

*Legal Clinic*

April 14, 2021

Ms. Paige Seals, Revisor of Statutes  
Office of Legal Services  
Tennessee General Assembly  
9th Floor, Cordell Hull Building  
Nashville, TN 37243

Dear Ms. Seals:

Public.Resource.Org (“Public Resource”) writes to respectfully request the Office of the Revisor and the Tennessee Code Commission (“TCC”) revise the Tennessee Code Annotated (“TCA”) to clarify that the TCA is in the public domain. The State of Tennessee currently claims copyright protection of the TCA. However, following the recent Supreme Court decision in *Georgia v. Public.Resource.Org, Inc.*, the TCA is ineligible for such copyright protections.<sup>1</sup> Thus, Public Resource also respectfully requests the removal of all indications of copyright protection from the TCA as such protection claims are obsolete.<sup>2</sup> These changes are consistent with federal copyright law and with Tennessee’s policy of promoting public access to public government documents.

Public Resource is a California-based 501(c)(3) nonprofit corporation working to increase citizens’ access to the law. Public Resource appreciates Tennessee’s dedication to improve government transparency through the Tennessee Public Records Act and the Tennessee Open Meetings Acts. However, the copyrights claimed for the Tennessee Code Annotated prevent the full realizations of these aims.

Following the decision in *Georgia*, under the government edicts doctrine, government officials cannot, for copyright purposes, “author” works they create in their official capacity.<sup>3</sup> The TCA and the annotations within are government edicts, authored by the TCC in its official capacity, and are therefore ineligible for copyright protection.

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<sup>1</sup> 140 S. Ct. 1498 (2020).

<sup>2</sup> Id.

<sup>3</sup> Id. at 1506.

“Every citizen is presumed to know the law,” so “it needs no argument to show . . . that all should have free access” to its contents.<sup>4</sup> To ensure true public access to the law, the public must be free to obtain and analyze the full official Tennessee Code Annotated. Thus, removing the TCA copyright notices is essential to comply with federal copyright law, serve the goals of the State of Tennessee, and protect public access to the law.

## **I. Tennessee’s Copyright Claim Over the TCA Is Contrary to Tennessee’s Goals of Government Transparency**

### **A. The Tennessee Public Records Act Requires All Public Government Documents Be Accessible to Tennessee Citizens**

The State of Tennessee enacted the Public Records Act to guarantee that Tennessee citizens have access to public government documents at all levels of municipal and state government.<sup>5</sup> The Tennessee Code defines “public record[s]” or “state record[s]” as “all documents, papers . . . or other material, regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental entity.”<sup>6</sup>

The Public Records Act further states that “all state, county and municipal records shall, at all times during business hours . . . be open for personal inspection by any citizen of this state, and those in charge of the records shall not refuse such right of inspection to any citizen, unless otherwise provided by state law.”<sup>7</sup>

### **B. Failure of the TCC to Make Accessible Public Government Documents**

The TCA falls within the § 10-7-503(a)(1)(A)(i) definition of “public record.” The TCC is charged with “publication, sale, and distribution of an official compilation of the statutes, codes, and laws of the state [the TCA].”<sup>8</sup> The TCC also has the power to enter into “all contracts necessary for and expedient to the successful production and publication of a revised compilation of the statutory laws of Tennessee.”<sup>9</sup>

Through this contracting authority, in 2014 the State of Tennessee Department of General Services Central Procurement Office entered into an exclusive publication contract with Matthew

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<sup>4</sup> Georgia, 140 S. Ct. at 1507, quoting Nash v. Lathrop, 142 Mass. 29, 35 (1886).

<sup>5</sup> Exceptions to the Tennessee Public Records Act, Tennessee Comptroller of the Treasury, <https://comptroller.tn.gov/office-functions/open-records-counsel/open-meetings/exceptions-to-the-tennessee-public-records-act.html>.

<sup>6</sup> T.C.A. § 10-7-503(a)(1)(A)(i).

<sup>7</sup> T.C.A. § 10-7-503(a)(2)(A).

<sup>8</sup> Tennessee Code Commission, Tennessee State Courts, <https://www.tncourts.gov/boards-commissions/boards-commissions/tennessee-code-commission>.

