No. 18-1150

IN THE

# Supreme Court of the United States

STATE OF GEORGIA, *et al.*,

*Petitioners,*

*v.*

PUBLIC.RESOURCE.ORG, INC.,

*Respondent.*

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

## BRIEF OF *AMICUS CURIAE* THE COPYRIGHT ALLIANCE IN SUPPORT OF PETITIONERS


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## BRIEF OF THE COPYRIGHT ALLIANCE AS *AMICUS CURIAE* IN SUPPORT OF REVERSAL

Pursuant to Rule 37 of the Supreme Court of the United States, *amicus curiae* the Copyright Alliance respectfully submits this brief in support of the request of Petitioners, the State of Georgia *et al.*, that the decision of the United States Court of Appeals for the Eleventh Circuit be reversed.[1]

## INTEREST OF *AMICUS CURIAE*

The Copyright Alliance is a nonprofit, nonpartisan 501(c)(4) membership organization dedicated to promoting and protecting the ability of creative professionals to earn a living from their creativity. It represents the interests of individual authors from a diverse range of creative industries—including, for example, writers, musical composers and recording artists, journalists, documentarians and filmmakers, graphic and visual artists, photographers, and software developers—and the

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[1] Pursuant to Sup. Ct. R. 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part, and no party or counsel for any party made a monetary contribution intended to fund the preparation or submission of this brief. Only *amicus curiae* made such a monetary contribution. Other Copyright Alliance members may join other *amicus* briefs submitted in this case. Both Petitioners' and Respondents' counsel have consented, via e-mail, to the filing of this brief.

small businesses that are affected by the unauthorized use of their works. The Copyright Alliance's membership encompasses these individual artists and creators, creative union workers, and small businesses in the creative industry, as well as the organizations and corporations that support and invest in them.

The Copyright Alliance's members rely heavily on copyright law to protect their work and provide them with the financial ability to be able to continue to create for the public good. As such, the Copyright Alliance and its members have a strong interest in the proper application of the statutory framework that Congress so carefully constructed. Consistent with its mission of advocating policies that promote and preserve the value of copyright, and protecting the rights of creators, the Copyright Alliance participates as an *amicus* in this case to help this Court understand why the Copyright Act protects statutory annotations as creative works and allows states to own the copyright in these annotations, which are intrinsically valuable to the public. From the members' perspective, reversing the Eleventh Circuit would further the goals of the Copyright Act by reinforcing the value of copyright and incentivizing authors to create scholarly works for the public good. The Copyright Alliance also chooses to participate as an *amicus* in this case to apprise the Court of the significant negative effects that affirmance of the Eleventh Circuit's decision would

create. Specifically, the extension of the decision nationwide would upend the current publication system that has endured for the last century and invalidate hundreds, if not thousands, of state-owned copyrights. This result, urged by Respondents, would not permit greater public access to the legal scholarship, but would only serve to benefit free-riders who seek to capitalize off of other's creative authorship and undermine the integrity of the annotations.

## SUMMARY OF ARGUMENT

As a matter of law and policy, the Court should reverse the Eleventh Circuit's decision and reiterate that annotated legal codes and statutes are copyrightable as creative works that can be protected by state actors. There is nothing in the Copyright Act that prohibits state ownership of copyrights. The only provision exempting government works from protection applies exclusively to the federal government. Congress expressly rejected the suggestion to extend this prohibition to the states during early discussions of the Copyright Act of 1909. In its later revision, Congress again declined to extend this prohibition to the states, recognizing the economic reasons for the rapidly increasing registrations of state copyrights.

The only limitation on states' long-held right to own copyrights stems from a common law doctrine developed in late 1800s. Those cases, which set out

the so-called "government edicts doctrine," recognized that the statutes and judicial opinions that legislators and judges write should not be subject to copyright protection to ensure ready public access. But statutory annotations are not the "law" and are not among the works excluded from copyright protection under the doctrine. As the Copyright Office has routinely recognized when registering state annotated legal codes, annotations meet the constitutional test for creative authorship because they contain editorial enhancements that explain the historical scope and language of the statute and expound upon the law. Annotations are not a formulaic recital of state statutes or judicial opinions but are more akin to academic and scholarly works in other fields that contain sufficient creative expression to entitle them to copyright. There is no legal basis to hold that states should be precluded from obtaining copyright protection for their annotated codes. Of course, not everything in the annotated codes is protected by copyright. The code itself is freely available.

