No. 18-1150

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

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Respondent PRO, petitioners, and a diverse array of *amici* (including eight states) agree: This case presents an "excellent vehicle" in an "ideal" procedural posture to address the "confusion and perceived inconsistency among the lower courts" regarding the scope of the "judge-made common law doctrine[]" that government edicts are ineligible for copyright protection—an issue of unquestioned "significance." Br. in Opp. ("BIO") 1, 13-14, 28. As PRO acknowledges, this Court's review is "sorely needed." *Id.* at 9.

Despite acquiescing in petitioners' request for review, PRO fruitlessly labors to distinguish this case from others in the circuit split. PRO's hairsplitting efforts to draw factual distinctions ignore the reasoning underlying the courts of appeals' decisions and provide no basis for reconciling them with the Eleventh Circuit's decision here. Indeed, PRO ultimately concedes that "the courts of appeals diverge in their approaches to applying the government edicts doctrine." BIO 14. The result: "case law is confusing and outcomes are difficult to predict." *Id.* at 9.

Such disagreement among the courts of appeals is "particularly troublesome in the realm of copyright." *Silvers* v. *Sony Pictures Entm't, Inc.*, 402 F.3d 881, 890 (9th Cir. 2005) (en banc); see also *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U.S. 225, 231 n.7 (1964) (noting "[t]he purpose of Congress to have national uniformity in * * * copyright laws"). Given "Congress' paramount goal * * * of enhancing predictability and certainty of copyright ownership," *Community for Creative Non-*

Violence v. *Reid*, 490 U.S. 730, 749 (1989), "it is peculiarly important that the boundaries of copyright law be demarcated as clearly as possible," *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517, 527 (1994); see also Software & Info. Indus. Ass'n ("SIIA") Amicus Br. 4-6. As the numerous briefs before this Court demonstrate, there is a widespread consensus that this Court's nineteenth-century case law on the government edicts doctrine has generated "uncertainty" regarding the scope of copyright protection, "ma[king] it difficult * * * to know [one's] rights and obligations." BIO 1, 10. The doctrine has proven "difficult to apply" where, as here, "a work does not fall neatly into a category, like statutes or judicial opinions, already held to be" uncopyrightable. *Id.* at 9; accord *id.* at 1 ("lower courts have struggled").

As even respondent and its *amici* urge, this Court should grant review to resolve that confusion. And it should reverse the Eleventh Circuit's "very wrong" decision. 1 Alexander Lindey & Michael Landau, *Lindey on Entertainment, Publishing and the Arts* § 1:5.30 cmt. (3d ed. 2019).

A. The Split Is Real

PRO's suggestion that "there is no square circuit split" (BIO 1) would come as a surprise to the Eleventh Circuit, which recognized that while some courts of appeals have "extended" the government edicts doctrine, others "have declined to extend the rule in other, related contexts." Pet. App. 17a. PRO's *amici* similarly acknowledge "division among the circuits" on the question presented. R St. Inst. Amicus Br. 5. And PRO's labored, nine-page discussion of the split makes clear that its purported distinction between a "square

circuit split" and one that "might as well" exist (BIO 1) rests on little more than identifying factual differences among cases that lack legal or practical relevance. Even PRO cannot deny that "the courts of appeals diverge in their approaches to applying the government edicts doctrine, sufficient to justify review in this Court." *Id.* at 14-15. PRO also admits that the "confusion and perceived inconsistency among the lower courts has made it difficult * * * to know [one's] rights and obligations." *Id.* at 1. "[T]his Court's intervention is * * * sorely needed" (*id.* at 9) to restore the certainty and national uniformity required for copyright law to achieve its constitutionally rooted objective of promoting "the proliferation of knowledge," *Eldred* v. *Ashcroft*, 537 U.S. 186, 212 n.18 (2003) (citation omitted); see also pp. 1-2, *supra*.[1]

In any event, PRO's efforts to minimize the split and cast doubt on whether "any court of appeals would decide this case differently" (BIO 14-15) are meritless. PRO's treatment of Justice Harlan's opinion in *Howell* v. *Miller*, 91 F. 129 (6th Cir. 1898), exemplifies its futile parsing of the circuit split. PRO contends the OCGA and the annotated code book in *Howell* "are not similar in the relevant sense" because "Howell did not

[1] Because the fair-use defense presupposes the existence of a "copyrighted work," 17 U.S.C. § 107, the potential availability of fair-use defenses in appropriate cases (see BIO 22-23) does not militate against granting review to resolve the disagreement among courts of appeals on the threshold question of the scope of the government edicts doctrine's rule of copyright *ineligibility*. See Pet. 35 n.11. Furthermore, there is no basis for PRO's contention that its online publication of the *entirety* of 186 OCGA volumes and supplements constitutes fair use. See Pet. App. 8a-9a, 65a-72a.