<sup>9</sup> T.C.A. § 1-1-106(a).

Bender & Company, Inc. (“Matthew Bender”), a member of the LexisNexis Group.<sup>10</sup> Under this contract, the State of Tennessee, through LexisNexis, has made available to the general public a poorly implemented unannotated version of the Tennessee Code.<sup>11</sup> Despite the availability of a free unannotated version, usage of the site requires acceptance to onerous terms of use.<sup>12</sup> Before a user may access the unannotated version, they must click a button that says they agree to LexisNexis’s terms and conditions.<sup>13</sup> The terms and conditions of the site are lengthy and contain provisions that are inconsistent with the Supreme Court’s decision.<sup>14</sup> For example:

- Users must agree “The Content on this Web Site is for your personal use only and not for commercial exploitation.” The Supreme Court has rejected any copyright claim that might give a state the right to so restrict the use of its state code.
- Users must agree “You may not use any robot, spider, other automatic software or device, or manual process to monitor or copy our Web Site or the Content without Provider’s prior written permission.” The Supreme Court has rejected any copyright claim that might give a state the right to so restrict the use of its state code.
- Users must agree “You may not copy, modify, reproduce, republish, distribute, display, or transmit for commercial, non-profit or public purposes all or any portion of this Web Site, except to the extent permitted above,” even though the Supreme Court has rejected any copyright claim that might give the state a right to so restrict the use of its state code.
- Users must agree “that the Content and Web Site are protected by copyrights, trademarks, service marks, patents or other proprietary rights and laws.” The Supreme Court has rejected any copyright claim that might give a state the right to so restrict the use of its state code.<sup>15</sup>

Additionally, any user of LexisNexis, including those who are not subscribers and using only the unannotated code, must agree to accept the State of New York as jurisdiction for any violations or challenges to the terms of use.<sup>16</sup> Further, the unannotated version is accessible solely through the LexisNexis website, which could make access difficult for the visually

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<sup>10</sup> Statewide Contract #3 Soul [sic] Source Contract Request, State of Tennessee Department of General Services (October 6, 2014) [https://capitol.tn.gov/Archives/Joint/committees/fiscal-review/archives/108ga/contracts/SWC%20353%20General%20Services%20\(Lexis%20Nexis%20-%20contract\).pdf](https://capitol.tn.gov/Archives/Joint/committees/fiscal-review/archives/108ga/contracts/SWC%20353%20General%20Services%20(Lexis%20Nexis%20-%20contract).pdf).

<sup>11</sup> Code Unannotated – Free Public Access, LexisNexis, <https://advance.lexis.com/container?config=014CJAA5ZGVhZjA3NS02MmMzLTRlZWQtOGJjNC00YzQ1MmZlNzc2YWYKAFBvZENhdGFsb2e9zYpNUjTRalWVfyrur9ud&crd=b3716179-de90-4f08-8e9d-37c7900b334d&prid=9ee2f1a2-9943-4305-ab18-300f4f9ce9c9>.

<sup>12</sup> LexisNexis, *Terms & Conditions*, (January 7, 2013), <https://www.lexisnexis.com/terms/>.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

impaired or others requiring adaptive technology. The unannotated code does not provide links to other sources or sections of the TCA as it would for a Lexis subscriber. Finally, the state's official compilation of laws, the TCA, is copyrighted and exclusively provided for publication to Matthew Bender.<sup>17</sup> Citizens must pay to subscribe to LexisNexis to gain access to the official TCA.

A governmental entity is prohibited from avoiding its disclosure obligations by contractually delegating its responsibility to a private entity.<sup>18</sup> Here, the government's contract with Matthew Bender does not provide a safe harbor for the government. The TCA must still be publicly accessible.