The fundamental purpose of copyright law as enshrined in the U.S. Constitution supports this conclusion. Affording copyright protection for statutory annotations "promote[s] the Progress of Science and useful Arts" by reinforcing the underlying value of copyright and ensuring authors receive an incentive for their creation of scholarly works that ultimately benefit the public. Under the

current system employed by most states, which has endured for the last century, states outsource their annotations to third-party publishers, which undertake the tremendous work of creating the annotations at no cost in exchange for the exclusive publication rights guaranteed by the states' copyright ownership of the annotated legal codes. As a result, both sides benefit—the states ensure distribution of thoughtful exposition of their laws to assist the public in interpreting what can often be complicated legalese, while the authors of the annotations receive a return on their creative labors.

The alternative paradigm that would flow from the Eleventh Circuit's decision, which Respondents seek to extend nationwide, would topple this system. Without the incentive of exclusive publication rights, third-party authors would not be able to offset the high overhead costs to create and maintain the annotations for states, and, as LexisNexis Group's ("Lexis") representative confirmed to the district court, would decline to take on such contracts. States would then be left in the difficult position of either paying third-party publishers a significant fee to create annotations or hiring the skilled workforce to undertake the annotations themselves; however, both options would place a significant burden on taxpayers. States could otherwise forego annotations of their laws entirely, but the public, which would be deprived of a thoughtful

understanding of the law, would certainly be worse off.

The economic reality is that states cannot afford to annotate their own laws. And while authors will be harmed by losing their incentive to create statutory annotations, the ultimate harm will fall on the public. This result is antithetical to the fundamental purpose of copyright, which as this Court has recognized, is to secure a fair return for an author's creative labor in order to stimulate further artistic creativity for the general public good. Affirmation of the Eleventh Circuit's decision would not only impede the public's access to scholarly analysis of the law but would also present a significant threat to other scholarly works. The decision cannot be viewed in a vacuum; it would certainly deal the most damage to state copyrights, invalidating hundreds, if not thousands, of copyrights in annotated legal codes, but would also endanger the protection of other scholarly works that may fall within the scope of the Court's reasoning. The Court should not support such a significant erosion of copyright law in favor of a result that would only benefit free-riders that tout public access but are merely seeking to usurp the benefits of other's creative authorship.

## ARGUMENT

### I. ANNOTATED LEGAL CODES ARE COPYRIGHTABLE WORKS OF CREATIVE AUTHORSHIP UNDER FUNDAMENTAL PRINCIPLES OF COPYRIGHT LAW

As a matter of law and policy, the Court should hold that annotated legal codes and statutes (not the law itself) are copyrightable. Under the Copyright Act, states' statutory annotations are entitled to protection as literary works. *See* 17 U.S.C. § 102 (2018). These carefully crafted creative works readily meet the constitutional test for copyrightability, *see Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991), and cannot be considered as one in the same as the "law" upon which they expound or the categories of works that are excluded from copyright under the government edicts doctrine.

The Court also should not overlook the significant policy reasons that bear in favor of copyright protection. Notably, as discussed below, extending copyright protection to annotations reinforces the value of copyright and incentivizes authors to create for the public good, by offering reliable and well-researched annotations. The Court has consistently interpreted copyright law in light of its essential purpose, reflected in the Constitution's grant of authority to Congress, "[t]o promote the Progress of Science and useful Arts." U.S. CONST.

art. I, § 8, cl. 8; *see, e.g.*, *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994); *Feist*, 499 U.S. at 349; *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 546 (1985); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 155–56 (1975); *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

### A. The Copyright Act Permits State Ownership of Copyrights.

The Copyright Act expressly states that U.S. government works—defined as "work[s] prepared by an officer or employee of the United States Government as part of that person's official duties"—are not entitled to copyright protection. 17 U.S.C. §§ 101, 105. However, the statutory exclusion on U.S. government works does not extend to works of state or local governments. *See id.* Indeed, there is nothing in the Copyright Act that prevents a state from owning or holding a copyright. *See generally* Copyright Act of 1976, 17 U.S.C. §§ 101–810.

