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Juvenile Jury Instruction Committee
Wisconsin Judicial Conference

Hon. Michael Schumacher, Chair
Civil Jury Instruction Committee
Wisconsin Judicial Conference
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Hon. D. Todd Ehlers, Chair
Criminal Jury Instruction Committee
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Dear Judge Ehlers, Judge Schumacher, Judge Perez, Mr. Pierson, and Professor Schultz:

I am writing to inform you that my organization, Public Resource, a 501(c)(3) non-profit corporation based in California, has recently purchased a set of the Wisconsin Jury Instructions, and we plan to make those materials publicly available. I want to give you an opportunity to respond and raise any facts or issues you believe are relevant.

Specifically, we have purchased from Continuing Legal Education Wisconsin (CLEW) of the University of Wisconsin School of Law the following materials for the sum of \$510 (order 989322):

- Wisconsin Jury Instructions—Children, 2019 Edition (Wis JI-Children), Softbound Edition, authored by the Wisconsin Juvenile Jury Instructions Committee of the Wisconsin Judicial Conference.
- Wisconsin Jury Instructions—Civil, 2020 Edition (Wis JI-Civil), 3-Volume looseleaf binders, authored by the Wisconsin Civil Jury Instructions Committee of the Wisconsin Judicial Conference.
- Wisconsin Jury Instructions—Criminal, 2019 Edition including Release 57 (Wis JI-Criminal), 5-Volume looseleaf binders, authored by the Wisconsin Criminal Jury Instructions Committee of the Wisconsin Judicial Conference.

These Wisconsin Jury Instructions contain “over one thousand jury instructions to assist judges, lawyers, and, most importantly, jurors in understanding what the jury must decide at

the conclusion of the trial.” Wis JI-Children ix (May 2019) (Bryce Pierson, Committee Reporter) “Foreword to the Wisconsin Jury Instructions-Children.”

The author of each of these sets of Wisconsin Jury Instructions is a standing committee of the Wisconsin Judicial Conference, which was established by Supreme Court Rule 70.15. The three standing committees were established under Article V, § 1 of the Bylaws of the Conference.

Each volume carries a notice that the publisher is Continuing Legal Education, University of Wisconsin Law School, an ISBN number, and a number of copyright notices in the name of the Board of Regents of the University of Wisconsin. Wis JI-Children i; Wis JI-Civil i, Wis JI-Criminal i. In addition to the standard copyright page in the front matter, every line of the table of contents contains a separate copyright symbol and date, and every page of each volume bears a footer with the copyright symbol and the words “Regents, Univ. of Wis.”

Mr. Pierson, the latest in a long and distinguished line of reporters, states that “each of the three sets of jury instructions published by the law school share the same objective—they strive for a careful blending of the substantive law and the collective wisdom and courtroom experiences of the Committee members.” Wis JI-Children ix (May 2019). The criminal and civil instructions have been published for 60 years, the children’s instructions for 27.

The voting members of the committees are all sitting judges appointed by the Judicial Conference. The judges take primary responsibility for the program “because the giving of instructions is uniquely a judicial function and one about which the judiciary has the most knowledge and experience.” Associate Dean David E. Schultz, “History of the Wisconsin Criminal Jury Instructions,” Gargoyle (Alumni Magazine for U. of Wisconsin Law School), Vol. 22, No. 1, Summer 1991, p. 3. As Professor Schultz has said, an “important aspect of the project’s trial judge orientation is that the instructions are not approved by anyone other than the committee of trial judges.” *ibid*, page 7.

The genesis for the original Committee on Civil Instructions came from Judge Andrew W. Parnell, a Circuit Court Judge of the 10th Judicial Circuit representing Outagamie, Shawano, Menominee, and Langlade counties from 1952 to 1972 who contributed “thousands of hour of labor” to their creation. 1 Wis JI-Civil ix, “In Memoriam: To Honor the Memory of Judge Andrew W. Parnell.” Judge Parnell purpose in creating this effort was to further “the ideal of progress and improvement in the judicial administration of our state.” Wis JI-Civil xxi, “Introduction to the 1960 Edition.”

The original committees were ably assisted by Mr. John Conway, who served as editor from 1960 to 1980. Wis JI-Civil viii, “In Tribute to Professor John E. Conway.” While serving as the reporter to the committees, John Conway also wrote a number of private books which were bestsellers for CLEW, including Wisconsin and Federal Civil Procedure (1966), Layman’s Guide to Procedure and Evidence (1972), Legal Drafting Manual (1973), and co-authored a treatise Environmental Litigation (1972). 1980 Wisc. L. Rev 233 (1980), Arnon R. Allen, “Testimonial to Professor John E. Conway.” In addition to being a professor at the school, he also served as the Revisor of Statutes for the State of Wisconsin. He also served on the Legislative Council and helped draft the statutory Judicial Council. 1980 Wisc. L. Rev 235 (1980), Hon. Bruce F. Beilfuss, “John E. Conway.”

Mr. Conway, and the others that have served as reporters after him, embody the “Wisconsin Idea.” As professor Marygold S. Melli said in a tribute to Professor Conway, “whenever anyone mentions the ‘Wisconsin Idea’—that proud motto which describes the commitment of the University of Wisconsin academic community to involvement in the life of its state—I

think of John Conway.” 1980 Wisc. L. Rev 239 (1980), Marygold S. Melli “John E. Conway.” He was also a passionate advocate for the advancement of women in the bar.