## II. The TCA Is Ineligible for Copyright Because the Law Belongs to the Public Domain

It is well established that “no one can own the law.”<sup>19</sup> The TCA is the official compilation of Tennessee law, and the “text of the statutes, codes and code supplements” within the TCA constitute “prima facie evidence of the statutory law” of Tennessee.<sup>20</sup> The Supreme Court has long recognized that the law, including state statutes,<sup>21</sup> belongs in the public domain according to the government edicts doctrine, which deems edicts of government to be uncopyrightable.<sup>22</sup>

The State of Tennessee currently claims a copyright on the TCA seemingly based on the assumption that “annotations, footnotes and other editorial matter” do not constitute “prima facie evidence of statutory law.”<sup>23</sup> However, following the recent Supreme Court decision in *Georgia v. Public.Resource.Org, Inc.*, Tennessee's assumption regarding the copyrightability of the TCA is incorrect.<sup>24</sup> The annotations, footnotes, and other editorial matter contained within the TCA are edicts of government; thus, the TCA is ineligible for copyright.

### A. The Applicability of the Government Edicts Doctrine

Copyright protection is available only for “original works of authorship.”<sup>25</sup> Under the government edicts doctrine, officials responsible for creating the law cannot be considered

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<sup>17</sup> *Statewide Contract #3 Soul [sic] Source Contract Request*, State of Tennessee Department of General Services (October 6, 2014) [https://capitol.tn.gov/Archives/Joint/committees/fiscal-review/archives/108ga/contracts/SWC%20353%20General%20Services%20\(Lexis%20Nexis%20-%20contract\).pdf](https://capitol.tn.gov/Archives/Joint/committees/fiscal-review/archives/108ga/contracts/SWC%20353%20General%20Services%20(Lexis%20Nexis%20-%20contract).pdf).

<sup>18</sup> T.C.A. § 10-7-503(a)(6).

<sup>19</sup> *Georgia v. Public.Resource.Org*, 140 S. Ct. 1498, 1507 (2020).

<sup>20</sup> T.C.A. §§ 1-1-105, 1-1-111.

<sup>21</sup> *Howell v. Miller*, 91 F. 129 (6th Cir. 1898).

<sup>22</sup> *Georgia*, 140 S. Ct. at 1505.

<sup>23</sup> T.C.A. § 1-1-111.

<sup>24</sup> 140 S. Ct. 1498 (2020).

<sup>25</sup> 17 U.S.C. § 102(a).

“authors” of work created in their official capacity because such work, as part of the “authentic exposition and interpretation of the law,” must be “free for publication to all.”<sup>26</sup>

The government edicts doctrine’s history can be traced back to a trio of Supreme Court cases in the 19<sup>th</sup> century. Beginning with *Wheaton v. Peters*, the Supreme Court first held there can be no claim of copyright on judicial opinions.<sup>27</sup> In 1888, the Court expanded *Wheaton* by holding that no judge who writes in his official judicial capacity can be regarded as the “author or proprietor” of such writing “so as to be able to confer any title . . . sufficient to authorize it to take a copyright.”<sup>28</sup> Finally, in *Callaghan v. Myers*, the Court clarified the limits of the government edicts doctrine by finding that individuals who act in a private capacity and possess no authority to speak with the force of law may retain a copyright interest in the works they author.<sup>29</sup> Thus, the government edicts doctrine emerged: judges, who have been given the authority to speak with the force of law, are not considered “authors” of any work they prepare in their official judicial capacity.<sup>30</sup>

The government edicts doctrine is not limited to works created by judges; it also extends to any work created by legislatures in their official capacity as legislators.<sup>31</sup> This includes any explanatory or procedural material created in the performance of a legislature’s official duties because “[t]hese materials are part of the ‘whole work done by [legislators],’ so they must be ‘free for publication to all.’”<sup>32</sup>

The annotations within the TCA are “formulate[d] and supervise[d]” by the TCC.<sup>33</sup> Because the TCC has the authority to speak with the force of law and creates the annotations in its official capacity, the TCC may not be considered an “author” of the annotations for copyright purposes. Thus, because these annotations lack authorship under 17 U.S.C. § 102(a), the TCA is ineligible for copyright.<sup>34</sup>

## **B. The Supreme Court’s Decision in *Georgia v. Public.Resource.Org, Inc.* is Directly Applicable to the Copyrightability of the TCA**

<sup>26</sup> *Georgia*, 140 S. Ct. at 1507.

