

No.

---

---

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

---

STATE OF GEORGIA, ET AL., PETITIONERS,

*v.*

PUBLIC.RESOURCE.ORG, INC.

---

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

---

**PETITION FOR A WRIT OF CERTIORARI**

---

ANTHONY B. ASKEW  
LISA C. PAVENTO  
MEUNIER CARLIN &  
CURFMAN LLC  
*999 Peachtree Street  
NE, Suite 1300  
Atlanta, GA 30309  
(404) 645-7700*

DANIEL R. ORTIZ  
UNIVERSITY OF  
VIRGINIA SCHOOL OF  
LAW SUPREME COURT  
LITIGATION CLINIC  
*580 Massie Road  
Charlottesville, VA  
22903*

JOHN P. ELWOOD  
JOSHUA S. JOHNSON  
*Counsel of Record*  
MATTHEW X. ETCHEMENDY  
VINSON & ELKINS LLP  
*2200 Pennsylvania Ave.,  
NW, Suite 500 West  
Washington, DC 20037  
(202) 639-6623  
joshjohnson@velaw.com*

---

---

## 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). Lower courts have extended that holding to state statutes. See, e.g., *John G. Danielson, Inc. v. Winchester-Conant Props., Inc.*, 322 F.3d 26, 38 (1st Cir. 2003). But the rule that “government edicts” cannot be copyrighted has “proven difficult to apply when the material in question does not fall neatly into the categories of statutes or judicial opinions.” *Ibid.*

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.

## 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.

III

TABLE OF CONTENTS

	<b>Page</b>
Question Presented.....	I
Parties To The Proceedings.....	II
Appendix Contents .....	IV
Table Of Authorities .....	V
Opinions Below .....	1
Jurisdiction .....	1
Constitutional And Statutory Provisions	
Involved .....	1
Introduction .....	1
Statement.....	3
Reasons For Granting The Petition .....	15
I. The Decision Below Exacerbates An Acknowledged Split Of Authority On The Scope Of The Government Edicts Doctrine.....	15
A. Courts Of Appeals Are Sharply Divided On The Government Edicts Doctrine.....	16
B. The OCGA Annotations Would Be Copyrightable In Other Circuits .....	22
II. The Decision Below Is Wrong .....	24
III. This Case Presents An Ideal Vehicle For Resolving An Issue Of Unquestionable Importance.....	32
Conclusion.....	36

IV

APPENDIX CONTENTS

	<b>Page</b>
APPENDIX A: Opinion of the U.S. Court of Appeals for the Eleventh Circuit (Oct. 19, 2018) .....	1a
APPENDIX B: Order of the U.S. District Court for the Northern District of Georgia (Mar. 23, 2017) .....	54a
APPENDIX C: Permanent Injunction Order of the U.S. District Court for the Northern District of Georgia (Apr. 7, 2017) .....	74a
APPENDIX D: Constitutional and Statutory Provisions .....	76a

## TABLE OF AUTHORITIES

<b>Cases:</b>	<b>Page(s)</b>
<i>Banks L. Pub. v. Laws.’ Co-Operative Pub. Co.</i> , 169 F. 386 (2d Cir. 1909) .....	29
<i>Banks v. Manchester</i> , 128 U.S. 244 (1888) .....	<i>passim</i>
<i>BUC Int’l Corp. v. Int’l Yacht Council Ltd.</i> , 489 F.3d 1129 (11th Cir. 2007) .....	12
<i>Callaghan v. Myers</i> , 128 U.S. 617 (1888) .....	<i>passim</i>
<i>CCC Information Services, Inc. v. Maclean Hunter Market Reports, Inc.</i> , 44 F.3d 61 (2d Cir. 1994).....	19, 23
<i>County of Suffolk v. Experian Info. Solutions, Inc.</i> , No. 99-cv-8735, 2000 WL 628731 (S.D.N.Y. May 15, 2000).....	17
<i>County of Suffolk v. First Am. Real Estate Sols.</i> , 261 F.3d 179 (2d Cir. 2001).....	<i>passim</i>
<i>Eldred v. Ashcroft</i> , 537 U.S. 186 (2003) .....	4, 27
<i>Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.</i> , 499 U.S. 340 (1991) .....	4, 25
<i>Gray v. Russel</i> , 10 F. Cas. 1035 (C.C.D. Mass. 1839) .....	29
<i>Harrison Co. v. Code Revision Comm’n</i> , 260 S.E.2d 30 (Ga. 1979).....	8, 23, 27

VI

<b>Cases—Continued:</b>	<b>Page(s)</b>
<i>Howell v. Miller</i> , 91 F. 129 (6th Cir. 1898) .....	3, 18, 19, 22
<i>Inhale, Inc. v. Starbuzz Tobacco, Inc.</i> , 755 F.3d 1038 (9th Cir. 2014) .....	26
<i>John G. Danielson, Inc. v. Winchester- Conant Props., Inc.</i> , 322 F.3d 26 (1st Cir. 2003).....	3, 4, 15
<i>Klaxon Co. v. Stentor Electric Mfg. Co.</i> , 313 U.S. 487 (1941) .....	28
<i>Mills Music, Inc. v. Snyder</i> , 469 U.S. 153 (1985) .....	26
<i>New State Ice Co. v. Liebmann</i> , 285 U.S. 262 (1932) .....	33
<i>Practice Management Information Corp. v. American Medical Ass’n</i> , 121 F.3d 516 (9th Cir. 1997) .....	<i>passim</i>
<i>Rosemond v. United States</i> , 572 U.S. 65 (2014) .....	35
<i>Seago v. Horry County</i> , 663 S.E.2d 38 (S.C. 2008).....	18
<i>Skidmore v. Swift &amp; Co.</i> , 323 U.S. 134 (1944) .....	26
<i>Veeck v. Southern Building Code Congress Int’l, Inc.</i> , 293 F.3d 791 (5th Cir. 2002) .....	<i>passim</i>
<i>Wheaton v. Peters</i> , 33 U.S. 591 (1834) .....	<i>passim</i>

VII

<b>Cases—Continued:</b>	<b>Page(s)</b>
<i>Zivotofsky v. Clinton</i> , 566 U.S. 189 (2012) .....	35