publish his annotations under the authority of the state." BIO 20. But the state did not merely "assign[] some evidentiary effect to [Howell's] volumes." *Ibid.* The legislature provided that Howell's annotated code book "shall be received and admitted * * * as evidence of the existing laws * * * *with the like effect as if published under and by the authority of the State*." 1883 Mich. Pub. Acts 8 (emphasis added). PRO identifies nothing in copyright law that could reconcile (1) the Sixth Circuit's recognition of copyright protection for annotations in a code book that state law mandated be treated "with the like effect as if published under and by the authority of the State," see *Howell*, 91 F. at 138, and (2) the Eleventh Circuit's denial of copyright protection for annotations produced by a private publisher under a work-made-for-hire agreement with the state.

In discussing other cases, PRO similarly invokes factual distinctions, but never meaningfully explains their legal significance. PRO points to nothing in the Copyright Act or this Court's precedents that would grant copyright protection to government-created maps that "clarified county residents' duty to pay property tax,"[2] while withholding it from annotations that merely provide references for researchers. Nor does PRO identify any copyright-law principle that would justify according Georgia's annotations less protection than a work approved by state regulators

[2] BIO 16 (discussing *County of Suffolk* v. *First Am. Real Estate Sols.*, 261 F.3d 179 (2d Cir. 2001)).

"as a legal standard for [insurance] valuation,"[3] or a medical coding system a government agency *requires* to be used in reimbursement applications.[4]

PRO is also wrong in suggesting (BIO 17) that the Fifth Circuit in *Veeck* v. *Southern Building Code Congress International, Inc.*, 293 F.3d 791 (2002) (en banc), did not depart from the Second and Ninth Circuits' analytic framework for identifying uncopyrightable government edicts. The Second and Ninth Circuits interpret *Banks* v. *Manchester*, 128 U.S. 244 (1888), as instructing courts to consider incentives for authorship and the need for public notice of the law. See *County of Suffolk*, 261 F.3d at 193-194; *Practice Mgmt.*, 121 F.3d at 518-519. *Veeck*, however, "reject[ed]" such a "bifurcated * * * interpretation of *Banks*" and expressly disagreed with *County of Suffolk* and *Practice Management*, which the *Veeck* majority believed had wrongly "identified the consideration of authorship incentives as a 'holding' of *Banks*." *Veeck*, 293 F.3d at 796-800; see also *id.* at 814 & n.19 (Wiener, J., dissenting) (majority's analysis "inconsistent" with *County of Suffolk* and *Practice Management*); U.S. Amicus Br. at 12, *Southern Bldg. Code Cong. Int'l, Inc.* v. *Veeck*, 539 U.S. 969 (2003) (mem.) (No. 02-355) (*Veeck* U.S. Br.) ("some of the reasoning in [*Practice Management*] differs" from *Veeck*). Instead, *Veeck* calls for a bright-line inquiry

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[3] BIO 20-21 (quoting *CCC Info. Servs., Inc.* v. *Maclean Hunter Mkt. Reports, Inc.*, 44 F.3d 61, 74 (2d Cir. 1994) (emphasis omitted)).

[4] See BIO 21-22 (discussing *Practice Mgmt. Info. Corp.* v. *Am. Med. Ass'n*, 121 F.3d 516 (1997), amended, 133 F.3d 1140 (9th Cir. 1998)).

into whether a work is "obligatory in law." *Veeck*, 293 F.3d at 805.

In addition to being wrong, PRO's attempted muddling of the disagreement between the Fifth Circuit and the Second and Ninth Circuits provides no basis for denying review. PRO concedes (BIO 15) that no other court of appeals has employed the analytic framework the Eleventh Circuit adopted here, which considers "the *identity* of the public officials who created the work, the *authoritativeness* of the work, and the *process* by which the work was created." Pet. App. 3a-4a. Based on those factors, the Eleventh Circuit concluded that the OCGA's annotations were "sufficiently law-like" to be "attributable to the constructive authorship of the People," and thus uncopyrightable. *Id.* at 24a-26a.