The choice to exclude federal government works, but not state works, from copyright protection was a deliberate choice made by Congress. Congress first prohibited copyright protection in publications of the U.S. government in the Copyright Act of 1909, incorporating its earlier restriction on copyright in such publications in the Printing Act of 1895. *See* Act of March 4, 1909, ch. 320, § 7, 35 Stat. 1075, 1077 (1909); Printing Law of 1895, ch. 23, § 52, 28

Stat. 601, 608 (1895). During preliminary considerations of the 1909 Act, Congress explicitly rejected a suggestion to extend the prohibition to state publications. *See Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law*, 87th Cong., 1st Sess. 130 (July 1961) (hereinafter *Register's Report*). At the time, many states did not have the ability to self-publish but instead contracted with private publishers, which printed and published state publications at their own expense, in exchange for copyright protection. *See id.* As a result, Congress declined to upset this balanced system.

During the copyright law revision in the 1960s and 1970s, Congress again considered the prohibition on U.S. government publications. The Senate Committee on the Judiciary reviewed studies from the Copyright Office, including one on copyright in government publications. *See* Caruthers Berger, U.S. Copyright Office, *Copyright in Government Publications*, Study No. 33 (Oct. 1959), *in Copyright Law Revision: Studies Prepared for the Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary*, 86th Cong., 2d Sess. 27–42 (Comm. Print 1961) (hereinafter *Copyright Law Revision Study*). In that study, the Copyright Office noted that the common law rulings before 1895, which denied copyright protection in the text of statutes, court decisions, and official rulings, still applied to the states, but pointed

out how widespread state ownership of copyrights had become. *See id.* at 36 ("A survey by the Copyright Office shows that during the 5-year period 1950 through 1954, about 4,700 copyright claims were registered in the name of a State or a State agency or in the name of an official on behalf of a State. Included are registrations by or for 47 States, ranging from one to 484 registrations for an individual State during that period.").

By 1960, almost every state (or state agency) had registered a copyright, and many states had enacted statutes to secure copyright protection in certain publications. *See id.* The Copyright Office cited states' relationships with private publishers as the principal motivation for securing copyright in such publications. *See id.* Thus, it seems the economy of states outsourcing their publications to private publishers in exchange for copyright protection had remained unchanged. As such, the Copyright Office found "no compelling reason . . . to withdraw from the States the privilege they have exercised for many years of securing copyright in some of their publications" (*id.*), and the Register ultimately recommended that the general prohibition against copyright in U.S. government publications should be retained, with the term "publication" being defined to include "published works" produced for the federal government. *Register's Report*, *supra*, at 133.

In the 1976 Copyright Revision Act, Congress again permitted state works to be eligible for copyright protection. *See* Copyright Act of 1976, 17 U.S.C. § 105. As noted in the House and Senate Reports on the revision, Congress maintained the same basic premise from the 1909 Act in section 105, refashioning the prohibition to apply to "any work of the United States Government" rather than publications. H. R. Rep. 94-1476, at 58–59, *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5671–73 (1976); S. Rep. No. 94-473, at 56 (1975). For policy reasons, Congress also included specific exceptions to this rule that the U.S. government cannot own copyrights.[2] *See* H. R. Rep. 94-1476, at 60; S. Rep. No. 94-473, at 56–57. However, neither report, which discussed the applicable scope of the prohibition, mentioned state works or state copyrights. *See* H. R. Rep. 94-1476, at 58–59; S. Rep. No. 94-473, at 56–57. As the law stands today, states are not precluded from obtaining copyright protection for their works (and may elect not to do so). There is no legal basis to hold otherwise.

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[2] For example, Congress included a limited exception for National Technical Information Service ("NTIS") works, allowing the Secretary of Commerce to secure copyright on behalf of the United States in NTIS publications. *See* H. R. Rep. 94-1476, at 60. Congress also restricted the scope of section 105 so that it would not apply to works created by employees of the U.S. Postal Service, in line with the objectives of the Postal Reorganization Act of 1970. *See* H. R. Rep. 94-1476, at 60; S. Rep. No. 94-473, at 56–57.