<sup>27</sup> *Wheaton v. Peters*, 33 U.S. 591, 593 (1834).

<sup>28</sup> *Banks v. Manchester*, 128 U.S. 244, 253 (1888) (extending the government edicts doctrine to cover *any* work authored by a judge in the discharge of his official duties).

<sup>29</sup> *Callaghan v. Myers*, 128 U.S. 617, 647 (1888) (holding the work of a private individual speaking without the authority of law is not prevented from obtaining a copyright on his work).

<sup>30</sup> *Georgia*, 140 S. Ct. at 1507.

<sup>31</sup> *Id.* at 1508.

<sup>32</sup> *Id.* citing *Banks v. Manchester*, 128 U.S. 244, 253 (1888).

<sup>33</sup> T.C.A. § 1-1-105.

<sup>34</sup> *Georgia*, 140 S. Ct. at 1513 (holding the Georgia Official Code’s annotations ineligible for copyright).

The recent Supreme Court decision in *Georgia v. Public.Resource.Org, Inc.* considered the copyrightability of the annotations contained within the Official Code of Georgia Annotated (“OCGA”). Georgia asserted copyright over the annotations in the OCGA and claimed they were eligible for copyright because they did not carry “the force of law.”<sup>35</sup> The Supreme Court disagreed, holding that the annotations, created by the Georgia Code Revision Commission (“GCRC”),<sup>36</sup> were ineligible for copyright.<sup>37</sup> Any work authored by a judge or legislator “produced in the course of his judicial or legislative duties,” regardless of whether it carries the force of law, “is not copyrightable.”<sup>38</sup>

In determining whether the annotations within the OCGA were government edicts belonging in the public domain, the Court first considered whether the GCRC was a government entity ineligible for copyright authorship.<sup>39</sup> The GCRC was a Georgia state body consisting largely of legislators and was funded and staffed by the legislative branch.<sup>40</sup> The Court also found it significant that the GCRC’s annotations must be approved by the legislature before going into effect.<sup>41</sup> Together, the Court thought it clear that the GCRC served as an extension of the Georgia Legislature in its preparation and publication of annotations; thus, the Court found the GCRC “wield[ed] the legislature’s authority when it works . . . to produce the annotations.”<sup>42</sup> The Court then moved on to find that the GCRC created the annotations in “the discharge of its legislative duties” because its preparation of the annotations was an act of “legislative authority.”<sup>43</sup> Thus, through its application of the government edicts doctrine framework, the Court found the entire OCGA to be ineligible for copyright.

The holding in *Georgia* is directly applicable to the annotations in the TCA; the TCA is uncopyrightable. Like the Court’s determination of the GCRC in *Georgia*, the TCC is a government entity ineligible for copyright authorship. The TCC is a Tennessee state body consisting of the chief justice of the Tennessee supreme court, the Tennessee attorney and

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<sup>35</sup> Id. at 1511.

<sup>36</sup> Note that Georgia contracted with LexisNexis to prepare the OCGA annotations; however, because Lexis worked through a work-for-hire agreement, the Court found the GCRC to still be the “sole author of the work” per the Copyright Act. Georgia, 140 S. Ct. at 1508. Georgia agreed that the GCRC is the “author” of the annotations for the purpose of copyright. Id.

<sup>37</sup> Georgia, 140 S. Ct. at 1513.

<sup>38</sup> Id.

<sup>39</sup> Georgia, 140 S. Ct. at 1508.

<sup>40</sup> Id.

<sup>41</sup> Id.

<sup>42</sup> Id.