**Constitutional Provisions:**

Ga. Const. art. III, § V .....	27
Ga. Const. art. V, § II, para. IV .....	27
U.S. Const. art. I, § 8, cl. 8 .....	3

**Statutes:**

17 U.S.C. § 101.....	6, 25
17 U.S.C. § 102.....	32
17 U.S.C. § 102(a) .....	3
17 U.S.C. § 102(b) .....	4
17 U.S.C. § 103.....	6, 25
17 U.S.C. § 103(b) .....	25
17 U.S.C. § 105.....	5, 25, 33
17 U.S.C. § 106.....	4
17 U.S.C. § 107.....	12
17 U.S.C. § 410(c).....	26
28 U.S.C. § 1254(1) .....	1
2016 Ga. Laws 882, § 54(b) .....	8
2016 Ga. Laws 882-883, § 54.....	8
2017 Ga. Laws 819, § 54(b) .....	8
2017 Ga. Laws 819-820, § 54.....	8
2018 Ga. Laws 1123, § 54.....	8
2018 Ga. Laws 1123, § 54(b).....	8, 27

## VIII

<b>Statutes—Continued:</b>	<b>Page(s)</b>
Act of Mar. 3, 1817, ch. 63, 3 Stat. 376 .....	28
Ark. Code Ann. § 1-2-102(b) .....	34
Ga. Code Ann. § 14-2-1302 (West 2018) .....	27
N.Y. Real Prop. Tax Law § 503(1)(a) (McKinney 2000) .....	17
O.C.G.A. § 1-1-1 .....	7, 27, 34
O.C.G.A. § 1-1-7 .....	8, 27
O.C.G.A. § 28-9-2(a) .....	6
O.C.G.A. § 28-9-5(c) .....	8
O.C.G.A. § 34-9-260 .....	9
O.C.G.A. § 34-9-260 (2017) .....	9
O.C.G.A. § 34-9-260(3) .....	9
<b>Other Authorities:</b>	
Brief of Defendant-Appellee-Cross-Appellant First American Real Estate Solutions, L.L.C., <i>County of Suffolk v. First Am. Real Estate Sols.</i> , 261 F.3d 179 (2d Cir. 2001) (No. 00-9011), 2001 WL 34113786.....	17
Carl Malamud, <i>10 Rules for Radicals</i> , <a href="https://bit.ly/2LcM9U7">https://bit.ly/2LcM9U7</a> .....	10
<i>Compendium of U.S. Copyright Office Practices</i> (3d ed. 2017), <a href="https://www.copyright.gov/comp3">https://www.copyright.gov/comp3</a> .....	5, 26

IX

<b>Other Authorities—Continued:</b>	<b>Page(s)</b>
Copyright Law Revision: Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 87th Cong., 1st Sess. (H.R. Judiciary Comm. Print 1961).....	26, 33
Craig A. Joyce, <i>The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy</i> , 83 Mich. L. Rev. 1291 (1985) .....	28, 29, 30
Craig Joyce, <i>A Curious Chapter in the History of Judicature: Wheaton v. Peters and the Rest of the Story (of Copyright in the New Republic)</i> , 42 Hous. L. Rev. 325 (2005) .....	30
O.C.G.A., vol. 12, at 1-2 (2017 ed.).....	27
O.C.G.A., vol. 40, at 166-167 (2011 ed.).....	27
Public.Resource.Org, <i>Official State Codes</i> , Internet Archive, <a href="https://bit.ly/2C9KLyQ">https://bit.ly/2C9KLyQ</a> .....	10
Terry A. McKenzie, <i>The Making of a New Code</i> , 18 Ga. St. B.J. 102 (1982) .....	6, 7

## PETITION FOR A WRIT OF CERTIORARI

---

The State of Georgia and the Georgia Code Revision Commission, on behalf of and for the benefit of the General Assembly of Georgia, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

### OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, 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, App., *infra*, 54a-73a, is reported at 244 F. Supp. 3d 1350. The district court's permanent injunction order, App., *infra*, 74a-75a, is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on October 19, 2018. On December 20, 2018, Justice Thomas extended the time for filing a certiorari petition to March 4, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are set forth in the appendix to this petition. App., *infra*, 76a-84a.

### INTRODUCTION

Based on a novel expansion of the doctrine that copyright protection is not available for "government

edicts” such as judicial decisions—an extratextual, policy-based rule that this Court has not addressed since creating it in the 1800s (and which has generated sharp disagreement among the courts of appeals ever since)—the Eleventh Circuit invalidated the State of Georgia’s copyright in annotations appearing in the Official Code of Georgia Annotated (“OCGA”), consisting of such materials as summaries of judicial decisions and state Attorney General opinions. That decision threatens to upend the longstanding arrangements of Georgia and numerous other states that rely on copyright’s economic incentives to create and distribute annotations useful to guide legal research, while ensuring that the states’ laws are widely disseminated and easily accessible. It also conflicts with decisions of the Second, Fifth, Sixth, and Ninth Circuits. Those courts disagree regarding the scope and rationale of the government edicts doctrine, but under each of their divergent approaches, the annotations here would be copyrightable because they undisputedly lack “the force of law” (App., *infra*, 26a)—the essential condition for applying the government edicts doctrine under precedents of this Court and other courts of appeals.

Indeed, the Eleventh Circuit’s decision rejecting Georgia’s infringement claim against respondent Public.Resource.Org, Inc. (“PRO”) squarely conflicts with this Court’s last statement on the doctrine, which recognized the copyrightability of annotations in Illinois’s official reporter of state supreme court decisions. See *Callaghan v. Myers*, 128 U.S. 617, 645-650 (1888). And it is impossible to square with a Sixth Circuit decision authored by Circuit Justice Harlan (a

member of the *Callaghan* Court) and joined by then-Judge Taft, affirming the copyrightability of annotations in a government-approved publication of Michigan's statutes. See *Howell v. Miller*, 91 F. 129 (1898).