### B. Annotations Are Creative Expression But Are Not Themselves "Law."

As Congress never extended the prohibition on U.S. government works to the states, the only limitation on states registering works derives not from the Copyright Act, but from the judge-made government edicts doctrine,[3] which was last addressed by this Court in 1888. *See Banks v. Manchester*, 128 U.S. 244 (1888); *Callaghan v. Myers*, 128 U.S. 617 (1888). While the Copyright Office recognizes the application of the government edicts doctrine, *see* U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices* §§ 313.6(C)(2), 717.1 (3d ed. 2017) (hereinafter *Compendium*), it has repeatedly taken the position that annotated codes do not constitute government edicts when registering annotated legal codes submitted by the states. For example, the Copyright Office has registered at least 254 iterations, supplements, and sections of the Official Code of Georgia Annotated ("OCGA").[4] At least 21 other states, two territories (Puerto Rico and the Virgin Island), and the District of Columbia have also registered their official annotated codes. *See* Brief of the State of Arkansas *et al.* as *Amicus Curie* in

[3] The Copyright Alliance defers to Petitioners' brief for its discussion of the application of this doctrine and why statutory annotations do not have the force of law.

[4] This data is available through the Copyright Office's public online catalog.

Support of Petitioners at 4 & n.2 (hereinafter States' Brief) (citing the registration numbers). Thus, following the express provisions of the Copyright Act, the Copyright Office regularly registers annotated codes "provided that the publication contains a sufficient amount of literary expression." *Compendium* § 717.1.

These requirements are clearly met in the case of the OCGA, just as they are met for other states' annotated codes registered by the Copyright Office, whose legitimacy is threatened by this case. As the Court recognized in *Feist*, to qualify for copyright protection a work must meet the constitutional requirement of originality, *i.e.*, the work must be independently created by an author, and must possess at least some minimal degree of creativity. 499 U.S. at 345. This level of creativity required is of course extremely low, as "even a slight amount will suffice." *Id.*

Statutory annotations easily meet the minimum threshold and are akin to scholarly works in other academic and scientific fields that contain copyrightable expression. *See* Shellea Diane Crochet, *Official Code, Locked Down: An Analysis of Copyright As It Applies to Annotations of State Official Codes*, 24 J. Intell. Prop. L. 131, 141 (2016) (arguing "annotations undoubtedly reach the minimal creativity standard of copyright protection under *Feist*"). Georgia's annotated legal code, like

those of other states, is not a formulaic recital of the state statutes; the annotations include notes explaining the historical scope and language of the statute, summaries of relevant judicial decisions, and other editorial enhancements. *See* Brief for Matthew Bender & Co., Inc. as *Amicus Curiae* in Support of Petitioners at 7–9 (hereinafter MB Brief); Nancy P. Johnson & Nancy Adams Deel, *Researching Georgia Law (1998 Edition)*, 14 Ga. St. U. L. Rev. 545, 550 (1998) (noting that the OCGA contains "various editorial enhancements" including references to the opinions of the Georgia Attorney General, Georgia's law reviews and bar journals, and legal encyclopedias).

The creation of annotations requires knowledge, skill, and judgment, as well as professional writing ability. Attorneys must read countless case law opinions, analyze the material for relevance to the understanding of the provision, and make careful determinations about what is and is not noteworthy. *See* MB Brief at 7–9. As evident from this arduous process that requires the cognition of a learned practitioner, annotations are far more than regurgitations of concededly unprotected statutory text or judicial opinions. They represent a careful analysis of the statutory text, how it applies, and its limitations. They are the product of the annotators' judgment and creative authorship. Statutory annotations handily meet the constitutional requirement for copyrightability and are clearly

distinguishable from the category of non-copyrightable subject matter considered by the Court in its pre-1900 rulings.