As petitioners have explained, Georgia would prevail under any other circuit's approach. Pet. 22-24. If, as *Veeck* concluded, the relevant inquiry is simply whether the work at issue constitutes "the law," 293 F.3d at 800, Georgia's annotations are copyrightable because it is undisputed that they do "not hav[e] the force of law," Pet. App. 26a; cf. *Veeck*, 293 F.3d at 806 (suggesting annotations to model code are copyrightable, even if model code has been "enacted into law").[5] To the extent economic incentives are

[5] PRO erroneously suggests the annotations here "comprehensively govern a very broad range of primary conduct" and "expressly regulate an entire area of private endeavor." BIO 19 (quoting *Veeck* U.S. Br. 11); accord *id.* at 21-22. To the contrary: the annotations do not "govern" or "regulate" *anything*. PRO elsewhere acknowledges "the annotations do not carry the force of law." *Id.* at 6; see also PRO C.A. Br. 21 ("No one disputes that the

relevant, PRO does not dispute that the absence of copyright protection would remove Lexis's incentive to continue its current contract with Georgia, which allows the state to provide its citizens with a reasonably priced annotated code at minimal cost to taxpayers. See BIO 17-18.[6] As for notice concerns, it is undisputed that Georgia's unannotated statutes—the actual *law*—are available online, and the OCGA is publicly available at over 60 sites throughout Georgia. Pet. App. 7a-8a.

B. The "Very Wrong" Decision Below Demands Review

Because they cannot prevail on the actual question presented here, PRO and some of its *amici* try to change the subject. But the question is not, as some PRO *amici* claim, whether "the law can be copyrighted." Next-Generation Legal Research Platforms Amicus Br. 6 (Next-Generation Amicus Br.). Nor is it, as PRO contends, "whether Georgia's only official code is an edict of government that cannot be copyrighted, because the law belongs to the People." BIO 1. As the Eleventh Circuit and PRO acknowledge, see Pet. App. 8a; BIO 6, 13, Georgia does not claim

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General Assembly does not individually enact the annotations as laws."). PRO is also wrong in asserting that an annotation of a vacated federal district court decision accompanying OCGA § 1-1-1 is "labeled as Code Commission Guidance." BIO 7; cf. Appellant's C.A. App. 90 (annotation lacks label).

[6] Although it is costless for a California corporation like PRO to urge Georgia to "ensure the publication of the OCGA by creating it using its own staff or by paying Lexis," BIO 18, that approach would require diverting scarce state resources from other priorities or increasing taxes on Georgia residents.

copyright in the actual law—the OCGA's statutory text. Through its contract with Lexis, Georgia makes its statutes freely available online. Pet. App. 7a. That website is text searchable and includes statutory text, numbering, and captions, as well as history lines explaining when statutes were enacted and revised. Anders Ganten Aff. ¶¶ 8-9 (June 27, 2016), ECF No. 38-1. If PRO or others are dissatisfied with Lexis's free website, they can republish the OCGA's statutory text in whatever format they see fit. Indeed, PRO could take pages from bound OCGA volumes, redact substantive information beyond the statutory text and numbering, and then publish those redacted pages online.

Instead, PRO has published *the entirety* of 186 OCGA volumes and supplements, including annotations that all agree are not the law, and in which Georgia claims copyright. Properly stated, the question presented here is thus whether the government edicts doctrine's rule of copyright ineligibility extends to works that, like the OCGA's annotations, lack the force of law. Pet. I.

PRO offers little in defense of the merits of the Eleventh Circuit's "very wrong" decision. 1 Lindey & Landau § 1:5.30 cmt. While petitioners have explained how a straightforward application of the Copyright Act's plain text establishes the copyrightability of the OCGA's annotations, Pet. 24-25, PRO makes no meaningful effort to ground the Eleventh Circuit's decision in the Act's text, instead effectively conceding it relied on "judge-made common law," BIO 28. PRO also does not dispute that the decision below conflicts with well-established

Copyright Office guidance, which supports the copyrightability of Georgia's annotations.[7] See U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices* §§ 313.6(C)(2), 717.1 (3d ed. 2017).

As for PRO's discussion of this Court's precedents, see BIO 23-27, PRO never identifies any copyright-law principle that would explain why the *official, government-paid* reporters in *Wheaton* v. *Peters*, 33 U.S. 591 (1834), and *Callaghan* v. *Myers*, 128 U.S. 617 (1888), could hold copyrights in their annotations of judicial opinions, but Georgia cannot hold a copyright in the OCGA's annotations (including annotations summarizing judicial decisions). See *Callaghan*, 128 U.S. at 646-650 (discussing *Wheaton* and *Callaghan* reporters' compensation); see also SIIA Amicus Br. 11 (comparing *Callaghan* headnotes with OCGA annotations). Indeed, the very Copyright-Office-sponsored study PRO cites (BIO 29-30) explains that nineteenth-century case law held that while "laws, court decisions, governmental rules, etc., [were] not subject to copyright," "other material prepared for State Governments by their employees," including "annotations," were "copyrightable on behalf of the

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[7] Although PRO asserts that "Petitioners' applications to register copyright" in "recent [OCGA] editions" have "languished," BIO 29, the Copyright Office has registered copyrights in the OCGA's 2016 and 2017 cumulative supplements. Registration Nos. TX0008253115 (Aug. 9, 2016), TX0008520098 (Aug. 4, 2017).