This Court should grant review to correct the Eleventh Circuit's misapplication of this Court's decisions and resolve the lower courts' considerable confusion regarding the government edicts doctrine, which has "proven difficult to apply" and produced "arguably inconsistent results" across a broad array of cases where "the material in question does not fall neatly into the categories of statutes or judicial opinions." *John G. Danielson, Inc. v. Winchester-Conant Props., Inc.*, 322 F.3d 26, 38 (1st Cir. 2003); see also *Veeck v. Southern Building Code Congress Int'l, Inc.*, 293 F.3d 791, 796-800 (5th Cir. 2002) (en banc) (rejecting tests applied by Second and Ninth Circuits); *id.* at 815-817 (Wiener, J., joined by King, C.J., and Higginbotham, Davis, Stewart, and Dennis, JJ., dissenting) (endorsing those tests).

### STATEMENT

1. a. Federal copyright protection is a statutory right, not a common-law one. See *Wheaton v. Peters*, 33 U.S. 591, 661-662 (1834). 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. To promote and protect "original works of authorship," 17 U.S.C. § 102(a), Congress enacted the nation's first copyright statute in 1790. It 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).

The statutory scheme grants copyright owners a bundle of exclusive rights, including the rights of reproduction and distribution. 17 U.S.C. § 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. 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 administers many copyright laws, 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.” U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices* § 313.6(C)(2) (3d ed. 2017), <https://www.copyright.gov/comp3> (*Compendium*).

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> App., *infra*, 7a. See generally Appellant’s C.A. App. 256-259; Terry A. McKenzie, *The Making of a New Code*, 18 Ga. St. B.J. 102 (1982), available at Appellant’s C.A. App. 264-267. The Commission contracted with the Michie Company to prepare and publish the OCGA. App., *infra*, 55a.

Under the Commission’s supervision, Michie prepared a manuscript containing an *unannotated* compilation of Georgia statutes. See App., *infra*, 55a. After the General Assembly voted to adopt that manuscript as Georgia’s official code, Michie added annotations, such as summaries of judicial decisions and Georgia Attorney General opinions interpreting or applying statutory provisions. See *id.*; Appellant’s

---

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

C.A. App. 258; McKenzie, 18 Ga. St. B.J. at 103. The OCGA took effect in 1982. McKenzie, 18 Ga. St. B.J. at 103.

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. App., *infra*, 47a. To the contrary, the General Assembly has repeatedly made clear that only the statutory portion of the OCGA has the force of law, and that the OCGA's annotations are merely research aids lacking any legal effect. The first section of the OCGA 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 very beginning of the code, 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. PRO’s Mot. for Summ. J., Ex. G, § 9.1 (May 17, 2016), ECF No. 29-9 (OCGA publication manual); see also OCGA § 28-9-5(c). Those bills reenact the “statutory portion” of the OCGA. *E.g.*, 2018 Ga. Laws 1123, § 54; 2017 Ga. Laws 819-820, § 54; 2016 Ga. Laws 882-883, § 54. At the same time, they expressly provide that the OCGA’s “[a]nnotations” are “not enacted as statutes,” and thus do not have the force of law. *E.g.*, 2018 Ga. Laws 1123, § 54(b); 2017 Ga. Laws 819, § 54(b); 2016 Ga. Laws 882, § 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.” Appellees’ C.A. App., Tab 29-2, at 23-24.

b. The Commission now contracts with Matthew Bender & Co., part of the LexisNexis Group (“Lexis”), to maintain, publish, and distribute the OCGA. App., *infra*, 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 Georgia Attorney General opinions.<sup>2</sup> *Id.* at 55a-56a (quoting agreement). Lexis undertakes a resource- and time-intensive editorial process to prepare the annotations and ensure their accuracy and stylistic consistency. See Appellees’ C.A. App., Tab 30-5; see also App., *infra*, 69a (creating annotations requires “tremendous amount of work”).

Georgia does not claim copyright in the OCGA’s statutory text and numbering. Pl.’s Mem. Supp. Mot. for Partial Summ. J. 1 (May 17, 2016), ECF No. 30-1. It does, however, hold a “registered copyright in the OCGA annotations.” App., *infra*, 11a; see also Appellant’s C.A. App. 289 (“work made for hire” provision in Georgia-Lexis agreement). The agreement grants Lexis an exclusive license to publish and sell the OCGA in printed, CD-ROM, and online formats. App.,

---

<sup>2</sup> For example, an annotation to OCGA § 34-9-260, which addresses workers’ compensation, summarizes a decision applying the statute as follows:

**Average weekly wage calculated correctly.** – Award of workers’ compensation benefits was upheld because there was some evidence to support the administrative law judge’s calculation of the claimant’s average weekly wage under O.C.G.A. § 34-9-260(3) based on the claimant’s testimony that the claimant was supposed to work from the car wash’s opening until its close. *Cho Carwash Property, LLC v. Everett*, 326 Ga. App. 6, 755 S.E.2d 823 (2014).

OCGA § 34-9-260 (2017) (case note); see also Brief of Amicus Curiae Matthew Bender & Co., Ex. 2 (June 27, 2016), ECF No. 38-2 (reproducing OCGA § 10-7-21’s annotations).

*infra*, 7a-8a. The Commission receives royalties on the CD-ROM and online versions. *Id.* at 8a. The agreement also sets price controls: As of 2016, the price for a full set of 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; Appellees’ C.A. App., Tab 33-1, at 20-21.

To ensure that Georgia’s laws are readily accessible by the general public, the agreement requires Lexis to publish the code’s unannotated statutory text online, free of charge. App., *infra*, 7a; Appellant’s C.A. App. 189. 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.” App., *infra*, 8a.

3. Respondent PRO is a non-profit corporation operated by Carl Malamud. Its primary activity is publishing government documents online, including several state codes, such as Arkansas’s, Colorado’s, Idaho’s, and Mississippi’s, and encouraging the public to access them for free. See Carl Malamud, *10 Rules for Radicals* ¶ 120, <https://bit.ly/2LcM9U7>; Public.Resource.Org, *Official State Codes*, Internet Archive, <https://bit.ly/2C9KLyQ> (last visited Feb. 27, 2019). Despite its knowledge of Georgia’s registered copyright, PRO purchased 186 printed volumes and supplements of the OCGA, scanned them, and posted them online. App., *infra*, 8a-9a. PRO also distributed digital copies to Georgia legislators. *Id.* at 9a.