### C. Extending Copyright Protection to Statutory Annotations Furthers the Goals of Copyright Law.

The Court should find that statutory annotations are entitled to copyright protection (which can be enforced by state actors) in light of copyright law's essential purpose, reflected in the Constitution's grant of authority to Congress, "[t]o promote the Progress of Science and useful Arts." U.S. CONST. art. I, § 8, cl. 8. In examining copyright laws, the Court has often recognized the importance of interpreting the law in line with the underlying goals of copyright law. *See, e.g.*, *Kirtsaeng v. John Wiley & Sons, Inc.*, 136 S. Ct. 1979, 1986–87 (2016); *Fogerty*, 510 U.S. at 526–27; *Feist*, 499 U.S. at 349–50; *Sony Corp.*, 464 U.S. at 428–29; *Twentieth Century*, 422 U.S. at 155–56. These objectives are better served by extending copyright protection to statutory annotations because doing so reinforces the value of copyright and incentivizes authors to create timely and reliable scholarly works for the public good.

### 1. Copyright Protection for Statutory Annotations Reinforces the Value of Copyright.

Protecting annotations promotes the underlying goals of copyright law by reinforcing the value of copyright in scholarly works that inform the public. Annotations do not only serve to supplement statutes, they also expand on the public's understanding of the law. *See* Robert W. Kerns, Jr., *The History of the West Virginia Code*, 120 W. Va. L. Rev. 165, 176 (2017) (explaining that annotations play an important part in understanding statutes because "it is unsafe for a practitioner to give any opinion as to the effect of a statute without knowing what the courts have said concerning it"). By allowing annotations to be protected by copyright, the law is confirming copyright's valuable role in encouraging such scholarly works and, in turn, endorsing the significant value inherent in these works, which help the public understand and evaluate complex issues of legal interpretation and application.

Denying copyright protection to annotations would create a slippery slope. A determination by this Court that annotations are not protectable could invite later decisions that scholarly works and other non-fiction works, which similarly draw upon material in the public domain, but add insights relevant to the subject matter, are likewise not

entitled to copyright protection. Take biographies that rely heavily on historical information, for example. Extending the Eleventh Circuit's line of reasoning that such writings are inherently works of the people, would deprive writings by academic historians such Ron Chernow and T.J. Stiles from copyright protection. Simply because these carefully crafted and meticulously researched works recount history should not rob them of protection under copyright law, just as the mere fact that annotations build upon the law—legislatively authored statutes, which all agree are not protected by copyright—should not deny such works protection in their own independent creative expression.

An affirmation of the Eleventh Circuit's decision would constitute a step toward devaluing scholarly writings in general, resulting in a nationwide erosion of copyright law in this important sector. Such an outcome is antithetical to the underlying policies of the Copyright Act, which are best served by allowing the development and sharing of works of authorship, based on carefully conducted research that informs the public. *See Fogerty*, 510 U.S. at 527 ("[C]opyright law ultimately serves the purpose of enriching the general public through access to creative works…."); *Twentieth Century*, 422 U.S. at 155–56 (stating that the ultimate aim of our copyright law is to stimulate artistic creativity for the general public good).

### 2. Copyright Protection for Statutory Annotations Incentivizes Authors to Create Works for the Public Good.

Protecting annotations also promotes copyright law's fundamental policies because it enables authors who annotate statutory codes to be properly compensated for their work and encourages the spread of knowledge so that the ultimate benefit inures to the public. Like Georgia, at least 22 other states contract with a third-party publisher like Lexis to publish official state codes. *See Statutory Editorial Proces*s, LexisNexis, http://www.lexisnexis.com/documents/pdf/20170303045425_large.pdf (last visited Aug. 14, 2019). Under such contracts, third-party publishers create, update, and maintain annotations of state statutes, while the state holds the copyright in the annotated code as a work for hire. *See* MB Brief at 6–7.[5] This process requires a "tremendous amount of work" and entails a high amount of overhead, so professional publishers like Lexis, which have a skilled workforce and wealth of resources, are better-suited than states to handle the workload. *Id.* at 7–9, 14. To offset the overhead costs of creating the annotations, publishers receive the exclusive publication rights.

[5] States have also reached different arrangements with publishers, whereby the state shares the copyright with the publisher. *See* Nat'l Conference of State Legislatures, *State Statutes/Code: Holder of Copyright* (2011), available at http://www.ncsl.org/documents/lsss/Copyright_Statutes.pdf.

*Id.* at 13. In return for the future licensing fees, publishers do not charge any fee to create the annotations. *See id.* at 13–14.