Given the Copyright Office's well-established guidance supporting the copyrightability of annotations like Georgia's, and the universal agreement among the diverse assortment of parties and *amici* here that the Court should grant review, there is no need to invite the Solicitor General to file a brief expressing the government's views.

States." Copyright Law Revision: Studies Prepared for the Subcomm. on Patents, Trademarks, and Copyrights of the S. Comm. on the Judiciary, Study No. 33, at 28-29, 86th Cong., 2d Sess. (1961). The study concluded that "no compelling reason" existed "to withdraw from the States the privilege they have exercised for many years of securing copyright in some of their publications," and noted that copyright protection made possible the very type of arrangement Georgia has with Lexis—i.e., "giv[ing] exclusive rights to a private publisher to induce [it] to print and publish * * * material[s] at [its] own expense." *Id.* at 36.

PRO's and its *amici*'s merits arguments only highlight the current "confusion" over the government edicts doctrine. BIO 1. Is the doctrine founded on "the First Amendment" (R St. Inst. Amicus Br. 9), "Due Process" (BIO 34), "the Rule of Law" (*ibid.*), "the concept of popular sovereignty" (Pet. App. 35a), "the nature of law in a democratic society" (*id.* at 19a), or—as one might expect in a copyright case, see Pet. 3—the Copyright Act's text? No one seems to know for sure. See Pet. App. 12a (government edicts doctrine's "foundations * * * are far from clear"); cf. *American Soc'y for Testing & Materials* v. *Public.Resource.Org, Inc.*, 896 F.3d 437, 458-459 (D.C. Cir. 2018) (Katsas, J., concurring) (discussing "possible grounds" on which doctrine "might rest"). As PRO urges, this Court "should grant certiorari to clarify, authoritatively, how courts should analyze whether a given work is an uncopyrightable government edict." BIO 2.

C. This Case Is An Excellent Vehicle For Addressing An Important Question

There is widespread agreement regarding this case's "significance." BIO 14; see also States Amicus Br. 3 ("profound importance"); R St. Inst. Amicus Br. 5 ("exceptionally important"); Next-Generation Amicus Br. 5 (same). About one-third of states claim copyright in annotations to their statutes. See BIO 11-12; Next-Generation Amicus Br. 20; SIIA Amicus Br. 15-16; States Amicus Br. 4; Pet. 34-35. Eight state *amici* (which have every reason to try to *cabin* the decision below to protect their own copyright claims) have explained that the Eleventh Circuit's reasoning "would likely invalidate the copyrights in all" official annotated state codes nationwide. States Amicus Br. 4. By clouding the copyright incentives on which states like Georgia rely to produce statutory annotations at minimal cost to taxpayers, the Eleventh Circuit's decision "threaten[s] the continued production of official annotated state codes," *id.* at 1, thus calling into question the continued "public availability of high-quality legal analysis in jurisdictions spanning the country," SIIA Amicus Br. 16; accord Matthew Bender Amicus Br. 10-16. Without sales of copyright-protected annotated codes, companies like Lexis also would not agree to publish unannotated statutes for free online. See Matthew Bender Amicus Br. 15. And by exacerbating the uncertainty regarding the government edicts doctrine's scope, the decision below risks "discourag[ing] * * * invest[ments] in the production" of a wide range of "law-adjacent works," SIIA Amicus

Br. 12, from industry standards, to model codes, to legal treatises and restatements of the law.

PRO also agrees that this case is an "excellent vehicle" in an "ideal" procedural posture, with "no disputed or murky factual questions." BIO 13-14. Although PRO in passing suggests the possibility of "disputes over the meaning of state law," it does not identify *any* descriptions of Georgia law in the petition with which it disagrees, or that it views as diverging from the Eleventh Circuit's interpretation. *Id.* at 5 n.1, 14 n.3; cf. Sup. Ct. R. 15.2 ("obligation * * * to point out in the brief in opposition * * * any perceived misstatement made in the petition"). The plain text of the limited state statutory language relevant here speaks for itself. See Pet. 7-8. And the state-law principle that gives rise to the question presented—i.e., that the OCGA's annotations lack "the force of law"—is undisputed. Pet. App. 26a; BIO 6. This Court can resolve that question without addressing any contested state-law issues.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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