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. App., *infra*, 9a. PRO counterclaimed for a judgment of non-infringement. *Ibid.* PRO continued reproducing the OCGA after Georgia filed suit, publishing the 2015 volumes and supplements on its website. *Id.* at 58a.

4. a. On cross-motions for summary judgment, the district court held that the OCGA annotations were copyrightable, PRO's activities constituted infringement, and Georgia was entitled to injunctive relief. App., *infra*, 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 annotations were copyright eligible because the "commentary portions" of the OCGA 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.” App., *infra*, 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. App., *infra*, 72a. The court reasoned that “it is inevitable that [the] market[]” for the OCGA would “be substantially adversely impacted” by PRO’s conduct, for the straightforward reason that “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 annotations are not copyrightable under the government edicts doctrine.<sup>3</sup> App., *infra*, 2a, 4a. It acknowledged

---

<sup>3</sup> Because the Eleventh Circuit reversed based on the government edicts doctrine, it “ha[d] no occasion to address” PRO’s merger and fair use arguments. App., *infra*, 4a-5a.

that courts of appeals have split on the breadth of the government edicts doctrine since this Court “last addressed the question in 1888.” *Id.* at 12a-13a, 17a-18a. While some courts have expanded the doctrine, the Eleventh Circuit observed, “other courts have declined to extend the rule in other, related contexts.” *Id.* at 17a.

Because of this lack of consensus in the lower courts, and because the “foundations of the case law establishing this doctrine are far from clear,” the Eleventh Circuit concluded it was necessary to “resort to first principles” to resolve the “profound and difficult issues” it viewed this case as presenting. App., *infra*, 2a-3a, 12a. The court interpreted the nineteenth-century decisions of *Wheaton*, *Banks*, and *Callaghan*—this Court’s only decisions on the subject—to establish that public “authorship” is the basis for the government edicts doctrine, *id.* at 12a, such 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. 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 court of appeals determined that “there exists a zone of indeterminacy” where, even if a work “may not be characterized as law,” “policy interests” require that it be treated as such for purposes of copyright. *Id.* at 24a-25a.

b. In determining that the annotations here were “sufficiently law-like” to be attributable to the constructive authorship of the people of Georgia, App., *infra*, 26a, the court analyzed three factors: who

created the annotations, see *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 court of appeals acknowledged that “the annotations were initially prepared by a private party” (Lexis), and “annotations created by a private party generally can be copyrighted,” App., *infra*, 2a, 26a-27a, it concluded that this case fell outside 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, that the Commission retains editorial control over the OCGA’s contents, *id.* at 28a-29a, and 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 Lexis’s proposed text, but in the sense that the legislature votes “to make the OCGA the official codification of Georgia’s laws,” *id.* at 31a.

ii. The court of appeals recognized that the annotations do “not carry[] the force of law,” App., *infra*, 38a, and Georgia law expressly “disclaim[s] any legal effect in the annotations,” *id.* at 39a. But it concluded that because the annotations were “merged” with the statutory portions of the OCGA, 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 court of appeals 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 court of appeals acknowledged that “the annotations are prepared by the Commission outside of the normal channels of the legislative process,” App., *infra*, 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 “voted to adopt the annotations as prepared by the Commission as an integral part of the official Code,” and annually “reaffirm[s] [the OCGA’s] status as the official codification of Georgia’s laws.” *Id.* at 48a.

“[G]uided by [these] three factors,” the court of appeals “conclude[d] that the annotations in the OCGA are attributable to the constructive authorship of the People” and thus “belong[] to the People and, as such, must be free for publication by all.” App., *infra*, 51a-53a.

## **REASONS FOR GRANTING THE PETITION**

### **I. The Decision Below Exacerbates An Acknowledged Split Of Authority On The Scope Of The Government Edicts Doctrine**

The government edicts doctrine “has proven difficult to apply” in the broad range of circumstances where, as here, “the material in question does not fall neatly into the categories of statutes or judicial opinions”—leading “[a] number of appellate courts [to] reach[] arguably inconsistent results.” *John G. Danielson*, 322 F.3d at 38. The Eleventh Circuit

recognized this disagreement, explaining that some courts have “extended the rule” beyond the traditional categories of judicial opinions and statutes, whereas others “have declined to extend the rule in other, related contexts.” App., *infra*, 17a. It then further deepened the division over the doctrine’s scope, developing an entirely novel three-factor test by “resort[ing] to first principles” (*id.* at 3a), and denying copyright protection to an original work—the OCGA annotations—that would have been protected under any other circuit’s understanding of the doctrine. This Court’s intervention is warranted to review the Eleventh Circuit’s injection of further uncertainty into an already-confused area of law that has divided the courts of appeals regarding “profound and difficult issues,” *id.* at 2a—and which this Court has not addressed since 1888.

#### **A. Courts Of Appeals Are Sharply Divided On The Government Edicts Doctrine**

Like the Eleventh Circuit, the Second, Fifth, Sixth, and Ninth Circuits have addressed the copyrightability of works bearing the state’s imprimatur. Applying divergent analytic frameworks, the Second, Sixth, and Ninth Circuits have upheld such works’ copyrightability, while the Fifth and Eleventh Circuits have rejected copyright claims.

The Second Circuit has declined to apply the government edicts doctrine’s rule of uncopyrightability even to works that were directly created by local governments and clarified the nature of legal duties. In *County of Suffolk v. First American Real Estate Solutions*, 261 F.3d 179 (2001), the Second Circuit recognized the potential copyrightability of county-

created tax maps that were used for “making up the [tax] assessment rolls” and thus “directly impact[ed] [a] governmental agency’s decision-making.” *Id.* at 192-194 (quoting N.Y. Real Prop. Tax Law § 503(1)(a) (McKinney 2000)). The maps and an accompanying index system showed the “ownership, size, and location of real property in each of Suffolk County’s political subdivisions,” as well as the boundary lines for different tax districts. *County of Suffolk v. Experian Info. Solutions, Inc.*, No. 99-cv-8735, 2000 WL 628731, at \*1 (S.D.N.Y. May 15, 2000). State law required the county “to create [the] tax maps and to make them available to the public.” *County of Suffolk*, 261 F.3d at 184; see also Brief of Defendant-Appellee-Cross-Appellant First American Real Estate Solutions, L.L.C., at 7, *County of Suffolk*, 261 F.3d 179 (No. 00-9011), 2001 WL 34113786 (explaining “[t]ax maps are essential to the public’s right to challenge real property assessments” and “are regularly consulted \* \* \* to determine the tax status of real property”).