Under this model, which has been adopted by many states, both parties benefit: the state holds the copyright and is able to provide full versions of its laws, including thorough and timely analysis, to the public, while the publisher receives exclusive publication rights, and is therefore able to earn fair compensation for its work in the form of licenses and sales of hard copy editions. Incentivizing third parties like Lexis to annotate the law with the promise of copyright protection thus furthers copyright's ultimate aim to serve the public good by allowing states to provide their citizens with useful knowledge to expand their understanding of the law, and to do so at a minimal cost. *Twentieth Century*, 422 U.S. at 155–56 ("The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good."); *Mazer*, 347 U.S. at 219 ("[T]he economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors").

Absent such beneficial contracts, the financial burden of creating annotations would likely be foisted on unsuspecting taxpayers, who would either have to pay more for this service or have their current tax funds diverted. Both states and the public are better served by permitting the current system, which has endured for decades, to carry on.

Contrary to the arguments made by *amici* for Respondents during the certiorari stage that the current model limits public access, Georgia's agreement with Lexis requires it to publish the code's unannotated statutory text online free of charge, and the CD version (with annotations) is also available free of charge at libraries and universities. *See* Petition for a Writ of Certiorari at 10 (hereinafter Pet.). The agreement also institutes price controls for a full printed set of the official code, making the hard copies available for sale at a fraction of the cost that competitors charge. *See id.* For example, West charges $2,750 for its annotated version of the Georgia code, as compared to the $404 Lexis charges under the price cap. *See id.* Without copyright protection, states would not be able to impose such price controls or offer easy access to the law. As Lexis publisher Matthew Bender & Co., Inc. warned in its certiorari *amicus* brief, the commercial value of its statutory annotations would be destroyed in such a scenario. *See* MB Brief at 11–12.

In light of the purposes of the Copyright Act, the Court should confirm that annotated legal codes are expressive works entitled to copyright protection by states.

## II. THE ELEVENTH CIRCUIT'S DECISION THREATENS TO UPEND THE CURRENT SYSTEM FOR CREATING STATUTORY ANNOTATIONS

Affirming the Court of Appeals' extension of the government edicts doctrine to statutory annotations would have serious adverse consequences.

### A. Affirming the Eleventh Circuit Would Force States to Seek More Expensive Alternatives to Create Statutory Annotations That Help the Public Understand the Law.

As discussed above, under the current system, many states outsource their annotations to third-party contractors, like Lexis and West, that have the skilled workforce and resources to review and judiciously interpret state legal codes. This system dates back to the late 1800s, when states did not have their own publishers and, for economic reasons, engaged third parties to publish their works in exchange for copyright protection. *See Register's Report*, *supra*, at 130. States, publishers, and the public have benefited from these relationships, many of which have endured for the last century.

Respondents' request that this Court uphold the Eleventh Circuit's decision and extend the government edicts doctrine to states' annotated legal codes nationwide would topple a long-standing system that benefits the public. If Respondents prevail, neither the states nor the third-party publishers would receive the benefit of copyright protection and the right to exploit state statutory annotations. Absent such incentives, publishers would likely decline to take on annotation projects, as the work would provide no reasonable prospect of recovering costs, much less making a profit. Lexis' representative confirmed this assessment in his affidavit submitted to the district court. *See* Pet. at 23 (citing affidavit of Anders Ganten, in which he stated that Lexis "would lose all incentive to remain in [its] Contract [with Georgia] or create the Annotations"). As a result, such annotation projects would be left to the states to handle themselves.

Respondents overlook the consequences of this result, assuming that the states could simply create the annotations with their own staff or pay Lexis to do so directly. Brief in Opposition at 18 (hereinafter Opp.). But the creation of annotations is not so easy or straightforward. Most states do not have the ability or applicable resources to undertake such large annotation projects themselves nor do they have the funds to pay the high fees a third-party publisher would presumably charge to create annotations that would immediately become part of

the public domain. Indeed, under Georgia's current contract with Lexis, the publisher does not charge a fee for annotations. *See* MB Brief at 13–14. Consequently, states may be unable to deliver annotations of their laws for the benefit of the public.