The current system is based on what began as an informal partnership between CLEW and the trial court judges. In that arrangement, “the Extension Law Department would be the sponsor and publisher, with all rights and profits reserved to it, on its moral commitment that the prospective profits, if any, would be employed by it to the furtherance of better judicial administration in our state.” Wis JI-Civil xxii, “Preface to the 1978 Supplement.”

While the current system has served Wisconsin well, I believe the lack of public availability of these Wisconsin Jury Instructions is not compatible with the mission and purpose of the committees appointed by the Judicial Conference, particularly the study of “particular subjects appertaining to the administration of justice and its improvement.” Wisc. Stat. § 251.1835 (1964). The work of the three jury instructions committees is conducted by sitting judges in the course of their official duties as part of an overall commitment to, as Justice Connor T. Hansen said, to further the “maintenance of an independent and strongly function system of courts.” Justice Hansen said that “whatever we do to strengthen the courts, strengthens America.” Connor T. Hansen, “The Continuing Education Program of the Wisconsin Judiciary,” 52 Marq. L. Rev. 240 (1968).

It is a long-held common law doctrine that work produced by judges as part of their official duties is not eligible for copyright. This edicts of government doctrine goes back to the Golden Age of the Marshall Court in the case of *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834), where it was held that “the Court is 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.” The U.S. Supreme Court further elaborated on the edicts of government doctrine when it stated that no copyright may be obtained by a judge and that this principle “extends to whatever work they perform in their capacity as judges.” *Banks v. Manchester*, 128 U.S. 244, 253 (1888).

The Court has recently considered the edicts of government doctrine in the case *Georgia et. al. v. Public.Resource.Org, Inc.*, 140 S.Ct. 1498 (2020), in which my organization prevailed after being sued by the State of Georgia for having purchased and posted the Official Court of Georgia Annotated. Chief Justice Roberts stated:

The Copyright Act grants potent, decades-long monopoly protection for “original works of authorship.” 17 U. S. C. §102(a). The question in this case is whether that protection extends to the annotations contained in Georgia’s official annotated code.

We hold that it does not. Over a century ago, we recognized a limitation on copyright protection for certain government work product, rooted in the Copyright Act’s “authorship” requirement. Under what has been dubbed the government edicts doctrine, officials empowered to speak with the force of law cannot be the authors of—and therefore cannot copyright—the works they create in the course of their official duties.

*We have previously applied that doctrine to hold that non-binding, explanatory legal materials are not copyright- able when created by judges who possess the authority to make and interpret the law. See *Banks v. Manchester*, 128 U. S. 244 (1888).*

Georgia v. Public Resource, 140 S. Ct. 1498, 2

After carefully studying the Wisconsin Jury Instructions and their history, it appears that they fall squarely within the boundaries of the edicts of government doctrine. It is also my opinion that making these materials more broadly available to the public would further the stated goals of the creation of these Wisconsin Jury Instructions and would contribute to the administration of justice by informing lawyers, law students, citizens and judges of these important documents in different and more accessible formats.

The profuse assertions of copyright throughout the materials do not seem compatible with what the U.S. Copyright Office calls a “long-standing public policy” that such materials are not eligible for registration. Compendium of U.S. Copyright Office Practices §313.6(C)(2) (rev. 3d ed. 2017). We believe the proper course of action would be for the Wisconsin Judicial Conference to waive all copyright and other restrictions and make the materials freely available. But, even if CLEW decides to make the first instance of the Wisconsin Jury Instructions available only for a fee and in hard copy, I believe that the edicts of government doctrine would permit (indeed encourage) our right to speak these edicts of government by making them available in different ways and formats, a right which we intend to exercise.

Out of respect for the Wisconsin Judicial Conference and the 60 years of public service the University of Wisconsin has carried out in assisting the courts in this task, I am writing today to inform the Committees of our intentions to post these materials, making them available in electronic form on the Internet, without charge to users. We will not do so for a period of 60 days in order to allow the Committees to inform us of any factors or circumstances we might have overlooked.

We would be happy to discuss this matter with you, and would of course be delighted to assist the Wisconsin Judicial Conference and the University of Wisconsin Law School if you wish to take steps towards making the materials more broadly available.

I believe we all share a commitment towards common goals. The system in place today has served Wisconsin well, and I am struck by the words of Professor Schultz when he said that “one of the goals of the University is the pursuit of the ‘Wisconsin Idea,’ the idea that a public university ought to reach out to the people of the state and assist state government in serving the people.” Associate Dean David E. Schultz, History of the Wisconsin Criminal Jury Instructions, Gargoyle (Alumni Magazine for U. of Wisconsin Law School), Vol. 22, No. 1, Summer 1991, p. 7.

We should also keep in mind the words United States Supreme Court Justice Wiley Rutledge, who said “the essence of the Wisconsin idea has been looking forward, not backward, in the art of democratic living.” Rutledge, Two Centuries of the Wisconsin Idea, 1949 Wis. L. Rev. 7. I believe it is now time to look forward on the subject of Wisconsin Jury Instructions and hope you will agree with me that some changes in the way these important edicts of government are distributed are in order.

I look forward to hearing from you and thank you in advance for your attention to this matter.

Respectfully yours,

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Carl Malamud, President
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