Much like PRO, the alleged infringer in *County of Suffolk* argued that, as a matter of law, “the tax maps [were] sufficiently analogous to judicial opinions and statutes to be deemed in the public domain \* \* \* and, hence, not entitled to copyright protection.” 261 F.3d at 184-185. In rejecting that argument, the Second Circuit interpreted the government edicts doctrine to hinge on two primary factors: “(1) whether the entity or individual who created the work needs an economic incentive to create or has a proprietary interest in creating the work and (2) whether the public needs notice of this particular work to have notice of the law.” *Id.* at 194. Applying that framework, the Second Circuit

concluded that government works like tax maps—unlike statutes or judicial opinions—may require copyright protection to encourage their creation. *Ibid.* Moreover, the court explained that notice was not a significant concern since the tax maps “themselves do not create the legal obligation to pay property taxes,” but “are merely a means by which the government assesses a pre-existing obligation.” *Id.* at 195. “[F]air warning” of tax obligations was “satisfied through the notice provided by the statute” establishing such obligations. *Ibid.* Accordingly, the Second Circuit vacated the district court’s dismissal order and remanded so that the county could “present evidence in support of its copyright infringement claim.”<sup>4</sup> *Ibid.*

In a related line of cases, the Second, Sixth, and Ninth Circuits have allowed copyright protection for privately developed, government-adopted works. The Sixth Circuit in *Howell v. Miller*, 91 F. 129 (1898)—a decision written by Justice Harlan in his capacity as Circuit Justice, and joined by then-Judge (later Chief Justice) Taft—addressed the copyrightability of a work remarkably similar to the OCGA annotations: 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

---

<sup>4</sup> Addressing similar facts, the South Carolina Supreme Court followed *County of Suffolk in Seago v. Horry County*, 663 S.E.2d 38 (S.C. 2008). The court agreed with the Second Circuit that a “county may obtain copyrights, and [its] maps can be copyright-protected to the extent \* \* \* [they] contain[] original material, research, and creative compilation.” *Id.* at 43.

arranged in” Howell’s volumes, “should be received and admitted in all courts and proceedings, and by all officers, \* \* \* 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, App., *infra*, 38a, the Sixth Circuit nonetheless held that Howell’s marginal references, notes, and digests of judicial decisions could be copyrighted, “for they constitute[d] no part of that which is public property, and [were] plainly produced by the compiler.”<sup>5</sup> *Howell*, 91 F. at 138.

The Second Circuit in *CCC Information Services, Inc. v. Maclean Hunter Market Reports, Inc.*, 44 F.3d 61 (1994), considered the copyrightability of the “Red Book”—a privately developed automobile valuation system—in light of the fact that state regulations had incorporated it by reference as a permissible valuation method for insurance purposes. *Id.* at 63-64, 73. Consistent with its later decision in *County of Suffolk*, the court held that “a state’s reference to a copyrighted work as a legal standard” does not negate the work’s copyrightability. *Id.* at 74. Therefore, like the annotated code in *Howell*, the Red Book was copyrightable despite bearing state authorities’ “imprimatur.” App., *infra*, 38a.

Finally, in *Practice Management Information Corp. v. American Medical Ass’n*, 121 F.3d 516 (1997), amended, 133 F.3d 1140 (1998), the Ninth Circuit

---

<sup>5</sup> Ultimately, the court affirmed the denial of an injunction, finding insufficient evidence that the defendant had copied Howell’s annotations rather than producing his own. 91 F. at 141-142.

considered whether a medical coding system produced by the American Medical Association (“AMA”) but adopted by a federal regulatory agency could be copyrighted. Congress directed the Health Care Financing Administration to establish a uniform system for identifying physicians’ services in Medicare and Medicaid claim forms, and the agency complied by adopting the AMA’s existing code and requiring its use in reimbursement applications. *Id.* at 517-518. Like the Second Circuit in *County of Suffolk*, the Ninth Circuit interpreted the government edicts doctrine to turn on (1) the need for copyright incentives to promote a work’s creation, and (2) whether recognizing copyright protection would offend “the due process requirement of free access to the law.” *Id.* at 518-519. The court concluded that private entities like the AMA would not create the type of work at issue without the monetary incentive copyright provides, and that notice was not a major concern because there was no evidence that anyone bound to follow the code was unable to obtain access to it. *Ibid.* The court thus “affirm[ed] \* \* \* that the AMA’s copyright in the [coding system] should be enforced.”<sup>6</sup> *Id.* at 520.

In contrast to the Second and Ninth Circuits’ approach to the government edicts doctrine, the Fifth Circuit ignores any consideration of copyright incentives and asks only whether the work at issue is “the law.” In *Veeck v. Southern Building Code Congress International, Inc.*, 293 F.3d 791 (2002) (en banc), the Fifth Circuit considered whether privately developed

---

<sup>6</sup> The Ninth Circuit ultimately ruled against the AMA on the separate ground of copyright misuse. 121 F.3d at 520-521.

model building codes lost their copyrightability once they were adopted as the governing building codes of municipalities. *Id.* at 793-794. The sharply divided en banc court held that the building codes adopted by municipal governments were no longer copyrightable, at least when reprinted as “the law’ of” municipalities that had adopted the codes. *Id.* at 800. The majority interpreted the government edicts doctrine as establishing that “the law,’ whether articulated in judicial opinions or legislative acts or ordinances, is in the public domain.” *Id.* at 796; see also *id.* at 800. The court referenced the *County of Suffolk* and *Practice Management* cases from the Second and Ninth Circuits, and rejected those courts’ conclusion that *Banks* required an inquiry into copyright incentives and “the ‘adequacy’ of public access to the law.” *Id.* at 796-800.