Pennsylvania's model provides an apt example. Currently, Pennsylvania does not contract with a third-party publisher to annotate or publish its legal codes, but instead uses a state government entity to publish its laws. *See* Leslie A. Street & David R. Hansen, *Who Owns the Law? How to Restore Public Ownership of Legal Publication*, 26 J. Intell. Prop. L. 206, 213 (2019). As a result, Pennsylvania does not offer an official *annotated* version of its statutes.[6] The only annotations of such statutes are available (for a price) through Westlaw,[7] which publishes Purdon's Pennsylvania Statutes, the unofficial commercial codification of the state's statutes. *See* Univ. of Pittsburgh Sch. of Law, *Pennsylvania Research: Primary Sources – Legislative and*

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[6] *See generally Consolidated Statutes*, Pa. Gen. Assembly, https://www.legis.state.pa.us/cfdocs/legis/LI/Public/cons_index.cfm (last visited Aug. 14, 2019).

[7] The publisher charges $13,508 for a full hard copy set of the annotated statutes. *See Purdon's Pennsylvania Statutes and Consolidated Statutes Annotated (Annotated Statute & Code Series)*, Thompson Reuters, https://store.legal.thomsonreuters.com/law-products/Statutes/Purdons-Pennsylvania-Statutes-and-Consolidated-Statutes-Annotated-Annotated-Statute--Code-Series/p/100028601 (last visited Aug. 19, 2019).

*Administrative Materials*, PittLaw, https://www.law.pitt.edu/pennsylvania-research-primary-sources-legislative-and-administrative-materials (last visited Aug. 14, 2019).

Aside from the lack of official, publicly available annotations, and the costs associated with purchasing unofficial annotations, an even bigger issue stems from Pennsylvania's choice to buck the system and leave its statutory publication to a state entity: significant time delay. *See id.* In the case of Pennsylvania, in 1970, the General Assembly decided to consolidate the state's statutes in an official codification. *See* Pennsylvania Consolidated Statutes, P.L. 707, No. 230 (1970). Previously, researchers would have had to review the state's session laws and consult Westlaw's commercial codification with any questions. *See* Univ. of Pittsburgh Sch. of Law, *supra*. Without that available resource, more than thirty years later, Pennsylvania's state publisher has yet to complete this task. *See id.* On the legislature's website, the state offers the text of its currently consolidated statutes, as well as the unconsolidated statutes. *See Statutes of Pennsylvania and the Constitution of Pennsylvania*, Pa. Gen. Assembly, https://www.legis.state.pa.us/cfdocs/legis/LI/Public/index.cfm (last visited Aug. 14, 2019). However, anyone looking for a full annotated version of Pennsylvania's statutes must still consult the unofficial commercial codification, for a price.

As the University of Pittsburgh School of Law warns, the use of an unofficial codification is not without other shortcomings, including a lack of a consistent organizational scheme. For instance, the current version of Purdon's is a hybrid reflecting two different structures—the new titles created for Pennsylvania's Consolidated Statutes, which is still under development, and the original Purdon's arrangement. *See* Univ. of Pittsburgh Sch. of Law, *supra* ("In several instances there are two different groups of statutes sharing the same title number, one is consolidated while the other is from the original Purdon's scheme. This situation arises when the State publishes a consolidated title but [has not] done anything with the material occupying the same title number in the Purdon's scheme."); *see also* Electronic Resources Librarian, *Where Can I Find the Official Statutory Code for Pennsylvania*, Penn. Law (May 24, 2016), http://law-upenn.libanswers.com/faq/31582. Thus, even with the assistance of the unofficial commercial codification, effectively conveying Pennsylvania's statutes for easy public comprehension is still a difficult endeavor.

While Respondents may favor this system, it does not serve either the state or the public for a state like Pennsylvania to have no publicly available annotations and an incomplete unofficial codification of its laws. Pennsylvania serves as a cautionary example of how the statutory publishing and

annotations system could devolve if states were forced to shoulder the weight of developing their own official codes and annotations. Such a model would ultimately be detrimental to the public, which would lack timely, easy, and affordable access to the law and scholarly discussions of it. Scholars and lawyers who rely heavily on annotations would be forced to pay high prices to private publishers (in cases where states opted not to pass along the cost to taxpayers), who may not have the same reach or may only choose to annotate codes for certain states. The use of expensive commercial publishers to conduct basic research, or confirm interpretations of the law, would become a necessity, even though the average individual—let alone the indigent *pro se* party or incarcerated litigant—would likely not be able to afford the cost. As a result, the public would be unable to confidently access a basic, updated version of state laws and related commentary.