<sup>43</sup> Id. at 1509.

reporter, and two others appointed by the chief justice.<sup>44</sup> The TCC is funded by the Tennessee General Assembly<sup>45</sup> and is staffed by the office of legal services for the General Assembly.<sup>46</sup> Further, the TCC has the authority to certify the approval of the official compilation of statutory law in Tennessee.<sup>47</sup>

The TCC is authorized and directed to “formulate and supervise the execution of plans for the compilation, arrangement, classification, *annotation*, editing, indexing, printing, binding, publication, sale, distribution and the performance of all other acts necessary for the publication of an official compilation of the statutes, codes and session laws of the state of Tennessee of a public and general nature . . . which official compilation shall be known as ‘Tennessee Code Annotated.’”<sup>48</sup> Therefore, the TCC clearly produces the TCA annotations in the “discharge” of its official “duties.”<sup>49</sup> Thus, because the annotations were created by the TCC in the course of its official duties, the TCA is ineligible for copyright.<sup>50</sup>

### C. The U.S. Copyright Office Will Not Register Government Edicts

In January 2021, the U.S. Copyright Office updated their *Compendium of U.S. Copyright Office Practices, Third Edition* (“Compendium”) to include and reflect the Court’s decision in *Georgia v. Public.Resource.Org., Inc.*<sup>51</sup> The Compendium is the administrative manual of the Register of Copyrights and “provides instruction to agency staff regarding their statutory duties and provides expert guidance to copyright applicants, practitioners, scholars, the courts, and members of the general public regarding institutional practices and related principles of law” pursuant to 37 C.F.R § 201.2(b)(7).<sup>52</sup>

The Compendium makes clear that the U.S. Copyright Office will not register “non-binding, explanatory legal materials” created by a government body “vested with the authority to make law.”<sup>53</sup> Thus, because of the reasons stated above, the U.S. Copyright Office will likewise not recognize the TCA as copyrightable.

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<sup>44</sup> T.C.A. § 1-1-101. Current membership of the TCC include Chief Justice Jeffrey Bivins, Paige Seals (Executive Secretary), the Honorable Herbert Slatery III (Tennessee Attorney General), Justice Cornelia Clark, Karen Garrett (the director for the Tennessee General Assembly’s Office of Legal Services and counsel to the Speaker of the Senate), and Susan Jones (Senior Corporate Counsel of HCA).

<sup>45</sup> T.C.A. § 1-1-113.

<sup>46</sup> T.C.A. § 1-1-103.

<sup>47</sup> T.C.A. §§ 1-1-111, 1-1-112.

<sup>48</sup> T.C.A. § 1-1-105, emphasis added.

<sup>49</sup> Georgia, 140 S. Ct. at 1509.

<sup>50</sup> Id. at 1513.

<sup>51</sup> U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices* § 101 (3d ed. 2021).

<sup>52</sup> *Compendium* (Third) at 1.

<sup>53</sup> *Compendium* (Third) § 717; *see* *Compendium* (Third) § 313(C)(2).

### III. Notice That the TCA Has Been Published on GitHub

Public Resource also wishes to notify the Office of the Revisor and the Tennessee Code Commission that releases 72 to 75 of the Tennessee Code Annotated have been made available as word processing files for download in bulk from the Internet Archive, a web-based nonprofit public library.<sup>54</sup> In addition, Public Resource has released in the public domain code that transforms these word processing files into modern HTML, including: provisions of accessibility for the visually impaired; better structure and markup for viewing the code on different platforms; marking of citations to references to other sources, such as the U.S. Code; and cross-linking of references to other code sections. This code is available on “GitHub,” a repository for open-source software, and has been placed in the public domain.<sup>55</sup>

The Tennessee Code Annotated HTML files are also available on GitHub for download,<sup>56</sup> as are the annotated codes of Georgia,<sup>57</sup> Arkansas,<sup>58</sup> and Mississippi.<sup>59</sup> Public Resource intends to continue developing this open-source software to add other features, such as the ability to compare different versions of the Tennessee Code Annotated and create “redlines” showing the changes.

Public Resource would be delighted if the Office of the Revisor or the Tennessee Code Commission could make use of this code or the TCA files. In addition, Public Resource would be pleased to discuss this work with the Office of the Revisor, the Tennessee Code Commission, or technical staff of the Tennessee General Assembly. Making the full Tennessee Code Annotated freely available on the Tennessee General Assembly web site would be a great service to the citizens of Tennessee and all people wishing to do business in Tennessee.

### IV. Conclusion

Public Resource requests the removal of all invalid copyright claims on the TCA. Further, Public Resource requests publishing the TCA in such a way that it may be freely and publicly accessible for all Tennessee citizens.

