for any violations. *Patrick v. Burget*, 486 U.S. 94, 102 (1988).

²⁴ *A.D. Bedell Wholesale Co., Inc. v. Philip Morris Inc.*, 263 F.3d 239, 263 (3d Cir. 2001) ("if a state creates or sanctions a monopoly or cartel through sovereign powers, but does not regulate the resulting prices, the resulting anticompetitive behavior should not be granted immunity"; "only when the state approves and actively supervises the results of the anticompetitive scheme does *Parker* immunity attach"); see also *Mariana v. Fisher*, 338 F.3d 189 (3d Cir. 2003) (active state supervision was absent because state did not supervise the pricing of those allegedly

restrictive terms on the access and use of the edicts of government, bundle products together, and collect user data without adequate privacy notices. This total lack of supervision over these anti-competitive and anti-consumer acts – where an even greater level of supervision should be expected – makes clear that Lexis and West should not be entitled to state-action immunity.

III. CONCLUSION

For the foregoing reasons, Lexis and West’s conduct is not protected under the state-action immunity doctrine. As private parties, Lexis and West’s conduct is subject to the antitrust and consumer protection laws of this country. Yet, even after the Supreme Court ruling invalid assertions of copyright with respect to edicts of government, Lexis and West continue to falsely claim copyright over these edicts, thereby deceiving consumers and subverting competition in the market for these edicts. We encourage the Federal Trade Commission to use its authority to investigate and curb these practices, so that the public finally can access the law that governs them unencumbered by the anti-consumer and anticompetitive practices of legal research companies that provide it to them.

Submitted to the Federal Trade Commission this 16th day of February, 2022.

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authorized to engage in anticompetitive conduct); *New York ex rel. Spitzer v. Saint Francis Hosp.*, 94 F. Supp. 2d 399 (S.D. N.Y. 2000) (same).