Six judges dissented, noting that the Fifth Circuit was “the first federal appellate court to go [so] far” as to “adopt a *per se* rule that a single municipality’s enactment of a copyrighted model code into law by reference strips the work of all copyright protection.” *Veck*, 293 F.3d at 808 (Wiener, J., dissenting). The dissent approvingly cited “the Second Circuit’s two pronged test in *County of Suffolk*,” and argued that because the majority’s rule undermined incentives to produce model codes, “taxpayers would end up paying for a service that is currently provided efficiently, expertly, and at no expense for them.” *Id.* at 816-817.

The Eleventh Circuit’s decision has exacerbated this split of authority. Like the Second, Fifth, Sixth, and Ninth Circuits, the Eleventh Circuit considered the copyrightability of a work either created or adopted by a government entity. But it fashioned a

wholly new approach to the government edicts doctrine, departing both from the pragmatic approach of the Second and Ninth Circuits, with its focus on incentives and adequate notice, *and* from the Fifth Circuit's more bright-line approach, with its focus on whether the work at issue is "obligatory in law," *Veeck*, 293 F.3d at 805. Instead, the Eleventh Circuit engaged in an open-ended, multi-factor inquiry into whether the work in question, even if it does "not hav[e] the force of law," is nonetheless "so enmeshed with [the] law as to be inextricable." App., *infra*, 26a. The Eleventh Circuit has thus split from other circuits in at least two ways: (1) it has diverged from the Second and Ninth Circuits by ignoring copyright incentives as a factor in applying the government edicts doctrine, and (2) it is the *only* circuit to hold that a work admittedly lacking the force of law is uncopyrightable.

#### **B. The OCGA Annotations Would Be Copyrightable In Other Circuits**

Georgia would have prevailed in the Second, Fifth, Sixth, or Ninth Circuit. This case is materially indistinguishable from the Sixth Circuit's decision in *Howell*, which held that the annotations in a government-approved annotated code book were copyrightable. 91 F. at 138.

Under the Second and Ninth Circuits' approach, the inquiry would turn on whether the annotations would have been created without copyright incentives, and whether protecting the work offends considerations of notice and due process. See, *e.g.*, *County of Suffolk*, 261 F.3d at 194-195; *Practice Mgmt.*, 121 F.3d at 518-519. 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. App., *infra*, at 69a. As the district court concluded (and the Eleventh Circuit never contested), PRO’s copying fatally undermines that incentive. *Id.* at 71a-72a. Indeed, Lexis itself has made clear that absent copyright protection, “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 those services. Anders Ganten Aff. ¶ 30 (June 27, 2016), ECF No. 38-1.

As to notice and due process, Georgia law plainly states that the annotations lack any legally binding effect, and the actual *law*—i.e., the statutory portion of the OCGA—is freely available to everyone. See pp. 7-8, 10, *supra*. Indeed, *County of Suffolk, CCC Information Services*, and *Practice Management* declined to apply the government edicts doctrine to works that, if anything, raised far more substantial notice concerns than the OCGA annotations conceivably could. Like the tax maps in *County of Suffolk*, the annotations “themselves do not create \* \* \* legal obligation[s]”; but *unlike* the tax maps, the annotations are not even “a means by which the government assesses \* \* \* legal obligation[s],” nor do they “directly impact [a] governmental agency’s decision-making.” 261 F.3d at 192, 195; see also *Harrison*, 260 S.E.2d at 35 (annotations lack “any official weight”). Unlike the Red Book in *CCC Information Services*, the annotations do not set forth one of a limited number of legally permissible valuation methods. 44 F.3d at 73. And unlike the

coding system in *Practice Management*, no one is “required by government regulations” to use the OCGA annotations. 121 F.3d at 521.

The OCGA annotations would be copyrightable even under the Fifth Circuit’s approach. In *Veeck*, the Fifth Circuit concluded that municipal building codes were not copyrightable because they had been made “obligatory in law.” 293 F.3d at 805. Here, the OCGA annotations create no legal obligations; they were developed solely as research aids, and no one is required to use them. The annotations thus are not “the law” under the Fifth Circuit’s test. In fact, *Veeck* suggested that annotations to building codes *would be* copyrightable, and noted that “compilers of statutes and judicial opinions” use such “‘value-added’ \* \* \* commentary” to “enhance the market value” of their works. *Id.* at 806.

\* \* \* \* \*

The Eleventh Circuit has split from every other court of appeals that has addressed the issue by holding that a work indisputably lacking “the force of law,” App., *infra*, 26a, is ineligible for copyright protection under the government edicts doctrine. That novel decision deepens the existing confusion on the correct implementation of an extratextual, “judicial gloss on the [Copyright] Act” that this Court has not revisited since 1888. *County of Suffolk*, 261 F.3d at 193 (citation omitted). This Court’s intervention is urgently warranted.

## II. The Decision Below Is Wrong

1. The Eleventh Circuit’s decision conflicts with the Copyright Act’s plain text. The Act expressly provides that “annotations” are copyrightable. 17 U.S.C.

§§ 101, 103. Furthermore, by exempting only “work[s] of the United States Government”—not of state governments—from “[c]opyright protection,” *id.* § 105, the Act makes clear by negative implication that 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*, 261 F.3d at 187. Finally, the Eleventh Circuit’s conclusion that “the merger” (App., *infra*, 40a) of annotations and uncopyrightable statutory text in an official code book somehow renders the annotations ineligible for copyright protection 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 Publications*, 499 U.S. at 348 (“copyright protection” extends to “components of a work that are original to the author”). Therefore, the Copyright Act’s plain language establishes that the OCGA annotations are entitled to copyright protection.

The Act’s legislative history confirms that Congress intended state-sponsored works, such as the annotations here, to be copyrightable. In enacting the predecessor to 17 U.S.C. § 105, 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.” 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). Therefore, they 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. That is precisely what Georgia did here. The Eleventh Circuit’s decision thus violates Congress’s intent to provide “copyright protection” for state-government works so that “private publishers” like Lexis would agree “to print and publish” those works. *Ibid.* In fact, the 1961 Copyright Office report that served as a foundation for the modern Copyright Act expressly noted that the government edicts doctrine does not prevent states “from securing copyright” in “annotations, headnotes, or commentaries” added to “official documents.” *Id.* at 129; see also *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 159-161 (1985).