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<sup>54</sup> *Tennessee Code Annotated (Bulk Access)*, (October 09, 2020), <https://archive.org/details/gov.tn.tca>.

<sup>55</sup> Code Improvement Commission, *Beautifying State Codes*, <https://github.com/UniCourt/cic-beautify-state-codes> (last visited March 10, 2021).

<sup>56</sup> Code Improvement Commission, *Structured HTML State Codes of Tennessee (TN)*, <https://unicourt.github.io/cic-code-tn/> (last visited March 10, 2021).

<sup>57</sup> Code Improvement Commission, *Structured HTML State Codes of Georgia (GA)*, <https://unicourt.github.io/cic-code-ga> (last visited March 10, 2021).

<sup>58</sup> Code Improvement Commission, *Structured HTML State Codes of Arkansas (AR)*, <https://unicourt.github.io/cic-code-ar> (last visited March 10, 2021).

<sup>59</sup> Code Improvement Commission, *Structured HTML State Codes of Mississippi (MS)*, <https://unicourt.github.io/cic-code-ms> (last visited March 10, 2021).



All copyright claims held by the state of Tennessee on the contents of the TCA are invalid according to *Georgia v. Public.Resource.Org, Inc.* because government edicts are ineligible for copyright under federal copyright law. Additionally, the failure to make the TCA freely accessible for Tennessee citizens contravenes Tennessee's dedication to government transparency.

This solution is the only way to adequately resolve the legal and policy problems identified by Public Resource; removal of all copyright claims and publication of the TCA is consistent with federal copyright law and with Tennessee's policy of promoting access to public government documents.

Sincerely,

DocuSigned by:



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**ATTACHMENT A: STATEMENT OF SUPPORT FROM LAW PROFESSORS AND LAW STUDENTS**

## **ATTACHMENT A: STATEMENT OF SUPPORT FROM LAW PROFESSORS AND LAW STUDENTS**

We, the undersigned law students and professors of Tennessee, do respectfully urge the Tennessee General Assembly to expunge all assertions of copyright over the Tennessee Code Annotated. We recognize the right of the public to know the laws under which they are governed. As James Madison said, “Knowledge will forever govern ignorance: and a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.”

All affiliations are for identification purposes only and will not indicate institutional endorsement.

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**ATTACHMENT B: STATEMENT OF SUPPORT FROM LAW LIBRARIANS**

## **ATTACHMENT B: STATEMENT OF SUPPORT FROM LAW LIBRARIANS**

We, the undersigned, do respectfully urge the Tennessee General Assembly to expunge all assertions of copyright over the Tennessee Code Annotated. As Article 1, Section 19 of the Tennessee Constitution so aptly states, “That the printing press shall be free to every person to examine the proceedings of the Legislature; or of any branch or officer of the government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions, is one of the invaluable rights of man and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty.”

All affiliations are for identification purposes only and will not indicate institutional endorsement.

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Roger Skalbeck, *Law Librarian*, University of Richmond School of Law  
Olivia Smith, *Law Librarian*, Yeshiva University, Cardozo School of Law  
Leslie Street, *Law Librarian*, William & Mary School of Law  
Victoria Szymczak, *Law Librarian*, University of Hawaii  
Eric Taylor, *Law Librarian*, University of Wisconsin-Madison Law School  
Robert Truman, *Law Librarian*, Lewis & Clark Law School  
Mary Whisner, *Law Librarian*, University of Washington School of Law  
Beth Williams, *Law Librarian*, Stanford Law School



**ATTACHMENT C: STATEMENT OF SUPPORT FROM FOR-PROFIT AND NOT-FOR-PROFIT ORGANIZATIONS**

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We, the undersigned, do respectfully urge the Tennessee General Assembly to expunge all assertions of copyright over the Tennessee Code Annotated. Broad availability and accessibility of the law will lead to innovation and, as Rule 8(7) of the Supreme Court Rules so aptly states, “a lawyer should further the public’s understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.”

***Organizations***

Casetext  
Electronic Frontier Foundation  
Fastcase  
Fix the Court  
Justia  
Public Citizen  
Tennessee Justice Center  
UniCourt Inc.