Alternatively, Respondents propose that, in the absence of copyright protection, states could still pay commercial publishers to create annotations. Opp. at 18. However, as noted above, this position assumes that state treasuries have enough disposable funds to pay the high cost that would be charged by commercial publishers. Without the incentive of exclusive publication rights, third-party publishers would likely charge a higher price to undertake the arduous project of creating and updating annotations (for which they are not paid

directly when a licensing model is employed). Indeed, as noted above, under Georgia's current contract, Lexis does not charge any fee to create the annotations because it is able to offset the high overhead costs of creating and maintaining annotations by licensing the work in the future. *See* MB Brief at 13–14. Absent the incentive of copyright protection, states would have no leverage to negotiate lower prices or impose price controls on commercial publishers, which would instead charge market rates. Creators of annotations would also have to recover the high costs of creation on the first sale or license.

Moreover, under this model, states would not be able to recoup their costs by exploiting their copyrights and receiving royalty payments from third-party publishers. Unless states have reserve budgets that are able to cover this typically unexpected cost, the burden would ultimately fall to taxpayers, who would be forced to pay more in taxes to secure full access to high-quality, reliable exposition of the law. States could otherwise choose to divert funds that are already ear-marked for other programs or services, but this option, too, would hurt taxpayers who rely on such programs.

At the end of the day, under either the privately funded or state-funded scenario, it is the public that will bear the brunt of the harm, if this Court decides to adopt the Eleventh Circuit's decision.

### B. Affirming the Eleventh Circuit Would Have Widespread Adverse Effects on the Creation of States' Annotated Statutes and Codes.

In addition to upending the current relationship between states and publishers over statutory annotations, the Eleventh Circuit's decision presents a serious threat to hundreds, if not thousands, of state-owned copyrights of statutory annotations. Notably, Respondents did not contest Petitioners' petition for a writ of certiorari, likely because they want the Court to agree with the Eleventh Circuit's decision and apply its reasoning nationwide. If affirmed, the appellate decision certainly would, as it would not only invalidate the current OCGA (and past versions) but would also effectively nullify the copyrights of annotated codes and statutes of all other states that have registered.

This change would materially alter the landscape of state-owned copyrights. To estimate the scale of the effects, a review of the Copyright Office catalog is helpful. Using the state of Georgia as an example, the Copyright Office's catalog shows that the state holds copyrights in 254 iterations, supplements, and sections of the OCGA. The Court's affirmance of the Eleventh Circuit's decision would effectively wipe out these 254 copyrights—and that is just for the state of Georgia.

At least 21 other states, two territories (Puerto Rico and the Virgin Island), and the District of Columbia have registered their official annotated codes. *See* States' Brief at 4 & n.2 (citing the registration numbers); *see also* American Bar Association, *Section of Patent, Trademark & Copyright Law, Committee Report* 224 (1989) (identifying 28 states that claim copyright in some or all parts of their state statutes). As with the OCGA, these other *official* codes, which include annotations, would also be invalidated under the Eleventh Circuit's reasoning. While prior versions of such codes may no longer be operative, copyrights in these publications would likely also be voided. Depending on the scope of the Court's decision, other state copyrights may also be affected by the sweeping change.

With a nationwide extension of the Eleventh Circuit's decision, a substantial number of copyrights, which states have held for decades, would be invalidated. Official codes containing annotations would thus fall into the public domain, which would only benefit the public for a short time, until new laws are passed, and new court decisions are published. Any future publications would not receive any copyright protection and therefore would no longer hold value. This result would not serve the public interest in access to knowledge and information but would only serve to ring the death knell for the current annotations system and deprive

states of a long-held right and the public of a long-provided benefit. The basic policy underpinnings of the Copyright Act would be severely undermined if such a domino effect is permitted to take place.

## CONCLUSION

The decision of the Ninth Circuit should be reversed.

Respectfully submitted.

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