Today, the Copyright Office continues to recognize 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 annotations here lack (App., *infra*, 26a). *Compendium* § 313.6(C)(2); accord *id.* § 717.1. The Copyright Office’s views merit 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). Indeed, the Copyright Office registered Georgia’s copyright in the annotations here. App., *infra*, 11a. The registration “constitute[s] prima facie evidence of the validity of [Georgia’s] copyright.” 17 U.S.C. § 410(c).

In stark contrast to Georgia’s straightforward statutory argument, the Eleventh Circuit’s novel three-

factor test for whether a work is sufficiently “law-like” to be “attributable to the constructive authorship of the People” finds no home in the Copyright Act’s text. App., *infra*, 24a-26a; see also *Eldred*, 537 U.S. at 222 (Constitution “empowers Congress,” not courts, to determine scope of copyright protection). And the Eleventh Circuit’s decision that the annotations are uncopyrightable under that test disregards the Georgia legislature’s repeated enactments making clear the annotations “do not constitute part of the law,” OCGA § 1-1-7; accord, *e.g.*, *id.* § 1-1-1; 2018 Ga. Laws 1123, § 54(b), as well as the Georgia Supreme Court’s clear statement that the annotations lack “any official weight,”<sup>7</sup> *Harrison*, 260 S.E.2d at 35. To become law in Georgia, a piece of 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. That “the Georgia General Assembly does not individually enact each separate annotation as part of the ordinary legislative process” (App., *infra*, 47a) and, in fact, has repeatedly stated in duly enacted

---

<sup>7</sup> PRO below did not rely on the “OCGA comments” referenced in the Georgia cases the Eleventh Circuit cited, App., *infra*, 43a-44a, for good reason. Those comments 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.

legislation that the annotations lack legal force definitively establishes that the annotations are not uncopyrightable “government edicts.” Cf. *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 497 (1941) (federal court’s “proper function \* \* \* is to ascertain what the state law is, not what it ought to be”).

2. The Eleventh Circuit’s decision also conflicts with this Court’s precedents. This Court addressed the government edicts doctrine in three nineteenth-century cases. Those decisions establish that, although binding law (such as statutes and judicial decisions) cannot be copyrighted, annotations of that law are copyrightable—notwithstanding the “official” status of the annotations’ author, or the fact that the annotations are combined with the uncopyrightable primary legal materials in a single publication.

The fountainhead of the government edicts doctrine is *Wheaton v. Peters*, 33 U.S. 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 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 A. 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 decision stated that "no reporter has or can have any copyright in the *written opinions* delivered by this court." *Wheaton*, 33 U.S. at 668 (emphasis added). Yet the Court implicitly recognized that Wheaton's *annotations* were eligible for copyright protection, remanding for a trial on whether Wheaton had complied with statutory registration requirements. *Id.* 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."<sup>8</sup> *Callaghan*, 128 U.S. at 649-650 (quoting *Gray v. Russel*, 10 F. Cas. 1035, 1039 (C.C.D. Mass. 1839) (Story, J.)); see also *Banks L. Pub. v. Laws' Co-Operative Pub. Co.*, 169 F. 386, 388 (2d Cir. 1909) (*Wheaton* and *Gray* held "an official court reporter is entitled to copyright protection for his marginal notes or synopsis of case, statement of cases, abstract of arguments of counsel, and indexes to volumes"). In contrast to the Eleventh Circuit's decision below, see, e.g., App., *infra*, 41a, the Court never suggested Wheaton's statutory position as official reporter precluded him from asserting copyright over his annotations.

The Eleventh Circuit's decision is thus irreconcilable with *Wheaton*. Much as Georgia has used a third-party publisher to assist it with codifying its statutes, the Marshall Court lobbied Congress to create the

---

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

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). 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 copyright in the OCGA helps ensure accurate codification at minimal taxpayer expense, while providing useful (but non-binding) annotations to facilitate legal research.

In two 1888 cases, this Court extended *Wheaton* to state judicial opinions—holding that while such opinions are not copyrightable, annotations of them are. In *Banks v. Manchester*, 128 U.S. 244 (1888), the state-authorized publisher of the Ohio Supreme Court's decisions alleged copyright infringement against a competing publisher. The materials at issue in *Banks*—the 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 court's official reporter. *Id.* at 251. Therefore, applying the “public policy” announced in *Wheaton* that “no copyright could \* \* \* be secured in the products of the labor done by judicial officers in the discharge of their judicial duties,” *Banks* held that the copying of the judge-authored materials did not provide grounds for an infringement claim. See *id.* at 253-254. According to

*Banks*, the “work done by the judges \* \* \* is free for publication to all” because it “constitutes the authentic exposition and interpretation of the law, which[] bind[s] every citizen.” *Id.* at 253.

Less than a month later, this Court’s *Callaghan* decision confirmed *Banks*’s limited scope by holding that the Illinois Supreme Court’s official reporter *could* copyright annotations that the reporter himself (rather than the judges) had authored for his reports of the court’s decisions. *Callaghan*, 128 U.S. at 645, 647-650. 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 reporter “was a public officer” and thus “was not an author” within the meaning of the copyright statutes. *Id.* at 645-647. The 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 created and added to reports. *Id.* at 647. It 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.* Therefore, the official reporter could “obtain a copyright” for the annotations he authored.<sup>9</sup> *Id.* at 650.

---

<sup>9</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

In sum, *Wheaton* and *Callaghan* establish that the OCGA annotations are copyrightable, even though they are “merged” with statutory text in an “official” code book (App., *infra*, 39a-42a). *Banks* 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 because 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.” App., *infra*, 26a. The Eleventh Circuit’s misapplication of *Wheaton*, *Banks*, and *Callaghan* both demonstrates the confusion that has arisen among lower courts in the 130 years since this Court last addressed the government edicts doctrine, and demands this Court’s review.

### **III. This Case Presents An Ideal Vehicle For Resolving An Issue Of Unquestionable Importance**

1. The question presented here—whether the government edicts doctrine may be expanded beyond its traditional confines to deny copyright protection to works lacking the force of law—is vitally important to the functioning of state governments. The decision below unduly restricts state experimentation, limiting states’ ability to disseminate useful works while

---

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 17 U.S.C. § 102, state governments and agencies can qualify as “authors” entitled to copyright protection. See *County of Suffolk*, 261 F.3d at 187.

minimizing burdens on taxpayers. Here, Georgia implemented a cost-effective system for providing its citizens with annotations to assist with legal research. The federal court of appeals has now held that this fruitful experiment is unavailable to Georgia (and other similarly situated states), based on the court's own weighing of "considerations of public policy," and its own estimation of the annotations' "authoritativeness" under Georgia law. App., *infra*, 4a, 38a-39a. Impeding such state-level experimentation is a "grave responsibility" "fraught with serious consequences." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

The Eleventh Circuit's decision also squarely conflicts with Congress's considered judgment not to extend 17 U.S.C. § 105's prohibition against copyrighting U.S. government works to the works of state governments, because states lacking adequate printing facilities frequently rely on "copyright protection" as an incentive for "private publishers" to agree "to print and publish [state-government works] at their own expense as a commercial venture." Copyright Law Revision Report 129-130. As explained above, p. 23, *supra*, Lexis has stated that without copyright protection, it "could not recoup its significant investment \* \* \* in developing the Annotations" and thus "would lose all incentive to remain in [its] Contract [with Georgia] or create the Annotations unless it were directly paid for such services." *Ganten Aff.* ¶ 30. Therefore, if the Eleventh Circuit's decision is allowed to stand, Georgia will likely be required either to use tax dollars to pay for preparing and publishing the annotations, or cease publishing them altogether.

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. See p. 10, *supra*. Furthermore, the Eleventh Circuit’s decision undermines Lexis’s incentive to agree to continue publishing an unannotated version of Georgia’s statutes online, free of charge. See App., *infra*, 7a.

The implications of the Eleventh Circuit’s decision extend well beyond the continued viability of Georgia’s longstanding system for disseminating its statutes. In 2017 and 2018 alone, at least 16 other states and the District of Columbia appear to have registered copyrights in annotations to their codes.<sup>10</sup> To take just one example, § 1-2-102(b) of the official Arkansas Code of 1987 Annotated mirrors OCGA § 1-1-1, providing that “[t]he statutory portion of the codification shall be merged with annotations,” and Arkansas claims

---

<sup>10</sup> See Registration Nos. TX0008633448 (Sept. 17, 2018) (Alabama), TX0008570445 (Mar. 22, 2018) (Alaska), TX0008590841 (June 11, 2018) (Arkansas), TX0008381033 (Feb. 16, 2017) (Colorado), TX0008551825 (Jan. 16, 2018) (Delaware), TX0008566647 (Apr. 23, 2018) (District of Columbia), TX0008588533 (Mar. 13, 2018) (Idaho), TX0008430948 (Jan. 9, 2017) (Kansas), TX0008588394 (Apr. 3, 2018) (Mississippi), TX0008532691 (Aug. 28, 2017) (New Hampshire), TX0008600436 (Dec. 4, 2017) (New Mexico), TX0008555142 (Jan. 16, 2018) (Rhode Island), TX0008549132 (Oct. 18, 2017) (South Carolina), TX0008625275 (Aug. 7, 2018) (South Dakota), TX0008588806 (Mar. 19, 2018) (Tennessee), TX0008530993 (Nov. 23, 2017) (Vermont), TX0008604570 (Feb. 12, 2018) (Wyoming) (searchable through Copyright Office’s public catalog, <http://bit.ly/2VTNDI9>).

copyright in those annotations, which Lexis drafts. See Registration No. TX0008590841 (June 11, 2018). The holding below places all these states' copyright claims at serious risk of invalidation.

As the above survey of court of appeals decisions indicates, see pp. 15-24, *supra*, questions regarding the government edicts doctrine's scope also routinely arise in a variety of other contexts, from the copyrightability of county tax maps, to whether government-adopted industry standards or model codes retain copyright protection. The lower courts have struggled in answering those questions without guidance from this Court, which last addressed the government edicts doctrine over a century ago. This Court's intervention is needed.

2. This case presents an ideal vehicle to resolve the question presented. The issue was properly preserved below, and both the district court and the Eleventh Circuit discussed it thoroughly.<sup>11</sup> The parties have stipulated to relevant facts, Appellant's C.A. App. 175-194, and the record is concise and squarely presents this recurring legal issue.

---

<sup>11</sup> PRO asserted defenses below under the merger and fair use doctrines. The Eleventh Circuit did not address those arguments, and the district court correctly rejected them. See App., *infra*, 4a-5a, 64a-72a. In any event, the potential existence of alternative grounds for affirmance is no reason to deny certiorari on the question presented. This Court routinely reviews cases despite potential alternative grounds for affirmance on remand. See, e.g., *Rosemond v. United States*, 572 U.S. 65, 83 (2014); *Zivotofsky v. Clinton*, 566 U.S. 189, 201-202 (2012).

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ANTHONY B. ASKEW  
LISA C. PAVENTO  
MEUNIER CARLIN &  
CURFMAN LLC  
*999 Peachtree Street  
NE, Suite 1300  
Atlanta, GA 30309  
(404) 645-7700*

DANIEL R. ORTIZ  
UNIVERSITY OF  
VIRGINIA SCHOOL OF  
LAW SUPREME COURT  
LITIGATION CLINIC  
*580 Massie Road  
Charlottesville, VA  
22903*

JOHN P. ELWOOD  
JOSHUA S. JOHNSON  
*Counsel of Record*  
MATTHEW X. ETCHEMENDY  
VINSON & ELKINS LLP  
*2200 Pennsylvania Ave.,  
NW, Suite 500 West  
Washington, DC 20037  
(202) 639-6623  
joshjohnson@velaw.com*

MARCH 2019